Rejer v Professional Referee Org.
2020 NY Slip Op 30507(U)
February 24, 2020
Supreme Court, New York County
Docket Number: 152272/2019
Judge: Kathryn E. Freed

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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PAUL REJER,

Plaintiff,

- v -

PROFESSIONAL REFEREE ORGANIZATION and MAJOR LEAGUE SOCCER,

Defendants.

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INDEX NO. 152272/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISS.

In this action sounding in employment discrimination and breach of contract, defendant Major League Soccer ("MLS") moves, in lieu of an answer to the complaint, for an order pursuant to CPLR 3211(a)(7) dismissing this action, with prejudice (Docs. 6-13). Plaintiff Paul Rejer ("Rejer") opposes the motion (Docs. 23-26). After oral argument and a review of the parties' papers and the relevant case law and statutes, the motion is **granted**.

FACTUAL AND PROCEDURAL HISTORY:

Rejer timely commenced this action against Professional Referee Organization ("PRO") and Major League Soccer ("MLS") by filing a summons and complaint on March 4, 2019 (Doc. 1). In the complaint, Rejer alleged four separate causes of action against defendants (Doc 1 at 9-10.). Specifically, he claimed that defendants discriminated against him based on his age, in violation of New York Executive Law § 296 ("NYSHRL") and New York City Administrative

Code § 8-502 ("NYCHRL"); that defendants breached their contract with Rejer; and that they intentionally withheld wages owed to him, in violation of Labor Law §§ 191 (c) and 198 (Doc. 1 at 9-10). The factual allegations in the complaint are as follows.

In 2012, MLS and US Soccer set up PRO, an organization tasked with, *inter alia*, training professional soccer referees in the United States (Doc. 1 at 3, 4). In April 2012, MLS appointed an English Premier League Referee, Peter Walton, as general manager of PRO (Doc. 1 at 3). At that time, Rejer resided in the United Kingdom and worked for Professional Game Match Officials Ltd. ("PGMO") as an assistant referee manager (Doc. 1 at 3). In an effort to build up his staff in preparation for the 2013 season, which was set to commence in March 2013, Walton offered Rejer the position of "Training and Development Manager" at PRO in New York (Doc. 1 at 3). Rejer relocated to New York in October 2012 and started in his new position on November 1, 2012 (Doc. 1 at 3). In the months following Rejer's move, his wife and son joined him in New York (Doc. 1 at 4). Rejer signed a three-year lease agreement in Yorktown Heights, New York, commencing on January 1, 2013, and he and his family obtained green cards in 2015 (Doc. 1 at 4). Rejer alleged that Walton had promised to cover all relocation expenses, the deposit on the house, a housing allowance, and the costs associated with obtaining the green cards (Doc. 1 at 4).

At the end of 2015, Walton began traveling to the United Kingdom more frequently, delegating to Rejer the responsibility of overseeing "the most important function of the PRO organization, the Referee Training camps that took place every 2 weeks between the end of January to the end of October in Dallas in the winter[,] and Park City, Utah in the Summer" (Doc. 1 at 4). Although Walton assured Rejer that he would be his "Number 2 within PRO," in April 2016, Nick Primavera ("Primavera") joined PRO as "Quality Control Officer" and was later promoted to "Chief Operating Officer," making Rejer Primavera's subordinate (Doc. 1 at 4-6).

In August 2016, Walton announced that he was leaving his role as general manager and that employees would be interviewed for the position (Doc. 1 at 5). Walton encouraged Rejer to apply for the position and promised to recommend him for the post (Doc. 1 at 5). Although Rejer interviewed for the position in December 2016, he was not offered the job (Doc. 1 at 5). In 2017, Howard Webb ("Webb"), former World Cup Final Referee, joined PRO as "VAR Manager," relieving Rejer of the tasks he had fulfilled throughout 2016, and it was announced at the end of 2017 that Webb would replace Walton as general manager in 2018 (Doc. 1 at 5).

In July 2017, Rejer was promoted from "Training and Development Manager" to "Director of Training and Education" (Doc. 1 at 6). However, in October 2017, Rejer, then 63 years old, was invited to a meeting at which he was informed that his work was not "up to level" (Doc. 1 at 6). He was also told that there were serious doubts that he could keep up with the technical direction of PRO due to his age (Doc. 1 at 6). He alleged that both Walton and Primavera were present at that meeting (Doc. 1 at 6). In October 2017, an official letter was sent to Rejer, warning him that he would be terminated if his work did not improve significantly before the end of the season, which was due to end in three weeks (Doc. 1 at 6).

In December 2017, Walton announced a new company structure for 2018 and, in accord with the changes, Rejer's position as "Director of Training and Education" was changed to "Director of Senior Referees" (Doc. 1 at 7). The position of "Director of Senior Referees," Rejer claims, was the same job he had previously held: training and educating the referees at the camp (Doc. 1 at 7). Rejer was sent an invitation, via email, to apply for the new position; however, since Primavera had indicated to Rejer that he would not be considered for the position due to his age, Rejer entered into a consulting contract with PRO instead, which lasted from January 1st through June 20, 2018 (Doc. 1 at 8). Rejer claimed that he was replaced with a younger, "grossly

underqualified" individual (Doc. 1 at 8). He also alleged that, following the termination of his consulting contract, Primavera requested that he reimburse "MLS $9,500 for the house deposit that was allegedly loaned in January 2013" and, when Rejer refused, arguing that this was part of the agreement with Walton, Primavera withheld his final consultancy payment (Doc. 1 at 8).

Rejer served the defendants with process on March 12, 2019 (Docs. 2-3) and, on March 15, 2019, PRO interposed an answer and MLS filed the instant motion (Docs. 4, 6-13). MLS argues, *inter alia*, that it is entitled to dismissal of the discrimination claims as well as the Labor Law claims because the complaint fails to allege an employment relationship between Rejer and MLS (Doc. 7). Further, it claims that there was no reference in the complaint to any unlawful conduct by, or at the direction of, MLS (Doc. 7). MSL further asserts that the breach of contract claim must also be dismissed because there was no agreement between MSL and Rejer (Doc. 7 at 14).

In support of the motion to dismiss, MLS submits Webb's affidavit (Doc. 10). Web avers, *inter alia*, that MLS had no authority to hire any of PRO's employees or make any decisions concerning Rejer's employment, including his hiring and termination (Doc. 10 at 1-2). He also affirms that MLS had no supervisory control over Rejer's day-to-day tasks, that it was not involved in drafting the contract or in withholding of payment under the agreement (Doc. 10 at 2). Attached to his affidavit, Webb submits a September 2012 offer letter that was sent from PRO to Rejer (Doc. 11).[1] The only reference to MLS in the offer letter is that PRO is located at MLS' headquarters, but the letter is on PRO's letterhead and signed by Walton as general manager of PRO (Doc. 11). The offer letter provided that PRO and Rejer retained the right to terminate the employment

[1] In its memorandum of law, MLS relies on the exhibits annexed to Webb's affidavit to argue that "[t]hese documents are undisputed documentary evidence that can be considered on this motion pursuant to CPLR 3211 (a) (1)" (Doc. 7 at 11 n 3).

relationship, and that PRO could modify Rejer's position at any time with or without cause or notice (Doc. 11). The October 2017 letter was also on PRO's letterhead and signed by Walton in his capacity as general manager of PRO (Doc. 12). The consulting agreement, signed by Webb and Rejer, reflects that the contract was solely between PRO and Rejer (Doc. 13).

In opposition to the motion to dismiss, Rejer claims, *inter alia*, that there is substantial evidence to suggest that PRO and MLS are integrated and/or joint employers and that, since these questions are fact intensive, the motion to dismiss the pleadings must be denied (Doc. 26). He maintains that MLS is intimately involved in PRO's hiring and firing decisions, that both entities share space and equipment, and hold regular meetings to discuss PRO's business decisions (Doc. 26). He also claims that "MLS and PRO in material respects operated as one entity and, in particular, MLS controlled key aspects of personnel decision making of PRO" (Doc. 26).

Rejer submits, *inter alia*, an affidavit in which he avers, *inter alia*, that MLS formed PRO in 2012, that PRO's offices are located in MLS's offices and that they share the same resources, including the human resources department and Information Technology (IT) department (Doc. 25). Further, he claims that members of PRO's board, which are approved, and in certain cases selected by the MLS Commissioner, was comprised of the chairperson, a PRO consultant, an MLS representative, and a US Soccer representative (Doc. 25). MLS, affirms Rejer, provides 80% of PRO's funding, and it interviews and selects PRO's general manager (Doc. 25). He also avers that MLS participates in weekly meetings with PRO to discuss and evaluate referee performances and to provide input into referee assignments, as well as to discuss other PRO administrative issues (Doc. 25). According to Rejer, "PRO staff are treated like MLS staff and attend all company functions" (Doc 25). He also maintains that "MLS can and has directed PRO to terminate and hire PRO employees from time to time" (Doc. 25). Additionally, Rejer asserts that "PRO cannot exist

or function without MLS" (Doc. 25). Moreover, he affirms that the collective bargaining agreement between PRO and the union referee was negotiated and approved by MLS (Doc. 25).

LEGAL CONCLUSIONS:

"On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed, and courts must provide a plaintiff with every favorable inference" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 297 [2017] [citations omitted]; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). However, "conclusory allegations —claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss" (*Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014] [internal quotation marks and citation omitted]; *see Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]).

"If evidence is adduced in support of a CPLR 3211 (a) (7) motion, the court is required to decide whether the plaintiff has a cause of action, rather than whether one has been stated. If that evidence disproves a requisite allegation of the claim, the claim must be dismissed despite the fact that the allegations, by themselves, are adequate to resist a motion to dismiss. Dismissal in that circumstance is permitted only when the evidence establishes that the material fact alleged by plaintiff is not really a fact, and no significant dispute exists regarding it" (*Blumenfeld v Stable 49, Ltd*, 62 Misc 3d 1208 (A), *7 [Sup Ct, NY County 2018] [internal quotation marks and citations omitted]; *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]). "[H]owever, 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" (*Carlson v American Intl. Group, Inc.*, 30 NY3d at 298, quoting *Leon Martinez*, 84 NY2d 83, 88 [1994]).

"An employee may have more than one employer under the [NYSHRL] and the [NYCHRL] where: (1) the proposed employer has the power of selection and engagement over the employee, (2) the proposed employer made the payment of salary or wages to the employee, (3) the proposed employer had the power of dismissal over the employee, and [(4)] the proposed employer had the power to control the employee's conduct" (*Gerzog v London Fog Corp.*, 907 F. Supp 590, 600 [EDNY 1995]; *see Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; *State Div. of Human Rights v GTE Corp*, 109 AD2d 1082, 1083 [4th Dept 1985]). However, the Court of Appeals has clarified that "the really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter" (*Griffin v Sirva, Inc.*, 29 NY3d at 186 [internal quotation marks, brackets and citations omitted]).

MLS' motion to dismiss the discrimination claims pursuant to NYSHRL and NYCHRL is granted. Rejer's allegations, in both his complaint and affidavit, that MLS controlled PRO's employees and had control over its practices is conclusory in nature and insufficient to withstand dismissal of the discrimination claims (*see Adler v 20/20 Companies*, 82 AD3d 915, 917-918 [2d Dept 2011]; *Gerzog v London Fog Corp.*, 907 F. Supp 590, 599-600 [EDNY 1995]; *Robins v Max Mara, U.S.A., Inc.*, 923 F. Supp 460, 470-471 [SDNY 1996]; *Alie v NYNEX Corp*, 158 FRD 239, 246 [EDNY 1994]). There are no allegations that MLS hired Rejer, terminated his employment, or had any involvement in his day to day operations (see *Valcarcel v First Quality Maintenance*, 41 Misc 3d 1222[A], *5 [Sup Ct, Queens County 2013]; *compare Jianjun Chen v 2425 Broadway Chao Restaurant, LLC*, 2017 WL 2600051, *4 [SDNY 2017]; *DeMarzo v Urban Dove, Inc.*, 41 Misc 3d 1209[A], 2013 WL 5526047, *4 [Sup Ct, Kings County 2013]). Although Rejer claims, *inter alia*, that the two entities are interrelated through finances and that they both share a common

office and resources, this, without more, is insufficient to establish MLS' control over PRO's employees (see *Gerzog v London Fog Corp.*, 907 F. Supp at 599-600; *Morales v. N.Y.S. Dep't of Labor*, 865 F. Supp. 2d 220, 255 [NDNY 2012]). It is important to note that all factual allegations about any alleged discrimination pertain exclusively to PRO and its employees.

Further, the claims against MLS for breach of contract must also be dismissed. The offer letter and consulting agreement conclusively establish that Rejer was an employee of PRO. MLS does not allege that MLS was a signatory to the employment contract between PRO and Rejer, and Rejer "has failed to present th[is] court with any authority finding that a claim for a breach of contact can be stated against a non-party to an employment contract under a joint employer theory" (*Naderi v North Shore-Long Is. Jewish Health Sys.*, 2014 NY Slip Op 30485[U], 2014 NY Misc LEXIS 863, *9-10 [Sup Ct, NY County 2014], *affd* 135 AD3d 619 [2016]; *see Palomo v Demaio*, 2017 US Dist LEXIS 198503. *11 [NDNY 2017]).

For reasons previously articulated, this Court also finds that Rejer's claim against MLS for the alleged withholding of wages, in violation of Labor Law §§ 191 (c) and 198, must also be dismissed insofar as Rejer's pleadings fail to allege that MLS was his employer and, thus, that the Labor Law applies (see *Adler v 20/20 Companies*, 82 AD3d at 917).

The remaining arguments are either without merit of need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that the branch of defendant Major League Soccer's motion seeking dismissal of the complaint against it is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant Professional Referee Organization; and it is further

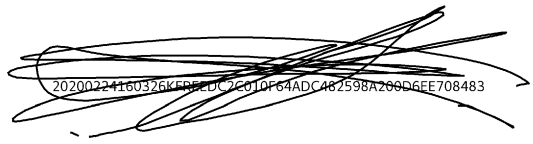
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141 B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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 counsel are directed to appear for a status conference at 80 Centre Street, Room 280, on May 19, 2020, at 2:30 p.m; and it is further

ORDERED that this constitutes the decision and order of the court



2/24/2020
DATE

KATHRYN E. FREED, J.S.C.

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