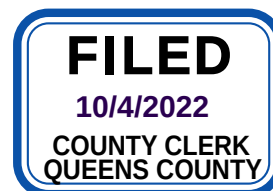


Johnson v Pristine Servs., Inc.
2022 NY Slip Op 35069(U)
September 29, 2022
Supreme Court, Queens County
Docket Number: Index No. 709738/19
Judge: Robert I. Caloras
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Short Form Order**NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. ROBERT I. CALORAS PART 36****Justice**-----X
PHILLIP JOHNSON,**Plaintiff,****-against-****PRISTINE SERVICES, INC.,****Defendant.**
-----X**Index No. 709738/19****Seq. No. 2**

The following papers numbered E25-E53 read on this motion by Plaintiff for an order for the following: a) CPLR 3212, 3126 and 22 NYCRR 202.21(d) striking the Defendant's Answer due to its willful and intentional spoliation of evidence of the documents that reflect protocols Thomas Ryder discussed with Plaintiff upon his hiring; b) In the alternative, directing that an adverse inference charge be presented and to the Jury at trial against the Defendant due to its willful and intentional spoliation of evidence of the documents that reflect protocols Thomas Ryder discussed with Plaintiff upon his hiring and failure to preserve the documents that reflect protocols Thomas Ryder discussed with Plaintiff upon his hiring involving the incident; c) imposing \$5,000.00 in sanctions pursuant to 22 NYCRR Part 130.1-1 and for attorney's fees in the amount of \$2,700.00 for failing to preserve the aforementioned documents that reflect protocols, and for forcing Plaintiff to make the instant Motion; and extending the time to file a Note of Issue; and the cross motion by Defendant for an order issuing sanctions against Plaintiff pursuant to 22 NYCRR 202.12(f).

PAPERS**NUMBERED**

Notice of Motion-Affirmation-Exhibits.....E25-E37

Notice of Cross Motion-Affirmation in Support of the Cross

Motion and in Opposition to the Motion-Exhibits-Memo of Law..E38-E48

Stipulation.....E49

Reply Affirmation and Affirmation in Opposition.....E50

Memo of Law in Reply-Affidavit.....E52-E53

Upon the foregoing papers, it is ordered that Plaintiff's motion and Defendant's cross motion are denied for the following reasons:

In the Complaint, Plaintiff asserted a cause of action for violation of the NYSHLR Exxec. L. 296, et seq.; racial discrimination and harassment in violation of the New York State Human Rights Law; racial discrimination in violation of New York City Administrative Code Section 8-107; hostile work environment in violation of New York City Administrative Code Section 8-107; and wrongful termination in violation of New York City Administrative Code Section 8-107. According to the Complaint, Plaintiff alleges the following: on or about May 2017, he was assigned to a job at LaGuardia Airport by a dispatcher employed by Union Local 79. Defendant was Plaintiff's employer. At the time of his termination, Plaintiff was a flagger, working five - six days a week at \$41.40 per hour for eight hours a day. His responsibilities included cleaning, and mitigating tripping hazards for plumbers to lay new piping. When he was initially hired, his direct foreman was Tommy Rider, whom he had a good relationship with. In May 2017, he met with Gavin (last name unknown), a fellow African American union employee of Defendant. Gavin warned Plaintiff that he should be very cautious about what he says in front of Kevin Smoot (Smoot), Tommy and JJ Johnson (Johnson). Gavin also warned Plaintiff that these individuals will purposely push your buttons to get you to lose your position. In June 2017, Johnson and Billy, both white males employed by Defendant, were talking about each other's wives on a personal level and then asked Plaintiff "what's for dinner? I'll call your girl and find out". Johnson and Billy, regarded themselves as the

"Trump boys", as a way to intimidate Plaintiff. Johnson and Billy also told Plaintiff "we banged your wife" and "she cooks dinner for me". In July 2017, Plaintiff found writings in urinals about Trump and overheard other Defendant's employees saying "Trump is taking over, white guys taking over no room for immigrants working here". In or around 2017, Smoot tried to embarrass Plaintiff and on one occasion screamed at him, in front of other Defendant's employees, for the way Plaintiff used a paddle. Smoot then jumped out of a van, and pulled the paddle out of Plaintiff's hand, and berated and embarrassed him in front of white workers. At the end of September 2017, Smoot yelled at Plaintiff and said "what's wrong with this Bozo?", causing everyone to laugh. In mid-October 2017, Smoot and Tommy asked if Plaintiff could rotate a shift, which Plaintiff consented to. Smoot then asked Plaintiff to relieve Ralph. Plaintiff inadvertently did not sign in, resulting in Ralph being unable to go home in time. Thereupon, Smoot told Plaintiff that he should not have gone to his post without signing in. Thereupon, Smoot started screaming at Plaintiff. Smoot then asked Plaintiff to report to the front gate and screamed in front of other employees, causing Plaintiff to be embarrassed. Smoot called Plaintiff "stupid" and a "kid", and told him that he "cannot follow simple rules". Smoot also had his fist balled up like he wanted to fight Plaintiff. On October 6, 2017, Smoot texted Plaintiff not to come to work anymore and terminated his employment.

In the first branch of the instant motion, Plaintiff moves for an order striking Defendant's Answer due to Defendant's willful and intentional spoliation of documents reflecting protocols Ryder discussed with Plaintiff when he was hired, or in the alternative, directing an adverse inference charge be presented at the time of trial against Defendant. Plaintiff submitted, among other things, the following: Plaintiff's demands, dated April 27, 2021, following Ryder's deposition and Defendants responses, dated September 22, 2021; and Plaintiff's demands, dated October 6, 2021, following Smoot's deposition, and Defendant's responses, dated November 19, 2021. The demand Plaintiff served following Ryder's deposition, requested the following documents:

- 1) Any and all documents that reflect any training Thomas Ryder attended from 2016 to present regarding racial discrimination.
- 2) Any and all documents that reflect protocols Thomas Ryder discussed with Mr. Philip Johnson upon his hiring.
- 3) Any and all documents contained within flash drive that purportedly reflects Mr. Philip Johnson's signing-in at the job site from 2016 through the last day of his employment.
- 4) Any and all documents that reflect Mr. Philip Johnson's over-time hours at Pristine Services, Inc. in 2017.

Defendant responded to these demands as follows:

- 1) Pristine objects to Request 1 on the grounds that it is overbroad, unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence insofar as the term "training" is vague, ambiguous, overbroad and not limited to the claims and defenses in this action. Subject to and without waiver of its specific objection, Pristine responds as follows: potentially responsive documents were destroyed during Hurricane Ida on September 1, 2021 when the bins in which the documents were stored in Mr. Ryder's garage were flooded.
- 2) Pristine objects to Request 2 on the grounds that it is overbroad, unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence insofar as the term "protocols" is vague, ambiguous, overbroad, and not limited to the claims and defenses in this action. Subject to

and without waiver of its specific objection, Pristine responds as follows: potentially responsive documents were destroyed during Hurricane Ida on September 1, 2021 when the bins in which the documents were stored in Mr. Ryder's garage were flooded.

- 3) A flash drive containing files potentially responsive to Request 3 was destroyed during Hurricane Ida on September 1, 2021 when the bin in which it was stored in Mr. Ryder's garage was flooded.
- 4) Pristine objects to Request 4 on the grounds that it is unduly burdensome and designed to annoy and harass insofar as Pristine has already produced documents reflecting Plaintiffs' overtime hours (PRISTINE00014-15) in response to Request 14 from Plaintiff's First Demand for Documents, dated October 2, 2020 (i.e. "Any and all documents which support, or evidence compensation paid to Plaintiff PHILLIP JOHNSON during his employment with you, including but not limited to, salary, bonuses, and commissions."). Pristine will not search for additional, duplicative documents responsive to Request 4 where Plaintiff has not even attempted to demonstrate why PRISTINE00014-15 is not sufficient.

Paragraph "6" in the demand Plaintiff served following Smoot's deposition requested "[a]ny and all documents that reflect the protocols of any disciplinary actions of laborers. Defendant responded to this demand as follows:

Pristine objects to Request 6 on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence, is designed to annoy and harass and does not identify the documents sought with reasonable particularity insofar as the term "protocols" is vague and ambiguous. Subject to and without waiver of its specific objections, Pristine responds as follows: as noted in counsel's email of May 25, 2021, "Pristine does not maintain personnel files, has no review process, has no employee handbook and no printed personnel policies or anti-discrimination/harassment policies."

Plaintiff argues that Defendant's responses to his demands establish that the subject documents were disposed of as recently of September 2021, despite Defendant being aware of the instant claim since as early as October 2019, when Defendant appeared in this action. Plaintiff further argues that Defendant should have reasonably anticipated that he would litigate this matter when he was terminated. Consequently, Plaintiff argues that Defendant was obligated to preserve the subject documents, and that Defendant's failure to do so was willful and contumacious, and has prejudiced him. Plaintiff further argues that Defendant's discovery response on September 22, 2021 contradicts Defendant's discovery response on November 19, 2021 regarding the existence of the requested documents.

In opposition, Defendant argues that it did not intentionally destroy the safety protocols nor did it destroy the records through an act of ordinary negligence. Rather, Defendant claims that the safety records were destroyed by an act of God due to unforeseeable flooding caused by Hurricane Ida on September 1, 2021, when the bins in which said documents were stored in Ryder's garage were flooded. Even if the Court finds that the subject documents were destroyed due to Defendant's negligence, Defendant argues that the safety protocols are not relevant to Plaintiff's claims for discrimination. In support thereof, Defendant submitted excerpts from both Gavin Cleghorn's deposition transcript and from Ryder's deposition transcript. Gavin testified that he never experienced any racial discrimination when he worked for Defendant. Gavin also testified that he never witnessed any racial discrimination by Defendant against Plaintiff, and never told Plaintiff that he had witnessed any racial discrimination by Defendant. At his deposition on August 5, 2021,

Ryder testified that when Plaintiff was hired, following Plaintiff's "airport initial training", he discussed basic job site protocols and company safety initiatives with Plaintiff, which included wearing a hardhat, safety glasses, safety gloves, a safety vest, and safety toed shoes at all times on the project.

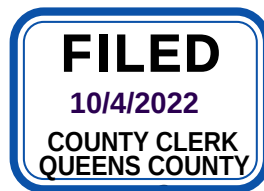
In reply, Plaintiff argues, among other things, that while Ryder testified that he discussed both basic job site protocols and company safety protocols, Defendant merely assumes that only safety protocols were destroyed. In the reply to Defendant's cross motion, Defendant submitted an affidavit from Ryder, notarized on May 17, 2022, wherein he stated, in pertinent part, that "[t]he only protocols that I discussed with plaintiff Philip Johnson were safety protocols when he was hired by Pristine to work at LaGuardia Airport. . . . I believe that copies of these . . . safety protocols may have been kept in storage bins in my garage. There were no other policies or protocols stored in the bins in my garage. . . . On September 1, 2021, my garage was flooded during Hurricane Ida. All of the documents stored in the bins, including the . . . safety protocols, were destroyed".

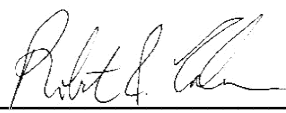
"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (Cain v Ameresco, Inc., 195 AD3d 677 [2d Dept. 2022]).

Initially, the Court finds that the affidavit Defendant submitted from Ryder was in the form of a sur reply. Pursuant to this Court's Part Rules, "[a] sur-reply shall not be permitted without prior consent to the Court". Here, Defendant did not seek leave to file a sur-reply. Consequently, the affidavit Defendant submitted from Ryder shall not be considered by the Court in determining Plaintiff's motion. Contrary to Plaintiff's claims, the Court finds that Defendant's responses to Plaintiff's discovery demands are not contradictory. Rather, Defendant merely responded that after Ryder was deposed, the potentially responsive documents stored at Ryder's home were destroyed during Hurricane Ida on September 1, 2021. Whereas, Defendant's subsequent response merely stated that it " . . . does not maintain personnel files, has no review process, has no employee handbook and no printed personnel policies or anti-discrimination/harassment policies". The Court finds that Defendant's responses to Plaintiff's demands for the subject documents did not establish that Defendant destroyed these documents with a culpable state of mind. Even if the Court determined that Defendant had destroyed the requested documents with a culpable mind, the requested documents are not relevant to Plaintiff's claims. Accordingly, the branch of Plaintiff's motion seeking sanctions for spoliation against Defendant is denied.

The branch of Plaintiff's motion seeking attorney's fees is denied due to his failure to demonstrate that Defendant engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1(c) (see Sessa v Doxey, 172 AD3d 939, 940 [2d Dept 2019]). The remaining branch of Plaintiff's motion seeking to extend the time to file a Note of Issue is denied with leave to renew at the Compliance Conference scheduled on October 4, 2022 before Hon. Tracy Catapano -Fox. Finally, the Court denies Defendant's cross motion seeking an order granting it sanctions against Plaintiff, due to its failure to demonstrate that Defendant within the meaning of 22 NYCRR 130-1.1(c) (id.). The Court notes that if Defendant had not waited to file Ryder's affidavit nine months after Ryder's deposition was held, perhaps the issues raised herein would have been avoided.

DATED: September 29, 2022




ROBERT I. CALORAS, J.S.C.