SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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SAMEH PESCALES,

Plaintiff,

- v -

PAX VENTURES LLC, ALEXANDER XENOPOULOS, AGAPI XENOPOULOS, PETER XENOPOULOS

Defendants.

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INDEX NO. 653319/2019

MOTION DATE 08/30/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 300, 301, 302, 303, 304, 305, 306, 307, 308, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this employment discrimination action, defendants-employers move pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint, which includes causes of action for (i) retaliation in violation of the New York City Human Rights Law (NYCHRL), as against all defendants; (ii) retaliation in violation of the New York State Human Rights Law (NYSHRL), as against all defendants; and (iii) breach of contract, as against defendant Pax Ventures LLC (Pax). Plaintiff cross-moves pursuant to CPLR § 3126 for sanctions for defendants' alleged spoliation of financial records.

BACKGROUND

Allegations Relevant to Defendants' Motion

Plaintiff, an Egyptian Coptic Christian, began working for Pax, a food/beverage retail management company owned by Alexander Xenopoulos, Agapi Xenopoulos and Peter

Xenopoulos (collectively, the individual defendants), in 2002 (NYSCEF Doc No 1 ¶¶ 12-13, 16). Plaintiff alleges that on March 15, 2015, he and Alexander entered into an oral agreement, with key terms memorialized in a handwritten document, which provided that Pax would employ plaintiff for a period of five years at a base yearly salary of $200,000, with an additional $300,000 payment spread over those five years in lieu of raises and annual bonuses (*id.* ¶¶ 22, 25-26; NYSCEF Doc No 228). Defendants deny creating or having any knowledge of this document (NYSCEF Doc No 250 ¶¶ 14-16).

Plaintiff alleges that he "was instrumental in bringing a large number of Coptic Christians from his church to work for Pax," and that he "assisted fellow Egyptian employees [] by hearing their complaints [of discrimination] and directing them to report their complaints to Pax'[s] Human Resource employees" (NYSCEF Doc No 1 ¶¶ 30-31)[1]. Plaintiff alleges that the individual defendants were aware that plaintiff did so, and that when he "raised the issue of [] discrimination against Coptic employees with [Agapi] in the presence of the HR director, Giselle Tsikaridis," Agapi reacted dismissively (*id.* ¶¶ 37-38, 66; NYSCEF Doc No 317, 252:19-253:20 [Agapi stating: "Are we going to leave the business now and talk about Muslim and Christian, and maybe next year we'll talk about fights between Greek and Turkish"]).

Plaintiff alleges that on May 25, 2017: yet another coworker complained to HR of discrimination, on plaintiff's advice; Peter received a demand letter from an attorney representing four other employees who planned to sue Pax for discrimination; and Peter "came into [plaintiff's office] and blamed him for instigating these employees to bring claims of discrimination, and informed him that he would be fired as a result" (*id.* ¶¶ 45-48; NYSCEF Doc

[1] Plaintiff's complaint states that he engaged in this activity "[b]eginning in or about October 2016" (*id.* ¶ 31), however, during his deposition, he stated that he actually started "ten [or] maybe eleven years ago[,] from 2009," and that the volume of complaints increased in October 2016 (NYSCEF Doc No 317, 245:6-18).

No 241). Following this conversation, plaintiff alleges he "was no longer spoken to by the Individual Defendants" until, on June 9, 2017, he was terminated and "physically assaulted" by Peter, who also threatened to "destroy [plaintiff's] family" (*id.* ¶¶ 49-52). Later that day, plaintiff's wife and sister, who were also Pax employees, were also terminated (*id.* ¶ 53).

Defendants deny plaintiff's characterization of these incidents, and allege that plaintiff was terminated for "legitimate, non-retaliatory business reasons," i.e., "[d]ue to a financial decline and the closing of several Retail Stores, [which made it] difficult to maintain operations" (NYSCEF Doc No 250 ¶¶ 48, 87). In December 2016, defendants hired consultants to "provide a recommendation to management on how best to proceed with winding down the business" and were advised that certain positions would have to be eliminated, and several employees terminated (*id.* ¶¶ 59-62; NYSCEF Doc Nos 236, 238). After gathering feedback on plaintiff's performance, defendants decided on May 12, 2017 that plaintiff would be terminated "[t]o reduce costs" and a severance package was prepared for him (*id.* ¶¶ 64-77; NYSCEF Doc Nos 227, 239). Defendants allege that plaintiff rejected the severance package and said to Peter: "I'll destroy you and your son . . . You cannot fire me" before being escorted off the premises (*id.* ¶¶ 79-82). Pax continued to wind down its business, ceasing all operations by December 2018 and officially dissolving in February 2019 (*id.* ¶ 86).

Allegations Relevant to Plaintiff's Cross-Motion

On October 3, 2017, plaintiff's counsel emailed defendants' counsel: "please remind your client of its obligations to preserve all evidence whether in audio-visual, electronic or documentary form . . . [and] please make sure your client does not take any steps to tamper with any such evidence in an effort to shift responsibility for any questionable accounting, Point of Sale and employment payroll practices it has engaged in to my client" (NYSCEF Doc No 282).

In Mot Seq No 3, plaintiff sought, *inter alia*, to compel defendants to produce: (i) all financial reports for Pax's retail stores from 2014 to 2019; (ii) any tax returns for Pax and its retail stores not previously produced by its accountant from 2014 to 2019; and (iii) an electronic version of eleven memoranda previously produced, along with all metadata or a detailed affidavit explaining why such information cannot be produced (collectively, the financial records). By decision and order dated July 26, 2022, this court granted that part of plaintiff's motion (NYSCEF Doc No 266). On August 25, 2022, defendants wrote to plaintiff's counsel that "[u]pon review, . . . Defendants are not in possession of any further documents responsive to [plaintiff's] request" and filed an affidavit sworn to by Agapi stating that metadata could not be produced because interoffice memoranda was typed, printed, and physically handed to the other individual defendants, and therefore only the hard copy files existed (NYSCEF Doc No 283).

DISCUSSION

Summary Judgment

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

i. Breach of Contract

Plaintiff submits a handwritten document as evidence of the alleged employment contract he entered into with Pax (NYSCEF Doc No 228). Defendants argue that plaintiff's cause of action for breach of contract must be dismissed because the alleged agreement violates the statute of frauds, which provides that any agreement which "[b]y its terms is not to be performed within one year from the making thereof . . . is void, unless [memorialized] in writing, and subscribed by the party to be charged therewith" (NY Gen Oblig Law § 5-701). Plaintiff argues that the agreement satisfies the statute of frauds because Alexander "admitted that 'parts of it' are 'seemingly [his] handwriting'" and therefore it did not need to be signed; it contains all of the material terms; and "[i]t is obvious that it is between Pax and Pescales" (NYSCEF Doc No 258). Plaintiff further argues that even if the agreement does not satisfy the statute of frauds, it is still enforceable due to the partial performance exception (*id.*).

The purported agreement is unenforceable under the statute of frauds. It merely lists dollar amounts next to the years 2015 through 2019; it does not include the names of the parties

to the agreement, their signatures, or any language explaining what the amounts refer to (NYSCEF Doc No 228). This is wholly insufficient to discern the terms of the contract, let alone manifest the parties' intent to be bound by it. Moreover, as defendants note, the "part performance exception [cannot] be applied to contracts that are not capable of performance within one year of their making," specifically including oral employment contracts (*Gural v Drasner*, 114 AD3d 25, 26-27 [1st Dept 2013]; *Cunnison v Richardson Greenshields Secur., Inc.*, 107 AD2d 50, 54 [1st Dept 1985] ["In New York, the part performance of an oral contract for employment, not to be performed within a year, does not remove the contract from the operation of the Statute of Frauds"]). Accordingly, the part of defendants' motion seeking dismissal of plaintiff's cause of action for breach of contract as against Pax will be granted.

ii. Retaliation

Plaintiff asserts causes of action for retaliation under NYCHRL § 8-107(6) and NYSHRL § 296(7), which both prohibit retaliation or discrimination against any person because he has opposed a forbidden practice or assisted in a proceeding or investigation into a claim of discrimination. Both the State and City HRLs require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination (NYSHRL § 300; NYCHRL § 8-130; *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *Matter of Binghamton GHS Ernpls. Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 [1990]). The NYCHRL further "requires an independent liberal construction analysis" to fulfill its "'uniquely broad remedial' purposes, which go beyond those of counterpart state or federal civil rights laws" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]).

To support a claim of retaliation under the New York HRLs, a plaintiff must show that (1) he has engaged in a protected activity; (2) his employer was aware of such activity; (3) he

suffered an adverse employment action based upon the activity (NYSHRL), or his employer acted in a manner reasonably likely to deter a person from engaging in protected activity (NYCHRL); and (4) a causal connection exists between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3NY3d 295, 312-13 [2004]; *Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 739 [2nd Dept 2013]). "At the summary judgment stage, retaliation claims brought pursuant to [New York's HRLs] are evaluated under the *McDonnell Douglas* burden-shifting framework" (*Baker v MTA Bus. Co.*, 2023 U.S. Dist. LEXIS 133710, *45 [SDNY 2023]). "Under this framework, [once] a prima facie case [of retaliation] is established, a defendant must proffer a legitimate and non-discriminatory reason for its actions; [] if the defendant offers such a reason, a plaintiff must show that the defendant's reason is pretext for unlawful [] retaliation" (*Holt v DynaServ Indus.*, 2016 U.S. Dist. LEXIS 127750, *13 [SDNY 2016]).

Here, defendants first argue that plaintiff has not met his prima facie case for retaliation because he did not engage in a protected activity, as the assistance he provided to his coworkers (i.e., directing them to speak to HR) was not "oppositional" as required under New York's HRLs. As plaintiff notes, however, plaintiff also alleged that he told Agapi and Giselle that discrimination was a "huge issue with the [] Coptic people in the company" which needed to be addressed (NYSCEF Doc No 317, 252:19-253:20); he spoke to Alex about complaints he heard from another coworker, Ereni Ibrahim (*id.*, 218:2-21); and Peter blamed plaintiff for encouraging other employees to come forward (NYSCEF Doc No 1, ¶ 48). In any event, a plaintiff does not necessarily need to show that he "opposed any practice forbidden under [those] chapters" directly; merely encouraging or assisting in a proceeding or investigation, may be considered a protected activity.

Defendants also argue that plaintiff has not met his prima facie burden because he failed to meet the third element under either HRL. As noted *supra*, under the NYSHRL, a plaintiff must demonstrate causation between the protected activity and the adverse employment action, and under the NYCHRL, a plaintiff must demonstrate that his employer acted in a manner reasonably likely to deter a person from engaging in protected activity. Defendants note that plaintiff allegedly assisted his coworkers in raising discrimination complaints over the course of ten or eleven years (although with increasing frequency in the last eight months of his employment), and so "it simply does not make any sense that [defendants] would suddenly develop retaliatory animus and terminate his employment" (NYSCEF Doc No 251). However, plaintiff argues that the multiple events culminating on May 25, 2017, including defendants' receipt of the demand letter, triggered Peter's "fit of retaliatory pique" which led to plaintiff's termination just fifteen days later (NYSCEF Doc No 258). This temporal proximity at least raises a question as to whether plaintiff's peripheral involvement in the discrimination complaints was a motivating factor in the decision to terminate him, and whether the termination might deter others from similarly encouraging coworkers to report discrimination.

Defendants argue that even if plaintiff has stated a prima facie cause of action for retaliation, defendants have demonstrated a legitimate and non-retaliatory reason for terminating his employment, as the company was struggling financially and they simply needed to reduce costs (NYSCEF Doc No 251). Notably, retail stores were "progressively closing down as they were becoming less profitable," "at least a dozen other employees were terminated around the same time as Plaintiff," and Pax "completely closed down just over a year after Plaintiff's termination" (NYSCEF Doc No 251). As defendants note, "a reduction in force undertaken for

economic reasons is a nondiscriminatory basis for employment terminations" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1st Dept 2016]).

In opposition, plaintiff emphasizes contradictions between defendant's EEOC response and their subsequent testimony and documents, the "troubling lack of clarity" from defendants' testimony regarding the details of the decision to terminate plaintiff, and "the facts supporting [plaintiff's claims of] animus" (NYSCEF Doc No 258). As defendants note, though the EEOC report did not perfectly reflect the testimony and documents submitted on this motion, unlike in *Kwan v Andalex Grp., LLC*, 737 F3d 834 [2nd Cir 2013], plaintiff has not identified any *contradictions* between the two. Rather, the testimony appears to expand on the reason behind the restructuring of the company which was mentioned in the EEOC report (see also NYSCEF Doc No 227 [severance agreement offered to plaintiff reflects that defendants "eliminate[d] Pescales' position and that of other employees . . . in an effort to reduce costs"]). Finally, even examining the evidence in the light most favorable to plaintiff, he failed to overcome the fact that the internal memo recording defendants' intent to terminate plaintiff *pre-dated* the May 25, 2017 incidents, which plaintiff alleges was the trigger of the adverse employment action. Plaintiff has thus failed to show that defendants' stated reason for terminating him was mere pretext.

Accordingly, the part of defendants' motion seeking dismissal of plaintiff's causes of action for retaliation under New York's HRLs will be granted.

Sanctions

"A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) 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" (*VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012], citing *Zubulake v UBS Warburg LLC*, 220 FRD 212 [SDNY 2003]).

Plaintiff argues that defendants had an obligation to preserve the financial records as early as May 25, 2017, when they received a demand letter from other former employees with discrimination claims, but in any event, no later than October 3, 2017, when they received plaintiff's email notifying them that they must preserve evidence that may be relevant to the instant action (NYSCEF Doc No 257). Plaintiff asserts that the financial records should have been deemed relevant, as defendants claim that plaintiff was terminated for the legitimate reason that the business was in financial trouble. Defendants argue that "it was completely unforeseeable" that the financial records might be relevant to this action, as defendants "reasonably believed" that it would be sufficient to show, as they have done here, that Pax was closing, other employees were terminated at the same time, and consultants were hired to assist in outsourcing (NYSCEF Doc No 308). Defendants note that many of the financial records plaintiff seeks pertain to other retail locations where plaintiff did not work and assert that they followed the directives of the October 3, 2017 email (NYSCEF Doc No 282 [telling defendants not "to tamper with any such evidence in an effort to shift responsibility for any questionable accounting, Point of Sale and employment payroll practices it has engaged in" to plaintiff]).

Plaintiff further claims that Agapi testified that defendants *only* discarded corporate records that were more than 10 years old, and thus, "the only conclusion is that the Financial Records [which were less than 10 years old] must have been spoliated" purposefully (NYSCEF Doc No 257). As defendants note, this is inaccurate; Agapi testified that she discarded files "that were ten years old *or* old things [they] didn't need anymore" (NYSCEF Doc No 226, 29:9-11),

and defendants allege that they did not anticipate that the financial records would become relevant. Additionally, defendants note that while "this case commenced in 2019, [] it was not until after Defendants' depositions in 2021 that Plaintiff" determined that the financial records may be relevant, and defendants have consistently advised that they were no longer in their possession by that time (NYSCEF Doc No 308).

Plaintiff has failed to demonstrate that the financial records were destroyed with the culpable state of mind required for spoliation sanctions. Accordingly, plaintiff's cross-motion will be denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendant's motion is granted, and plaintiff's complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendants with costs and disbursements to defendants as taxed by the clerk.

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10/10/2024
DATE

PAUL A. GOETZ, J.S.C.

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