Defran v Transport Workers Union of Greater N.Y. AFL-CIO, Local 100

2016 NY Slip Op 30329(U)

February 24, 2016

Supreme Court, New York County

Docket Number: 653974/2014

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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CHICEL DEFRAN,

Plaintiff, Index No.: 653974/2014

-against-

TRANSPORT WORKERS UNION OF GREATER NEW YORK AFL-CIO, LOCAL 100, INTERNATIONAL TWU OF AMERICA, JOHN DAY and JOHN SAMUELSEN,

Defendants.

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JAMES, J.S.C.:

This action arises out of plaintiff Chicel DeFran's claims that she was subject to employment discrimination, sexual harassment and retaliation, based on her gender, race and national origin, in violation of the New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

Plaintiff brought this action, alleging that defendants' actions violated the NYSHRL and NYCHRL. She contends that International TWU was her "joint employer that exercised complete control over" TWU employees so as to be liable under these statutes.

Defendant International TWU of America (International TWU) moves, pursuant to CPLR 3211 (a) (7) to dismiss the complaint, on the basis that International TWU is not plaintiff's employer, and therefore, should be dismissed as a defendant.[1]

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[1] Defendant's motion to dismiss names the defendant as Transport Workers Union of America, AFL-CIO i/s/h/a International TWU of America.

FACTUAL ALLEGATIONS

Plaintiff is female and was born in the Dominican Republic. In 2000, plaintiff was hired to work as a bus driver for nonparty Mile Square Transportation (Mile Square). She became a member of the union with which Mile Square has a collective bargaining agreement, defendant Transport Workers Union of Greater New York AFL-CIO, Local 100 (TWU, or Local 100) which is a branch of International TWU. In 2001, plaintiff became the "chair of the shop" steward for TWU employees and was "charged with resolving grievances between Mile Square's union employees and management." In December 2009, plaintiff was elected to serve as the "Chairperson of Local 100's Westchester Division for School Bus and Paratransit Transportation." After being elected to this position, she did not drive buses anymore and began to carry out her duties as chairperson of the TWU local. Plaintiff served as the elected representative for the Westchester Division, which included Mile Square and seven other bus companies. She states that one of her supervisors, defendant John Samuelsen (Samuelsen), assigned her to report to a satellite office in Yonkers. Samuelsen allowed plaintiff to select four aides, which she did. Samuelsen also advised her to report to defendant John Day (Day), the vice president of the Westchester Division.

In the amended complaint, plaintiff claims that International TWU "controlled the employment of all members of the [TWU] as well as the employment of members from all of the local chapters of the Union."[2] Plaintiff affirms that, pursuant to the appeal process, all

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[2] After International TWU brought its motion to dismiss, plaintiff filed her amended complaint. International TWU requests that the court apply its motion to dismiss to the amended complaint.

employment disputes were ultimately resolved by International TWU. She further claims that International TWU "regularly sent staff members to her office to direct her on how to perform her job, how to resolve issues, and to organize members of the [TWU]." Specifically, plaintiff asserts that she was required to report what was happening at TWU to Frank McCann (McCann), an International TWU employee, so that he could relay the information to International TWU. She adds that McCann "instructed her on certain issues and she was required to follow his instruction."

Plaintiff alleges that she was sexually assaulted by Day. Plaintiff asserts that she reported Day's behavior to Samuelsen in November 2010. However, after reporting this behavior to Samuelsen, plaintiff alleges that defendants retaliated against her. Among other things, plaintiff states that her aides were fired, and then she received new staff, who refused to recognize her as their boss. She also states that this new staff made offensive comments regarding her gender and national origin. Samuelsen allegedly defamed plaintiff's work performance in public. In sum, she maintains that she suffered from severe retaliation, discrimination and a hostile work environment as a result of reporting Day's behavior.

Plaintiff states that she also complained in writing about her situation, on three occasions, to International TWU. Plaintiff contends that International TWU ignored her letters, despite allegedly "regularly" hearing appeals of employment issues.

On November 16, 2012, plaintiff was advised that she was terminated "because a dues review had been conducted which revealed that there was a lapse in her dues in October of 2009. She was told that she had violated the Constitution of TWU International." She claims,

among other things, that all Mile Square employees stopped paying their dues as a result of a contract renewal failure between Mile Square and TWU, and that defendants knew this. Plaintiff alleges that her termination was "nothing more than the final step in defendants' attempts to get rid of plaintiff from reporting defendant Day's sexual harassment, and defendant Samuelsen's failure to act." Plaintiff argues that she may amend her pleadings as a matter of right. In her reply papers, plaintiff submits an affidavit in which she states that "all employment disputes were ultimately decided by [International TWU] pursuant to the appeals process." She further maintains that International TWU regularly came and supervised her and directed her on how her duties should be performed. Also, in support of her argument that International TWU is a joint employer, plaintiff claims that an employee may be terminated for violating International TWU's constitution. She reiterates that she wrote to International TWU to ask them for help with the alleged discrimination she was experiencing.

International TWU provides W-2 and earnings summaries which it says demonstrate that plaintiff was "compensated exclusively by Local 100 during her employ as the Chairperson of the Westchester Division." However, the 2010 W-2 summary lists Mile Square Transportation, Inc. as plaintiff's employer and the actual 2010 and 2011 W2 statements list her employer as Transport Worker's Union of America.

International TWU maintains that plaintiff has not alleged that, at the time of the discrimination, International TWU controlled her salary, terms or employment or removal. As a result, according to International TWU, plaintiff has not sufficiently pled that International TWU and TWU are joint employers.

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International TWU provides a copy of its constitution, which provides that each local union shall adopt by-laws that govern the local unions and their members. International TWU claims that it did not have any authority to establish the salaries of TWU employees or hire or fire them. According to International TWU, the president of TWU had such authority. As a result, International TWU maintains that it is not a joint employer with TWU.

The court notes that the Transport Workers Union of America constitution, as provided by International TWU, states that any member who has been found guilty of charges preferred against him by the Local Executive Board has the right to appeal the determination with the International Committee on Appeals. Pursuant to the constitution, any higher body may affirm or reverse the appeal of the decision of the local executive board.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." Mendelovitz v Cohen, 37 AD3d 670, 671 (2d Dept 2007); see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 375 (1st Dept 2003). "In addition, employment discrimination cases are themselves generally reviewed under notice pleading standards . . . . [I]t has been held that a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." Vig v New York Hairspray Co., L.P., 67 AD3d 140, 145 (1st Dept 2009) (internal citation omitted).

Under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon v Martinez, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." Silverman v Nicholson, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

As plaintiff argues, plaintiff can amend her complaint as of right as a result of International TWU's motion to dismiss. CPLR 3025 (a). See e.g. STS Mgmt. Dev. v New York State Dept of Taxation & Fin., 254 AD2d 409, 410 (2d Dept 1998). This amended complaint supersedes the original complaint. Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, 71 AD3d 533, 533 (1st Dept 2010). Pursuant to International TWU's request, this court will apply the motion to dismiss the complaint to the amended complaint.

The amended complaint alleges that, for purposes of NYSHRL and NYCHRL liability, International TWU is a "joint employer" that exercised control over TWU employees. Although an entity may not be a formal or direct employer, a plaintiff may still assert employer liability under the NYSHRL and the NYCHRL under the "joint employer" doctrine. Barbosa v Continuum Health Partners, Inc., 716 F Supp 2d 210, 216-217 (SD NY 2010). "A joint employer relationship may be found to exist where there is sufficient evidence that the respondent had immediate control over the other company's employees." N.L.R.B. v Solid Waste Servs., 38 F3d 93, 94 (2d Cir 1994). The court must consider factors which include "hiring, firing, discipline, pay,

insurance, records, and supervision." Id; see also Service Employees International Union, Local 32BJ v N.L.R.B., 647 F3d 435, 442-443 (2d Cir 2011) (Courts consider, "whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process [internal quotation marks and citations omitted]").

Under the joint employer doctrine, plaintiff "must plead enough facts so that the claim is facially plausible and gives fair notice to defendants on her theory of employer liability." Barbosa v Continuum Health Partners, Inc., 716 F Supp 2d at 219. For the reasons set forth below, plaintiff has satisfied this standard.

According to plaintiff, staff members from International TWU regularly came to her office to direct her on how to perform her job. She further maintains that International TWU handled appeals of the TWU employees. Plaintiff also claims that when she was terminated, she was told she had violated the International TWU constitution. In addition, the evidence submitted from International TWU demonstrates that International TWU was involved in paying plaintiff's salary, as the W-2 and earnings summary forms list plaintiff's employer as TWU of America rather than as Local 100.

Accordingly, viewed in the light most favorable to plaintiff, at this juncture, plaintiff has established that International TWU may be a joint employer for purposes of liability under the NYSHRL and NYCHRL. See e.g. Hae Sheng Wang v Pao-Mei Wang, 96 AD3d 1005, 1008 (2d Dept 2012) (in evaluating the sufficiency of the pleadings, the plaintiffs' ultimate ability to prove

those allegations is not relevant).

Accordingly, it is

ORDERED that the motion of International TWU of America to dismiss the amended complaint herein is otherwise denied; and it is further

ORDERED that International TWU of America is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in IAS Part 59, 71 Thomas Street, New York, New York, on April 5, 2016, 9:30 AM.

Dated: February 24, 2016

ENTER:

DEBRA A. JAMES J.S.C.