SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SEUNG WON LEE and MIN CHUL SHIN,

Plaintiffs,

Index No. 154157/14

-against-

DECISION/ORDER

WOORI BANK, NEW YORK AGENCY,

Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Seung Won Lee and Min Chul Shin commenced the instant action asserting claims for retaliation, battery, negligence and sexual harassment against defendant Woori Bank, New York Agency ("Woori"). Woori now moves for an order pursuant to CPLR §§ 3211(a)(5) & (7) dismissing plaintiffs' amended complaint. For the reasons set forth below, defendant's motion is granted in part and denied in part.

The relevant facts according to the amended complaint are as follows. In or around May 2011, plaintiff Shin was hired by Woori, a Korean Bank, as a member of the accounting staff in its New York office. In or around April 2012, plaintiff Lee was hired by Woori as a Wire Transfer Department Staff Member in its New York office. Plaintiffs allege that Woori has a

policy of transferring, rotating and/or sending executives and managers from its Korean office to its New York office for three years at a time. One of these managers, Shin Hyung Yoo, was transferred from the Korean office to the New York office in January 2012 in the role of Senior Manager. Plaintiffs allege that Mr. Yoo, along with five other managers and executives from Korea, "consistently used foul language, profanity, talked dirty, and made sexual comments" toward the staff in the New York office. Plaintiffs allege other inappropriate sexual behavior against female staff members and that Mr. Yoo "made unwelcome homosexual advances and comments to [Mr. Shin]," and physically touched him against his will by "repeatedly slapp[ing] his buttocks" and "repeatedly attempt[ing] to kiss [him] on the lips."

Plaintiffs allege that in or around March 2013, plaintiff Lee sent an e-mail to upper management in the Korea office detailing the conduct that the staff in the New York office was experiencing. The e-mail was sent anonymously and from an unassigned e-mail address at the bank. Thereafter, Woori sent three people from the Korea office to the New York office to investigate the matter but plaintiffs allege that these three individuals "were intent on learning the identity of the person(s) who sent the email, rather than investigating and correcting the problems at the office." Plaintiffs allege that shortly thereafter, defendant considered closing the New York office because of the sexual harassment issues. However, this would have meant that plaintiff Lee and the other staff members would have lost their jobs so plaintiff Lee requested to send another e-mail from the same e-mail account to Woori's office in Korea to request that the New York office remain open. Two Deputy General Managers of Woori instructed plaintiff Lee to send the e-mail requesting same. Thus, in or around March 2013, plaintiff Lee sent a letter to Woori's Korea office requesting that the New York office remain open and that the New York

office should not receive any unfair disadvantages because of what happened.

Plaintiffs allege that after the second letter was sent to the Korea office, plaintiffs were mistreated by defendant in that they were ignored, ostracized and were not given their normal work assignments. In or around February 2014, plaintiff Lee was transferred to the Reimbursement Department as an input data clerk, which he alleges is well below the level of work he was hired to do, and defendant attempted to transfer plaintiff Shin to the Trade Finance Negotiation Department, even though Mr. Shin had informed defendant prior to being hired that he did not desire to work in that department. On or about April 7, 2014, plaintiff Lee was fired by defendant's outside counsel and was directed to sign a Release Agreement, allegedly absolving the bank of any liability, but he refused to sign it. Additionally, plaintiffs allege that plaintiff Shin was thereafter constructively fired for his failure to accept his new position.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exist." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990).

As an initial matter, defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiffs' cause of action for retaliation in violation of New York Labor Law § 740 (the "Whistleblower Act") is granted. Pursuant to the Whistleblower Act, an employee may bring an action against his employer if the employer takes "any retaliatory personnel action against [said] employee because such employee...discloses, threatens to disclose to a supervisor or to a 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 employer is also prohibited from taking such retaliatory personnel action based on the employee's objection to, or refusal to participate in, any such activity. *See* Labor Law § 740(2)(c). However, a complaint that alleges a violation of the Whistleblower Act based on the discharge of an employee which occurs as a result of a report of any illegal activity or violation of public policy or the objection to or refusal to participate in any illegal activity or violation of public policy that does not directly effect the health and safety of the public, does not satisfy the statute. *See Lamagna v. New York State Ass'n for Help of Retarded Children, Inc.*, 158 A.D.2d 588 (2d Dept 1990); *see also Leibowitz v. Bank Leumi Trust Co. of New York*, 152 A.D.2d 169 (2d Dept 1989).

Here, that portion of plaintiffs' first cause of action alleging a violation of Labor Law § 740 must be dismissed on the ground that it fails to state a claim. Plaintiffs allege that defendant violated the Whisleblower Act by firing plaintiff Lee and constructively firing plaintiff Shin based on their report of the sexual harassment and inappropriate conduct portrayed by defendant and their objection to the sexual harassment. However, plaintiffs have failed to sufficiently articulate that the illegal activity or violation of public policy that they reported directly effects the health and safety of the public. Indeed, plaintiffs only allege that the conduct of certain of defendant's employees directly effect their own personal health and safety.

Additionally, plaintiffs' cause of action alleging retaliation in violation of New York City Human Rights Law ("NYCHRL") §8-101 must be dismissed as plaintiffs have waived the right to pursue said cause of action. Pursuant to Labor Law § 740(7),

> Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or

> employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

Courts have interpreted this statutory provision "to bar only those claims 'arising out of the retaliatory personnel action.'" *Gaughan v. Nelson*, 1995 WL 575316 *6 (S.D.N.Y. 1994) (citing *Fischer v. Homes for the Homeless, Inc.*, 1994 WL 319166 *2 (S.D.N.Y. 1994). *See also Kraus v. Brandstetter*, 185 A.D.2d 302, 303 (2d Dept 1992)(holding that Labor Law § 740(7)'s "waiver only applies to those causes of action relating to retaliatory discharge.") Indeed, courts have determined that "causes of action sounding in tort which are separate and independent from the cause of action to recover damages for retaliatory termination" are not waived if the plaintiff commences a lawsuit pursuant to Labor Law § 740. *Kraus*, 185 A.D.2d at 303. Thus, plaintiffs' cause of action alleging retaliation pursuant to NYCHRL § 8-101 must be dismissed as waived. However, Labor Law § 740's waiver provision does not exclude plaintiffs' claims for battery, negligence or sexual harassment because they are separate and independent from plaintiffs' retaliation claim and the conduct underlying such claims does not arise out of defendant's alleged retaliatory personnel action.

However, defendant's motion for an Order pursuant to CPLR § 3211(a)(5) dismissing plaintiff Shin's second cause of action for battery on the ground that it is untimely is granted. Pursuant to CPLR § 215(3), there is a one-year statute of limitations for "an action to recover damages for...battery." The statute of limitations begins to run on a battery claim from the date of the alleged battery. *See Wende C. v. United Methodist Church*, 4 N.Y.3d 293 (2005). In the instant action, plaintiff Shin has alleged that Mr. Yoo committed the alleged battery against him

in or around November 2012. However, he did not commence this lawsuit until April 2014, nearly eighteen months after the alleged battery occurred and six months after the one-year statute of limitations for his battery claim had already expired. Plaintiffs' assertion that the battery claim is timely on the ground that defendant is estopped from asserting a statute of limitations defense based on plaintiffs' fear to openly complain about defendant's conduct or commence a lawsuit is without merit. It is well-settled that courts have the power to bar the assertion of a statute of limitations defense but only "where it is the defendant's affirmative wrongdoing...which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128 (1966). Here, plaintiffs have not alleged any specific affirmative wrongdoing on the part of the defendant, such as threats that were made, which prevented them from timely commencing an action for battery. Plaintiffs' fear to do so, without more, is insufficient to estop defendant from asserting a statute of limitations defense.

Defendant's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiffs' third cause of action for negligent hiring and retention must be denied. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Talavera v. Arbit*, 18 A.D.3d 738 (2d Dept 2005). "[A]n exception exists to this general principle where...the injured plaintiff seeks punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee." *Id.* at 739. Here, plaintiffs' third cause of action properly alleges a claim for negligent hiring and retention as it asserts that "[d]efendant Woori failed to

properly screen Yoo to protect other employees from his conduct and behavior...failed to properly train Yoo on American employment practices, American laws, and American culture...had knowledge of Yoo's sexual harassment and improper behavior, but failed to protect other employees...." The complaint further alleges that "[t]he conduct of Defendant Woori [in its hiring and retention of Mr. Yoo] also constitutes gross negligence" and seeks punitive damages based on such gross negligence.

Accordingly, defendant's motion for an Order pursuant to CPLR § 3211 dismissing the complaint is granted only to the extent that plaintiffs' first and second causes of action are dismissed. This constitutes the decision and order of the court.

Dated: 8/21/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.