Kingston v International Bus. Machs. Corp.
2019 NY Slip Op 32795(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 156289/2018
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 14**

Justice

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SCOTT KINGSTON, ANDRE TEMIDIS, MICHAEL LEE

Plaintiff,

- v -

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

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INDEX NO. 156289/2018

MOTION DATE 05/21/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45

were read on this motion to/for DISMISS.

Upon the foregoing documents the Plaintiff's motion pursuant to CPLR 3211[a][1] and [7] is determined as follows:

In the original complaint, the Plaintiffs Scott Kingston ("Kingston"), Andre Temidis ("Temidis") and Michael Lee ("Lee") asserted three causes of action against the Defendant, their former employer, to wit [1] retaliation in violation of New York Labor Law §215, [2] retaliation in violation of the New York State Human Rights Law (NY Exec §296 et seq.); and the New York City Human Rights Law (AC of NYC §8-107 et seq.), and [3] failure to pay wages pursuant to New York Labor Law §§193, 198[1-a]. Distilled to its essence, Plaintiffs' action stems from Defendant's alleged failure to pay agreed upon commissions and Defendant's purported firing of Plaintiffs when they protested what they believed was failure to pay commissions to other employees based upon their race and ethnicity.

Defendant moved to dismiss all the claims of Kingston and Lee on the basis that the pleaded statutory and code sections did not apply since neither Plaintiff was a New York resident when the causes of action accrued. Defendant also moved to dismiss Temidis's first and second causes of action and to direct him to re-plead the third. By order dated November 26, 2018, Justice Shlomo Hagler granted the motion to the extent that the entire complaint was dismissed with leave to replead in 30 days.

In the amended complaint, Plaintiff's asserted eight causes of action, to wit [1] retaliation in violation of New York Labor Law §215 [Kingston, Temidis and Lee]; [2] retaliation in violation of the New York State Human Rights Law (NY Exec §296 et seq.) and the New York City Human Rights Law (AC of NYC §8-107 et seq.) [Kingston, Temidis and Lee]; [3] failure to pay wages pursuant to New York Labor Law §§193, 198[1-a][Kingston and Temidis]; [4] retaliation in violation of Revised Code of Washington §49.46.100 [Kingston]; [5] retaliation in violation of Revised Code of Washington §49.46.210 [Kingston]; [6] failure to pay wages

pursuant to Revised Code of Washington §49.52.050; [7] wrongful termination in violation of public policy pursuant to Washington Law [Kingston] and [8] retaliation in violation of Texas Labor Law §21.055 [Lee].

Defendant now moves to dismiss the amended complaint in its entirety pursuant to CPLR 3211[a][1] and [7]. By notice pursuant to CPLR §3217, Plaintiff Kingston discontinued all his claims. As such, Defendant's motion only concerns the first, second and third causes of action as to Temidis and Lee as well as the eighth cause of action on behalf of Lee.

As to Lee, Justice Hagler dismissed all his causes of action fail since Lee worked for Defendant in Texas. More specifically, Justice Hagler determined Lee's causes of action under the Labor Law did not apply extraterritorially (*see* NYSCEF Document #33, pp 17-19). Similarly, concerning Plaintiff's claims under the State HRL and City HRL, these causes of action were dismissed by Justice Hagler who found Lee failed to plead enough visits to New York City and State such that the complained of conduct impacted Lee here (*see* NYSCEF Document #33, pp 17-19).

A comparison of the dismissed complaint, the affidavits submitted in opposition to the previous motion to dismiss and the amended complaint reveals that the new facts pled to connect Lee's claims to New York were *de minimus* and insufficient to resurrect Lee's claims under the Labor Law, State HRL and City HRL in light of the earlier dismissal (*see O'Neill v Mermaid Touring*, Inc., 968 F Supp 2d 572, 578-79 [SDNY 2013]; *Rodriguez v KGA Inc.*, 155 AD3d 452, 453 [1st Dept 2017]; *Hoffman v Parade Publishing*, 15 NY3d 285, 292 [2010]; *Hardwick v Auriemma*, 116 AD3d 465 [1st Dept 2014]).

Lee's eighth cause of action for alleged retaliation in violation of Texas Labor Law §21.055 is dismissed on the basis of *forum non conveniens* as there is little to no connection of that claim to this state and Lee has his residence state as an alternate forum for adjudication of that claim (*see generally Kainer v UBS AG*, ___AD3d____, 2019 NY Slip Op 06053 [1st Dept 2019]).

Justice Hagler dismissed Temidis's first and second causes of action for retaliation under the Labor Law, State HRL and City HRL on the basis that the complaint did not sufficiently plead that Temidis engaged in a protected activity about which IBM was aware (*see* NYSCEF Document #33, p 26-27). In the original complaint, the only actual actions attributed to Temidis were discussions with Kingston where they "were disturbed" by IBM's actions. As to communication with IBM, all that was pled was that the Plaintiffs were "informed and believed the IBM executives were aware from discussions with Plaintiff Kingston that [Kingston, Temidis and Lee] were discussing the issue amongst themselves and that they all held the same views expressed to IBM by Plaintiff Kingston".

To state a claim under the State HRL, a plaintiff must show that [1] they engaged in a protected activity, [2] their employer was aware of such activity, [3] they suffered an adverse employment action based upon the activity, and [4] a causal connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). The test for the City HRL is identical except that a plaintiff must claim a defendant

"took an action that disadvantaged" them rather than they suffered an adverse employment action (*see Harrington v City of New York*, 157 AD3d 582 [1st Dept 2018]). Similar to the State and City HRL claim, a claim for retaliation under the Labor Law requires, formally or informally, a complaint of discrimination be made to the employer (*see e.g. Epifani v Johnson*, 65 AD3d 224, 235 [2d Dept 2009]; *Day v Summit Sec. Servs. Inc.*, 53 Misc3d 1057 [Sup Ct NY Cty 2016]).

In the amended complaint, the new allegation regarding Temidis's actions added little more than gloss to the earlier dismissed complaint. Specific reference to Temidis on this issue could only be found in paragraph 48 in the amended complaint where it is alleged that "it was clear in his conversations with IBM executives that [Kingston] had discussed the discrimination against J with Plaintiff Temidis and that Plaintiff Temidis agreed that IBM's treatment was discriminatory". Generalized allegations of protected conduct and knowledge of same to by the employer without elaboration, e.g. dates and times, are insufficient to sustain a retaliation claim (*see Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Mejia v T.N. 888 Eighth Ave. LLC Co.*, 169 AD3d 613, 615 [1st Dept 2019]; *McCabe v Consulate Gen. of Can.*, 170 AD3d 449, 450 [1st Dept 2019]). More specifically, simply contending "it was clear" Kingston discussed discrimination with Temidis fails to state a claim (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). Accordingly, when viewed in conjunction with Justice Hagler's earlier dismissal of the original complaint, Temidis's first and second causes of action fail to state a claim.

The branch of Defendant's motion to dismiss Temidis's third cause of action for unpaid wages under Labor Law §193 is denied. Failure to pay "earned" bonuses and commissions which are expressly linked to labor or services rendered by an employee can constitute a violation of Labor Law §193 (*see Ryan v Kellogg Partners Institutional Servs.*, 19 NY3d 1, 16 [2012]). However, discretionary incentive plans dependent on the employer's overall performance, rather than tied directly to an employee's particular efforts, are not considered "wages" under the Labor Law (*see Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 [2000]).

Here, the Plaintiff claims the disputed "wages" were "Incentive Payments" due and owing under Incentive Plan Letters ("IPL"), drafted by Defendant to which Temidis assented. Contrary to the parties' assertions, the IPL does not, on the moving papers, fit clearly into either the category of "earned" wages or "discretionary" payments. The IPL seems to provide for two types of "Incentive Payments", namely "Earnings" and "Management-Assessed Payments". Earnings are by definition "earned . . . if . . . all payment requirements are met" and are tied to whether "the customer has paid the billing for the sales or services transactions related to [the employee's] incentive achievement". "Management-Assessed Payments" are, if included in a particular plan, "made from an incentive pool funded in relation to business results from a team, IBM management will determine, in its sole discretion, the amounts of any such incentive payments and which employees, if any, will receive them".

Although IBM can "adjust the Plan terms. . . modify or cancel the Plan, for any individual", there is no express statement that payment of "earned" "incentive payments" are entirely discretionary or tied to IBM's overall performance. Rather, "Incentive Payments" are stated to be reviewable and adjustable at IBM's sole discretion based upon an employees'

"effect" or "contribution" to a transaction as well as based upon "errors in the measurement of achievement or calculation of payments".

From the foregoing, the court cannot conclusively answer, as a matter of law, that the IPL does not provide for the possibility, depending upon the interpretation of the ILP after discovery, that Temidis's claimed "Incentive Payments" were wages within the meaning of the Labor Law (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100 [2018]). Since Temidis alleges, and the court must accept as true[1], his claim that the disputed "Incentive Payments" were, in fact, "earned" and not paid by IBM, in this procedural context, Temidis's third cause of action states a claim for pleading purposes.

Accordingly, it is

ORDERED that Defendant's motion to dismiss all of Plaintiff Michael Lee's causes of action is granted, and it is

ORDERED that Defendant's motion to dismiss as to Plaintiff Andre Temidis's is granted only to the extent that his first and second causes of action are dismissed, and it is

ORDERED that Defendant shall, to the extent it has not already done so, serve an answer within the time accorded in CPLR 3211[f] and the parties are directed to appear for a preliminary conference on **October 29, 2019 at 9:30 a.m.**, at 111 Center Street, IAS Part 14, courtroom 1045.

9/20/2019
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[1] Not only must the facts and allegations contained in the complaint be presumed true (*see 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]), but "whatever may be implied from its statements by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). Indeed, all manner of ostensibly unsupported allegations have been assumed to be true when the Court of Appeals has evaluated challenged pleadings (*see Howard v Lecher*, 42 NY2d 109 [1977]; *Becker v Schwartz*, 46 NY2d 401 [1978]; *see also Howard Stores Corp. v Pope*, 1 NY2d 110 [1956]).