Brunot v Congregation ETZ Chaim/Tree of Life/Rainbow Preschool
2017 NY Slip Op 33487(U)
February 17, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 64674/2013
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX NO. 64674/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TAHISHA BRUNOT,

Plaintiff,

-against-

CONGREGATION ETZ CHAIM/TREE OF LIFE/RAINBOW PRESCHOOL and TREE OF LIFE NURSERY SCHOOL,

Defendants.

MOTION DATE: AUGUST 4, 2016
FINAL SUBMISSION DATE: SEPTEMBER 15, 2016
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to _____ read on this motion _____ FOR SUMMARY JUDGMENT_____.
Notice of Motion and supporting papers __1-3__; Affirmation in Opposition and supporting papers __7__; Reply Affirmation __8__; it is,

ORDERED that this motion by defendants CONGREGATION ETZ CHAIM/TREE OF LIFE/RAINBOW PRESCHOOL and TREE OF LIFE NURSERY SCHOOL ("defendants" or "School") for an Order, pursuant to CPLR 3212, granting summary judgment to defendants, dismissing all remaining allegations of the plaintiff contained in the complaint, is hereby **DENIED** in its entirety. The Court has received opposition to this application from plaintiff TAHISHA BRUNOT.

Plaintiff asserts three causes of action against defendants. The first is a cause of action pursuant to Labor Law § 740 (2) (a), commonly known as the "whistleblower" law, claiming that the termination of her employment with the School was in retaliation for her making complaints to the New York State Office of Children and Family Services ("OCFS"). The complaints alleged, among other things, that defendants maintained improper staffing ratios and improper group sizes, including, but not limited to, violations of 18 NYCRR § 418-1.3 (o), 18 NYCRR § 418-1.5 (a), 18 NYCRR § 418-1.8 (e), 18 NYCRR § 418-1.15, and 18

NYCRR § 418-1.13 (i), and other regulations of the Department of Social Services, all of which endangered public health, safety and/or welfare of the children at the School.

The second cause of action was discontinued with prejudice on March 24, 2016.

The third cause of action seeks damages for defendants' alleged failure to pay for plaintiff's overtime, lunch break time, and agreed-upon employee benefits, including, but not limited to, health insurance, holidays and vacation time. Plaintiff seeks a judgment awarding lost wages and earnings, loss of future earnings, loss of benefits, other economic loss, costs, mental anguish, disbursements, attorney's fees, and all other damages permitted by law.

Regarding the first cause of action, defendants assert that plaintiff was fired based on improper behavior and performance issues pursuant to Labor Law § 740 (c), and not in retaliation for filing complaints with the OCFS. Regarding the third cause of action, defendants assert that plaintiff was an at-will employee as no employment agreement was in place, and therefore is not now entitled to reimbursement for benefits, overtime and holiday pay.

Defendants have filed the instant application for summary judgment dismissing the first and third causes of action. In support of the motion, defendants submit, among other things, an affidavit of Tova Plaut and an "activity log" of incidents written by Ms. Plaut regarding plaintiff's alleged employment infractions. In opposition, plaintiff has submitted, among other things, her own affidavit and the School Employee Handbook.

Plaintiff was hired in 2008 as a teacher at the School and continuously worked in that capacity until on or about June 28, 2013. The School is owned and operated by Rabbi Wizman and his wife Bella Wizman, and operated by their daughter Tova Plaut. During her five years of employment, plaintiff alleges that she made several reports to Ms. Plaut and Ms. Wizman concerning the student-teacher ratio exceeding the 5:1 ratios required by law and her concern for the safety of the children. Plaintiff contends that she kept a daily record of the student-teacher ratios and other conditions of the facilities in a binder in her classroom. Plaintiff confided in her assistant that she reported the staffing violations to the OCFS and had maintained a binder of daily reports and observations to prove these violations. Shortly after that conversation, plaintiff contends that her assistant took the binder and gave it to Ms. Plaut and informed

Ms. Plaut that plaintiff made reports to the OCFS. Plaintiff alleges that she was fired thereafter in direct retaliation for reporting the alleged violations to OCFS.

In moving for summary judgment, defendants maintain that plaintiff's allegations do not make out a claim under Labor Law § 740 because: (1) plaintiff did not first inform her employer of violations and allow them time to rectify the problem (Labor Law § 740 [3]); and (2) there is no evidence that the School was cited for purported violations. Defendants also contend that plaintiff was terminated because of repeated instances of unprofessional behavior which were documented over several years, culminating in a final altercation with plaintiff's assistant on the day of plaintiff's termination. Plaintiff contends in her affidavit that she informed defendants on multiple occasions of the student-teacher ratio violation and repeatedly requested additional help with her large class.

On a motion for summary judgment, the Court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). The movant's burden on a summary judgment motion is a heavy one, as a court must view the evidence in the light most favorable to the nonmoving party and all inferences must be resolved in the favor of the nonmoving party (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Vega v Restrani Constr. Corp.*, 18 NY3d 499 [2012]). If the initial burden is met, the party opposing summary judgment must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Vega*, 18 NY3d 499; *Alvarez*, 68 NY2d 320). Mere allegations, unsubstantiated conclusions, expression of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v New York*, 49 NY2d 557 [1980]; *Blake v Guardino*, 35 AD2d 1022 [1970]). If the movant fails to make a *prima facie* case, summary judgment must be denied, regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d 320).

Initially, the document offered by defendants as evidence in support of their claim that plaintiff was terminated for poor performance and behavior, to wit: the "activity log," is hearsay and therefore inadmissible evidence. As such, it cannot be used to award summary judgment in defendants' favor. Business records prepared in the ordinary course of business practices contemporaneously prepared by an employer are admissible (CPLR 4518; *see Browne v International Bhd. of Teamsters, Local Union 851*, 203 AD2d 13 [1994]). However, the Court

finds that the casually and informally created "activity log" does not meet the standard of admissibility as a business record.

In addition, the affidavits of Ms. Plaut and plaintiff raise questions of fact as to whether plaintiff was terminated for cause or in retaliation for her complaints to OCFS. Specifically, plaintiff states that she informed defendants that there were problematic safety issues concerning the staffing ratios of teacher and student and only after these issues were not addressed did she report these violations to the OCFS. Defendants claim they first heard of these alleged violations in the current proceeding. Additionally, plaintiff attests that all factual allegations and claims made against her are fabricated and untrue, including, but not limited to, the policies and procedures of the School. Ms. Plaut states that all employees must clock in and out for breaks and lunchtime; however, plaintiff states that there were no breaks allowed and all teachers were forced to eat with the children as per the employee handbook. Further, plaintiff states that the School did not conduct formal reviews of their employees and that she never received a reprimand for poor performance or behavior issues during her five years of employment. In contrast, Ms. Plaut indicates that over the term of plaintiff's employment there were several occasions where Ms. Plaut addressed poor performance and inappropriate workplace etiquette with plaintiff. Lastly, Ms. Plaut accuses plaintiff of heated altercations with other staff members – the final incident resulting in the police being called to the School. The plaintiff denies these incidents.

Based on the foregoing delineated material issues of fact, this motion by defendants for summary judgment dismissing the remainder of plaintiff's complaint is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: February 17, 2017

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**