Dilm v. Matthew Schmelzer only

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

MANUEL PACHECO,

Plaintiff,

-against-

TRYAX REALTY MANAGEMENT, INC., MICHAEL LEON, individual, MICHAEL SCHMELZER, individual, MATTHEW SCHMELZER, individual, ALEX GUERRERO, individual,

Defendants.

Index No. 300341/11

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to _3__ read on this motion, for summary judgment

No On Calendar of 03/14/14

	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	
Affidavit	
Memorandum Of Law	3
Notice Of Cross Motion	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff was a live-in superintendent in a building owned by defendant, Tryax Realty Management, Inc., (Tryax). Tryax was owned by defendants, Michael Schmelzer and Matthew Schmelzer. Plaintiff's former direct supervisors were defendants, Michael Leon, (Leon), and Alex Guerrero, (Guerrero). After plaintiff has withdrawn other causes of action, his remaining causes of action are for failure to accommodate his disability and retaliation, therefore violating the New York City Human Rights Law, (NYCHRL). Specifically, plaintiff alleges that he was terminated on account of the time he needed be away from his job on account of this treatment for cancer.

The NYCHRL provides in relevant part that,

> It shall be an unlawful discriminatory practice:(a) For an employer or employee or agent thereof ... because of disability ... to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Administrative Code §8–107(a)(1)

Plaintiff's discharge letter dated August 9, 2010, signed by Michael Schmelzer, (Schmelzer), references two warning letters dated May 7, 2010 and June 10, 2010, that plaintiff allegedly received. The Schmelzer termination letter states that plaintiff had told his supervisor that he would be absent from the building July 19 through July 26, 2010, (one week). However, it is undisputed that plaintiff took a two week leave from his work. Defendants argue that it discharged plaintiff essentially on account of alleged unauthorized absences from work.

"It is not uncommon for covered entities to have multiple or mixed motives for their action, and the City HRL proscribes such "partial" discrimination since "[u]nder Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations" (see Williams, 61 AD3d at 78 n 27; see also Rep of Comm on Gen Welfare, Local Law No. 85 [2005] of City of New York, 2005 NY City Legis Ann, at 537; *Weiss v JP Morgan Chase & Co.*, 2010 WL 114248, 2010 US Dist LEXIS 2505, [SD NY 2010] [the City HRL "requires only that a plaintiff prove that age [disability herein], was 'a motivating factor' for an adverse employment action"])."

(*Bennett v Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 40 [1st Dept 2011]).

Plaintiff avers that "Michael Schmelzer threatened me that he would terminate me if I took more time off from work and that I would lose my apartment as well." He further avers that Matthew Schmelzer told him "that if I kept taking off sick from work I wouldn't have a job." Plaintiff avers that both of his supervisors, Guerrero and Matthew Schmelzer "would make comments to me repeatedly during the time that I was being treated like 'If you're sick, why are you here?' They told me that I didn't belong at work if I had an illness." Plaintiff further avers he received permission from Guerrero to take two weeks leave beginning on July 19, 2010 to rest

from treatment with two different types of chemotherapy. Plaintiff also avers that he sought a second opinion in the Dominican Republic. Plaintiff avers that Guerrero told him Adan Battista, (Battista), would cover for him for the two weeks. Plaintiff's averment regarding his authorization to have two weeks leave is corroborated by the sworn statement of Battista. While defendants correctly assert that plaintiff cannot produce a leave form for the two week period plaintiff was absent from work, plaintiff avers he was not offered a leave form, but was given oral authorization to leave work. On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]).

"[W]here a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Id.* at 39. In the case at bar, plaintiff has not stood silent, but rather has directly submitted evidence that the reason offered by defendants for plaintiff's discharge was pretextual. With respect to the individual defendants, "[t]he local ordinance (NYCHRL), thus includes fellow employees under the tent of liability, but only where they act with or on behalf of the employer in hiring, firing, paying, or in administering the "terms, conditions or privileges of employment"--in other words, in some agency or supervisory capacity." *(Priore v New York Yankees,* 307 A.D.2d 67, 74 [1stDept 2003]).

Plaintiff's attorney argues that Leon "participated in the decision to discharge the Plaintiff from employment." While the plaintiff's reference to page 124 of the transcript of

Michael Schmelzer is inaccurate, the transcript is rife with references to the involvement of the two field managers, Leon and Guerrero with the issue of plaintiff's unauthorized leave. Michael Schmelzer testified that he did not speak with plaintiff directly about the subject matter herein, but it is clear that Leon and Guerrero, as field managers, were closely involved in plaintiff's termination. (Michael Schmelzer transcript pp. 88-90; 148-157). Michael Schmelzer was very involved in the termination process and decision. Michael Schmelzer himself signed the termination letter. However, there is no proffered evidence of any involvement of Matthew Schmelzer in plaintiff's termination.

Accordingly, defendants' motion is granted to the limited extent that the complaint is dismissed as against Matthew Schmelzer only. Defendants' motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: MAY 2 2 2014

J.S.C.
KENNETH L. THOMPSON, JR.