

Mogrovejo v Village/Towntown of Mt. Kisco
2024 NY Slip Op 35617(U)
May 28, 2024
Supreme Court, Westchester County
Docket Number: Index No. 62075/2023
Judge: Charles D. Wood
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To commence the statutory time period for appeals
as of right (CPLR 5513[a]), you are advised to serve a copy
of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KLEVER MOGROVEJO,

Plaintiff,

DECISION AND ORDER
Index No. 62075/2023
Seq No. 1

-against-

VILLAGE/TOWN OF MOUNT KISCO,

Defendant.
-----X

WOOD, J.

NYSCEF Document Numbers 14-34 were read in connection with the motion by
defendant Village/Town Of Mount Kisco (“the Town”) for an order pursuant to CPLR
3211(a)(1), (a)(5), a)(7), dismissing all claims against it related to events/incidents that took
place prior to June 6, 2020, all claims of wrongful termination, and all claims arising from the
Westchester County Human Rights Law (“WCHRL”).

Plaintiff brought this action against Village/Town of Mt. Kisco (“the Town”) for
purported race and national origin discrimination and retaliation in violation of the New York
State Human Rights Law (“NYSHRL”) and WCHRL. According to the complaint, plaintiff is a
Hispanic male citizen of the United States who resides in Brewster, and was born and raised in
Ecuador and speaks English with a foreign accent. Plaintiff began working for the Town in or
about January 25, 2006, as a laborer. Plaintiff was hired to work on the back of garbage trucks,
collecting garbage, maintaining the town, cutting the grass, picking up leaves, and doing snow
removal. Plaintiff alleges the following (among other things): the white male workers in
plaintiff’s department made racist and discriminatory comments, using terms such as “spic” (a

derogatory term for Hispanic), telling minority workers to “speak English,” and, assuming that plaintiff and the other Hispanic workers were immigrants, telling them to “go back to” their country. Manager Luppino immediately reassigned employees so that they were segregated by race on different work crews. Then, Manager Luppino gave the minority workers less desirable work assignments than the white workers. Between 2010 and 2018, Manager Luppino often passed plaintiff over in favor of more junior white co-workers, white workers also got training on machines that minority workers did not get, and this allowed them to gain new skills so that they could advance in their careers. Training opportunities are not publicized or posted anywhere in plaintiff’s department. Instead, supervisors typically called employees into their offices to offer them training classes and opportunities. Prior to 2019, plaintiff had never been invited to participate in a training or class. Plaintiff has wrongly been disciplined for walking off a job site, which is something that white employees did all the time without disciplinary action.

Plaintiff originally commenced proceedings against the Town by a Charge of Discrimination filed with the New York State Division of Human Rights Equal Opportunity Employment Commission (“EEOC”) on May 15, 2019, alleging discrimination due to national origin in violation of Title VII. Plaintiff subsequently filed an Amended Charge of Discrimination with the EEOC on October 4, 2019, alleging continued discrimination due to national origin, a hostile work environment, and retaliation in violation of Title VII, contained specific references to incidents that occurred in or about April 2014, May 1, 2014, May 6, 2014, June 2018, March 12, 2019, April 2019, May 22, 2019, and July 8, 2019.

On December 17, 2020, a “right to sue” letter was issued to plaintiff, notifying him he had the right to institute a civil action under Title VII against the Town. This letter stated such suit must be filed within 90 days of receipt of this Notice. Plaintiff did not commence any civil

action under Title VII against the Town in state or federal court within this 90 day time period.

On June 15, 2022, the Town received a Notice of Claim from plaintiff alleging discrimination on the basis of race and national origin and retaliation under NYSHRL, New York Equal Pay Act, New York Labor Law, and Title VII of the Civil Rights Act. On October 13, 2022 and March 20, 2023, the Town conducted plaintiff's 50-H hearing.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must 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 (*Bivona v Danna & Assocs., P.C.*, 123 AD3d 956, 957 [2d Dept 2014]). A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 804 [2d Dept 2020]).

Turning to the causes of action pursuant to WCHRL, plaintiff cannot bring a private cause of action under WCHRL because the WCHRL does not provide for a private cause of action (*Garcia v Yonkers Bd. of Educ.*, 188 F. Supp. 3d 353, 363 [S.D.N.Y. 2016]).

As for plaintiff's claim for wrongful termination, a plaintiff alleging discrimination in violation of the NYSHRL must establish that (1) he or she is a member of a protected class, (2) he or she was qualified to hold the position, (3) he or she suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1001 [2d Dept 2021]). Plaintiff's claims of wrongful termination are dismissed as plaintiff is still employed by the Town. As such, plaintiff has failed to state a claim for which relief can be granted as to

wrongful termination. In any event, plaintiff in his opposition papers, does not contest the Towns' arguments regarding the allegations of constructive/wrongful termination or claims under the WCHRL. Therefore, these claims against WCHRL and wrongful termination are dismissed.

Next, to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, "the defendant bears the initial burden of establishing, prima facie, that the time within which to sue has expired, whereupon the burden shifts to the plaintiff to raise a question of fact as to whether the limitations period has been tolled or should not apply" (*Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc.*, 184 AD3d 803, 804–05 [2d Dept 2020]). An action to recover damages for discriminatory practices under NYSHRL is governed by a three-year statute of limitation (*See* CPLR 214 (2)).

The First Department has held that the filing of an EEOC complaint tolls the statute of limitations for NYSHRL claims, thus during the pendency of the EEOC complaint, the three-year limitations is tolled (*Gabin v Greenwich House, Inc.*, 210 AD3d 497 [1st Dept 2022]). As plaintiff points out, crediting the tolling period, plaintiff's claims occurring prior to December 16, 2018, are time-barred, unless the "continuing violation" doctrine applies. Here, the continuing violation doctrine is not warranted because the complaint does not allege facts comprising "a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint", but rather discrete events, involving different actors, and occurring months to years apart (*Campbell v New York City Dep't of Educ.*, 200 AD3d 488 [1st Dept 2021])[internal citations omitted]. In addition, plaintiff fails to raise a question of fact as to whether the continuous violations doctrine applied to toll the running of the limitations period. Notably, plaintiff describes the incidents in conclusory fashion, does not

provide specific dates for many of his allegations, and/or gives broad timeframes for some and no timeframes for others. In fact, in opposition to the motion, plaintiff does not address how the allegations in the complaint show such a pattern.

Accordingly, that branch of the motion for an order dismissing the complaint, pursuant to CPLR 3211(a)(5), as time-barred is granted solely to the extent that plaintiff is barred from asserting any claims accruing prior to December 16, 2018, due to the tolling of the statute of limitations while his claims were pending before the EEOC.

THEREFORE, based upon the stated reasons, it is hereby

ORDERED that the Town's motion to dismiss is **granted** solely to the extent stated herein including dismissing all of plaintiff's claims which have occurred prior to December 16, 2018, and is otherwise denied; and it is further

ORDERED, that within twenty days after this decision and order is uploaded to NYSCEF, counsel for the Town shall serve a copy of this decision and order, with notice of entry, upon all parties, and file proof of service on NYSCEF within 5 days of service.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

**Dated: White Plains, New York
May 28, 2024**



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF