Katouchis v Rockefeller Group, Inc.
2014 NY Slip Op 32946(U)
October 6, 2014
Supreme Court, Queens County
Docket Number: 700784/14
Judge: Valerie Brathwaite Nelson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON IA Part 7
Justice

GEORGE KATOUCHIS, x

Plaintiff,

-against-

ROCKEFELLER GROUP, INC., ET AL.,

Defendants. x

Index Number 700784/14

Motion Date: May 27, 2014

Motion Cal. Number: 2

Motion Seq. No.: 2

FILED
OCT - 9 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 7 read on this motion by defendants Rockefeller Group, Inc., Rockefeller Group International, Inc., Rockefeller Group Technology Soultions, Inc., Nick D'Attilo, John T. Tarduno, Richard Gross, Ted Thompson, Patricia Glorioso, and Robert Paul (collectively referred to as defendants) for an order dismissing the complaint against John T. Tarduno and Ted Thompson and dismissing the causes of action numbered seven through twelve in the complaint against defendants for failure to state a cause of action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits-Memorandum	1-3
Answering Memorandum	4
Reply Affidavits-Memorandum	5-7

Upon the foregoing papers it is ordered that the motion is determined as follows:

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This is an action to recover damages for claims sounding in disability discrimination, retaliation, hostile work environment, intentional infliction of emotional distress, negligence, negligent hiring, negligent supervision, negligent retention, and negligent infliction of emotional distress. Plaintiff was employed by defendant Rockefeller Group Technology Soultions, Inc., from approximately January 2011 to November 18, 2013. Plaintiff has alleged that he was deprived of his rights as a result of defendants' policies and practices of discrimination against him based upon his disability. He has further alleged that he was subjected to a continuing pattern and practice of discrimination, a hostile work environment and retaliation for complaining about defendants' actions.

Defendants have moved for an order dismissing the complaint against John T. Tarduno (Tarduno) and Ted Thompson (Thompson) pursuant to CPLR 3211 (a)(7), for failure to state a cause of action. "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction" (*Kempf v Magida*, 37 AD3d 763, 764 [2007]; *see Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d 1168, 1170 [2010]). "The court must accept the facts as alleged in the complaint as true, accord the plaintiff[] the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory"(*Yusin v Saddle Lakes Home Owners Assn., Inc.*, 73 AD3d at 1170). "[I]n addition to the standards generally applicable to a motion to dismiss for failure to state a cause of action, stated above, 'employment discrimination cases are themselves generally reviewed under notice pleading standards,' such that 'a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination, but need only give fair notice of the nature of the claim and its grounds'" (*Baldwin v Bank of America, N.A.*, 42 Misc3d 1203[A], *7 [2013], quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [2009] [internal quotation marks, brackets, and citations omitted]).

While defendants have argued that plaintiff's complaint does not allege any wrongdoing by Tarduno or Thompson that would support any of plaintiff's causes of action, they have failed to directly address each of the twelve causes of action in their papers. Thus, giving the allegations a liberal construction, this Court finds that defendants have failed to adequately demonstrate that the facts do not fit within any cognizable legal theory based upon each cause of action alleged against Tarduno and Thompson. Therefore, they are not entitled to the relief sought.

Defendants have moved to dismiss plaintiff's claim for intentional infliction of emotional distress and have argued that it is duplicative of plaintiff's causes of actions under New York State and New York City Human Rights Laws because those laws provide for recovery for emotional distress. In opposition, plaintiff has argued that his claim for emotional distress is pleaded in the alternative to his other claims and is for the recovery of

damages for allegations of discriminatory conduct that took place after his employment was terminated. The complaint contains allegations based upon New York State Executive Law § 296 and New York City Administrative Code § 8-107. Nowhere has plaintiff alleged that he has sought his claim for intentional inflection of emotion distress as an alternative relief, except in his opposition papers to the motion.

The tort of "intentional infliction of emotional distress is a theory of recovery that is to be invoked only as a last resort" in order to "afford relief where traditional theories of recovery do not" (*McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 270 [1998]). Thus, "where an applicable statute expressly provides for the recovery of damages for emotional distress," and, for example, where "emotional damages are available under New York City Human Rights Law (Administrative Code of City of NY § 8-107)," the alleged "offending conduct is embraced by a traditional tort remedy ... [and] there is no reason to apply the theory" (*id.*, at 270 [internal citation omitted]). Therefore, plaintiff's claim for intentional infliction of emotional distress is duplicative, at least, of his claim under New York City Administrative Code § 8-107. Despite plaintiff's argument, none of the wrongdoing in his complaint was alleged to have occurred after his date of termination, November 18, 2013. Therefore, defendants are entitled to the dismissal of plaintiff's claim for intentional infliction of emotional distress.

While defendants have also attempted to argue that plaintiff's complaint fails to allege the necessary elements for a claim for intentional infliction of emotional distress, they have impermissibly done so for the first time in their reply papers, and the Court will not consider that argument on this motion (CPLR 2214; *see Abramson v Hertz*, 19 AD3d 305 [2005]; *Mohsin v Port Auth. of N.Y. & N.J.*, 83 AD3d 536 [2011]; *McNair v Lee*, 24 AD3d 159, 160 [2005]).

Defendants have moved to dismiss plaintiff's claims based upon negligence, negligent hiring, negligent supervision, negligent retention, and negligent infliction of emotional distress, on the ground that they are barred by the exclusive remedy of Workers' Compensation Law. Workers' Compensation Law § 11 provides in relevant part that "the liability of an employer ... shall be exclusive and in place of any other liability whatsoever, to such employee ... entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees..."

It is true that claims based upon negligence are barred by this provision (*see e.g. Conde v Yeshiva University*, 16 AD3d 185, 187 [2005]). However, defendants have failed to adequately demonstrate, on their motion, that they did, in fact, procure workers' compensation coverage for plaintiff. Therefore, they have failed to satisfy their burden on

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this branch of their motion and the opposition papers need not be considered (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, the branch of defendants' motion to dismiss the complaint against Tarduno and Thompson is denied. The branch of defendants' motion to dismiss the causes of action for negligence, negligent hiring, negligent supervision, negligent retention, and negligent infliction of emotional distress, counts number eight through twelve, is denied. The branch of defendants' motion to dismiss plaintiff's cause of action for intentional infliction of emotional distress, count number seven in the complaint, is granted.

Dated: 10/6/14

VALERIE BRATHWAITE NELSON, J.S.C.