

<b>Webb-Weber v Community Action for Human Servs., Inc.</b>
2011 NY Slip Op 34087(U)
January 12, 2011
Supreme Court, Bronx County
Docket Number: 310286/09
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: STP

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WENDY WEBB-WEBER,

Plaintiff(s),

- against-

INDEX No. 310286/09

COMMUNITY ACTION FOR HUMAN SERVICES,  
INC., DAVID G. BOND, PAIGE C. BOND, J. MAXINE  
AGEE, CHAIRMAN OF THE BOARD OF  
DIRECTORS and THE BOARD OF DIRECTORS OF  
COMMUNITY ACTION FOR HUMAN SERVICES,  
INC.,

Defendant(s).

Present:  
HON. STANLEY GREEN  
J.S.C.

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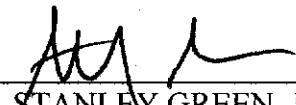
The following papers numbered 1 to 5 read on this motion  
No. on the Calendar of April 19, 2010

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1,2
Answering Affidavit and Exhibits.....	4
Replying Affidavit and Exhibits.....	
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	3,5

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: January 12, 2011

  
\_\_\_\_\_  
STANLEY GREEN, J.S.C.

MP

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: STP

-----X  
WENDY WEBB-WEBER,

INDEX No. 310286/09

Plaintiff(s),

- against-

COMMUNITY ACTION FOR HUMAN SERVICES,  
INC., DAVID G. BOND, PAIGE C. BOND, J. MAXINE  
AGEE, CHAIRMAN OF THE BOARD OF  
DIRECTORS and THE BOARD OF DIRECTORS OF  
COMMUNITY ACTION FOR HUMAN SERVICES,  
INC.,

Defendant(s).

DECISION

-----X

**HON. STANLEY GREEN:**

The motion by defendants for an order dismissing the complaint pursuant to CPLR §3211(a)(1), (2), (7) and (11) is granted to the extent that the Third, Fourth, Fifth, Sixth and Seventh Causes of Action are dismissed and the complaint is dismissed as against Paige Bond, J. Maxine Agee, Chairman of the Board of Directors and The Board of Directors of Community Action for Human Services, Inc. The cross-motion for leave serve an amended complaint in the form submitted by plaintiff on the return date of the motion is granted. (This court gave defendants the opportunity to prepare an additional brief in support of their motion and defendants chose to rest on the papers already submitted).

Plaintiff, who was employed as the Chief Operating Officer of Community Action for Human Services, Inc. (CAHS), commenced this action to recover money damages and damages for mental distress arising out of her termination from her position with CAHS.

According to plaintiff, she was terminated from her position in retaliation for her

reporting of “issues endangering the safety and welfare of those persons who entrusted their care to CAHS,” including the falsification of medical records, lack of proper maintenance of facilities, lack of proper supervision of patient/residents; lack of adequate medical nursing, unpaid federal and state taxes, bouncing payroll checks, unpaid vendor bills and inaccurate reporting of revenue and expenses.

The complaint alleges that defendants violated Labor Law §§740 and 741 (First and Second causes of action, respectively), the NYS and NYC Human Relations Law (Third and Fourth causes of action, respectively), the U.S. ERISA law (Fifth cause of action), and the US and NY Fair Labor Standards Act (Sixth and Seventh causes of action, respectively).

Defendants seek dismissal of the complaint on the grounds that: (1) the complaint fails to state a cause of action pursuant to Labor Law §740 and plaintiff was not an “employee” within the meaning of Labor Law §741; (2) plaintiff waived her claims under the NYSHRL and NYCHRL by electing to proceed under Labor Law §740; (3) plaintiff’s cause of action under ERISA is moot, because only a plan administrator may be held liable for failing to inform her of her COBRA rights and, in any event, plaintiff’s insurance coverage remained in effect and she does not allege that she incurred any expense; (4) in the absence of a contractual agreement (which is not alleged here) vacation pay does not constitute “wages” that may be recovered under the US Fair Labor Standards Act and NY Wage Payment Laws.

Defendants also contend that the complaint must be dismissed against the Board members because they are immune from suit and there are no allegations that defendant Paige Bond did anything that violated plaintiff’s rights.

Plaintiff opposes the motion on the ground that the allegations in the proposed amended

complaint are sufficient to state causes of action under the laws cited. She acknowledges that the election of remedies provision of Labor Law §740(7) would preclude her third and fourth causes of action “where such claims arose from the same discharge”, but contends that the negative job action complained of arose from distinct acts. Plaintiff also contends that discovery is “likely to provide admissible evidence” that could establish that the defendants’ COBRA violations were due to willful neglect or intentional and that the Sixth and Seventh causes of action are “sufficiently alleged and supported” as she claims that defendants failed to pay her adequately for time worked and vacation time.

Plaintiff also contends that the facts and circumstances alleged support a “potential finding” that the Board Members’ acts or omissions and that of individuals on the board constituted gross negligence or were intended to cause the resulting harm to plaintiff and that Paige Bond acted in concert with her father for her own gain.

On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed, the facts presumed to be true and the pleading accorded the benefit of every possible favorable inference (Rivietz v. Wolohojian, 38 AD3d 301). However, “bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration” (Garner v. China Natural Gas, Inc., 71 AD3d 825) and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (Guggenheimer v. Ginzburg, 43 NY2d 268).

While plaintiff does not recite the specific rules, regulations and laws she claims were violated by defendants, given a liberal construction and affording plaintiff the benefit of every possible favorable inference, the allegations in the complaint are sufficient to state causes of

action under Labor Law §§740(2)(a) and 741. However, by initiating an action pursuant to Labor Law §740, plaintiff has waived any rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law (Labor Law §740(7); Reddington v Staten Island University Hosp., 11 NY3d 80). Accordingly, plaintiff's Third and Fourth causes of action, which allege violations of the NYS and NYC Human Rights Law that arose out of or are related to plaintiff's wrongful discharge claim, are dismissed.

Plaintiff's Fifth cause of action, which alleges that defendants violated ERISA, is dismissed. Section 502© of ERISA requires the plan administrator to provide plaintiff with notice of her COBRA rights and plaintiff does not deny that her insurance coverage was not interrupted and she did not incur any medical expenses that were not reimbursed.

Plaintiff's Sixth and Seventh causes of action, which allege that defendants violated the US Federal Fair Labor Standards Act and NYS Fair Labor Standards Act by failing to provide her with pay in lieu of unused accrued vacation time are dismissed. The FLSA does not protect an employee's right to vacation pay or pay in lieu of unused vacation time, because such pay does not constitute "wages" within the meaning of the FLSA that may be recovered under that statute (Webster v. Public School Employees of Washington, Inc., 247 F. 3d 910).

With respect to the Seventh cause of action, plaintiff was exempt from the protections of the NYS Labor Law regarding vacation pay because she earned more than \$100,000 per year and in the absence of a contract that provided for payment of unused accrued vacation pay upon termination of employment, vacation pay or pay in lieu of unused vacation time does not constitute "wages" under the FLSA or NYS Labor Law (Gennes v. Yellow Book of New York, Inc., 23 AD3d 520). Insofar as plaintiff alleges that defendants failed to pay the full amount of

accrued but unpaid personal, sick, vacation and compensatory time earned by her, plus interest for the time such amounts should have been paid, these claims arise out of the same facts and circumstances as her retaliation claims and are thus waived pursuant to Labor Law §740(5).

With respect to plaintiff's claims against the Board of Directors, uncompensated Trustees of a Tax-Exempt Charitable Organization, such as CAHS, are immune from liability based upon their conduct in the execution of their office, except for gross negligence or where their conduct was "intended to cause the resulting harm to the person asserting such liability." (Goldsmith v. Fight for Sight, Inc., 251 AD2d 120).

Here plaintiff fails to allege circumstances which would support a finding that the Board's acts or omissions, or those of individuals on the Board, constituted gross negligence or was intended to cause the resulting harm to her. Accordingly, the complaint is dismissed as against the members of the Board of Directors of CAHS.

With respect to Paige Bond, while complaint contains allegations that Ms. Bond "joined with Mr. Bond and acted with him in creating and promoting the policies and procedures" that plaintiff claims were in violation of the law, and that Ms. Bond, along with the Board and Mr. Bond, terminated her in retaliation for her reporting them and CAHS to outside regulatory agencies, the prohibitions of Labor Law §§740 and 741 are limited to "employers." and plaintiff does not allege that Ms. Bond was her employer. Therefore, the complaint fails to state a cause of action against Ms. Bond. Accordingly, the complaint is dismissed as against Ms. Bond.

This constitutes the decision and order of the court.

Dated: January 12, 2011

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STANLEY GREEN, J.S.C.

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

**R.J.I.**

-----X  
WENDY WEBB-WEBER,

Plaintiff,

- against -

COMMUNITY ACTION FOR HUMAN  
SERVICES, INC., et al.,

Defendants.  
-----X

Index No. 310286/2009

NOTICE OF MOTION

**STANLEY GREEN**

4/16

MOTION BY: Defendants

**MAR 16 2010**

DATE, TIME & PLACE: April 16, 2010 at 9:30 a.m., Room 217 of the  
Supreme Court of the State of New York, Bronx County  
851 Grand Concourse, Bronx, New York 10451

SUPPORTING PAPERS: Annexed affirmation of Dennis A. Lalli, Esq., and affidavits  
of David G. Bond, Jemayne Cullum, and Olubukola Akande,  
each with attached exhibits.

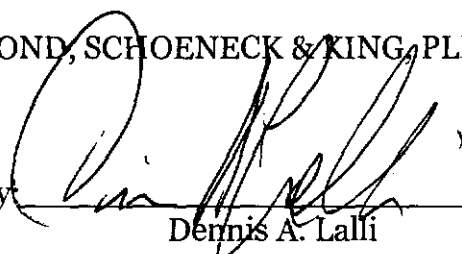
RELIEF DEMANDED: An Order dismissing the Complaint pursuant to CPLR  
3211(a)(1), (2), (7), and (11).

ANSWERING PAPERS: Pursuant to CPLR § 2214(b), answering papers, if any, must  
be served so as to be received by counsel for the defendants  
at least seven days before the return date of this motion.

Dated: New York, New York  
March 11, 2010

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BOND, SCHOENECK & KING, PLLC

By   
Dennis A. Lalli

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Attorneys for the Defendants

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(914) 686-4456

Attorneys for the Plaintiff

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ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSASDENNIS A. LALLI  
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DLalli@BSK.com

November 17, 2010

**VIA FACSIMILE TRANSMISSION AND FIRST CLASS MAIL**Honorable Stanley B. Green  
Acting Justice, Supreme Court  
12th Judicial District  
851 Grand Concourse  
Bronx, New York 10451Re: *Webb-Weber v. Community Action for Human Services, Inc., et al.*  
Bronx Supreme Index No. 310286/2009

Dear Justice Green:

This firm represents the defendants in the referenced action. At oral argument in chambers last week on defendant's motion to dismiss, counsel for the plaintiff handed me a "Proposed Amended Verified Complaint." At that time, the Court allowed me leave to review that pleading and then advise the Court whether defendant would like time to prepare an additional brief in support of my motion, or to rest on the briefs submitted already.

Defendant will rest on the briefs submitted already. Even as amended by the verbatim addition of the statements set forth in the affidavit that plaintiff served in opposition to defendant's motion, the Complaint still must be dismissed because it still fails to plead the material elements of each cause of action plaintiff purports to plead.

Very truly yours,

Dennis A. Lalli

DAL/omo

cc: Mitchell I. Weingarden, Esq. (via e-mail as pdf document)

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX**

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 :  
**WENDY WEBB-WEBER,** :  
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**Plaintiff,** :  
 :  
**- against -** :  
 :  
**COMMUNITY ACTION FOR HUMAN** :  
**SERVICES, INC., et al.,** :  
 :  
**Defendant.** :  
 :  
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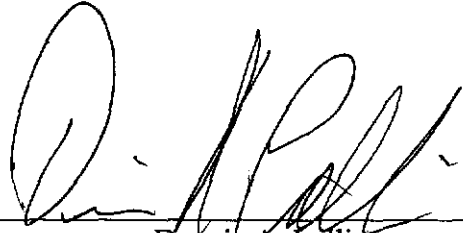
**Index No. 310286/2009**

**AFFIRMATION OF DENNIS A.  
LALLI IN SUPPORT OF  
CPLR 3211 MOTION TO DISMISS**

**DENNIS A. LALLI**, an attorney not a party to this action who is duly admitted to practice before the Courts of the State of New York, hereby affirms under CPLR 2106 on penalty of perjury as follows:

1. I am counsel for the defendant in this action and am fully familiar with the facts and circumstances addressed herein. I make this affirmation in support of defendant's motion for an order pursuant to CPLR 3211(a)(1), (2), (7), and (11) to dismiss the Complaint.
2. Attached as Exhibit 1 is a true copy of the Summons and Complaint in this action.
3. For all the reasons set forth in defendants' Memorandum of Law, defendants' motion to dismiss the Complaint should be granted, in its entirety.

Dated: New York, New York  
March 5, 2010



Dennis A. Lalli