

Zherka v Tower Group Cos., Inc.

2011 NY Slip Op 33985(U)

April 29, 2011

Supreme Court, New York County

Docket Number: 308365/10

Judge: Lizbeth Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

PART 29

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed
 Settle Order
 Schedule Appearance

HASIME ZHERKA

Index No. 0308364/2010

-against-

Hon. Lizbeth Gonzalez

TOWER GROUP COMPANIES

Justice.

The following papers numbered 1 to _____ Read on this motion, DISMISSAL
 Noticed on December 17 2010 and duly submitted as No. _____ on the Motion Calendar of _____

| | PAPERS NUMBERED | |
|--|--|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | RECEIVED BRONX COUNTY CLERK'S OFFICE | |
| Answering Affidavit and Exhibits | | |
| Replying Affidavit and Exhibits | MAY 04 2011 | |
| _____ Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers | | |
| Memoranda of Law | | |

Upon the foregoing papers this *motion is decided in accordance with the annexed Decision and Order.*

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: 4/29/11

Hon. _____

Lizbeth Gonzalez, AJSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

-----X
Hasime Zherka a/k/a Samantha Zherka and
Norticia Moreno,

Plaintiffs,

DECISION and ORDER
Index No 308364/10

-against-

Tower Group Companies, Inc. and Tower
Group, Inc.,

Defendants.

-----X
Recitation of the papers considered in reviewing the underlying motion for summary judgment as
required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....1
Affirmation in Opposition and annexed Exhibits.....2

Plaintiffs Hasime Zherka a/k/a Samantha Zherka (“Zherka”) and Norticia Moreno (“Moreno”) filed the underlying action against the defendants on gender discrimination, equal pay and retaliation grounds. Plaintiff Zherka’s complaint also alleges hostile work environment and constructive discharge. The plaintiffs allege that the defendants violated the New York State Equal Pay Act (“NYSEPA”)¹ and the New York City Human Rights Law (“NYCHRL”). Defendants Tower Group Companies, Inc. and Tower Group, Inc. (collectively “Tower Group”) move to dismiss the plaintiffs’ claims for failure to state a cause of action.

In support of their motion, the defendants proffer the plaintiffs’ complaint filed in the United States District Court for the Southern District of New York; letters from the defendants and plaintiff Zherka addressed to federal court Judge Paul A. Crotty; and a letter from the Equal Employment Opportunity Commission (“EEOC”).

¹ The New York State Equal Pay Act is codified at New York Labor Law § 194.

In opposition to the defendants' motion, the plaintiffs proffer an e-mail that includes Judge Crotty's Order and the plaintiffs' complaint filed in this Court.

Procedural History

Plaintiffs Zherka and Moreno filed their respective discrimination complaints with the EEOC on 7/24/08. Plaintiff Zherka also filed a federal complaint on 12/21/09. Plaintiff Moreno sought no federal relief. Judge Crotty, the assigned judge in federal court, required pre-motion conferences. The defendants moved to dismiss and by letter dated 1/21/10 requested a conference. By letter dated 2/12/10, plaintiff Zherka requested an adjournment pending receipt of her Right to Sue letter from EEOC. She indicated that, upon receipt, she would either amend her federal complaint, commence federal claims, move for different relief or withdraw her motion. Judge Crotty dismissed the federal complaint without prejudice to its renewal. Plaintiffs Zherka and Moreno received their EEOC Right to Sue letters on 2/24/10 and 3/31/10, respectively. Zherka neither amended her federal complaint nor pursued her federal claim. Instead, both plaintiffs filed the underlying complaint in this Court on 10/8/10.

Defendants Tower Group allege that the plaintiffs have made several failed attempts to pursue their claims. They claim that the plaintiffs' respective 2008 EEOC complaints were unsuccessful and that plaintiff Zherka's 2009 federal complaint was "devoid of any factual allegations to support her vague, conclusory discrimination claims." The defendants assert that the plaintiffs commenced their action here in state court because their complaints would not have survived the federal court's heightened pleading standards.

Factual Allegations

Plaintiff Zherka began working for the defendants as a field property adjuster on 6/30/03. Approximately 4½ years later, Ms. Zherka learned on 1/1/08 that she was paid lower wages than

her male counterparts for substantially equal work under similar working conditions. She complained of gender discrimination to James Tippet, the defendants' Vice-President of Claims. In March 2008, Ms. Zherka complained to Bobbie Murawski², the defendants' manager, who advised her that the matter would be investigated. On or about 3/31/08, plaintiff Zherka became disabled with chronic cholecystitis, underwent surgery on the following day and was hospitalized. She returned to work on 4/28/08. Mr. Murawski allegedly advised plaintiff Zherka's co-workers that her "days were numbered" as an employee. On 4/28/08, plaintiff Zherka met with Scott Melnick, Senior Vice-President of Claims, and John Marcellino,³ Senior Vice President of Human Resources. At the meeting, Ms. Zherka again complained of gender discrimination, unequal pay and retaliation. In response, Mr. Marcellino asked Ms. Zherka what she does when her children misbehave. After that meeting, Ms. Zherka's job assignments significantly decreased; she was assigned work normally performed by clerical staff; and she was subjected to repeated and unwelcome harassment. The managers allegedly berated and belittled her creating a difficult work environment. Ms. Zherka states that she was constructively discharged when her work environment led her to take a leave of absence on 7/25/08.

Plaintiff Moreno began working for the defendants as a finance department worker in August 1999. In July 2006, approximately seven years later, she became a field property adjuster. On 1/1/08, Moreno, like Zherka, learned that she was paid less than her male counterparts for substantially equal work under similar working conditions. Ms. Moreno expressed her concern to Mr. Tippet, Mr. Melnick and Mr. Murawski. In December 2009, Mr. Murawski informed her co-

² Plaintiffs also spell Bobbie Muraski's surname as Murwaski and Murowski.

³ Plaintiffs also spell John Marcellino's surname as Marceliano.

workers that Ms. Moreno's employment would soon cease. Ms. Moreno claims that she was falsely accused of inaccuracies in her work, subjected to false rumors regarding her employment status and received the minimum annual pay increase.

DISCUSSION

The defendants move to dismiss the plaintiffs' gender discrimination, equal pay and retaliation claims pursuant to CPLR § 3211(a)(7) for failure to state a cause of action. CPLR § 3013 provides that "statements in a pleading shall be sufficiently particular to (1) give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and (2) the material elements of each cause of action or defense." (CPLR § 3013.) A motion to dismiss for failure to state a cause of action is defeated if the complaint satisfies these two requirements. (Siegel, NY Prac § 208 [4th ed].)

Plaintiffs Zherka and Moreno oppose the defendants' motion on the ground that the defendants' motion is premature because the parties have not exchanged discovery. The plaintiffs contend that the defendants should move for summary judgment if the plaintiffs fail to provide sufficient factual evidence at discovery to sustain their respective causes of action. The converse reasoning holds true to the extent that summary judgment may be granted before discovery is complete unless an evidentiary basis is offered to suggest that discovery may lead to relevant evidence. (*Lee v Ana Development Corp.*, 2011 NY Slip Op 03134 [1st Dept 2011] citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156 [2000].)

Plaintiffs' Gender Discrimination and Equal Pay Claims

Plaintiffs Zherka and Morena allege that the defendants violated the NYEPA which states as follows in relevant part:

No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility and which is performed under similar working conditions except where payment is made pursuant to a differential based on any other factor other than sex.

A party alleging discrimination must show that (1) he or she is a member of the class protected by the statute, (2) he or she was discharged from employment or barred from a position for which he or she was qualified or paid less in such position and (3) his or her discharge, exclusion from employment, or receipt of lower wages occurred under circumstances giving rise to an inference of age or sex discrimination. (*Kent v Papert Companies, Inc.*, 309 AD2d 234 [1st Dept 2003].) When a plaintiff establishes, through admissible evidence, a prima facie case of discrimination, the burden shifts to the defendant to provide a legitimate non-discriminatory reason for the plaintiff's rejection. (*Kent v Papert Companies, Inc.*, 309 AD2d 234, *supra*, citing *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. 1817).

The defendants move to dismiss the plaintiffs' claims on the ground that their claims are conclusory and merely mirror the statutory language of NYEPA. They claim that both plaintiffs Zherka and Moreno omit their "own compensation as a baseline by which to compare the allegedly discriminatory unequal pay provided to male employees" and the identity of the higher paid employees.

While the complaint omits the defendants' specifically requested information, it provides the gender, title and dates of occurrences. Significantly, the defendants do not set forth a defense that all field property adjusters, male and female, are paid the same salary or that their salaries are commensurate with experience. The Court finds that the plaintiffs' causes of action are sufficient.

The defendants' motion to dismiss the plaintiffs' gender discrimination and equal pay claims are accordingly denied.

Plaintiffs' Retaliation Claim

Plaintiffs Zherka and Moreno claim the defendants retaliated after the plaintiffs complained about their unequal pay. A claim of retaliation is established when the plaintiff shows that (1) he or she engaged in protected activity, (2) the employer knew that the he or she participated in such activity, (3) he or she suffered adverse employment action based on her activity and (4) a causal connection between the protected activity and the adverse action exists. (*Bendeck v NYU Hospitals Center*, 77 AD3d 552 [1st Dept 2010].)

Plaintiff Zherka claims that after she complained to the executive staff and took disability leave, her job assignments significantly decreased; she was assigned work normally performed by clerical staff; and she was subjected to repeated unwelcome harassment when defendants' managers berated and belittled her, thus creating a difficult work environment.

In her retaliation claim, plaintiff Moreno asserts that after she complained to the same executive staff members, she was subjected to false allegations of inaccuracies in her work and false rumors regarding her employment status and was paid the minimum annual pay increase.

By way of rebuttal, the defendants argue that the plaintiffs' respective claims are conclusory and nonspecific. The Court finds that the plaintiffs' retaliation claim satisfies the four part standard set forth above. The defendants' motion to dismiss the plaintiffs' retaliation claims are accordingly denied.

Plaintiff Zherka's Hostile Work Environment Claim

Plaintiff Zherka alleges that she was subject to a hostile work environment and constructively discharged. A hostile work environment occurs when the "workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (*Espaillet v Breli Originals, Inc.* 227 AD2d 266 [1st Dept 1996].)

Plaintiff Zherka cites two instances of alleged harassment. The Court finds that neither instance constitutes severe and pervasive conduct. The defendants' motion to dismiss plaintiff Zherka's hostile work environment claim is granted.

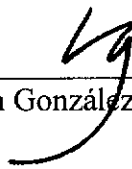
Plaintiff Zherka's Constructive Discharge Claim

To establish a constructive discharge, the plaintiff must proffer evidence that the defendants deliberately created working conditions that were so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign. (*Short v Deutsche Bank Securities, Inc.*, 79 AD3d 503 [1st Dept 2010]; *Hernandez v Central Parking Systems of New York, Inc.*, 63 A.D.3d 411 [1st Dept 2009].) Ms. Zherka contends that because she took a leave of absence she was constructively discharged by the defendants. Since plaintiff Zherka did not resign and intended to return after her leave of absence, the defendants' motion to dismiss her constructive discharge claim is granted.

This constitutes the Decision and Order of the Court.

Dated: April 29, 2011

So ordered,



Hon. Lizbeth González, AJSC