



Azadpour v. Blue Sky Sports Center of Keller LP et al

2018 | Cited 0 times | N.D. Texas | August 14, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION MOSTAFA ARAM AZADPOUR, § Plaintiff, § § v. § Civil Action No.
3:17-CV-1335-N-BK

§ BLUE SKY SPORTS CENTER § OF KELLER, et al, § Defendants. §

FINDINGS, CONCLUSIONS AND RECOMMENDATION

OF THE UNITED STATES MAGISTRATE JUDGE Pursuant to Special Order 3 and 28 U.S.C. 636(b)(1)(B)&(C) Motion to Dismiss, Doc. 44, is before the Court for findings of fact and a recommended disposition. As discussed herein Motion to Dismiss should be GRANTED.

I. PROCEDURAL HISTORY In May 2017, Plaintiff filed a pro se complaint against his former employer and several for Defendant Blue Sky Sports as an indoor soccer referee from April 2015 until he was

terminated in July 2015. Doc. 3 at 1-2; Doc. 3 at 6. Plaintiff alleged that he was (1) discriminated against and terminated based on his gender and national origin; and (2) retaliated against after (a) complaining that he had wrongfully been accused of gender discrimination by

that he might sue his employer. Doc. 3 at 1-2; Doc. 3 at 11-14.

, with the exception of his retaliation claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 10; Doc. 19; Doc. 29. The Defendants, but denied the motions to dismiss Title VII discrimination claims against Defendants Blue Sky Sports Center of Keller, LP; Blue Sky Sports Center of Euless, LP; and Blue Sky Keller Management, Inc. (collectively, the Blue Sky Entities 1

Doc. 38 at 4-5, 7; Doc. 41. The Court granted Plaintiff leave to amend his complaint to attempt to sufficiently plead his dismissed claim for defamation against all Defendants. Doc. 38 at 4-5, 7; Doc. 41. In his First Amended Complaint, Doc. 42, Plaintiff again alleges that the Blue Sky Entities discriminated against him on the basis of his gender and national origin and re-asserts his retaliation claim. 2

Doc. 42 at 2; Doc. 42 at 12-15. In addition, Plaintiff brings defamation claims against all Defendants.



Azadpour v. Blue Sky Sports Center of Keller LP et al

2018 | Cited 0 times | N.D. Texas | August 14, 2018

Specifically, Plaintiff alleges that the Trautman Defendants called players, timekeepers, and Plaintiff himself. Doc. 42 at 13, 16. Plaintiff bases his defamation claim against the Blue Sky Entities on (1) their statements verbally and via email, as well as and the letter-response of Blue Sky's attorney to the Equal Employment and during its investigation of Doc. 42 at 15-18. Title VII retaliation claim. Doc. 44 at 7 n.1, 10.

1 Jane Naumann because Plaintiff had abandoned his claims against them. Doc. 38 at 2-3; Doc. 41. 2 Although Plaintiff purports to incorporate by reference the entirety of his original complaint, he instant First Amended Complaint, (2) replace its body in its entirety with the body of instant First amended Complaint Doc. 42 at 1 of his original complaint with the amended complaint, the Court only considers the allegations in his First Amended Complaint. See *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985) (noting general rule that an amended complaint ordinarily supersedes the original and renders it of no legal effect unless the amended complaint specifically adopts the earlier pleading).

II. APPLICABLE LAW A plaintiff fails to state a claim for relief under Rule 12(b)(6) when the complaint does Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) allegations on every material point necessary to sustain a recovery . . . or contain allegations

from which an inference fairly may be drawn that evidence on these material points will be Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995). Although pro se complaints are held to a more lenient standard, plaintiffs must still plead factual See Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002); see also Twombly, 550 U.S. at 555. A court ruling on a Rule 12(b)(6) motion may rely on the complaint, documents properly attached to the complaint or incorporated into the complaint by reference, and matters of which a court may take judicial notice. Randall D. Wolcott, M.D., P.A. v. Sebelius, 635 F.3d 757, 763 (5th Cir. 2011).

III. ARGUMENTS AND ANALYSIS 1. Employment Discrimination Defendants argue that (1) Plaintiff fails to plead any facts to support discrimination on the basis of his national origin, Doc. 44 at 18-19; and (2) because Plaintiff fails to allege sufficient facts demonstrating that a similarly situated female employee was treated more favorably than he was under the same circumstances, his gender discrimination claim should be dismissed pursuant to Rule 12(b)(6), Doc. 44 at 19-21. In his response, Plaintiff does not address the sufficiency of his factual allegations in his First Amended Complaint, but argues that he is not required to plead a prima facie case of discrimination at the dismissal stage. Doc. 45 at 6. Title VII makes it unlawful for employers to discriminate against individuals with respect 42 U.S.C. § 2000e-2(a)(1). A plaintiff need not plead

specific facts establishing a prima facie case of employment discrimination to survive a Rule 12(b)(6) motion to dismiss. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). *Id.*; see also *Meadows v. City of Crowley* (holding that the plaintiff was not exempt from alleging facts sufficient to establish the elements of her discrimination claims) (emphasis in original). To state a claim for discrimination,



Azadpour v. Blue Sky Sports Center of Keller LP et al

2018 | Cited 0 times | N.D. Texas | August 14, 2018

a plaintiff must allege that he or she because of their protected status. *Raj v. La. State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013) (quoting *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004) decisions such as *McCoy v.*

City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007) (per curiam) (citation and internal quotation marks omitted). In this case, Plaintiff has failed to plead facts that plausibly allege he suffered an adverse he was terminated because two female referees

complaine Doc. 42 at 13. However, this does not constitute an allegation that the Blue Sky Entities te either his gender or his national origin. *Raj*, 714 F.3d at 331; cf. *Williams v. City of Richardson*, No. 3:16-CV-2944-L, 2017 WL 4404461, at *6 (N.D. Tex. Sept. 8, 2017) (Toliver, J.) (recomme because of original), adopted by 2017 WL 4351535 (N.D. Tex. Sept. 30, 2017) (Lindsay, J.).

Moreover, Plaintiff has not pointed to any similarly situated female or person of different national origin who was treated more favorably by the Blue Sky Entities than he was. 3

See generally Doc. 42. the Blue Sky the Blue Sky Entities treated similarly situated female employees more favorably, he fails to raise his right to relief above a speculative level. See *Raj*, 714 F.3d at 331 VII discrimination claim based on gender and national origin should be dismissed.

2. Defamation To state a claim for defamation, a non-public plaintiff must plead that the defendant: (1) published a false statement of fact to a third party; (2) the statement was defamatory concerning the plaintiff; (3) the defendant acted negligently regarding the truth of the statement; and (4) in some instances, the plaintiff incurred damages. See *Patton v. Adesa Texas, Inc.*, 985 F. Supp. 2d 818, 822 (N.D. Tex. 2013) (holding that employee had stated a slander claim where she alleged that co-workers had falsely accused her of making racist remarks in order to have her terminated); *Copeland v. D & J Const. LLC*, No. 3:13-CV-4432-N-BH, 2015 WL 512590, at *5- 6 (N.D. Tex. Feb. 6, 2015) (Godbey, J.) (finding that statements contained in text messages stated a claim for defamation); *In re Perry*, 432 B.R. 215, 267 (S.D. Tex. 2010) (holding that an

purposes) (citation omitted).

3 Doc. 42-1 at 18-19.

A. Blue Sky Entities The Blue Sky Entities statements alleged to be defamatory are entitled to absolute privilege - Doc. 44 at 12-13. Plaintiff responds that the

EEOC investigation was not quasi- his complaint. Doc. 45 at 5.

Under Texas law, c



Azadpour v. Blue Sky Sports Center of Keller LP et al

2018 | Cited 0 times | N.D. Texas | August 14, 2018

Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 912 (1942). This privilege also applies to - Matta v. May, 118 F.3d 410, 415 (5th Cir. 1997) -judicial proceedings require an ALJ, proceedings are considered to be quasi-judicial if the person or entity presiding over the Dick v. J.B. Hunt Transp., Inc., 772 F. Supp. 2d 806, 823 (N.D. Tex. 2011) (holding that proceedings before the EEOC are quasi-judicial in nature); see also Matta v. May, 888 F. Supp. 808, 813 (S.D. Tex. 1995) - Thus, the EEOC proceedings in this case are properly considered quasi-judicial.

As the Blue Sky Entities published the allegedly defamatory statements in defending proceeding. Russell v. Clark, 620 S.W.2d 865, 870 (Tex. Civ. App. Dallas 1981) (privilege

by the Blue Sky Entities during the EEOC proceeding m should be dismissed.

B. The Trautman m is time- barred and should be dismissed on that basis. Doc. 44 at 13-14. In response, Plaintiff argues that the Trautman Defendants waived their statute of limitations defense by failing to raise it in their first motion to dismiss, Doc. 29, or in their reply brief, Doc. 32. Doc. 45 at 3-4. As an initial matter, Defendants did not waive their statute of limitations defense by failing to raise it in the briefing on their first motion to dismiss. Federal Rule of Civil Procedure 12(g) cept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that FED. R. CIV. P. 12. The referenced exception, Rule 12(h)(2), allows a party to raise a 12(b)(6) motion: (a) in any pleading allowed or ordered under Rule 7a; (b) by motion under Rule 12(c); or (c) at trial. FED. R. CIV. P. 12(h)(2). Thus, taken together, Rule 12(h)(2) specifically exempts motions to dismiss for failure to state a claim from the consolidation requirement of Rule 12(g), therefore preserving defense from waiver. See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 141 (5th Cir. 2007) (holding that Rule 12(h)(2) excepts motions to dismiss for failure to state a claim from the consolidation requirement); see also MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. 3:02-CV-2727-G, 2004 WL 833595, at *5 (N.D. Tex. Apr. 19, 2004) (Fish, C.J.) Read together, Rule 12(g) exempts a Rule 12(b)(6) defense from its consolidation requirement, and Rule 12(h)(2) (citation omitted). limitations argument is not waived, the Court now considers -barred. In Texas, defamation actions have a one-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.002(a). The statute of limitations Jackson v. Texas A & M Univ. Sys., 975 F. Supp.

943, 945 (S.D. Tex. 1996) (citing Dwyer v. Sabine Mining Co., 890 S.W.2d 140, 142 (Tex. App. Texarkana 1994)). Based on the allegations in First Amended Complaint, the cause of action began to run Doc. 42 at 13. Plaintiff filed his original complaint on

May 19, 2017. Doc. 3 s is therefore barred by the one-year statute of limitation and, accordingly, should be dismissed. 4 3. Leave to Amend

Ordinarily, plaintiffs should be granted leave to amend their complaint prior to dismissal. See Brewster v. Dretke, 587 F.3d 764, 767-68 (5th Cir. 2009) pro se Plaintiff already has amended his



Azadpour v. Blue Sky Sports Center of Keller LP et al

2018 | Cited 0 times | N.D. Texas | August 14, 2018

complaint once, so it appears that he has pled his best case at

this point. See *Jones v. Greninger*, 188 F.3d 322, 327 (5th Cir. 1999) (per curiam) (dismissal with prejudice of a pro se case is appropriate if the court determines that the plaintiff has alleged

4 The Court does not reach the Trautman Defendants additional ground for dismissal, to wit, that the allegedly defamatory statements constitute their opinions, as the defamation claim may be disposed of based on the statute of limitations. his best case). Allowing Plaintiff leave to amend his complaint again, with respect to his Title VII discrimination claim and defamation claims, would be futile, cause needless delay, and waste Accordingly, Plaintiff should not be granted leave to amend his complaint a second time.

IV. CONCLUSION For the reasons stated above, Defendants Motion to Dismiss, Doc. 44, should be GRANTED Title VII retaliation claim against the Blue Sky Defendants, should be DISMISSED WITH PREJUDICE.

SO RECOMMENDED on August 14, 2018.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). To be specific, an objection must identify the finding or recommendation to which objection is made, state the basis for the objection, and indicate where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See *Douglass v. United*, 79 F.3d 1415, 1417 (5th Cir. 1996).

