20-2709-cv

United States Court of Appeals

for the

Second Circuit

FRANCIS P. LIVELY,

Plaintiff-Appellant,

– v. –

WAFRA INVESTMENT ADVISORY GROUP, INC.,
AKA Wafra Inc., FAWAZ AL-MUBARAKI,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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I.

PRELIMINARY STATEMENT

Plaintiff-Appellant Frank Lively ("Lively") filed the instant action against Defendants-Appellees Wafra Investment Advisory Group, Inc. and Fawaz Al-Mubaraki (collectively, "Defendants") to redress the wrongs he suffered when he was discriminated against and fired on the basis of his age. Lively was a stellar employee for Wafra for over two decades, but his days were numbered when Al-Mubaraki became his direct superior. Unbeknownst to Lively, both Wafra and Al-Mubaraki were possessed with a deep-seeded prejudice against employees of advancing age. Defendants' views about older employees only became apparent when Wafra began to purge its ranks of older individuals. The point was underscored as Al-Mubaraki made disparaging and discriminatory comments deriding those he perceived to be too old—including Lively. Al-Mubaraki's views were evidently condoned by Wafra, as Lively's complaints about this behavior were ignored entirely.

Defendants were aware that they could not fire Lively based purely on his age, so they contrived a pretextual reason for his termination. The pretext they seized was an employee named Sabine Kraut who alleged that Lively harassed her. Rather than actually conduct a proper investigation of the allegations, and provide their long-time employee with an opportunity to defend himself, Wafra suspended

Lively without pay and, only one day later, fired him supposedly "for cause." Lively contends that the true reason he was terminated was due to his advanced age, and as retaliation for his decision to exercise his rights when he complained about Al-Mubaraki's comments. Wafra's conduct, and the statements made following Lively's termination have caused him significant financial damage as well and have dramatically interfered with his ability to procure new opportunities befitting his experience as an investment professional.

After Lively filed the instant action—which set forth claims for employment discrimination, retaliation, tortious interference with prospective business relations, defamation per se, negligence and unjust enrichment—Defendants filed a motion for judgment on the pleadings and attached correspondence purportedly sent by Lively to Kraut, for the purpose of convincing the District Court that Lively's firing was justified. To Lively's dismay, the District Court granted the Defendants' motion. In rendering its decision, it appears the District Court treated the allegations in Defendants' Amended Answer as true, and afforded the attachments to Defendants' Amended Answer the same degree of deference as if they had been attached to Lively's Complaint. The District Court also held Lively to an impermissibly high pleading standard and suggested that he needed to make out a prima facie case for discrimination and retaliation in his Complaint. Because the District Court's opinion is clearly at odds with this Court's precedent, Lively

submits this appeal and asks that this Court reverse both the Opinion and Order issued by the District Court dismissing his Complaint and the concomitant Judgment rendered by the Clerk of the Court.

II.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as Lively's Complaint presents claims which arise under the Constitution, laws, or treaties of the United States. In addition, the District Court had supplemental jurisdiction over this action pursuant to 28 U.S.C. § 1367 as the remaining claims in Lively's Complaint are part of the same case or controversy as those which arise under federal law. The District Court entered an Opinion and Order on July 17, 2020 and a Judgment on July 17, 2020. Lively filed a notice of appeal on August 13, 2020. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment.

III.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Issue One: Did the District Court err in the weight it afforded to the allegations contained in the Defendants Amended Answer and the exhibits annexed thereto?

2. Issue Two: Did the District Court commit an error of law in its application of pleading standards and the *McDonnell Douglas* inference governing Lively's ADEA age discrimination and retaliation claims to the factual allegations of Lively's Complaint?

3. Issue Three: Did the District Court misapply the law by holding that Lively's ADEA claims were barred as a matter of law because he was replaced by an older employee?

IV.

STATEMENT OF THE CASE

A. Procedural Background.[1]

Lively brought this action alleging age-based employment discrimination and retaliation pursuant to the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621. In sum, Lively alleges that he was terminated from his

[1] Citations to the Joint Appendix appear as "A.___."

employment at the investment firm Wafra due to his age. Lively's Complaint was filed on April 11, 2019.[2] Defendants Wafra and Al-Mubaraki filed their Amended Answer to the Complaint on December 9, 2019.[3] On January 17, 2020, Defendants filed a motion for judgment on the pleadings pursuant to Rule 12(c).[4]

By Opinion and Order dated July 17, 2020, District Court Judge J. Paul Oetken, USDJ, granted Defendants motion for judgment on the pleadings and dismissed Lively's discrimination and retaliation claims under the ADEA.[5] In the Opinion and Order, Judge Oetken declined to exercise jurisdiction over Lively's claims under state law and common law.[6] That same day, on July 17, 2020, the Clerk of the Court entered a Judgement formally closing the matter.[7]

B. Statement of Facts

For 21 years Lively managed Wafra's Real Estate Division, and oversaw its significant growth and development.[8] Lively initially served as Senior Vice

[2] A. 10-29.

[3] A. 36-165.

[4] A. 166-167.

[5] A. 172-184.

[6] A. 184.

[7] A. 186-195.

[8] A. 12-13, ¶ 9.

President in 1997 and was promoted to Executive Vice President in 2014.[9] He then was appointed Senior Managing Director of the Real Estate Division.[10]

In or around June 2017, Wafra appointed Defendant Al-Mubaraki to the position of Chief Executive Officer.[11] As a result, he became Lively's direct supervisor.[12] Shortly thereafter, Al-Mubaraki began making negative comments about Lively's age.[13] In meetings with WAFRA executives and others, Al-Mubaraki stated that Lively (and other senior executives) was too old and that he would seek to replace Mr. Lively (and them) with younger counterparts.[14]

On November 13, 2017, Al-Mubaraki's negative view of Lively's age again surfaced at an after-hours gathering at Wafra's offices that included Lively, his son, and Adel Mohamad Al-Bader ("Al-Bader"), a senior executive from Wafra's parent company, the Public Institution For Social Security ("PIFSS") in the State of Kuwait.[15] At the gathering, Al-Mubaraki stated to all, including to Lively's son, also a real estate executive and attorney licensed in New York, that Wafra needed

[9] A. 13, ¶ 9.

[10] A. 13, ¶ 9.

[11] A. 14, ¶ 13.

[12] A. 14, ¶ 13.

[13] A. 14, ¶ 13.

[14] A. 14, ¶ 13.

[15] A. 14, ¶ 14.

to replace older employees like his father with younger employees.[16]

During a campaign to purge the company of elder workers, Wafra terminated or forced out many of its senior executives, including: (1) Mohamad Khouja, former Chief Executive Officer; (2) Anthony Barbuto, former Chief Financial Officer; (3) Paul Mackin, former Senior Managing Director of the Private Asset Management Division; (4) P. Christopher Leary, former Senior Managing Director of Securities; and (5) Peter Petrillo ("Petrillo"), former Senior Managing Director of Wafra Partners LLC, a profitable private equity arm operating as a subsidiary of Wafra.[17] Prior to his own termination, Mr. Lively complained to his supervisors about the loss of talent and experience, as well as the discriminatory pattern that was emerging.[18] Mr. Lively was informed that there was no pattern and that he should simply manage his group and stay positive.[19]

On November 14, 2017, Mr. Lively first reported Al-Mubaraki's discriminatory comments and stated plans to the Human Resources Director, Padrone, and then to the Chief Operating Officer, Campagna.[20] Padrone expressed

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[16] A. 14, ¶ 14.

[17] A. 15, ¶ 17.

[18] A. 15, ¶ 18.

[19] A. 15, ¶ 18.

[20] A. 16, ¶ 19.

frustration that Al-Mubaraki continued to engage in inappropriate conduct.[21] Campagna, in a separate conversation, expressed forlorn acceptance of Al-Mubaraki's conduct and asked whether Mr. Lively reported his complaint to anyone else at the office.[22]

Lively further discussed Al-Mubaraki's conduct with Al-Bader, a Senior Manager of Wafra parent company, PIFSS, who was present at the meeting of November 13, 2017, along with Al-Bader's colleague, Joel D'Souza.[23] Both men understood Lively's position but suggested that he view Al-Mubaraki's statement as humorous, or as a joke.[24] Lively told them he did not see it as such, and that Al-Mubaraki says what he really thinks, jokingly or otherwise.[25] Because Mr. Lively had not received a response or remedy, he followed up with Padrone and Campagna on at least two occasions, weeks after he lodged his complaint.[26]

On April 30, 2018, without prior notice, Lively received a letter from Padrone, HR Director at Wafra, stating that he was suspended without pay,

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[21] A. 16, ¶ 19.

[22] A. 16, ¶ 19.

[23] A. 16, ¶ 20.

[24] A. 16, ¶ 20.

[25] A. 16, ¶ 20.

[26] A. 16-17, ¶ 22.

effective immediately.[27] The very next day, with no formal explanation of the "conduct" in question, Lively received a letter from WAFRA's Chief Administrative Officer, Healy, informing him that he was terminated for purportedly violating company policies and the code of ethics prohibiting sex discrimination and harassment in the workplace.[28]

After Lively's termination, Wafra's employees published knowingly false statements about him.[29] In particular, Wafra personnel published confidential information submitted to the EEOC accusing Mr. Lively of allegedly causing a colleague to fear for her safety.[30] Wafra further declared in press statements that it terminated Mr. Lively based on its "investigation" into the complaint of the female employee.[31]

In addition, Defendants' actions were designed to interfere with business relationships and prospective contracts to which Mr. Lively would have obtained substantial economic benefit.[32] For example, Al-Mubaraki impeded Mr. Lively's efforts to develop relationships with potential partners, all the while emphasizing

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[27] A. 13, ¶ 12.

[28] A. 13, ¶ 12.

[29] A. 17, ¶ 23.

[30] A. 17, ¶ 23.

[31] A. 17, ¶ 23.

[32] A. 18, ¶ 26.

that Mr. Lively was too old to develop those relationships and conveying that those relationships were best forged by younger executives.[33] Indeed, Mr. Lively had a reasonable expectation to enter into contracts with several potential partners to acquire properties for investment and management, which are detailed in Mr. Lively's Complaint.[34]

Wafra also refuses to recognize Mr. Lively's entitlement to partnership and/or carried interests (*i.e.*, profit sharing in funds) relating to his work on several completed fund transactions.[35] Mr. Lively worked diligently and invested a great deal of time and effort in sourcing and managing these Wafra funds, and leading Wafra's real estate team to raise capital and acquire assets.[36] On September 25, 2018, Mr. Lively filed his Charge of Discrimination ("Charge") with the New York District Office of the Equal Employment Opportunity Commission ("EEOC"), alleging age discrimination and retaliation.[37] Pursuant to EEOC rules, a plaintiff may file an ADEA lawsuit in court sixty (60) days after filing a Charge, even without the issuance of a Notice of Right to Sue.[38] After sixty days elapsed,

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[33] A. 18, ¶ 26.

[34] A. 18, ¶ 27.

[35] A. 18, ¶ 28.

[36] A. 18-19, ¶ 29.

[37] A. 19, ¶ 31.

[38] A. 19, ¶ 32.

Lively filed his Complaint in this action.[39]

In the instant Complaint, Lively alleges that he has been discriminated and retaliated against in violation of the ADEA.[40] He also asserts discrimination and retaliation claims under both the New York State Human Rights Law and the New York City Human Rights Law.[41] In addition, Lively's Complaint includes claims against the Defendants for tortious interference with prospective business relations, defamation per se, negligence, unjust enrichment and quantum meruit.[42]

Defendants filed their operative Amended Answer on December 9, 2019.[43] Attached to the Amended Answer, Defendants included Exhibits marked A-O which consisted of (1) a purported transcript of a recording of a conversation between Lively and a non-party Kraut;[44] (2) written correspondence allegedly sent by Lively to Kraut;[45] (3) letters from Wafra to Lively;[46] (4) the Wafra Employee Handbook;[47] and (5) Kraut's EEOC Complaint;[48] and (6) the complaint in Kraut's

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[39] A. 19, ¶ 32.

[40] A. 19-20.

[41] A. 21-23.

[42] A. 23-28.

[43] A. 36-165.

[44] A. 58-66.

[45] A. 67-90.

[46] A. 91-94.

[47] A. 95-100.

suit against Wafra and Lively.[49] Except for the two letters from Wafra to Lively, none of the other exhibits annexed to Defendants Amended Answer were referenced in Lively's Complaint.

On January 17, 2020, Defendants moved pursuant to Rule 12(c) for judgment on the pleadings.[50] In their motion, Defendants argued that the District Court should consider the transcript and written correspondence between Lively and Kraut as proof that Lively was fired for sexual harassment—not age discrimination. Lively opposed the motion and argued that, at the pleading stage, he had set forth sufficient facts to maintain his discrimination and retaliation claims against Defendants.

On July 17, 2020, the District Court issued its Opinion and Order granting the Defendants motion for judgment on the pleadings related to Lively's claims for discrimination and retaliation under the ADEA.[51] The District Court found that there was a "plethora of evidence indicating that Lively was fired for his inappropriate conduct."[52] The District Court later stated that Lively's claims of having been discriminated and retaliated against were "undermined by the

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[48] A. 101-128.

[49] A. 129-165.

[50] A. 166-167.

[51] A. 172-184.

[52] A. 173.

existence of a far more plausible cause of Lively's termination: the allegations of sexual harassment and discrimination made against Lively by another employee."[53] Finally, the Court ruled that the "only plausible conclusion to be drawn from the facts in the complaint, as supplemented with facts from the answer is that Lively was terminated as a result of his violation of WAFRA's policies prohibiting sexual harassment and discrimination."[54]

Having dismissed the only claims in the Complaint based upon federal law, the District Court declined jurisdiction over Lively's remaining state law and common law claims.[55]

V.

SUMMARY OF ARGUMENT

Lively respectfully requests that this Court reverse the Opinion and Order and Judgment issued by the District Court which granted judgment on the pleadings in favor of the Defendants. This Court reviews "*de novo* a grant of a judgment on the pleadings under Federal Rule of Civil Procedure 12(c)."[56] Lively contends that this Court should reverse the District Court's Opinion an Order and Judgment for three main reasons.

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[53] A. 181.

[54] A. 183.

[55] A. 184.

[56] *Roberts v. Babkiewicz*, 582 F.3d 418, 420 (2d Cir. 2009).

First, the District Court afforded an undue degree of weight and deference to both the allegations in the Defendants' Amended Answer and the exhibits annexed thereto. The District Court was only supposed to treat the allegations in the Complaint as being true but appears to have bestowed that same presumption upon the Defendants' allegations against Lively. Further, this Court's precedent dictates that it was an error for the District Court to consider the exhibits to the Defendants' Amended Answer as being "integral" to the Complaint. Weighed and considered appropriately, the allegations in the Complaint sufficiently set forth a plausible claim for both discrimination and retaliation under the ADEA.

Second, the District Court erred in that it seems to have rendered it's Opinion and Order while under the misapprehension that Lively was required to make out a *prima facie* case at the pleading stage. This Court's precedent makes clear that such a showing is not required to withstand a motion for judgment on the pleadings.

Third, it was inappropriate for the District Court to discount the validity of Lively's claims purely because he was replaced by an older individual. Lively was not required to establish that he was replaced by a younger individual to state a claim for either discrimination or retaliation.

VI.

ARGUMENT

A. The District Court afforded undue deference to the allegations in the Defendants' Amended Answer and the documents attached thereto, all of which were controverted.

"Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law."[57] "The standard for addressing a motion for judgment on the pleadings pursuant to Rule 12(c) is the same as the standard used in evaluating a motion to dismiss under Rule 12(b)(6)."[58] Thus, a Court, in reviewing a motion pursuant to Rule 12(c) must "accept all factual allegations in the complaint as true and draw all reasonable inferences in [Plaintiff's] favor."[59]

In granting the motion for judgment on the pleadings, the District Court failed to draw all reasonable inferences in Lively's favor and, instead, improperly treated the allegations in the Defendants' Amended Answer as true. The District Court was also mistaken in that it considered the Defendants attachments to the Amended Answer to be "integral" to the Complaint even though 13 of the

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[57] *Burns Int'l Sec. Servs., Inc. v. Int'l Union, United Plant Guard Workers of Am. (UPGWA) & Its Local 537*, 47 F.3d 14, 16 (2d Cir. 1995).

[58] *Evanston Ins. Co. v. Harrison St. Residences, LLC*, No. 18 CIV. 4918 (GBD), 2020 WL 1529310, at *4 (S.D.N.Y. Mar. 30, 2020).

[59] *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009).

Defendants 15 exhibits were not referenced in the Complaint and were not relied upon in the drafting thereof. Had the correct legal standards been applied in the review of the Defendants motion for judgment on the pleadings, the motion would have been denied as Lively's Complaint sufficiently alleges his claims for discrimination and retaliation under the ADEA.

1. The allegations in Defendants' Amended Answer should not have been accorded any presumption of truth.

Lively contends that the District Court erred in that it treated both the allegations in the Complaint and the assertions in Defendants' Amended Answer with equal deference. Specifically, the District Court misapplied the law when it found that the factual contentions in Defendants' Amended Answer were (1) "far more plausible" than the allegations in Lively's Complaint; and (2) "the only plausible conclusion to be drawn from the facts in the complaint, as supplemented with facts from the answer." In so doing, Lively was deprived of the presumption he is entitled at the pleading stage—that his allegations are all truthful.

While it is well settled in this Circuit that a Court can "consider" an answer and the documents attached thereto when deciding a Rule 12(c) motion[60], only those facts alleged by the nonmoving party (in this case, Lively) are to be accepted

[60] *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (noting that on a 12(c) motion, the court considers the answer and documents attached thereto).

as true.[61] The District Court's statements about the comparative plausibility of the contentions in Defendants' Amended Answer and the allegations in the Complaint make clear that the District Court inappropriately treated both sides' factual recitations as equally valid and true.

This misapplication of the law is further evident from the District Court's statement of the applicable legal standard. According to the District Court, the presumption of truth afforded to the allegations in a complaint does not apply to "facts 'contradicted by more specific allegations or documentary evidence.'"[62] That fragment of a quotation, which is taken from this Court's ruling in *L-7 Designs, Inc.*, is misleading when standing on its own. Without further context, the quote appears to suggest that allegations in a complaint can be contradicted by more specific allegations in an answer. However, the full quotation reveals that this Court assumed the facts in the Complaint to be true "unless contradicted by more specific allegations or documentary evidence—from the Complaint and from the exhibits attached thereto . . . ."[63] Thus, allegations in the Complaint will only

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[61] *See Powermat Techs., Ltd. v. Belkin Int'l Inc.*, No. 19-CV-878 (VSB), 2020 WL 2892385, at *5 (S.D.N.Y. Apr. 2, 2020) (confining analysis of a Rule 12(c) motion to "facts alleged in the pleadings, ***accepting only those alleged by the nonmoving party as true***") (emphasis added).

[62] A. 177-178 (quoting *L-7 Designs, Inc.*, 647 F.3d at 422).

[63] *L-7 Designs, Inc*, 647 F.3d at 422.

lose the presumption of truth if they are contradicted by other more specific allegations *within the complaint*.[64]

As such, it was not appropriate for the District Court to treat the Complaint and Amended Answer with equal deference in analyzing the Defendants' motion for judgment on the pleadings. Defendants' alternative explanation for Lively's termination should not have been afforded any presumption of truth by the District Court. Instead, this Court has held when judging the plausibility of a plaintiff's allegations, a court can consider "the existence of alternative explanations ***so obvious that they render plaintiff's inferences unreasonable***."[65] Thus, this Court has set a high bar for Defendants who seek to dismiss a case by simply offering an alternative explanation to undercut a plaintiff's theory. In this case, Defendants' contention that Lively was fired for cause based on a harassment complaint, at

[64] This is further supported by this Court's citations in *L-7 Designs, Inc.* to its prior decisions in *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 222 (2d Cir.2004) (discrediting allegation "belied" by letters ***attached to the complaint***) (emphasis added) and *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir.1995) ("General, conclusory allegations need not be credited ... ***when they are belied by more specific allegations of the complaint***.") (emphasis added).

[65] *L-7 Designs, Inc*, 647 F.3d at 430.

best, creates a triable issue of fact, but certainly does not satisfy Defendants' burden of demonstrating they are "entitled to judgment as a matter of law."[66]

2. <u>The documents annexed to Defendants' Amended Answer were not "integral" to Lively's Complaint.</u>

In support of its determination that Defendant's explanation for Lively's termination was "far more plausible," the District Court advised that it took "into consideration the exhibits attached to Defendants' Amended Answer detailing the sexual harassment and discrimination claims against Lively because they are "'integral to [Lively's] ability to pursue' his cause of action" and because they "contradict[]" the allegations made in Lively's complaint."[67] This amounts to a misapplication of the law because the documents attached to the Defendants' Answer were not "integral" to Lively's cause of action, as that term has been defined by this Court. This Court has considered a document "integral" to a complaint when the complaint "relies heavily upon its terms and effect."[68] Contrarily, in *Chambers v. Time Warner, Inc.*, this Court found that documents were not integral where the complaint "does not refer to the [documents], plaintiffs

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[66] *Aviles v. S&P Glob., Inc.*, No. 17-CV-2987 (JPO), 2020 WL 1689405, at *2 (S.D.N.Y. Apr. 6, 2020) (quoting *Burns Int'l Sec. Servs., Inc.*, 47 F.3d at 16).

[67] A. 181, n. 3 (citing *L-7 Designs, Inc.*, 647 F.3d at 422 (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))).

[68] *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995).

apparently did not rely on them in drafting it, and none of the [documents] submitted to the court were signed by the [defendants]."[69]

In this matter, the documents attached to the Defendants Amended Answer consist of (1) a purported transcript of a recording of a conversation between Lively and a non-party Kraut;[70] (2) written correspondence allegedly sent by Lively to Kraut;[71] (3) letters from Wafra to Lively;[72] (4) the Wafra Employee Handbook;[73] and (5) Kraut's EEOC Complaint;[74] and (6) the complaint in Kraut's suit against Wafra and Lively.[75] The letters sent from Wafra to Lively are referenced in the Complaint and are, thus, properly considered on a motion to dismiss. However, none of the other documents—and least of which the transcript and correspondence between Lively and Kraut—are integral to the Complaint in this action. These documents are not referred to in the Complaint and were not relied upon by Lively in the drafting of the Complaint.

Moreover, the District Court's conclusion that the documents annexed to the Amended Answer are integral to Lively's "ability to purse his cause of action" is

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[69] *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002).

[70] A. 58-66.

[71] A. 67-90.

[72] A. 91-94.

[73] A. 95-100.

[74] A. 101-128.

[75] A. 129-165.

not supported by the case law cited in the Order. The District Court based its conclusion on a quotation in *L-7 Designs, Inc.*, wherein this Court, in turn, quoted its prior decision in *Sira v. Morton*. In *Sira*, a § 1983 action brought by a state prisoner, an order reversing a prison disciplinary sentence was deemed to be incorporated into the plaintiff's complaint because, to succeed on his claim, the plaintiff had the burden to demonstrate that his disciplinary conviction had been overturned.[76] Thus, the "reversal order" in *Sira* was deemed incorporated into the complaint because this document represented a required element of the plaintiff's claim. This Court's reasoning in *Sira* is inapplicable to the instant action as the sensationalized transcript and correspondence annexed to the Defendants' pleading do not speak to any element of Lively's discrimination or retaliation claims.

In addition, the District Court found undue significance in the fact that the exhibits annexed to the Amended Answer "'contradict[]' the allegations made in Lively's Complaint."[77] However, as detailed above, allegations in a complaint

[76] *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("Although the complaint does not expressly cite the reversal order, this document is also incorporated into the pleading because reversal was integral to Sira's ability to pursue a § 1983 challenge to procedures that caused him to lose good-time credits. *See Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (holding that prisoner who files a § 1983 action challenging discipline procedures resulting in loss of good-time credits must show that the conviction has been overturned).").

[77] A. 181, n. 3 (citing *L-7 Designs, Inc.*, 647 F.3d at 422 (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))).

only lose the presumption of truth when they are contradicted by documentary evidence "from the Complaint and from the exhibits attached thereto[]."[78] Thus, there is no legal basis to conclude that the attachments to Defendants' Amended Answer, which are not integral to the Complaint, can somehow deprive Lively's allegations of the presumption of truth they are afforded under the law when a court decides a Rule 12(c) motion.

3. Accepting Lively's uncontroverted allegations as true, he has set forth plausible allegations sufficient to withstand a motion to dismiss.

"To survive a . . . motion to dismiss, a plaintiff asserting an employment discrimination complaint under the ADEA must plausibly allege that adverse action was taken against her by her employer, and that her age was the "but-for" cause of the adverse action."[79] A plaintiff need only plead facts to provide "'plausible support to a minimal inference' of the requisite discriminatory causality."[80]

The allegations in the Complaint meet this standard easily. Lively has alleged that shortly after Defendant Al-Mubaraki became his direct superior, he "made negative comments about Lively's age" including that he "(and other senior

[78] *L-7 Designs, Inc*, 647 F.3d at 422.

[79] *Marcus v. Leviton Mfg. Co., Inc.*, 661 F. App'x 29, 31–32 (2d Cir. 2016).

[80] *Id.* (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 310–11 (2d Cir. 2015)).

executives) was too old and that he would seek to replace Lively (and them) with younger counterparts."[81] The Complaint further alleges that on November 13, 2017 Defendant Al-Mubaraki advised Lively's son and others that "WAFRA needed to replace older employees like his father with younger employees like Lively's son."[82]

The District Court disregarded these comments as "stray remarks" which are "rarely given any weight particularly if they were made temporally remote [from] the date of the decision."[83] The treatment of Defendant Al-Mubaraki's statements as "stray remarks" unworthy of due consideration is not supported by case law in this Circuit. Preliminarily, there is no support for the implication that Lively has an obligation, at the pleading stage, to identify a certain number of discriminatory comments to withstand a Rule 12(c) motion. Lively's only obligation is to allege "plausible support to a minimal inference"[84] of discrimination. The District Court quoted *Campbell v. All. Nat'l Inc.* to support its decision to disregard Defendant Al-Mubaraki's comments, but that decision related to a summary judgment motion, where the burdens and standards at play are far different than those for a

[81] A. 14, ¶ 13.

[82] A. 14, ¶ 14.

[83] A. 180 (quoting *Campbell v. All. Nat'l Inc.*, 107 F.Supp. 2d 234, 247 (S.D.N.Y. 2000) (internal quotation omitted)).

[84] *Littlejohn*, 795 F.3d at 310-311.

Rule 12(c) motion. Even in the summary judgment context, the notion that a "stray remark" should not be given proper weight has been rejected by this Court and, instead, the remark should be "considered within the totality of all the evidence."[85]

We note that the District Court also cited to *Moore v. Verizon*, wherein an ADEA age discrimination claim was dismissed on the basis that the discriminatory statements were deemed "non-actionable stray remarks."[86] *Moore* is distinguishable from the facts herein as the comments at issue in that case were made by an individual who "was not Plaintiff's supervisor at the time of her suspensions and termination."[87] In contrast, Defendant Al-Mubaraki's comments were made when he was Lively's direct superior. In sum, it was demonstrably improper for the District Court to disregard or discount the importance of the discriminatory comments identified in Lively's Complaint.

In addition to the comments made by Defendant Al-Mubaraki, the Complaint further details (and the Defendants have never disputed) that Lively was

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[85] *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 136 (2d Cir. 2000) (quoting *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir.1998) ("Although evidence of one stray comment by itself is usually not sufficient proof to show age discrimination, that stray comment may "bear a more ominous significance" when considered within the totality of all the evidence").

[86] *Moore v. Verizon*, No. 13-CV-6467 (RJS), 2016 WL 825001, at *9 (S.D.N.Y. Feb. 5, 2016).

[87] *Id.*

terminated only one day after first being informed of Kraut's accusations of harassment. These allegations, when viewed together, certainly provide plausible support to a minimal inference that Lively was fired due to his perceived undesirable age, and that the complaint by Kraut was seized upon and hastily acted upon as a thinly-veiled pretext. This is more than enough to withstand a motion for judgment on the pleadings.

For Lively's retaliation claim to survive the motion, he was only required to allege that "(1) defendants discriminated—or took an adverse employment action—against him, (2) 'because' he has opposed any unlawful employment practice."[88] As detailed in the Complaint, the day after Al-Mubaraki's comment to Lively's son, Lively reported same to Wafra's human resources director and chief operating officer, to a senior manager of Wafra's parent company and to the senior manager's colleague.[89] He received no response or remedy after lodging his complaints, despite following up on at least two occasions in the weeks thereafter.[90]

Al-Mubaraki's comments, when considered alongside the apathy shown by Wafra after the comments were reported, and the summary manner in which Lively

[88] *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015).

[89] A. 16, ¶ 19.

[90] A. 16-17, ¶ 22.

was dismissed, plausibly support the allegation that "retaliation was a 'but-for' cause of the employer's adverse action"[91]—which, in this case, was the decision to terminate Lively. The District Court's determination that the Defendants presented a "far more plausible" cause for Lively's termination demonstrates a misapprehension of the law as this Court has held that pleading causation "***does not . . . require proof that retaliation was the only cause of the employer's action***, but only that the adverse action would not have occurred in the absence of the retaliatory motive."[92]

As such, Lively's Complaint states cognizable claims for discrimination and retaliation and should have withstood the Defendants motion for judgment on the pleadings.

B. The District Court applied an inappropriate pleading standard in analyzing Defendants' motion for judgment on the pleadings as Lively is not required to set forth a prima facie case for discrimination or retaliation at the pleading stage.

The District Court's decision to grant Defendants' motion for judgment on the pleadings was based, in part, on notion that "a showing of a prima facie case of discrimination at the first step suffices to defeat a motion to dismiss."[93] This

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[91] *Vega*, 801 F.3d at 90-91.

[92] *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018) (quoting *Vega*, 801 F.3d at 90-91).

[93] A. 179.

statement suggests a misapprehension of the law by the District Court as it is well-settled that statement of a prima facie case "is an evidentiary standard, ***not a pleading requirement***."[94]

In *Littlejohn v. City of New York*, the Second Circuit explained the distinction between analyzing a plaintiff's *evidence* as satisfying the *McDonnell Douglas* framework at the summary judgment stage versus analyzing plaintiff's *complaint* at the first stage of litigation to satisfy *pleading* requirements set forth by the United States Supreme Court in *Swierkiewicz, Twombly,* and *Iqbal*.[95] Applying the *Iqbal* "plausibility" standard to the *McDonnell Douglas* framework, the *Littlejohn* Court explained,

> "while the plaintiff ultimately will need evidence sufficient to prove discriminatory motivation on the part of the employer-defendant, at the initial stage of the litigation—prior to the employer's coming forward with the claimed reason for its action—the plaintiff does not need substantial evidence of discriminatory intent. If she makes a showing (1) that she is a member of a protected class, (2) that she was qualified for the position she sought, (3) that she suffered an adverse employment action, and (4) can sustain a *minimal* burden of showing facts suggesting an inference of discriminatory motivation, then she has satisfied the prima facie requirements and a presumption of discriminatory intent arises in her favor, at which point the burden of production shifts to the employer, requiring that the employer furnish evidence of reasons for the adverse action. … At this stage, a plaintiff seeking to defeat a defendant's motion for summary judgment would not need evidence sufficient to sustain her ultimate burden of showing

[94] *Vega*, 801 F.3d at 83 (emphasis added).

[95] 795 F.3d 297, 307-311 (2d Cir. 2015).

> discriminatory motivation, but could get by with the benefit of the presumption if she has shown evidence of the factors entitling her to the presumption**. The discrimination complaint, by definition, occurs in the first stage of litigation. Therefore, the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff's minimal burden to show discriminatory intent. The plaintiff cannot reasonably be required to allege more facts in the complaint than the plaintiff would need to defeat a motion for summary judgment made prior to the defendant's furnishing of a non-discriminatory justification.**"[96]

Beyond the pleadings stage, defendants can rebut the *McDonnell Douglas* temporary inference of discrimination by offering "admissible evidence" of a legitimate, nondiscriminatory reason for the adverse employment action.[97] In *Burdine*, the United States Supreme Court held that an "articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."[98] Wafra's statement of its non-discriminatory reason for Lively's termination found in its Amended Answer is not admissible evidence, nor should the exhibits to the Amended Answer have been considered until the summary judgment stage

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[96] *Littlejohn*, 795 F.3d at 311, ci*ting Swierkiewicz*, 534 U.S. at 511-12 ("It … seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits *if direct evidence of discrimination is discovered*.")(emphasis added).

[97] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.").

[98] *Burdine*, 450 U.S. at 255 n.9.

after discovery was completed. Yet, the District Court improperly considered Wafra's "non-discriminatory" explanation and "evidence" offered to rebut the *McDonnell Douglas* inference in deciding whether Lively's complaint met the minimal *pleading* standard to invoke the *McDonnell Douglas* inference in the first place.

In *Vega*, this Court reaffirmed the *Swierkiewicz* holding that an employment discrimination plaintiff need not plead a *prima facie* case of discrimination at the motion to dismiss stage because the *McDonnell Douglas prima facie* case "is an evidentiary standard, not a pleading requirement" and, as such, applies only at the summary judgment phase.[99] The *Littlejohn* Court concludes that *Iqbal's* requirement that a complaint refer to sufficient facts to make its claim plausible is not incompatible with the burden shifting framework of *McDonnell Douglas*, "so long as the requirement to plead facts is assessed in light of the presumption that arises in the plaintiff's favor under *McDonnell Douglas* in the first stage of the litigation."[100] Thus, to survive Rule 12(c) judgment on the pleadings, Lively was not required to plead facts that, if proven, would establish a prima facie case of discrimination, but was required only to

[99] *Vega*, 801 F.3d at 83.

[100] *Littlejohn*, 795 F.3d at 310.

allege enough to create a minimal inference of discriminatory intent without any direct evidence of discrimination.

It is immaterial that Lively was aware of Wafra's alleged non-discriminatory explanation for his termination at the time his complaint was filed. A court cannot consider a defendant's non-discriminatory explanation for the challenged employment action without providing the plaintiff with the opportunity to prove the explanation is a "pretext."[101] While the District Court claims to examine Lively's complaint with the correct *Littlejohn* principles in mind, the Court sets out the full *McDonnell Douglas* evidentiary framework that includes consideration of an employer's proffered non-discriminatory reason for the adverse employment action, and then improperly concludes that "a showing of a prima facie case of discrimination at the first step suffices to defeat a motion to dismiss."[102]

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[101] *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 143 (2000)(an employee "must be afforded the opportunity" to show that the asserted legitimate reasons were "not [the employer's] true reasons, but were a pretext for discrimination"; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)("She now must have the opportunity to demonstrate that the proffered reason was not the true reason…"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("[Employee] must … be afforded a fair opportunity to show that [the employer's] stated reason … was in fact, pretext.").

[102] A. 179.

This statement makes clear the District Court dismissed Lively's complaint for failing to plead the full *McDonnell Douglas* evidentiary prima facie case of discrimination, including facts to establish Defendant's rebuttal explanation is a pretext. This error is confirmed by the District Court's consideration of Wafra's rebuttal explanation and the disputed exhibits in drawing its conclusions that Lively's complaint failed to plead facts necessary to invoke the inference, as the inference is established at the pleading stage prior to consideration of any rebuttal. Thus, although citing some of the proper standards, the District Court committed error by holding Lively to the wrong pleading standard in the same manner as the court whose decision was reversed by the Second Circuit in *Vega*.[103]

C. The District Court erred in its holding that the replacement of Lively by an older individual served to "fatally undermine[]" his claim.

In its Opinion, the District Court states "the fact that Lively was replaced by someone 'who is currently 66 years old—two years *older* than' he is (Answer at 17), fatally undermines his claim that Defendants wanted 'to replace older employees like Lively with younger employees.' (Compl. ¶ 14)." In support, the Court quotes *Owens v. N.Y.C. Hous. Auth.,* "[A] *prima facie* case of age discrimination … requires a plaintiff … to show … that a younger individual has

[103] *See Vega*, 801 F.3d at 84.

replaced her."[104] The *Owens* court cites *Montana v. First Fed. Savings & Loan Ass'n of Rochester* for this requirement, but the *Montana* opinion stated "we have previously tailored the four elements of a *McDonnell Douglas* prima facie case to permit a plaintiff in a non- reduction-in-force case to make a *prima facie* showing of age discrimination without establishing that she was replaced by a younger employee."[105] Two later opinions recognized the discrepancy, stating "[n]ot only is this statement in *Owens* dicta, but it most likely is a mistake. The *Owens* court cites *Montana* [supra], in support of the four-prong test. The *Montana* court explicitly states that there is no need to show that the employee discharged was replaced by a younger employee."[106] Later authority confirms that the fourth element may be satisfied by a number of facts, with replacement by a younger employee as one of many.[107]

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[104] 934 F.2d 405, 408-09 (2d Cir. 1991).

[105] 869 F.2d 100, 104, (2d Cir. 1989) (citing *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2d Cir. 1983) (listing the fourth element as "the discharge occurred under circumstances giving rise to an inference of age discrimination)).

[106] *Wanamaker v. Columbian Rope Co.*, 907 F.Supp. 522, 529-30 and fn. 10 (N.D.N.Y. 1995) (*quoting Stein v. McGraw-Hill, Inc*., 782 F.Supp. 207, 210 and fn. 2 (S.D.N.Y. 1992) (holding "[t]hat is simply not the law in this Circuit")).

[107] *See Pride v. Summit Apartments*, No. 09-CV-0861, 2012 WL 2912937, at *8 (N.D.N.Y. July 16, 2012) (if plaintiff's replacement was hired after plaintiff filed a complaint, a rational fact finder could conclude that, rather than rebut the inference of discrimination, the hiring was merely a cover-up of prior discrimination); *Miller v. Nat'l Ass'n of Sec. Dealers, Inc*., 703 F.Supp.2d 230, 245 (E.D.N.Y. 2010) ("a significant decrease in average employee age within a short

The District Court also quotes from the lower court opinion in *Tarshis*, stating "[w]hen a plaintiff has been replaced by someone older than himself, … a fact-finder can draw no reasonable, immediate inference of discrimination."[108] It is important to note that *Tarshis* was not a dismissal on the pleadings, but on summary judgment. The court recognizes "whether plaintiff has met his or her burden in any particular case will depend on a number of factors, including 'the strength of the plaintiff's prima facie case, the probative value of the proof that employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered."[109] The *Tarshis* court quotes the *Owens* opinion, but does not state that a plaintiff *never* can state a *prima facie* case at the pleadings stage to reach the *McDonnell Douglas* inference if replaced by someone older, but that "maintaining an age discrimination claim becomes rather difficult because a fact-finder can draw no reasonable, immediate inference of discrimination."[110] Instead, at this later stage of the proceedings, after conducting discovery, Tarshis did not find enough evidence to "maintain" his age

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time … may be considered as circumstantial evidence supporting the necessary inference of discrimination").

[108] A. 181 (*citing Tarshis v. The Riese Org*., 195 F. Supp.2d 518, 526 (S.D.N.Y. 2002), *aff'd*., 66 Fed. Appx. 238 (2d Cir. 2003) (affirming summary judgment where the employee failed to present sufficient evidence to overcome the employer's non-discriminatory reason for termination).

[109] *Tarshis*, 195 F.Supp.2d at 525, *quoting Reeves*, 530 U.S. at 148-49.

[110] *Tarshis*, 195 F.Supp.2d at 526.

claim. Notably, the *Owens* decision also was on summary judgment, thus the court was deciding whether plaintiff had sufficient evidence to state a *prima facie* case to a jury on the ultimate issue of age discrimination, not evaluating plaintiff's complaint to determine if plaintiff had met the minimal showing necessary to invoke the *McDonnell Douglas* inference of discrimination designed to survive dismissal at the pleadings stage.

VII.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grant of judgment on the pleadings in favor of the Defendants-Appellees and enter an order denying said motion in its entirety.

Dated: November 19, 2020
New York, NY

Respectfully submitted,

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Dated: November 19, 2020
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