

Cordell v Maximus, Inc.
2020 NY Slip Op 35091(U)
February 6, 2020
Supreme Court, Monroe County
Docket Number: Index No. E2019002952
Judge: Debra A. Martin
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PRESENT: HONORABLE DEBRA A. MARTIN
Acting Justice of the Supreme Court

TROY CORDELL,

Plaintiff,

-vs-

MAXIMUS, INC.,

Defendant,

DECISION AND ORDER

Index No.: E2019002952

APPEARANCES:

Appearing on behalf of plaintiff

By: Van Henri White, Esq.

19 Grove Place

Rochester, New York 14604

Appearing on behalf of defendant

By: Kristi Rich Winters, Esq. and

Christopher J. Stevens, Esq.

JACKSON LEWIS P.C.

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Documents submitted and reviewed by the Court:

1. Defendant's notice of motion to dismiss filed with the Office of the Monroe County Clerk on October 17, 2019;
2. Attorney affirmation by Christopher J. Stevens, Esq, affirmed on October 17, 2019, along with exhibits A through E;
3. Defendant's memorandum of law in support of its motion dated October 17, 2019;
4. Plaintiff's notice of cross motion to amend complaint filed on November 22, 2019;
5. Attorney affirmation by Van Henri White, Esq. in support of plaintiff's cross motion and in opposition to defendant's motion, affirmed on November 21, 2014 but not filed until November 22, 2019, with exhibits A and B;
6. Plaintiff's memorandum of law dated November 21, 2019;
7. Supplemental affirmation by Van Henri White, Esq., dated November 21, 2014 (sic), with an exhibit;
8. Defendant's memorandum of law in opposition to plaintiff's cross motion and in further support of motion dated November 27, 2019;
9. Defendant's supplemental memorandum of law in opposition to cross motion and in further support of motion dated December 13, 2019; and
10. Plaintiff's supplemental memorandum of law dated December 17, 2019.

MARTIN, J.

The following timeline of events is critical to analyzing the pending motions:

1. May 7, 2018, plaintiff filed a general complaint with few dates or facts against defendant Maximus, Inc., his former employer, with the New York State Division of Human Rights (NYSDHR) alleging multiple acts of employment-related discrimination.
2. October 12, 2018, NYSDHR issued a "Determination and Order After Investigation," finding no probable cause, and dismissed the complaint. The plaintiff was notified in the decision that any appeal must be made by Notice of Petition filed in Supreme Court within 60 days.
3. January 30, 2019, the United State EEOC issued a Dismissal and Notice of Rights, which adopted the findings of the NYSDHR, and notified plaintiff to file a lawsuit in state or federal court within 90 days.
4. March 29, 2019, plaintiff commenced this action against defendant by service of a summons with notice. The notice stated:
 - (a) The nature of the action is to recover money for personal injuries.
 - (b) It is anticipated that the causes of action shall include, but not be limited to, violations of New York States Human Rights Law, breach of contract, fraud, tortuous interference with economic interests, violations of various state and federal labor laws, as well as claims sounded in negligence.
 - (c) The relief sought is money damages."
5. August 7, 2019, defendant served a "Demand for Complaint and Notice of Appearance."

6. August 28, 2019, plaintiff served a summons¹ and complaint with few facts, but that expressly listed five general acts of racial and sexual discrimination that violated "Article 15, Section 296, of New York State's Executive Law", and, that defendant "[o]therwise acted in a deliberately discriminatory and unlawful manner in violation of the common law, federal and state constitutional law, and applicable case law." Plaintiff sought both compensatory damages for lost wages and extreme emotional distress along with punitive damages.

7. October 17, 2019, defendant filed a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), (5), and (7). The grounds for defendant's motion were that the complaint was untimely, barred by the doctrine of election of remedies, and failed to state a cause of action.

8. Plaintiff responded by serving a cross motion to amend his complaint per CPLR 3025 (a) along with a proposed amended complaint that stated plaintiff's claims of discrimination based on race, gender, and sex "in violation of 42 U.S.C. 1981; 42 U.S.C. 1982; 42 U.S.C. 1983 and Section 296 of New York State's Executive Law." The proposed amended complaint also claimed that the conditions precedent to the jurisdictional requirements of federal Title VII were met because the summons with notice was filed within 90 days of the federal right to sue letter.

¹ The second summons described the nature of the claim as "to recover money for economic injuries as a result of injuries suffered as a consequence of employment discrimination", however, it was of no moment because plaintiff was not authorized to serve an amended summons. (see CPLR R. 305 [c].)

Discussion

A. State Discrimination Causes of Action Must Be Dismissed.

The State Division of Human Rights issued a Determination and Order after a thorough investigation, finding no probable-cause to support plaintiff's state law discrimination allegations, and giving plaintiff notice of right to appeal by filing a notice of petition and petition within 60 days.

As a matter of law, plaintiff's decision to file an administrative discrimination complaint with the State Division of Human Rights barred any subsequent judicial action on the same complaint. (*Executive Law* § 297 (9); see *Marine Midland Bank v New York State Div. of Human Rights*, 75 NY2d 240, 245 [1989] *superseded on unrelated grounds by Statute*; *Nizamuddeen v New York City Tr. Auth.*, 140 AD3d 880 [2d Dept 2016]; *Legg v Eastman Kodak Co.*, 248 AD2d 936, 936 [4th Dept 1998].) Comparing plaintiff's New York State Division of Human Rights Employment Complaint Form and attachments with his proposed amended complaint confirmed that all the issues raised before the NYSDHR were contained in the proposed pleading. Plaintiff had the right of election to either commence a discrimination action in court or file an administrative discrimination complaint with the NYSDHR, and the law prohibits him from doing both.

As to the timeliness argument, the Court notes that plaintiff had the right to challenge the NYSDHR's Determination and Order with a special proceeding pursuant to 22 NYCRR 202.57 (a) within 60 days of receipt, which he failed to do. (see *Executive Law* § 298; *Uniform Rules for Trial Cts* [22 NYCRR] § 202.57 [a]; *Matter of Johnston v Kirkland*, 100 AD3d 1354, 1355-56 [4th Dept 2012].) Plaintiff's opposition to defendant's motion to dismiss the state law claims failed to address the election of

remedies argument and his proposed amended complaint improperly included all the state claims.

Accordingly, plaintiff's election of remedies precluded any further consideration of any causes of action falling under the New York State Human Rights Law and they are dismissed.

B. The Summons with Notice Did Not Provide Notice of Federal Discrimination Causes of Action.

The more complicated issue was raised by the plaintiff's cross motion to amend his complaint to allege, for the first time, claims based on Title VII and 42 USC 1981, *et. seq.* The Court asked counsel to provide further briefing on the procedural question presented by the cross motion: did the summons with notice commence the action based on the federal claims?

Although a summons with notice is a permissible way to commence a lawsuit, it is risky, beset with limitations, as demonstrated in the matter at hand, and is not the preferable method in commencing of an action. (*Micro-Spy, Inc. v Small*, 9 AD3d 122, 125 [2d Dept 2004]; see Siegal N.Y. Practice § 60, at 101-103 [6th ed].) CPLR 305 (b) provides:

"Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment maybe taken in case of default."

A summons with notice is deemed a nullity if the required notice is not provided with the summons, or if the description is found to be defective or inadequate because

jurisdiction over the defendant has not been achieved. (*Parker v Mack*, 61 NY2d 114, 116 [1984]; see *Drummer v Valeron Corp.*, 154 AD2d 897, 897 [4th Dept 1989].)

Although an inadequate complaint may be amended, “a summons dismissed for failure to comply with the notice requirements of CPLR 305(b) is ‘jurisdictionally defective’ and cannot be amended. Further, if the plaintiff’s summons is dismissed for failure to comply with CPLR 305(b) the six-month extension for commencement of a new action pursuant to CPLR 205(a) is not available.” (*Micro-Spy, Inc. v Small*, 9 AD3d 122, 126 [2d Dept 2004] [internal citations omitted]).

A survey of the caselaw revealed that decisions run the gamut as to what is sufficient notice. (see Alexander, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C305:3, at 66.) General terms were found to be acceptable notice where the facts and circumstances were narrow and the causes of action stemming from the incident were plainly obvious. (see *Gilewicz v Buffalo Gen. Psychiatric Unit*, 118 AD3d 1298, 1298 [4th Dept 2014] [notice that alleged medical malpractice, assault, emotion distress was deemed sufficient to apprise defendant of constitutional violations]; *Roswell v Gould, Inc.*, 124 AD2d 995, 995 [4th Dept 1986] [notice of “negligence” was sufficient where plaintiff was injured in a car battery explosion]; *Bullis v American Motors Corp.*, 175 AD2d 535, 536 [3d Dept 1991] [“the nature of this action is personal injury proximately caused by a defective product,” was sufficient notice to the manufacturer]; *Skidmore v Carr*, 89 AD2d 600, 600 [2d Dept 1982] [notice “for legal services rendered” sufficient for a collection action brought by an attorney]).

In contrast, the use of general terms was deemed defective when the incident was complex with multiple potential causes of action or when the nature of the incident

or causes of action was unclear. (see *Drummer v Valeron Corp.* 154 AD2d 897, 897 [4th Dept 1989].) A summons with notice that leaves the opposing party guessing as to the precise nature of the claim stated against it is jurisdictionally defective, having failed to secure jurisdiction over the person. (*Roth v State Univ. of N.Y.*, 61 AD3d 476, 476 [1st Dept 2009].) As argued in the defendant's supplemental memorandum of law (Electronic Case File ("ECF"), No. 19), *Roth* is directly on point, with a summons with notice that read:

"The nature of this action sounds in violations of federal, New York State, and New York City human rights laws, including but not limited to, the New York State Executive Law, § 296, *et seq.*; New York City Administrative Code § 8-107, *et seq.*, 42 U.S.C. 1983, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; Title II of the Americans with Disabilities Act, 42 U.S.C. 12132; Article I, Section II of the New York State Constitution; and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; and various tort claims."

(*Roth v State Univ. of New York*, 2007 NY Slip Op. 33894[U] [NY Sup Ct, NY County 2007], *affd*, 61 AD3d 476 [1st Dept 2009], *lv denied* 13 NY3d 711[2009].) In affirming the insufficiency of this notice, the Appellate Division stated:

"The summons described the nature of this action as 'violations of federal, New York State, and New York City human rights laws, including but not limited to' various named statutes. Since numerous potential causes of action may be brought under these statutes, the summons left defendants to guess the precise claims against them (see *Scaringi v Broome Realty Corp.*, 191 AD2d 223 [1993]). In thus failing to comply with the notice requirements of CPLR 305 (b), the summons was jurisdictionally defective (*Wells v Mount Sinai Hosp. & Med. Ctr.*, 196 AD2d 749 [1993]), and as such could not be amended."

(61 AD3d at 476.)

The actual notice in *Roth* was significantly more detailed than that in the instant case. Since *Roth* is directly on point, and a case search did not uncover any Fourth Department decisions in which a similar notice was at issue, this Court is bound to follow it:

"It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 72[b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals' (*D'Alessandro v. Carro*, 123 A.D.3d 1, 6, 992 N.Y.S.2d 520; see *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664–665, 476 N.Y.S.2d 918)."

(*Phelps v Phelps*, 128 AD3d 1545, 1547 [4th Dept 2015].)

The Court finds that plaintiff's notice was insufficient as a matter of law, based on the precedent set by *Roth*. Moreover, plaintiff created a presumption that he was not pursuing federal discrimination causes of action by his specific reference to the New York State Human Rights Law. It is not reasonable to conclude that defendant could have ascertained plaintiff's intent to pursue federal *discrimination* causes of action when he merely cited "federal labor laws" in his notice, or what specific statutes he planned to pursue.

Defendant also argued that it has been potentially prejudiced by the plaintiff's insufficient notice because, had it known plaintiff intended to pursue the federal statutory claims he listed in his proposed amended complaint,

defendant would have sought removal to federal court. (ECF No. 19.) Since a summons with notice may serve as an initial pleading that triggers the 30-day removal period under federal procedure law, defendant may now be foreclosed from removal to federal court. (see *Whitaker v Am. Telecasting, Inc.*, 261 F3d 196, 205 [2d Cir 2001].)

C. Plaintiff's Cross Motion to Amend His Complaint Must Be Denied.

Plaintiff's argument that CPLR 3025 entitled him to serve an amended complaint as a matter of right or, at a minimum, that the Court should grant his motion to amend his complaint, is specious. It ignored the fundamental principle that "[a] jurisdictionally void summons cannot be amended to breathe life into a dead claim, since to do so would be to prejudice 'a substantial right of a party against whom the summons issued.'" (*Wells v Mount Sinai Hosp. and Med. Ctr.*, 196 AD2d 749, 749 [1st Dept 1993] [internal citations omitted]; see Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C305:4.; see also *Parker v Mack*, 61 NY2d 114, 116 [1984].) Here, defendant timely moved to dismiss the defective summons with notice on numerous grounds and objected to the proposed amended complaint as untimely. The caselaw cited by plaintiff in support of his proposition that he was permitted to amend his complaint as a matter of right is inapposite because it did not address cases commenced by a defective summons with notice.

Given that the summons with notice was a nullity, the federal claims were not asserted within 90 days of the right to sue letter and are now time-barred. (see *Tiberio v Allergy Asthma Immunology of Rochester*, 664 F3d 35, 37 [2d Cir 2011].)

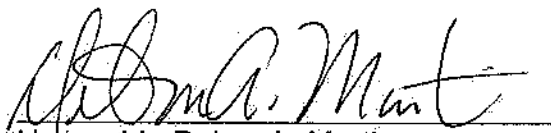
In light of the Court's findings, it need not address defendant's remaining contentions.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is granted, with prejudice; and it is further

ORDERED, that plaintiff's motion to amend his complaint is denied.

DATED: February 6, 2020



Honorable Debra A. Martin,
Acting Justice of the Supreme Court