Berges v Bodner
2019 NY Slip Op 32825(U)
September 23, 2019
Supreme Court, New York County
Docket Number: 153658/2019
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 153658/2019

INGRID BERGES,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION AND ORDER ON MOTION

CAROLYN BODNER and UTOPIA THE AGENCY INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 10 were read on this motion for DISMISSAL.

Upon the foregoing documents, it is ordered that the motion is **decided as follows**.

In this employment discrimination suit, defendants Carolyn Bodner ("Bodner") and Utopia the Agency Inc. ("the Agency") move, pursuant to CPLR 3211(a)(7), to dismiss the complaint of plaintiff Ingrid Berges ("Berges") in its entirety. Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the instant action on April 8, 2019, by filing a summons and complaint. (Doc. 4.) The following facts are alleged in her complaint: In January of 2016, plaintiff was hired by defendant Bodner to work as an accountant for defendant the Agency. (*Id.* at 3.) Bodner is the owner of the Agency. (*Id.*) During her employment, plaintiff was the Agency's only

African American and Hispanic employee. (*Id.* at 6.) Plaintiff's duties as an accountant included, among other things, paying invoices and paying agents and employees. (*Id.*)

About a year-and-a-half later, in July of 2017, the Agency hired Amro Elkashef ("Elkashef"), who became plaintiff's immediate supervisor. (*Id.*; *see also* Doc. 7 at 5.) Once Elkashef was hired, plaintiff began questioning defendants' accounting practices, which allegedly included requests for large money transfers without documentation, as well as changes in purchases that were made for Bodner's home. (Docs. 4 at 6; 7 at 5.) As a result of questioning these practices, plaintiff claims that she was issued a negative employment evaluation by Elkashef in August of 2018. (Doc. 7 at 5.)

The complaint further alleges that plaintiff suffered an ankle injury in October of 2018. (Doc. 4 at 7.) This injury precluded her from commuting to work, and her physician recommended that she should work from home until her re-evaluation in November of 2018. (*Id.*) However, even after her follow-up medical visit on November 15, 2018, plaintiff was still not cleared to go to work. (*Id.*) Although she requested permission to work from home, defendants declined her request and instead offered that she could come in later and take an Uber "because she was needed at work to cut checks." (*Id.*) Plaintiff also claimed that all other employees were allowed to work from home. (*Id.*) Moreover, she alleged that, during her employment, it was disclosed to another employee of the Agency that plaintiff was allergic to dogs. (*Id.* at 9.)

Plaintiff's employment with the Agency was eventually terminated on December 31, 2018. (*Id.* at 5.) She was informed of her termination through a letter, and the reason given was that the Agency was reducing its workforce. (*Id.*) Despite being given this reason, a male employee was hired to replace her in January of 2019. (*Id.* at 6.)

Based on these allegations, plaintiff asserted four causes of action against defendants Bodner and the Agency in her complaint: (1) discrimination based on sex and race in contravention of the New York State Human Rights Law ("NYSHRL"), the New York City Human Rights Law ("NYCHRL"), New York City Administrative Code § 8-107,[1] and Title VII of the Civil Rights Act of 1964 (*id.* at 5–6); (2) discrimination based on her temporary disability in contravention of the NYSHRL and the NYCHRL (*id.* at 6–8); (3) retaliation in violation of the NYCHRL (*id.* at 8–9); and (4) disclosure of confidential medical information in violation of the NYCHRL (*id.* at 9).

In a pre-answer motion, defendants now move, pursuant to CPLR 3211(a)(7), to dismiss the complaint in its entirety. (Doc. 2.) Plaintiff opposes the motion. (Doc. 7.)

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

In particular, CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

[1] Although the complaint alleges that defendants violated both the NYCHRL and New York City Administrative Code § 8-107 (*see* Doc. 4 at 6), this Court will treat the two provisions as the same throughout this opinion.

a. Plaintiff's First Cause of Action.

In her first cause of action, plaintiff asserts that defendants unlawfully discriminated against her based on her race and sex, and therefore that they violated the NYSHRL, the NYCHRL, and Title VII of the Civil Rights Act of 1964. (Doc. 4 at 5–6.) Thus, in assessing whether plaintiff's first cause of action should be dismissed, this Court must determine whether she has a viable cause of action for discrimination under any of those statutes.

At this early juncture of the proceedings, this Court finds that plaintiff's claims for sex and race discrimination pursuant to the NYSHRL and the NYCHRL must be allowed to proceed. Under both provisions, the framework for asserting a cause of action for discrimination is the same: To establish a prima facie case of discrimination, a "plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." (*See Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004] (setting forth this framework in analyzing a claim for racial discrimination under the NYSHRL and the NYCHRL); *see also Hamburg v New York Univ. School of Med.*, 155 AD3d 66, 74 [1st Dept 2017] (setting forth this same framework in analyzing a cause of action for discrimination under the NYCHRL).)

Keeping this framework in mind, and viewing the factual allegations in the complaint in the light most favorable to plaintiff, as this Court must do on a motion to dismiss (*see Leon*, 84 NY2d at 87–88), this Court finds that she has established all four elements. As an African American and Hispanic woman, plaintiff is a member of a protected class. (*See Forrest*, 3 NY3d at 306.) Moreover, the fact that she was employed as an accountant with the Agency for nearly a two-year period suggests that she was qualified for the position. (Doc. 4 at 3.) And she has clearly

satisfied the third element, since she was terminated from her position in December of 2018. (*Id.* at 5.)

The only element that the parties seriously dispute is the fourth: whether her termination occurred under circumstances giving rise to an inference of discrimination. (*See Forrest*, 3 NY3d at 305.) (Docs. 5 at 15; 7 at 8–9.) Our courts have held that "[t]hat inference may be drawn from direct evidence, from statistical evidence, *or merely from the fact that the position was filled or held open for a person not in the same protected class*." (*Sogg v Am. Airlines*, 193 AD2d 153, 156 [1st Dept 1993] (emphasis added).) In her complaint, plaintiff has expressed the various ways in which she felt like she was mistreated by Bodner and the Agency throughout her employment. (*See, e.g.*, Doc. 4 at 5–6.) The complaint further asserts that plaintiff was the only African American and Hispanic employee (*id.* at 6) and, crucially, that she was replaced by a male who is neither African American nor Hispanic (*id.*) (*see Sogg*, 193 AD2d at 156). On top of that, this "replacement hire" was hired only a month after plaintiff was terminated from her position (*see id.* at 5–6), despite the fact that plaintiff was allegedly told that she was being let go because of a reduction in defendants' workforce (*id.*). Giving plaintiff the benefit of every possible favorable inference (*see Leon*, 84 NY2d at 87–88), these facts, *taken together*, raise at least an inference—albeit not a strong inference[2]—that defendants' conduct may have been influenced by some invidious motive. Given that a CPLR 3211(a)(7) motion addresses solely the facial sufficiency of the complaint, this Court is reluctant, at least at this early stage of the proceedings, to dismiss

[2] Plaintiff's complaint does not allege other indicia of discrimination, such as disparaging remarks by her employer. (*See Mittl v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003].) Although the complaint does not allege stronger indicators of discrimination, what gives this Court pause are the allegations that plaintiff was the only African American and Hispanic worker *and* the fact that she was replaced by a non-minority worker *and* that this worker was hired shortly after her termination even though defendants' were purportedly reducing their workforce. In other words, although these facts taken separately may not raise an inference of discrimination, they do so when considered together.

plaintiff's first cause of action entirely.[3] However, in allowing plaintiff's discrimination claims under the NYSHRL and the NYCHRL to proceed, and given that the inference of discrimination in the complaint is not particularly strong, this Court will note that "the burden of persuasion of the ultimate issue of discrimination always remains with the plaintiff." (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114 [1st Dept 2012].)

Defendants' arguments to the contrary are not persuasive. They contend that "any inference of discrimination is . . . eroded by the fact that Plaintiff admits she was hired in 2016 and terminated in 2018 by the same individual." (Doc. 5 at 17.) (*See Dickerson v Health Mgmt. Corp. of Am.*, 21 AD3d 326, 329 [1st Dept 2005].) The reason is simple enough: An employer who harbors some sort of *animus* toward a particular minority group would not likely hire a person from that group in the first place.

However, it is not so clear whether this "same hirer-same firer" doctrine is applicable to the facts herein. Defendants would have this Court believe that Bodner was the individual that both hired and fired plaintiff (Doc. 5 at 17), but the complaint is vague in that regard: Indeed, the complaint only states that plaintiff was informed of her termination through a letter, but it does not include an allegation as to who sent that letter or who made the decision to end her employment (*see id.*). In fact, it would seem that, if anyone had any say in terminating plaintiff, it would have been Elkashef, especially since he was plaintiff's supervisor and since he gave her a negative review in August of 2018. (Doc. 4 at 4.) At the very least, this Court determines that the doctrine is an insufficient basis on which to dismiss plaintiff's first cause of action in its entirety because

[3] This outcome is further bolstered by the fact that "employment discrimination cases are themselves generally reviewed under notice pleading standards." (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144–45 [1st Dept 2009].) In deciding motions to dismiss, "it has been held that a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie cause of discrimination but need only give fair notice of the nature of the claim and its grounds." (*Id.* (internal quotations and brackets omitted).)

this Court cannot discern from a facial reading of the complaint whether it is even applicable to the facts.

Defendants' next argument is that plaintiff could not have been fired due to her race or sex because she also asserts in the complaint that "she was fired because she complained about reporting [their purportedly] illegal accounting activities . . . ." (Doc. 8 at 9.) However, this argument is even less convincing than the last. Alleging that she was fired because she raised concerns about defendants' accounting practices is not necessarily inconsistent with alleging that she was fired on a discriminatory basis. Under the well-recognized "mixed-motive" theory of discrimination, a "plaintiff should prevail . . . if he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision." (*Melman*, 98 AD3d at 127.) In other words, this theory allows for the possibility that defendants might have fired plaintiff because she complained about their business practices *and* because they were influenced by a discriminatory motive; so long as they were motivated by *animus* toward her sex or race, defendants may be held liable under the NYSHRL and the NYCHRL. Thus, this argument is also inadequate to dismiss plaintiff's first cause of action in its entirety.

Nevertheless, insofar as plaintiff claims sex and race discrimination under Title VII of the Civil Rights Act of 1964, this Court finds that those claims must be dismissed. The complaint is completely silent as to whether plaintiff first attempted to exhaust her administrative remedies before the Equal Employment Opportunity Commission ("EEOC"). "[T]he filing of charges with the EEOC is a condition precedent to the commencement of a Title VII action." (*Romney v New York City Transit Auth.*, 294 AD2d 481, 482 [2d Dept 2002]; *see also Patrowich v Chem. Bank*, 98 AD2d 318, 323–24 [1st Dept 1984].)

Accordingly, the branch of plaintiff's first cause of action for discrimination under Title VII of the Civil Rights Act of 1964 is dismissed pursuant to CPLR 3211(a)(7) for failure to plead material allegations necessary to establish it. In all other respects—that is, her claims for discrimination pursuant to the NYSHRL and the NYCHRL—this Court finds that the cause of action should proceed.

b. Plaintiff's Second Cause of Action.

In her second cause of action, plaintiff claims that defendants discriminated against her based on her temporary disability—that is, her October 2018 ankle injury—in contravention of the NYSHRL and the NYCHRL. (Doc. 4 at 6–8.)

"[I]n order to state a cause of action for disability discrimination under the [NYSHRL], the complaint must allege that the plaintiff suffers a disability and that the disability caused the behavior for which the individual was terminated." (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 146 [1st Dept 2009].) Similarly, the NYCHRL also "prohibits discharging an employee *because* of a disability . . . ." (*Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 451 [1st Dept 2012] (emphasis added).)

Given the type of employer conduct that these statutes are intended to prohibit, this Court finds that plaintiff's claims for disability discrimination under both the NYSHRL and the NYCHRL must be dismissed. Since the complaint alleges, in conclusory fashion, that "[d]efendants discriminated against [p]laintiff by terminating [her] while she was on temporary disability" (Doc. 4 at 8), it falls short of pleading a nexus between that disability and her termination. Thus, plaintiff merely alleges that she was discharged *while* she was temporarily disabled, but not *because* of her disability, which is the conduct prohibited by the NYSHRL and

the NYCHRL. (*See Vig*, 67 AD3d at 146; *Romanello*, 97 AD3d at 451.) Thus, plaintiff's second cause of action for disability discrimination must be dismissed pursuant to CPLR 3211(a)(7) for failure to plead a material allegation necessary to establish it.

c. Plaintiff's Third Cause of Action.

In her third cause of action, plaintiff asserts that defendants retaliated against her in violation of the NYCHRL. (Doc. 4 at 8–9.) Plaintiff alleges that the basis for defendants' retaliation was the fact that she had voiced her concerns about their allegedly illegal accounting practices. (*See id.*) But "[f]iling a grievance complaining of conduct other than unlawful discrimination is not a protected activity subject to a retaliation claim under the [NYSHRL and the NYCHRL]." (*Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008].) Instead, our courts have interpreted the phrase "protected activity" to mean "opposing or complaining about unlawful discrimination." (*Forrest*, 3 NY3d at 313.) Voicing concerns about purportedly illegal accounting practices is not the same as "complaining about unlawful discrimination." Thus, plaintiff's third cause of action must be dismissed pursuant to CPLR 3211(a)(7) because, under the facts as alleged in the complaint, no actionable claim for retaliation exists.

d. Plaintiff's Fourth Cause of Action.

In her fourth cause of action, plaintiff asserts that defendants disclosed her confidential medical information in violation of the NYCHRL. (Doc. 4 at 9.) Specifically, plaintiff claims that a coworker asked her about her allergic reaction to dogs, even though nobody at the Agency had reason to know about this condition except for Bodner and Elkashef. (*Id.*)

As an initial matter, this Court notes that neither party cites any caselaw in support of their respective arguments addressing this cause of action. (Docs. 5 at 22–23; 7 at 13–14; 8 at 13–14.) As far as this Court can tell, this cause of action has been limited to instances where a patient's treating physician was the individual who disclosed the information. (*See Doe v Roe*, 190 AD2d 463 [1993] (a plaintiff has a right to maintain a cause of action where the *physician* disclosed confidential HIV-related information); *see also Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480 [2014] (a *medical corporation*'s duty of safekeeping confidential medical information is limited to risks that are reasonably foreseeable and to actions that occur within the scope of employment).) Because plaintiff's fourth cause of action is against her employer, and not against her treating physician, this Court finds that it must be dismissed.

Finally, this Court, as a word of warning for both parties moving forward, admonishes the parties on the quality of their briefs submitted on the instant motion. Defendants' counsel, rather than citing federal caselaw (*see, e.g.*, Doc. 5 at 15), should cite more First Department caselaw, or at least decisions from the New York State Court of Appeals, to the extent that such cases are available[4] and are pertinent to the issues raised. On the other hand, plaintiff's counsel should actually make an attempt to cite some caselaw in their next brief; indeed, plaintiff's brief in opposition to the instant motion only cited five cases, all of which were used to describe the well-known standard for a motion to dismiss. (*See* Doc. 7.)

In accordance with the foregoing, it is hereby:

[4] A lack of case citations is more understandable where, as in the fourth cause of action, there appears to be a dearth of relevant caselaw.

ORDERED that the branch of the motion by defendants Carolyn Bodner and Utopia the Agency Inc. to dismiss the first cause of action by plaintiff Ingrid Berges is granted to the extent that the first cause of action pleads sex and race discrimination pursuant to Title VII of the Civil Rights Act of 1964, and is otherwise denied; and it is further

ORDERED that the branches of defendants' motion to dismiss plaintiff's second, third, and fourth causes of action in their entirety are granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for the defendants is directed to serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and upon all parties within 30 days after this order is entered; and it is further

ORDERED that the parties are to appear for a preliminary conference on December 17, 2019, at 2:15 PM in Room 280 at 80 Centre Street; and it is further

ORDERED that his constitutes the decision and order of this Court.

09/23/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE