Krolick v Natixis Sec. N. Am. Inc.
2011 NY Slip Op 33385(U)
November 23, 2011
Sup Ct, NY County
Docket Number: 109979/2010
Judge: Lucy Billings
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SCANNED ON 12/22/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: J.S.C. **PART** 46

Index Number : 109979/2010

KROLICK, RONALD S.

VS

NATIXIS SECURITIES NORTH

Sequence Number : 002

AMEND PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ **were read on this motion to/for** Supplement the Complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court denies plaintiff's motion to supplement his complaint as moot, since plaintiff has supplanted this motion with his subsequent motion to amend his complaint, as set forth in the accompanying decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

DEC 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/23/11

Lucy Billings

LUCY BILLINGS J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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RONALD S. KROLICK, Index No. 109979/2010

Plaintiff

- against - DECISION AND ORDER

NATIXIS SECURITIES NORTH AMERICA INC.
and NATIXIS NORTH AMERICA INC.,

Defendants

----------x

APPEARANCES:

For Plaintiff
David B. Wechsler Esq. and Todd Gutfleisch Esq.
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For Defendants
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FILED
DEC 14 2011
NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, defendants' former employee, sues defendants for age discrimination in compensating him and in terminating his employment. Plaintiff already amended his complaint once, which defendants moved to dismiss based on its failure to state a claim. C.P.L.R. § 3211(a)(7). Plaintiff then moved, through separate motions, to supplement his First Amended Complaint with claims based on events that occurred after he commenced the action, and to join an individual defendant. C.P.L.R. §§ 1002(b), 3025(b). Defendants apply their motion to dismiss to the First Amended Complaint to any supplemental or second amended

complaint that the court permits.

The proposed Second Amended Complaint includes the new claims from the proposed Supplemental Amended Complaint as well as joinder of claims against Yann Gindre, plaintiff's supervisor at Natixis Securities North America Inc., and Natixis North America Inc., the corporate defendants. Since the proposed Second Amended Complaint incorporates and replaces the proposed Supplemental Amended Complaint, the court denies plaintiff's first motion to supplement his First Amended Complaint as moot and considers only his subsequent motion.

Regarding the remaining motions, the court concludes, in sum, that plaintiff fails to sustain a claim for defamation or retaliation based on defendants' filing with the Financial Industry Regulatory Authority (FINRA) a Form U-5 Uniform Termination Notice, specifying defendants' reason for terminating plaintiff from their employment. As for defamation based on the Form U-5, it is absolutely privileged so as to immunize defendants from liability. Although the absolute privilege is not equally dispositive of plaintiff's retaliation claim, filing the Form U-5 did not constitute or cause the requisite change in the terms or conditions of plaintiff's employment, because his employment already had ceased when defendants filed the form. Even if filing the form were an adverse employment action, defendants filed the form in response to FINRA requirements that subjected defendants to penalties for noncompliance, rather than in retaliation for plaintiff pursuing this action.

Plaintiff does sustain claims for age discrimination under the New York State and City Human Rights Laws. Defendants discharged him, the oldest member of his team by at least a decade, despite his successful performance of his duties, and under other circumstances that raised an inference of age discrimination, such as the discharge of other employees who were older than the average employees and his supervisor's specific remarks about his age. He also may sue that supervisor who effectuated many of the corporate defendants' adverse actions.

II. PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT BY ADDING CLAIMS

A. STANDARDS FOR AMENDING THE COMPLAINT

C.P.L.R. § 3025(b) permits amendments to a complaint as long as the they do not unfairly surprise or otherwise substantially prejudice defendants, Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claims, as alleged, are meritorious. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Watts v. Wing, 308 A.D.2d 391, 392 (1st Dep't 2003). Plaintiff bears the burden to demonstrate his proposed claims' merit through admissible evidence. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000);

Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 116 (1st Dep't 1998). See Spence v. Bear Stearns & Co., 264 A.D.2d 601, 602 (1st Dep't 1999).

B. THE MERITS OF THE PROPOSED CLAIMS

Plaintiff's proposed defamation and retaliation claims both arise from the Natixis defendants' filing with the Financial Industry Regulatory Authority (FINRA) a Form U-5 Uniform Termination Notice for Securities Industry Registration, after plaintiff commenced this action, specifying defendants' reason for terminating plaintiff as "Did Not Meet Expectations." Aff. of David B. Wechsler (Mar. 29, 2011) Ex. A (2d Am. Compl.) ¶ 53.

1. The Proposed Defamation Claim

The filing of the Form U-5 is absolutely privileged so as to immunize defendants from liability for defamation based on the form. Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 368 (2007). Plaintiff's proposed fourth claim for defamation is thus without merit. The court therefore denies plaintiff leave to amend his complaint to add the proposed fourth claim for defamation.

2. The Proposed Retaliation Claim

To sustain a claim for retaliation, plaintiff must allege that he engaged in protected activity, that his employers were aware of the protected activity, and that he suffered an adverse employment action as a result of the protected activity. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312-13 (2004); Bendeck v. NYU Hosps. Ctr., 77 A.D.3d 552, 553 (1st Dep't 2010). "An adverse employment action requires a materially adverse

change in the terms and conditions of employment." Forrest v Jewish Guild for the Blind, 3 N.Y.3d at 306; Messinger v. Girl Scouts of U.S.A., 16 A.D.3d 314, 315 (1st Dep't 2005). See Block v. Gatling, 84 A.D.3d 445 (1st Dep't 2011). Although the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-107(7), 8-130, must be more liberally construed than the New York State Human Rights Law, N.Y. Exec. Law § 296(7); Albunio v. City of New York, 16 N.Y.3d 476, 477 (2011); Williams v. New York City Hous. Auth., 61 A.D.3d 62, 70 (1st Dep't 2009), this definition of adverse employment action applies to the City Human Rights Law as well as the State Human Rights Law. Block v. Gatling, 84 A.D.3d 445.

The Natixis defendants' preparation or filing of the Form U-5 did not constitute or cause a change in the terms or conditions of plaintiff's employment because his employment already had ceased when Natixis filed the Form U-5. The Form U-5 and its contents did not change that fact.

Even if Natixis's filing of the Form U-5 were an adverse employment action, FINRA rules, as plaintiff concedes, required Natixis to file the Form U-5 and subjected Natixis to penalties if it did not file the form. Rosenberg v. MetLife, Inc., 8 N.Y.3d at 367. Defendants thus filed the Form U-5 in response to FINRA requirements rather than in retaliation for or as any consequence of plaintiff pursuing this action.

Plaintiff nonetheless claims that, even if the statement, Did Not Meet Expectations," is entirely true, and even though

FINRA required Natixis to file the Form U-5, the specified reason for his termination was retaliatory if defendants did not specify such a reason on other terminated employees' Forms U-5. Plaintiff does not allege, however, that defendants deviated from any standard language. In fact, despite being required to file the Form U-5, they gave it little meaningful content, conveying nothing more than vague, subjective dissatisfaction as their reason for terminating plaintiff.

Moreover, while the absolute privilege afforded to the Form U-5 is not dispositive of plaintiff's proposed retaliation claim as it is of his proposed defamation claim, the privilege does weigh against permitting the retaliation claim. Controlling appellate authority does not preclude absolutely privileged conduct from ever supporting a retaliation claim, but, in declining to so hold, cautions that instances when communications immune from a defamation claim might be retaliatory would be extremely rare. Klein v. Town & Country Fine Jewelry Group, 283 A.D.2d 368, 369 (1st Dep't 2001). Reflecting that improbability, the court in Rosenberg v. MetLife, Inc., 8 N.Y.3d at 368, was unpersuaded that an employer conceivable use of a defamatory Form U-5 to retaliate against a former employee was a reason to refrain from conferring an absolute privilege on the form. In any event, even if plaintiff's proposed third claim or fourth claim, for defamation, were meritorious as pleaded, plaintiff presents no admissible evidence to support his proposed claims as required for leave to add them to his complaint. Zaid Theatre

Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d at 284; Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d at 116 (1st Dep't 1998). See Spence v. Bear Stearns & Co., 264 A.D.2d at 602.

III. PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT BY JOINING YANN GINDRE AS A DEFENDANT AND ADDING CLAIMS AGAINST HIM

Plaintiff may join proposed defendant Yann Gindre, who is a permissive party, C.P.L.R. § 1002(b), and amend the complaint to add claims against this new defendant. C.P.L.R. § 3025(b). The claims that plaintiff alleges against Gindre arise from the same transactions and occurrences as the claims already alleged against the Natixis defendants. C.P.L.R. §§ 1002(b), 3025(b). Plaintiff claims Gindre, as plaintiff's supervisor, was the very individual who effectuated many of the corporate defendants' actions. Individuals may be liable for discrimination in such circumstances under the State and City Human Rights Laws. N.Y. Exec. Law § 296(6); N.Y.C. Admin. Code § 8-107(1)(a). Although plaintiff cites only New York Executive Law § 296(1) and not § 296(6), the court is to determine only whether his factual allegations sustain a claim under the law, not whether he accurately cites that law or states the claim in perfect legal terms. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Pepler v. Coyne, 33 A.D.3d 434, 435 (1st Dep't 2006); Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002).

Plaintiff supports Gindre's involvement in Natixis's discriminatory acts through plaintiff's affidavit in opposition

to defendants' motion to dismiss his amended complaint. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d at 284; Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d at 116. See Spence v. Bear Stearns & Co., 264 A.D.2d at 602. His affidavit's reference to an ageist comment by Gindre, even as evidence of Gindre's attitude rather than the truth of the comment's contents, is inadmissible hearsay, because plaintiff did not personally hear Gindre's remark. People v. Huertas, 75 N.Y.2d 487, 491-92 (1990). Instead it was to a third person, plaintiff's former co-employee, who then "detailed that conversation," either to plaintiff, or to another intermediary, suggesting yet another layer of hearsay. Aff. of Richard S. Krolick ¶ 4. Nevertheless, while plaintiff may not rely on his co-employee's statement that Gindre made his remark, plaintiff further attests that Gindre was the decisionmaker in the termination of plaintiff's employment.

Plaintiff also fails to support his motion with an excuse for his delay in joining Gindre. Mere delay, however, without prejudice to defendants, does not bar the joinder or the related amendments. Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d at 504; Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d at 655; Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 354-55. Defendants claim no prejudice other than the potential for unwarranted disclosure relating to Gindre. The need for additional disclosure, by itself, is not sufficiently prejudicial to deny leave to amend.

Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d at 654. If plaintiff in fact demands unwarranted disclosure, whether from Natixis or Gindre, C.P.L.R. § 3103 provides defendants a remedy through a protective order.

IV. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AS AMENDED

A. STANDARDS FOR DISMISSAL

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Leon v. Martinez, 84 N.Y.2d at 87-88; Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). The applicable standard is thus whether reasonable inferences from the complaint sustain a claim, especially upon a preanswer motion to dismiss as here. Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Pepler v. Coyne, 33 A.D.3d at 435. See Lappin v. Greenberg, 34 A.D.3d 277, 279 (1st Dep't 2006). In short, the court may dismiss a claim based

on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d at 121; Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

The court assesses employment discrimination claims under a particularly relaxed "notice pleading" standard. Vig v. New York Hairspray Co., L.P., 67 A.D.3d at 145. Under notice pleading, plaintiff need not plead specific facts, but need only give defendants "fair notice" of the nature and grounds of his claims. Id. Although Vig v. New York Hairspray Co., L.P., 67 A.D.3d at 145, cites a 2002 United States Supreme Court decision applying the Federal Rules of Civil Procedure, the First Department decided Vig September 15, 2009, four months after the Supreme Court's rearticulation of federal pleading standards in Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937 (2009), on which defendants rely. Vig therefore represents the First Department's determination to adhere to notice pleading standards under New York law regardless of Iqbal's implications for notice pleading under federal law.

B. PLAINTIFF STATES CLAIMS FOR AGE DISCRIMINATION UNDER BOTH THE STATE AND THE CITY HUMAN RIGHTS LAWS.

Plaintiff states claims for age discrimination under the State Human Rights Law against all defendants, including Gindre, by pleading the following elements of age discrimination. (1) Plaintiff was the oldest member of his team by at least a decade. (2) Defendants terminated his employment despite his successful

performance of his duties. (3) A pattern of circumstances, such as the termination of other employees who were older than the average employees' age and comments by Gindre, plaintiff's supervisor, specifically remarking about his age, raise an inference of age discrimination. N.Y. Exec. Law § 296(1) and (6); Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO, 6 N.Y.3d 265, 270 (2006); Ferrante v American Lung Assn., 90 N.Y.2d 623, 629 (1997); Wiesen v New York Univ., 304 A.D.2d 459, 460 (1st Dep't 2003).

The State Human Rights Law forms a floor below which the City Human Rights Law must not fall. Williams v. New York City Hous. Auth., 61 A.D.3d at 66-67. See N.Y.C. Admin. Code § 8-130; Brightman v. Prison Health Servs., Inc., 62 A.D.3d 472 (1st Dep't 2009). Because plaintiff states a claim for age discrimination under the State Human Rights Law, he also states a claim under the City Human Rights Law.

V. CONCLUSION

For the above reasons, the court denies plaintiff's first motion, to supplement his complaint, as moot; denies his subsequent motion to amend his complaint insofar as he seeks to add third and fourth claims for retaliation and defamation; otherwise grants his motion to amend his complaint; and denies defendants' motion to dismiss the complaint as amended. C.P.L.R. §§ 1002(b); 3025(b); 3211(a)(7). Plaintiff shall file and serve a Second Amended Complaint as proposed, but with the disallowed claims deleted, and a supplemental summons, naming the original

and newly permitted defendant, on all defendants within 10 days after service of this order with notice of entry. C.P.L.R. § 305(a).

Having denied plaintiff's motion to add a retaliation claim, the court supplements its order dated October 24, 2011, determining plaintiff's motion to compel production of documents responsive to his requests served April 15, 2011. The court denies his motion to compel production of documents responsive to requests ##15-16, which were relevant only to a retaliation claim, and #18, insofar as it concerned retaliation claims. C.P.L.R. § 3124.

This decision constitutes the court's order. The court will transmit copies to the parties' attorneys.

DATED: November 23, 2011

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
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