

Cushnie v B & H Foto & Elec. Corp.
2011 NY Slip Op 33861(U)
April 8, 2011
Sup Ct, Bronx County
Docket Number: 309380/2009
Judge: Ben R. Barbato
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

Present: Honorable Ben R. Barbato, A.J.S.C.

NAKISHA G. CUSHNIE, YESENIA R. PESQUERA,
JACQUELINE THURIK, MARGARET DIAZ MACKENZIE,
JUANNA LORA, ANNE L. HOULE, and NANCY B. FRAY,
each individually and on behalf of others similarly situated,

Plaintiffs,

-against-

B & H FOTO & ELECTRONICS CORP. and TUTTLE
SPECIALTY SERVICES, INC.,

Defendants.

DECISION/ORDER

Index No.: 309380/2009

The following papers numbered 1 to 11 read on these motions to dismiss noticed on March 3, 2010, duly transferred on February 15, 2011 and fully submitted on March 31, 2011.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits (B&H Foto & Electronics Corp.)	1, 2, 3
Memorandum of Law (Steinberg)	4
Notice of Motion & Affirmation (Tuttle Specialty Services, Inc.)	5, 6
Affirmation in Opposition	7
Reply Affirmation & Exhibits	8, 9
Memorandum of Law (Steinberg)	10
Joinder in Reply (Tuttle Specialty Services, Inc.)	11

Upon the foregoing cited papers and after reassignment of this matter from Justice Stanley Green on February 15, 2011, Defendants B & H FOTO & ELECTRONICS CORP. and TUTTLE SPECIALTY SERVICES, INC. move for an Order pursuant to CPLR 3211(a)(1) and (7) partially dismissing Plaintiffs' Complaint. Defendants' grounds for dismissal are that Plaintiffs' Class Action claims under the New York City Human Rights Law and the New York Labor Law violate CPLR §901(b) and that Plaintiff Cushnie's failure-to-promote claims are devoid of factual support. These motions are hereby **granted** to the extent as Ordered below.

This is a gender discrimination and wage-hour action commenced by the Plaintiffs against the Defendants on or about November 18, 2009. The Defendants moved for partial dismissal of Plaintiffs' Complaint on or about January 21, 2010. An Amended Complaint, dated March 17, 2010, was subsequently filed by the Plaintiffs' counsel. On March 3, 2011, this Court granted Plaintiffs' motion for leave to file a Second Amended Complaint. The Court will now apply Defendants' dismissal motions to Plaintiffs' Second Amended Complaint.

The Defendants are moving for Pre-Answer relief, pursuant to CPLR 3211(a)(1) and (7), claiming that documentary evidence warrants dismissal of Plaintiffs' claims and that Plaintiffs fail to state a cause of action. In assessing a motion under CPLR §3211(a)(7), the court is required to view every allegation of the Complaint as true and resolve all inferences in favor of the Plaintiff regardless of whether the Plaintiff will ultimately prevail on the merits. See *Grand Realty Co. v. City of White Plains*, 125 A.D.2d 639, (2nd Dept. 1986). A Court may also consider affidavits and other evidentiary material to "establish conclusively that plaintiff has no cause of action." See *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976). To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." See *New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc.*, 305 A.D.2d 563 (2nd Dept. 2003).

The Defendants argue that CPLR §901(b) bars Plaintiffs from maintaining class action claims that seek to recover class-wide "penalties" (such as punitive and/or liquidated damages) and that are brought under statutes that do not expressly authorize class actions. CPLR §901(b) provides in pertinent part that: "Unless a statute creating or imposing a penalty, or a minimum

measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.” In this regard, the New York State Court of Appeals recently stated that: “By including the penalty exception in CPLR §901(b), the Legislature declined to make class actions available where...individual Plaintiffs were afforded sufficient economic encouragement to institute actions through statutory provisions awarding something beyond or unrelated to actual damages.” See *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007).

A close review of the Second Amended Complaint reveals that class action claims are only sought in the Fourth and Seventh Causes of Action, but that they do not seek to recover class-wide “penalties” as argued by the Defendants. These class action claims only seek compensatory damages, thus Defendants’ contention fails. However, the Plaintiffs may not avail themselves of the benefits of class action litigation while, at the same time, pursuing punitive and/or liquidated damages that the class members they seek to represent may not recover. New York Law requires that Plaintiffs waive their individual rights to recover punitive and/or liquidated damages if they wish to maintain a class action. See *Krebs v. Canyon*, 880 N.Y.S.2d 87 (N.Y. Sup. Ct. 2009); *Cox v. Microsoft Corp.*, 8 A.D.3d 39 (1st Dept. 2004); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 132 A.D.2d 604 (2nd Dept. 1987). Since the Plaintiffs herein have continued to seek punitive and/or liquidated damages in their individually-named causes of action, the class action claims sought in the Fourth and Seventh Causes of Action are dismissed.

The Defendants further argue that Plaintiff Cushnie’s failure-to-promote claims based on gender discrimination are devoid of factual support. In order to establish a prima facie case of discrimination, a Plaintiff must show that (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she suffered an adverse employment action; and (4) the

circumstances surrounding the action gave rise to an inference of discrimination. *Wilson v. N.Y.P. Holdings, Inc.*, 2009 WL 873206 (S.D.N.Y.). Once the Plaintiff's prima facie case is established, the burden shifts to the employer to offer some legitimate non-discriminatory reason for its actions. *Id.* The Plaintiff then has the burden of offering proof that would enable a reasonable fact finder to conclude that the proffered reason was a pretext for prohibited discrimination. *Id.*

The Court has reviewed the file and all evidence submitted. Based upon that review the Court finds that the standards for the granting of a motion to dismiss based on documentary evidence have been met, especially in light of the documentary evidence proffered by the Defendants which conclusively establish that Plaintiff Cushnie was not qualified for the position of salesperson. Plaintiff Cushnie's written employment application reflects that Ms. Cushnie had minimal work experience, consisting solely of work as a dental assistant. In addition, Ms. Cushnie's eight-month tenure as a B&H cashier yielded at least six reported customer complaints. In this instance, Ms. Cushnie's lack of sales experience, lack of technical knowledge and deficient customer relations skills disqualified her from becoming a member of B & H Foto's sales staff. Since Plaintiff Cushnie fails to meet her prima facie case for discrimination, she fails to withstand dismissal of her claims. Consequently, Plaintiff Cushnie's failure-to-promote claims sought in the First and Second Causes of Action are dismissed.

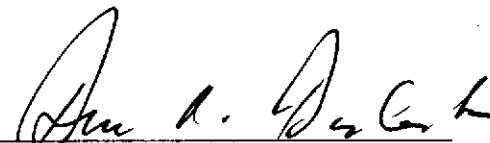
Accordingly it is

ORDERED that Defendants B & H FOTO & ELECTRONICS CORP. and TUTTLE SPECIALTY SERVICES, INC.'s motion for an Order pursuant to CPLR 3211(a)(1) and (7) partially dismissing Plaintiffs' Complaint is **granted to the extent** that, the Fourth and Seventh

Causes of Action are dismissed in Plaintiffs' Second Amended Complaint as well as the First and Second Causes of Action to the extent that they pertain to Plaintiff Nakisha G. Cushnie.

The above constitutes the Decision and Order of this Court.

Dated: April 8, 2011

A handwritten signature in black ink, appearing to read "Ben R. Barbato", written over a horizontal line.

Hon. Ben R. Barbato, A.J.S.C.