Williams v Gilbane McKissack Joint Venture
2014 NY Slip Op 32454(U)
September 17, 2014
Supreme Court, New York County
Docket Number: 161507/2013
Judge: Cynthia S. Kern

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

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DELISA WILLIAMS,

Plaintiff,

Index No. 161507/2013

-against-

DECISION/ORDER

GILBANE MCKISSACK JOINT VENTURE, GILBANE, INC., GILBANE BUILDING COMPANY, MCKISSACK CONSTRUCTION GROUP, LLC,

Defendants.

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HON. CYNTHIA 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 and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

This is an employment discrimination action arising out of defendants' failure to hire plaintiff as a hoist operator at a construction project in Harlem. Defendants now move for an Order pursuant to CPLR § 3211(a)(2) dismissing the action for lack of subject matter jurisdiction on the ground that plaintiff's claims are preempted by federal law. For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff is a member of the Labor Organization Union, Local 14 of the International Brotherhood of Operating Engineers ("Local 14"), which is an

affiliated union of the Building and Construction Trades Council of Greater New York and Vicinity (the "Council"). On or about February 27, 2012, defendants Gilbane Building Company/McKissack & McKissack, a Joint Venture, and the Council entered into a Project Labor Agreement ("PLA") to contract for the performance of construction management services for a project at North General Hospital (the "Project"). A PLA is defined by N.Y. Labor Law § 222 as "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work." The PLA herein at issue was binding on all "participating Unions and their affiliates, the Construction Manager and all Contractors of all tiers performing Project Work as defined in Article 3." This included defendants McKissack Construction Group, LLC and Gilbane Inc..

In September 2012, plaintiff, an African American Female, applied for a temporary hoist operator position at the Project. While plaintiff alleges that she was initially told that she would be hired for the position, she ultimately was not hired. Instead, the position was allegedly given to a white man. Thus, on or about December 19, 2014, plaintiff commenced the instant action alleging employment discrimination claims arising out of defendants' failure to hire her. Specifically, plaintiff asserts the following four causes of action in her complaint: (1) failure to hire on the basis of race and gender under the New York City Human Rights Law ("NYCHRL"); (2) adopting, aiding and abetting Local 14's retaliatory and discriminatory intent in violation of the NYCHRL; (3) maintaining a discriminatory policy "of deferring to Local 14's

recommendations and preferences for the selection of individuals to be hired"; and (4) breach of contract. Defendants now move to dismiss the complaint on the ground that this court lacks subject matter jurisdiction as plaintiff's action is preempted by Section 301 of the Labor Management Relations Act ("LMRA").

Section 301of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). The United States Supreme Court has interpreted this section to preempt state law claims "founded directly on rights created by collective bargaining agreements" as well as "claims 'substantially dependent on an analysis of a collective bargaining agreement.'" *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988) (quoting *Electrical Workers v. Hechier*, 481 U.S. 851, 859 (1987)). According to the Supreme Court, preemption is necessary "to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Id.* at 404. Thus, "[any] claim that challenges a provision in a [collective bargaining agreement] must be brought under section 301." *Tamburino v. Madison Square Garden, L.P.*, 115 A.D.3d 217 (1st Dept 2014) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985)).

Section 301 of the LMRA, however, does not preempt state law claims when state law confers an independent statutory right to bring a claim. *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994)). "[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Lingle,* 486 U.S. at 410. Moreover, defendant's reliance on the collective bargaining agreement

is not enough to "inject [] a federal question into an action that asserts what is plainly a state-law claim." *Tamburino,* 115 A.D.3d at 217 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987)).

In applying the above principles to a case remarkably similar to the present one, the First Department, in *Suarez v. Gallo Wine Distributors, L.L.C.*, 32 A.D.3d 737 (1st Dept 2006), found that plaintiffs' claims for violation of New York City and State Human Rights Laws were not preempted by the LMRA. In coming to this determination the court noted that "[w]hile perhaps [the] litigation will require consultation of the union contract, and perhaps defendants' defenses may be based upon its existence, the agreement is only tangentially relevant to the claims as pleaded." *Id.* at 738. Similarly, in *Domnister v. Exclusive Ambulette, Inc.*, 607 F.3d 84 (2nd Cir. 2010), another case directly analogous to the present one, the Second Circuit recognized that plaintiffs are "masters of the complaint" and, as such, the LMRA does not preempt state and city discrimination claims when the claims as plead do not rely upon, address or even mention any collective bargaining agreement. Specifically, the Second Circuit stated as follows: "Simply put, [plaintiffs'] complaint alleges plain vanilla employment discrimination. As 'masters of the complaint,' plaintiffs were entitled to construct their complaint in this fashion, regardless of the existence of collective agreements. Thus the complaint, as written, is not preempted by [the LMRA]." *Domnister*, 607 F.3d at 90.

In the present case, similar to the First Department and Second Circuit's holdings in *Suarez* and *Dominster*, the court finds that plaintiff's first claim for employment discrimination is not preempted by Section 301 of the LMRA. In her first claim, plaintiff alleges a straight forward failure to hire claim under NYCHRL based on her status a black female. There is simply

no mention of any collective bargaining agreement or, specifically, the PLA. Thus, plaintiff is seeking to assert a state law claim and such claim is not, as plead, preempted by the LMRA. To the extent defendants argue that adjudication of plaintiff's first claim requires the court to interpret the PLA to determine whether defendants had sufficient decision-making power as contractors, as defined under the PLA, in order for plaintiff to enforce a failure to hire claim based on her minority/gender status, such argument is without merit. Defendants' attempt to rely on the PLA as part of their defense is not enough to preempt a straight forward failure to hire state law claim that does not arise pursuant to any rights under the PLA. Indeed, while discussion of defendants' defenses may require the court to refer to the PLA, it does not require the court to interpret the PLA itself. Thus, plaintiff's first claim is not preempted by the LMRA as the PLA is only tangentially relevant to the plaintiff's claim as plead.

Similarly, the court also finds that plaintiff's second claim is not preempted as it can be resolved without interpreting the PLA itself. In her second claim, plaintiff alleges that defendants "adopted Local 14's retaliatory or discriminatory intent, or aided and abetted Local 14 in illegal discrimination and retaliation against plaintiff, all in violation of the New York City Human Rights Law." Specifically, plaintiff asserts the following: (1) defendants initially decided to hire plaintiff but once it communicated this to Local 14, Local 14 objected to defendants hiring plaintiff; (2) Local 14 objected to defendants hiring plaintiff because plaintiff had sued Local 14 in an employment discrimination lawsuit or because Local 14 wanted to steer the position to a white male; (3) when Local 14 made this objection, defendants knew that Local 14 was acting out of illegal discriminatory or retaliatory motives; and (4) this caused or contributed to defendants' decision not to hire plaintiff as a hoist operator. Based on these allegations,

resolution of this claim only requires analysis into factual questions regarding why Local 14 did not recommend plaintiff for the position; defendants knowledge of those reasons; and defendants' ultimate reason for not hiring plaintiff. It does not, contrary to defendants' assertion, turn "on whether Defendants' adherence to the PLA's referral system, resulted in an aiding and abetting of Local 14's alleged discrimination and/or retaliation." While the PLA does control defendants' hiring practice for the Project and the court may have to refer to the PLA when discussing defendants' defenses, it is, in the end, only tangentially relevant to plaintiff's second claim as plead in her complaint. Additionally, defendants' contention that plaintiff's second claim requires "by the very language of the Complaint" that the court interpret the PLA, such contention is without merit. Contrary to defendants' contention, plaintiff is not asserting that defendants' violated the non-discrimination referral clause in the PLA but that they violated her rights under the NYCHRL.

However, plaintiff's third claim is preempted by Section 301 of the LMRA as adjudication of the claim requires the court to interpret the terms of the PLA and is inextricably intertwined with the PLA. In her third claim, plaintiff alleges that defendants maintained a discriminatory policy "of deferring to Local 14's recommendations and preferences for the selection of individuals to be hired" and that "said policy has a detrimental impact on the hiring of non-Whites and non-White women Operating Engineers in constructions sites in New York City." As an initial matter, the court notes that its unclear what cognizable claim plaintiff is asserting here as she does not identify what law or contract term such alleged discriminatory policy is in violation of. Nonetheless, as the claim by its very terms implicates defendants' hiring policies at the Project, which is undisputedly governed by the PLA, resolution of such claim

would undoubtedly require the court to analyze the PLA's hiring guidelines.

Additionally, plaintiff's fourth claim for breach of contract is preempted as it is founded upon rights created under the PLA. In her fourth claim, plaintiff alleges that "[i]n connection with their work as construction managers at [the Project], defendants entered into a contract or series of contracts with one or more public agencies or corporations[,which] contained provisions requiring defendants to adhere to equal employment hiring guidelines and to make good faith efforts to achieve minimum hiring goals for minority and female construction workers." While plaintiff does not explicitly identify the PLA as the contract she is referring to, it is undisputed that the PLA was the governing contract for the Project and contained the exact anti-discrimination policy plaintiff references. Thus, while styled as a general breach of contract claim, plaintiff's fourth claim is clearly a claim brought pursuant to her rights under the PLA. Thus, it is preempted by Section 301 of the LMRA as a matter of law.

To the extent plaintiff contends that defendants' motion should be denied as the PLA is not binding on Local 14, such contention is without merit. As an initial matter, Article 2 of the PLA defines the parties to the PLA to include "the Building and Construction Trades Council of Greater New York and Vicinity and its participating affiliated Local Unions" and Local 14 is expressly identified on the Building and Construction Trades Council of Greater New York and Vicinity's website as an "affiliated union." Moreover, it is undisputed that defendants herein were bound by the PLA's terms for all hiring occurring at the Project, including the position plaintiff was ultimately not hired for.

Based on the foregoing, it is hereby ORDERED that defendants' motion is granted only to the extent that plaintiff's third and fourth claims are hereby dismissed for lack of subject

matter jurisdiction. However, the remainder of defendants' motion is hereby denied. This constitutes the decision and order of the court.

Dated: 9/17/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.