

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

EDWIN LOKE DINAH,
Plaintiff,

Index No.: 2443/05

- against -

Motion Date: 8/31/05

SALZMAN ELECTRIC COMPANY, INC., JOHN
VAN BLERKOM, LARRY SAZMAN, PETER
"DOE", and SILVERLINING INTERIORS,
INC.,

Motion No.: 10

Defendants.

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The following papers numbered 1 to 13 on this motion:

	<u>Papers Numbered</u>
Silverlining Interior's, Inc.'s Notice of Motion-Affirmation-Memorandum of Law Affidavit(s)-Service-Exhibit(s)	1-5
Plaintiff's Notice of Cross-Motion and Affirmation in Opposition-Memorandum of Law Affidavit(s)-Exhibit(s)	6-10
Silverlining Interior's Inc.'s Reply Affirmation Memorandum of Law-Exhibit(s)	11-13

By notice of motion, defendant, Silverlining Interiors, Inc., seeks an order of the Court, pursuant to CPLR §3211(a)(2) and/or CPLR §3211(a)(7), dismissing plaintiff's complaint as to them.

Plaintiff opposes and cross-moves for an order pursuant to CPLR §3025(b), allowing plaintiff to amend the complaint and amend the caption.

Defendant files a reply to plaintiff's opposition.

The underlying cause of action herein, is a claim by plaintiff, Edwin Loke Dinah, that he was a victim of racial discrimination, perpetrated by defendants as prohibited by NYS Executive Law, Article 15, §296 (Human Rights Law) and the NYC Administrative Code §8-502, et seq.

Plaintiff, Edwin Loke Dinah, is a black male, born in Guyana, South America. At the time of the alleged discriminatory acts, plaintiff, an electrician, was employed by defendant, Salzman Electric Co., Inc.

In or about October 2004, defendant, Salzman Electric Co., Inc., (Salzman) was engaged as a sub-contractor for defendant, Silverlining Interiors, Inc. (Silverlining) to do work on a project located in New York County.

On or about October 19, 2004, while working at a project site that was one of the Silverlining projects, plaintiff became embroiled in an argument with, and then an altercation with, one of defendant Silverlining's white male employees. The next day, when he called in sick, plaintiff was informed he was no longer welcome at any of Silverlining's job sites. Plaintiff worked two more days for Salzman and then, he maintains, he was repeatedly told by Salzman, that they had no work for him.

Defendant Silverlining, had no direct control over plaintiff's employment with Salzman. Silverlining did not set wages, collect taxes, provide insurance or any other benefits for plaintiff. Plaintiff maintains, however, that Silverlining's instruction to Salzman, that plaintiff was no longer allowed on any of their projects constituted defacto deprivation of employment since the majority of Salzman's projects were with Silverlining.

Defendant, Silverlining, maintains that the action against them must be dismissed pursuant to CPLR §3211(a)(2) and/or CPLR §3211(a)(7) on the grounds that defendant Silverlining is not an employer as contemplated by the NYS Human Rights Law (NYS Executive Law Art. 15, §256, or the NYC Administrative Code §8-502, et seq., under which plaintiff brings this complaint (State Division of Human Rights v. GTE, 104 AD2d 1082, 1083 [4th Dep't. 1985])). Moreover, defendant adds, that even if the Court were to find Silverlining is plaintiff's employer for purposes of

enforcing the statutory prohibitions against racial discrimination, plaintiff fails to make out a prima facie case for relief. (Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 324 [2004]).

Plaintiff maintains that defendant Silverlining is plaintiff's "employer" within what plaintiff characterizes as a broad definition applied by the Federal courts, and that such broad application should also be applied in these circumstances and also cites Forrest v. Jewish Guild for the Blind (3 NY3d 295, 305), particularly FN3, as support for such, which states:

"The standards for recovery under the New York State Human Rights Law (see Executive Law §296) are the same as the federal standards under Title VII of the Civil Rights Act of 1964 (42 USC §2000e et seq.; see Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. Of Human Rights, 100 NY2d 326, 330 [2003]). Thus, '[b]ecause both the Human Rights Law and Title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal' (Matter of Aurecchione v. New York State Div. Of Human Rights, 98 NY2d 21, 26 [2002] [citation omitted]). Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards."

Plaintiff maintains that Silverlining Interiors, Inc., also qualifies as a "joint employer," using the same federal standards and that plaintiff has successfully plead all four elements of a prima facie racial discrimination case. Id.

The case upon which both defendant and plaintiff rely, Forrest v. Jewish Guild for the Blind, (3 NY3d 295 [2004]) involved a claim by an African American female music therapist who alleged that she was discriminated against by her employer on the basis of race and color in violation of the NYS Human Rights Law (Executive Law §296) and the NYC Administrative Code

(§8-107(1)[a](7)). Id., at 304.

In that case, the Court of Appeals affirmed the Appellate Division's reversal of the trial court's decision and granted defendant's motion for summary judgment, dismissing the case. Id.

In stating the standard, the Court declared that "...[a] plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination." Id., at 305. It is this sentence in the opinion which was footnoted, as mentioned above, and it is this footnote upon which plaintiff relies to suggest that this Court must apply the "federal standard" for determining the definition of "employer."

In this Court's opinion, such reliance is misplaced. It is clear to this Court that the portion of the opinion upon which plaintiff relies, clearly refers to the substantive elements of a prima facie claim for racial discrimination. Id., at 305. The sentence which immediately follows the footnote explains: "...plaintiff must show that (1) she is a member of protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." Id. (citations omitted). At no point in the Court's analysis is there a discussion of definitions, or the applicability of the statute to defendants who are not the direct employers of the plaintiff.

Moreover, even if this Court agreed that the "federal standard" should be applied to determine whether or not Silverlining is an "employer" for purposes of the statute, plaintiff would fail to meet its burden.

Plaintiff relies on the case of Sibley v. Wilson (488 F.Supp. 1338 [Court of Appeals, District of Columbia, 1973]) for the proposition that Silverlining can be considered plaintiff's employer for purposes of the application of Title VII. In that action, a private male nurse, brought suit against a hospital, where he alleged that the hospital refused to refer him for work with female patients. Id.

Since 1973, numerous federal courts have continued to struggle with the issue of when an entity that is not plaintiff's direct employer can still be considered an "employer" for purposes of falling within the coverage of the statute.

In Anderson v. Pacific Maritime Association (336 F2d 924, 930 [9th Circuit, Court of Appeals 2003]) the Ninth Circuit pointed out in its post "Sibley" analysis that while the goal of Title VII was to equalize access to job opportunities, and that Title VII did not explicitly require a direct employer relationship, "...that did not mean that no (emphasis added) relationship was required for a claim to fall under Title VII." Id. at 930. "The Court stated: We think it significant that [Title VII] has addressed itself directly to the problems of interference with the direct employment relationship by labor union and employment agencies - - institutions which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties." Id.

Defacto, or indirect employer liability for putative Title VII defendants has been found to exist when the defendant "...is the 'real' employer for all intents and purposes, including Title VII liability (Kerr v. WGN, 229 F. Supp2d 880, 886 [ND, Ill. 2002]).

Putative defendants were found to have defacto liability in circumstances such as where "an entity is making behind the scenes decisions about material terms of employment such as hiring, firing and rate of pay; or where "an indirect employer had ultimate responsibility for hiring and firing decisions"; or where a parent corporation directed a subsidiary corporation to violate anti-discrimination laws" Id. (citing EEOC v. State of Illinois, 69 F3d 167, 171; Pelech v. Klaff-Joss, LP, 815 F.Supp. at 263; Papa v. Katy Indus, Inc., 166 F3d 937, 941 [7th Circuit 1999]).

In this circumstance, and even viewing the facts in a light most favorable to plaintiff (Sopesis v. Solomon, 199 AD2d 491, 493 [2nd Dep't. 1993]), he has failed to allege sufficient facts to support a claim that defendant Silverlining exercised such control as to constitute a defacto or indirect employer. Requesting that plaintiff not be sent to any of their project sites, without more, is not enough to support such a claim (Kerr v. WGN, supra. at 886.

Nor has plaintiff demonstrated any facts to support a theory that Silverlining and Salzman Electric are "joint employers" for purposes of Title VII enforcement. ("Relevant factors include commonality of hiring, firing, disciplines, pay, insurance, records and supervision" (NLRB v. Solid Waste Servs., 38 F3d 93, 94 [2nd Circuit 1994], quoted in Woodman v. WWOR-TV, Inc., 2005 US App. Lexis 11060 at *54 [2nd Circuit 2005])).

For all of the foregoing reasons, this Court concludes that Silverlining Interiors, Inc., is not an "employer" within the scope of the NYS Humans Rights Law (NYS Executive Law, Article 15 §296) or the NYC Administrative Code, §8-502. The Court, therefore, lacks jurisdiction over the subject matter of this cause of action, and the pleading fails to state a cause of action cognizable under the law. CPLR §3211(a)(2)(7).

In light of this Court's finding above, it is unnecessary to determine the second branch of defendant Silverlining's motion.

Plaintiff's cross-motion to amend the pleadings is denied in part and granted in part as follows:

That portion of the motion which seeks to amend the complaint is denied. That portion of the motion which seeks to amend the caption to change "Larry Sazman" to "Larry Zassman" and to change "Peter Doe" to "Peter Danielsson" is granted.

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

- - - - - x

EDWIN LOKE DINAH,

Plaintiff,

Index No. 2443/05

- against -

SALZMAN ELECTRIC COMPANY, INC.,
JOHN VAN BLERKOM, LARRY ZASSMAN,
PETER DANIELSSON, and SILVERLINING
INTERIORS, INC.,

Defendants.

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Plaintiff shall serve a copy of this order with notice of

entry on all parties to the action, so amended, the Clerk of Queens County, and at the time of the filing of a note of Issue on the Clerk of the Trial Term Office.

Defendants are given leave to serve an amended answer asserting any cross claims and counterclaims necessitated by the amended summons and complaint within thirty (30) days after service of a copy of the order to be entered hereon; and, it is further

ORDERED, that defendant's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant, Silverlining Interiors, Inc., and the Clerk is directed to enter judgment in favor of said defendant; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
October 5, 2005

JOSEPH P. DORSA
J.S.C.