

Sethi v Narod
2011 NY Slip Op 32123(U)
July 25, 2011
Sup Ct, Nassau County
Docket Number: 002499/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

HARSHARAN SETHI,

Plaintiff,

-against-

RANDY NAROD, ERICA LEE, DEBORAH
 MORRISSEY, BRIAN WASSERMAN,
 MITCHELL ROBBINS, JERRY MOTT,
 RICHARD SOMECK, DONALD TRUMP, JR.
 and CAMBRIDGE WHO'S WHO PUBLISHING,
 INC.,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 002499/11

MOTION DATE: May 19, 2011
Motion Sequence # 001, 003

The following papers read on this motion:

Notice of Motion..... X
 Cross-Motion..... X
 Affidavit in Reply X
 Memorandum of Law..... XX
 Memorandum of Law in Reply..... X

Motion by defendants to dismiss the complaint is **granted** in part and **denied** in part.
 Cross motion by plaintiff to consolidate the present action with Index No. 9175/10 is **granted**
 to the extent of ordering a joint trial.

This is an action for retaliatory discharge pursuant to Labor Law § 740. Defendant

Cambridge Who's Who Publishing provides marketing and networking services to business professionals. Defendants Randy Narod, Erica Lee, Deborah Morissey, Brian Wasserman, Mitchell Robbins, and Jerry Mott are officers of Cambridge. Defendants Richard Someck and Donald Trump, Jr. are principal stockholders of the company.

On July 21, 2008, plaintiff Harsharan Sethi was hired by Cambridge as director of management information systems. At the time of his employment, Sethi signed an employee covenants and non-disclosure agreement. In the non-disclosure agreement, Sethi promised not to use confidential information of Cambridge, except in carrying out the business of the company. The company defines confidential information as including its client's names, addresses, and credit card numbers.

In early 2009, Sethi discovered that a set of five back up tapes, or electronic storage devices, containing important company data was missing. The tapes contained detailed information on the business people who subscribe to Cambridge's services, including their credit card and social security numbers. It appears that the drive in which the tapes were stored was not functioning properly, and the drive was returned to the manufacturer with the tapes still in place. Although Sethi blames Cambridge's outside consultant, Proactive Technology Group, for the loss of the tapes, Proactive attributes at least some of the fault to Sethi. Sethi urged officials of Cambridge to report the data loss to "appropriate authorities," but was not satisfied with their response. On February 12, 2010, Sethi sent an email concerning the data loss to Randy Narod and Mitchell Robbins, with a copy to the Nassau County District Attorney, the Internal Revenue Service, and the New York Attorney General. Sethi submitted a letter of resignation to Cambridge on the same day that he sent the email (Defendants' reply aff. Ex A).

On May 12, 2010, Cambridge commenced an action against Sethi for breach of the confidentiality provision in his employment agreement and defamation (Index No. 9175/10).

Sethi commenced the present action against Cambridge and the individual defendants on February 17, 2011. In the amended complaint, Sethi asserts claims for retaliatory discharge in violation of Labor Law § 740, assault, and conversion of his personal property. On the Labor Law claim, plaintiff seeks to hold all of the defendants liable as his "employer." Plaintiff also seeks to hold defendants Narod, Robbins, Someck, Wasserman, and Trump liable on a piercing the corporate veil theory. Finally, plaintiff asserts a claim against Narod for defamation based upon statements which he made accusing plaintiff of attempting to extort money from Cambridge or "shake them down." The statements were published in the Daily News on February 22, 2011.

Defendants move to dismiss the complaint based upon a defense founded upon documentary evidence, lack of subject matter jurisdiction, another action pending, statute of limitations, lack of personal jurisdiction, and failure to state a cause of action. Plaintiff cross moves to consolidate the present case with Cambridge's action for breach of the employment agreement.

Labor Law § 740(2) provides that an employer shall not take any retaliatory personnel action against an employee because such employee discloses to a supervisor or to a public body an activity of the employer that is in violation of law "which violation creates and presents a substantial and specific danger to the public health or safety..." "Retaliatory personnel action" is defined as "discharge, suspension or demotion of an employee or other adverse employment action taken against an employee in the terms and conditions of employment" (Labor Law § 740(1)[e]). An employee who has been the subject of retaliatory personnel action may institute a civil action within one year after the alleged retaliatory personnel action was taken (Labor Law § 740(4)). Subdivision 7 provides that nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee, "except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under...the common law." The mere commencement of an action under Labor Law § 740(4) acts as an election of remedies, waiving other causes of action relating to the alleged retaliatory discharge, irrespective of the disposition of such claims (*Deshpande v TJH Medical Services*, 52 AD3d 648, 651 [2d Dept 2008]).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

Defendants argue that plaintiff's Labor Law § 740 claim is barred by the one year statute of limitations since plaintiff resigned on February 12, 2010, and the present action was not commenced until February 17, 2011. In opposition, plaintiff submits an email dated May 10, 2010 from defendant Morrissey, Cambridge's vice president of human resources, stating that, based upon his most recent inappropriate emails, Cambridge was "withdrawing its offer of severance" and plaintiff's employment was "terminated effective immediately." (Plaintiff's ex. 1). Since the court must assume based on the exhibit that plaintiff was not terminated until May 10, 2010, defendants' motion to dismiss plaintiff's Labor Law § 740 claim based on the statute of limitations is **denied**.

Defendants argue that plaintiff has not alleged an actual violation of Labor Law § 740. In support of his Labor Law § 740 claim, plaintiff alleges that he was harassed and ultimately fired in May 2010. Discharge is expressly included within the definition of “retaliatory personnel action.” The harassment presumably includes the November 2009 assault, which would constitute adverse action “in the terms and conditions of employment.” Defendants’ motion to dismiss plaintiff’s Labor Law § 740 claim for failure to state a cause of action is denied.

Defendants argue that the individual defendants cannot be liable under Labor Law § 740 because they were not plaintiff’s employer. Labor Law § 740(1) defines “employer” as any person, firm, partnership, institution, corporation, or association that employs one or more employees. The “economic realities” test determines whether a given individual is an employer (*Noble v 93 University Place Corp.*, 303 F. Supp 2d 365 [SDNY 2003]). The relevant factors include whether defendant had the power to hire and fire employees and whether defendant supervised and controlled employee work schedules or conditions of employment (*Id.*). On the present motion to dismiss, the court must give plaintiff the benefit of the favorable inference that the individual defendants exercised supervisory control or had hiring and firing power. Defendants’ motion to dismiss plaintiff’s Labor Law § 740 claims as against the individual defendants is denied.

Defendants argue that the third cause of action, based on the November 2009 assault, is barred by the one year statute of limitations. However, that assault claim was asserted as a counterclaim against Narod in Sethi’s answer to the complaint filed by Cambridge on May 12, 2010 (Plaintiff’s ex. 5 at 12). Since the counterclaim was not barred when the complaint was filed, it is timely as against Narod (CPLR § 203[d]). The counterclaim is timely as against the other defendants because they are united in interest with Narod (CPLR § 203[b]); *Haidt v Kurnath*, 2011 N.Y. App. Div LEXIS 5764 [4th Dept 2011]). Defendants’ motion to dismiss plaintiff’s third cause of action for assault based on the statute of limitations is denied.

Defendants argue that plaintiff’s claims for assault, conversion, and defamation are waived by the election of remedies provision in Labor Law § 740(7). Plaintiff alleges that defendant Narod assaulted him in November 2009 and again on September 9, 2010, i.e. both before and after plaintiff’s discharge. The amended complaint does not set forth the date when plaintiff’s personal property was allegedly converted. However, the retention of plaintiff’s personal items appears to have occurred in connection with his discharge and exclusion from Cambridge’s premises. The allegedly defamatory statements appear to have

occurred shortly before they were published in the newspaper on February 22, 2011.

The court determines that the alleged conversion of plaintiff's personal property was incident, and thus related, to his alleged retaliatory discharge. Accordingly, any claim for conversion is waived. The court notes that Cambridge claims to have returned plaintiff's personal property in any event. Defendants' motion to dismiss plaintiff's conversion claim based on an election of remedies is **granted**.

The court determines that the alleged assault which occurred prior to plaintiff's discharge is related to the alleged retaliatory personnel action. However, the alleged assault which occurred subsequent to plaintiff's discharge is an unrelated occurrence, as is the alleged defamation. Defendants' motion to dismiss plaintiff's claims for the November 2009 assault based on an election of remedies is **granted**. Defendants' motion to dismiss plaintiffs' claims for the September 2010 assault and for defamation based upon an election of remedies is **denied**.

Defendants argue that plaintiff's second cause of action for assault is legally insufficient as against Cambridge because it occurred after plaintiff's termination and was not in the course of Narod's employment. Under the doctrine of respondent superior, the employer may be held liable whether the employee acts negligently or intentionally so long as the tortious conduct is generally foreseeable and a natural incident of the employment (*Fernandez v Rustic Inn*, 60 AD3d 893, 896 [2d Dept 2009]). Liability will not attach where the employee is acting solely for personal motives unrelated to the furtherance of the employer's business (*Id*).

On this motion to dismiss, the court must give plaintiff the benefit of the favorable inference that Narod assaulted plaintiff to discourage further emails critical of Cambridge. Thus, plaintiff has adequately alleged that the assault was in the course of Narod's employment. Defendants' motion to dismiss the second cause of action for assault for failure to state a cause of action is **denied**. Since the individual defendants may be liable on a theory of vicarious liability, the court need not determine whether liability may be imposed on a theory of piercing the corporate veil.

Defendants argue that Narod's statement that plaintiff was attempting to extort Cambridge was not defamatory per se. However plaintiff has alleged special damages in that the statement will affect his ability to secure employment. The court cannot rule on defendants' defense of truth on a motion to dismiss. Defendants' motion to dismiss plaintiff's defamation claim for failure to state a cause of action is **denied**.

SETHI v NAROD, et al

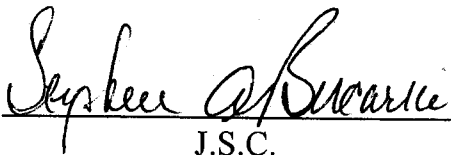
Index no. 002499/11

Since both of the parties' actions are pending before this court, defendants' motion to dismiss for another action pending is **denied**. As defendants Wasserman, Robbins, and Trump have not established that they were not validly served at their actual place of business, defendants' motion to dismiss for lack of personal jurisdiction is denied (CPLR § 308[2]).

Plaintiff's cross motion to consolidate the above action with Index No. 9175/10 is **granted** to the extent of ordering a joint trial (CPLR § 602). The actions shall also proceed jointly with respect to discovery.

So ordered.

Dated JUL 25 2011


J.S.C.

ENTERED
JUL 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE