

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

STEVEN STANTYOS, Individually and
NELSON BAEZ, Individually,

Plaintiffs,

INDEX No. 00805/09

MOTION DATE: Sept. 23, 2009
Motion Sequence # 001, 002

-against-

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Reply Affirmation X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

This motion, by defendant, for an order pursuant to Section 3211(a) of the New York Civil Practice Law and Rules (“CPLR”) dismissing the Verified Complaint filed against it in this action by the plaintiffs, Steven Stantynos and Nelson Baez (“Plaintiffs”), in its entirety, and for such other and further relief as this Court deems just and proper; and a cross-motion, by plaintiffs, for:

- (1) An order denying the defendants motion to dismiss in its entirety; or in the alternative

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- (2) An order granting the plaintiff permission to serve an Amended Complaint; asserting with specificity the statutes violated by the defendant; and
- (3) For such other, further and different relief as this Court deems just and proper,

are **both** determined as hereinafter set forth.

Factually, the plaintiffs were employed by the defendant as Auto Damage Appraisers. They were discharged in November 2008. The complaint alleges three causes of action: one sounding in violation of “whistleblower” protection; one sounding in a tort-based wrongful discharge; and one for Breach of Contract for alleged failure to comply with the procedures in the Employee Handbook.

The defendant, through its attorney, asserts that the plaintiffs’ common law claims, sounding in tort and Breach of Contract, were waived by the plaintiffs’ statutory claim; and are barred by New York case law and policy of at-will employment. Counsel argues that the Breach of Contract claim, based on the Employee Handbook, is directly contradicted by the plain language of that book. Counsel further argues that all causes of action should be dismissed for failure to state a cause of action; that the allegation that the defendant violated the “Whistleblower Statute” by firing the plaintiffs are not sustainable, in that the complaint lacks an allegation that the public health or safety was endangered and that no specific violation of law is alleged. The defendant avers that, by commencing the action alleging a violation of the “whistleblower statute”, the plaintiffs have waived all other related claims; and that their statutory claim is improperly pleaded.

The plaintiffs’ attorney, in opposition, asserts that all necessary allegations were made in the complaint asserting a violation of the whistleblower statute; and that case law permits an affidavit of the plaintiff to supplant the complaint when such a motion is made. He further asserts that the affidavits of the plaintiffs state that by the defendant’s violation of pertinent statutes and regulations results in unsafe automobiles being placed back on the road. Counsel contends that the plaintiffs should be permitted, with the instant application, to amend the complaint, as there is no prejudice or surprise to the defendant and the affidavits demonstrate sufficient merit. Counsel argues that the plaintiffs are entitled to plead in the alternative and to plead inconsistent causes of action. He further argues that the Courts of this State do permit causes of action for wrongful termination under these

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circumstances, even though New York is an at-will employment state. The plaintiffs have submitted affidavits asserting that they were experienced and highly-praised Claims Examiners, with 26 years and 12 years experience, respectively; that they were pressured by the defendant to cut their appraisal costs in an unethical and illegal manner so as to jeopardize their appraiser licenses; that they were fired under the pretext of common clerical coding errors; and without any counseling or probation as prescribed in the employee manual.

The attorney for the defendant argues, in reply, that the plaintiffs' statutory law claim is meritless, in that it does not allege the necessary violations of the whistleblower statute so as to set forth such a cause of action. She also argues that the plaintiffs have not alleged a specific statute or regulation that the defendant allegedly actually violated, and case law requires more than a reasonable belief that a violation has occurred. She repeats the argument made in the moving papers that the alleged violations do not constitute a substantial and specific threat to public health and safety, only a possible economic impact. She contends that the plaintiffs' proposed amendments lack merit and the cross-motion to amend should be denied.

In reply on the cross-motion, the plaintiffs' attorney argues that the original complaint has merit, but the plaintiffs make the cross-motion should the Court view the complaint as deficient. Counsel further argues that the import of the Insurance regulation is that the insurer negotiate a loss in a reasonable manner, which the plaintiffs argue was not the defendant's focus in making the changes that cost them their jobs. He contends that the case law cited by the defendant's attorney is inapplicable and distinguishable from the case at bar. He also contends that the causes of action alternative to the statutory claim are not waived by the election to plead the violation of the statute.

DECISION

“Upon a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed (see CPLR 3026). “The question presented for review is not whether [the plaintiff] should

ultimately prevail in this litigation, but rather, more narrowly, whether [its complaint] state[s] cognizable causes of action” (**Becker v Schwartz**, 46 NY2d 401, 408; cf. **Sotomayor v Kaufman, Malchman, Kirby & Squire**, 252 AD2d 554). For the purposes of review, the court must assume the allegations in the complaint to be true, “accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (**Leon v Martinez**, 84 NY2d 83, 87; see **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634)”.

(**Natural Organics Inc. v Smith**, 38 AD3d 628, 832 NYS2d 76, 2nd Dept., 2007).

Initially, the Court notes that it is well-settled that

“New York courts have long held that “absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party”. **Rooney v Tyson**, 127 F.3d 295, 296 (2d Cir.1997) (citations omitted); *certified question answered*, 91 N.Y.2d 685, 689, 674 N.Y.S.2d 616, 697 N.E.2d 571 (1998)”.

(**Schultz v North American Insurance Group**, 34 F. Supp.866, W.D., 1999).

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The plaintiffs herein allege that their respective terminations were in violation of the policies of the employee handbook which constitutes a Breach of Contract, and therefore an exception to the “at-will” labor policy in New York State. The Court of Appeals, in **De Petris v Onion Settlement Association, Inc.** (86 NY2d 406, 410, 633 NYS2d, 274, 1995), ruled that an employee may recover for wrongful discharge when he establishes

“that the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment. Where these elements are proved, the employee in effect has a contract claim against the employer”.

Herein, the plaintiffs have not pleaded those elements, nor have their affidavits mentioned them. Therefore, the first and third causes of action, which allege wrongful termination, must be **dismissed**.

The plaintiffs herein have cross-moved to amend their complaint, by submission of their own affidavits, but without a proposed amended complaint. That cross-motion is limited, by their affidavits, to the second cause of action for violation of Labor Law §740, the “Whistleblower Statute”.

“Labor Law §740 prohibits an employer from taking “any retaliatory personnel action against an employee” who discloses to a supervisor “an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety”. Commonly referred to as the “whistleblower’s statute” (**Mazzacone v Corlies Assoc.**, 21 AD3d 1066, 802 NYS2d 182), this section requires “proof of an actual violation of

law to sustain a cause of action” (**Bordell v General Elec. Co.**, 88 NY2d 869, 871, 644 NYS2d 912, 667 NE2d 922; see **Nadkarni v North Shore-Long Is. Jewish Health Sys.**, 21 AD3d 354, 355, 799 NYS2d 574). The plaintiff’s “reasonable belief of a possible violation” is not sufficient (**Bordell v General Elec. Co.**, 88 NY2d at 871, 644 NYS2d 912, 667 NE2d 922; see **Khan v State Univ. of N.Y. Health Science Ctr. At Brooklyn**, 288 AD2d 350, 351, 734 NYS2d 92)”.

(**Berde v North Shore-Long Island Jewish Health System, Inc.**, 50 AD3d 834, 855 NYS2d 656, 657, 2nd Dept., 2008). Plaintiffs’ counsel urges this Court to distinguish the case law cited by defendant’s counsel, in that the defendant’s alleged violation of Regulation was not “mere speculation”, and the potential for public harm need not be proven at this stage, i.e., a motion to dismiss. A perusal of the plaintiffs’ affidavits reveals that they allege that the defendant’s actions “would have the effect of encouraging – even forcing – automobile body shops to undertake rushed and shoddy repairs of automobiles, skimping on necessary work and failing to take a sufficient time to ensure that the vehicles were being repaired thoroughly and properly. These rushed and accelerated repairs could easily cause a hazard to the public. . .” (Stantyos affidavit, ¶ 8, emphasis supplied). Such language and allegations inveigh against a purported policy which may cause unknown third parties (automobile repair shops) to violate the law. These allegations, stated in the original complaint and elaborated upon by the plaintiffs’ affidavits, do not rise to the level of posing a “substantial and specific danger to the public health and safety” (Labor Law §740[2][a], see **Vail-Ballou Press, Inc. v Tomasky**, 266 AD2d 662, 698 NYS2d 98, 3d Dept., 1999; **La Magna v N.Y.S. AHRC**, 158 AD2d 588, 551 NYS2d 556, 2nd Dept., 1990), and “an employee’s good faith, reasonable belief that a violation occurred is insufficient” (**Nadkarni v North Shore-Long Island Jewish Health System**, 21 AD3d 354, 355, 799 NYS2d 574, 2nd Dept., 2005).

Accordingly, the defendant’s motion to dismiss is **granted**; and the plaintiffs’ cross-motion to amend their complaint is **denied** (**Morton v Brookhaven Memorial Hospital**, 32 AD3d 381, 820 NYS2d 294, 2nd Dept., 2006).

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This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated _____

XXX J.S.C.