Burgos v Clinton Hous. 10th St. Partners
2014 NY Slip Op 30667(U)
March 12, 2014
Sup Ct, New York County
Docket Number: 150036/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, IAS PART 11

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CARLOS BURGOS and HARRY SOTO

Index No.: 150036/13

Plaintiffs,

-against-

CLINTON HOUSING 10th STREET PARTNERS and
CLINTON HOUSING DEVELOPMENT COMPANY, INC.

Defendant.

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JOAN A. MADDEN, J.:

Defendants Clinton Housing 10th Street Partners ("Clinton Housing") and Clinton Housing Development Company, Inc. ("CHDC") move to dismiss the complaint pursuant to CPLR 3211 (a)(1), (5) and (7), based stipulations of settlement entered into in a prior Housing Court proceeding, and for failure to state a cause of action. Plaintiffs Carlos Burgos ("Burgos") and Harry Soto ("Soto") oppose the motion. For the reasons set forth below, the motion is granted in part and denied in part.

Background[1]

Clinton Housing is the owner of the buildings located at 548 West 53rd Street and 500 West 52nd Street in Manhattan. Defendant Clinton Housing Development Co., Inc. ("CHDC") is a limited profit corporation that manages low income and middle income properties in the Clinton Urban Renewal area.

Plaintiffs Soto and Burgos were hired by CHDC as maintenance workers in March 2006

[1]Unless otherwise noted, the following facts are based on the allegations in the complaint which, for the purposes of this motion, must be accepted as true.

and September 2008, respectively. Both plaintiffs were eventually promoted to be resident superintendents for various buildings owned by Clinton Housing. Plaintiffs alleged that on or about January 16, 2012, Frank Fontaino ("Fontaino), CHDC's Director of Maintenance and the plaintiffs' supervisor, assigned Burgos to demolish a floor and ceiling at 548 West 53rd Street. When Burgos reported to Fontaino about Burgos' belief that the building contained asbestos, Fontaino stated, "I don't care. Do it anyway [and to] close the windows and doors so the tenants don't see." Fontaino called Burgos, Soto, and other employees to perform an "emergency job" at 548 West 53rd Street, and told them that the work needed to be completed that night because the Department of Environmental Protection ("DEP") was inspecting the building the next day. Plaintiffs and their co-workers believed that the presence of asbestos was the reason why Fontaino wanted the materials moved before the inspection. Fontaino told the plaintiffs that they would be terminated if they did not perform the work, which included several hours of removing materials from the ceiling, tile, wall and floor from the second floor and throwing the debris into a truck outside.

On or about January 26, 2012, Fontaino called plaintiffs over to 500 West 52nd Street, where the debris containing asbestos that plaintiffs had previously removed from 548 West 53rd street remained. Fontaino required plaintiffs and other employees to remove the debris from garbage bags and take them to the dumpster. Plaintiffs performed this work because they did not want to lose their jobs. Plaintiffs claim that they were not provided adequate protective gear to perform the work. While plaintiffs were performing the work, the DEP conducted an inspection and issued a stop work order at 500 West 52nd street because said assignment was "unsafe and illegal."

Fontaino and another CHDC supervisor, Amel Zunic, accused plaintiffs of calling the

DEP to alert the department of illegal asbestos removal. Thereafter, defendants repeatedly sent plaintiffs to the worksites unprepared and without proper supplies to complete the job. When plaintiffs asked for the necessary supplies to complete the job, such supplies were not provided. Defendants also forced plaintiffs to complete plumbing and electric jobs even though they were not licensed as plumbers or electricians and could not perform the work.

On or about February 17, 2012, plaintiffs both received "poor performance" evaluations from Fontaino and were terminated by defendants. Plaintiffs contend that prior to the evaluation, Soto received only one prior performance evaluation during his six years of employment, in which he received a $5,000 raise for excellent performance.

On or about March 15, 2012, plaintiffs submitted complaints to OSHA. Defendants responded to the complaints and denied all wrongdoing. On March 1, 2012, Soto applied for unemployment insurance benefits, which defendants contested. On March 28, 2012, plaintiffs made a written request for an extension of time to vacate their apartments. On or about April 23, 2012, Clinton Housing filed a notice of petition against plaintiffs, and plaintiffs interposed an answer and counterclaim alleging that the evictions were retaliatory.

On May 25, 2012, Burgos, who was represented by counsel, and Clinton Housing entered into a stipulation of settlement, which in relevant part state: "this settles all claims by [Burgos] against [Clinton Housing], its agents, officers, members, affiliates or partners to date, with the exception of any claims [Burgos] has asserted in his complaint with OSHA. This agreement is without prejudice to the claims and defenses that both sides have with OSHA." On August 8, 2012, Soto, who was represented by counsel, and Clinton Housing entered into a stipulation of settlement, which in relevant part states that, "this agreement settles all claims by [Soto] against [Clinton Housing] its agents or employees to date with the sole exception of

claims asserted by [Soto] in a pending case before the Occupational Safety and Health Administration (OSHA) entitled *Harry Soto vs. Clinton Housing Development Co., Inc., Case No. 2-4173-12-07* and as such, is without prejudice to said claims by [Soto] in the OSHA proceeding or other related Federal Court proceeding." While the settlements appear to be made with Clinton Housing, defendants maintain that CHDC can be considered an agent or employee of Clinton Housing[2], and plaintiffs do not argue otherwise.

On August 2, 2012, OSHA completed an inspection of defendants' property located at 548 West 53rd street, New York, NY and issued five citations against defendant.

On January 2, 2014, plaintiffs commenced this action against defendants in this court, asserting a cause of action for (1) employer retaliation in violation of Labor Law section 740, i.e. the "whistleblower statute" alleging, inter alia, defendants' termination was based on their request for protective equipment and objection to performing asbestos removal work in violation of OSHA; (2) negligent infliction of emotional distress; and (3) negligence.

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(1), (5) and (7) based on the stipulations of settlement entered in Housing Court (hereafter "the Housing Court stipulations") and for failure to state a cause of action. Defendants argue that this action is barred as it seeks the same or similar relief as the OSHA complaints. Defendants alternatively claim that Housing Court stipulations demonstrate plaintiffs' intent to release defendants from all claims other than the OSHA complaint or related actions in the federal courts. In support of the

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[2]While Clinton Housing is the named as petitioner in both proceedings, in the Burgos proceeding, the judgment of possession is in favor of CHDC, while in the Soto proceeding, the judgment of possession is in favor of Clinton Housing.

motion, defendants submit Soto's complaint filed against CHDC with OSHA[3] and the Housing Court stipulations.

Defendants further contend that as to Clinton Housing that the complaint fails to state a cause of action for retaliation under Labor Law §740 as there are no allegations of employer discrimination or other actionable conduct as against this defendant in the complaint.

In opposition, plaintiffs argue that the Housing Court stipulations do not bar this action as they expressly reserved their right in those stipulations to litigate the ongoing OSHA case and that the stipulations only were intended to bar any claims related to landlord and tenant proceedings and eviction. Plaintiffs also contend that they expressly reserved their right to further pursue these substantive claims alleged in their OSHA complaint in any forum. Plaintiffs also assert that in December 2012, plaintiffs submitted a written letter to OSHA requesting a formal dismissal without prejudice in order for plaintiffs to pursue their federal, state, and city claims in another forum, and that they requested and received permission to commence this litigation from an OSHA investigator. With respect to the motion to dismiss the retaliation under Labor Law §740 against Clinton Housing for failure to state a cause of action, plaintiffs argue that such dismissal is premature prior to discovery as to the relationship between Clinton Housing and CHDC.

In response, defendants argue that plaintiffs' claims are essentially duplicative of the OSHA claims and therefore barred by the Housing Court stipulations, and that under the stipulations, plaintiffs agreed that they would not pursue any other claims except for the previously filed OSHA complaints, regardless of whether in state court or federal court against

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[3]Burgos' OSHA complaint is not part of the record.

the defendants that related to their employment. Defendants further contend that plaintiffs' employment was discussed at the time the stipulations were entered into, as plaintiff's occupancy of the apartments that were the subject matter of the stipulation were intertwined and dependent on their employment. Defendant also contends that plaintiffs' opposition fails to provide any evidentiary basis for their arguments.

Discussion

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" Morgenthow & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. A dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

"[A] valid release which is clear and unambiguous on its face and is knowingly and voluntarily entered into will be enforced as a private agreement between parties." Skluth v. United Merchants & Mfrs., Inc., 163 AD2d 104, 106 (1st Dept 1990) (internal quotation

omitted). Furthermore, "stipulations of settlement are favored by the courts and will not be set aside in the absence of fraud or overreaching." Gallasso v. Gallasso, 35 NY2d 319, 321 (1974); Weissman v. Bondy & Schloss, 230 AD2d 465, 467 (1st Dept 1997), lv dismissed, 91 NY2d 887 (1998). "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." Hallock v. State, 64 NY2d 224, 230 (1984) citing In re Fruitger's Estate, 29 NY2d 143, 149-150 (1971).

At the same time, however, "the meaning and coverage [of a release] necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given... [and thus] a release may not be read to cover matters which the parties did not desire or intend to dispose of." Cahill v. Regan, 5 NY2d 292, 299 (1959);see also, NAB Const. Corp. v. City of New York, 276 AD2d 388 (1st Dept 2000); Hallmark Synthetics Corp. v. Sumitomo Shoji New York, Inc., 26 AD2d 481, 485 (1st Dept 1966), aff'd 20 NY2d 871 (1967). Moreover, "where a court cannot definitively determine whether the scope of a release was intended to cover the allegations in a complaint, a motion pursuant to CPLR 3211(a)(5) to dismiss the complaint must be denied." Desiderio v. Geico General Ins. Co., 107 AD3d 662, 663 (2d Dept 2013).

Under this standard, the language contained in the Housing Court stipulations settling all claims against Clinton Housing and its agents and employees cannot be read as barring plaintiffs' first cause of action for retaliation under the Labor Law section 740 in connection with OSHA violations such that a pre-answer dismissal under CPLR 3211(a)(5) is warranted. The Housing Court stipulation signed by Burgos excludes "any claims that [Burgos] has asserted in his complaint with OSHA," while Soto's stipulation of settlement excludes "claims asserted

by [Soto] in a pending case before the Occupational Safety and Health Administration (OSHA) entitled *Harry Soto vs. Clinton Housing Development Co., Inc., Case No. 2-4173-12-07* and as such, is without prejudice to said claims by [Soto] in the OSHA proceeding or other related Federal court proceeding." Both stipulations thus appear to reserve plaintiffs' right to pursue claims related to the OSHA complaints, and contrary to defendants' position the stipulations do not expressly restrict plaintiffs' to pursuing such claims in proceedings before OSHA. Moreover, while the stipulation signed by Soto refers to related Federal court proceeding, such language does not unambiguously exclude Soto from bringing claims related to the OSHA proceeding here.

Nor is dismissal of the OSHA claims warranted based on the documentary evidence submitted on the motion. Documentary evidence must be "unambiguous, authentic and undeniable" and plainly contradict the claims in the complaint. See e.g., Guido v. Orange Regional Medical Center, 102 AD3d 828, 830 (2d Dep't 2013); Artis v. Random House, Inc., 34 Misc3d 858 (Sup Ct NY Co. 2011). As stated above, the Housing Court stipulations do not plainly bar plaintiffs from asserting the OSHA related claims nor does Soto's OSHA complaint submitted by defendants provide a basis for dismissal.[4]

On the other hand, by the clear and express terms of the Housing Court stipulations, plaintiffs agreed to release defendants from all other claims not related to the OSHA complaint. In this connection, contrary to plaintiffs' position, the broad language of the stipulations cannot be read as releasing defendants only with respect to the landlord tenant dispute before the

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[4]While defendants argue that plaintiffs' claims before OSHA are still pending, they provide no documentary evidence to support this claim or to contradict plaintiffs' assertion that they were given permission by OSHA to commence this action.

Housing court. As such, the motion to dismiss plaintiffs' claims of negligent infliction of emotional distress and negligence is granted.

Next, the allegations in the complaint that plaintiffs were retaliated against by defendants for seeking protective equipment and taking other actions in response to OSHA violations committed by defendants are sufficient to state a cause of action under Labor Law section 740 (2). See generally, Heinitz v. Standard Const. Inc., 202 AD2d 843 (3d Dept 1994). Additionally, as defendants maintain that CHDC was an agent and/or employee of Clinton Housing, it is premature to dismiss this claim as to Clinton Housing on the grounds that it is not an employer of the plaintiffs.

Finally, plaintiffs are not required to submit proof on a pre-answer motion to dismiss so that the lack of such proof is not fatal to their opposition.

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the causes of action for the negligent infliction of emotional distress and for negligence; and it is further

ORDERED that the first causes of action under Labor Law § 740 shall continue; and it is further

ORDERED that defendants shall answer the complaint within 30 days of the date of this decision and order; and it is further

ORDERED that the parties shall appear on May 15, 2014, in Part 11, room 351, 60 Centre Street for a preliminary conference.

DATED: March 2, 2014

HON. JOAN A. MADDEN
J.S.C. J.S.C.