

**Solomon v Pepsi-Cola Bottling Co. of N.Y., Inc.**

2013 NY Slip Op 30079(U)

January 18, 2013

Sup Ct, New York County

Docket Number: 110152/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**DORIS LING-COHAN**

PRESENT: J.S.C.  
Justice

PART 36

Index Number : 110152/2011  
SOLOMON, ROBERT  
vs.  
PEPSI-COLA BOTTLING COMPANY  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to for dismiss

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

Answering Affidavits — Exhibits (memo) | No(s) 3

Replying Affidavits (memo) | No(s) 4

Upon the foregoing papers, it is ordered that this motion to dismiss by defendant  
is granted in accordance with the attached  
memorandum decision.

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

**FILED**  
JAN 18 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/15/13

[Signature]  
**DORIS LING-COHAN**, 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: IAS PART 36

-----X  
ROBERT SOLOMON,

Plaintiff,

Index No.: 110152/11  
DECISION/ORDER

-against-

Motion Seq. No.: 001

PEPSI-COLA BOTTLING COMPANY OF NEW  
YORK, INC.,

Defendant.

**FILED**

-----X  
HON. DORIS LING-COHAN, J.S.C.:

JAN 18 2013

NEW YORK  
COUNTY CLERK'S OFFICE

In this employment discrimination action, defendant Pepsi-Cola Bottling Company of New York, Inc. (Pepsi) moves to dismiss the complaint, pursuant to CPLR 3211 (a) (5) (motion sequence number 001). For the following reasons, this motion is granted.

BACKGROUND

Plaintiff Robert Solomon (Solomon) was employed as a forklift operator by Pepsi from approximately 1988 through 2008. *See* Notice of Motion, Exhibit F. Solomon alleges that he suffers from diverticulitis and drug addiction, and that he informed Pepsi about his conditions at some point in 2006. *Id.* Solomon further alleges that he missed a certain number of workdays during the period of 2006 through 2008, but that he always presented his supervisor with a doctor's note explaining that he was undergoing either medical or substance abuse treatment. *Id.* Solomon claims that Pepsi nonetheless informed him that his conditions were not recognized by the Americans With Disabilities Act (ADA), and, in 2007, Pepsi commenced an arbitration against him, with respect to his absenteeism. *Id.* Thereafter, Solomon and Pepsi entered into a "last chance agreement", which Solomon subsequently violated, and Pepsi sent him a letter

recommending his termination on June 25, 2008. *Id.* Pepsi's decision to terminate Solomon was upheld at a subsequent arbitration hearing on August 14, 2008. *Id.*

Solomon initially commenced an employment discrimination suit against Pepsi before the United States Equal Opportunity Commission (EEOC) on September 25, 2008, however the EEOC subsequently dismissed that proceeding in an order issued on January 25, 2010. *See* Notice of Motion, Exhibit A. Solomon next commenced an action for disability discrimination and violation of the ADA against Pepsi in the United States District Court for the Southern District of New York on March 10, 2010 under Case No. 10-CV-1886 (BSJ) (HBP) (the federal action). *Id.*; Exhibit A. Finally, on September 2, 2011, Solomon commenced the instant action in this court by filing a summons and complaint that sets forth two causes of action each for violation of NY Exec Law § 290 and NYC Admin Code § 8-101. *Id.*; Exhibit F. In lieu of filing an answer, Pepsi has filed the instant motion to dismiss.

#### DISCUSSION

CPLR 3211 (a) (5) provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... statute of limitations." Here, Pepsi argues that Solomon's complaint should be dismissed because Solomon commenced the instant action after the expiration of the three-year statute of limitations governing both of his claims. *See* Memorandum of Law in Support of Motion, at 5-9. As an initial matter, the court notes that Solomon does not contest that his claims are governed by a three year statute of limitations. *See* CPLR 214 (2); NYC Admin Code § 8-502 (d).

Solomon bases its argument on the rule that disability discrimination claims like

Solomon's, accrue "on the date that an adverse employment determination is made and communicated to [a] plaintiff." See *Pinder v City of New York*, 49 AD3d 280, 281 (1<sup>st</sup> Dept 2008); *Vig v New York Hairspray Co., L.P.*, 93 AD3d 565 (1<sup>st</sup> Dept 2012). Pepsi argues that Solomon's claims accrued on June 25, 2008 when he received Pepsi's letter recommending termination, and that the three (3) year statute of limitations expired, prior to the commencement of this case on September 2, 2011. See Memorandum of Law in Support of Motion, at 5. Solomon responds that Pepsi's original letter merely recommended termination, but that the decision to terminate was not actually confirmed by the arbitrator until September 2, 2008, and argues that this action - commenced on September 2, 2011 - is, therefore, timely. See Memorandum of Law in Opposition to Motion, at 2-3. Solomon fails, however, to cite to any case law to support his argument.

Pepsi responds that Solomon's argument misconceives the law, which fixes the accrual date for job discrimination claims "on the date that an adverse employment determination is made," rather than on the date when "termination" is actually given effect. See Plaintiff's Reply Brief, at 2-5. Pepsi is correct. Indeed, the Appellate Division, First Department, has noted that "the possibility that [a] determination may [be] reversed ... is insufficient to toll the limitations period, [where] there is no evidence that the firm actively misled plaintiff about her status, or that it restricted her in some extraordinary way from exercising her rights to allege discrimination ." *Cordone v Wilens & Baker, P.C.*, 286 AD2d 597, 598 (1<sup>st</sup> Dept 2001); see also *Peterec-Tolino v Harap*, 93 AD3d 577 (1<sup>st</sup> Dept 2012). Here, too, Solomon has presented no such evidence. Therefore, Solomon's disability discrimination claim against Pepsi accrued on June 25, 2008, when Pepsi sent him the letter containing "an adverse employment determination," - i.e., a

recommendation that his employment be terminated. As a result, the discrimination claims set forth in the within action are untimely, as they were asserted after the governing three-year statute of limitations had expired.

The balance of Solomon's opposition raises issues regarding the admissibility of documentary evidence. *See* Memorandum of Law in Opposition to Motion, at 3-5. However, these questions are now moot, as they pertain to this action which has been dismissed. Solomon is free to raise such arguments, if appropriate, in conjunction with his Federal Court action. Accordingly, Pepsi's motion is granted.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR §3211 (a) (5), by defendant Pepsi-Cola Bottling Company of New York, Inc. is granted and the complaint is dismissed, without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

**FILED**

JAN 18 2013

Dated: New York, New York  
January 15, 2013

NEW YORK  
COUNTY CLERK'S OFFICE



Hon. Doris Ling-Cohan, J.S.C.

J:\Dismiss\solomonvpepsi.dlc.lane final.wpd