

Shevlin v Wonder Works Constr. & Dev. Corp.
2018 NY Slip Op 30360(U)
March 1, 2018
Supreme Court, New York County
Docket Number: 150348/2014
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
SCOTT SHEVLIN

Plaintiff

Index No. 150348/2014

v

DECISION AND ORDER

WONDER WORKS CONSTRUCTION & DEVELOPMENT
CORP., WONDER WORKS CONSTRUCTION CORP.,
421 KENT DEVELOPMENT, LLC, and XIN
DEVELOPMENT MANAGEMENT EAST, LLC

Defendants.

MOT SEQ 001,002

-----X
NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for violation of Labor Law § 740, also known as the whistleblower law, the defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action (SEQ 001) and pursuant to CPLR 2201 for a stay of trial pending hearing of the motion to dismiss the complaint (SEQ 002). The motions are denied.

II. BACKGROUND

The plaintiff alleges that, upon his refusal to comply with his employers' directive to keep a certain gate open at a construction site during times when it should have been closed, his employment with them was terminated. He thus avers that he was discharged from employment as a consequence of his refusal to

participate in violating New York City Building Code § 3307.3.4, which regulates the opening and closing of gates in sidewalk sheds, fences, barriers, and railings at construction sites. He asserts that this provision of the Building Code was enacted to protect the public from entering work sites and thereupon being injured, and that a violation thereof would present a substantial and specific danger to the public safety. The plaintiff thus seeks to recover for the defendants' violation of Labor Law § 740 (2)(c).

This court, in a preliminary conference order dated July 17, 2014, directed that "[a]ny dispositive motion[s] shall be made on or before 60 days after Note of Issue." The plaintiff filed the note of issue on June 27, 2015. The deadline for making a dispositive motion was thus August 26, 2015. The parties thereafter attended four pretrial settlement conferences between October 15, 2015, and September 19, 2016, and made four appearances in the trial assignment part between December 19, 2016, and November 29, 2017. They then adjourned their next appearance in the trial assignment part from January 17, 2018, until February 28, 2018.

The defendants waited until December 1, 2017, or two years and four months from the filing of the note of issue, to move to dismiss the complaint, and until February 20, 2018 to move for a stay of trial.

III. DISCUSSIONA. Defendant's Motion To Dismiss The Complaint (MOT SEQ 001)

In the first instance, the motion to dismiss the complaint is untimely. A motion pursuant to CPLR 3211(a)(7) constitutes a "dispositive motion to dismiss." Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P., 154 AD3d 523, 523 (1st Dept. 2017). Where, as here, a court order limits the time for the making of dispositive motions, including a motion pursuant to CPLR 3211(a)(7), any such motion made after that deadline is untimely. See Thomsen v Suffolk County Police Dept., 50 AD3d 1015 (2nd Dept. 2008). "Despite the clear directions of the preliminary conference order, which required 'all dispositive motions' to be made" by August 26, 2015, "the defendants disregarded that directive. Rather, the defendants unreasonably delayed" for two years and four months "the submission of their motion to dismiss the complaint," despite being directed to commence trial. Id. at 1017.

The defendants have cited, and research has revealed, no appellate authority holding that this court lacks authority to impose a time limitation on motions made pursuant to CPLR 3211(a)(7).

Even were the court to consider the merits of the motion to dismiss the complaint, the motion must be denied. A motion to dismiss a complaint for failure to state a cause of action "must

be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002) (internal quotation marks omitted); see Guggenheimer v Ginzburg, 43 NY2d 268 (1977). Where, as here, the court considers evidentiary material beyond the complaint, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, *supra*, at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it." Id. The occasions on which the parties' submissions prove that a material fact alleged by the plaintiff is not a fact at all, and that no significant dispute exists regarding it, have been characterized as "relatively rare." Kraut v City of New York, 85 AD3d 979, 980 (2nd Dept. 2011).

The complaint clearly alleges all of the elements necessary to sustain a cause of action to recover pursuant to Labor Law § 740(2)(c) against each of the defendants. Hence, the plaintiff states a cause of action. Moreover, the defendants' evidentiary submissions do not establish that any particular fact alleged in the complaint is not a fact at all. Nor do they reflect the absence of a significant dispute between the plaintiff's and

their own characterizations of both the factual predicate underlying the plaintiff's claim and the plaintiff's employment relationships with the defendants. Hence, the evidentiary material fails to defeat the causes of action asserted against all of the defendants.

1. Actual Violation of Law

In relevant part, Labor Law § 740(2) provides that

"[a]n 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; . . . **or** (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation." (emphasis added)

The plaintiff alleges that his employment with the defendants was terminated because he refused to participate in violating New York City Building Code § 3307.3.4, which requires certain sidewalk sheds, fences, barriers, and railings at construction projects to be closed at certain times. He specifically asserts that this provision of the Building Code was enacted to protect the public from entering work sites and thereupon being injured, and that a violation thereof would present a substantial and specific danger to the public safety since persons could stumble into an opening at a construction site and injure themselves.

The defendants note that Court of Appeals and several

appellate courts have concluded that a cause of action under Labor Law § 740(2)(a) requires a plaintiff to allege and prove an "actual" violation of law. See Webb-Weber v Community Action for Human Servs., Inc., 23 NY3d 448 (2014); Bordell v GE, 88 NY2d 869 (1996); Mazzacone v Corlies Assoc., 21 AD3d 1066 (2nd Dept. 2005); Khan v State Univ. of N.Y. Health Sci. Ctr., 288 AD2d 350 (2nd Dept. 2001). Contrary to the defendants' characterization, however, the term "actual violation" refers to the nature and quality of the conduct alleged to be in violation of the law, and was meant to distinguish actual violations of law from speculative violations, not ongoing violations from inchoate violations. See Villarin v Rabbi Haskel Lookstein School, 96 AD3d 1 (1st Dept. 2012). Crucially, the plaintiff does not allege that he was fired for disclosing a pre-existing or ongoing violation of the Building Code to a supervisor or public official in violation of Labor Law § 740(2)(a), but that he was fired for refusing to participate in violating public safety provisions of the Building Code, which is proscribed by Labor Law § 740(2)(c).

The Legislature's use of the disjunctive word "or" to distinguish the statutory provision describing disclosure of an activity that is "in violation of law" (Labor Law § 740[2][a]), from that describing an employee's refusal to participate "in any such activity . . . in violation of a law" (Labor Law § 740[2][c]), makes clear that it did not intend to require an

employee to plead and prove pre-existing or ongoing violations of law before he or she could refuse to participate in an illegal activity without fear of adverse consequences. See Villarin v Rabbi Haskel Lookstein School, supra; Rodgers v Lenox Hill Hosp., 211 AD2d 248 (1st Dept. 1995); see also Hughes v Gibson Courier Servs. Corp., 218 AD2d 684 (2nd Dept. 1995). Rather, Labor Law § 740(2)(c) was enacted to prevent violations from occurring in the future. See Villarin v Rabbi Haskel Lookstein School, supra.

To adopt the defendants' interpretation would be to incongruously import the equivalent of a "one-bite" rule into the whistleblower law, thus immunizing employers from liability for terminating the employment of persons who refuse to engage in illegal activity as long as the employer had not previously engaged in such activity. Even if the plaintiff were obligated to plead and prove an actual violation of law to sustain a cause of action under Labor Law § 740(2)(c), as suggested by the defendants, his allegations are sufficient here, since he has asserted that he refused to participate in an activity that would constitute an actual violation of the Building Code.

2. Cause of Action Against Those Defendants That Were Not The Plaintiff's Nominal Employer

There is also no merit to the defendants' contention that the plaintiff fails to state a cause of action against those defendants that were not his nominal employers. The plaintiff

has sufficiently pleaded facts sufficient to allege that those defendants, while not his nominal employers, were in fact liable as his joint employers. See Brankov v Hazzard, 142 AD3d 445 (1st Dept. 2016). Neither the defendants' documentary submissions nor nondocumentary evidence establishes that any particular defendant lacked "immediate control over the terms and conditions of the plaintiff's employment." Id. at 446. Thus, given the similarity of the names of two of the defendants, and the manner in which authority to control an employee's tasks is usually exercised on construction projects, it cannot be determined, at the pleading stage, that any defendant was not the plaintiff's joint employer.

The court expresses no opinion as to whether the plaintiff might be able to establish, at trial, a joint employment relationship between the several defendants and him.

B. DEFENDANT'S MOTION FOR STAY OF TRIAL (MOT SEQ 002)

Since the court has now determined the motion to dismiss the complaint, and the pendency of that motion was the only ground urged by the defendants in support of their request for a stay, there is no basis upon which to stay the trial of the action pending the hearing of that motion. See CPLR 2201.

The court notes that, although the issue is not before it, to the extent that the complaint seeks the exclusive remedies enumerated in Labor Law § 740(5), there is no right to a jury

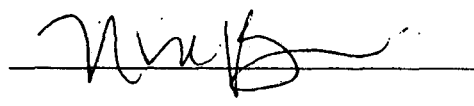
trial, as only "the court may order relief." Labor Law § 740(5);
see Scaduto v Restaurant Assoc. Indus., 180 AD2d 458 (1st Dept.
1992); see also Tipaldo v Lynn, 76 AD3d 477 (1st Dept. 2010).

IV. CONCLUSION

In light of the foregoing, it is
ORDERED that the defendants' motion to dismiss the complaint
(SEQ 001) is denied; and it is further,
ORDERED that the defendants' motion for a stay of the trial
pending hearing of their motion to dismiss the complaint (SEQ
002) is denied.

This constitutes the Decision and Order of the court.

Dated: March 1, 2018

ENTER: 

J.S.C.

HON. NANCY M. BANNON