

Akhtab v BCBG Max Azria Group Inc.
2012 NY Slip Op 31041(U)
April 16, 2012
Sup Ct, NY County
Docket Number: 106770/11
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 106770/2011
AKHTAB, MAGEEDAH
vs.
BCBG MAX AZRIA GROUP
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 106770/11
MOTION DATE 2/9/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 44, were read on this motion to/for Dismiss
Notice of Motion/Order to Show Cause — Affidavits — Exhibits 1 Memo of LAW No(s). 1-7
Answering Affidavits — Exhibits _____ No(s). 8-34
Replying Affidavits + Memo of LAW No(s). 35-44

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

MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 16, 2012

Joan M. Kenney, J.S.C.
JOAN M. KENNEY

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X
MAGEEDAH AKHTAB,

Plaintiff,

DECISION & ORDER

Index No.: 106770/11

-against-

BCBG MAX AZRIA GROUP INC., DESIREE
MOHIMI, LINDA MORA, TRACY KIM,
MELISSA MANGIN, MATT DONAHUE, SARA
DERR, CARLA MARCIAS,

Defendants.

-----X
JOAN M. KENNEY, J.:

Defendants move, pursuant to CPLR 3211 (a) (7), to dismiss
complaint with prejudice.

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FACTUAL BACKGROUND

In her complaint, plaintiff alleges that she was subject to employment discrimination based on her race and/or national origin, and asserts nine causes of action: (1) violation of Title VII of the Civil Rights Act of 1964, asserted as against defendant BCBG Max Azria Group, Inc. (BCBG); (2) violation of New York Executive Law § 296, asserted as against defendant Desiree Mohimi (Mohimi); (3) violation of New York Executive Law § 296, asserted as against defendant Linda Mora (Mora); (4) violation of New York Executive Law § 296, asserted as against defendant Tracy Kim (Kim); (5) violation of New York Executive Law § 296, asserted as against defendant Melissa Mangin (Mangin); (6) violation of New York Executive Law § 296, asserted as against defendant Matt Donahue (Donahue); (7) violation of New York Executive Law § 296, asserted as against defendant Sara Derr (Derr); (8) violation of New York

Executive Law § 296, asserted as against defendant Carla Macias (Macias) s/h/a Marcias; and (9) violation of the New York City Human Rights Law, New York City Administrative Code of the City of New York 8-107 (NYCHRL), asserted as against all defendants. Motion, Ex. A.

On March 10, 2010, plaintiff filed charges with the United States Equal Employment Opportunity Commission (EEOC), alleging wrongful termination, retaliation, and denial of employment. Motion, Ex. C. In July 2010, plaintiff received a right-to-sue letter from the EEOC, and the instant action was received by the Clerk of this court on June 10, 2011, almost eight months later. *Id.* The action was removed to the federal court on July 5, 2011, and the federal court dismissed plaintiff's cause of action based on a violation of Title VII of the Civil Rights Act of 1964, with prejudice, as being untimely, since any claim based on such violation must be filed within 90 days after receiving the right-to-sue letter. *Id.* Having dismissed the federal claim, the federal court determined that it lacked the jurisdiction to adjudicate the state law claims, which the federal court remanded to this court on October 13, 2011. *Id.*

Plaintiff was employed by BCBG as a full-time sales associate from June 30, 2006 until her termination on April 20, 2009. According to the complaint, plaintiff alleges that, beginning on April 1, 2009, various events took place that led to her

termination; however, the complaint fails to allege any incident occurring based on her race, national origin, or as the result of retaliation. Motion, Ex. A. The complaint, which consists of stream-of-consciousness statements, recites personal issues that plaintiff had with several of the individual defendants, but fails to allege a single fact or incident regarding her race and/or national origin. In addition, plaintiff's only allegation regarding retaliation is a claim that she was retaliated against for filing an administrative charge with EEOC in 2008. *Id.*

Defendants maintain that the complaint must be dismissed because plaintiff does not identify her national origin, does not identify the national origin of any of the individual defendants, nor pleads any facts to indicate that her termination was motivated by her national origin. Further, plaintiff fails to allege that any of the individual defendants had any involvement with the decision to terminate her employment.

In sum, defendants argue that the complaint is bereft of any allegation that plaintiff's termination was motivated by her being a member of a protected class.

In opposition to the instant motion, plaintiff has only submitted an unsworn affidavit, which consists of conclusory assertions. In addition, plaintiff has attached a looseleaf binder, consisting of 26 tabbed documents, plus sub-tabs, which includes communications from her former counsel, EEOC submissions,

unsworn statements of third parties, and various documents that are not responsive to defendants' motion.

In reply, and in support of their request that the complaint be dismissed with prejudice, defendants state that this is the third employment discrimination case that plaintiff has filed against BCBG.

The first discrimination claim asserted as against BCBG in 2008 was dismissed from the federal court for plaintiff's and her co-plaintiffs' extreme conduct that warranted dismissal. Reply, Ex. E. Eight months after plaintiff's initial case was dismissed, she sought to have it reinstated, but her motion to reinstate her claims was denied. Reply, Ex. F. Plaintiff is currently appealing this dismissal. Reply, Ex. G.

The second lawsuit filed by plaintiff against BCBG was filed on or about April 19, 2010, instituted while the first federal action was pending. BCBG asserts that, to date, it has not been properly served in that action.

Defendants maintain that, in this action, plaintiff has failed to plead a claim sounding in employment discrimination, either in her complaint, which fails to identify plaintiff's national origin or the origin or race of the individual defendants, or in her unsworn opposition, both of which consist of mere conclusory assertions. It is defendants' position that plaintiff has failed to make out a prima facie claim of employment discrimination.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action;"

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002).

Defendants' motion is granted and the complaint is dismissed.

"A plaintiff alleging racial discrimination in employment has the initial burden of establishing a prima facie case of discrimination. To meet this burden, a plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination [internal citations omitted]."

Lambert v Macy's East, Inc., 84 AD3d 744, 745 (2d Dept 2011) (claim based on alleged violations of Executive Law § 296 and NYCHRL); see

also *Furfero v St. John's University*, ___ AD3d ___, 2012 NY Slip Op 2452 (2d Dept 2012) (age discrimination claim).

"To establish entitlement to judgment as a matter of law in a case alleging discrimination, the 'defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact' ... [internal citation omitted]."

Sayegh v Fiore, 88 AD3d 981, 982 (2d Dept 2011) (allegation of employment discrimination based on national origin, pursuant to Executive Law § 296).

In the case at bar, plaintiff has failed to allege any facts to substantiate her claim that she was terminated based on her race, national origin, or as a result of retaliation. The complaint consists of bare conclusory statements, fails to identify plaintiff's national origin, and only incidentally refers to plaintiff as African-American. Further, plaintiff's presumed opposition was not submitted in legally admissible form and, consequently, fails to raise a triable issue of fact. See generally *Briggs v 2244 Morris L.P.*, 30 AD3d 216 (1st Dept 2006).

"[E]ven accepting the allegations of the complaint as true, and giving her every favorable inference to be drawn therefrom, the plaintiff failed to state a prima facie case of illegal discrimination." *DuBois v Brookdale University Hospital and Medical Center*, 29 AD3d 731, 732 (2d Dept 2006). Plaintiff's bare legal conclusions are not entitled to consideration. *Kaisman v*

Hernandez, 61 AD3d 565 (1st Dept 2009); *Tectrade International Ltd. v Fertilizer Development and Investment, B.V.*, 258 AD2d 349 (1st Dept 1999). Moreover, even though a pro se litigant's submissions are held to less stringent standards, especially in situations in which civil rights are at issue, courts need not accept as true conclusions of law or unsupported allegations. *Gonzalez v New York State Division of Human Rights*, 2011 WL 4582428, 2011 US Dist Lexis 114662 (SD NY 2011).

Nor does the court find any merit in plaintiff's argument that BCBG should be held responsible for the alleged actions of the individual defendants, even assuming that sufficient allegations were made concerning illegal discriminatory action on their parts. There is no allegation that BCBG, as their employer, knew of such conduct or condoned it. *Zakrzewska v New School*, 14 NY3d 469 (2010).

Lastly, with respect to plaintiff's allegation of illegal retaliation, there is no evidence of a causal connection between plaintiff's earlier discrimination complaints asserted as against BCBG and her termination almost one year later. *Williams v City of New York*, 38 AD3d 238 (1st Dept 2007).

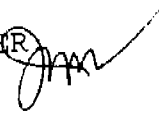
Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an

appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 16, 2012

ENTER 

Joan M. Kenney, J.S.C.

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