Ortegas v G4S Secure Solutions (USA) Inc.
2016 NY Slip Op 33138(U)
October 3, 2016
Supreme Court, Bronx County
Docket Number: 23111/2015E
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(E)

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VICTORIA ORTEGAS,

Plaintiff,

- against -

G4S SECURE SOLUTIONS (USA) INC.,
JOHN MASSONI and ANGELO DiPIERRO

Defendants.

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DECISION and ORDER
Index No: 23111/2015E

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affidavits.....1
Memorandum of Law 2
Affirmation in Opposition and annexed Exhibits and Affidavits.....3

Defendants G4S Secure Solutions (USA) Inc., ("G4S"), John Massoni and Angelo DiPierro seek summary judgment pursuant to CPLR 3212(b) dismissing plaintiff Victoria Ortegas' claim on the ground that documentary evidence establishes that the plaintiff's action is time barred. The plaintiff opposes the motion on the ground that shortening of the statute of limitations set forth in her employment application is unconscionable.

DISCUSSION

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. (*Bethlehem Steel Corp v Solow*, 51 NY2d 870 [1980].) In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material question of fact. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].)

A motion to dismiss premised on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a mater of law." (*Morpheus Capital Advisors LLC v UBS AG,* 105 AD3d 145 [1st Dept 2013] citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

On 11/24/09, plaintiff was hired as a security guard by G4S, a security company located at 225 Liberty Street, County of New York. In 2012, she was promoted to the position of Console Operator. Ms. Ortegas is described as having brown skin, mixed ethnicity and coarse hair texture. She alleges that on more than one occasion prior to her discharge, G4S supervisors, defendants John Massoni and Angelo DiPierro, criticized her hairstyle, demanding that she wear her hair in a ponytail. She pointed out to defendants that her hairstyle was in line with the G4S handbook requiring female employees to keep their hair neat. On 11/20/14, the G4S guards were extended an invitation to take leftover food from a luncheon at Bank of America. Bank of America which is located in the same building, has extended the same invitation for the past five years. Plaintiff proceeded to Bank of America, retrieved some food, thanked everyone and returned to her assigned post. On 11/24/14, four days later, Ms. Ortegas was instructed to report to the main office. At that time, defendant DiPierro and Jodi Weiner, Manager of Business Development, informed plaintiff that she was being discharged for stealing food from the Bank of America luncheon. Plaintiff was discharged on 11/24/14; the underlying action was filed on 6/25/15.

Plaintiff maintains that she was fired on discrimination grounds based on her skin color and hair texture. Executive Law § 296 (1) (a) provides that:

> It shall be an unlawful discriminatory practice for an employer or licensing agency because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The statute of limitations to bring a claim for discrimination is 3 years from the date of discharge.

Defendants G4S Solutions (USA) Inc., John Massoni and Angelo DiPierro seek dismissal of the plaintiff's action based on documentary evidence. In support of their motion, defendants proffer their answer and notice to admit and plaintiff's summons and complaint, signed application for employment and her responses to the notice to admit. Defendants' employment application states in pertinent part:

> I further agree that any claim or lawsuit arising out of my employment with The Wackenhut Corporation must be filed with the court no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any right I may have under any law that might allow me a longer time period to file such a claim or lawsuit.

Plaintiff's response to the notice to admit confirms that the 11/24/09 application annexed by defendants as Exhibit A is a true and complete copy of the application bearing her signature.

In opposition to defendants' motion, the plaintiff proffers an affidavit dated 5/23/16 wherein she states she was only given a few minutes to complete the lengthy employment application because her interview was scheduled at the same time. The interviewer was waiting for her to complete the document before he could conduct the interview; there were other people in the reception area waiting to be interviewed by the same G4S interviewer, so she felt pressured. Ms. Ortegas asserts that when she reached the last page of the application she asked a representative what is all this "legal stuff" about she was told that there was "nothing for her to worry about" and that she should just sign it. She claims the representative did not explain the legal provisions in the application or mention anything about shortening the statute of limitations. She requested but was not provided with a copy of the application. As a result, five years later when she was discharged for discriminatory reasons, she did not have a copy of the application to give to her attorney.

Plaintiff claims the shortening of the statute of limitations from 3 years to 6 months to commence an action against defendants is unconscionable and should not be enforced. A written contractual provision that shortens the statute of limitations, however, is an enforceable standard clause; such agreement does not conflict with public policy provided it is in writing. *(Kassner v City of New York,* 46 NY2d 544 [1979].) In *Par Fait Originals v ADT Security Systems*, 184 AD2d 472 (1st Dept 1992), for example, the Appellate Division found that parties to a contract may agree to be bound by a shortened statute of limitations period for all claims including discrimination.

Here, Ms. Ortegas filed her claim on 6/5/15, six months and eleven days after her discharge and not within the specified six-month statute of limitations period. No explanation for her delay in filing the underlying action is proffered. Absent proof that the contract was one of adhesion or the product of overreaching or that the altered period was unreasonably short, an abbreviated period of limitation will be enforced. (*Hunt v Raymour & Flanigan,* 105 AD3d [2nd Dept 2013].) Similarly, it is well settled that a " party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms." (*Aoki v Aoki,* 117 AD3d 499 [1st Dept 2014] citing *Shklovskiy v Khan* 273 AD2d 372 [2d Dept 2000]; *Morby v DiSiena Associates LPA*, 291 AD2d 604 [3d Dept 2002].) To the extent that the plaintiff has not established duress, fraud or misrepresentation, the Court determines that she voluntarily agreed to the shortened statute of limitations term set forth in her employment application. (*Krohn v Felix Industries, Inc.*, 226 AD2d 506 [2d Dept 1996].)

CPLR 3212(b) provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action. After careful consideration, the Court finds that the

defendants have met their burden of proof through documentary evidence; the plaintiff has not met her shifting burden of proof. This Court is thus unable to determine the validity of the plaintiff's claims. Based on the foregoing, the defendants' motion for summary judgment dismissing the plaintiff's claim is granted. The defendants' request for costs and fees is denied.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 60 days.

Dated: October 3, 2016

So ordered,

Hon. Lizbeth González, JSC