

No. 21-662

**In The
Supreme Court of the United States**

MICHAEL BRIGHT-ASANTE,

Petitioner,

v.

SAKS & COMPANY, INC. and THEO CHRIST,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the Second Circuit Court of Appeals correctly affirmed the decision of the District Court granting summary judgment to Respondents on all of Petitioner's claims.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Defendant Saks & Company LLC (misidentified in Plaintiff's Complaint as "Saks Fifth Avenue") ("Saks") states (1) its sole member is Saks Incorporated, a Tennessee corporation with a principal place of business of 225 Liberty Street, Floor 31, New York, New York 10281-0097, and (2) no publicly-held corporation owns 10% or more of Saks Incorporated's stock.

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INTRODUCTION

The District Court in this matter correctly ruled that there were no genuine issues of material fact related to Petitioner's claim that Saks & Company, Inc. ("Saks") or Theo Christ ("Christ" and, collectively with Saks, "Respondents") acted with discriminatory motive in suspending Petitioner, who is African-American, following an investigation of multiple Sales Associates suspected of facilitating fraudulent purchases with stolen credit card information. The Second Circuit Court of Appeals correctly affirmed that decision. On this application, Petitioner simply repeats the same arguments that were rightly rejected by both of the lower courts, and provides no grounds whatsoever for this Court to grant a writ. Plaintiff is not entitled to a third bite of the apple in this Court based on the same arguments that have already failed twice before the lower courts.

Petitioner, formerly a Sales Associate in the Women's Shoe Department at Saks's Fifth Avenue flagship store, was suspended in 2014 following an investigation of Sales Associates who, working together with external individuals posing as Saks credit cardholders, engaged in fraudulent purchases of high-end women's shoes. That investigation revealed, among other things, that a Saks cardholder named Maureen Hennessy was a victim of the scheme and that her information was being used to make fraudulent purchases.

On August 29, 2014, Petitioner made two sales to an individual named Crystal Kipp who, posing as Maureen Hennessy, purchased over nine thousand dollars' worth of designer shoes. The first of those transactions took place in a back room of the Christian Louboutin area of the Women's Shoe Department, closed off from the main sales floor by two doors, where Petitioner allowed Kipp to enter information directly into the Saks register, then keyed in Maureen Hennessy's Saks credit card number to complete the sale. Approximately 15 minutes later, Kipp returned to complete another sale with Petitioner, and Petitioner again used Hennessy's information to complete the sale. Based on the internal review and investigation of Petitioner's sales to Kipp, Saks reported the transactions to law enforcement.¹

Kipp returned to the store on September 3, 2014 and used Hennessy's information again to make a purchase from Susan David, a White Saks Sales Associate. David's transaction with Kipp was also identified for further review, but was not found to be suspicious and was therefore not reported to law enforcement.

Petitioner's primary argument is that the District Court made improper "credibility determinations" in granting summary judgment by failing to find that he was treated differently than Susan David, who he claims engaged in comparable conduct. Nothing could be further from the truth, however, and the essential

¹ Criminal charges against Petitioner were subsequently dropped on speedy-trial grounds.

facts that led to Petitioner's dismissal were, as found by both the District Court and the Second Circuit Court of Appeals, undisputed. Those undisputed facts include: (1) Petitioner, unlike David, allowed Kipp into a private area of the store to complete transactions; (2) Petitioner, unlike David, allowed Kipp to access the Saks register directly; and (3) Petitioner, unlike David, appeared to be on his cell phone during the entirety of the transaction with Kipp. As noted by the District Court, Petitioner attempted to explain and provide context for his conduct with Kipp, but did not dispute that any of it occurred. Thus, the District Court correctly found that there was not material issue of fact with respect to Petitioner's claim that he and David engaged in "comparable" conduct with respect to Kipp, and he offered no other factual support for his claim that his suspension was discriminatory.

On appeal, the Second Circuit, on *de novo* review and viewing the record in the light most favorable to Petitioner, concluded that the District Court's decision should be affirmed. The Circuit Court noted, again, that the essential facts regarding Petitioner's conduct with Kipp were (1) not disputed, and (2) not comparable to David's conduct. Accordingly, because the essential facts were not disputed there was not, and could not have been, any error by the District Court with respect to any "credibility" determination in connection with any disputed facts. Petitioner merely seeks to rehash the same arguments that have already been rejected by the District Court and the Second Circuit.

There is no basis for this Court to grant his petition, and it should be denied.

◆

STATEMENT OF THE CASE

This petition challenges a Summary Order of the United States District Court of Appeals for the Second Circuit affirming an Order of the United States District Court for the Southern District of New York, which granted summary judgment in favor of Respondents on all of Petitioner's claims. The pertinent facts are summarized in the Second Circuit's Order, which this brief quotes below. (*See* B-1 through B-9).²

Petitioner's claims arise from his 2014 suspension without pay from his job at Saks's flagship store in New York City "following an internal investigation" that "focused on a group of sales associates suspected of facilitating fraudulent purchases with stolen credit card information, working with non-employee conspirators." (B-3). In 2014, Petitioner "facilitated two transactions that Saks flagged as suspicious because of the zip code associated with the credit card used. Upon review of relevant CCTV footage, [Saks's] investigators concluded that the transactions were fraudulent. [Saks] then forwarded the footage to law enforcement authorities for further investigation."

² References to "B-" are references to pages of Appendix B to the Petition.

(B-3-B-4). The referral “resulted in [Petitioner’s] arrest and suspension without pay.” (B-4).

Petitioner, who is African-American, filed a complaint in the District Court alleging race discrimination in violation of the New York City Human Rights Law (“NYCHRL”); discrimination in violation of 42 U.S.C. § 1981; and constructive discharge. Petitioner alleged that Saks’s treatment of employee Susan David, who is White, demonstrated that he was the subject of unlawful discrimination. (B-4). “David processed transactions for the same impostor customer after [the] impostor’s transaction with [Petitioner] aroused the suspicions leading to the charges against him,” and Petitioner argued “that Saks’s failure to forward the security footage of David’s sales transactions with the impostor to law enforcement and to take any adverse employment actions against David constitutes unlawful discrimination.” (B-4-B-5). The District Court granted summary judgment to Defendants-Respondents on all claims on the ground that Petitioner had failed to raise any genuine issue of material fact related to his claim that Saks acted with a discriminatory motive. *Id.*

On appeal, the Second Circuit affirmed, explaining that Petitioner’s arguments fell short because, “[e]ven if David’s transaction with the imposter raised suspicion of a further fraudulent transaction, the evidence did not implicate David in the fraud so as to admit an inference of race discrimination in Saks’s treatment of its employees.” (B-5).

“The transactions conducted by [Petitioner] and David were different in material respects. David did not take the customer into the private, closed off area where [Petitioner] had gone. Further, David, unlike [Petitioner], did not allow the customer to access the Saks register to input her Social Security number and email address; did not use her cell phone during the transactions; and did not take an unusually long time to process her transactions.”

Id.

Moreover, the Second Circuit noted that Petitioner “does not dispute these critical differences between his transactions with Kipp and David’s transaction. Nor does he point to any other aspects of the two sets of transactions that could give rise to an inference of discriminatory motive by Saks in dealing with its employees.” (B-5). Therefore, in light of the undisputed facts, the Second Circuit determined that the District Court properly entered summary judgment dismissing Petitioner’s claims that Respondents acted with discriminatory motive in suspending him and subsequently refusing to reinstate him to active employment, and specifically noted that Petitioner had not “aduce[d] evidence admitting a finding that Saks’s conduct stemmed at least in part from a discriminatory motive” in support of his NYCHRL claim. (B-4, B-6). Petitioner’s other claims, for unlawful discrimination under 42 U.S.C. § 1981 and unlawful constructive discharge, were similarly correctly dismissed based upon

Petitioner’s failure to “show circumstances giving rise to an inference of racial discrimination.” (B-6).



REASONS FOR DENYING THE PETITION

I. **The Second Circuit Applied The Correct Standards In Affirming The District Court’s Grant Of Summary Judgment.**

The Second Circuit’s Order makes clear that the Circuit Court (1) engaged in a *de novo* review, and (2) found no error in the District Court’s grant of summary judgment:

“On **de novo** review and viewing the record in the light **most favorable to** [Petitioner], **as we must**, we conclude that the district court did not err when it entered summary judgment for Defendants. The record reveals no genuine issue of material fact related to [Petitioner’s] claim that Saks acted with a discriminatory motive.”

(B-4) (*citing Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 44 (2d Cir. 2015) (plaintiff “may not survive summary judgment merely by conjuring a hypothetical issue of material fact,” and “must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact. More specifically, it must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or

unsubstantiated speculation.”) (citations and internal quotation marks omitted).

Petitioner’s primary argument is that the Second Circuit (as well as the District Court) erred by making “credibility determinations” in favor of Respondents. (Petition at 1). Specifically, Petitioner argues that the Second Circuit should have held that the District Court was required to “disregard” the testimony of Respondent’s witness, Lisa Benson, who testified regarding the differences between Petitioner’s transactions with Kipp and David’s transaction with Kipp based upon Benson’s contemporaneous review of CCTV footage of both transactions. (*See* Petition at 11-14). Petitioner characterizes Benson’s testimony as “uncorroborated” and, ironically, spends several pages attacking Ms. Benson’s credibility. (Petition at 14-17). Petitioner suggests (although he did not, and cannot, offer any evidence to support his claim) that the CCTV footage of David’s transaction, which was not preserved, might not have shown “material differences” from Petitioner’s transaction (Petition at 13) and, therefore, the Second Circuit should have found a disputed issue of material fact sufficient to deny summary judgment. (*See* Petition at 13). Leaving aside the irony of Petitioner’s claim that the Second Circuit made an improper “credibility” determination while simultaneously attacking the credibility of Respondents’ witnesses, Petitioner simply mischaracterizes the Second Circuit’s decision and the governing law.

First, Petitioner’s claim that the Second Circuit “relied heavily upon Ms. Benson’s declaration and

deposition testimony” (Petition at 17) is flatly incorrect. The Second Circuit did not “rely upon” any declaration or testimony, but rather concluded, correctly, that the record before the District Court did not reveal any “genuine issue of material fact related to [Petitioner’s] claim that Saks acted with a discriminatory motive.” (B-4). That determination was made upon the undisputed facts in the record regarding Petitioner’s transactions with Kipp and Petitioner’s utter failure to provide any evidence to contradict those facts.

Second, it is well-settled that a plaintiff may not create a material issue of fact by “conjuring a hypothetical” or attempting to “show that there is some metaphysical doubt as to the material facts,” or relying upon “conclusory allegations or unsubstantiated speculation.” *Robinson, supra*. In this case, Petitioner is attempting to create a fact issue by speculating (without any basis) that the CCTV footage of David’s transaction might potentially have supported his claim, in contradiction to sworn testimony in the record that demonstrated that it did not. Instead of offering evidence to demonstrate a disputed issue, Petitioner simply imagines the contents of a videotape and speculates that they might be different from what was described in the sworn testimony regarding the actual tape. Unsubstantiated speculation, however, is no substitute for evidence and cannot compel a court to find a disputed issue of fact sufficient to defeat summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (party opposing summary judgment “must do more than simply show

that there is some metaphysical doubt as to the material facts”).); *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) (non-moving party may not rely on unsupported assertions, conjecture, or surmise). Accordingly, neither the District Court nor the Second Circuit erred in concluding that summary judgment was appropriate.

Petitioner’s claim that the Second Circuit did not apply the correct standard to the dismissal of his claim under the NYCHRL (Petition at 26) is similarly baseless. The Second Circuit correctly noted that, “[e]ven under the NYCHRL, which courts interpret ‘broadly in favor of discrimination plaintiffs,’ . . . to survive a motion for summary judgment [Petitioner] must adduce evidence admitting a finding that Saks’s conduct stemmed at least in part from a discriminatory motive.” (B-6) (citations omitted). In this case, Petitioner “has not pointed to any evidence of discriminatory intent fueling the decision not to reinstate him.” *Id.* Once again, the issue is Petitioner’s failure to come forward with any evidence sufficient to create a material issue of fact in order to defeat summary judgment.



CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Florham Park, New Jersey
December 6, 2021

Respectfully submitted,

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