Zutrau v Ice Sys., Inc.
2010 NY Slip Op 34011(U)
May 13, 2010
Supreme Court, Suffolk County
Docket Number: 37576-09
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

INDEX
NO.: 37576-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 1-7-10
SUBMITTED: 2-4-10
MOTION NO.: 001-MOT D

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LEILANI ZUTRAU, individually and on behalf of ICE SYSTEMS, INC.,

Plaintiff,

-against-

ICE SYSTEMS, INC. and JOHN C. JANSING,

Defendants.

---x

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Upon the following papers numbered 1 _7_ read on this motion _to dismiss_ ; Notice of Motion and supporting papers _1-4_ ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers _5-6_ ; Replying Affidavits and supporting papers _7_ ; it is,

ORDERED that this motion by the defendants for an order dismissing the plaintiff's first, second, third, fifth, seventh, and eighth causes of action is granted as to the third cause of action only; and it is further

ORDERED that the motion is otherwise denied.

The defendant ICE Systems, Inc. ("ICE"), which operates under the name "Proxytrust," provides proxy processing and related information services to the U.S. trust banking industry. The defendant John Jansing is ICE's President and majority shareholder. The plaintiff began working for ICE in 2000 as a consultant. In 2001, Jansing promised the plaintiff that he would grant her an equity interest in ICE if she worked with him to rehabilitate the company until it became profitable and could be sold. The plaintiff agreed. In 2004, she

received a 22% equity interest in ICE and was appointed ICE's Treasurer and Secretary. Jansing reiterated that the purpose of her equity position was to ensure the plaintiff's continued employment with ICE until the company was sold. In February 2005, the plaintiff's job duties were expanded to Executive Vice President.

As an Executive Vice President and shareholder, the plaintiff was responsible for ICE's human resource and payroll functions, among other things. She instituted timekeeping software to track employee hours and attendance, in part, to ensure the proper payment of overtime to those employees who worked in excess of 40 hours a week. Jansing objected to her attempts to comply with the wage-and-hour laws. In early June 2007, he told the plaintiff to stop tracking the hours of certain non-exempt employees, including Walter Lotspeich, whom she supervised. When she refused, Jansing removed her as Lotspeich's supervisor, and her employment was terminated shortly thereafter.

At the end of 2005, the plaintiff advised Jansing that she had breast cancer. She continued to perform her functions as Executive Vice President, taking time off as needed for medical appointments and treatment. In December 2006, she discovered a lump in her lymph nodes that was subsequently diagnosed as cancerous. She informed Jansing and commenced drug therapy. At the end of May 2007, the plaintiff advised Jansing that she needed to take a two-month leave of absence for treatment. Her leave of absence was scheduled to begin on June 15, 2007, but she postponed it until June 30, 2007, to work on an internal audit. The defendants terminated her employment on June 20, 2007.

The plaintiff commenced this action on behalf of herself individually and on behalf of ICE derivatively. The plaintiff's individual claims are found in the first eight causes of action, and the derivative claims are found in causes of action nine through twelve. The defendants move to dismiss the first, second, third, fifth, seventh, and eighth causes of action. The plaintiff opposes dismissal of the first, second, third, and seventh causes of action and withdraws with prejudice the fifth and eighth causes of action.

The First Cause of Action

The first cause of action alleges that the defendants violated the New York State Human Rights Law (Executive Law § 290 et seq.), which prohibits discrimination in employment on the basis of disability, among other things. The plaintiff contends that her cancer is a disability for which the defendants refused to provide her with reasonable accommodations, as required by the Human Rights Law. The defendants move to dismiss this cause of action on the grounds that the plaintiff was not an "employee" within the meaning of the Human Rights Law and that her allegations fail to establish that she was refused reasonable accommodations.

Contrary to the defendants' contentions, the issue of whether a principal of a corporation should be considered an employee for purposes of the Human Rights Law is not well

settled in New York. In **Germakian v Kenny Intl. Corp.** (151 AD2d 342), upon which the defendants rely, the court found that the principals of a closely held corporation were not employees for the purpose of determining the number of persons employed by the defendant employer. The court recognized, however, that there may be instances when principals may be counted as employees for purposes of the Human Rights Law. In **Harris v Iannaccone** (107 AD2d 429, *affd* 66 NY2d 728), the court found that the plaintiff was entitled to a judicial forum to air his charge of discrimination. The plaintiff in **Harris**, like the plaintiff in this action, was a minority shareholder and officer of a corporation. His employment was allegedly terminated due to his disability, a progressive neurological disease.

Recent federal court decisions have recognized that the mere fact that a person is a shareholder should not necessarily be used to determine whether she is an employee or a proprietor under antidiscrimination laws. In **Clackamas Gastroenterology Assocs. v Wells** (538 US 440), the Supreme Court eschewed categorical approaches and, instead, looked to the common-law master servant relationship for guidance, stating that the common-law element of control is the principal guidepost that should be followed in evaluating whether a shareholder is an employee for purposes of antidiscrimination statutes (**Id.** at 448). The Supreme Court ruled that the relevant inquiry is whether the individual acts independently and participates in managing the organization or whether she is subject to the organization's control (**Id.** at 449; *see also*, **Rodal v Anesthesia Group of Onondaga**, 369 F3d 113, 123 [2d Cir]).

Liberally construing the allegations of the complaint in the plaintiff's favor, accepting the alleged facts as true, and according the plaintiff the benefit of every possible favorable inference (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88), the court finds that the plaintiff's allegations are sufficient to survive dismissal of the first cause of action. Whether the plaintiff was an employee of ICE and whether the defendants refused her reasonable accommodations are factual questions that cannot be determined on this record. Accordingly, the court declines to dismiss the first cause of action.

The Second Cause of Action

The second cause of action alleges that the defendants violated Labor Law § 215 by terminating the plaintiff's employment in retaliation for her raising objections to their noncompliance with the wage-and-hour laws. The defendants move to dismiss this cause of action on the grounds that the plaintiff was not an "employee" within the meaning of the Labor Law and that her allegations fail to establish that she made a complaint about the defendants' alleged violations thereof.

In order to state a claim under Labor Law § 215, a plaintiff must adequately plead that, while employed by the defendant, she made a complaint about the employer's violation of the Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result. In addition, there must be a nexus between the

plaintiff's complaint and the defendant's retaliatory action (*see*, **Higueros v New York State Catholic Health Plan**, 526 F Supp 2d 342, 347 [EDNY]). A close connection in time between the alleged complaint and termination indicates that the complaint could have been a motivating factor for the employee's termination (**Id.** at 347, *citing* **Jacques v Di Marzio, Inc.**, 200 F Supp 2d 151, 162 [EDNY], *affd* 386 F3d 192 [2nd Cir]).

On a CPLR 3211 motion to dismiss a complaint, the court must take the allegations as true and resolve all inferences which reasonably flow therefrom in favor of the pleader (**Cron v Hargro Fabrics**, 91 NY2d 362, 366). In opposition to such a motion, the plaintiff may submit affidavits to remedy defects in the complaint and thereby preserve inartfully pleaded, but potentially meritorious, claims (**Id.** at 366). Though limited to that purpose, such additional submissions by the plaintiff, if any, will also be given their most favorable intendment (**Id.** at 366). Applying these principles, the court finds that the plaintiff has set forth sufficient factual allegations in her complaint and in her affidavit in opposition to survive dismissal of the second cause of action.

As previously discussed, whether the plaintiff was an employee of ICE, is a factual issue that cannot be determined at this time. The defendants contend that the plaintiff was not an "employee" within the meaning of the Labor Law because § 2(5), which defines "employee" as "a mechanic, workingman or laborer working for another for hire," refers to manual laborers only. However, retaliatory discharge claims under Labor Law § 215 have not been limited to manual laborers. Other courts have considered retaliatory discharge claims under § 215 from a marketing and sales representative (**Higueros v New York State Catholic Health Plan**, *supra*), commissioned salespersons (**Kelly v Xerox Corp.**, 256 AD2d 311; **Kreinik v Showbran Photo, Inc.**, 2003 WL 22339268 [SDNY]), and even a college professor (**Quintas v Pace University**, 23 AD3d 246 [dismissed on other grounds]). The defendants have not brought to the court's attention any case in which a retaliatory discharge claim under § 215 was dismissed because the plaintiff was not an "employee" within the meaning of Labor Law § 2(5), nor is the court aware of any such case. Accordingly, the court finds the defendants' argument to be specious.

The defendants, relying on **McKenzie v Renberg's Inc.** (94 F3d 1478 [10th Cir]) and its progeny, contend that plaintiff cannot assert a retaliatory discharge claim because she was responsible for ICE's human resource and payroll functions. In **McKenzie**, a personnel director did not engage in protected activity when she brought potential violations of employment law to the attention of her employer because it was her job to identify such risks. The Tenth Circuit found that the plaintiff never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a personal complaint about the wage-and-hour practices of her employer and asserting a right adverse to the company. Unlike the plaintiff in **McKenzie**, who merely alerted management to potential violations of the law in order to avoid liability for the company, the plaintiff in this case did assert a right adverse to ICE. In her affidavit in opposition to the defendants' motion, the plaintiff avers that she refused to implement

Jansing's order to stop tracking the hours of certain non-exempt employees, including Walter Lotspeich, whom she supervised. This placed her outside the normal managerial role, which is to further company policy (**Equal Employment Opportunity Comm. v HBE Corp.**, 135 F3d 543, 554 [8th Cir]; **Frazier v United Parcel Service**, 2005 WL 1335245 [ED Cal]). Accordingly, the court finds that the plaintiff has made out a claim of protected conduct.

Finally, the court recognizes that the plaintiff must allege that she complained about a specific violation of the Labor Law to support a claim of retaliatory discharge pursuant to Labor Law § 215 (**Epifani v Johnson**, 65 AD3d 224, 236; **Kelly v Xerox Corp.**, 256 AD2d 311, 312). While the Labor Law does not contain any provisions governing overtime compensation (**Epifani v Johnson**, *supra* at 236), §§ 195(4) and 679 require employers to keep records of the hours worked and wages paid to employees. The plaintiff's allegations are sufficient to establish that her complaints were premised upon ICE's alleged failure to comply with those sections. Accordingly, the court declines to dismiss the second cause of action.

The Third Cause of Action

The third cause of action alleges that the plaintiff, as a minority shareholder of ICE, had reasonable expectations of continued employment, profits and distributions, participation in ICE's management, and access to ICE's books and record, among other things. The defendants move to dismiss this cause of action on the ground that Delaware law does not recognize a common-law claim of shareholder oppression.

It is undisputed that the plaintiff's third cause of action is governed by the laws of Delaware. Issues of corporate governance are determined by the state in which the corporation is chartered (*see*, **Kikis v McRoberts Corp.**, 225 AD2d 455), and ICE is a Delaware Corporation. The only Delaware case that squarely addresses the issue of shareholder oppression is **Litle v Waters** (1992 WL 25758), an unpublished opinion of the Delaware Chancery Court. The court in **Litle** declined to dismiss a claim of minority shareholder oppression, finding that the complaint adequately alleged oppression under the standard enunciated in **Gimpel v Bolstein** (125 Misc 2d 45), a New York corporate dissolution case pursuant to Business Corporation Law § 1104-a. After **Litle** was decided, the Delaware Supreme Court, in dicta, expressed a distaste for special, judicially created rules to protect the minority shareholders of non-statutory, closely held Delaware corporations (*see*, **Nixon v Blackwell**, 626 A2d 1366, 1379-1381). Some non-Delaware courts have continued to follow **Litle** and have interpreted Delaware law so as not to preclude minority shareholder oppression claims thereunder (*see e.g.*, **Sokol v Ventures Educ. Systems**, 10 Misc 3d 1055[A]; **Carstarphen v Milsner**, ____F Supp 2d ____, 2010 WL 890142 [D Nev]; **Clemmer v Cullinane**, 62 Mass App 904; **Reserve Solutions, Inc. v Vernaglia**, 438 F Supp 2d 280 [SDNY]). In **Kikis v McRoberts Corp.** (*supra*), the First Department held that a minority shareholder of a closely held Delaware corporation was not entitled to any special protection against being terminated by reason of his status as a minority shareholder. The First Department, citing **Nixon**, dismissed the plaintiff's complaint, finding

that the Delaware Supreme Court had unequivocally rejected the notion that there are any special, judicially created rules to protect the minority shareholders of Delaware corporations. Since **Kikis** is the only New York Appellate Division precedent on the issue of minority shareholder oppression in closely held Delaware corporations, this court is bound to follow it (*see generally*, Siegel, NY Practice §449, at 758 [4th ed]). Accordingly, the third cause of action is dismissed.

The Seventh Cause of Action

The seventh cause of action alleges that the defendants entered into an oral contract to employ the plaintiff for as long as she owned stock in ICE. The defendants move to dismiss this cause of action on the ground that such an agreement is barred by the statute of frauds because it cannot be performed within one year.

The statute of frauds, codified in General Obligations Law § 5-701, provides in pertinent part that an agreement, promise, or undertaking is void unless embodied in a writing or writings and signed by the party to be charged if, by its terms, it is not to be performed within one year from the making thereof (General Obligations Law § 5-701[a]). The Court of Appeals has interpreted the one-year time frame as follows: "'[i]t is not the meaning of the statute that the contract must be performed within a year....if the obligation of the contract is not, by its very terms, or necessary construction, to endure for a longer period than one year, it is a valid agreement, although it may be capable of an indefinite continuance.'...In other words, as another court expressed the matter, 'the statute only applies to agreements which are, by express stipulation, not to be performed within a year'" (**North Shore Bottling Co. v Schmidt & Sons**, 22 NY2d 171, 175-176). Thus, the statute of frauds concerns only those agreements that, by their terms "have absolutely no possibility in fact and law of full performance within one year" (**D&N Boening v Kirsch Beverages**, 63 NY2d 449, 454). As long as the agreement may be "'fairly and reasonably' interpreted such that it may be performed within a year, the statute of frauds will not act as a bar however unexpected, unlikely, or even improbably that such performance will occur during that time frame" (**Cron v Hargo Fabrics**, 91 NY2d 362, 366; *see also* **Freedman v Chemical Constr. Corp.**, 43 NY2d 260).

The plaintiff alleges that the defendants agreed to employ her for as long as she owned stock in ICE. The plaintiff also alleges that Jansing promised her an equity interest in ICE if she would work with him to rehabilitate the company until it became profitable and could be sold. When, as here, there is no provision in the alleged oral agreement that directly or indirectly regulates the time of performance, the agreement does not fall within the statute of frauds, (*see*, **Freedman v Chemical Constr. Corp.**, *supra* at 265). Moreover, contrary to the defendants' contentions, the alleged oral agreement was capable of performance within a year given the possibility that Jansing would sell ICE within that time (*cf.* **Canet v. Gooch Ware Travelstead**, 917 F Supp 969, 987 [EDNY], *citing* **Blake v Voight**, 134 NY 69, 75). When, as here, the parties agree to carry on business for a period exceeding one year, or until the happening of an event that may transpire before the end of the year, the contract is protected from the operation of

the statute of frauds (**Id** at 73). Accordingly, the court declines to dismiss the seventh cause of action.

Finally, the plaintiff seeks leave to replead the dismissed third cause of action. While the plaintiff does not have a cause of action for shareholder oppression, Delaware law recognizes that a shareholder owes a fiduciary duty to other shareholders when he owns a majority interest in or exercises control over the business affairs of the corporation (**Ivanhoe Partners v Newmont Mining Corp.**, 535 A2d 1334, 1344). The plaintiff's fourth cause of action for breach of fiduciary duty is based on the same facts as the third cause of action, and the defendants do not seek dismissal thereof. Accordingly, the plaintiff's application for leave to replead is denied.

Dated: May 13, 2010

J.S.C.