

At an I.A.S. Trial Term, Part ~~2~~ of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 19 day of March 2010

P R E S E N T :

Hon. Francois Rivera
Justice

Eugene Gray

Plaintiff(s)

Cal. No. 19

Index No. 46027/07

- against -

Volmar Construction Inc

Defendant(s)

The following papers numbered 1 to read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed <u>Affid. Michael McDermott, Dimitrios Gykos, Artemis Marina Kisi</u>	①
Answering Affidavit (Affirmation) <u>Todd Krawand, Affid Eugene Gray, Affid Toston Gray</u>	②
Reply Affidavit (Affirmation) <u>Affirm Michael McDermott</u>	③
_____ Affidavit (Affirmation)	_____
Pleadings - Exhibits	_____
Stipulations - Minutes	_____
Filed Papers	_____

On the papers and exhibits submitted, and upon hearing oral argument, for the reasons stated more fully on the record by Honorable Francois Rivera, J.S.C., on March 19, 2010, Defendant's motion for summary judgment is denied because it has not offered competent evidence to sustain its burden on the motion of demonstrating a legitimate, non-discriminatory reason for Plaintiff's termination.

For Clerks use only

MG

MDX

Motion Seq. #

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ENTER
J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.



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1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF KINGS CIVIL TERM: PART 52

2 -----X
3 EUGENE GRAY,

3
4 PLAINTIFF,

4 INDEX #
5 -against- 46027/2007
6 Motion

7 VOLMAR CONSTRUCTION,

8 DEFENDANT.

9 -----X

9 Supreme Courthouse
10 360 Adams Street
10 Brooklyn, New York 11201
11 March 19, 2010

11 B E F O R E:

12 THE HONORABLE FRANCOIS RIVERA,
13 Justice of the Supreme Court

14 A P P E A R A N C E S:

15 LAW OFFICE OF TODD J. KROUNER
16 Attorneys for the Plaintiff
16 140 Bedford Road
17 Pleasantville, New York 10570
17 BY: TODD J. KROUNER, ESQ.
18 and
18 BY: DIANA M. CARLINO, ESQ.

19 GEORGOULIS & ASSOCIATES, PLLC.
20 Attorneys for the Defendant
20 45 Broadway
21 New York, New York 10006
21 BY: MICHAEL McDERMOTT, ESQ.

22
23 SUSAN K. WRIGHT
23 Senior Court Reporter

24
25

1 THE CLERK: Number nineteen on the motion
2 calendar, Eugene Gray versus Volmar Construction, Inc.

3 COURT OFFICER: Counselors, please state your
4 appearances for the record.

5 MS. CARLINO: Diana Carlino and Todd Krouner
6 for plaintiff.

7 THE COURT: You have to speak a little
8 louder.

9 MS. CARLINO: I'm sorry. Diana Carlino and
10 Todd Krouner for Plaintiff Eugene Gray.

11 THE COURT: Carlino is it?

12 MS. CARLINO: Yes.

13 THE COURT: Who's that?

14 MS. CARLINO: Yes, I'm sorry. I said Todd
15 Krouner.

16 THE COURT: He has to speak for himself.

17 MR. KROUNER: Forgive me, your Honor. Todd
18 Krouner, Law Office of Todd J. Krouner for the
19 plaintiff.

20 THE COURT: Could you spell your last name
21 please.

22 MR. KROUNER: K-R-O-U-N-E-R.

23 THE COURT: So your plaintiff has two
24 lawyers.

25 Counsel?

1 MR. McDERMOTT: Good morning, your Honor,
2 Michael McDermott for Volmar Construction, movant.

3 THE COURT: Is your name on any of these
4 papers?

5 MR. McDERMOTT: Well, yes, I signed all the
6 papers. But Georgoulis is the firm. My name is
7 Michael McDermott.

8 THE COURT: That's okay. In case I publish
9 it, I want to put your name on it. I want to spell it
10 right.

11 MR. McDERMOTT: It's Michael,
12 M-C-D-E-R-M-O-T-T.

13 THE COURT: Did you do the affirmation?

14 MR. McDERMOTT: Yes, all the papers.

15 THE COURT: Who is the movant?

16 MR. McDERMOTT: I am, your Honor. I'm not
17 sure if the Court has the reply papers which would have
18 been filed this morning by service.

19 THE COURT: I do. I have a reply
20 affirmation.

21 MR. McDERMOTT: Perfect.

22 THE COURT: All right, so what are you
23 seeking and why?

24 MR. McDERMOTT: Summary judgment, your Honor.
25 Volmar Construction is a construction firm here in

1 Brooklyn, about medium size. They employed plaintiff
2 on a public job in New Jersey. Now plaintiff is suing
3 for discrimination.

4 The story is this, your Honor: Plaintiffs
5 brother was working at Volmar.

6 THE COURT: Can I stop you for one second?

7 MR. McDERMOTT: Certainly.

8 THE COURT: So we're not saying that -- I
9 mean, it's a recognized cause of action. Substantively
10 I can recognize this cause of action. You're not
11 saying they failed to state a cause of action. You're
12 saying he's not going to win because you can prove that
13 you're not liable; is that correct?

14 MR. McDERMOTT: That's correct, your Honor.

15 THE COURT: So, one, he works for you.

16 MR. McDERMOTT: Or did work.

17 THE COURT: And two, he doesn't work anymore.

18 MR. McDERMOTT: That's correct.

19 THE COURT: Was that your idea or his?

20 MR. McDERMOTT: Volmar's idea, your Honor.

21 THE COURT: And there's a basis for his
22 termination?

23 MR. McDERMOTT: Lack of work.

24 THE COURT: I'm sorry?

25 MR. McDERMOTT: Lack of work. He was laid

1 off.

2 THE COURT: And did you see their opposition?

3 MR. McDERMOTT: Yes.

4 THE COURT: Does Mr. Gray have a different
5 reason for being laid off that he's swearing to?

6 MR. McDERMOTT: He claims he was
7 discriminated against for two reasons. He's black.
8 And his last day of work was May 14, 2005. He had an
9 accident. He took off about three weeks. But by that
10 time, the project was winding down and --

11 THE COURT: So what is your nondiscriminatory
12 basis for discharging him that somebody's swearing to?

13 MR. McDERMOTT: There's two reasons. The
14 project was winding down. This was the Newark Penn
15 Station New Jersey public job there, train station. So
16 the project was winding down and Mr. Gray was a
17 construction laborer. So they just needed fewer
18 laborers. But also at the same time, Volmar was
19 undergoing a change in its business approach.

20 THE COURT: Yes.

21 MR. McDERMOTT: Plaintiff was a direct
22 employee of Volmar and Volmar was the general
23 contractor on the job. So Volmar had started employing
24 subcontractors to perform all sorts of tasks. Laborer
25 tasks included.

1 So there's two things. The project is
2 winding down, but Volmar is also evolving into,
3 strictly speaking, a general contractor, so they hired
4 other firms which would do labor work which would do
5 all types of work, masonry work. Volmar was evolving
6 into a more --

7 THE COURT: Let me cut to the chase.

8 MR. McDERMOTT: Sure.

9 THE COURT: Who is swearing to why he was
10 fired?

11 MR. McDERMOTT: That's in the affirmation of
12 Mr. Marinakis.

13 THE COURT: Is that the person who's swearing
14 to why he was fired?

15 MR. McDERMOTT: Yes.

16 THE COURT: Now, let's go to paragraph number
17 five. What does he say?

18 MR. McDERMOTT: There he says he does not
19 specifically remember the decision to hire or fire
20 plaintiff.

21 THE COURT: So your sworn allegation of fact
22 for the reasons for firing him is, I don't remember.

23 MR. McDERMOTT: And that's explained in the
24 testimony.

25 THE COURT: I don't need an explanation

1 because that's self-explanatory. So does that mean
2 that whatever the reason is for his firing you don't
3 recall?

4 MR. McDERMOTT: Your Honor, there's
5 deposition testimony by Mr. Marinakis, it's not a --

6 THE COURT: So help me with this. Does his
7 deposition testimony refresh his recollection as to why
8 he fired the plaintiff?

9 MR. McDERMOTT: No, but he --

10 THE COURT: Is anybody else swearing to why
11 the plaintiff was fired?

12 MR. McDERMOTT: It's in the testimony of
13 Mr. Demetrius Lykas. In his deposition, he describes
14 how --

15 THE COURT: What about his affidavit? What
16 does he have to say about why plaintiff was fired?

17 MR. McDERMOTT: Mr. Lykas had no role.
18 Mr. Lykas is a project superintendent.

19 THE COURT: So he knows from nothing as to
20 why he was fired. Yes? No?

21 MR. McDERMOTT: He knows that he was --

22 THE COURT: Yes? No?

23 MR. McDERMOTT: He knows. He knows that he
24 was on the project.

25 THE COURT: So take me to the paragraph that

1 gives his explanation as to why the plaintiff was
2 fired.

3 MR. McDERMOTT: That's not in the affidavit,
4 your Honor.

5 THE COURT: So what is it that you have
6 that's sworn from anybody as to why the plaintiff was
7 fired?

8 MR. McDERMOTT: It's in the deposition
9 transcript of Mr. Lykas.

10 THE COURT: You want me to hunt or you want
11 to find the page?

12 MR. McDERMOTT: I'll find you the --

13 THE COURT: Is it going to be something like
14 "I don't remember"?

15 MR. McDERMOTT: No, your Honor. On page ten.

16 THE COURT: So do I have it basically if
17 you -- if you're telling me, if I understand you
18 correctly, and I don't mean to be difficult because
19 this is actually kind of simple. Mr. Marinakis, it's
20 his deposition you're going to?

21 MR. McDERMOTT: At this point, no.
22 Mr. Lykas' testimony. But we can go to Mr. Marinakis
23 as well. Mr. Marinakis is the owner of the company.

24 THE COURT: Here's what you're going to do.
25 I'm going to call your case back in a moment and when

1 we come back you're going to be able to take me either
 2 page or line or somewhere in someone's affidavit for
 3 anybody who can swear to me why this person was fired.

4 MR. McDERMOTT: I have that information here,
 5 your Honor.

6 THE COURT: Okay, so I've already seen what
 7 you've shown me. So now take me to whatever page you
 8 want me to look at.

9 MR. McDERMOTT: Page ten of the reply
 10 affirmation.

11 THE COURT: Reply affidavit?

12 MR. McDERMOTT: Affirmation.

13 THE COURT: That's a little late. I want to
 14 know it in your motion.

15 Do you need a moment to look at it?

16 MR. McDERMOTT: Your Honor --

17 THE COURT: Do you need a moment to find it?

18 MR. McDERMOTT: Yes, I'll take a moment.

19 THE COURT: Sure. This case will be second
 20 called. Just raise your hand when you're ready and
 21 then I'll recall the case.

22 MR. McDERMOTT: Thank you, your Honor.

23 MR. KROUNER: Your Honor, I'm just, as a
 24 matter of procedure, I'm on a calendar with Judge
 25 Dabiri. May I --

1 THE COURT: I got two lawyers here. Any one
2 of them could stand up on it. You want to leave
3 your --

4 MR. KROUNER: I'd like to be heard for this,
5 your Honor.

6 THE COURT: So what do you want me to do,
7 wait for you?

8 MR. KROUNER: I'm just looking for guidance.

9 THE COURT: Guidance is that when the case is
10 ready you should be here or a lawyer representing your
11 client should be here. Which one doesn't matter.

12 MR. KROUNER: When my adversary indicates
13 he's ready, we'll come next, or we're second called
14 after everybody else?

15 THE COURT: When your adversary raises his
16 hand, he's going to be called as soon as I'm ready for
17 him.

18 MR. KROUNER: Thank you. I'll stay.

19 (Whereupon, other cases were called and
20 heard, after which this matter was recalled.)

21 COURT OFFICER: Parties on number 19, step
22 up.

23 THE COURT: So we have Diana Carlino, Todd
24 Krouner, and Mr. Michael McDermott for Volmar
25 Construction.

1 MR. McDERMOTT: Yes, your Honor.

2 THE COURT: So where we left off is you were
3 going to show me in your motion papers any place that I
4 could find a sworn allegation as to the reasons
5 plaintiff was fired.

6 MR. McDERMOTT: We can look at three places.
7 The first I refer your Honor to is Exhibit 3 which is
8 the plaintiff's transcript.

9 THE COURT: Got it.

10 MR. McDERMOTT: At Page 196 of the
11 transcript.

12 THE COURT: One ninety-six of plaintiff's
13 transcript.

14 MR. McDERMOTT: Which is Exhibit 3 of
15 Volmar's motion.

16 THE COURT: Yes.

17 MR. McDERMOTT: He explains from lines eight
18 to fourteen what he was told when he was laid off, that
19 it was the lack of work, that the project was winding
20 down. We could also look at Exhibit 4 and 5 which are
21 documents --

22 THE COURT: So this is plaintiff talking
23 about what was told to him.

24 MR. McDERMOTT: Right, when he tried to
25 return to work.

Proceedings

1 THE COURT: When he tried to return to work.

2 MR. McDERMOTT: If I could take a step back.

3 THE COURT: So does that mean after he's
4 terminated?

5 MR. McDERMOTT: No, your Honor. What happens
6 is in May he has an injury, an accident on the site and
7 he needs time to recover. About a month later he wants
8 work again, but by that time the project had wound
9 further down, it was nearing completion, as well as the
10 additional use of subcontractors that at that point
11 there was no position available for him.

12 THE COURT: So you want me to basically read
13 the answer, which is ten to fourteen.

14 MR. McDERMOTT: Right, and there's also
15 Exhibits 4 and 5.

16 THE COURT: Exhibit 4 and 5. Let me go to
17 it. And what's Exhibit 4?

18 MR. McDERMOTT: That's the response to a
19 Worker's -- Worker's Compensation when the plaintiff
20 made a claim said --

21 THE COURT: Help me with this. Exhibit 4, is
22 anybody explaining the document under oath?

23 MR. McDERMOTT: No, your Honor.

24 THE COURT: Is this document signed by the
25 plaintiff?

1 MR. McDERMOTT: No, your Honor.

2 THE COURT: What makes this admissible for me
3 to consider?

4 MR. McDERMOTT: Exhibit 4 and 5, it could be
5 argued, are government records.

6 THE COURT: So let's hear the argument,
7 because otherwise they're thought to be interested. So
8 what is Exhibit 4?

9 MR. McDERMOTT: Exhibit 4 is the
10 questionnaire or the document generated by the Worker's
11 Compensation Board. When a claim was made by
12 plaintiff, they submit the questionnaire to Volmar and
13 Volmar has to explain why the plaintiff, you know, the
14 situation how he left Volmar's employment and the
15 accident.

16 THE COURT: So this is an unsworn document by
17 a party offered to Worker's Compensation Board that
18 nobody's attesting to what it is or what it's for.

19 MR. McDERMOTT: Yes.

20 THE COURT: Okay, let's move on. Exhibit 5
21 is what?

22 MR. McDERMOTT: Is, I guess, Mr. Gray had
23 some problems with child support. So a similar
24 document was sent to Volmar seeking to garnish his
25 paychecks. And that's the same type of document,

Proceedings

1 prepared by Volmar and submitted to -- I don't know the
2 exact name, but Support --

3 THE COURT: So this is an admission against
4 Mr. Peraltas, right, because he signed it?

5 MR. McDERMOTT: Yes.

6 THE COURT: And what's it saying that you
7 want to use?

8 MR. McDERMOTT: I thought this said lack of
9 work. I'm not seeing it.

10 Laid off. Laid off. It says that he was
11 laid off.

12 THE COURT: Where?

13 MR. McDERMOTT: The box that's checked. The
14 second -- the third line with handwriting.

15 THE COURT: So the checked box said date last
16 employed 5/14/05, on layoff, yes.

17 MR. McDERMOTT: Right, and the documents
18 before this --

19 THE COURT: When was he fired?

20 MR. McDERMOTT: There was no sort of firing.

21 THE COURT: When was he separated from
22 service permanently?

23 MR. McDERMOTT: I guess June 6th I think is
24 the date. So May 14th is the accident. Three weeks
25 later, approximately.

Proceedings

1 THE COURT: So on May 14th when he was on --
2 when he had an accident --

3 MR. McDERMOTT: He was not fired.

4 THE COURT: He was recovering.

5 MR. McDERMOTT: Right. In fact, they said
6 call back, call us when you're ready to return.

7 THE COURT: So it sounds like laid off while
8 you're recuperating.

9 MR. McDERMOTT: No, your Honor.

10 THE COURT: Okay.

11 MR. McDERMOTT: That's the accident on May
12 14th --

13 THE COURT: What else you got?

14 MR. McDERMOTT: The Marinakis affidavit.

15 THE COURT: Let's go to that. Which one is
16 that?

17 MR. McDERMOTT: That's the first affidavit.

18 THE COURT: That's the one that says I don't
19 know.

20 MR. McDERMOTT: That's correct, your Honor.

21 THE COURT: What else do you have?

22 MR. McDERMOTT: In paragraph seven he
23 describes the process that Volmar had started to employ
24 subcontractors rather than direct laborers.

25 THE COURT: What else you got?

1 MR. McDERMOTT: If we can go to the -- you
2 want to know why he doesn't remember. That
3 explanation?

4 THE COURT: No, no.

5 MR. McDERMOTT: Or that seems --

6 THE COURT: No, no, it's simple. It's so
7 simple, I don't know how to put it. Which is why I
8 gave you time.

9 Who is swearing to a reason for the firing?
10 Show me.

11 MR. McDERMOTT: That is in the Marinakis.

12 THE COURT: So this is what I told you to
13 look for and you're showing me.

14 What else you got? Are we done?

15 MR. McDERMOTT: Mr. Marinakis made the
16 decision.

17 THE COURT: Is there anything else?

18 Okay, so the motion for summary judgment is
19 denied because I have nobody telling me under oath,
20 under oath with any personal knowledge as to why the
21 plaintiff was fired. Therefore, they cannot meet their
22 burden.

23 Orally argued on record. Write the decision,
24 please. Please also indicate Exhibit 4 and 5 were not
25 admissible, not in admissible form to demonstrate

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anything about why plaintiff was fired.

You can put that plaintiff's deposition does not offer an explanation as to why he was fired either.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPTION OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

Susan K Wright

SUSAN K. WRIGHT

OFFICIAL COURT REPORTER