Zutrau v Ice Sys., Inc.
2012 NY Slip Op 33947(U)
July 16, 2012
Supreme Court, Suffolk County
Docket Number: 37576-09
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

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NO.: 37576-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 6-15-12
SUBMITTED: 6-21-12
MOTION NO.: 003-MOT D

LEILANI ZUTRAU, individually and on behalf of ICE SYSTEMS, INC.,

Plaintiff,

-against-

ICE SYSTEMS, INC. and JOHN C. JANSING,

Defendants.

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Upon the following papers numbered 1-8 read on this motion to strike ; Notice of Motion and supporting papers 1-6 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 7-8 ; Replying Affidavits and supporting papers __; it is,

ORDERED that the branch of the motion by the defendants which is for an order striking the plaintiff's jury demand is granted; and it is further

ORDERED that the branch of the motion by the defendants which is for an order dismissing the third cause of action for violation of Labor Law § 215 is denied.

The prevailing rule is that the deliberate joinder of claims for legal and equitable relief arising out of the same transaction amounts to a waiver of the right to demand a jury trial (**Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hospital Ctr.**, 59 AD3d 481, 482). Once the right to a jury trial has been intentionally lost by joining legal and equitable claims, any subsequent dismissal, settlement, or withdrawal of the equitable claims will not revive the right to a trial by jury (**Id.**).

Contrary to the plaintiff's contention, all of the plaintiff's claims arise out of the same transaction. Thus, by joining shareholder derivative claims, which are equitable in nature,

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and equitable claims for an accounting and breach of fiduciary duty with legal claims to recover damages for breach of contract and employment discrimination, the plaintiff waived her right to a jury trial (*see*, **Ayromlooi v Staten Is. Univ. Hosp.**, 7 AD3d 475). Moreover, the plaintiff does not allege facts upon which monetary damages alone will afford full relief (**Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hospital Ctr.**, *supra*). The plaintiff seeks reinstatement as an alternative to front pay as well as an accounting. In connection with her dismissed derivative claims, she also sought an accounting, the appointment of a receiver, and injunctive relief. Accordingly, the branch of the motion which is to strike the jury demand is granted.

The plaintiff's failure to notify the Attorney General of her claim for a violation of Labor Law § 215 at or before the commencement of this action is not fatal to that claim. The requirement that notice be given is designed solely to apprise the Attorney General that an action has been commenced so that he is aware of the circumstances, and it is not considered a condition precedent to a cause of action pursuant to § 215 (*see*, **Quintanilla v Suffolk Paving Corp.**, US Dist Ct., EDNY, Feb. 10, 2011, Tomlinson, Magistrate J. [2011 WL 1323033 at *6], report and recommendation adopted US Dist Ct., EDNY, Mar. 28, 2011, Feuerstein, J. [2011 WL 1253248). The fact that the Attorney General may investigate the claim does not impede the plaintiff's ability to prosecute this action (*see*, **Ji v Belle World Beauty, Inc.**, Sup Ct NY County, Aug. 12, 2010, Goodman, J. [2010 WL 3285639 at 6]). In any event, the plaintiff has now notified the Attorney General. The defendants are not prejudiced by the delayed notice because § 215 requires notice to the Attorney General and not to the defendants (*see*, **Quintanilla v Suffolk Paving Corp.**, *supra* at *6). Accordingly, the branch of the motion which is to dismiss the third cause of action for violation of Labor Law § 215 is denied.

Dated: July 16, 2012

HON. ELIZABETH HAZLITT EMERSON

J.S.C.