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VIA ECF

Hon. George B. Daniels
United States District Court Judge
Southern District of New York
500 Pearl Street
New York, N.Y. 10007

Re: Cargian v Breitling USA, Inc.
Civil Action No.: 15-cv-01084(GBD)
Plaintiff's opposition to Defendant's letter requesting renewal of summary judgment motion and dismissal of complaint

Dear Judge Daniels:

I write on behalf of plaintiff in opposition to defendant's letter request for renewal of its summary judgement motion and dismissal of plaintiff's claims based on prior submissions.[1] The request fails on several levels: (1) technically this case is not even before you at the present time; (2) defendant misstates your prior decision and that of the Second Circuit in remanding the matter; and (3) the Supreme Court's decision in *Bostock v Clayton County, Ga.*,140 S. Ct. 1731 (2020) not only unequivocally declared discrimination based on sexual orientation a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq., but in so doing expansively discussed the standards of proof which should be considered by this Court, if defendant does ultimately pursue a properly framed motion.

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[1]. Plaintiff did not appeal dismissal of his ADEA claim and agrees that it is no longer before this court.

(1) On April 25, 2019, at the joint request of the parties, your Honor placed this case on the suspense docket "until further order of the court." Dkt. No. 77. There has been no further order nor any request for reinstatement to the active calendar, as required before any proceeding can go forward.

(2) Without merit is defendant's argument that this Court has already ruled that plaintiff has no claim even under *Bostock*. That assertion is plainly refuted by the Second Circuit's explicit reversal of this Court's holding that plaintiff failed to establish a *prima facie* case.

In granting summary judgement this Court was clear that plaintiff's complaint failed under the then existing law as stated in *Simonton v Runyon*, 232 F3d 33 (2d Cir. 2000) and *Dawson v Bumble & Bumble*, 398 F 3d 211 (2d Cir. 2005) which denied coverage on the basis of sexual orientation, but made a narrow exception where there was proof of gender stereotyping. The Court recognized that Plaintiff, in addition to claiming that *Simonton* was no longer good law, presented his case under prevailing law of gender stereotyping. This Court ultimately held that (1) Second Circuit law did not recognize a claim of sexual orientation discrimination and (2) plaintiff failed to support a claim of gender stereotyping. *Cargian v Breitling*, Dkt. No. 63 p 6-9. There was absolutely no analysis of whether there would be a claim, if sexual orientation discrimination was recognized under Title VII.

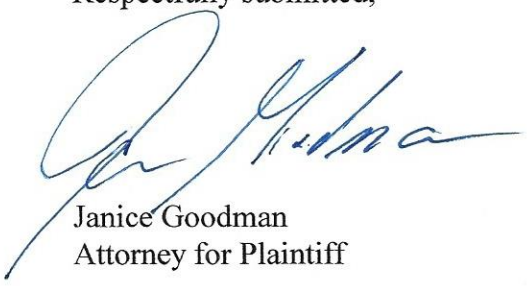
The Second Circuit, in reversing the granting of summary judgement, clearly recognized that this Court's dismissal was based on the prior law requiring proof of gender stereotyping stating that "the district court concluded that 'discrimination based upon sexual orientation is not currently actionable under Title VII.'" The Second Circuit concluded that "(b)ecause the legal framework for evaluating Title VII claims has evolved substantially in this Circuit, we conclude the district court should have the opportunity to consider in the first instance whether Cargian's claims can survive a motion for summary judgement after *Zarda* altered that legal landscape." Dkt. No.71 p 3.

(3) Finally, the altered legal landscape goes well beyond extending protection to lesbian, gay, bisexual and transgender plaintiffs. The *Bostock* court discussed at great length very broad and generous standards of proof for establishing discrimination under Title VII. Specifically the Court states "(a)n employer violates Title VII when it intentionally fires an individual employee in part on sex." *Bostock*, at 1731 (emphasis added). The Court also states that under Title VII "a defendant cannot avoid liability just by citing some other factor that contributed to its challenged decision. So long as the plaintiff's sex was one but for cause of that decision that is enough to trigger the law." *Id* at 1739. The Court then goes on to define discrimination as to "make a difference in treatment or favor" (of one as compared to another) *Id* at 1740. Because this court found that plaintiff did not establish a *prima facie* case since he

did not meet the definition of a covered person–to wit a victim of gender stereotyping–the Court never analyzed the proof he presented as a victim of discrimination based on sexual orientation as now articulated by the Second Circuit and the Supreme Court.

Plaintiff submits that his submission on the prior motion substantiates a sufficient claim to warrant a trial by jury of the ultimate issue. It is conceded that under *Bostock* he is a member of a protected class, and adverse action was taken against him–he was demoted, reduced in salary and then fired. Plaintiff has also submitted ample evidence that defendant's proffered reasons for termination are pretextual, and that he was treated differently than heterosexual men. Dkt No. 49 If defendant wishes to pursue a paper war, further delaying justice in a seven year old case, then plaintiff submits civil procedures must be followed, allowing plaintiff the opportunity to have the facts of his case considered under the new legal landscape. First, the Court must order the case restored to the active calendar, which plaintiff hereby requests. Second, plaintiff requests that a conference be scheduled to discuss proceeding in a manner requiring defendant to articulate precisely why summary judgment is warranted under *Bostock*, and prior summary judgement precedence and allowing plaintiff to submit direct evidence and analysis on that issue. This may not require submission of a new Rule 56C statement, but the legal analysis of the evidence will certainly be different and relevant.

Respectfully submitted,



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cc: All counsel of record vis ECF