

Weiss v Kaufman

2010 NY Slip Op 33261(U)

November 18, 2010

Supreme Court, New York County

Docket Number: 103473/2010

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 11/23/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 103473/2010
WEISS, STEPHANIE
vs.
KAUFMAN, BENJAMIN
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 9/27/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for DISMISS

PAPERS NUMBERED
1-3
4-7
8-11, 12, 13-14

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed memorandum decision and order.*

*NB PC sat at
end for 1-10-11 @ 11 AM
in Part 55, rm 43
60 Centre St*

FILED
NOV 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/18/10

JANE S. SOLOMON c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
STEPHANIE WEISS

Plaintiff,

-against-

BENJAMIN KAUFMAN, in his corporate
and individual capacities, KLUSTER,
INC., and QUIRKY, INC.,
Defendants.

-----X

JANE S. SOLOMON, J.:

Plaintiff Stephanie Weiss (Weiss) sues defendants Benjamin Kaufman (Kaufman), Kluster, Inc. (Kluster), and Quirky, Inc. (Quirky) for "liquidated damages, attorney's fees, litigation costs, etc., and sanctions against all defendants under NY Labor Law § 198 and 22 NYCRR 130-1" in connection with Defendants' non-payment of her wages, and for retaliatory discharge. Defendants move to dismiss the complaint on the grounds that Weiss was paid all owed back wages, plus interest, prior to the initiation of this lawsuit, and for failure to state a cause of action (CPLR 3211(a)(7)). Weiss cross moves for pre-answer summary judgment on the complaint.

FACTS

Kaufman was president of Kluster, a Delaware corporation, and the president of Quirky, a separate Delaware corporation (Kaufman Affidavit, attached to Motion, Ex. C). Weiss began working for Kluster as an office manager on September

Index No. 103473/2010
DECISION & ORDER

FILED
NOV 22 2010
NEW YORK
COUNTY CLERKS OFFICE

[* 3]

10, 2008 (Motion, Ex. D). At some point during her employment, Kluster became short of funds. As a result of which, she was not paid between January 15, 2009 and March 11, 2009. She complained and was assured by Kaufman that she would be paid, with interest, when funds were available. In June 2009, Weiss was fired. At that time, Kluster owed her back pay in the amount of \$16,041.69.

In August 2009, Weiss, as a pro-se litigant, commenced an action in the Civil Court entitled *Weiss v. Kluster, Inc.*, Index No. CV-036273/2009 (the Civil Court Action, attached to Motion, Ex. F), for "[f]ailure to pay for wages for \$16,041.69 with interest from 1/31/2009" (Id.). Subsequent to initiating the Civil Court Action, Weiss hired counsel. On January 14, 2010 the parties entered into a stipulation discontinuing that action, without prejudice (Motion, Ex. G).

On February 9, 2010, Weiss received two checks from Kluster's successor corporation, Quirky Ventures, Inc. (QVI). The first check was for her net back wages in the amount of \$10,581.81; the second was for interest, calculated at 9%, in the amount of \$1,564.06 (Motion, Ex. H). It is undisputed that Weiss received the checks and cashed them. On April 16, 2010, Weiss brought this action.

DISCUSSION

A. Labor Law § 198(1-a)

Section 198 of the Labor Law is entitled "Costs, Remedies." It provides, as relevant:

In any action instituted in the courts upon a wage claim by an employee . . . in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.
(Emphasis added)

A prerequisite to recovery under this section is that the plaintiff prevails in a lawsuit for wages (see, e.g., *Gottlieb v. Kenneth D. Laub & Co., Inc.*, 82 NY2d 457, 462-64 [1993]). Weiss cannot be said to have prevailed in the Civil Court Action because it was discontinued. In the interim, she was paid what she was due with interest. The proper forum for a section 198 claim was the Civil Court. The relied upon damages provision is not the basis for a subsequent lawsuit.

While the claim must be dismissed, nothing alleged in the complaint raises to the level of frivolous conduct required by 22 NYCRR 130-1.1.

B. Retaliatory Discharge

Labor Law § 215 provides, as relevant:

(a) No employer or his or her agent . . . shall discharge, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, that the employer has violated any provision of this chapter . . .

Weiss alleges that she "complained about the fact that she was owed approximately seven (7) pay-checks in back wages" (Complaint, ¶ 20) and one month later, was terminated.

[* 5]

Defendants argue that Weiss has not sufficiently alleged that she complained of a violation of the labor law, and that she was an at-will employee, and that she who was fired for performance issues.

To assert a cause of action for retaliatory discharge under Labor Law § 215, a plaintiff must allege that she complained about a specific violation of the Labor Law (*Epifani v. Johnson*, 65 AD3d 224, 236 [2nd Dept, 2009]). Thus, Weiss did so. Defendant's position that an employee must allege that she notified her employer of the exact section she relies on is incorrect. The employee need not be familiar with the specifics of the Labor Law to cite the section of the statute she relies on. All that is required is that the complaint to the employer be of a colorable violation of the statute.

Viewing the complaint in the light most favorable to Weiss, she adequately alleges a violation of Labor Law,¹ in that she was not paid for seven pay periods, complained, and then was fired. Defendants' argument that Weiss was fired for poor performance raises a factual dispute. Accordingly, the second cause of action survives dismissal.

1. Dismissal as to Quirky

Defendants argue that Quirky has no connection to this

¹Labor Law § 191(1)(d) ("Clerical and other worker--A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly").

[* 6]

action because Weiss did not work for Quirky. Weiss responds that Kaufman dominated both Quirky and Kluster, the corporate veil between Kaufman and Quirky could be pierced, and Quirky is an appropriate defendant. This argument is unpersuasive. Quirky did not fire her. Accordingly, the second cause of action is dismissed as against Quirky.

C. The Cross Motion

Weiss argues that there is no question of fact that Kaufman, as the "decision-maker" for Kluster, fired Weiss in retaliation for her complaining about not being paid for several months. Defendants argue that evidence shows that Weiss made errors on the job sufficient to warrant her termination (See, Kaufman Affidavit, attached to Affirmation in Opposition to Cross Motion, Ex. C; Application for Unemployment Benefits, attached to Cross Motion, Ex. 6). Again, this dispute goes to the merits. Accordingly, summary judgment is denied.

All other arguments raised in the cross motion are moot.

CONCLUSION

In accordance with the foregoing, it hereby is

ORDERED that the motion to dismiss is granted to the extent that the first cause of action is dismissed, and the second cause of action is dismissed as against defendant Quirky, Inc., and is otherwise denied; and it further is

ORDERED that the cross motion for summary judgment is

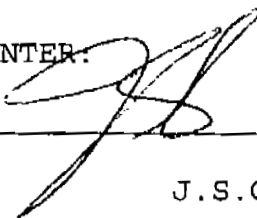
denied; and it further is

ORDERED that the remaining defendants are directed to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel are directed to appear for a preliminary conference in Part 55, Room 432, 60 Centre Street, on January 10, at 11 AM.

Dated: 11/18/10

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
NOV 22 2010
NEW YORK
COUNTY CLERK'S OFFICE