STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

MARGUERITE KELLY,

Plaintiff,

-against-

ADVANCED CARE, INC.,

Defendant.

DECISION and ORDER
INDEX NO. 08-0296
RJI NO. 19-08-3656

Supreme Court Greene County All Purpose Term, June 13, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

By Summons and Verified Complaint, dated February 18, 2008, Plaintiff commenced this action against defendant. Plaintiff's Verified Complaint sets forth five "claim[s] for relief", which purportedly state claims under: New York Labor Law §740(2), New York Labor Law §741(1)(d), New York Labor Law §198-c, New York Labor Law §191, and the tort of defamation. By its Verified Answer and Counterclaim, dated April 11, 2008, defendant denied plaintiff's allegations and counterclaimed for attorney's fees pursuant to New York Labor Law §740(6). Plaintiff served her Reply, dated April 24, 2008.

Defendant now moves for summary judgment to dismiss the complaint stating numerous

legal theories, each of which will be addressed in turn.

Summary Judgment Standard

This Court is mindful that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 AD2d 869, 870 (3rd Dept., 1996).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986), Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 (1988). A movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 (3d Dept.1996).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. Zuckerman v. City of New York, 49 NY2d 557 (1980). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Id. at 562.

It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination, and all evidence must be viewed in the light most favorable to the opponent to the motion. Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 (3d Dept. 2005); Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

New York Labor Law §740(7) Waiver

Defendant's motion seeks dismissal of plaintiff's New York Labor Law §§741(1)(d), 198-c and 191 claims along with her defamation claim by arguing that her "instituting" a Labor Law §740 claim (the "whistleblower" law) caused her to "waive" all of her other rights. New York Labor Law §740(7). In accord with Reddington v. Staten Island University Hosp. (__N.E.2d __, 2008 WL 2571785 [2008]) and Collette v. St. Luke's Roosevelt Hospital (132 F.Supp.2d 256 [SDNY 2001]), the defendant's motion is denied.

New York Labor Law §740(7), states:

> Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

Clearly, the above waiver's plain meaning is extremely broad. A literal reading of the statute would cause a waiver of all past and future claims of any nature whatsoever. The Courts, however, have limited its literal interpretation.

In Reddington (supra at 10), the Court of Appeals examined whether a plaintiff waived a Labor Law §741 action by instituting a Labor Law §740 action. The Court of Appeals held that, because of "the uniquely interconnected elements of sections 740 and 741", no waiver occurred. Accordingly, defendant's motion for summary judgment to dismiss plaintiff's Labor Law §741 action, due to Labor Law §740(7), is denied.

The Court of Appeal's holding in Reddington is limited to the specific interplay of a Labor Law §740 action and its effect on a Labor Law §741 action, leaving open the interpretation

and scope of §740(7)'s waiver as it relates to non-Labor Law §741 claims. The Court did, however, cite favorably to the Collette (132 F.Supp.2d at 274) decision, which held, after an exhaustive analysis, that §740(7)'s waiver "applies only to rights and remedies concerning whistleblowing as defined in the act."

Applying the Collette standard here, plaintiff's claim for "termination pay" brought under Labor Law §198-c and her claim for unpaid wages brought under Labor Law §191, are clearly distinct from her whistleblower claim. Plaintiff's whistleblower claims are premised upon her alleged wrongful termination due to her complaints relative to defendant's violations of New York Law. Such claim is factually different from her claims that she was not paid "termination pay" or "wages". The legal rights sought to be protected under the separate claims are likewise distinct. In denying the waiver's applicability to a claim for unpaid wages, the Collette court stated, that if a defendant owes plainitff "money, under her contract of employment, for vacation time accrued prior to her termination, there is no logical connection between that debt and the dispute about the reasons for her firing, and no reason to assume that the Legislature intended that a plaintiff with a valid claim of retaliatory discharge would be required either to forego a challenge to her firing or to seek reinstatement under the Act but forego earned and unpaid wages." Such reasoning is equally applicable here, and neither of plaintiff's above claims are waived by her instituting a Labor Law §740 claim.

Likewise, plaintiff's defamation claim is also factually and legally distinct from her whistleblower claim. The defamation claim is premised upon facts occurring well after her termination, in connection with her attempts to obtain new employment, and cannot be linked to her claimed wrongful termination. Just as the Court in Kraus v. Brandsetter (185 AD2d 302 [2d

Dept. 1992]) found are that a plaintiff's Labor Law §740 claim did not automatically waive her defamation claim, here too plaintiff's defamation claim has not been waived.

The Court of Appeals found that the "entire point of section 740's waiver provision is to prevent duplicative recovery." Reddington (supra at 12). In allowing plaintiff's defamation, Labor Law §198-c and §191 claims to proceed there is no risk that she will obtain "duplicative recovery" if she recovers under each theory.

Due to the foregoing defendant has failed to meet its threshold burden on their motion for summary judgment based upon Labor Law §740(7)'s waiver, which is denied in its entirety.

Private Right of Action Under Labor Law §§ 191 and 198-c

Defendant's motion seeks dismissal of Plaintiff's Labor Law §§ 191 and 198-c claims on the legal theory that such statutory provisions do not provide for a private right of action. Because Labor Law §§ 191 and 198-c, as interpreted, do provide a private right of action the defendant's motion is denied.

In Cort v. Ash (422 US 66, 78 [1975]) the United States Supreme Court set forth the standard for "determining whether a private remedy is implicit in a statute not expressly providing one". The requisite factors are: first, whether the plaintiff is "one of the class for whose especial benefit the statute was enacted... [s]econd, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one... [and t]hird, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." Id; See also Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 325 (1983).

There is no question that plaintiff is an employee for whose benefit New York Labor Law was enacted. Chu Chung v. New Silver Palace Restaurants, Inc., 272 F.Supp 314, 317 (SDNY 2003). Likewise, considering the entire statutory text of Labor Law Article 6, it is clear that a private civil remedy was intended by the legislature. See Labor Law §198(1, 1-a and 3) (providing that "in an action instituted upon a wage claim by an employee" the employee may recover attorney's fees, costs and liquidated damages; and, in addition states employees may recover wages "whether the action is instituted by the employee or the commissioner"). The explicit statutory text clearly recognizes the right of an employee to bring suit. Lastly, allowing an employee's private right of action is entirely consistent with the statutory scheme laid out, as the Labor Law sets forth a "strong legislative policy aimed at redressing the power imbalance between employer and employee." Chu Chung, supra at 317.

Additionally, the case law relied upon by defendant for its position that no private right of action exists for Labor Law §§ 191 and 198-c is readily distinguished. In, Stoganovic v. Dinolofo (92 AD2d 729 [4th Dept. 1983] aff'd 61 NY2d 812 [1984] (affirmed for reasons stated in the appellate divisions decision)), that plaintiff brought suit for wages against the president of the corporate employer individually. The Court denied a private cause of action exists under Labor Law §§ 198-a and 198-c to bring suit against corporate officers and agents individually. The holding does not stand for the broader proposition that there is no private cause of action under the Labor Law, but rather is limited in its application to actions brought against corporate officers and agents individually. *See* Chu Chung, supra at 318. Here, unlike the claim in Stoganovic, plaintiff has brought suit against her employer not against her employer's officer's and directors individually. As such, Stoganovic is inapplicable to the case at bar.

Moreover, the Appellate Divisions have consistently implied that a private cause of action exists for both Labor Law § 191 and Labor Law 198-c. Dwyer v. Burlington Broadcasters, Inc., 295 AD2d 745 (3d Dept. 2002); Tuttle v. George McQuesten Co., 227 AD2d 745 (3d Dept. 2006); Gennes v. Yellow Book of New York, Inc., 806 AD3d 520 (2d Dept. 2005); Excavators Union Local 731 Welfare Fund v. Zurmuhlen, 68 AD2d 816 (1st Dept 1979).

Accordingly, the Court finds that Labor Law §§198 c and 191 provide plaintiff with a private right of action and defendant's motion for summary judgment on that ground is denied.

Defendant's Fact Based Grounds For Summary Judgment

Defendant's remaining arguments are all grounded in fact based assertions, alleging that plaintiff cannot prove a specific element, or more, of each of her causes of action. Because defendant's motion for summary judgment is premature on these issues, it is denied at this time.

Plaintiff has duly served discovery demands, but discovery is not yet complete. Defendant attached to its reply papers Plaintiff's discovery demands. Defendant does not allege that they responded to, or complied with, plaintiff's demands, nor did they attach their responses. CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated. See, Amico v. Melville Volunteer Fire Co. Inc., 39 AD 3d 784 (2nd Dept. 2007). A summary judgment motion is properly denied as premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant. See, Juseinoski v. New York Hosp. Medical Center of Queens, 29 AD 3d 636 (2nd Dept. 2006); Metichecchia v. Palmeri, 23 AD 3d 894 (3rd Dept.

2005).

Plaintiff alleges, albeit in summary fashion, that discovery is not complete and that further discovery is required as none of the parties to the action have been deposed. It appears that information solely within the control of defendant may support plaintiff's claims relative to defendant's termination of her employment, the wages and hours required by her employment, and any claimed defamatory statements made by the defendant. Since relevant discovery has not been completed, and plaintiff has not had a reasonable time to conduct discovery, defendant's motion for summary judgment on its remaining grounds is denied but may be renewed once discovery has been concluded.

Defendant's request for attorney's fees is denied, as no frivolous behavior is found.

All papers, including this Decision and Order are being returned to the attorneys for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: June 21, 2008
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 22, 2008, Affidavit of Stewart M. Gittelman, dated May 14, 2008, with attached Exhibits 1-2, Affidavit of Nancy Gittelman, dated May 14, 2008, Affidavit of Karen Kahn, dated May 21, 2008, with attached Exhibit 1, Affidavit of Bernice Melancon, dated May 16, 2008, Affidavit of Paula Cone, dated May 16, 2008, Affidavit of Silvia Torres, dated May 14, 2008 with attached Exhibit 1, Affirmation of John Hartzell, dated May 22, 2008, with attached Exhibits A-C, Memorandum of Law of John Hartzell, undated.
2. Affirmation of Joseph Hein, dated June 6, 2008, Affidavit of Robert Otty, dated June 3, 2008, Affidavit of Marguerite Kelly, dated June 5, 2008, Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment of Joseph Hein, dated June 6, 2008.
3. Affirmation of John Hartzell, dated June 12, 2008, with attached Exhibit A, Reply Memorandum of Law in Support of Defendant's Motion for Summary Judgment of John Hartzell, undated.