

**Lacap v Electronic Security**

2013 NY Slip Op 30832(U)

April 15, 2013

Supreme Court, New York County

Docket Number: 103702/12

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS

PART 58

*Justice*

**DONNA M. MILLS, J.S.C.**

ROBERTO LACAP,

INDEX No. 103702/12

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 001

ELECTRONIC SECURITY AND COMMUNICATIONS  
CORP. et al.,

Defendants.

MOTION CAL No. \_\_\_\_\_

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavit- Exhibits

**FILED**

1, 2

Answering Affidavits- Exhibits

APR 23 2013

3, 4

Replying Affidavits

5, 6

**COUNTY CLERK'S OFFICE  
NEW YORK**

CROSS-MOTION: \_\_\_\_\_ YES  NO \_\_\_\_\_

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated:

4/15/13

*Donna M. Mills*  
J.S.C.

Check one:

FINAL DISPOSITION

\_\_\_\_\_  
NON-FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

ROBERTO LACAP,

INDEX NO.  
103702/12

Plaintiff,

- against -

ELECTRONIC SECURITY and COMMUNICATIONS  
CORP. and ROBERT HOROWITZ,

DECISION/ORDER

Defendants.

**FILED**

APR 23 2013

DONNA M. MILLS, J:

**COUNTY CLERKS OFFICE  
NEW YORK**

In this employment discrimination case, defendants Electronic Security and Communications Corp. ("ESCC"), Robert Horowitz, and James More (collectively "defendants"), move for an order, pursuant to CPLR 3211 (a) (5), dismissing the verified complaint of plaintiff Roberto Lacap in its entirety and imposing sanctions under N.Y.C.R.R. 130-1.1 ( c).

**BACKGROUND**

On or about October 9, 2008, plaintiff, commenced an action entitled Roberto Lacap v Innovative Commercial Systems, Index No. 113680-08, in the Supreme Court of the State of New York, County of New York (the "First Action"). In the First Action, plaintiff alleged that he was discriminated against, based on his age, ethnicity and national origin, when his employment with defendant Innovative Commercial Systems ("ICS") was terminated. As the basis for his claims against ICS, plaintiff stated in the First Action that he was employed by ICS as a service technician from about October 1998 until September 5, 2008, that he was fired without just cause or justification.

After discovery was concluded in the First Action, ICS moved pursuant to CPLR 3212 for an order of summary judgment dismissing plaintiff's Verified Complaint in its entirety. The Court in the First Action dismissed on the merits plaintiff's claims for employment

discrimination based on national origin and ethnicity under Title 8 of the New York City Administrative Code and Article 15 of the New York Executive Law.

Thereafter, a trial on plaintiff's claim for age discrimination in the First Action was held before the Honorable Debra A. James beginning on June 25, 2012. On June 29, 2012, the parties entered into a stipulation of settlement on the record concerning plaintiff's age discrimination claims (the "Settlement"). Pursuant to the terms of the Settlement, the period in which ICS was obligated to make the specific settlement payments commenced upon plaintiff's delivery to ICS of a compliant general release and a stipulation of discontinuance executed by plaintiff and his attorneys. To date, no settlement payments have been made because there is a dispute between ICS and plaintiff concerning whether a compliant general release executed by plaintiff has been delivered to ICS.

While engaged in the dispute with ICS over the terms of the Settlement in the First Action, plaintiff commenced this action (the "Second action"). In the Second Action, plaintiff again alleges that his employment was unlawfully terminated due to his age, national origin, ethnicity or some combination thereof. Unlike in the First Action, however, plaintiff now asserts claims against defendants ESCC, Horowitz, and More. In the Second Action, unlike in the First Action, plaintiff now claims that he was employed by ESCC as a service technician from about October 1998 until September 5, 2008.

Plaintiff concedes that his claims brought under the New York City Administrative Code are time barred, and he does not oppose the dismissal of them. Plaintiff's remaining claim is brought under 42 U.S.C. §1981, which bars discrimination in employment on the grounds of race, etc. The defendants argue that this claim is barred by the doctrine of collateral estoppel.

### APPLICABLE LAW AND DISCUSSION

"The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). Collateral estoppel effect will be given only to matters actually litigated and determined in a prior action or proceeding (see Kaufman v Eli Lilly & Co., 65 NY2d 449, 456 [1985]). It must be shown that the identical issue was decided in the prior action or proceeding, is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest it (*id* at 455).

Notwithstanding the difference between the defendants in the First and Second Actions, plaintiff once again asserts a discrimination claim for his termination from employment in September of 2008 . As in the First Action, plaintiff states in the Second Action that shortly after James More, a white American born male in his thirties, became his supervisor, plaintiff's employment was terminated without cause or justification. Likewise, plaintiff restates in the Second Action that a month prior to his termination, More hired a new native born American employee in his mid-thirties to work in plaintiff's department. And, similarly, plaintiff reallèges in the Second Action that the termination of his employment occurred under circumstances giving rise to the inference that his age, national origin, ethnicity or some combination thereof played a part in More's decision to terminate him.

It is undisputed that the individual defendant, Robert Horowitz, owns the two companies ISC and ESCC, and that they are engaged in the same business, namely, the installation, maintenance and repair of building security and communication systems. Other than the identity of plaintiff's employer, plaintiff's remaining allegations in the instant

action are substantially similar to those in First Action. As such, the national origin and ethnicity discrimination claims raised by plaintiff in this action are barred by collateral estoppel.

"Pursuant to 22 NYCRR 130-1.1, an award of costs, including attorney's fee, may be imposed against a party for frivolous conduct" (Finkelman v SBRE, LLC, 71 AD3d 1081, 1081 [2010]). While this Court finds that plaintiff's action lacks merit, I do not find that it rises to the level of frivolous conduct.

Accordingly, it is

ORDERED that the motion of defendants to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against the defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that the defendants' motion for sanctions is denied. I

Dated: 4/15/13

So Ordered



Donna M. Mills, J.S.C.  
**DONNA M. MILLS, J.S.C.**

**FILED**  
APR 23 2013  
COUNTY CLERKS OFFICE  
NEW YORK