SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SAMARADASA WEERAHANDI,

Plaintiff,

-against-

AMERICAN STATISTICAL ASSOCIATION, JUN LIU, and XUMING HE,

Defendants.

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Index No.: 160738/13

Motion Seq. No. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action based on alleged racial discrimination, defendants American Statistical Association ("ASA"), Jun Liu ("Liu"), and Xuming He ("He') (collectively, "defendants") move to dismiss the complaint of plaintiff *pro se* Samaradasa Weerahandi ("plaintiff") pursuant to CPLR 3211(a)(2) (lack of subject matter jurisdiction), (a)(7) (failure to state a cause of action) and (a)(8) (lack of personal jurisdiction due to improper service), and pursuant to 22 N.Y.C.R.R. 130-1.1 for sanctions.

Plaintiff opposes the motion and cross-moves for a default judgment.

Factual Background[1]

ASA is a national association of statisticians, with local chapters in a number of states; its New York City chapter president "operates" in Manhattan. ASA publishes scholarly articles on the field of statistics in the *Journal of the American Statistical Association* ("JASA").

Plaintiff, a resident of Edison, New Jersey, has been a member of ASA since 1983. Liu and He are co-editors of JASA, with office addresses at Harvard University, Cambridge,

[1] The factual background is derived from the allegations in the complaint.

Massachusetts, and University of Michigan, Ann Harbor, Michigan, respectively.

Plaintiff is a successful member of ASA, and moreover, has been serving as a "spokesperson" for the Asian-American community. In that role, plaintiff enhanced ASA's diversity by fostering the election of ASA's first minority president and vice-president. Following communications with JASA's senior management about the lack of diversity in JASA's board, Liu and He became the first Asian-American co-editors of JASA.

However, plaintiff claims that in retaliation against his "repeated Diversity Communications," ASA violated "Diversity principles" and deliberately appointed Chinese-American statisticians as co-editors of JASA, thus alienating many members of ASA, in which total minority membership is less than 35%, and Chinese-American membership is around 20%. In or around late 2010 and early 2011, Liu and He allegedly made racially-biased appointments of Associate Editors ("AE"), when they fired almost all well-accomplished AEs of the previous editorial board and appointed under-qualified Chinese-Americans as AEs. These new AEs included Liu's and He's recently graduated students and friends.

Thereafter, the quality of articles published in JASA severely deteriorated. In January 2011, Liu and He did not respond to plaintiff's statement that "we Asians should practice what we preach." Two months later, when plaintiff wrote again, Liu and He "took some positive action in reducing the Lack of Diversity situation."

Notwithstanding, following these communications, plaintiff allegedly became a target for retaliation by defendants. For example, when plaintiff traveled to give a seminar at the university where Liu works, Liu did not attend the seminar. Also, He repeatedly passed submissions by plaintiff to Liu, who allegedly "does not even seem to take a careful look at the papers before

making a decision about a paper."

On this note, the previous editorial boards had accepted three articles in a row submitted by plaintiff. In contrast, Liu rejected plaintiff's articles on three consecutive occasions. Some of the decisions were made "without a single referee report," or they are "based [sic] reports from second class reviewers who did not even understand the context or had the expertise to judge what a good research article is." Plaintiff's most recent article was rejected based on a referee report in which the referee basically "guessed" that there might be published papers with results in that paper submitted by plaintiff.

Given the allegedly unprofessional way of responding to plaintiff's last submission and the failure of the editors to understand the seriousness of the situation, plaintiff asked Liu to have the paper reviewed by an AE who is an expert on the topics contained in the paper. In alleged retaliation, Liu, knowing the outcome, sent the paper back to the same AE, wasting three months when plaintiff could have submitted the paper to another journal.

Plaintiff alleges that as a result of defendants' conduct, plaintiff, whose job performance is partly judged by publication of research papers, was subjected to economic loss and job detriment caused by the lack of publications during the past two years. Plaintiff alleges racial discrimination and retaliation based on violations of New York State Human Rights Law ("NYSHRL") 290-297 *et seq.* and New York City Human Rights Law ("NYCHRL") 8-101 to 131, *et seq.*

Arguments[2]

Defendants argue that the complaint must be dismissed because the court lacks subject matter jurisdiction over the claims for alleged violations of the NYCHRL and NYSHRL. Such jurisdiction is lacking where, as here, a complaint is based on allegations of discrimination which took place outside of New York by foreign corporations or non-residents. Here, *via* an affidavit provided by Stephen Porzio (ASA's associate executive director), ASA states that it is a foreign (Massachusetts) corporation that does not maintain an office or any other property in New York, use or possess property in New York, or have any employees working in New York on its behalf. Also, plaintiff is not, and has never been, an employee of ASA. Liu and He provide affidavits in which they establish that they do not reside in, or have any other connections with, New York.

Moreover, plaintiff does not allege that he has any connection to New York, as he identifies his residence in the complaint as being in Edison, New Jersey. Thus, plaintiff does not, and cannot, allege that any discriminatory conduct or retaliation occurred in New York, occurred by or against any New York resident, or otherwise had any impact whatsoever in New York. Accordingly, the court lacks subject matter jurisdiction of the matter under CPLR 3211(a)(2).

In opposition, plaintiff argues that New York State law allows one to sue any entity doing business in the State of New York, and ASA does business and collects membership fees from New York members annually. ASA's New York chapter president's official address is given as one in Manhattan by ASA, and that is where ASA's copy of the summons and complaint was delivered.

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[2] For reasons set forth below in the following section, the court discusses the parties' arguments only with respect to subject matter jurisdiction.

Additionally, plaintiff contends that defendants were not eligible to file a motion to dismiss, as plaintiff's prior motion for a default judgment filed on February 4, 2014, is pending, and defendants did not submit opposition to same.

Discussion

Dismissal is appropriate where the court lacks jurisdiction of the subject matter of the action (*see* CPLR 3211(a)(2); *Benham v. eCommission Solutions, LLC*, 118 A.D.3d 605, -- N.Y.S.2d --, 2014 WL 2841139 [1st Dept 2014]). And, a complaint should be dismissed for want of subject matter jurisdiction where statutory claims are asserted under statutes that do not apply to the alleged conduct (*see Hardwick v. Auriemma*, 2013 WL 1625155 [Sup Ct New York Cty], *aff'd* 116 A.D.3d 465, 983 N.Y.S.2d 509 [1st Dept 2014]). Furthermore, the court may, *sua sponte*, dismiss an action for lack of subject matter jurisdiction (*see Concourse Nurshing Home v. Chasin*, 259 A.D.2d 302, 684 N.Y.S.2d 784 [1st Dept 1999]).

New York State courts lack subject matter jurisdiction over claims brought under the NYCHRL and the NYSHRL by a non-resident plaintiff, when the alleged discriminatory conduct did not have an "impact" on the plaintiff within New York City (regarding the NYCHRL) and within New York State (regarding the NYSHRL) (*see Hoffman v. Parade Publications.*, 15 N.Y.3d 285 [2010]; *Shah v. Wilco Systems, Inc.*, 27 A.D.3d 169, 806 N.Y.S.2d 553 [1st Dept 2005]). In other words, "impact" refers not to where the locus of the discriminatory act took place, but where the import of the act as to plaintiff is felt (*see Shah*, *supra*).

In *Hoffman*, the plaintiff was a resident of Georgia, and the defendant was a publisher headquartered in New York City. The plaintiff brought an action for discrimination under both the NYCHRL and NYSHRL after he was called (in Georgia) by the defendant's president (in

New York City) and terminated over the telephone (*Hoffman*, 15 N.Y.3d at 287-288). Despite the fact that the allegedly discriminatory conduct arguably took place in New York City, the Court of Appeals reinstated the trial court's dismissal of the matter for lack of subject matter jurisdiction on the ground that the non-resident plaintiff did not state a claim that the conduct had any impact in New York City or State (*id.*).

Here, plaintiff is a non-resident, as he alleges that he resides in New Jersey. Further, he does not even allege that any alleged discriminatory conduct took place in New York City or New York State, or that the impact of such alleged conduct affected him therein. Plaintiff's arguments in opposition do not challenge defendants' demonstration in the moving papers.

Accordingly, the complaint must be dismissed for lack of subject matter jurisdiction, since the NYCHRL and NYSHRL do not apply to the conduct at issue (*see Hardwick* and *Hoffman*, *supra*). The only potential connection to New York in the complaint is plaintiff's claim that ASA's New York chapter president "operates" in Manhattan. However, this allegation, with nothing more, is light-years from providing this court with jurisdiction.

And, because the court lacks subject matter jurisdiction over this matter, any further order or judgment rendered would be a nullity (*see Nash v. Port Authority of New York and New Jersey*, 22 N.Y.3d 220, 229 [2013], *quoting Lacks v. Lacks*, 41 N.Y.2d 71 [1976] ("it is blackletter law that a judgment rendered without subject matter jurisdiction is void")). As such, the court is precluded from evaluating the merits of the complaint and the parties' remaining contentions.

On this note, the court is precluded from considering, and must deny, plaintiff's cross-motion for a default judgment. First, plaintiff's contention that defendants' motion is improper

because his prior motion for default judgment is pending is unavailing. The Court's E-filing records indicate that such "motion" was "returned for correction" (see entries for e-filed document # 3, entitled Affidavit in Support Of Motion for Default Judgment, and e-filed document #14 entitled "Request For Default Judgment"), and was never assigned a motion sequence number for proper processing. Therefore, plaintiff's purported motion is not pending for decision. Second, and more important, the lack of subject matter jurisdiction may be raised at any time by either the court or a party, and if the court determines it lacks subject matter jurisdiction, it must immediately dismiss the action upon that determination (*see Metro Interior Distributors Corp. v. Hynes*, 41 Misc.3d 1202(A), 977 N.Y.S.2d 667 [Dist Ct Nassau Cty 2013], *citing Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y.315 [1889]).

Lastly, both parties' requests for sanctions are denied.

22 N.Y.C.R.R. § 130-1.1 gives the court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 N.Y.C.R.R. § 130-1.1 (c) provides that conduct is frivolous if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the

conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*see also LibertyPointe Bank v. 75 East 125th, LLC*, 2013 WL 582254 [Sup Ct New York Cty 2013]).

Plaintiff's request is denied because his cross-motion lacks merit. Defendants' request for sanctions warrant further examination.

Although the Court is wary of plaintiff's conduct in bringing the instant action, given defendants' April 2014 request that plaintiff withdraw the complaint due to, *inter alia*, deficiencies with subject matter jurisdiction, it is not so egregious as to warrant sanctions at this stage (*Chase v Stendhal*, 16 Misc 3d 1137(A), 851 NYS2d 57 [Sup Ct, New York County 2007]). Defendants' request was based in part on its position that jurisdiction is lacking when the alleged discrimination or retaliation "otherwise had [no] impact whatsoever in New York."

As is evident in his opposition, however, plaintiff continued prosecuting this action based in part on the claim that ASA did business, and collected membership fees from members, in New York. Thus, it is not wholly unreasonable for plaintiff to assert that defendants' alleged discriminatory acts (which would have affected JASA's final product) had an impact in New York. However, as demonstrated by the controlling case law (*see Hoffman, supra*), much more is required to prevail -- specifically that the discriminatory conduct had an impact *on the plaintiff.* This plaintiff failed to do.

Thus, although ultimately unpersuasive, it cannot be said that plaintiff's conduct in bringing and continuing the within action was unreasonable or was designed to harass or injure defendants. Moreover, none of the other factors referenced in 22 N.Y.C.R.R. § 130-1.1(c) is indicated by plaintiff's conduct herein. Accordingly, defendants' request for sanctions is denied.

Conclusion

Based on the foregoing, it is hereby

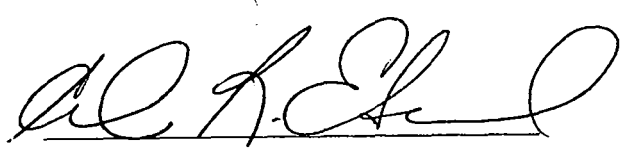
ORDERED that defendants' motion is granted only to the extent that the complaint is dismissed due to the court's lack of subject matter jurisdiction; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry within 30 days of entry.

This constitutes the decision and order of the Court.

Dated: July 28, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD