

Yoo v E. Gluck Corp.
2015 NY Slip Op 31311(U)
June 22, 2015
Supreme Court, Queens County
Docket Number: 5773/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

REGINA YOO,

 Plaintiff,

 -against-

E. GLUCK CORPORATION, et al.,

 Defendants.

Index No. 5773/13

Motion
Date February 27, 2015

Motion
Cal. No. 161

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants E. Gluck Corporation ("EGC") and Sidney Gluck for an order pursuant to CPLR 3212 granting summary judgment to the Gluck defendants and dismissing the First Amended Complaint in its entirety is hereby denied.

Plaintiff, Regina Yoo, brings this action against her former employer, defendant, EGC, a watch maker and design firm, and against defendant, Sidney Gluck, a senior vice president of EGC.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence

of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Via the First Amended Complaint, plaintiff alleges, inter alia: "This is a civil action seeking injunctive relief and compensatory and punitive damages for breach of contract and violations of the anti-retaliation provisions of the New York City Human Rights Law, Title 8 of the Administrative Code of the City of New York § 101 et seq. ("NYCHRL"). . . Specifically, plaintiff Regina Yoo, a former employee of the E. Gluck Corporation, filed a Charge of Discrimination ("Charge") with the United States Equal Employment Opportunity Commission ("EEOC"), alleging that during her employment with the E. Gluck Corporation, she was subjected to various forms of discrimination in violation of the NYCHRL. Thereafter, E. Gluck Corporation and plaintiff Regina Yoo agreed to enter into a settlement agreement to resolve the claims plaintiff raised before the EEOC. The settlement agreement restricted the information regarding plaintiff that employees of E. Gluck Corporation could provide to plaintiff's prospective employers. Defendants Sidney Gluck and E. Gluck Corporation retaliated against plaintiff in violation of the NYCHRL and breached the settlement agreement when defendant Sidney Gluck and other management officials at EGC provided management officials at defendant Movado Group, Inc. with information regarding plaintiff's allegations in her EEOC Charge and the resulting settlement of those claims in an effort to black ball plaintiff from the watch industry. Defendant Movado Group, Inc. retaliated against plaintiff in violation of the NYCHRL when it refused to hire plaintiff for a position that she interviewed for and was otherwise qualified for." After the filing of the First Amended Complaint, plaintiff settled her claims as against defendant Movado, Inc. and Movado, Inc. is no longer a party in this action. Plaintiff alleges causes of action against defendants for retaliation under the New York City Human

Rights Law ("NYCHRL") and for breach of contract.

To prevail on a claim of retaliation, a plaintiff must show that: (1) he is engaged in a protected activity, (2) his employer was aware that he participated in such activity, (3) he suffered an adverse employment action, and (4) there is a causal connection between the protected activity and the adverse reaction (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [NY 2004]). If plaintiff establishes a prima facie case of retaliation, the burden shifts to defendants to articulate a legitimate, non-discriminatory reason for the challenged action (*McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). The plaintiff must then prove that the stated reason was merely a pretext for retaliation.

A retaliation claim based upon a negative employment reference must be supported by proof that the defendant made a false statement which negatively affected a plaintiff's chances of gaining employment (*Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166 [2d Cir. 2005]).

Defendants established a prima facie case that there are no triable issues of fact on plaintiff's retaliation cause of action against them. In support of this branch of the motion, defendants present, inter alia, the examination before trial transcript testimony of plaintiff herself; and an affidavit of Diane Fox, the Senior Vice President of Design and Merchandising for Movado Group, Inc., wherein she avers inter alia that: "On or about March 10, 2011, I had an exploratory interview with Ms. Yoo to discuss her general interests, skills and work experience. The Company did not have an open position at that time which fit Ms. Yoo's level of experience or compensation," she had no knowledge that Movado ever reached out to defendant Sidney Gluck at the time she decided not to hire plaintiff, during her meeting with plaintiff she reviewed plaintiff's portfolio and based on the review of the portfolio and her responses to questions she was asked at the meeting, she determined that plaintiff would not be a good fit at Movado, and she was never contacted nor was she aware of any communications with plaintiff's references. Defendants established a prima facie case that the retaliation claims against them must fail because: plaintiff has failed to present any evidence that there was any communication between defendant Gluck and Movado regarding plaintiff, plaintiff fails to present any evidence that any such communications resulted in her not obtaining employment with Movado, and plaintiff fails to present any evidence that defendant Gluck contacted any watch companies other than Movado.

In opposition, plaintiff raises a triable issue of fact on the retaliation causes of action. Plaintiff established that on March 9, 2011, a Movado interviewer advised plaintiff that an executive would be calling her former boss, defendant Sidney Gluck, for a reference; the examination before trial transcript testimony of defendant Sidney Gluck revealed that such call did take place, and Movado, Inc. stated in its Response to Interrogatories that during such phone call defendant Sidney Gluck was asked about plaintiff's performance at EGC and defendant Sidney Gluck said that he would not recommend plaintiff for employment. Plaintiff establishes that there is a triable issue of fact as to whether defendants attempted to blackball her from the industry. Plaintiff also raises a triable issue of fact as to whether there was a causal relationship between defendants' reference and Movado's failure to offer her a job since she presented evidence that Movado showed substantial interest in her by interviewing her twice for a position and by calling the defendants and asking for a reference. As plaintiff raises triable issues of fact on her retaliation claim, the retaliation claim shall not be dismissed.

Defendants established a prima facie case that there are no triable issues of fact on plaintiff's breach of contract cause of action. "The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages." (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]).

Plaintiff alleges that defendant EGC and defendant Sidney Gluck breached a Confidential Settlement Agreement and General Release dated April 26, 2010 between the parties by disparaging plaintiff and by actively discouraging other employers in the watch making industry from hiring plaintiff.

Defendants established a prima facie case that the breach of contract claims must fail because: Plaintiff testified that defendant Sidney Gluck was the only person at EGC that breached the non-disparagement and confidentiality provisions of the 2010 Settlement Agreement. However, defendant Sidney Gluck was not a signatory to the Settlement Agreement. It is well-established law that plaintiff cannot personally bind an employee to a contract to which he was not a party. Furthermore, the non-disparagement provision in the Settlement Agreement was narrowly tailored to include only plaintiff's immediate supervisor, Temi Bernstein. Because plaintiff is only accusing defendant Sidney Gluck of violating the non-disparagement provision, such a claim must fail

pursuant to the language contained in the Settlement Agreement. Finally, plaintiff has provided no probative evidence that defendant Sidney Gluck violated the confidentiality provisions of the Settlement Agreement by disclosing to Movado, Inc. or anyone else, the terms of the Settlement Agreement or the fact that plaintiff previously filed an EEOC charge. Defendants established that plaintiff's own testimony reveals that she has no personal knowledge that defendant Sidney Gluck disclosed the terms of the Settlement Agreement to Movado, Inc. or that plaintiff had previously filed an EEOC charge against EGC.

In opposition, plaintiff raises a triable issue of fact regarding the breach of contract causes of action.

Plaintiff rebuts defendants' argument that the breach of contract cause of action asserted against defendant Sidney Gluck must be dismissed as defendant Sidney Gluck is not personally bound by the settlement because he was not a party to the settlement agreement. Plaintiff demonstrated that defendant Gluck executed a General Release pursuant to the Settlement and the settlement provides that EGC by its Human Resources Director and "any other similarly situated employee" shall not disparage plaintiff and that "[i]n the event any prospective employer contacts the Human Resources Director or similarly situated employee of E. Gluck regarding Yoo," the Human Resources Director or similarly situated employee shall only provide prospective employers with plaintiff's dates of employment and positions held. Plaintiff establishes that as defendant Gluck is a senior EGC executive, he is a "similarly situated employee."

In opposition, plaintiff raises triable issues of fact on her breach of contract claims. As such, the breach of contract claim shall not be dismissed.

This constitutes the decision and order of the Court.

Dated: June 22, 2015

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Howard G. Lane, J.S.C.