

Greenberg v Bovis Lend Lease LMB, Inc.

2012 NY Slip Op 30052(U)

January 10, 2012

Supreme Court, New York County

Docket Number: 113266/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 113266/2008
GREENBERG, MARSHALL
vs
BOVIS LEND LEASE LMB
Sequence Number : 002
OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) <u>1</u>
Answering Affidavits — Exhibits _____	No(s) <u>2, 3</u>
Replying Affidavits _____	No(s) <u>4</u>

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/12


HON. EILEEN A. RAKOWER J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MARSHALL GREENBERG,

Plaintiffs,

- against -

BOVIS LEND LEASE LMB, INC., THE JOHN GALT
CORP., REGIONAL SCAFFOLDING & HOISTING CO.,
GREG BLINN, individually and as a beneficial owner and
officer of The John Galt Corp. and Regional Scaffolding
& Hoisting Co., ROBERT HALLICK, JAMES FOLEY,
JOSEPH LUCCHESI, and JOHN and JANE DOES "1"
through "10",

Defendants.

-----X
HON. EILEEN A. RAKOWER

Index No.
113266/08

**DECISION
and ORDER**

Mot. Seq.
002

FILED

JAN 12 2012

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NEW YORK
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Marshall Greenberg ("Plaintiff") commenced this action on September 30, 2008 alleging that he was the subject of unlawful discrimination and retaliation through 2006 and 2007 at the work site of the former Deutsche Bank building ("DB building"), located adjacent to the World Trade Center site in New York County. Plaintiff states that he is a member of the International Union of Operating Engineers, Local 14-14B, "with substantial experience in operating hoists (elevators) at large-scale commercial construction sites throughout New York City." Starting in March 2006, he was hired by defendants Bovis Lend Lease LMB, Inc. ("Bovis") and The John Galt Corp. ("Galt") to operate one of four exterior hoists that were erected at the DB building to deliver men, tools and machinery, and materials to and from various floors of the building.

Plaintiff claims in his complaint that throughout the time that he worked at the site, he was "regularly subjected to outrageous, degrading, harassing and discriminating jokes, comments and conduct directed toward his Jewish heritage and his perceived health status." This conduct included various anti-Semitic epithets,

either verbal or in graffiti, and one incident in which his cubicle was “temporarily sealed with duct tape positioned in the form of a Swastika ...” Plaintiff alleges that this conduct was carried out by employees of Bovis, Galt, and defendant Regional Scaffolding & Hoisting Co. (“Regional”), and by their supervisors, “who either participated in the conduct or were aware of it, tolerated it and failed to take remedial action.”

In addition, Plaintiff states that after he received treatment for a skin disorder in August 2006, a Bovis supervisor “improperly violated his medical confidentiality by publicly discussing his medical condition and demanding that [Plaintiff] provide a doctor’s note to verify that the condition was not contagious. Thereafter, a rumor spread that Plaintiff suffered from AIDS, and Bovis, Galt, and Regional employees subjected Plaintiff to taunting and derogatory remarks. Plaintiff was further excluded from using the trailer that Bovis provided for operating engineers and others at the site.

Plaintiff also claims that, from nearly the beginning of his work at the DB building, he observed “illegal and unsafe conditions” which were tolerated by supervisory personnel from Bovis, Galt, and Regional. These included: smoking in enclosed spaces or in the presence of highly flammable material; allowing open flames near combustible material; failing to use or wear safety equipment; allowing and failing to remedy and prevent objects falling from the DB building onto unprotected areas of the work site; consumption of alcohol and/or working under the influence of alcohol or illegal substances; improper transportation of asbestos or asbestos-contaminated materials; “being purposefully stranded on vacant floors”; and being forced to operate elevators without safety interlock brakes, with open gates, and/or at times in which there were indications of potential mechanical problems.

Plaintiff states that he objected to and reported to Bovis supervisors that people were smoking in his elevator, and that people were consuming alcohol on the work site. Plaintiff also claims that the defendants attempted to discourage Plaintiff from cooperating with government safety inspectors.

On August 18, 2007, a fire broke out at the DB building which resulted in the deaths of two New York City Firefighters who responded to the scene. Plaintiff states that he was “warned and threatened ... that he should keep his mouth shut and not cooperate” with the subsequent investigation. Plaintiff nevertheless met with FDNY

investigators and “cooperated in offering information and documentation concerning the unsafe conditions that existed at the Site.”

Plaintiff states that the defendants retaliated against him for his cooperation in the investigation of the fire by, among other things, excluding Plaintiff from operating hoists at the DB building, and ultimately terminating him as an operating engineer at the site in August 2007. Although Plaintiff filed a grievance with his union and was ultimately reinstated in April 2008, he

continued to be subjected to harassment and retaliation, similar to those he suffered earlier, including religious epithets and references to rodents and informants; but also more serious actions, such as physical assaults, verbal batteries and threats, and the intentional and improper placement of sharp objections where he [was] likely to suffer a physical injury.

Plaintiff states that he “continues to be subject to threats by Bovis managers and others at the site,” and that despite his complaints to Bovis, Bovis has failed to take steps to “document, investigate and take remedial actions in response thereto”

Plaintiff asserts causes of action under New York Executive Law §296, NYC Administrative Code §§8-502 and 8-107 *et seq.*, and New York Labor Law §740.

By order dated January 12, 2009, the court granted the New York County District Attorney’s motion to intervene, and for a stay of proceeding pending a grand jury investigation into the August 18, 2007 fire.

Plaintiff now moves for an order lifting the stay of the action, stating that the grand jury proceedings and all related criminal proceedings are terminated. The District Attorney has submitted an affirmation confirming that the criminal proceeding related to the fire has concluded.

Bovis cross-moves for an order pursuant to CPLR §2201 continuing the stay, or alternatively, issuing a new stay in the action. Bovis notes that on March 1, 2010, while the instant action was stayed, Plaintiff commenced an action against Bovis, Galt, and Regional in the Eastern District of New York (“the Federal Action”). Also named in the Federal Action are Plaintiff’s union and LVI Environmental Services, Inc.; not named in the Federal Action are the individually named defendants in the

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action before the court.

In the Federal Action complaint, Plaintiff alleges that “[t]hroughout his employment at the Deutsche Bank Building worksite, [he] was regularly subjected to outrageous, degrading, harassing and discriminating jokes, comments and conduct directed toward his Jewish heritage and perceived health status.” The same allegations of anti-Semitic epithets and derogatory remarks surrounding rumors that Plaintiff had AIDS are contained in the Federal Action complaint. Plaintiff further alleges in the Federal Action complaint that because he had made complaints about safety conditions at the DB building prior to the August 18, 2007 fire, “he became a *persona non grata* to Bovis and Local 14B.... As a result, plaintiff was scapegoated by Bovis for the fire, and he was removed from the job immediately after the fire.” Plaintiff alleges that “[a]lthough [he] had been wrongly removed from the worksite [and subsequently reinstated on April 28, 2008], Bovis refused to pay him back pay and Local 14B failed to take any action to compel Bovis to do so.”

Plaintiff further alleges in the Federal Action complaint that on or around September 22, 2008, “Bovis again removed plaintiff from the work site, claiming that he was unable to work because of medical issues.” In or around early October 2008, Plaintiff was medically cleared to return to work. Plaintiff alleges that his medical issues included anxiety and depression, and that these conditions “were caused or exacerbated by the hostile work environment and scapegoating to which plaintiff was subjected” Although he claims he was fit to return to work, “Bovis refused to reinstate plaintiff to the job site, instead putting plaintiff on paid administrative leave in early November, 2008,” which deprived Plaintiff of “significant overtime that he would have earned had he been permitted to return to the workplace.” Plaintiff further states that Bovis failed to pay back wages for the period from September 22, 2008 through the date that he was placed on paid administrative leave.

Unique to the Federal Action, Plaintiff alleges that Local 14B breached its duty of fair representation to Plaintiff by failing to properly pursue his rights under the governing Collective Bargaining Agreement. Plaintiff also claims that Bovis breached the CBA “by, among other things, wrongfully removing plaintiff from the work site, failing to pay plaintiff the wages to which he was entitled, by failing to pay plaintiff overtime and other entitlements while on administrative leave and by terminating plaintiff’s employment without cause.” In addition, Plaintiff alleges that Bovis, Galt, Regional, and LVI subjected plaintiff to a hostile work environment based upon his

Jewish faith, in violation of 42 U.S.C. §1981. With respect to his perceived medical condition, Plaintiff alleges that Bovis and LVI subjected him to a hostile work environment “in violation of the New York State Executive Law and the New York City Administrative Code.” Lastly, the Federal Action complaint alleges that Bovis violated the Executive Law and the NYC Admin. Code by refusing to permit Plaintiff to return to work, and by terminating his employment based upon “his disability, or perceived disability.”

Plaintiff opposes the cross-motion for a further stay of this action, arguing that “each action contains claims and parties that are completely unrelated to claims and parties asserted in the other action.”

CPLR §2201 provides:

Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.

Where two actions contain substantially identical parties and claims, the court is authorized, in the exercise of its discretion, to stay one of the actions in order to avoid inconsistent outcomes and conserve judicial resources (*see Asher v. Abbott Labs.*, 307 A.D.2d 211, 212 [1st Dept. 2003]).

Here, the court finds that a further stay of the action is warranted in light of the pending Federal Action. It is undisputed that, while no discovery has taken place in this action as a result of the stay, the parties to the Federal Action have already engaged in “extensive discovery,” while, as of November 2, 2011 (the date of Bovis’s cross-motion), the parties were in the process of scheduling 13 depositions. The court further notes that, according to a docket report from PACER, the deadline for completion of discovery in the Federal Action is March 30, 2012. Moreover, although the claims and parties to this action are not *completely* identical, the allegations in this action and the Federal Action, recited at length above, clearly demonstrate *substantial* identity between the claims and parties to both actions, such that simultaneous litigation of both actions could potentially result in inconsistent results (*see Certain Underwriters at Lloyd's London v. Pneumo Abex Corp.*, 2007 NY Slip Op 81, *2 [1st Dept. 2007]) (“While the parties and issues in this action and the federal litigation are not completely identical ... the familiarity of the federal court with the issues, the

court with the issues, the substantial identity of the parties, and the interdependence of the issues ... weigh in favor of adjudicating the federal litigation in advance of this action.”).

Wherefore it is hereby

ORDERED that Plaintiff’s motion to lift the stay dated January 12, 2009 is denied; and it is further

ORDERED that Bovis’s cross-motion is granted, and this action is hereby stayed pending resolution of the Federal Action (*Greenberg v. Bovis Lend Lease LMB, Inc. et al.*, 10-CV-0897 (JBW)(MDG)).

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: January 9, 2012



EILEEN A. RAKOWER, J.S.C.

FILED

JAN 12 2012

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