

<b>Coleman v Services for the Underserved, Inc.,</b>
2019 NY Slip Op 31145(U)
April 25, 2019
Supreme Court, New York County
Docket Number: 161235/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 161235/2017

DESIREE COLEMAN,

MOTION SEQ. NO. 001

Plaintiff,

- v -

SERVICES FOR THE UNDERSERVED, INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 9, 10, 11, 12

were read on this motion to DISMISS

Upon the foregoing documents, it is ordered that the motion is granted.

In this Labor Law action, defendant Services for the Underserved, Inc. ("Services for the Underserved") move to dismiss the complaint of plaintiff Desiree Coleman ("Coleman"), a former employee, under CPLR 3211(a)(7). Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this action on October 18, 2017, by filing a summons and complaint. (Doc. 5.) The facts alleged in the complaint reveal that plaintiff was employed as a full-time program director for Services for the Underserved. (Id. at 6.) Services for the Underserved is a non-profit corporation that provides "services for people in and around New York City whose lives have been unsettled by circumstances beyond their control." (Id. at 5.) Such services include

mental health housing. (*Id.*) The organization's client base consists primarily of people with disabilities, those living in poverty, and people who face homelessness. (*Id.*) Services for the Underserved receives government grant funds to aid it in pursuing its mission. (*Id.* at 6.) The issue in this case is whether the misuse or misallocation of government grant funds is actionable under New York Labor Law § 740.

On August 25, 2017, plaintiff made a report to the human resources department about her direct supervisor, Robert Pruitt ("Pruitt"). (*Id.* at 6–7.) In the report, she accused Pruitt of misusing the government grant funds by billing programs for work and overtime that was not actually done by the programs, and by charging programs for materials and items that they did not order. (*Id.* at 7.) On September 1, 2017, plaintiff sent a follow-up e-mail to the human resources department about her report. (*Id.*) She was terminated from employment on September 11, 2017. (*Id.*)

The first cause of action in her complaint asserts violations of Labor Law § 740 and New York Not for Profit Corporations Law § 715-b. (*Id.* at 7–10.) In particular, she alleges that Pruitt's commingling of government funds ran afoul of Not for Profit Corporations Law § 715-b and that, in firing her, Services for the Underserved committed retaliation in violation of Labor Law § 740. (*Id.* at 9.) The second cause of action requests punitive damages. (*Id.* at 10.)

Services for the Underserved now moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint in its entirety and with prejudice. (Doc. 3.) It argues that plaintiff does not have a cause of action under Labor Law § 740 because that statute proscribes activities that create a substantial danger to public health or safety (Doc. 6 at 3–5) and because the type of activity being challenged here—financial mismanagement—does not implicate public health or safety concerns (*id.*). With respect to the second cause of action, defendant claims that it must be dismissed because a request for punitive damages is not in itself a valid, independent cause of action. (*Id.* at 5–6.) Services for

the Underserved further argues that the entire complaint should be dismissed with prejudice because Labor Law § 740 contains an election of remedies provision, which bars any concurrent state law claim arising out of the same set of alleged facts. (*Id.* at 7–8.)

In opposition, plaintiff argues that she has adequately set forth a cause of action under Labor Law § 740 because the complaint alleges facts that not only constitute a violation of Not for Profit Corporations Law § 715-b, but also constitute a danger to public health and safety: “[Services for the Underserved’s] improper actions created a substantial and specific danger to the general public in that they created a health-care financial fraud depriving programs that directly provide housing, safety, health, welfare, and security to members of the general public who were homeless and/or suffered physical and mental disabilities.” (Doc. 11 at 6.) Plaintiff also requests leave to amend the pleading so that she may put in a more definitive statement of the specific law, rule, or regulation violated that comprises part of her Labor Law § 740 claim. (*Id.* at 7–8.)

#### LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, “the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

A motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) “test[s] the facial sufficiency of the pleading in two different ways.” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, “the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law.” (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable

cause of action but has nevertheless failed to plead a material allegation necessary to establish it.

(*Id.*)

Even affording the complaint a liberal construction, as this Court must, this Court finds that the motion must be granted. A wealth of caselaw establishes that financial impropriety is not actionable under Labor Law § 740, which is “triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety.” (*Remba v Fedn. Empl. & Guidance Serv.*, 76 NY2d 801, 802 [1990] (holding that fraudulent billing is not the type of violation contemplated under Labor Law § 740).) “[A]lleged financial dealings [do] not create a substantial and specific danger to the public health or safety within the meaning of Labor Law § 740.” (*Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012]; see also *Villarin v Rabbi Haskel Lookstein Sch.*, 96 AD3d 1, 3 [1st Dept 2012] (“[I]llegal economic or financial activities that may be inimical to the public welfare are not within the statutory protection absent a showing that the illegal activity concomitantly creates ‘substantial and specific danger to the public health and safety.’”); *Vella v United Cerebral Palsy of New York City, Inc.*, 141 Misc 2d 976 [Sup Ct, NY County 1988] (employing the same reasoning).) To put it simply, the caselaw is clear that Pruitt’s alleged misconduct does not fall within Labor Law § 740’s ambit.

To the extent the first cause of action cites Not for Profit Corporations Law § 715-b as a part of plaintiff’s Labor Law § 740 claim (Doc. 5 at 9), this Court determines that the provision is inapplicable to these facts. That provision is “a safe harbor protecting interested directors involved in a transaction if the same is approved by a fully informed vote of disinterested directors.” (*In re Sephardic Found. for Torah Studies, Inc.*, 18 Misc 3d 1141 [Sup Ct, Kings County 2008]; see also *In re New York Stock Exch./archipelago Merger Litigation*, 12 Misc 3d 1184, \*11 [Sup Ct, NY

County 2005].) This Court fails to see how the provision aids plaintiff, since nowhere in the complaint does she allege that she was a director for Services for the Underserved in the duration of her employment. (*See* Doc. 5.)

Because “[t]here can be no separate cause of action for punitive damages,” (*Bunker v Bunker*, 73 AD2d 530, 530 [1st Dept 1979]), plaintiff’s second cause of action must also be dismissed.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that the motion by defendant Services for the Underserved, Inc. to dismiss the entire complaint of plaintiff Desiree Coleman is granted; and it is further


**ORDERED** that, within 30 days of the uploading of this order to NYSCEF, defendant’s counsel is directed to serve a copy of this order, with notice of entry, on plaintiff’s counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that this constitutes the decision and order of this Court.

4/25/2019  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE