

Vance v New York City Commission on Human Rights

2012 NY Slip Op 31759(U)

June 26, 2012

Supreme Court, New York County

Docket Number: 113818/11

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 : 113818/2011
VANCE, MARINA
vs.
NYC COMMISSION ON HUMAN RIGHTS
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

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</u>
Replying Affidavits _____	No(s). <u>3</u>

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 06 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/28/12


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

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 15

-----X
MARINA VANCE and A. BRIDAL HAIR AND
MAKE-UP SALON BY MARINA VANCE,

Index No.
113818/11

Petitioners,

-against-

ORDER

NEW YORK CITY COMMISSION ON HUMAN RIGHTS,

Respondent.

Mot. Seq. 002

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

AMENDED DECISION

Respondent submits this motion for leave to reargue this courts April 16, 2012 decision pursuant to CPLR §2221(d). This court's decision overlooked the fact that this is a special proceeding brought under the Administrative Code of the City of New York ("Administrative Code") §§8-123 and 8-125 and CPLR Article 4, not Article 78. Section 8-123 provides specific procedures for seeking judicial review of a Human Rights Commission determination and §8-125 provides procedures for seeking enforcement of a Human Rights Commission determination. Since this is not an Article 78 proceeding, there is no basis to refer the substantial evidence question to the Appellate Division. Pursuant to §§8-123 and 8-125 and Article 4, this Court must hear and decide all issues raised in the Petition and Answer, including the questions of substantial evidence. Therefore, the instant order is amended as follows.

Petitioner brings this motion for an Order vacating the Decision and Order made by the New York City Commission on Human Rights dated November 9, 2011, based upon a default OATH Report and Recommendation. Petitioner, A Bridal Hair and Make-up Salon by Marina Vance, is a d/b/a of Marina Vance.

Marina Vance does not presently own a salon, but states that she occasionally rents a chair at various salons in Manhattan to service clients, or services clients at their homes.

Petitioner asserts that she was not properly served with a Notice of Trial and accordingly, was unaware of the OATH hearing which took place on June 13, 2012. Petitioner annexes copies of envelopes that were returned to the Commission from all five of the addresses where they attempted to serve Petitioner. She points out that while the Decision notes that the Commission attempted service on Petitioner at five different addresses, none of these addresses were at her home address on record with the State of New York Department of State Division of Licensing Services that issued her cosmetology license. Petitioner asserts that she has lived at this address since 1998. She also says that she does not own, nor is she employed by, a salon; she occasionally rents a chair at various salons and sometimes services clients at their homes.

The commission has broad discretion "to decide how to conduct its investigations." (*See, Stern v. NYC Comm'n Human Rights*, 38AD3d 302 [1st Dept 2007]). "So long as the investigation is sufficient and the claimant afforded a full opportunity to present [her] claims" the method or methods to be employed in investigating a claim" are left to the human rights agency. (*See, McFarland v. New York State Div. Human Rights*, 241 AD2d 108 [1st Dept 1998]).

Petitioner fails to prove that she was not given a full and fair opportunity to rebut the claims against her. The Commission made efforts to contact Petitioner to notify her of its intention to proceed to trial at five different locations, two locations which Petitioner advertises on her official website. Petitioner admits in her complaint that she had provided a San Jose address to the Commission and that she received the Complaint at that address, and submitted an Answer. The court also notes that Petitioner states she never received notice of trial, yet following the mailing of the ALJ's Report and Recommendation to two addresses which she had been sent the notice of trial, Petitioner immediately submitted comments to the Commission.

Additionally, Petitioner requested that the ALJ's Report and Recommendation, and the Commission's Decision and Order should be vacated because they were arbitrary and capricious and not supported by substantial

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evidence, the damages and civil penalties awarded were excessive and that Tiffany McIntosh's ("McIntosh") complaint before the Commission should be dismissed on the ground that she was not denied a public accommodation.

The relevant facts are as follows. On November 16, 2009, Tiffany McIntosh, an African American woman, filed a verified complaint with the Law Enforcement Bureau of the Commission, alleging that Petitioner discriminated against her by denying her a public accommodation on account of her race. McIntosh alleged that she called Petitioner to schedule a hair appointment for her wedding and was asked about her race. She responded that she was black, and they scheduled the appointment. McIntosh asserts that she missed the appointment with Petitioner due to a last minute conflict, and Petitioner left her a voicemail berating her for failing to cancel the appointment. McIntosh alleges that Petitioner called her a "nigger," among other derogatory remarks. McIntosh also claims that in a subsequent conversation, Petitioner told her that she does "not do business with niggers."

The Bureau investigated McIntosh's claims, and determined that there was probable cause to believe that Petitioner had discriminated against McIntosh and referred the case to the OATH for a trial before ALJ Alessandra Zorogniotti. As discussed above, Petitioner did not appear at the trial.

On July 18, 2011, ALJ Zorogniotti issued a Report and Recommendation finding that Petitioner discriminated against McIntosh by denying her the rights, privileges and advantages of a public accommodation on account of her race and recommended compensatory damages of \$7,500 and a civil penalty of \$15,000. The Commission adopted the finding and recommendations of the Report, by Decision and Order, dated November 11, 2011, and further, rejected Petitioner's claim, made following the issuance of the Report, that she was not properly served with notice of the OATH trial.

Section 8-123 of the New York City Administrative Code provides that "[t]he findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record considered as a whole." After a review of the commission's trial transcript, it is clear that the decision is fully supported by substantial evidence. In the hearing, McIntosh provides a copy of the voice mail allegedly left by Vance which stated, "Hello Tiffany, this is Marina Vance. We

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had an appointment today at 11:30— why didn't you show up, or why didn't you call, alright? Ah this is very common with the— I'm sure you're a fucking nigger, ah, who doesn't care for anybody's time, alright... Tiffany with an "F", a fucking nigger, next time, or a fucking Dominican bitch... Good bye." McIntosh testified that when she tried to call Vance back to explain why she did not show up and to apologize, Petitioner told her "I do not want to talk with you, I don't do business with niggers."

Thus, there is substantial evidence that Petitioner discriminated against McIntosh by making racially discriminatory comments, and making her feel unwelcome as a customer. There is also evidence that she was denied a public accommodation. NYCHRL 8-107(4)(a) makes it unlawful for "any place or provider of public accommodation because of the actual or perceived... race... of any person directly or indirectly to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof..." The record indicates that Petitioner made discriminatory statements that she refused to do business with people of a certain race.

With regard to damages and civil penalties, "the relief imposed by the Commissioner need only be reasonably related to the discriminatory conduct. Unless the award is so arbitrary and capricious as to constitute an abuse of discretion, it is not erroneous as a matter of law." (*See, New York City Transit Authority v. State Div. Of Human Rights*, 78 NY2d 207 [1991]). Here, the Commissioner adopted the recommendation of ALJ Zorgonotti. The ALJ's recommendation for civil penalties considered various factors, such as the impact on the public, the use of offensive language, and the blatant disregard for the NYCHRL.

Wherefore it is hereby,

ORDERED that Respondent New York City Commission on Human Right's motion to reargue is granted and this Court's decision dated April 13, 2012 is vacated; and it is further,

ORDERED that upon reargument, Petitioner Marina Vance and A. Bridal Hair and Make-Up Salon By Marina Vance's motion to vacate the decision of the New York City Commission on Human Rights dated November 9, 2011 is denied

in all respects.

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

Dated: June 26, 2012



EILEEN A. RAKOWER, J.S.C.

FILED

JUL 06 2012

**COUNTY CLERKS OFFICE
NEW YORK**