

Aurelien v Albert Augustine Ltd.

2012 NY Slip Op 32901(U)

November 7, 2012

Supreme Court, New York County

Docket Number: 102589/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

SUZETTE AURELIEN,

INDEX No. 102589/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

*ALBERT AUGUSTINE LTD., and STEPHEN
GRIESGRABER, Individually,
Defendants.*

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

NOV 14 2012

DECIDED IN ACCORDANCE WITH ATTACHED

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/7/12

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

INDEX NO.
102589/12

SUZETTE AURELIEN,

Plaintiff,

- against -

ALBERT AUGUSTINE LTD., and STEPHEN
GRIESGRABER, Individually,

Defendants.

FILED

NOV 14 2012

**COUNTY CLERK'S OFFICE
NEW YORK**

DECISION/ORDER

DONNA M. MILLS, J.:

In this action, plaintiff Suzette Aurelien alleges that she was wrongfully terminated by her employer/defendant Albert Augustine Ltd. ("Albert Augustine") and defendant Stephen Greisgraber an officer and an employee of Albert Augustine. Defendants' now move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1)(7).

Plaintiff's complaint alleges four causes of action against Defendants in violation of New York Labor Law, namely the alleged (1) failure to make timely payment of wages to plaintiff in violation of New York Labor Law §191(1)(a); (2) retaliation in violation of New York Labor Law §215; (3) failure to maintain employee-specific payroll records in violation of New York Labor Law §661 and 12 NYCRR 142-2.6; and (4) failure to post conspicuously in the workplace notice summarizing employees' rights in violation of 12 NYCRR 142-2.8.

In opposition to the motion, plaintiff withdrew her first, third and fourth causes of action, leaving the sole basis of her complaint the second cause of action, where she alleges that defendants violated New York Labor Law §215.

Plaintiff contends she was terminated in retaliation for her supposed complaint on February 29 and March 1, 2012 about not being paid within the time frame required by New York Labor Law §191(1)(a). Plaintiff further alleges in her complaint that defendants violated New York Labor Law §215 by terminating her in retaliation for her supposed complaints on the aforementioned dates.

Defendants argue that the remaining cause of action is deficiently pled and plaintiff failed to state a cause of action. Additionally, defendants argue that plaintiff has failed to satisfy a condition precedent to bringing a claim under New York State Labor Law §215, by failing to timely serve the attorney general.

In regards to plaintiff's claim for retaliation under Labor Law § 215, the statute states in relevant part at subdivision (1) that:

"[n]o employer ... shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer that the employer has violated any provision of this chapter [the Labor Law].."

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb,

Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, where the allegation in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1st Dept 1999).

This Court finds that plaintiff's allegation that she complained on two occasions to her employer about not being paid in violation of the Labor Law, coupled with the fact that she claims to have been terminated just two weeks later, is sufficient at this stage of the action to fulfill her burden of stating a cause of action for violating Labor Law §215.

The issue of whether plaintiff was required to notify the attorney general before commencing this action is a more challenging issue for this Court. The defendants note in their moving papers that there is no evidence that the plaintiff had given notice of her claim to the attorney general, as required by New York Labor Law §215(2). While Labor Law §215 bars dismissal of an employee for complaining to an employer about a substantive Labor Law violation (Quintas v Pace University, 23 AD3d 246 [1st Dept 2005]), it also requires that notice be given to the attorney general "[a]t or before the commencement" of the action (see Crosland v City of New York, 140 F Supp 2d 300, 312 [SD NY 2001] affd 54 Fed Appx 504 [2d Cir 2002]). Plaintiff has not alleged that she timely served the attorney general at, or prior to, this action's commencement. Plaintiff however

claims to have served notice of her action upon the attorney general on July 20, 2012, approximately six months after her action arose.

While court's in this state have disagreed with respect to whether the notice requirement to the attorney general is a condition precedent to filing a suit, I find, however, that such notice is not, under the circumstances herein, a condition precedent that would bar this action. In Columbia Gas of New York, Inc. v New York State Elec. & Gas Corp., 28 NY2d 117 [1971], the Court held that the requirement that notice be given is designed solely to apprise the attorney general that such an action was commenced so that he would be aware of the circumstances and may not be considered a condition precedent to the plaintiff's cause of action. Moreover, Section 215 requires notice to the Attorney General, not to the defendants, and they are not prejudiced by delayed notice. As such, I find that plaintiff is not barred from bringing an against agasitn defendants without first notifying the attorney general.

However, the Court notes that the sole cause of action remaining, did not contain any specific allegations against defendant Stephen Griesgraber, so the action must be dismissed against him individually.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted to the limited extent of dismissing the action against Stephen Griesgraber in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

* 6]
ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Court Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendant is directed to serve an answer to the remaining cause of action in the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for preliminary conference in Room 574, 111 Centre Street, on December 14, 2012, at 10:00 AM.

Dated:

11/7/12

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.

FILED

NOV 14 2012

COUNTY CLERK'S OFFICE
NEW YORK