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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X INDEX NO. 303945/2010

JAMES HALL,

PLAINTIFF,

-against- **DECISION/ORDER**

GREENHOUSE, GREENHOUSE USA, INC.,
JOHN BAKHSHI, and BARRY MULLINEAUX, HOWARD H. SHERMAN

DEFENDANTS.

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Introduction

Plaintiff, an African-American man who worked as a security guard at defendants' Greenhouse Nightclub (the Nightclub), alleges that defendants terminated his employment because of his race, and in retaliation for complaining to managers and owners about an alleged racially discriminatory policy. This damages action was commenced against the Nightclub, the Nightclub's corporation, Greenhouse USA, Inc., as well as a former and current shareholder, John Bakhshi and Barry Mullineaux, respectively. Defendants move for summary judgment dismissing the complaint in its entirety. Plaintiff partially opposes the motion.

Factual Background

Plaintiff began working as a security guard at the Nightclub in November 2008. At the Nightclub, security guards are expected to check identifications, let patrons in and

out of the Nightclub, and ensure that no fights occur. Additionally, each night, immediately before locking-up, one security guard conducts a "walkthrough" in which he ensures that no customers are left in the establishment.

By all accounts, plaintiff performed his job at a satisfactory level at and immediately following the onset of his employment. Prior to plaintiff's termination, defendants had never taken any formal disciplinary action against him.

Plaintiff alleges that the Nightclub employed a racially discriminatory entrance policy. Specifically, plaintiff alleges that the Nightclub would unfairly deny entrance to black and Hispanic patrons. According to plaintiff, the doorman at the Nightclub would refuse to allow entrance to black and Hispanic patrons on the basis that their dress and attitude were, "not appropriate." Plaintiff alleges that the Nightclub's doorman would either outright refuse to allow black and Hispanic patrons into the building, or would condition their entrance on the purchase of multiple bottles of alcohol typically priced between $500-700 each. According to plaintiff, while black and Hispanic patrons were either outright refused entry or effectively forced to pay exorbitant prices to enter the Nightclub, white patrons were granted entry regardless of dress or willingness to purchase bottles of alcohol. Defendants deny ever employing any racially discriminatory door policy.

Plaintiff alleges that he first complained to the doorman ("Giorgio") about the allegedly discriminatory door policy. According to plaintiff, Giorgio told him that the Nightclub's owners had instructed Giorgio not to grant black and Hispanic patrons entry

into the Nightclub. Plaintiff alleges that he subsequently complained to defendants Bakhshi and Mullineaux, and was told, "just let Giorgio deal with the door... you're just security out there." In spite of this, plaintiff alleges that he asked defendants to change the policy, "maybe twice a week." Defendants Bakhshi and Mullineaux both testified at depositions that plaintiff never complained to them about a discriminatory door policy.

Plaintiff claims that defendants began to treat him differently following an incident surrounding a book release party ("the Teri Woods Party") at the Nightclub. According to plaintiff, Teri Woods, a black author, reserved a floor for a book release party. Plaintiff alleges that Ms. Woods' guests, nearly all of whom were black, were denied entry into the club because of their race. Defendant Mullineaux said, according to plaintiff, "I'm not letting all those black people in this club." Plaintiff alleges that some of Ms. Woods' guests were white, and were also denied entry into the Nightclub.

Following the incident outside of the Teri Woods party, plaintiff began to complain more frequently about the door policy. Plaintiff claims that, "after that night... I was going to make sure something was done for black people coming into the club." Further, plaintiff testified that any time he would see either defendant Bakhshi or Mullineuax, which typically occurred four times a week, he would complain about the alleged door policy. Crucially, plaintiff testified that after he began to complain more frequently about the alleged door policy, defendants retaliated by assigning him to fewer hours and shifts. Additionally, plaintiff alleges that, following one of his complaints about the alleged policy, a verbal altercation between he and defendant Bakhshi ensued.

According to plaintiff, following the Teri Woods incident and his subsequent verbal altercation with Bakhshi, "my days were cut, and next thing you know, I was terminated." Plaintiff alleged that prior to the Teri Woods incident, he would work seven days in a typical week, compared to five after. Further, plaintiff testified that other employees began to tell him that the club owners were, "after him."

Plaintiff's complaint asserts 13 causes of action. The first cause of action, brought under New York City Administrative Code § 8-107, alleges that defendants terminated plaintiff's employment because of his race. The second cause of action, also brought under § 8-107, alleges that defendants terminated plaintiff's employment in retaliation for his complaints about the Nightclub's alleged racially discriminatory policies. The third cause of action seeks damages under New York's Whistleblowing Statute. The fourth cause of action alleges a violation of the anti-retaliation provision of 42 USC § 2000e. The fifth cause action alleges a violation of the "New York City Commission on Human Rights Section [sic]." The sixth and seventh causes of action allege violations of 42 USC § 1985 and 42 USC § 1986, respectively. With respect to these claims, plaintiff alleges that defendants conspired for the purpose of depriving a person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws. The eighth cause action alleges a violation of 42 USC § 2000a, which allows for damages stemming from the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. The ninth and tenth causes of actions allege libel and slander. The

eleventh cause of action alleges intentional tortious inference with business and contracts. The twelfth cause of action alleges "Intentional Infliction of a Harm [sic] Hostile Environment." The thirteenth cause of action alleges negligent infliction of harm.[1]

On this motion, defendants assert that they terminated plaintiff's employment after he failed to properly conduct a walkthrough, i.e., a procedure to ensure no customers remained in the establishment, on the morning of November 11, 2009. An incident report, dated November 11, 2009 and signed by Manager John Fiore, states that, after plaintiff conducted a walkthrough and reported that the club was empty, two female patrons were found sleeping in the club. Plaintiff alleges that the two females were friends of Fiore, and that Fiore told plaintiff that the female patrons would leave with him. The incident report does not indicate what disciplinary actions, if any, were or would be taken against plaintiff. Further, an employee manual provided by defendants does not indicate what disciplinary measures, if any, the Nightclub would take against a security guard who improperly conducted a walkthrough.

At his deposition, defendant Mullineaux testified that he does not remember why the Nightclub terminated plaintiff's employment, and does not remember who made the decision to terminate plaintiff's employment. Additionally, defendant Mullineaux testified that he does not recall whether he was involved in the decision to terminate

[1] The complaint listed thirteen causes of action, incorrectly numbered with two "twelfth" causes of action, and no "tenth." For the purpose of this decision, plaintiff's causes of action are numbered as they were ordered, and not labeled, in the complaint.

plaintiff. Defendant Bakhshi testified that he was not sure why defendants terminated plaintiff's employment, and did not know who made the decision to terminate plaintiff.

Mathis Van Leyden, the Nightclub's general manager at the time of plaintiff's termination, testified that the *owners* made the decision to terminate plaintiff's employment. Specifically, Van Leyden believed that defendant Mullineaux made the decision to terminate plaintiff's employment. Van Leyden also testified that he could not remember whether he was at the Nightclub on November 11, 2009, and could not remember how he learned that two female patrons were found sleeping in the club on the morning of November 11, 2009.

In opposition, plaintiff argues: that the legitimate nondiscriminatory reason offered by defendants for terminating plaintiff's employment (i.e., that he failed to properly conduct the walkthrough) was pretextual; that defendants do not have firsthand knowledge regarding the facts surrounding plaintiff's termination; that issues of fact exist surrounding plaintiff's termination; and that the individually-named defendants are affirmatively linked to the alleged discriminatory conduct.[2]

Each branch of defendants' motion will be reviewed separately.[3]

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[2] Defendants contend that, pursuant to CPLR 3117, plaintiff should be precluded from using the deposition of Teri Woods. The court disagrees. Although the Woods deposition may not be admissible in the event of a trial, for the purpose of determining whether a triable issue of fact exists, defendants are not barred from using it. *See State v. Metz*, 241 AD2d 199 (1st Dept 1998).

[3] As discussed in more detail below, plaintiff does not contest the dismissal of the claim under New York's Whistleblowing Statute, and makes no mention of the causes of action for termination of plaintiff's employment because of his race, for libel and slander, for intentional tortious interference with business and contracts, for "intentional infliction of harm [sic] hostile environment," for negligent infliction of harm, under the "New York City Commission on Human Rights Section [sic]," and under 42 USC § 2000a.

Retaliation

To make out a prima facie case of retaliation under the New York City Human Rights Law, plaintiff is required to show that "(1) he participated in a protected activity known to defendant; (2) defendant took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action." *Cadet-Legros v. New York Univ. Hosp. Cntr.*, 135 A.D.3d 206 (1st Dept 2015), quoting *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 51-52 (1st Dept 2012). Similarly, the anti-retaliation provision of 42 USC § 2000e-3 forbids an employer from "discriminating against" an employee or job applicant because that individual opposed any practice made unlawful by Title VII of the Civil Rights Act of 1964. *Burlington Northern & Sante Fe Ry. v. White*, 548 US 53, 56 (2006).[4]

In an effort to obtain summary judgment dismissing the retaliation claims, defendants assert that they had a legitimate, nondiscriminatory reason to terminate plaintiff's employment: he failed to properly conduct the walkthrough.

Defendants rely on the testimony of Bakhshi, Mullineaux, and Van Leyden, as well as an incident report detailing the events that transpired on the morning of November 11, 2009. Bakhshi testified that he did not know who decided to fire plaintiff, or why. Mullineaux testified that he did not remember who made the decision to fire plaintiff, why plaintiff was fired, or what involvement, if any, he had in making the decision to fire plaintiff. Van Leyden testified that he believed, but was not sure, that Mullineaux made

[4] The court appreciates the need to treat separately plaintiff's causes of action under the federal statute and the City Human Rights Law (*See Bennett v. Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011]).

the final decision to fire plaintiff. Further, Van Leyden testified that he could not remember whether he was at the club on the morning of November 11, 2009, or how he initially learned that the two female patrons were found in the Nightclub. Lastly, the incident report signed by Fiore does not indicate what, if any, disciplinary action would be taken against plaintiff.

Defendants failed to proffer admissible evidence from an individual with firsthand knowledge regarding who decided to terminate plaintiff's employment, and more importantly, why defendants terminated plaintiff's employment. Accordingly, those branches of defendants' motion seeking summary judgment on the retaliation claims are denied.[5]

Discrimination

Defendants made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's claims for discrimination under 42 USC § 2000e and the City Human Rights Law.

The relevant portion of 42 USC § 2000e states, "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis

[5] Defendants Bakhshi and Mullineaux are not entitled to summary judgment as individual defendants. As discussed above, both individuals testified as to a lack of memory pertaining to plaintiff's termination. Therefore, the court cannot make any findings as to whether defendants Bakhshi and Mullineaux personally retaliated against plaintiff.

of his race, color, religion, sex, or national origin." Similarly, the City Human Rights Law makes it unlawful "for an employer... because of the... race, creed, color... to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment." NYC Administrative Code § 8-107.

Defendants made a prima facie showing of entitlement to judgment as a matter of law under both 42 USC § 2000e and the City Human Rights Law. Defendants established that plaintiff was not discriminated against because of his race. Plaintiff testified that defendants *did not treat him differently because of his race*. When asked whether defendants treated him differently because he was black, plaintiff testified, "No... Well, I can't say it was because I was black. They treated me just cool." Further, plaintiff testified that he was not fired because of his race, but because he frequently complained to defendants Bakhshi and Mullineaux about the Nightclub's allegedly discriminatory door policy (a matter relevant to plaintiff's claims of retaliation). Specifically, plaintiff testified that, "I knew it was for speaking up for the blacks; that's why they fired me."

In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, those branches of defendants' motion seeking summary judgment on the causes of action for discrimination under 42 USC § 2000e, and New York City Administrative Code § 8-107 are granted.

42 U.S.C. § 1985 and § 1986

Section 1985 states, in the relevant part,

"If two or more persons in any State or Territory conspire... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws... whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages."

Defendants made a prima facie showing that plaintiff did not suffer any injury as a result of a conspiracy to deprive a person or class of persons of the equal protection of the law, or of equal privileges and immunities under the law. Plaintiff testified that defendants terminated him for, "speaking up for the blacks." Further, when asked whether defendants treated him differently because he was black, he testified, "No... Well, I can't say it was because I was black. They treated me just cool." While plaintiff alleges that defendants employed an entrance policy that discriminated against black and Hispanic *patrons*, plaintiff was not *personally* denied entry into the Nightclub at any point. Therefore, even assuming the existence of a conspiracy by defendants to deprive people of color of the benefit of entering the Nightclub (and further assuming that entry to the Nightclub is a right or privilege protected by § 1985), plaintiff was not injured as a result of that conspiracy.

In opposition, plaintiff failed to raise a triable issue of fact.

42 USC § 1986 "merely gives a remedy for the misprision of a violation of 42 USC § 1985." *Levy v. City of New York*, 726 F.Supp 1446, 1455 (S.D.N.Y. 1989)

(quoting *Williams v. St. Joseph's Hosp.*, 629 F.2d 448, 452). Thus, because plaintiff failed to raise a triable issue of fact on the cause of action under 42 USC § 1985, plaintiff's claim under 42 USC § 1986 must be dismissed.

Accordingly, those branches of defendants' motion seeking summary judgment on the causes of action under 42 USC § 1985 and 42 USC § 1986 are granted.

42 USC § 2000a

To recover under 42 USC § 2000a, a plaintiff must have suffered an injury as a result of denial of, "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

Defendants made a prima facie showing that plaintiff did not suffer an injury as a result of the denial of any public accommodation on the basis of his race. As described above, plaintiff acknowledged at his deposition that defendants did not treat him differently because of the color of his skin. Plaintiff further acknowledged that he was fired because he frequently complained to defendants Bakhshi and Mullineaux about the Nightclub's allegedly discriminatory door policy. Also, plaintiff does not allege that he was ever denied entry into the Nightclub (for discriminatory or nondiscriminatory reasons).

In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, that branch of defendants' motion seeking summary judgment on the cause of action under 42 USC § 2000a is granted.

Libel and Slander

The Court of Appeals articulated the distinction between libel and slander in *Ostrowe v. Lee*, 256 NY 36 (1931). In *Ostrowe*, the Court opined that, "The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident ... Many things that are defamatory may be said with impunity through the medium of speech. Not so; however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and 'perpetuates the scandal'." *Id.* at 39.

Here, when asked whether defendants put anything on paper regarding his termination, plaintiff testified, "No – I don't know." Because plaintiff testified that he was not aware of any written statements by defendants concerning his termination, defendants made a prima facie showing of entitlement to judgment as a matter of law on the cause of action for libel.

With respect to the cause of action for slander, in such an action "the particular words complained of shall be set forth in the complaint." CPLR 3016(a). Here, the complaint alleges that, "each of the defendants made oral statements concerning the plaintiff's race and his appearance. These statements were derogatory, demeaning, false, defamatory, slanderous and malicious. The oral communications constitute slander per

se."[6] Because the complaint does not set forth any particular words, it does not meet the requirements of CPLR 3016(a), and is thus defective as a matter of law.

In any event, defendants made a prima facie showing of entitlement to judgment as a matter of law on the grounds that plaintiff was not subject to racial slurs, and was not aware of any specific statements made by defendants about him, slanderous or not.

In opposition, plaintiff did not make any mention of the causes of action for libel and slander, and thus failed to raise a triable issue of fact.

Accordingly, those branches of defendants' motion seeking summary judgment dismissing the causes of action for libel and slander are granted.

Intentional Tortious Interference with Business and Contracts

To state a cause of action for tortious interference with a prospective contract or business relationship, a plaintiff must establish, inter alia, that defendants used wrongful means, i.e., "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. Persuasion alone although it is knowingly directed at interference with the contract does not constitute wrongful means." *NBT Bancorp v. Fleet/Norstar Fin Group,* 87 NY2d 614, 624 (1996) (quoting *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]).

[6] The court notes that the types of words the complaint alleged that defendants uttered do not constitute slander per se, as they would not fit within the four categories treated as slander per se: (1) charging plaintiff with a serious crime; (2) that tend to injure another in his or her trade, business or profession; (3) that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman. *Liberman v. Gelstein,* 80 NY2d 429, 435 (1992).

Defendants made a prima facie showing of entitlement to judgment as a matter of law because defendants did not use wrongful means to interfere with any prospective contract or business relationship into which plaintiff could have entered. In opposition, plaintiff did not mention the cause of action for intentional tortious interference with business and contracts, and thus failed to raise a triable issue of fact.

Accordingly that branch of defendants' motion seeking summary judgment dismissing the cause of action for intentional tortious interference with business and contracts is granted.

Intentional Infliction of Emotional Distress[7]

To recover for intentional infliction of emotional distress, a plaintiff must prove four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Howell v. New York Post Co. Inc.*, 81 NY2d 115 (1993). Pertaining to the fourth element, in *Welantas v. Johnes*, 257 AD2d 352 (1st Dept 1999), the First Department held that, "A plaintiff is required to establish... that severe emotional distress was suffered, which must be supported by medical evidence, not the mere recitation of speculative claims." *Id.*

[7] No cause of action for intentional infliction of emotional distress was pleaded in the complaint. However, the parties in their respective submissions each discuss the merits of such a cause. Accordingly, the court will consider the merits of a cause of action for intentional infliction of emotional distress.

Defendants made a prima facie showing that plaintiff did not suffer severe emotional distress. Plaintiff testified that although he suffers from headaches and has difficulty sleeping, he has not visited any doctors in relation to these issues.[8] In opposition, plaintiff failed to raise a triable issue of fact.

Accordingly, that branch of defendants' motion seeking summary judgment dismissing the cause of action for intentional infliction of emotional distress is granted.

The Remaining Causes of Action

Plaintiff's claims under the "New York City Commission on Human Rights Section (sic)," for "Intentional Infliction of Harm [sic] Hostile Environment," and "Negligent Infliction of Harm" are dismissed as they do not state cognizable causes of action (*see* CPLR 3211[a][7]).

Conclusion

Accordingly, it is hereby ordered that those branches of defendants' motion seeking dismissal of the causes of action for discrimination under 42 USC § 2000e, 42 USC § 2000a and the New York City Human Rights Law; conspiracy under 42 USC § 1985 and § 1986; libel and slander; intentional tortious interference with business and contracts; intentional infliction of emotional distress; "intentional infliction of harm [sic]

[8] The court notes that, although not raised by defendants, the conduct alleged does not appear to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Chanko v. American Broadcasting Co.*, 27 NY3d 46, 56 [2016]).

hostile environment"; "negligent infliction of harm'; and under "New York City Commission on Human Rights Section [sic]" are granted; and it is further,

ORDERED that the remaining branches of the motion are denied.

This constitutes the decision and order of the court.

Date: 6/29/16

Hon. Howard Sherman, J.S.C.