

Martino v Consolidated Edison Co. of N.Y., Inc.

2012 NY Slip Op 30408(U)

February 6, 2012

Supreme Court, New York County

Docket Number: 111864/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JOAN M. KENNEY
Index Number : 111864/2011

MARINO, NELSON

vs
CONSOLIDATED EDISON COMPANY

Sequence Number : 001

DISMISS

PART 8

INDEX NO. 111864/11
MOTION DATE 12/6/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion to dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4

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

FILED

FEB 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: Feb. 3, 2012

Joan M. Kenney, 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

JOAN M. KENNEY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X

Nelson Martino,
Plaintiff,

-against-

Consolidated Edison Company of NY, Inc.,
Defendant.

-----X

KENNEY, JOAN M., J.

DECISION AND ORDER
Index Number.: 111864/11
Motion Seq. No.: 001

FILED

FEB 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion
to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, Exhibits	1-3
Opposition Papers	4 ¹
Reply Papers	5

In this action seeking damages for a purported wrongful employment termination, defendant Consolidated Edison Company of New York, Inc. (Con Edison), seeks a pre-answer Order, pursuant to CPLR 3211(a)(7), dismissing the complaint against defendant.

Factual Background

From 1994 until 2005 plaintiff was employed by Con Edison as an independent contractor doing video conferencing. In 2005 plaintiff was hired as a Con Edison management-level employee, as a "Project Specialist" in the Information Resources Department.

On April 23, 2010, plaintiff was charged with driving while intoxicated (DWI). Plaintiff pleaded guilty to that charge (the 1st Arrest). Plaintiff admits that he did not report the conviction to Con Edison.

¹This motion was originally submitted on default. However, upon the parties' consent, leave to file opposition and reply papers, was granted by this Court.

In November 2010 plaintiff was again arrested and charged with yet another DWI (the 2nd Arrest). However, these charges were dismissed.

In December 2010 Con Edison's security department called plaintiff and told him that someone reported that there was a possible DWI charge against plaintiff. Plaintiff admitted to Con Edison that he had pled guilty to such a charge and thereafter, Con Edison suspended plaintiff for a week.

After returning to work from his suspension, defendant inquired of plaintiff about the 2nd Arrest. Plaintiff told defendant that those charges were being contested and that he expected the charges to be dismissed.

On January 7, 2011, defendant terminated plaintiff's employment.

After being terminated, defendant advised plaintiff that he could resign and collect unemployment benefits if plaintiff waived the Con Edison Appeals Procedure. Plaintiff agreed to do so and resigned. Several months later, however, on or about July 24, 2011, plaintiff rescinded his resignation, and thereafter commenced the within action asserting that plaintiff's employment was terminated in violation of Article 23-A of the New York Correction Law (NYCL).

Arguments

Defendant contends that this matter must be dismissed because: (1) Article 23-A of the NYCL is only applicable to persons terminated for convictions *prior* to employment; and (2) plaintiff's employment was terminated because plaintiff failed to disclose arrest(s) and a criminal conviction in violation of Con Edison's Standards of Business Conduct Policy.

Plaintiff argues that the within motion must be denied because Article 23-A of the NYCL applies to termination of employment based on both criminal convictions that occurred during

employment as well as before employment.

Discussion

N.Y. C.P.L.R. § 3211(a)(7) states, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action.” When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v. Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this Court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff. (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).

Section 752 of the NYCL, titled “Unfair Discrimination Against Persons Previously Convicted of One or More Criminal Offenses Prohibited,” states, in pertinent part:

“No application for any...employment, and no employment...held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses..., unless: 1. there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or 2. the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

In order to properly state a cause of action under this section, plaintiff would need to state specifically in his facts that he was “acted upon adversely by reason of” his “having been previously

convicted of one or more criminal offenses” during his application for employment, or, acted upon adversely during his employment for convicted offenses that occurred previous to said employment. In fact, "In 2007, the New York Legislature amended N.Y. Correct. Law § 752 to provide that no employment or license held by an individual shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses. The plain language of the amendment and its legislative history confirm the Legislature's intent to provide new protections against termination lacking from the original version of § 752. The anti-discrimination protections in § 752 of the Correction Law previously applied only to applicants for employment or occupational licenses who had criminal convictions. The law provided no protection to existing employees or license holders who faced unfair discrimination based on criminal records *that predated their employment or licensure*. The amendment extends the anti-discrimination protections to current employees" (emphasis added; see *Noble v. Career Educ. Corp.*, 375 Fed. Appx. 102 [2d Cir. N.Y. 2010]).

Additionally, “discrimination in hiring on the basis of a criminal record prohibits discrimination in terminating employment on the basis of a criminal record” (see, *Givens v. New York City Hous. Auth.*, 249 A.D.2d 133, 133, 671 N.Y.S.2d 479, 479 (1998)). The court in *Givens* still refers to convictions that occur before the plaintiff is hired. Section 751 of the NYCL also sets forth the specific instances under which a cause of action pursuant to Article 23-A of the NYCL may be maintained and it states, in pertinent part:

“The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any

other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.”

In this case, plaintiff’s employment at the managerial level for Con Edison began in 2005, and the DWI conviction in 2010 occurred during his employment. Plaintiff’s contention that he was terminated from his position at Con Edison because he was convicted of a DWI while already an employee, does not raise a cause of action under Article 23-A of the NYCL because the conviction in question did not occur prior to his employment with Con Edison. Furthermore, plaintiff’s allegation that his 2nd Arrest factored into his wrongful termination also falls short of satisfying a cause of action under Article 23-A of the NYCL. The statutory protections contemplated by Correction Law Article 23-A are for people convicted of a criminal offense (*see, Elgart v. New York City Dept. of Educ.*, 25 Misc. 3d 1231(A), 906 N.Y.S.2d 772 [Sup. Ct. 2009]). Plaintiff’s 2nd Arrest for DWI did not lead to a conviction, and therefore cannot be a basis for a wrongful termination claim under Article 23-A of the NYCL.

Lastly plaintiff does not dispute defendant’s claim that he was terminated for violating disclosure requirements as set forth in Con Edison’s Standards of Business Conduct Policy. Without any case law or statutory reference to support its position, plaintiff contends that defendant cannot address the reasons why plaintiff was discharged from his employment (i.e. failure to report) on a motion to dismiss. This statement is wholly without merit. The within pre-answer motion to dismiss specifically addresses plaintiff’s claims in the complaint asserting that reasons plaintiff believes he was wrongfully terminated. Any discussion regarding the reasons for termination are squarely at

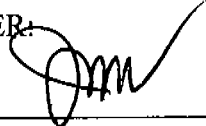
issue here and appropriate for consideration in this pre-answer motion. Accordingly, it is

ORDERED, that defendant's motion to dismiss, is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant against plaintiff, dismissing the complaint.

Dated: February 6, 2012

ENTER:



Joan M. Kenney, J.S.C.