SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 109287/2007
LLOYD, KEITH B.
vs
SHEN, MICHAEL ESQ.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. 109287/2007
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted as to the fifth cause of action, and is otherwise denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/4/2010

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KEITH B. LLOYD,

Plaintiff,

-against-

MICHAEL SHEN, ESQ., IAN FRANCIS WALLACE, ESQ., and MICHAEL SHEN & ASSOCIATES, P.C.,

Defendants.

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Index №.: 109287/07
Motion seq.: 004

DECISION AND ORDER[1]

CAROL R. EDMEAD, J.S.C.:

In a legal malpractice action, where the underlying case involved allegations that an orchid curator at the New York Botanical Garden (the "Garden") was subjected to a hostile work environment, and was discriminated against on the basis of his age, race, and disability, defendants Michael Shen, Esq., Ian Francis Wallace, and Michael Shen & Associates, P.C. (collectively, the "Law Firm") move for summary judgment, pursuant to CPLR 3212 and CPLR 3211, dismissing the complaint.

Background

Plaintiff started working at the Garden in 1984 and was fired in 2001. Plaintiff, who is African-American, claims that during his tenure, he was paid less and given less support staff than white curators of similar experience and responsibility (Lloyd Affidavit, at 4). Plaintiff also alleges that he was

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[1]The court thanks John Eckert, Temple University, Beasley School of Law, 2006, Law Clerk, Supreme Court, New York County Law Department, for his assistance with this decision.

subjected to acts of vandalism, and overtly racist harassment (*id.* at 6-7). Plaintiff further alleges that the Garden's refusal to provide him with the assistance of available and willing volunteers, and its insistence that he do menial labor which white curators were not required to do, caused him to injure both of his shoulders (*id.* at 8). Plaintiff was fired for taking unexcused leave after injuring his left shoulder (*see Lloyd v N.Y. Botanical Garden*, 2006 US Dist LEXIS 49066, *4 [SD NY 2004]).

The Law Firm represented plaintiff in a litigation entitled *Keith Lloyd v The New York Botanical Garden and Gregory Long* (United States District Court for the Southern District of New York, Docket No. 03-7557) (the "underlying action"). Plaintiff filed his complaint in the underlying action on September 24, 2003, alleging: (1) unlawful racial discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended (42 USC § 2000a, *et seq.*) (Title VII), the New York State Human Rights Law (Executive Law § 290, *et seq.*) ("NYSHRL"), and the New York City Human Rights Law (Administrative Code of the City of New York § 8-107) ("NYCHRL"); (2) unlawful age discrimination in violation of the Age Discrimination in Employment Act (29 USC § 621, *et seq.*) ("ADEA"), the NYSHRL, and the NYCHRL; (3) unlawful disability discrimination in violation of the Americans with Disabilities Act (42 USC § 12101, *et seq.*) ("ADA"), the NYSHRL,

and the NYCHRL; (4) violations of the Consolidated Omnibus Budget Reconciliation Act (29 USC § 1161 *et seq.*) ("COBRA"), and the Employee Retirement Income Securities Act (29 USC § 1140) ("ERISA"); (5) unlawful retaliation in violation of section 120 of the New York Workers' Compensation Law ("New York Workers' Compensation Law" § 120); and (6) hostile work environment in violation of Title VII and the ADEA.

On August 10, 2004, the District Court dismissed all claims against defendant Gregory Long ("Long") in the underlying action, as well as several claims against the Garden, which plaintiff withdrew (*Lloyd v New York Botanical Garden*, 2004 US Dist LEXIS 21961 [SD NY 2004]) (the "August 2004 Order"). Subsequent to the August 2004 Order, plaintiff's remaining claims were for race discrimination, age discrimination, and hostile work environment (*id.* at 6). By an order dated September 15, 2004 (*Lloyd v New York Botanical Garden*, 2004 US Dist LEXIS 18749 [SD NY 2004]) (the "September 2004 Order"), the District Court granted plaintiff leave to amend the complaint to assert a claim against the Garden and Long for racial discrimination in violation of 42 USC section 1981 (section 1981). The Law Firm never filed an amended complaint asserting section 1981 claims.

On July 6, 2006, the District Court dismissed all claims against Long because of plaintiff's failure to timely file and serve the amended complaint on Long (2006 US Dist LEXIS 49066 [SD

NY 2006]) (the July 2006 Order). The District Court, in the July 2006 Order, also granted the Garden's application for summary judgment on all claims asserted as against it. On July 5, 2007, plaintiff commenced this legal malpractice action.

Plaintiff's complaint asserted seven causes of action for legal malpractice. Previously, the Law Firm moved to dismiss plaintiff's complaint, and plaintiff cross moved for leave to amend the complaint. In an order dated March 31, 2008 (the "March 2008 Order"), this court dismissed the sixth and seventh causes of action in the proposed amended complaint submitted by plaintiff, granted plaintiff leave to amend the complaint, and deemed served the amended complaint in the proposed form, upon service of a copy of the order with notice of entry. In an order dated October 31, 2008 (the "October 2008 Order"), this court denied the Law Firm's second motion to dismiss, pursuant to CPLR 3211 (a) (1) and (7).

Here, the Law Firm moves for summary judgment pursuant to CPLR 3212 and 3211 (c),[2] once again asserting its entitlement to dismissal pursuant to CPLR 3211 (a) (7) because plaintiff fails to state a cause of action.

Discussion

"Summary judgment must be granted if the proponent makes 'a

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[2] Although CPLR 3211(c) permits the court to treat a CPLR 3211 motion as one for summary judgment upon notice to the parties, the Law Firm has also expressly moved for summary judgment pursuant to CPLR 3212.

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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

To prevail on a claim for legal malpractice, "a party must establish that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, that such negligence was a proximate cause of the loss in question, and that actual damages were sustained" (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007], citing *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Proximate cause requires a showing that "but for" the attorney's negligence, the plaintiff would have succeeded on the merits of the underlying action (*AmBase Corp.*, 8 NY3d at 434).

Plaintiff's first cause of action is based on the Law Firm's failure to file and serve his amended complaint asserting violations of section 1981 against the Garden and Long in the underlying action, while plaintiff's second cause of action is

based on the Law Firm's failure to plead violations of section 1981.

The Law Firm does not contest that it was negligent with respect to these causes of action. Instead, the Law Firm argues that plaintiff cannot prove proximate causation since plaintiff would have failed on the merits of his section 1981 claims. Specifically, the Law Firm argues that since section 1981 and Title VII claims are analyzed in the same way, and since the court dismissed plaintiff's Title VII claims, then the court would necessarily have also dismissed plaintiff's section 1981 claims. The Law Firm contends, moreover, that plaintiff is collaterally estopped from bringing these claims by the July 2006 Order, and the subsequent resolution of plaintiff's appeal by a consent order of dismissal issued by the United States Court of Appeals for the Second Circuit on October 26, 2007. In opposition, plaintiff argues that collateral estoppel is inapplicable, and that he had a viable section 1981 claim, which he lost through the negligence of the Law Firm.

The District Court's July 2006 Order stated that the September 2004 Order

> permitted plaintiff to amend his Complaint to add claims under [section 1981] against both Long and the Garden. Plaintiff never filed an Amended Complaint. Accordingly, this court will not consider any claim by plaintiff under § 1981 against either Long or the Garden.

(*Lloyd*, 2006 US Dist LEXIS 49066 at *6).

As this court previously acknowledged, in its October 2008 Order, section 1981 discrimination claims and Title VII discrimination claims are analyzed under the same standard (*see Whidbee v Garzarelli Food Specialties, Inc.*, 223 F3d 62, 69 [2d Cir 2000]). However, as the court previously noted, while the race discrimination claim under Title VII was dismissed on the merits by the District Court in the July 2006 Order, the hostile work environment claim under Title VII was dismissed on the basis of plaintiff's failure to exhaust his administrative remedies through the Equal Opportunity Commission ("EEOC"), *i.e.*, by failing to file a timely charge with the EEOC within 300 days of the alleged discriminatory acts (*Lloyd, 2006 US Dist LEXIS 49066* at *11-12).

In addition to being time-barred, the District Court held that because "[p]laintiff's administrative charge was not sufficient to put the EEOC on notice of possible claims based on hostile work environment" (*id.* at *18-20 [internal quotation marks and citations omitted]), plaintiff's Title VII hostile work environment claim was barred by the rule that "a plaintiff typically may raise in district court only those claims that either were included or are reasonably related to the allegations contained in his EEOC charge."

However, a plaintiff's failure to properly pursue

administrative remedies before the EEOC, "does not preclude him from instituting an action under § 1981" (*Goss v Revlon, Inc.*, 548 F2d 405, 407 [2d Cir 1976]). The statute of limitations for a section 1981 hostile work environment claim is four years (*see Jones v R.R. Donnelly & Sons Company*, 541 US 369 [2004]). Clearly, plaintiff's section 1981 hostile work environment claim would not have been time-barred. Moreover, the continuing violation doctrine may have allowed plaintiff to submit evidence of a hostile work environment dating back to prior to the statutory period, including the placement of dead rats on his work equipment in 1989, the vandalization of his car in an area accessible only to Garden employees in 1991, the vandalization of his locker in 1995, and the placement of two nooses in plaintiff's work area in 1995 (Plaintiff's affidavit at 6-7; plaintiff's complaint in the underlying action, paragraphs 57-60).

Under the continuing violation doctrine "the plaintiff is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period" (*Cornwell v Robinson*, 23 F3d 694, 704 [2d Cir 1994]). A continuing violation exists "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a

discriminatory policy or practice" (*id.*).

Further, collateral estoppel is not applicable here. This doctrine precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (*Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]).

There are two requirements which must be satisfied before collateral estoppel is invoked: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

Here, the section 1981 hostile work environment claim that the Law Firm failed to bring does not present an identical issue to the Title VII race discrimination claim which the District Court dismissed in the July 2006 Order. In order to establish a hostile work environment claim under section 1981, "a plaintiff must show that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of [his] employment were thereby altered" (*Fincher v Depository Trust and Clearing Corp.*, 604 F3d 712, 723-724 [2d Cir 2010] [internal quotation marks and citation omitted]). "A hostile working environment is shown when the incidents of

harassment occur either in concert or with a regularity that can reasonably be termed pervasive" (*Lopez v S.B. Thomas, Inc.*, 831 F2d 1184, 1189 [2d Cir 1987]). Typically, a plaintiff must show "more than a few isolated incidents of racial enmity" (*Williams v County of Westchester*, 171 F3d 98, 100-01 [2d Cir 1999] [per curiam] [internal quotation marks and citation omitted]), although a hostile work environment can also be established through evidence of a single incident of harassment that is "extraordinarily severe" (*Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 [2d Cir 2000]).

In order to bring a claim for race discrimination under Title VII, a plaintiff must show that: (1) he belongs to a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent (*Terry v Ashcroft*, 336 F3d 128, 138 [2d Cir 2003]). While this standard may be coterminous with the standard for race discrimination under section 1981 (*see Spencer v International Shoppes, Inc.*, 2010 WL 1270173, *10, 2010 US Dist LEXIS 30912, 29 [ED NY 2010]), it is certainly not identical to the standard used to analyze claims of hostile work environment under either Title VII or section 1981. Moreover, different facts may be used to support a hostile work environment claim. For example, the placement of a noose in plaintiff's work

area may qualify as an extraordinarily severe incident of harassment, establishing a hostile work environment by itself, while it may be less essential to a claim for race discrimination. As such, collateral estoppel is inapplicable here and the Law Firm fails to make a *prima facie* showing of entitlement to summary judgment with respect to plaintiff's first and second causes of action. Thus, the branch of the Law Firm's motion which seeks summary judgment dismissing plaintiff's first and second causes of action is denied.

Plaintiff's third cause of action alleges that the Law Firm was negligent for failing to follow Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and Local Rule 56.1. Plaintiff's fourth cause of action alleges that the Law Firm was negligent for failing to provide substantive evidence in the form of a proper Rule 56 separate statement of facts. Specifically, plaintiff alleges that the Law Firm "simply failed to put forward the evidence in [its] possession to oppose the summary judgment motion" (Amended Complaint, at paragraph 44).

In the July 2006 Order, the District Court wrote that plaintiff's failure to follow these rules caused the Court to deem admitted the majority of facts asserted by the Garden:

> Plaintiff has failed to meet his obligations under Local Rule 56.1. Under Local Rule 56.1(b), a party opposing summary judgment must include a statement with numbered paragraphs corresponding to the movant's statement. Under Local Rule 56.1(d), each statement of fact must be followed

> by citation to evidence which would be admissible set forth as required by Federal Rule of Civil Procedure 56(e). Plaintiff does not dispute the [m]ajority of the paragraphs in defendants' Rule 56 Statement, and the majority of plaintiff's responses do not contain any citations to the record; instead, plaintiff merely asserts, "Plaintiff disputes the facts asserted in paragraph [] of Defendants' statement of facts." *See* Pl.'s Rule 56 Statement PP 16, 19, 21, 23, 24, 26, 17 and 19). Facts alleged by defendants tha[t] are not properly refuted by plaintiff are "deemed admitted" for purposes of adjudicating this motion

(*Lloyd*, 2006 US Dist LEXIS 49066 at 2 n 1, quoting *Millus v D'Angelo*, 224 F3d 137, 138 [2d Cir 2000]).

As with its failure to bring claims under section 1981, the Law Firm does not contest that it negligently failed to conform to the FRCP 56 and Local Rule 56.1. Instead, the Law Firm again argues that plaintiff cannot prove proximate causation, contending that, despite the insufficient Rule 56 Statement, the District Court nevertheless carefully considered all of the evidence and properly concluded that the Garden was entitled to summary judgment. The Law Firm does not cite to anywhere in the District Court's July 2006 Order which would suggest that it overlooked the insufficiency of plaintiff's Rule 56 Statement, and searched the record on its own. Instead, the Law Firm cites to cases in other jurisdictions which suggest that courts have discretion to search the record when faced with an insufficient statement of facts opposing a motion for summary judgment (*see e.g. Arias v Robinson,* 2010 WL 1265079, *1 n 1, 2010 US Dist

LEXIS 29253, *1 n 1 [ND Ga 2010] [noting that "[t]hough Plaintiff failed to file a response to the Statement of Material Facts as required by Local Rule 56.1B, the Court has taken into account Plaintiff's Affidavit. . .submitted with his Response to the Motion for Summary Judgment"]).

The Law Firm also contends that, since plaintiff was not entitled to any relief, the failure to submit a sufficient statement of facts was not a proximate cause of plaintiff losing his case against the Garden.

Without addressing plaintiff's opposition, which offers facts which were available, but which the Law Firm failed to assert, it is clear from the July 2006 Order that the Law Firm's failure to submit a sufficient statement of facts was not overlooked by the District Court. Instead, the court deemed admitted the majority of the Garden's statement of facts. As discussed above, the July 2006 opinion does not preclude the possibility that plaintiff could have succeeded on a section 1981 hostile work environment claim that the Law Firm never brought. Moreover, it is unclear, and a question of material fact exists, as to whether a proper Rule 56 Statement which included all of the relevant facts which were available to the Law Firm would have changed the outcome with regard to plaintiff's race discrimination and age discrimination claims. As such, the Law Firm fails to make a *prima facie* showing of entitlement to

summary judgment dismissing plaintiff's third and fourth causes of action, which relate to the Law Firm's failure to submit a sufficient Rule 56 Statement. Thus, the branch of the Law Firm's motion which seeks summary judgment dismissing plaintiff's third and fourth causes of action is denied.

Plaintiff's fifth cause of action alleges that the Law Firm negligently failed to argue that Long was a COBRA administrator, which resulted in the dismissal of plaintiff's ERISA and COBRA claims. The District Court's August 2004 Order stated that "directors of a corporate plan cannot be held liable under COBRA or ERISA unless they qualify as an administrator" and "[o]nly the plan administrators and trustees of the plan in their capacity as such may be held liable under COBRA and ERISA" (*Lloyd*, 2004 US Dist LEXIS 21961 at *6 n 2 [internal quotation marks and citations omitted]).

The Law Firm argues that this omission was not negligent since Long was, in fact, not a COBRA administrator. The Law Firm submits the deposition of Sally Gavin, administrator of the Garden's health and insurance plans. Gavin's testimony tends to indicate that Long was not a COBRA administrator:

> Q: Who is the administrator of the health and insurance plans?
> A: I am the plan administrator but I do not do the daily work on the plan.
> Q: Who does?
> A: Who does what?
> Q: The daily administration work?
> A: The benefit coordinator does and the benefit

coordinator reports to the director of human resources.

...

Q: During the last five years of Mr. Lloyd's employment do you know who the benefit coordinator was?
A: Last five years of his employment Delia Witley, Vestena Stuckey, Iris Rochae, Evelyn Jackson.
Q: Would those people have reported to Karen Yesnick?
A: Yes.
Q: Would Karen Yesnick have reported to you?
A: Yes.
Q: Under the rubric administration of health and insurance plans would notifying persons of their COBRA rights would that come under that rubric administration of health insurance plans?
A: Yes.

(Gavin Deposition, at 66-68).

The Law Firm makes a *prima facie* showing of entitlement to judgment on the issue of whether it was negligent for failing to argue that Long was a COBRA administrator, as it clearly cannot be negligent for failing to argue something that is not factually accurate. In his opposition papers, plaintiff does not make any arguments with regard to his fifth cause of action. As such, plaintiff's fifth cause action, alleging that the Law Firm negligently failed to argue that Long was a COBRA administrator, is dismissed.

Conclusion

Based on the foregoing, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted as to the fifth cause of

action, and is otherwise denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 4, 2010

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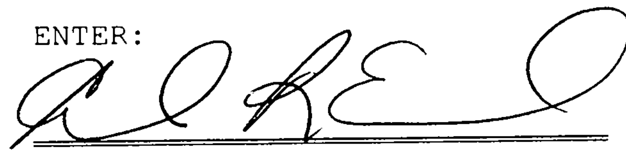

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD