Landfield v Tamares Real Estate Holdings, Inc.
2002 NY Slip Op 30168(U)
July 23, 2002
Supreme Court, New York County
Docket Number: 105149/11
Judge: Joan A. Madden
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SCANNED ON 7/27/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice

PART 11

Index Number : 105149/2011
LANDFIELD, KENNETH
vs.
TAMARES REAL ESTATE HOLDINGS,
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

FILED
JUL 27 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: July 23, 2012

______, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

KENNETH LANDFIELD,

Plaintiff,

-against-

TAMARES REAL ESTATE HOLDINGS, INC. and TAMARES MANAGEMENT LLC,

Defendants.

Index No.: 105149/11

FILED

JUL 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this action to recover damages for retaliation under the New York False Claims Act, defendants move for an order pursuant to CPLR 3211 (a) (7), dismissing the amended complaint in its entirety. Plaintiff opposes the motion.

BACKGROUND

According to the amended complaint, plaintiff alleges that he was retaliated against by defendants, his employer, for his objections and opposition to defendants' Chief Executive Officer (CEO), Chairman and sole beneficial owner's sustained efforts to evade New York State income tax obligations in violation of New York State Finance Law § 191 *et seq.* Motion, Ex. A.

Plaintiff joined defendant Tamares Real Estate Holdings, Inc. as its chief financial officer on July 31, 2002. During his employment, plaintiff alleges that he performed all of his responsibilities as chief financial officer, and later chief operating officer, with exceptional skill and diligence. *Id.*

Plaintiff reported both to the CEO and a New York-based attorney who had been retained to provide part-time real estate assent management and investment advisory services (Advisor). *Id.* Allegedly, plaintiff was told by the CEO to return monies earned in the United States directly to him and one of his offshore companies and, according to plaintiff, the CEO also told plaintiff that he was not willing to pay any U.S. taxes on these transfers. *Id.* Plaintiff states that the CEO's repeated knowing evasion of U.S. taxes became a conflict between the two of them, ultimately resulting in plaintiff's employment being terminated on December 17, 2010. *Id.*

The complaint details several financial transactions that plaintiff characterizes as evasive of U.S. tax laws, and states that, as soon as he started working for defendants, plaintiff warned the CEO that his, the CEO's, actions regarding the transfer of funds would not be in compliance with the tax laws. *Id.* The complaint details several sections of the New York tax laws that plaintiff alleges were violated by the CEO, and states that, when plaintiff became the chief operating officer when the Advisor's contract was terminated, he became aware of other tax law violations. *Id.* The amended complaint also alleges that the Advisor's contract was terminated because the Advisor complained to the CEO about the CEO's tax evasions.

Plaintiff states, in the amended complaint, that, in December 2008, he raised issues to the CEO about tax concerns voiced by the companies' accountant in its report. *Id.* Plaintiff avers that, after this meeting with the CEO, he received a substantially reduced bonus and, the following year, 2009, he received no bonus at all. *Id.* In December of 2010, plaintiff says that he was terminated in retaliation for his complaint to the CEO about the CEO's tax evasion schemes. *Id.* The amended complaint continues to indicate the various tax laws that plaintiff alleges were violated by the CEO. The amended complaint asserts only one cause of action: unlawful employment action in retaliation for plaintiff's concerns regarding the CEO's violation of the New York State tax laws. *Id.*

In support of the instant motion, defendants have provided plaintiff's affidavit, in which he states that Ivy Greenberg (Greenberg) signed all of the relevant tax returns from 2005 until his termination, except for 2006, when he signed the corporate returns. In her affidavit, also submitted in support of defendants' motion, Greenberg avers that plaintiff signed all of the tax returns between 2002 and 2007, and that she signed the returns for 2008 and 2009 at plaintiff's direction. Greenberg also states that plaintiff's annual salary increased from $175,000.00 in 2002 when he was hired to $660,000.00 in the year that he was terminated.

It is defendants' position that plaintiff's allegations do not rise to the level of protected conduct sufficient to maintain an action pursuant to the New York False Claims Act (FCA). New York State Finance Law § 191 (1).

In opposition to the instant motion, plaintiff maintains that the objections that he voiced to the CEO fall within the parameters of protected activity under the FCA and, consequently, that defendants' motion should be denied.

In reply, defendants reiterate their argument that plaintiff's complaints to the CEO do not constitute protected activity under the FCA, and, if the complaint were dismissed, plaintiff would still have a potential remedy as a whistleblower, which is different from asserting a claim based on retaliation.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that: "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . .(7) the pleading fails to state a cause of action."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in

favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg,* 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank,* 300 AD2d 226 (1st Dept 2002).

The FCA, as amended August 27, 2010, provides:

> Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action brought under this article or *other efforts to stop one or more violations of this article*, shall be entitled to all relief necessary to make the employee, contractor or agent whole [emphasis added].

The FCA is relatively new, and the courts interpret its provisions by closely tracking judicial interpretation of its federal counterpart. *Garcia v Aspira of New York,* 2011 WL 1458155, 2011 US Dist LEXIS 41708, *9 n 2 (SD NY 2011). To state a retaliation claim under the FCA,

> plaintiff must plead that '(1) the employee engaged in conduct protected under the FCA; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged, discriminated against or otherwise retaliated against the employee because of the protected conduct [internal quotations and citation omitted].

Id., 2011 WL 1458155, at *3, 2011 US Dist LEXIS, at *10.

> To qualify as protected conduct an employee's actions must have been in furtherance of an action under the FCA, that is, an employee must have been investigating matters that were calculated, or reasonably could have lead [*sic*] to a viable FCA action. Protected activity

> is interpreted broadly [internal quotations and citations omitted].

United States ex rel. Sasaki v New York University Medical Center, 2012 WL 220219, *12, 2012 US Dist Lexis 8672 *35 (SD NY 2012).

Defendants' motion is granted and the amended complaint is dismissed.

The crux of this motion concerns the interpretation of "protected activity," as amended, in the FCA.

Based on the allegations appearing in the amended complaint, the court concludes that plaintiff's allegations do not rise to the level of protected activity, because he was merely fulfilling his job functions and voicing his concerns to the CEO alone. Prior to the 2010 amendment, courts held that an employee whose job function included disclosing improper practices within the company, as did plaintiff's function as both the chief financial and chief operating officer, did not rise to the level of protected activity unless the employee specifically indicated to his superiors that he or she was going to report the violations to the government or file a whistleblower lawsuit. *United States ex rel. Ramseyer v Century Healthcare Corp.,* 90 F3d 1514 (10th Cir 1996); *United States ex rel. Smith v Yale University,* 415 F Supp 2d 58 (D Conn 2006).

When an employee was engaged in conduct that ordinarily fell within his job description and merely complained, internally,

about potential legal violations, such activity did not constitute protected activity under the FCA. *Faldetta v Lockheed Martin Corp.*, 2000 WL 1682759, 2000 US Dist LEXIS 16216 (SD NY 2000). Only warning an employer of the consequences of its actions was not deemed to be protected activity under the FCA. *Robertson* v *Bell Helicopter Textron*, 32 F3d 948, 951 (5th Cir 1994), *cert denied* 513 US 1154 (1995).

In the case at bar, the only allegations proffered by plaintiff are that, as part of his normal job function, he voiced his concerns and objections to the CEO about certain money transfers violating US tax laws. The amended complaint is devoid of a single allegation that he did so in furtherance of an action brought under the FCA, that he was specifically investigating potential tax fraud, or that he mentioned a potential lawsuit to the CEO.

Post-amendment judicial determinations of the FCA have not varied from the earlier interpretation of "protected activity." The actions articulated by plaintiff in his amended complaint still do not constitute protected activity under the FCA. *See e.g., Clinkscales v Walgreen Company d/b/a Walgreens,* 2012 WL 80543, 2012 US Dist LEXIS 3822 (D SC 2012)(simply reporting concerns to supervisors does not raise a possibility of a suit under the FCA); *United States ex rel. Owens v First Kuwaiti General Trading and Contracting Co.*, 612 F3d 724, 735 (4th Cir

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2010)(employee's simply reporting his concern to his supervisor does not establish an act in furtherance of an FCA suit); *see generally Gaffney v City of New York*, 2011 WL 4544705, 2011 NY Misc LEXIS 4592 (Sup Ct, NY County 2011)(filing a notice of claim and instituting a lawsuit constitute protected activities, not the filing of internal grievances).

Even taking a liberal interpretation of the recent amendment to the FCA, in which the concept of "protected activity" was broadened to include actions taken as part of an effort to stop a violation of the act, the amended complaint fails to allege that plaintiff's concerns voiced to the CEO were taken to stop a violation. In total, the amended complaint states the following with respect to plaintiff's reports to the CEO:

> 35. ... [Plaintiff] repeat[ed] to [the CEO] that the initial characterization of these payments as temporary could no longer stand up to an audit and needed to be resolved or subject [the company] and possibly [the CEO] to significant taxes, interest and penalties.
>
> . . .
>
> 43. ... [Plaintiff] raised the issue of [the accountant]'s report with [the CEO] and, once again, reiterated his complaint about ... noncompliance with U.S. federal and state tax law.
>
> 44. [Plaintiff] warned that the accumulated tax deficiency of all evaded personal and business taxes and filings could cause New York State auditors to aggressively seek taxes and penalties.
>
> . . .
>
> 62. As repeatedly told to [the CEO] by [plaintiff], the New York Department of Taxation and Finance may rightly assert that all of the distributions to [the CEO] are New York source income, claiming that the distributions are income from a New York business or income from real estate transactions in New York.

None of these assertions rises to the level of a protected activity, even under a broadened concept of an attempt to stop a violation of the act. All of the above-referenced allegations merely indicate that plaintiff warned the CEO that the companies and the CEO might be subject to taxes, interest and penalties. This is simply a statement of fact of the potential legal consequences of the alleged tax violations.

In his opposition, plaintiff contends that the amendment to the FCA broadens the concept of protected activity to include internal company complaints as part of an effort to stop a violation of the act. However, not a single post-amendment decision has been provided by the parties, or discovered by the court, that would support such contention.

Based on the foregoing, the court concludes that the amended complaint fails to state a cause of action for retaliation under the FCA, and defendants are entitled to dismissal.

Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is granted, and the amended complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

Dated: July 23, 2012

FILED
JUL 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

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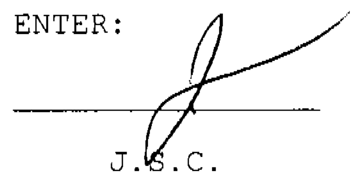

J.S.C.