SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

YURI STARIKOV,

Plaintiff(s),

-against-

CEVA FREIGHT, LLC, CEVA INTERNATIONAL, INC., KIMBERLY WAKEMAN,

Defendant(s).

TRIAL/IAS, PART 40
NASSAU COUNTY
INDEX NO.: 605302/14

MOTION SUBMISSION DATE: 4-7-15

MOTION SEQUENCE NO: 001

XXX

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits.....X
Affirmation in Opposition and Exhibits.....X
Affirmation in Reply.....X

Defendants move for an Order dismissing Plaintiff's complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7). Defendants further move for counsel fees pursuant to Labor Law §740. Plaintiff opposes the motion.

Plaintiff, an attorney operating *pro se*, commenced this action by the filing of a summons and complaint dated October 8, 2014. Defendants brought the within motion to dismiss in lieu of an answer.

Plaintiff was a part-time regulatory compliance specialist employed by Defendant

CEVA Freight (Freight) and supervised by Defendant Kimberly Wakeman (Wakeman). He claims he was fired, as a retaliatory measure, for complaining that Freight engaged in customs business without a license, that freight violated certain Federal regulations through improper emails and that Defendant CEVA International (International) improperly claimed Plaintiff was an employee of theirs. Defendants deny the allegations, but argue even if they were true, they fail to state a cause of action under the sections of the Labor Law Plaintiff claims were violated. After Plaintiff filed his summons and complaint, the within motion ensued[1].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept. 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" *(Hense v Baxter*, 79 AD3d 814, 815 [2d Dept. 2010], *supra*; *see Leon v Martinez*, 84 NY2d 83, 87 [1994], *supra*; *Sokol v Leader*, 74 AD3d 1180,1181

[1]Plaintiff requested oral argument on the motion. The request was granted and oral arguments were held on April 7, 2015

[2d Dept. 2010], *supra*; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept. 2008]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2d Dept. 2008]; *see also 511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed (*see Leon v. Martinez*, 84 NY2d 83 [1994], *supra*). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (*see Aberbach v. Biomedical Tissue Services,* 48 AD3d 716 [2d Dept. 2008]; *see also EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3D 11 [2005]).

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002], *supra*; *Dana v. Malco Realty, Inc.,* 51 AD3d 621 [2d Dept. 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept. 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d 1180, 1181 [2d Dept. 2010], *supra*). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR §

3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *see Sokol v. Leader*, 74 A.D.3d 1180, 1182 [2d Dept. 2010], *supra*).

Labor Law §§740(2)(a) and (c) state:

> 2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
> (a) discloses, or 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, or which constitutes health care fraud;...
> (c)objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation

Labor Law §215(1)(a) states:

> No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, or to the attorney general or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner (ii) because such employer or person believes that such employee has made a complaint to his or her employer, or to the

> commissioner or his or her authorized representative, or to the attorney general, or to any other person that the employer has violated any provision of this chapter, or any order issued by the commissioner (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter, or (iv) because such employee has provided information to the commissioner or his or her authorized representative or the attorney general, or (v) because such employee has testified or is about to testify in an investigation or proceeding under this chapter, or (vi) because such employee has otherwise exercised rights protected under this chapter, or (vii) because the employer has received an adverse determination from the commissioner involving the employee.
> 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.

The crux of Plaintiff's argument is that Freight was engaging in customs business, as that term is defined by 19 U.S.C. §1641(a)(2), without authority to do so in violation of Federal law, and tried, through Wakeman's orders, to direct Plaintiff to partake in that illegal activity. To cover up this illegal activity, International, who was authorized to perform customs business, claimed Plaintiff was its employee, though he was not. Apparently, it would look as if the customs business Plaintiff was actually performing for Freight would appear as if it was being performed for International. Tangentially, Plaintiff further argued that Freight and International disclosed confidential information via email, in violation of 19 CFR 111.24. It was when he pointed out these issues that the retaliatory measures were taken against him.

Plaintiff makes the unusual argument that when he started to make complaints about Defendants' alleged wrongdoing, he was retaliated against by being offered a full-time position by Wakeman. Due to the workload and the nature of the work, Defendants needed a person in Plaintiff's position to be there full-time, and were eliminating the part-time position. Unable to accept the full-time position, Defendant was fired. He was unable to accept a full-time position because, aside from his work for Freight, Plaintiff was able to maintain a law practice where he represented private clients in, among other things, criminal proceedings. If he were forced to work full-time for Freight, he would be unable to maintain his law practice and meet his obligations to his private clients. On the other hand, he wanted to remain employed by Freight because it provided him with steady income and other benefits. Plaintiff argues Defendants were aware of these circumstances and knew he would be unable to accept a full-time position. He further argues he offered to work more hours in the evenings or weekends, but Defendants were unwilling to be flexible. When he would not accept the full-time position, he was informed by Wakeman it was considered a voluntary resignation. Plaintiff vociferously disagreed.

A viable cause of action under Labor Law §740 requires the violation of law, rule or regulation which creates a substantial and specific danger to the public. (*Lukose v. Long Island Medical Diagnostic Imaging P.C.*, 120 A.D.3d 1312 [2nd Dept. 2014]; *Tomo v. Episcopal Health Services*, 85 A.D.3d 766 [2nd Dept. 2011]; *Cotrone v. Consolidated*

Edison Co. of N.Y., Inc., 50 A.D.3d 354 [1st Dept 2008]). The provisions of Labor Law §740 are to be strictly construed. (*Id., citing Noble v. 93 Univ. Place Corp.*, 303 F.Supp.2d 373 [S.D.N.Y. 2003]). The alleged violation must present an actual danger to the public, not a potential or speculative danger. (*Cotrone v. Consolidated Edison Co. of N.Y., Inc., supra; Nadkarni v. North Shore-Long Island Jewish Health System*, 21 A.D.3d 354 [2nd Dept. 2005]).

Herein, Plaintiff argues that by conducting customs business without authority to do so, Freight may have allowed products, such as pharmaceuticals, cosmetics, and food to enter the country improperly and illegally. Even assuming each allegation in the complaint is true, and assuming that Freight, International and Wakeman violated Federal law, Plaintiff has still failed to establish these activities resulted in a substantial and specific danger to the public health or safety as required by the statute. Plaintiff points to no specific item or material that entered the country and posed a danger to the public. He merely eloquently argues that some items may have, or could have, entered the country illegally and caused a danger. As such, his Labor Law §740(a)(1) claims must fail. (*Cotrone v. Consolidated Edison Co. of N.Y., Inc., supra).*

Plaintiff has also failed to establish that the actions taken against him could be considered retaliatory. Defendants offered Plaintiff, a part-time employee, a full-time job with all the associated benefits and increased income. While Plaintiff poses his predicament as one where he *could not* accept the full-time position, in actuality he *chose*

not to accept the position. That the full-time position was inconvenient for him and his private practice of law does not make the offer retaliatory. Further, Plaintiff's argument requires this court to assume that Defendants took the risk of offering Plaintiff a job they did not want him to take knowing he would refuse it, thereby giving them the ability to release him. The court cannot make that leap in logic. Therefore, finding no retaliation, the Labor Law §740(1)(a) and (c) claims, as well as the Labor Law §215 claim against Wakeman and International, must fail.

Accordingly, it is hereby

ORDERED, that Defendant's motion to dismiss the complaint is GRANTED; and it is further

ORDERED, that Defendant's motion for counsel fees pursuant to Labor Law §740(6) is DENIED.

This constitutes the decision and order of the court.

Dated: May 19, 2015
Mineola, New York

JAMES P. McCORMACK, A.J.S.C.