DiStefano v Verizon
2010 NY Slip Op 34093(U)
July 1, 2010
Supreme Court, New York County
Docket Number: 109311/2009
Judge: Paul G. Feinman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK .
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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SALVATORE DiSTEFANO and SEBASTIAN TARAVELLA,

Plaintiffs,

- against -

VERIZON,

Defendant.

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Index No. 109311/2009
Mot. Seq. No. 001

DECISION and ORDER

Appearances:	**For Plaintiffs:**	**For Defendant:**
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Papers considered in review of this motion and cross motion:

Papers	E-Filing Document Number
Notice of Motion	4
Miklave Affirmation and Exhibit	5
Memo of Law	6
Notice of Cross Motion	7A
Affirmation in Opposition	10
Reply Memo of Law	11
Interim Order	12

PAUL G. FEINMAN, J.:

Defendant moves to dismiss the verified complaint for failure to state a cause of action. Plaintiffs cross-move for leave to serve an amended complaint. For the reasons discussed below, defendant's motion is granted and plaintiffs' cross motion is denied.

Background

Plaintiffs were employed by defendant. They allege that in 2007, a manager "promised workers under his charge . . . that if they did [a certain number of duties] each day, they would be permitted to falsely record the hours they actually worked each day and to leave early, regardless

of how early they finished the 'jobs'" (Doc 2. ¶ 8).[1] DiStefano "refused to participate in this scheme [and] voiced its illegality to [the manager], other workers and other management officials" and, he alleges that he consequently "rarely got any overtime" (Doc 2. ¶ 8). Taravella also "declined to participate" which, according to plaintiffs, led "to a pervasive campaign of harassment" and a number of adverse employment actions (Doc. 2 ¶ 13).

Plaintiffs commenced this action alleging a single cause of action: a violation of Labor Law 740 ("Whistleblower's Law"). Defendant moved to dismiss and plaintiffs purportedly cross-moved for leave to amend the complaint. However, plaintiffs did not file and serve a notice of cross motion pursuant to CPLR 2215, nor did they pay the relevant filing fee for a cross motion. Rather than deny the cross motion for these procedural infirmities, by interim order dated March 3, 2010, this court granted plaintiffs a brief adjournment to correct these oversights (Doc. 12). These errors were then corrected by counsel (Doc. 7A).

Analysis

I. Defendant's Motion to Dismiss

Defendant moves to dismiss the original complaint for failure to state a cause of action. The original complaint alleges a single cause of action: a violation of Labor Law § 740 premised upon plaintiffs' alleged refusal to engage in a "scheme" to falsify their employment hours, which they claim led to retaliatory actions (Doc. 2 ¶¶ 21-22).

The Whistleblower's Law protects an employee's conduct in three finite circumstances. The first is when an employee "discloses, or threatens to disclose to a supervisor or public body, an activity, policy or practice of the employer that is in violation of law, rule or regulation which

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[1] Unless otherwise indicated, all page references are to the E-filing document number.

violation creates and presents a substantial and specific danger to the public health or safety" (Labor Law § 740 [2] [a]). The second is when the employee "provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer" (Labor Law § 740 [2] [b]). The third is when the employee "objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation" (Labor Law § 740 [2] [c]).

Here, the complaint is entirely devoid of any allegations that defendant's conduct "create[d] and present[ed] a substantial and specific danger to the public health or safety" (Labor Law § 740 [2] [b]). Plaintiffs do not oppose this motion. Instead, they have moved to amend the complaint to add several new causes of action and withdraw the cause of action alleging violation of the Whistleblower Law. Even affording plaintiffs a liberal construal of their pleadings and "every possible favorable inference" the original complaint fails to state a cause of action (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 458 [1st Dept 2009]). Thus, defendant's motion is granted as to the original complaint.

II. Plaintiffs' Cross Motion for Leave to Amend the Complaint

Plaintiffs cross move for leave to amend the complaint. Leave to amend pleadings "shall be freely given" unless the proposed amendment is prejudicial, palpably improper, or lacks merit (CPLR 3025 [b]; *see MBIA Ins. Corp. v Greystone & Co., Inc.*, 2010 NY Slip Op 04867, *1 [1st Dept 2010]; *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

Labor Law § 740 (7) provides 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." "The plain text of this provision indicates that 'institut[ing]' an action-without anything more-triggers waiver. And in New York, an action is instituted with the filing of a complaint and service upon opposing parties" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87 [2008]).

Here, the proposed amended complaint alleges five causes of action: (1) intentional infliction of emotional distress; (2) violation of the Human Rights Law; (3) violation of the City Human Rights Law; (4) negligent retention; and (5) negligent supervision. An examination of the proposed amended complaint plainly reveals that the additional causes of action alleged clearly "arise out of the same acts" as those that gave rise to the Labor Law § 740 claim" (*Owitz v Beth Israel Med. Ctr.*, 1 Misc 3d 912[A] [Supt Ct, New York County 2004]). "Such a waiver may not be avoided by a plaintiff by amending the complaint, to withdraw the Labor Law § 740 claim" (*Bones v Prudential Fin., Inc.*, 54 AD3d 589, 589 [1st Dept 2008] [unanimously reversing trial court's denial of defendants' motion to dismiss]; *Hayes v Staten Is. Univ. Hosp.*, 39 AD3d 593, 594 [2d Dept 2007] ["plaintiff's attempt to amend the complaint to exclude the Labor Law § 740 cause of action did not nullify the waiver"]). While this result may seem harsh, inasmuch as it precludes plaintiffs from having any cause of action adjudicated in court arising out of these facts, it is mandated by the "waiver" or "election of remedies" provisions of Labor Law § 740; it is the course charted by plaintiffs in this litigation by originally seeking to proceed under the Labor Law, albeit unsuccessfully. Thus, the court is compelled to deny plaintiffs' motion for leave to amend the complaint. Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that plaintiffs' cross motion for leave to amend is denied; and it is further

ORDERED that defendant shall serve a copy of this order upon the Clerk of the Court

who shall enter judgment in favor of defendant dismissing the complaint in its entirety, together with costs and disbursements, as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

Dated: July 1, 2010 7:35 pm
New York, New York

Paul G. Feinman
J.S.C.

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