SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ROBERTA JONES,

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 7/20/11

BELLEROSE TERRACE FIRE DISTRICT, ROSE NACINCIK, JAMES DARDEN, GASPAR DiPERI, THEODORE F. GABEL and THOMAS McCAULEY,

INDEX NO.: 4392/11

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

In this civil rights action alleging violations of the New York State Human Rights Law and the Nassau County Human Rights Law, defendants move for an order pursuant to CPLR 3211(a)(2) dismissing the complaint for lack of jurisdiction.

Background

Plaintiff Roberta Jones is a former employee of defendant Bellerose Terrace Fire District (the "Fire District"). According to the Complaint, for over 35 years, plaintiff simultaneously held positions as an elected Treasurer and appointed Secretary to the Fire District's Board of Fire Commissioners. (Complaint ¶ 11-12)

On or about November 1, 2010, defendants notified plaintiff that they were terminating her employment as secretary effective December 31, 2010, purportedly on the basis of her inability to utilize computers and software which defendants found necessary for their operations. (Complaint ¶ 13-14).

On or about February 1, 2011, "defendants replaced plaintiff with a new secretary

who is significantly younger than plaintiff - she is about 37 years old and does not suffer from a disability" (Complaint ¶ 25).

The instant action is predicated on allegations that plaintiff was unlawfully terminated because of her age (69) and disability (she suffered a stroke in July 2010). Plaintiff claims that the disparagement of her skills after 35 years of employment was a pretext for a discriminatory termination, in violation of Executive Law §§ 290 *et seq.* (the "State Human Rights Law"), and Title C-2 of the Nassau County Administrative Code (the "Nassau County Human Rights Law").

Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(2) on the ground that the prohibition against employment discrimination contained in the State Human Rights Law (see Executive Law §296) does not apply to employers who employ fewer than four employees (see Executive Law §292[5]). Defendants submit the affidavit of James Darden, the Chairman of the Board of Fire Commissioners, attesting to the fact that, in 2010, the Fire District employed only two employees: a part-time mechanic and a part-time district secretary (Roberta Jones). Therefore, defendants argue, Executive Law §296 does not apply, and the complaint, which references only that provision and the Nassau County "equivalent," must be dismissed for lack of jurisdiction. (Affirmation in Support ¶ 7)

As "secondary" arguments on the merits, defendants assert (i) that public officials such as the individually named defendants are not personally liable for acts of discrimination under the Human Rights Law unless they have acted in bad faith or without any reasonable basis; and (ii) that the position of District Secretary is appointed for a one-year annual term only, and the decision not to renew the appointment at the expiration of the one-year period was a discretionary act which is not subject to the provisions of the Human Rights Law. (Affirmation in Support ¶ 7)

In opposition, plaintiff's counsel urges that the employee numerosity requirement of Executive Law § 296 is not a jurisdictional issue, but rather, goes to the merits of the employee's claim. See *Da Silva v Kinsho Intern. Corp.*, 229 F3d 358, 366 [2nd Cir. 2000]. Further, plaintiff argues that satisfaction of the numerosity requirement is a factual issue that is not appropriately decided on a motion to dismiss. *Arbaugh v Y&H Corp.*, 546 U.S. 500 [2006]. Plaintiff asserts that "[a]t all relevant times, defendant Bellerose Terrace Fire

District has had approximately 25 volunteer firefighters." (Affidavit of Roberta Jones, ¶3) Plaintiff argues that it is an issue of fact as to whether volunteer firefighters are considered employees for the purposes of the numerosity requirement. *See Haavistola v Community Fire Co. of Rising Sun, Inc.*, 6 F3d 211 [4th Cir. 1993] (holding that issues of fact existed regarding whether volunteer firefighters received sufficient compensation to qualify as "employees" under Title VII).

Plaintiff also argues that the Nassau County Human Rights Law has no provision defining "employer" and does not limit the scope of the statute based upon the number of employees. Thus, even if the numerosity requirement under State law is not satisfied, the claim under Nassau County law may be upheld.

Discussion

The Supreme Court is a court of original, unlimited and unqualified jurisdiction; it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed *(Lacks v Lacks*, 41 NY2d 75, 75 [1976], citing *Kagen v Kagen*, 21 NY2d 532, 537 [1968]; *see* New York Constit., Art VI, § 7). The Supreme Court has subject matter jurisdiction over complaints alleging violations of the Human Rights Law. *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159 [1967]. "Subject matter jurisdiction" has been defined as the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question." *Id.* , quoting *Hunt v Hunt*, 72 NY 217, 229. "Because the Human Rights Law does not explicitly state that the four-employee minimum relates to subject matter jurisdiction, the law's four-employee requirement for qualifying as an employer is not a jurisdictional requirement, but an element of a claim for relief. McKinney's Executive Law § 292." *Matter of Argyle Realty Associates v New York State Division of Human Rights*, 65 AD3d 273 [2nd Dept. 2009]. "Any defects in the plaintiff's allegations are relevant to whether the plaintiff has stated a cause of action, and not to whether the Supreme Court has subject matter jurisdiction." *Kolomick v New York Air National Guard*, 219 AD2d 367 [2nd Dept. 1996].

Applying these principles to the case at bar, the Court finds that it has jurisdiction to entertain this cause of action, and that, therefore, the complaint is not subject to dismissal pursuant to CPLR 3211(a)(2). The Court finds that defendants have raised a

substantial challenge to the merits of plaintiff's claim, on the basis that the Fire District is not an "employer" for purposes of the State Human Rights Law and the Nassau County Human Rights Law. The arguments submitted to date, however, raise more questions than they answer. Can the Fire Department's 25 volunteer firefighters be considered "employees" for purposes of the Human Rights Law? Assuming that the Fire District and the Fire Department are separate political and legal entities, what is the relationship between these entities? Can employees of the Fire Department be considered employees of the Fire District for purposes of the Human Rights Law? Is there a difference in the scope of the State Human Rights Law and the Nassau County Human Right Law? Did Nassau County intend to dispense with the numerosity requirement by not explicitly adopting it? Insofar as the submissions are inconclusive, the Court finds that dismissal on the merits is unwarranted at this juncture.

With respect to defendants "secondary" arguments, the Court finds: (i) that the liability of the individual defendants depends on issues of fact beyond the scope of the instant motion, a point raised by plaintiff in opposition, and apparently conceded by defendants, by virtue of their failure to address it in their reply; (ii) although plaintiff may not have a right to employment beyond the one-year appointment period, the refusal to rehire may be subject to scrutiny under anti-discrimination provisions of the State and County Human Rights Laws. (See Executive Law § 296 ["it is an unlawful discriminatory practice for an employer to refuse to hire or to discharge from employment...."] and Nassau County Administrative Code § 21-9.8 ["It shall be unlawful discriminatory practice....[f]or an employer to refuse to hire or employ....]).

The Court has considered the remaining arguments of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that defendants application to dismiss the Complaint pursuant to CPLR 3211 is **denied.**

Dated: January 10, 2012

J.S.C.