| **Langone v Facsimile Communication Indus., Inc.** |
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| 2019 NY Slip Op 30221(U) |
| January 28, 2019 |
| Supreme Court, New York County |
| Docket Number: 154396/2017 |
| Judge: Margaret A. Chan |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

***Justice***

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MICHAEL LANGONE,

Plaintiff,

- v -

FACSIMILE COMMUNICATION INDUSTRIES, INC.,LARRY WEISS, ADAM WEISS

Defendant.

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**INDEX NO.** 154396/2017

**MOTION DATE**

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

In this age discrimination action, defendants Facsimile Communication Industries, Inc. (FCI), Larry Weiss, and Adam Weiss move to dismiss plaintiff Michael Langone's complaint pursuant to CPLR 3111(a)(1) and (a)(7) for failure to state a cause of action, that the court lacks subject matter jurisdiction, and that defendants' defense is founded upon documentary evidence. Plaintiff cross-moves for leave to amend his complaint.

Plaintiff's original complaint alleges: (1) discrimination under New York City Administrative Code (NYCHRL) §8-107; (2) discrimination under New York State Human Rights Law (NYSHRL) §296; (3) discrimination under Title VII, 42 USC §2000e; (4) defendants Larry Weiss and Adam Weiss aided and abetted the discrimination of FCI in violation of NYSHRL §296; (5) violations of the Fair Labor Standards Act (FLSA) 29 USC §201 for failure to pay plaintiff compensation; (6) lost wages pursuant to New York State Labor Law; (7) breach of contract; (8) unjust enrichment; (9) quantum meruit; (10) negligent infliction of emotional distress; and (11) intentional infliction of emotional distress. The proposed amended complaint, which defendants oppose and reply to, replaces the 42 USC §2000e claim with an age discrimination claim under 29 USC §621, the federal Age Discrimination in Employment Act (ADEA) and omits the FLSA claim.

Plaintiff was hired by defendants on March 8, 2016 as a Branch Manager. Plaintiff was terminated from the position on December 9, 2016. Plaintiff alleges that his firing was motivated by age animus. Plaintiff also alleges that commission wages were withheld. As a sales manager, plaintiff claims that he was entitled to commissions. Plaintiff alleges that the defendants "had a stated policy of hiring younger sales department employees and [that the defendants had complained that]

the sales force was 'too old'." (NYSCEF Doc. No. 1 - Complaint at ¶11). However, plaintiff also admits in the complaint that while the policy "was directly confirmed by [d]efendant FCI... FCI claimed such policy did not extend to [p]laintiff as a sales manager" (*id.*). Plaintiff further alleges that defendant Larry Weiss "expressed his desire to hire younger persons" and that "following [p]laintiff's hire, Operations Manager Adam Weiss asked [p]laintiff his age and then stated... that if his age was known, [p]laintiff would not have been hired" (*id.* at ¶12). Plaintiff further claims that "FCI unilaterally paid remuneration due [p]laintiff, but without explanation, calculation, interest, costs, or fees" (*id.* at ¶14). Defendants now move to dismiss.

*Standard on Motion to Dismiss*

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

*New York City and State Human Rights Law Claims*

Plaintiff's first and second causes of action rest upon NYCHRL §8-107 and NYSHRL §206. NYCHRL §8-107(a) provides that "it shall be an unlawful discriminatory practice... for an employer or an employee or agent thereof, because of the actual or perceived age... to discharge from employment such person; or to... discriminate against such person in compensation or in terms, conditions or privileges of employment." Likewise, NYSHRL §296 provides that "it shall be an unlawful discriminatory practice... for an employer... because of an individual's age... to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

On a motion to dismiss, employment discrimination cases are reviewed under the notice pleading standard (*see Vig v New York Hairspray Co. L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). In particular, NYCHRL and NYSHRL have liberal pleading standards (*id.*). A plaintiff states a *prima facie* cause of action for employment discrimination by alleging facts supporting the following elements: (1) he or she is a member of a protected class, (2) who was well-qualified for his or her position, (3) that he or she was treated adversely or differently by the defendant, (4) and the adverse action was effected under circumstances giving rise to an inference of discrimination (*see Santiago-Mendez v City of New York*, 136 AD3d 428, 428-429 [1st Dept 2016]).

Plaintiff here has valid causes of action under NYCHRL and NYSHRL. While plaintiff's initial pleading omits his age and fails to establish that he is a member of the protected class, plaintiff's memorandum of law and proposed amended complaint remedy this infirmity (*see generally* Complaint; NYSCEF Doc. Nos. 22 & 24). While the initial complaint, standing on its own, would fail to state a cause of action because of the omission of plaintiff's age, "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]). As such, this court will accept that plaintiff is over the age of forty as required to be a member of the protected class. Defendants do not concede that the second and third elements are met, but do not argue them here. Thus, for purposes of this motion, the court will accept as true that plaintiff was qualified for his position and that defendants made an adverse employment decision.

As to the fourth element, plaintiff's complaint has alleged enough to raise an inference that his termination occurred under discriminatory circumstances. Defendant Adam Weiss' alleged ageist remark that plaintiff would not have been hired if defendants had known about his age is not a mere stray remark but may provide the nexus between the adverse employment decision and its discriminatory origin (*see Mete v NYS Office of Mental Retardation & Developmental Disabilities, 21 AD3d 288, 294* [1st Dept 2005]; *cf. Godbolt v Verizon New York Inc.*, 115 AD3d 493 [1st Dept 2014] [finding that decision maker's stray remark, without more, did not constitute discriminatory intent in plaintiff's termination and did not defeat defendant's summary judgment motion]). These facts are not developed at this stage of litigation. As such, plaintiff has alleged enough here to survive the motion to dismiss on these first two causes of action.

While defendants have provided ample evidence that plaintiff was fired for cause, specifically that plaintiff used corporate resources and time to work on his own personal business Meatheads Catering, that plaintiff fell asleep in a client meeting, and that plaintiff's performance was not up to snuff, the court cannot rely on said evidence on a motion to dismiss (NYSCEF Doc. No. 16 – Affidavit of Adam Weiss; *see Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 438 [1st Dept 2014] ["Factual affidavits... do not constitute documentary evidence within the meaning of the [CPLR] statute"]).

*The 42 USC §2000e and ADEA Claims*

Plaintiff's third cause of action in his initial complaint makes a claim for violation of 42 USC §2000e on age discrimination grounds. However, 42 USC §2000e does not cover age discrimination (*see* 42 USC §2000e-2). Plaintiff admits as much in his memorandum of law and attempts to remedy the infirmity in his amended complaint by changing his third cause of action to a federal 29 USC §621 Age Discrimination in Employment Act (ADEA) claim (NYSCEF Doc. No. 22 – Pl's

Memo of Law at 9). However, plaintiff's amended claim is still deficient as plaintiff failed to exhaust his administrative remedies as required by the ADEA (29 USC §626(d)(1)(A)). To bring a civil action in court for discrimination under the ADEA, plaintiff must first file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the adverse employment decision (*id.*; *see also Patrowich v Chemical Bank*, 98 AD2d 318, 323-24 [1st Dept 1984]). By failing to do so before June 7, 2017 (180 days after his termination on December 9, 2016), plaintiff has failed to exhaust his administrative remedies and the time to do so has passed. Accordingly, count three is dismissed and the amended complaint has no merit on this cause of action as the court is without jurisdiction.

*The "Aiding and Abetting" Claims against Larry Weiss and Adam Weiss*

Plaintiff's aiding and abetting claims against Larry Weiss and Adam Weiss fail as a supervisor's whose conduct gave rise to the plaintiff's discrimination claim cannot be held liable under NYSHRL §296(6) for aiding and abetting his own violation of the NYSHRL (*see Matter of Medical Express Ambulance Corp. v Kirkland*, 79 AD3d 886, 888 [2d Dept 2010]; *Krause v Lancer & Loader Group, LLC*, 40 Misc. 3d 385, 399 [NY Sup Ct May 19, 2014]). As Larry and Adam Weiss' conduct are at the root of the primary NYSHRL claim, they could not possibly aid and abet their very own conduct. Accordingly, this count must also be dismissed.

*Fair Labor Standards Act (FLSA) Claim and NYS Labor Law Wage Claim*

Plaintiff withdraws his FLSA claim in his opposition papers and removes the claim from the proposed amended complaint (NYSCEF Doc. No. 22 – Pl's Memo of Law at 10; NYSCEF Doc. No. 24 – Proposed Amended Complaint). Accordingly, plaintiff's FLSA claim is withdrawn. Plaintiff does not withdraw its New York Labor Law cause of action regarding unpaid wages. However, plaintiff's complaint is threadbare and does not articulate a valid claim here. Plaintiff alleges that he was paid remuneration by defendants but does not state how the remuneration was insufficient as a matter of law (Complaint at ¶14-15). Plaintiff provides no details to support his claim that he was not paid for all the hours he worked or for his commissions. In contrast, defendants submit a detailed accounting of plaintiff's commissions and a record of payment corresponding to those amounts (NYSCEF doc nos 32-33 – Sales Spreadsheet and Support for Payment in Full Following Separation). Accordingly, plaintiff's New York Labor Law wage claim is dismissed.

*Breach of Contract, Quantum Meruit, and Unjust Enrichment Claims*

Plaintiff's claim for breach of contract is dismissed. To make a valid breach of contract claim, plaintiff must "allege, in nonconclusory language, as required, the essential terms of the parties' purported…contract, including those specific provisions of the contract upon which liability is predicated…" (*Caniglia v Chicago-*

*Tribune-New York News Syndicate*, 204 AD2d 223, 234 [1st Dept 1994]). Plaintiff does not identify which provisions of the employment contract were breached and therefore plaintiff's claim must be dismissed.

Plaintiff's claims for quantum meruit and unjust enrichment are dismissed as well. "A cause of action under a quasi-contract theory 'only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment'" (*Martin H. Bauman Assoc., Inc. v H & M Intern. Transp., Inc.*, 171 AD2d 479, 484 [1st Dept 1991] [*citing Clark-Fitzpatrick, Inc. v Long Island Rail Road Company*, 70 NY2d 382, 388 [1987]). Defendants submit the "2016 Sales Achievement Program" signed contractual agreement between the parties that details the workings of FCI's commission payment program (NYSCEF Doc. No. 31 – 2016 Sales Achievement Program). Plaintiff does not challenge the validity of the contract and does not respond to defendant's arguments regarding the quantum meruit or unjust enrichment claims. As there is an express contract governing the disputed subject matter, plaintiff's quantum meruit and unjust enrichment claims must be dismissed (*see G&G Investments, Inc. v Revlon Consumer Products Corp.*, 283 AD2d 253 [1st Dept 2001] [express contract precludes unjust enrichment claim]; *Grace Industries, Inc. v New York City Dept. of Transp.*, 22 AD3d 262, 263 [1st Dept 2005] [express contract precludes quantum meruit claim]).

*Negligent and Intentional Infliction of Emotional Distress Claims*

Plaintiff's claim for negligent infliction of emotional distress is dismissed. To plead a "cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, [it] generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). Plaintiff makes no allegations that defendants breached any duty owed to plaintiff which either unreasonably endangered the plaintiff's physical safety or caused the plaintiff to fear for his own safety. Accordingly, plaintiff's negligent infliction of emotional distress claim must be dismissed.

Plaintiff's claim for intentional infliction of emotional distress is similarly dismissed. The tort of intentional infliction of emotional distress consists of four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Cohn-Frankel v United Synagogue of Conservative Judaism*, 246 AD2d 332, 332 [1st Dept 1998]). Nothing in plaintiff's complaint alleges anything out of the ordinary regarding his employment with FCI which would shock the conscious or constitute "extreme or outrageous" behavior. Accordingly, this claim is dismissed.

*Plaintiff's Cross-Motion for Leave to Amend Complaint*

Plaintiff's cross-motion for leave to amend his complaint pursuant to CPLR 3025 is denied in part. While "leave to amend pleadings is freely granted", when the "proposed amendment is palpably insufficient or patently devoid of merit" the court may properly deny leave (*Risk Control Associates Ins. Group v Lebowitz*, 151 AD3d 527 [1st Dept 2017]). Plaintiff's proposed amended complaint does not remedy the patent infirmities that were apparent in the initial complaint. While plaintiff fixes some blatant errors such as providing his age, it does not address the issues with the initial complaint that this decision has identified at length. Further, defendants in reply identified the lack of merit in plaintiff's added allegation regarding the ADEA claim, which is addressed above. However, as it regards plaintiff's age in paragraph five of the amended complaint, the court grants plaintiff leave to amend. In all other respects, plaintiff is denied leave to amend.

Accordingly, it is hereby ORDERED that defendants' motion to dismiss is granted with respect to causes of action three through eleven; it is further

ORDERED that defendants' motion to dismiss as it relates to causes of action one and two is denied; it is further

ORDERED that the plaintiff's motion for leave to amend the complaint is granted only to the extent that plaintiff may add his age to the statement of facts and the first and second causes of action as it relates to plaintiff's age, and the complaint, as amended, and annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; it is further

ORDERED that leave to amend the third cause of action in the proposed complaint is denied and that third cause of action is stricken; it is further

ORDERED that the defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service, it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 33, 71 Thomas Street, on March 6, 2019 at 9:30 AM.

This constitutes the decision and order of the court.

1/28/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER

APPLICATION: [ ] SETTLE ORDER [ ] SUBMIT ORDER