Siebor v World Tech. Servs., Inc.
2013 NY Slip Op 32960(U)
July 10, 2013
Supreme Court, Suffolk County
Docket Number: 18423/2012
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

INDEX NO. 18423/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

RICHARD SIEBOR,

Plaintiff,

-against-

WORLD TECHNICAL SERVICES, INC.,

Defendant.

ORIG. RETURN DATE: OCTOBER 19, 2012
FINAL SUBMISSION DATE: DECEMBER 13, 2012
MTN. SEQ. #: 001
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 8 read on this motion TO DISMISS.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in Opposition and supporting papers 5, 6; Memorandum of Law 7; Reply Memorandum of Law 8; it is,

ORDERED that this motion by defendant, WORLD TECHNICAL SERVICES, INC., for an Order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff's complaint with prejudice for failure to state a cause of action, is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition hereto from plaintiff RICHARD SIEBOR.

This action, commenced on June 15, 2012, was brought pursuant to Labor Law § 740, based upon defendant WORLD TECHNICAL SERVICES, INC.'s termination of plaintiff's employment allegedly in retaliation for his

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complaining about defendant's violation of laws, regulations and policies that allegedly created a substantial and specific danger to the public.

Plaintiff, a master electrician, was employed in April of 2005 by defendant's predecessor, Field Support Services, Inc., and later by defendant. Defendant is a private company that contracts with the Department of Homeland Security to provide electrical work and other maintenance services at the Plum Island Animal Disease Center. Plaintiff alleges that he was terminated from his employment with defendant in retaliation for his complaints about co-workers sleeping on the job, directions on how to operate a motor, and the condition of a temporary sump pump. Plaintiff claims that his termination violated Labor Law § 740, New York's "Whistleblowers' Statute."

Defendant has now filed the instant application to dismiss, arguing that plaintiff's allegations are insufficient as a matter of law to state a claim under Labor Law § 740. In particular, defendant alleges that plaintiff has failed to allege a specific or actual violation of any law, rule or regulation; has offered only "pure speculation" about potential dangers to public health; and has failed to allege that adverse consequences occurred as a result of the conduct about which he complained.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true in determining whether the complaint states any legally cognizable cause of action (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

Labor Law § 740 prohibits an employer from taking "any retaliatory personnel action against an employee" who discloses to a supervisor or public body "an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety" (Labor Law § 740 [2] [a]). An employee's "good faith, reasonable belief that a violation occurred is insufficient" to satisfy the statute – instead, there must be an actual violation of a law, rule, or regulation

(*Nadkarni v North Shore-Long Is. Jewish Health Sys.*, 21 AD3d 354, 355 [2005]; *see Bordell v General Elec. Co.*, 88 NY2d 869 [1996]; *Tomo v Episcopal Health Servs., Inc.*, 85 AD3d 766 [2011]; *Berde v North Shore-Long Is. Jewish Health Sys., Inc.*, 50 AD3d 834 [2008]; *Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350 [2001]). Moreover, the protection afforded by Labor Law § 740 (2) "is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety" (*Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801, 802 [1990]; *see Pipia v Nassau County*, 34 AD3d 664 [2006]; *Nadkarni v North Shore-Long Is. Jewish Health Sys.*, *supra*; *Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, *supra*; *Easterson v Long Is. Jewish Med. Ctr.*, 156 AD2d 636 [1989]).

Here, the Court finds that plaintiff has pleaded that the actions complained of actually violated federal and state laws, including Occupational Safety and Health Administration ("OSHA") regulations, specifically OSHA § 1910, *et seq.* (29 CFR § 1910, *et seq.*), National Electric Code § 500.5, as well as defendant's own policies, and that such violations presented a potential health and safety hazard to the public at large. Therefore, upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that plaintiff has sufficiently pleaded the elements of a cause of action for violation of Labor Law § 740.

Accordingly, defendant's motion to dismiss plaintiff's complaint in its entirety is **DENIED**. However, the Court notes that an employee's relief under Labor Law § 740 is limited to an injunction restraining the continued violation; reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position; the reinstatement of full fringe benefits and seniority rights; the compensation for lost wages, benefits and other remuneration; and the payment by the employer of reasonable costs, disbursements, and attorney's fees (*see* Labor Law § 740 [5]). Therefore, the instant motion is **GRANTED** solely to the extent that those prayers for relief which seek damages beyond those provided by Section 740 (5), to wit: emotional damages and compensatory damages other than back pay and restoration of

benefits, are hereby dismissed (*see Scaduto v. Restaurant Assoc. Industries, Inc.*, 180 AD2d 458 [1997]).

The foregoing constitutes the decision and Order of the Court.

Dated: July 10, 2013

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**