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

PRESENT: HON. PAUL WOOTEN Justice PART 7

ANTHONY ANTOLINO,
Plaintiff,

-against-

DISTRIBUTION MANAGEMENT CONSOLIDATORS WORLDWIDE, LLC,
Defendant.

INDEX NO. 101541/2011

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion by defendant to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Reply Affidavits — Exhibits (Memo)	5

Cross-Motion: ☐ Yes ■ No

In this action, plaintiff Anthony Antolino (Antolino or plaintiff) sues his former employer to recover damages for breach of an employment agreement and violations of the Labor Law. Defendant Distribution Management Consolidators Worldwide, LLC (DMCW or defendant) moves, pursuant to CPLR 3211(a)(7), for partial dismissal of the Verified Amended Complaint, seeking an order dismissing the third cause of action for retaliation under Labor Law § 215.

BACKGROUND

Antolino worked for DMCW as Senior Vice President from January 2008 until his employment was terminated on November 17, 2010 (*see* Verified Amended Complaint, ¶¶ 9-10). According to plaintiff, he was hired to rebuild the company and was "overwhelmingly successful in transforming DMCW into a company with multiple new, innovative business offerings, product lines, and significant growth trajectory" (*id.*, ¶¶ 1, 12-13). Plaintiff signed a three-year employment agreement with defendant, effective January 1, 2008, which provided, among other things, that he would be paid a salary and guaranteed annual bonuses, and would be eligible for performance bonuses and commissions for new business brought to DMCW (*id.*,

¶¶ 18, 24-26). The agreement also provided that in the event of plaintiff's termination, other than for cause, he was entitled to a lump sum payment of the lesser amount of six months of salary or full payment through the end of the contract (*id.*, ¶ 28).

Plaintiff alleges that defendant breached the employment agreement by failing to pay him guaranteed bonuses for 2009 and 2010 and sales commissions owed to him, and by terminating him without cause and without providing any severance (*id.*, ¶¶ 31-33). Plaintiff further claims that he was terminated because he sought payment of the unpaid wages. He alleges that in November of 2010, Ben Lowinger (Lowinger), one of the owners of the company, threatened him with termination if he did not sign a proposed contract, which would have required him to release and waive his claim to any outstanding unpaid wages (*id.*, ¶¶ 36-40). Plaintiff further maintains that when plaintiff objected to defendant's refusal to pay the outstanding wages, his employment was terminated (*id.*). Plaintiff also alleges that following his dismissal Lowinger sought to "impede plaintiff's ability to earn a living," by advising mutual business contacts not to conduct business or otherwise to associate with him, and by instructing employees of the company and its affiliated companies not to talk to or have any contact with him (*id.*, ¶¶ 43-45).

Plaintiff commenced this action in February of 2011, alleging claims against DMCW, certain affiliated companies, and individuals with an ownership interest in the affiliated companies. By a prior order, dated November 28, 2011, the Court dismissed some causes of action, and dismissed all claims against the affiliated companies and the individual defendants (*see Antolino v Distribution Mgt. Consolidators Worldwide, LLC*, 2011 NY Slip Op 33138[U] [Sup Ct, NY County 2011]). The Court dismissed the retaliation claim based on plaintiff's failure to timely notify the Attorney General's office, as required by Labor Law § 215. Plaintiff then served an Amended Verified Complaint, which asserts four causes of action, for breach of contract, failure to pay wages in violation of Labor Law § 193, retaliation in violation of Labor

Law § 215, and equitable estoppel. With respect to the cause of action for retaliation, plaintiff alleges that he notified the Attorney General's office prior to serving the Verified Amended Complaint (*id.*, ¶ 84). Defendant now seeks dismissal of the amended retaliation claim, on the merits, for failure to state a cause of action.

DISCUSSION

It is well settled that when considering a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be afforded a liberal construction (*see* CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see People v Coventry First LLC*, 13 NY3d 108, 115 [2009]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). The "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Bernstein v Kelso & Co.*, 231 AD2d 314, 318 [1st Dept 1997]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11,19 [2005]; *see Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]; *AG Capital Funding Partners, L.P. v State St.*

Bank & Trust Co., 5 NY3d 582, 591 [2005]).

Retaliation under Labor Law § 215

Labor Law § 215(1)(a) prohibits an employer from discharging, penalizing or "in any other manner" retaliating against an employee "because such employee has made a complaint to his or her employer . . . that the employer has violated any provision of this chapter . . ." (*Adler v 20/20 Cos.*, 82 AD3d 914, 914-915 [2d Dept 2011]; *Epifani v Johnson*, 65 AD3d 224, 235 [2d Dept 2009]; *Kelly v Xerox Corp.*, 256 AD2d 311, 312 [2d Dept 1998]; *Kreinik v Showbran Photo, Inc.*, 2003 WL 22339268, *8, 2003 US Dist LEXIS 18276, *28-29 (SD NY 2003). "'"[T]his chapter' refers to any provision of the Labor Law'" (*Epifani*, 65 AD3d at 235, quoting *Kelly*, 256 AD2d at 312). To state a retaliation claim under Labor Law § 215, "a plaintiff must adequately plead that while employed by the defendant, he or she made a complaint about the employer's violation of New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result" (*Higueros v New York State Catholic Health Plan, Inc.*, 526 F Supp 2d 342, 347 [ED NY 2007]; *see Castagna v Luceno*, 2011 WL 1584593, *12, 2011 US Dist LEXIS 45567, *41 [SD NY 2011]; *Tin Yao Lin v Hayashi Ya II, Inc.*, 2009 WL 289653, *7, 2009 US Dist LEXIS 12963, *24 [SD NY 2009], adopted by 2009 WL 513371, 2009 US Dist LEXIS 15513 [SD NY 2009]). Further, "a plaintiff must allege that he or she complained about a specific violation of the Labor Law to support a claim of retaliatory discharge pursuant to Labor Law § 215" (*Epifani*, 65 AD3d at 236; *see Castagna*, 2011 WL 1584593, at *12, 2011 US Dist LEXIS 45567, at *41).

Defendant argues that plaintiff's retaliation claim must be dismissed because plaintiff did not complain to his employer about a specific violation of the Labor Law. More particularly, defendant contends that plaintiff was required to cite a specific section of the Labor Law in his complaint to his employer. In support of its argument, defendant asserts that an April 2011 amendment of Labor Law § 215 demonstrates that the applicable pre-2011 version of the

statute required employees to "reference specific Labor Law provisions in their complaints to their employer" (*see* Defendant's Memorandum of Law in Support, at 4).

Labor Law § 215(1)(a), as amended, effective April 9, 2011, expressly provides that "[an] employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section." Defendant contends that this added provision, and the absence of such language in the pre-2011 statute, make it "irrefutably clear" that pre-2011 retaliation claims required employees to reference specific sections of the statute in their complaints to employers (*see* Memorandum of Law in Support, at 4-5). Defendant's interpretation of the applicable statute is, however, unsupported by the statutory language or relevant case law. Courts have repeatedly held, both before and after the 2011 amendment, that an employee need not "allege that she notified her employer of the exact section she relies on . . . [a]ll that is required is that the complaint to the employer be of a colorable violation of the statute" (*Weiss v Kaufman*, 2010 WL 4858896, 2010 NY Misc LEXIS 5699, *4 [Sup Ct, NY County 2010] [allegation that plaintiff was fired after complaining she had not been paid for weeks was adequate]; *see Esmila v Cosmopolitan Club*, 2013 WL 1313771, *7, 2013 US Dist LEXIS 47161, *23-24 [SD NY 2013] [pre-2011 version of statute did not obligate plaintiff to tell employer which section of law she thought was being violated]; *Castagna*, 2011 WL 1584593, at *12, 2011 US Dist LEXIS 45567, at *41-42). "An informal complaint to an employer that the employer is violating a provision of the Labor Law suffices" (*Ting Yao Lin*, 2009 WL 289653, at *7, 2009 US Dist LEXIS 12963, at *24; *see Duarte v Tri-State Physical Medicine & Rehabilitation, P.C.*, 2012 WL 2847741, *3, 2012 US Dist LEXIS 96249, *10 [SD NY 2012] ["Unlike its federal analogue, the NYLL's anti-retaliation provision unquestionably protects informal complaints made to an employer"]; *see also Castagna*, 2011 WL 1584593, at *12, 2011 US Dist LEXIS 45567, at *41; *Veerman v Deep Blue Group L.L.C.*, 2010 WL 4449067, *3, 2010 US Dist LEXIS 117511, *7 [SD NY 2010]; *Barturen v Wild Edibles,*

Inc., 2007 WL 4468656, *5, 2007 US Dist LEXIS 93025, *17-18 [SD NY 2007]). Even if some federal courts have interpreted § 215 in a more restrictive manner (*see Seever v Carrols Corp.*, 528 F Supp 2d 159, 166 [WD NY 2007]), most courts applying "New York's own courts' interpretation of its law" have found that an employee is not "required to complain formally or to tell her employer which section of the law she thought was being violated" (*Veerman*, 2010 WL 4449067, at *3, 2010 US Dist LEXIS 117511, at *7).

Here, plaintiff alleges that he had a contractual right to the payments he seeks, that his employer withheld those wages, that he complained about wages being withheld, and that after he complained, he was fired. The Amended Complaint asserts that defendant violated Labor Law § 190 *et seq.*, and, as previously found by this Court, plaintiff has adequately alleged a violation of Labor Law § 193, which prohibits an employer from making certain deductions from an employee's "wages" (*see Antolino*, 2011 WL 6148826, 2011 NY Misc LEXIS 5737, at *6-7). Thus, plaintiff's allegations satisfy the pleading requirement that he complain about a specific Labor Law violation (*see Duarte*, 2012 WL 2847741, at *3, 2012 US Dist LEXIS 96249, at *10-11 [inquiries into failure to pay overtime sufficient basis for retaliation claim]; *Smalls v Bright*, 2011 WL 5419685, *4, 2011 US Dist LEXIS 129669, *14 [WD NY 2011] [informal complaints about being underpaid sufficient to support retaliation claim]; *Patel v Baluchi's Indian Rest.*, 2009 WL 2358620, at *11, 2009 US Dist LEXIS 66512 [SD NY 2009] [complaints about unsafe working conditions, low wages and lack of benefits sufficiently alleged retaliation claim]; *Higueros*, 526 F Supp 2d at 348 [complaints about nonpayment of overtime, without reference to any "state" law, sufficient to support claim; complaint itself lists specific sections of law]; *Barturen*, 2007 WL 4468656, at *5, 2007 US Dist LEXIS 93025, at *17-18 [SD NY 2007] [informal complaint that employer failed to pay overtime is sufficient]).

Defendant also contends that the retaliation claim should be dismissed because plaintiff has alleged retaliatory actions occurring after his employment was terminated, and Labor Law §

215 does not apply to post-termination conduct. As previously noted, to state a retaliation claim under Labor Law § 215, a plaintiff must plead that "while employed by the defendant, he or she made a complaint about the employer's violation of New York Labor Law and was terminated or otherwise ... subjected to an adverse employment action as a result" (*Higueros*, 526 F Supp 2d at 347; *see Esmila*, 2013 WL 1313771, at *6, 2013 US Dist LEXIS, at *17; *Ting Yao Lin*, 2009 WL 289653, at *7, 2009 US Dist LEXIS 12963, at *24). Defendant argues that this means that only adverse actions which occurred while plaintiff was employed give rise to a Labor Law § 215 claim (*see* Memorandum of Law in Support, at 7-8; Defendant's Reply Memorandum of Law, at 4). It is undisputed, however, that section 215 applies to current and former employees (*see Adler*, 82 AD3d at 915 ["the clear intention [of Labor Law § 215] was to provide a cause of action against current and former employers for discriminatory or retaliatory acts"]). Courts accordingly have found that post-termination conduct can, in some circumstances, be considered an adverse action for purposes of a retaliation claim (*see Liverpool v Con-Way, Inc.*, 2010 WL 4791697, *9, 2010 US Dist LEXIS 122419, *37 [ED NY 2010] [post-termination statement to prospective employer may be retaliatory]; *Torres v Gristede's Operating* Corp., 628 F Supp 2d 447, 472-473 [SD NY 2008] [baseless claims or lawsuits against former employee constitute retaliatory actions "even though they do not arise strictly in an employment context"][1]; *Kreinik*, 2003 WL 22339268, at *9, 2003 US Dist LEXIS 18276, at *30 [counterclaims in post-termination lawsuit brought by employee "can be used as a retaliatory practice"); *see*

---

[1]Contrary to defendant's contention, *Torres* involved claims under both the Fair Labor Standards Act (FLSA) and New York Labor Law (*see Torres*, 628 F Supp 2d at 471, 475). Even if it had not, however, the analysis of retaliation claims under the FLSA generally is applicable to claims under Labor Law § 215 (*see Esmila*, 2013 WL 1313771, at *6 n 7, 2013 US Dist LEXIS 47161, at *18 n 7; *Torres*, 628 F Supp 2d at 471 n 18), except that Labor Law § 215 "offers broader coverage than the FLSA" (*Flick v American Fin. Resources, Inc.*, 2012 WL 5386157, *4, 2012 US Dist LEXIS 161517, *12 [ED NY 2012]; *see Yu G. Ke v Saigon Grill, Inc.*, 595 F Supp 2d 240, 263-264 [SD NY 2008]). Moreover, Labor Law § 215, like the FLSA and Title VII, is a remedial statute, and "the same basic analysis applies to retaliation claims under [any of the statutes]" (*Torres*, 628 F Supp 2d at 471 n 19; *see Artica v J.B. Custom Masonry & Concrete, Inc.*, 2012 WL , 2012 US Dist LEXIS 103272, *43 [ED NY 2012]).

also Artica, 2012 US Dist LEXIS 103272, *at 42 ["employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace"]). Post-termination actions that "implicate some legal, financial, or significant reputational harm for the plaintiff" (*Castagna*, 2011 WL 1584593, at *13, 2011 US Dist LEXIS 45567, at *45) and could "negatively affect his prospective employment or business opportunities" may be a basis for a retaliation claim (*Kreinik*, 2003 WL 22339268, at *9, 2003 US Dist LEXIS 18276, at *30; *see Fei v WestLB AG*, 2008 WL 594768, *3, 2008 US Dist LEXIS 166338, *8 [SD NY 2008] [retaliatory action must have some impact on employment or prospective employment]; *see also Thompson v Morris Heights Health Ctr.*, 2012 WL 1145964, *6, 2012 US Dist LEXIS 49165, *15-16 [SD NY 2012] [in analogous Title VII context, post-employment actions, such as untruthful letter of reference, "blacklisting" or otherwise speaking ill of former employee, and attempts to damage future job prospects by restricting access to former co-workers may be considered adverse retaliatory actions]).

In this case, plaintiff's allegations that defendant sought to damage his ability to earn a living, by speaking ill of him and telling business associates and former co-workers not to associate with him, are sufficient to satisfy pleading requirements for purposes of withstanding the instant motion to dismiss. In any event, plaintiff also alleges that his employment was terminated, which undisputedly can constitute actionable retaliatory conduct under the statute. Similarly, as to defendant's argument that the alleged retaliatory actions do not constitute adverse actions for purposes of Labor Law § 215, "[t]ermination, of course, constitutes an 'adverse employment action' under § 215" (*Tin Yao Lin*, 2009 WL 289653, at *7, 2009 US Dist LEXIS 12963, at *25; *see Higueros*, 526 F Supp 2d at 347; *Liverpool*, 2009 WL 1362965, at *12, 2009 US Dist LEXIS 41349, at *36-37 ["wrongful discharge is the archetypal example of the kind of adverse action retaliation provisions are designed to protect"]).

Accordingly, it is

ORDERED that the motion to dismiss the third cause of action of the Verified Amended Complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: 8-2-13

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

FILED

AUG 08 2013

COUNTY CLERK'S OFFICE
NEW YORK