

Blank v Curtiss-Wright Flow Control Corp.

2014 NY Slip Op 32496(U)

September 8, 2014

Sup Ct, Suffolk County

Docket Number: 12654/2013

Judge: Ralph T. Gazzillo

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This opinion is uncorrected and not selected for official publication.

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 001 MG; 002 MG

Hon. RALPH T. GAZZILLO
A.J.S.C.

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Steven Blank,	:	
	:	
Plaintiff(s),	:	
	:	
- against -	:	
	:	
Curtiss-Wright Flow Control Corporation, Roy	:	
Sherman, Manager of Design Drafting, et.al.,	:	
	:	
Defendant(s),	:	
<hr/>		X

Upon the following papers numbered 1 to 11; Notice of Motion and supporting papers numbered 1- 5; Memorandum of Law in Opposition numbered 6-8 ; Reply papers numbered 9- 11;it is

ORDERED that defendants' motion¹ to dismiss the plaintiff's amended complaint is granted in its entirety, and it is further

ORDERED that defendants' application for fees, costs and sanctions pursuant to 22 NYCRR §130-1.1 is denied, and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

This is an action commenced to recover damages based upon an alleged employment discrimination and wrongful termination. According to the plaintiff, he began working for Curtiss-Wright Flow Control Corporation as a Senior Mechanical Designer in January of 2005. The plaintiff's salary at the time was \$72,000.00. The complaint alleges that although plaintiff was an exemplary employee for the ensuing five year period, in December 2010, he received a negative performance evaluation from his supervisor, Mr. Sherman, which faulted him for

¹ Although there are two motion sequences showing in the Court's records (001, 002) , a copy of the motion was inadvertently identified as a separate motion. There was only one motion to dismiss.

“negative interdepartmental social dynamics. Based upon the negative performance evaluation, plaintiff was placed on an “Employee Improvement Plan” (hereinafter “EIP”) which was allegedly scheduled to be in place for the later months of 2010 and the early part of 2011. According to the plaintiff, during the time that the EIP was in place, a co-worker named Paul Cerrito began harassing and mocking the plaintiff based upon his religious beliefs. Allegedly, during that same time period, some of plaintiff’s co-workers, including Mr. Cerrito, began harassing the plaintiff regarding concerning his sexual orientation. These incidents escalated until plaintiff and Paul Cerrito nearly went to blows. Thereafter, plaintiff claims that another co-worker, Don Kreutal, used the company’s “anonymous code of conduct” hotline to complain about the plaintiff’s behavior. Mr. Sherman thereafter escorted the parties to the Human Resources department in an apparent effort to resolve the dispute. Plaintiff and Mr. Cerrito were given a “final” written warning and a one week unpaid suspension after the meeting with Lisa King, the Human Resources Director. Plaintiff claims that he was given another EIP following the conclusion of the first and that, thereafter, while his immediate supervisor was on vacation, he was summarily fired based on the claim of Robert Frole and Debbie Ryan from Human Resources, alleging that he had not fulfilled his obligations under the EIP. At the time he was terminated, plaintiff was 53 years of age.

Plaintiff initially filed a complaint with the New York State Division of Human Rights (hereinafter “NYSDHR”) on November 3, 2011 alleging religious and age discrimination. In that proceeding plaintiff claimed that he received an inaccurate employee evaluation and EIP, that he was mocked by his co-workers for his religious beliefs, received a demotion in title, was told that he was disruptive and did not get along well with his co-workers and was held responsible for training his co-workers even though that was not part of his job description, wrongly received an written warning and unpaid suspension, that the Human Resources department failed to investigate his complaints and that he was unlawfully terminated despite an alleged improvement in his performance. That proceeding was dismissed as having no probable cause to believe that the defendants had engaged in the alleged wrongful behavior. In fact, the NYSDHR found that defendant Curtiss-Wright had provided plaintiff with a legitimate basis for discharging him. Further, the NYSDHR determined that the evidence did not support the allegations of age and religious discrimination. Plaintiff did not seek judicial review of the determination of the NYSDHR pursuant to New York Executive Law §298.

Thereafter, plaintiff filed a complaint against defendant Curtiss-Wright in the United State District Court for the Easter District of New York asserting claims for age discrimination and harassment, religious discrimination and harassment, naming the individual defendants as parties as well asserting claims for discriminatory termination and harassment based upon “perceived sexual orientation” against all defendants. However, plaintiff moved to voluntarily dismiss that action which motion was granted on April 8, 2013.

Plaintiff then commenced this action. Just after the complaint was served in June of 2013, defendants moved to dismiss the action asserting that the plaintiff had elected to initiate its claims through the NYSDHR. Rather than oppose the motion, plaintiff filed an amended

complaint in which he asserts essentially the same allegations but instead changed the jurisdictional basis of the claim now asserting that the defendants' actions are violative of New York Civil Rights Law §40-c and the Equal protection clause of the New York State Constitution.

Defendants now move to dismiss the amended complaint on several grounds. Specifically, defendants assert that the plaintiff's complaint must be dismissed pursuant to New York Civil Rights Law §40-c since plaintiff failed to serve notice on the attorney general. Further, defendants assert that plaintiff is barred pursuant to the doctrine of collateral estoppel and the applicable statute of limitations based upon the dismissal of the claims in both the NYSDHR and the United States District Court since, the claims asserted herein are nearly identical to the claims asserted in that proceeding and action both of which were dismissed.

Plaintiff opposes the motion arguing, *inter alia* that the State complaint contains new claims, differences in jurisdiction and new defendants. In addition, plaintiff argues that its admitted failure to serve notice on the Attorney General pursuant to §40-d of the New York Civil Rights Law is a correctable procedural defect which does not warrant dismissal of the plaintiff's claims.

Pursuant to New York Civil Rights Law §40-d, a party claiming violations of New York Civil Rights Law must serve notice thereof upon the attorney general "[a]t or before the commencement of any action under this section...". Plaintiff herein admits, although the complaint was served in June of 2013, that no such notice was served. Accordingly, all claims in the complaint that allege violations of New York State Civil Service Law must be dismissed (see, *Cinquanti v. Tompkins-Cortland Community College*, 2000 WL 949460 (N.D.N.Y)).

Defendants also asserts that, based upon the determinations in the NYSDHR and in the Federal Court, plaintiff is collaterally estopped from litigating the claims at issue here. A review of the Determination and Order After Investigation rendered by the NYSDHR dated March 21, 2012 which dismissed the complaint in its entirety and determined that there was "no probable cause to believe that shows that plaintiff's claims included allegations of discrimination, resulting in his termination, due to his "personal beliefs" and "opinions" and that he alleged discrimination based upon his religious beliefs. In addition, NYSDHR found that plaintiff had not made any allegations of discrimination based upon age. However, the NYSDHR did find that 40% of the individuals that filled plaintiff's former position were 40 years old or older. It is clear from a review of the NYSDHR determination and the complaint in this action that the basis of the claims plaintiff made against defendant Curtiss-Wright are the basis of the claims now made in State Court. Accordingly, plaintiff's claims here are barred by collateral estoppel since he had a full and fair opportunity to litigate those issues at the NYSDHR.

Plaintiff also argues that the fact that he has added new defendants prevents defendant from successfully asserting a defense based upon collateral estoppel. It is well settled law that the when a plaintiff's claims are based upon the same facts and incidents raised in a previously

litigated matter, addition of new defendants does not prevent the claims from being barred pursuant to collateral estoppel. Specifically “under New York’s election of remedies doctrine, ‘a person claiming to be aggrieved by an unlawful discriminatory practice may elect to seek redress in either an administrative or judicial forum where different rights and remedies may be pursued.’ *Universal Packaging Corp. v. N.Y. State Div. of Human Rights*, 270 A.D.2d 586, 704 N.Y.S.2d 332, 333 (N.Y.App.Div.2000). These remedies, however, are mutually exclusive, and ‘[o]nce a complainant elects the administrative forum by filing a complaint with the Division, a subsequent judicial action on the same complaint is generally barred. ‘(*Legg v. Eastman Kodak Co.*, 248 A.D.2d 936, 670 N.Y.S.2d 291, 292 (N.Y.App.Div.1998).” (*Wiercinski v. Mangia 57, Inc.* 2010 WL 2681168 at 2).

The election-of-remedies bar is not limited to the precise claims brought in the administrative proceeding, but extends to all claims arising out of the same events. “If substantially the same facts are involved, then the doctrine of election of remedies will bar any subsequent court proceedings. The facts need not be perfectly identical, and merely adding some additional facts and/or re-labeling the claim will not prevent the application of the doctrine of election of remedies.” (*Benjamin v. N.Y. City Dep’t of Health*, 851 NYS2d 68 at 5.)

Since it is clear that the plaintiff’s claims in this action arise out of substantially the same facts that were resolved in the NYSDHR proceeding, plaintiff is barred from relitigating them here and, as such, the amended complaint must be dismissed.

Lastly, defendants claim that plaintiff’s amended complaint should also be dismissed because it was filed after the expiration of the applicable statute of limitations. Specifically, defendants assert that since plaintiff elected to file an administrative charge with the NYSDHR that pursuant to New York Executive Law §298 plaintiff should have availed himself of the opportunity to have the NYSDHR determination reviewed within the sixty (60) day period set forth New York Executive Law. Since plaintiff’s claims in the amended complaint are based upon the same facts that formed the basis of his NYSDHR complaint, his failure to file an appeal of that decision pursuant to New York State Executive Law §298 on or before May 20, 2012 also requires the dismissal of the amended complaint (see, *Gil v. New York State Div. of Human Rights*, 17 A.D.3d 365).

Accordingly, based upon the foregoing, defendants’ motion is granted in its entirety and the complaint is dismissed without costs, fees and/or sanctions.

Dated: _____

9/8/14
 Riverhead, N.Y.



 Hon. Ralph T. Gazzillo
 A.J.S.C.

Non-Final Disposition

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