

Koleshnick v Scotiabank Group
2012 NY Slip Op 31660(U)
June 18, 2012
Supreme Court, New York County
Docket Number: 113873/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

KLESHNICK, EDMUND

Plaintiff,

-against-

SCOTIABANK GROUP, et al.,

Defendants.

INDEX No. 113873/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits Exhibits.... 1, 2

Answering Affidavits - Exhibits 3

Replying Affidavits 4

CROSS-MOTION: _____ YES ☒ NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

JUN 21 2012

Dated: 6/18/12

NEW YORK
COUNTY CLERK'S OFFICE
Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

☒ **DONNA M. MILLS, J.S.C.**
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

EDMUND KOLESHNICK,

INDEX NO.
113873/11

Plaintiff,

- against -

SCOTIABANK GROUP, SCOTIA CAPITAL
(USA), INC., CHRISTOPHER CAMPBELL,
KROLL, INC. AND KROLL BACKGROUND
AMERICA, INC.,

Defendants.

DECISION/ORDER

DONNA M. MILLS, J:

In this action brought by Edmund Koleshnick ("Plaintiff") for employment discrimination, discriminatory inquiry, and discriminatory adverse action, Defendants Kroll, Inc. ("Kroll") and Kroll Background America, Inc ("KBA") bring this motion to dismiss the claims against Kroll and KBA in the Amended Complaint pursuant to Civil Practice Law and Rules ("CPLR") §§ 3211(a)(2) and (7).

Plaintiff makes allegations against Kroll and KBA regarding an employment-related background report that was purportedly provided to Plaintiff's former employer Defendants ScotiaBank Group and Scotia Capital Inc. (the "Scotia Defendants"). Specifically, Plaintiff claims that the Scotia Defendants terminated his employment based on certain information that was included in a background report that Kroll and KBA allegedly produced for the Scotia Defendants.

BACKGROUND

On or about October 21, 2011, Plaintiff, a resident of Monmouth County, New Jersey, received an offer of employment from the Scotia Defendants. On November 7, 2011, Plaintiff began his employment with the Scotia Defendants. That same day, Plaintiff authorized the Scotia Defendants to order his background report.

On November 22, 2011, Plaintiff received from an employee of the Scotia Defendants a letter along with a copy of his background report. The background report, for which Plaintiff alleges both Kroll and KBA appear responsible for, contained the result of a criminal record search in Monmouth County, New Jersey. The background report included four felony charges against Plaintiff in the New Jersey Superior Court for Monmouth County that resulted in no indictment on October 23, 2010.

Plaintiff claims that after he received the background report, his criminal attorney advised an employee of the Scotia Defendants, individual Defendant Christopher Campbell, that Plaintiff was not guilty of the charges in the criminal complaint. On or about November 29, 2011, the Scotia Defendants and Defendant Campbell allegedly informed Plaintiff that his employment was being terminated because of information contained in the background report.

Plaintiff's Amended Complaint sets forth allegations that support theories that Defendants Kroll and KBA violated the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law §§ 290 et seq., in particular N.Y. Exec. Law § 296(16), by making inquiry into a criminal accusation not then pending which was followed by a termination of that criminal action in favor of Plaintiff, and acting adversely upon that criminal accusation not then pending. Plaintiff also relies on the same theory of discrimination based on violations of the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101 et seq., in particular N.Y.C. Admin. Code § 8-107(11).

The discriminatory inquiry by Defendants Kroll and KBA appears to be inquiry to New Jersey regarding arrest record and criminal accusations not then pending that were terminated in favor of Plaintiff. The discriminatory adverse action by Defendants Kroll and KBA appears to be delivering a report to an employer in New York City revealing arrest records and criminal accusations not then pending that were terminated in favor of Plaintiff.

DISCUSSION

Defendants Kroll and KBA move to dismiss the complaint for, among other things, lack of subject matter jurisdiction. Moving Defendants contend that plaintiff cannot assert that he is a resident of New York State or City, or any actual allegations that Kroll or KBA made any inquiries about him in New York State or City. Defendant also argues that Plaintiff cannot allege facts to support his conclusory assertion that they took any adverse actions against him.

Plaintiff opposes the motion asserting that Defendants Kroll and KBA made discriminatory inquiries while doing business with persons and corporations in New York, Scotia Defendants and Defendant Christopher Campbell, and conducted business in a manner discriminatorily adverse to Plaintiff.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail” (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a) (7), the test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” Jones Lang Wooton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001).

A dismissal motion pursuant to CPLR § 3211(a)(2) is based on the court not having jurisdiction of the subject matter of the cause of action.

Both the City and the State Human Rights Laws deem it an "unlawful discriminatory practice" for an employer to discharge an employee because of an inquiry that reveals an arrest that was terminated in a Plaintiff's favor (see Administrative Code of City of N.Y. § 8–107[11]; Executive Law § 296[16]). The question raised on this motion is whether nonresidents of the city and state must plead and prove that the alleged discriminatory conduct had an impact within those respective boundaries. Executive Law § 296 (16) provides in relevant part:

It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual...

When defendants Kroll and KBA provided the other defendants in this action with Plaintiff's arrest record, Plaintiff's prior arrest was "not then pending" and had been followed by a termination of that criminal action or proceeding in favor of Plaintiff, at least one year before the termination. Thus, the termination by the Scotia Defendants shortly after receiving the arrest record of Plaintiff provided by Defendants Kroll and KBA, is to be examined for violation of Exec. Law § 296(16).

Defendants Kroll and KBA claim that Exec. Law § 296(16) does not apply because Plaintiff was not a resident of New York City or New York State, and also that Plaintiff's claims do not support his conclusory assertion that they took any adverse actions against him.

First, let this Court address Plaintiff's non-resident status. Both the moving Defendants and the Plaintiff cite the Court of Appeals decision of Hoffman v Parade Publications et al., 15 NY3d 285 [2010]), in support of its positions. This Court finds that the moving Defendants have misapplied the Hoffman case. Hoffman holds that nonresidents who suffer discrimination outside of New York must plead and prove that the discriminatory conduct had an impact in New York. The Hoffman court also concluded that a nonresident plaintiff may invoke the protections of the NYCHRL by merely alleging and proving that the discriminatory decision to terminate was made in the city (Hoffman at 290-291; also see Rohn Padmore, Inc. v. LC Play Inc., 679 F.Supp.2d 454, 465 [S.D.N.Y.2010] [nonresident plaintiff working in California need only show that the alleged discriminatory decision to terminate occurred in the city]). It is undisputed that although Plaintiff was a resident of New Jersey at the time of termination, he was terminated in New York City while in the employ of the Scotia Defendants.

Finally, Defendants Kroll and KBA argue that its actions did not injure Plaintiff, implying that if any adverse action occurred it was when the Scotia Defendants terminated Plaintiff. While Plaintiff may also have an action against the Scotia Defendants, it is clear that Executive Law section 296(16) is not limited in scope. This Court finds that the legislature in enacting the aforementioned law, wanted to insure that a person in Plaintiff's position be protected from dissemination of the subject information, as well as from the acting upon the information so disseminated.

Applying the applicable law, this Court must accept all of the facts alleged in the complaint as true, and as such, I determine that they do fit within a cognizable legal theory as alleged in the Amended Complaint.

For similar reasons, Plaintiff's City's Human Rights Law claim which is analogous to the above referenced State Human Rights Law, should also be upheld at this juncture of the proceedings.

Accordingly, it is

ORDERED that the Defendants Kroll and KBA's motion to dismiss is denied; and
it is further

ORDERED that Defendants Kroll and KBA are directed to serve an answer to the
Amended Complaint within 20 days after service of a copy of this order with notice of entry;
and it is further

ORDERED that counsel are directed to appear for a preliminary conference in
Room 574, 111 Centre Street, on 6/15, 2012, at 10:00 AM.

Dated:

6 / 18 / 12

ENTER:

DMH

JUN 18 2012

NEW YORK

J.S.C. COUNTY CLERKS OFFICE

DONNA M. MULLIS, J.S.C.