

Klaper v Cypress Hills Cemetery

2016 NY Slip Op 33103(U)

October 21, 2016

Supreme Court, Kings County

Docket Number: 9951/2015

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No. 9951/2015
Motion Calendar No.
Motion Sequence No.

JOZEF KLAPER,

Plaintiff(s),

-against-

CYPRESS HILLS CEMETERY,

Defendant(s).

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion :
Defendant Cypress Hills Cemetery's Motion for Dismissal:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits....(Opposition of Defendant).....	3
Replying Affidavits.....	4
Exhibits.....	_____
Other: <u>Memorandum of Law (Plaintiff and Def.)</u>	5, 6

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Decision:

The instant motion to dismiss has been filed on behalf of defendant, Cypress Hills Cemetery ("CHC"), to dismiss the summons and complaint brought by plaintiff, Jozef Klaper ("Klaper"). Defendant CHC seeks a dismissal pursuant to CPLR sections 3211(a)(2), (5) and (7) alleging that plaintiff, inter alia, has failed to state a cause of action in his pleadings and, in addition, plaintiff is barred from proceeding in this case because the same issue has been brought earlier before

both a Federal Court and the New York State Division of Human Rights.

The plaintiff's complaint in this action was filed on or about August 7, 2015 and alleges violations by the defendant of the New York City Human Rights Law ("NYCHRL"). Plaintiff sets forth two causes of action against defendant, CHC: the first cause of action is based on an alleged hostile work environment based on plaintiff's age; and the second cause of action is an alleged hostile work environment based on plaintiff's national origin.

Argument was heard before the undersigned on July 13, 2016. Both parties in this matter are represented by counsel.

Factual Background:

The plaintiff, Mr. Klaper, emigrated to the United States from Poland in 1985. Mr. Klaper applied for work as a laborer at the Cypress Hills Cemetery and was hired as a seasonal worker on or about May 9, 2005 (see Aff. of Rachel Ambats, Esq. in support of the Motion to Dismiss, pg. 12).

It was disclosed by Mr. Klaper that he was of Polish origin in his application for employment and that he was not a U.S. citizen. In May 2008, plaintiff was promoted to a "Regular Worker".

Mr. Klaper claims that he was called names by his supervisor, John Nicastro, and Mr. Nicastro used a Polish slang work for male anatomy to insult Mr. Klaper (see Klaper Dep. Pg 49-50 annexed as Ex. "R" to the Motion to Dismiss).

Plaintiff became a member of Local 74 of the United Service Workers Union in 2006. The record indicates that plaintiff had not made any complaints to the Union regarding his treatment by his employer. (Ambats Aff. Par. 63).

On June 27, 2008, plaintiff had made threats to "beat up" his supervisor (John Nicastro) and made a death threat the same day. It was also reported that he was seen carrying a weapon. Mr.

Klaper received a warning for those incidents and told that such threats would not be tolerated (see *Ambats Aff.* Par. 70).

Plaintiff subsequently failed to return to work for reasons attributed to alcoholism. Plaintiff acknowledges that he was drinking and did not return to work. Plaintiff was then terminated on July 2, 2008 by written notice. After the intercession of his Union representative, the decision to discharge Mr. Klaper was reversed and a stipulation entered into on July 28, 2008, which was referred to as a “Last Chance Stipulation”. (See Stipulation annexed as Ex. “CC” to the Motion to Dismiss).

The Stipulation provided that Mr. Klaper was suspended for three months, yet would continue to have medical benefits, and the agreement was conditioned upon obtaining treatment for alcoholism. The agreement provided for Mr. Klaper to return to work on October 1, 2008.

According to Mr. Klaper’s deposition testimony, he obtained treatment at St. Mark’s Place Institute for Mental Health on August 4, 2008 and was discharged on September 4, 2008. Mr. Klaper relapsed and was hospitalized at Wyckoff Hospital in Brooklyn. He was discharged on October 1, 2008 and, according to his treating doctor’s letter, was able to return to work.

Mr. Klaper did not return to work on October 1, 2008 as required by the Stipulation and he eventually appeared for work on October 9, 2008. No reason was offered for Mr. Klaper’s failure to return to work on October 1, 2008, and, consequently, he was fired by CHC on October 9, 2008.

Prior Litigation:

Plaintiff had filed a complaint with the New York State Division of Human Rights (“NYSDHR”) on or about November 7, 2008 against CHC. The complaint alleged discriminatory treatment towards plaintiff based on age discrimination and based on national origin, in violation of the New York State Human Rights Law (Executive Law sec. 296). The complaint was cross-filed with the United States Equal Opportunity Commission (“EEOC”).

Mr. Klaper did not comply with the requests made by NYSDHR to contact the Agency for the purposes of cooperating with their investigation and plaintiff failed to appear for a “One Party Conference”. An investigation was conducted by NYSDHR nonetheless, resulting in a “Final Investigation Report and Basis for Determination” on February 22, 2010 (the “Report”). In the Report, NYSDHR found no evidence to support the allegations made by Mr. Klaper. The Report specifically addressed the claims of age discrimination and discrimination based on his Polish background. The Report stated that “Complainant gave no details, motives, or incidents concerning age discrimination”. The Report also found that CHC had hired older employees and had several workers of Polish background working for CHC. (A copy of the Final Investigation Report is annexed as Ex. “D” to the Motion to Dismiss). The Report stated that there was no evidence supporting his discrimination claims and, instead, discussed Mr. Klaper’s abandonment of his job and threats he made towards his supervisor. The complaint was then dismissed on February 22, 2010, based on a finding of no causal nexus between Mr. Klaper’s allegations and the actions of CHC. (See “Determination and Order After Investigation” annexed as Ex. E” to the Motion to Dismiss).

No appeal was taken of the NYSDHR Determination Order by Mr. Klaper. Furthermore, the EEOC adopted the findings of NYSDHR and dismissed the case before it on or about July 15, 2010.

On or about April 20, 2010, Mr. Klaper filed a summons and complaint against CHC and his Union, United Service Workers Union Local 74, in Federal District Court of the Eastern District, alleging violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990. Plaintiff was allowed to retain counsel and amend his complaint adding several additional charges against CHC which included violations of New York State and New York City Civil Rights Laws.

CHC filed a motion for summary judgment in the Federal case. Plaintiff did not oppose the motion with respect to his allegations of discrimination on the basis of national origin (in violation of Title VII of the Civil Rights Act of 1964) and age discrimination in violation of the Age Discrimination in Employment Act of 1967 and to other charges which are not relevant to

this motion.

On or about May 3, 2013, United States Magistrate Judge Bloom recommended that summary judgment be granted dismissing the plaintiff's claims of discrimination based on alcoholism disability. A "legitimate, nondiscriminatory justification" for the decision to terminate plaintiff was found by that Court. (See the Report and Recommendation annexed as Ex. "L" to the Motion to Dismiss). The Federal Court declined to exercise jurisdiction over the City and State claims involving Executive Law sec. 296 and New York City Human Rights Law. The Report was adopted by Hon. Judge Garaufis on March 31, 2014 in a Memorandum and Order.

Plaintiff appealed the Federal Court determination and the decision was affirmed by the Second Circuit Court of Appeals on or about February 10, 2015.

Discussion:

At this juncture, counsel for the defendant CHC points out that Mr. Klaper has litigated employment discrimination claims based upon his age, his national origin and his disability (alcoholism) before the NYSDHR and in the Eastern District Federal Court. In all of the proceedings the same facts have been alleged and plaintiff has been completely unsuccessful in obtaining a favorable ruling.

It is CHC's contention that Mr. Klaper is now barred by the doctrine of collateral estoppel and should be barred by the concept of election of remedies.

Mr. Klaper asserts that his complaint to the NYSDHR listed facts "related solely to the wrongful termination claims and did not assert any facts related to his hostile work environment claims". (See Plaintiff's Memorandum of Law in Opposition to the Motion to Dismiss, pg. 3).

In so doing, Mr. Klaper is attempting to engineer a distinction between his previous litigation in which he alleged hostility towards himself based on his Polish origin and his age and his disability and his current claim which he claims is based on "hostile work environment".

In his complaint before the NYSDHR (in which he failed to cooperate with their investigation) he asserted that he was the victim of hostility by his supervisor. He also claimed to be discriminated against because the employer (CHC) was informed of his alcoholism. (See Plaintiff's complaint to the NYSDHR annexed as "Ex. "B"). These claims were rejected by the State Division of Human Rights after a thoughtful and thorough analysis. It is this Court's opinion that the allegations made of discrimination before the NYSDHR and the Eastern District Federal Court are essentially the same as the allegations contained in the present complaint before this Court.

Despite the plaintiff's characterization of the claims before this Court as being distinguishable from the discrimination claims brought previously, the facts underlying each proceeding are identical. They involve the same allegations of discrimination and work place hostility. As such, the determinations of the NYSDHR and the Eastern District Court serve to bar further litigation of this issue pursuant to the doctrine of collateral estoppel. (See *Schwartz v Public Administrator*, 24 NY2d 65 [1965]). Mr. Klapner had a full opportunity to litigate the same issue before the NYSDHR and the issue was determined in the prior proceeding.

As to the concept of election of remedies, the Court notes that litigants are prevented from filing separate actions stemming from the same facts by the terms of the New York Executive Law. Section 297(9) of the Executive Law allows a person complaining of discrimination to file a cause of action "in any court of appropriate jurisdiction for damages ... and such other remedies as may be appropriate, ... unless such person had filed a complaint with any local commission on human rights..." (Exec. L. Sec. 297(9)). The facts in this case certainly support the argument that Mr. Klapner should be barred from filing his discrimination claims in this Court after having first filed a complaint before the State Division of Human Rights. Mr. Klapner now alleges being discriminated against because of a hostile work environment related to his national origin and his age (Plaintiff's complaint is annexed as Ex. "A" to the motion to Dismiss). The same facts were presented to the New York State Division of Human Rights and are indistinguishable from the facts before this Court. Accordingly, the present action should be dismissed. (See *Emil v Devey*, 49 NY2d 968 [1980]; *Borum v Village of Hempstead*, 590 F. Supp. 2d 376 [USDC ED 2008]). It is fairly understood that when there is a sufficient identity of issues between the agency

complaint and the court action, the subsequent litigation is barred. (See *Spoon v American Agriculturalist, Inc.*, 103 AD2d 979 [3rd Dept. 1984]).

Having found that the facts set forth by Mr. Klaper before this Court are essentially the same facts as he put forth in his employment discrimination case before the State Division of Human Rights, the current lawsuit must be dismissed. A litigant may not avoid dismissal by simply changing the legal theory of relief he relies upon (*Bhagalia v State of New York*, 228 AD2d 882 [3rd Dept. 1996]); and a litigant may not split claims and assert some claims in State Court and others before an agency if they stem from the same course of conduct. (See *Craig-Oriol v Mt. Sinai Hospital*, 201 AD2d 449 [2d Dept. 1994]; see also, *Borum v Village of Hempstead*, 590 F. Supp. 2d at 383).

Conclusion:

Mr. Klaper had ample opportunities to set forth his claims of discrimination before the New York State Division of Human Rights and the Federal Court. The fact that he chose not to participate in the investigation by the NYSDHR was his decision and he should not be allowed to re-litigate the same issue based on his failure to participate.

The determination by the Eastern District Court gave a thorough analysis of Mr. Klaper's claim for discrimination based on his alcohol disability and found the defendant CHC had reasonably accommodated Mr. Klaper. This Court also notes that the Federal determination found sufficient reasonable cause for dismissing Mr. Klaper that was not the result of discrimination.

Despite plaintiff's counsel's argument that Mr. Klaper has not had an opportunity to set forth a claim for hostile work environment pursuant to the New York City Human Rights Law, the record shows otherwise. The same facts alleged previously before the NYSDHR are the same facts which Mr. Klaper now asserts support a cause of action for hostile work environment. As shown above, Mr. Klaper is simply describing a new legal theory based on the same facts and a dismissal is warranted under these circumstances.

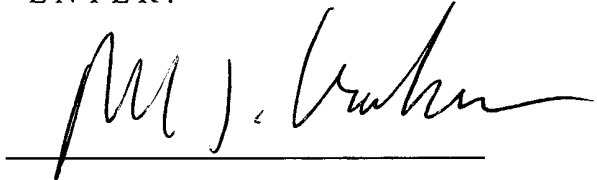
Notwithstanding the opinion of this Court that the current lawsuit must be dismissed due to the prior litigation, there is also a failure to state a cause of action which mandates dismissal of the case. The reasons for Mr. Klaper's original termination by his employer were credible and included threats to his supervisor. There was also sufficient proof offered that Mr. Klaper had abandoned his job. Nonetheless, Mr. Klaper was given a second chance and failed to comply with the conditions which would have led to his resuming his employment. There is nothing in the record that indicates that Mr. Klaper was the victim of age discrimination or discrimination based on his national origin or alcohol disability which caused him to lose his job. His loss of employment was inextricably linked to his failure to obtain proper treatment for alcoholism and comply with the terms and conditions of being rehired. Furthermore, Mr. Klaper had alleged hostile treatment towards him by his employer in the previous actions as well. Accordingly, Mr. Klaper's complaint requires dismissal as he has failed to present sufficient evidence to show that he has a cause of action for violation of his rights pursuant to the New York City Human Rights Law and his complaint should be dismissed for failure to state a cause of action pursuant to CPLR sec. 3211(a)(7).

The motion to dismiss is granted and the plaintiff's summons and complaint are dismissed.

This shall constitute the decision and order of this Court.

Dated: October 21, 2016

ENTER:



Bernard J. Graham, JSC

HON. BERNARD J. GRAHAM

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