

Rodriguez v Dickard Widder Indus., Inc.

2014 NY Slip Op 33894(U)

May 27, 2014

Supreme Court, Queens County

Docket Number: 19323/13

Judge: Howard G. Lane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

19323/2013 ORDER SIGNED

Page 1 of 4

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

OS

ANGELA RODRIGUEZ,
Plaintiff,

Index No. 19323/13
Motion
Date March 31, 2013

-against-

DICKARD WIDDER INDUSTRIES, INC.,
Defendant.

Motion
Cal. No. 129
Motion
Sequence No. 1

Papers
Numbered

| | |
|---|------|
| Notice of Motion-Affidavits-Exhibits... | 1-4 |
| Opposition..... | 5-8 |
| Reply..... | 9-10 |

Upon the foregoing papers it is ordered that the branch of the motion by defendant, Dicker Widder Industries, Inc. seeking to dismiss the plaintiff, Angela Rodriguez's Complaint pursuant to CPLR 3211(a) (5) on the grounds that the claims are barred by the statute of limitations is hereby denied. Said motion is untimely made.

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998]).

FILED
JUN 5 2014
COUNTY CLERK
QUEENS COUNTY

Dismissal is warranted under CPLR 3211(a)(5) on the grounds that:

..“the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;”

A pre-answer motion to dismiss on statute of limitations grounds must be made before service of the responsive pleading (3211 [e]). The record reflects that service was complete on November 21, 2013. Defendant had thirty (30) days from service of the plaintiff’s summons and complaint to make its motion to dismiss pursuant to CPLR 3211(a)(5) (CPLR 3012[a]; 3211[e]). Defendant served its motion to dismiss on January 16, 2014. However, the motion should have been made by December 21, 2013.

Accordingly, that branch of the motion seeking to dismiss the plaintiff’s Complaint pursuant to CPLR 3211(a)(5) on the grounds that the claims are barred by the statute of limitations is denied as untimely.

That branch of the motion seeking to dismiss the plaintiff’s Complaint pursuant to CPLR 3211(a)(2) on the grounds that the court does not have subject matter jurisdiction of the cause of action is hereby granted.

The record reflects that on October 17, 2013, plaintiff, Angela Rodriguez commenced a complaint alleging five (5) causes of action under state law: hostile work environment, retaliatory termination, gender based discrimination, negligent hiring and retention; and negligent infliction of emotional distress.

Defendant, Dickard Widder Industries, Inc. established a prima face case that all of the causes of action in the Complaint are barred by the election of remedies doctrine, and as such, this Court has no subject matter jurisdiction.

The record also reflects that on December 1, 2008, plaintiff filed a verified complaint with the New York State Division of Human Rights (“the Division”) charging defendant with discrimination on the basis of sex, hostile work environment, and retaliation for opposing discrimination.

10/27/2013 ORDER SIGNED

Page 3 of 4

Rodriguez's complaint before the Division alleged that she was harassed by Shipping Manager Gerald Gibson ("Gibson"), including that Gibson showed Rodriguez a penis molded out of wax and that Gibson arranged for Rodriguez to see another worker fondling himself. Rodriguez's Division complaint also alleged that another worker, John Reyes, complained to upper management about Gibson's harassment of Rodriguez, that Rodriguez was interviewed by the Company's President and Vice President about Gibson and that Rodriguez was terminated shortly thereafter on November 18, 2008, because she cooperated with the complaint against Gibson. After investigation, the Division referred the case to a public hearing, and public hearing sessions were held.

On June 3, 2013, Administrative Law Judge Thomas S. Protano issued Recommended Findings of Fact, Opinion and Decision, finding that Rodriguez failed to use the complaint mechanisms available to her, that Dickard Widder acted properly after learning about the alleged harassment, and that the Company articulated a legitimate business reason for terminating Rodriguez's employment. Accordingly, Administrative Law Judge Protano recommended that the case be dismissed. On July 29, 2013, Division Commissioner Galen D. Kirkland issued a Notice and Final Order, adopting and issuing Administrative Law Judge Protano's Recommended Order as the Division's Final Order. The Division's Notice and Final Order provided that any party to the proceeding could appeal the Order to the Supreme Court by filing a Petition and Notice of Petition within sixty (60) days after service of the Order. Plaintiff did not appeal the Division's Notice and Final Order.

Like the complaint filed by Rodriguez with the Division, the instant Complaint also alleges that Rodriguez was subject to harassment by Gibson, including that Gibson showed a penis molded out of wax and that Gibson arranged for Rodriguez to see another worker fondling himself; that Reyes complained to the Company about Gibson's harassment of Rodriguez; that the Company conducted an investigation of Reyes' complaint; that Rodriguez participated in the investigation; and that Rodriguez was terminated shortly after participating in the investigation.

New York Executive Law section 297(9) provides for an election of remedies, which states in relevant part:

Any person claiming to be aggrieved by
an unlawful discriminatory practice
shall have a cause of action in any court of
appropriate jurisdiction for damages...unless

19323/2013 ORDER SIGNED

Page 4 of 4

such person had filed a complaint hereunder or with any local commission on human rights... provided that, where the division had dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division.

Where a plaintiff files a claim with the Division and subsequently files suit in federal and state court raising substantially similar charges, both the federal and state courts lack subject matter jurisdiction (*Session v. New York City, Dist. Council of Carpenters*, 2011 U.S. Dist. LEXIS 14050 at **13-15 (S.D.N.Y. February 10, 2011); *Wren v. Verizon*, 106 AD3d 995 [2d Dept 2013]).

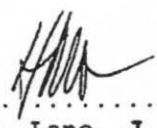
The hostile work environment claims, gender discrimination and retaliatory termination claims are barred by the election of remedies doctrine as said claims were based on the same alleged incident, underlying course of conduct, and same operative events as those alleged before the Division (see, *Bhaglia v. State*, 228 AD2d 882 [3d Dept 1996]; see also, *Troy v. Goord*, 300 AD2d 1086 [4th Dept 2002]).

Additionally, even though plaintiff did not assert before the Division any claims for negligent hiring and retention and negligent infliction of emotional distress, said claims are barred since they arise out of the same events as that alleged by plaintiff in her complaint with the Division.

Accordingly, the motion is granted and plaintiff's Complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: May 27, 2014



 Howard G. Lane, J.S.C.