

Lockwood v CBS Corp.

2020 NY Slip Op 35421(U)

February 27, 2020

Supreme Court, Kings County

Docket Number: Index No. 514650/2018

Judge: Pamela L. Fisher

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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 27th day of February 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
LAUREN LOCKWOOD,

Plaintiff,

DECISION/ORDER

- against -

Index No: 514650/2018

MS # 6

CBS CORPORATION, CBS RADIO INC.,
CBS SPORTS RADIO EAST, LLC,
ENTERCOM COMMUNICATIONS CORP.,
JOSEPH BENIGNO, SEAN ARGAMAN,
MARK ZUKERMAN, ABC CORPORATIONS
and JOHN DOES 1-10,

Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion and	
Memorandum of Law Annexed _____	1, 2
Opposing Affidavits (Affirmations) _____	3
Memorandum of Law in Opposition _____	4
Reply Memorandum of Law _____	5

Upon the foregoing papers in this wrongful termination action, defendant CBS Corporation moves for an order, pursuant to CPLR 3211(a)(7), to dismiss plaintiff Lauren Lockwood’s (Lockwood) amended verified complaint.

Procedural History

On July 17, 2018, plaintiff commenced this action against her former employer CBS Radio, Inc., its alleged successor in interest, Entercom, Inc., and its alleged parent company, CBS Sports Radio (collectively, CBS Radio), where Lockwood worked as an executive from February 2006 until her termination on July 17, 2017. She also sued three of her male supervisors at CBS Radio: Joseph Benigno (Benigno), Sean Argaman (Argaman), and Mark Zukerman (Zukerman). In her original

complaint, she alleged that she was sexually harassed during her employment at CBS Radio, was wrongfully terminated, and sought relief under the New York State Human Rights Law and the New York City Human Rights Law (Complaint ¶1, NYSCEF #2). On April 18, 2019, plaintiff moved to amend her complaint to add CBS Corporation as a party defendant pursuant to CPLR 1003 and 3025(b) on the grounds that CBS Corporation was a joint employer (Motion to Amend Complaint, NYSCEF #23; Clancy Affirmation, NYSCEF #24, ¶2). In a decision dated September 27, 2019, this court granted her leave to amend her complaint to add CBS Corporation as a defendant (NYSCEF #83, annexed as Exhibit C to plaintiff's opposition papers). The amended verified complaint states that CBS Corporation "own[ed], control[led] and supervise[d] the activities and operation of its wholly owned subsidiaries," and "managed and approved of their acts" (Amended Complaint ¶¶ 54, 55). Plaintiff contends that "CBS Corporation promulgated, drafted and approved its subsidiaries'" "human resources policies, financial policies and internal control policies," "monitored [their] effectiveness," and "approved CBS Radio's discipline and/or termination of their employees" (*Id.* at ¶¶57-58).

Facts

In support of defendant's motion to dismiss, defendant CBS Corporation maintains that the plaintiff has failed to state a cause of action against CBS Corporation. Defendant contends that CBS Corporation was not plaintiff's employer, the allegations in her complaint against CBS Corporation are conclusory and non-specific, and the factually specific allegations in the complaint "focus on conduct committed solely by CBS Radio/ CBS Radio East employees" (Defendant's Memo of Law at 16).

In support of their motion to dismiss, CBS Corp. submitted an affidavit of Margaret Marion, the former Director of Human Resources for CBS Radio Services, Inc. In her affidavit, she alleges that CBS Radio "maintained additional human resources policies, separate from the policies maintained by CBS Corporation" (Marion Aff ¶8, annexed as exhibit B to defendant's motion papers). Plaintiff's wages and commissions were paid by CBS Radio Services, Inc., as evidenced by Plaintiff's Form W-

2's for 2015-2017 (annexed as Exhibit 1 to defendant's motion papers). Plaintiff's personnel records were maintained at CBS Radio's Hudson Street location, where the plaintiff worked (Marion Aff ¶12). The plaintiff never worked at CBS Corporation's headquarters, located on 52nd street in Manhattan, and she was never supervised by anyone from there (*Id.* at ¶¶11, 17). Defendants Argaman, Zukerman, and Beningo, whom plaintiff made allegations against, all worked out of the Hudson Street location (*Id.* at ¶14). Marion indicates that she investigated the July 13, 2017 Floyd Mayweather/Conor McGregor press conference that ultimately resulted in plaintiff's termination (*Id.* at ¶20). She affirms that on July 14, 2017, Mr. Argaman notified Lockwood that she was being placed on a suspension pending an investigation into the event, and on July 17, 2017, Marion told the plaintiff that she was terminated (*Id.* at ¶¶20, 21; termination letter annexed as exhibit 2 to defendant's motion papers).

In opposition to defendant's motion, plaintiff points to Margaret Marion's LinkedIn page as evidence of CBS Corp's link to plaintiff's termination, as Marion was part of the group that made the decision to terminate her employment (Clancy Affirmation, NYSCEF No. 80, ¶13). Marion's LinkedIn states that she has been an employee of CBS Corporation for 22 years and indicates that she has been endorsed by executives at CBS Corp. (*Id.* at ¶¶11, 14). Plaintiff also highlights the fact that certain employees of CBS Radio had both CBS.com and CBSRadio.com email addresses (*Id.* at ¶15). The opposition also refers to CBS Corporation's employment policies, which provide that they apply to CBS Corporation's employees, as well as employees of their subsidiaries (*Id.* at ¶16). In her opposition, plaintiff contends that the "hostile work environment and discriminatory conduct of Defendant CBS Radio's male executives was the product of a top down workplace culture manifest in Defendant CBS Corporation's failure to properly implement, monitor and enforce adequate anti-harassment, anti-discrimination policies and complaint procedures which enabled such a culture to persist" (Memo of Law in Opposition at 2). Plaintiff submits an affidavit of Jacquelyn Musiello, Ms.

Marion's LinkedIn profile, emails, CBS Corporation's Business Conduct Statement and CBS Corporation's Policy Guide in support of her contentions.

The Affidavit of Jacquelyn Musiello, a HR Manager at CBS Radio from 2012 to February 2017, states that she was required to "administer" CBS Corporation policies (Musiello Aff ¶3, annexed as Exhibit B to plaintiff's opposition papers). She states that any important questions were referred to CBS Executive Management, or In-House Legal Counsel, and that CBS Radio Executives reported to CBS Corporation's Executives on up to Les Moonves (*Id.* at ¶5). Musiello alleges that "CBS Radio and CBS Corporation had integrated software through Oracle Database Management System, and integrated internal communication and payroll systems" (*Id.* at ¶9). She maintains that CBS Corp. had access to the payroll records of CBS Radio and were able to adjust them, and CBS Radio reconciled their books with CBS Corporation's Finance Department at the end of the month (*Id.*). She also contends that "CBS Corporation had the right to hire, layoff, and/or fire any CBS Radio employee, and in fact, were involved in decision making to terminate CBS Radio employees as part of approved layoffs, performance and/or termination policies, particularly leading up to merger talks with Entercom in late 2016 to early 2017" (*Id.* at ¶12).

In reply, defendant maintains that plaintiff has not provided enough facts to substantiate her claim that CBS Corporation was a single or joint employer.

Law

"On a [pre- answer] motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects" (*Minovici, v. Belkin BV*, 109 A.D.3d 520, 521 [2d. Dept 2013]). "Notwithstanding the broad pleading standard, bare legal

conclusions with no factual specificity do not suffice to withstand a motion to dismiss” (*Mid-Hudson Valley Federal Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d 1218, 1219 [3d. Dept. 2017]). “Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one” (*Minovici*, 109 A.D.3d at 521).

Under the New York State Human Rights Law, it is unlawful for an employer to refuse to hire, terminate, or to discriminate against an individual “in compensation or in the terms, conditions or privileges of employment” on the basis of “age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence” (McKinney’s Executive Law §296(1)(a)). Under the New York City Human Rights Law, it is unlawful for an employer to “represent that any employment or position is not available when in fact it is available,” to refuse to hire, terminate or discriminate against an individual “in compensation or in the terms, conditions, or privileges of employment” because of “the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status” (New York City Administrative Code §8-107(1)(a)).

Single / Joint Employer

A plaintiff can “prevail in an employment action against a defendant who is not the plaintiff’s direct employer” under either the single employer doctrine or the joint employer doctrine. (*Snyder v. Advest, Inc.*, No. 06 CIV. 1426 (RMB), 2008 WL 4571502, at *6 [S.D.N.Y. 2008]; *Woodell v. United Way of Dutchess County*, 357 F.Supp.2d 761, 767 [S.D.N.Y. 2005]). Under the single employer doctrine, “the plaintiff must establish that the defendant is part of an ‘integrated enterprise’ with the

employer” (*Snyder*, 2008 WL 4571502 at *6 (quoting *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 341 [2d Cir. 2000])). The courts look at four factors to decide whether a defendant constitutes a single employer: “[i] interrelation of operations, [ii] centralized control of labor relations, [iii] common management, and [iv] common ownership or financial control” (*Snyder*, 2008 WL 4571502, at *6). “Shared records, bank accounts, credit lines and office space...are probative of interrelated operations” (*Id.* (quoting *Lenoble v. Best Temps, Inc.*, 352 F.Supp.2d 237, 244 [D.Conn. 2005])). The most important factor is centralized control of labor relations (*Brathwaite v. Sec. Indus. Automation Corp.*, 06 CV 0300 (ERK) (JMA), 2006 WL 8439237, at *2 [E.D.N.Y. 2006]). “[H]andling job applications, approving personnel status reports, and exercising veto power over major employment decisions” constitutes evidence of centralized control of labor relations (*Id.* at * 3). The most important question is “what entity made the final decisions regarding employment matters related to the person claiming discrimination?” (*Id.* at *2; *see also Cook v. Arrowsmith Shelburne*, 69 F.3d 1235, 1240 [2d. Cir. 1995]; *Woodell*, 357 F.Supp.2d at 769) (finding that there must be evidence that defendant “exercised actual control with respect to plaintiff’s employment specifically,” such as “whether an entity hired the plaintiff, fired the plaintiff, or supervised the plaintiff’s work on a daily basis”).

In determining whether a non-direct employer constitutes a joint employer, many courts have applied the “immediate control test” (*See Brankov v. Hazzard*, 142 A.D.3d 445, 445-46 [1st Dept. 2016]). Under the “immediate control” test, “a joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the other company’s employees, and particularly the defendant’s control over the employee in setting the terms and conditions of the employee’s work” (*Id.* at 446 (quoting *Haight v. NYU Langone Med. Ctr., Inc.*, 2014 WL 2933190, *11, 2014 US Dist. LEXIS 88117, *28-29 [SDNY 2014], [internal quotation marks omitted])). Factors that bear on this inquiry include “commonality of hiring, firing, discipline, pay, insurance, records, and supervision” (*Id.*; *see also Defran v. Transp. Workers Union of Greater New*

York, AFL-CIO, No. 653974/2014, 2016 WL 740308, at *3 [Sup Ct, NY County 2016]) (stating that “[c]ourts consider whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process”). “The extent of the employer’s right to control the means and manner of the worker’s performance is the most important factor” (*Brankov*, 142 A.D.3d at 446).

Analysis

Defendant CBS Corporation’s motion to dismiss pursuant to CPLR 3211(a)(7) is granted as plaintiff has not alleged sufficient facts to support that CBS Corporation was a single or joint employer. The allegations in her complaint that CBS Corporation “own[ed], control[led] and supervise[d] the activities and operation of its wholly owned subsidiaries” and “approved CBS Radio’s discipline and/or termination of their employees” are conclusory and lack factual specificity (Amended Complaint ¶¶54, 58; see *Mid-Hudson Valley v. Credit Union*, 155 A.D.3d 1218, 1219 [3d. Dept. 2017]; *Adler v. 20/20 Companies*, 82 A.D.3d 915, 916-17 [2d Dept. 2011]) (allegations that “Verizon personnel were involved generally in the supervision, training, discipline, and termination of employees” “were insufficient to warrant the denial of Verizon’s motion” to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7)). Since the allegations in the complaint are not specific enough to withstand a motion to dismiss, the next step requires the court to look at the facts submitted in plaintiff’s opposition to defendant’s motion to dismiss to see if they remedy the defects in the complaint.

The facts submitted in plaintiff’s opposition do not remedy the defects in the complaint, because they are either irrelevant, lack factual specificity, or do not support that defendant had control over plaintiff’s employment, specifically. The fact that Margaret Marion’s LinkedIn profile states that she was an employee of CBS Corporation is irrelevant, because CBS Corporation is not bound by her

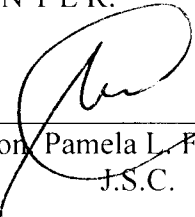
characterization of her employment. The fact that Ms. Marion was endorsed by Executives at CBS Corporation is also of no consequence, as it does not indicate that either she or Lockwood were employed by CBS Corporation. Plaintiff's contention that defendant CBS Corporation is responsible for the alleged discrimination by CBS Radio, because of a top-down workplace culture is speculative and lacks factual support. In her opposition, plaintiff alleges that CBS Corporation had control over Defendant CBS Radio's employment policies and that CBS Radio relied on CBS Corporation's policies. However, the mere fact that CBS Radio was bound by employment policies promulgated by CBS Corporation is not enough to demonstrate a joint or single employer relationship (*See Lambert v. Macy's East Inc.*, 34 Misc.3d 1228(A) *1, *14 [Sup Ct, Kings County 2010] (finding that allegations that parent exercised control over subsidiary, because "its Code of Good Business Conduct applied" to all of subsidiary's employees was not sufficient to demonstrate a joint employer relationship); *Snyder*, 2008 WL 4571502, at *7 (stating that parent's distribution of corporate policies to subsidiary "does not indicate that [parent] exercised control over or made final decisions regarding the employment of Plaintiff," evidencing that defendant and plaintiff were not a single, integrated enterprise)).

The affidavit of Jacquelyn Musiello contains some evidence of factors relevant to the single/joint employer inquiry but fails to allege that defendant had control over plaintiff's employment, specifically. In her affidavit, she maintains that CBS Corporation and CBS Radio had integrated software, CBS Corporation could adjust the payroll records of CBS Radio, and CBS Radio reconciled their books with CBS Corporation's Finance Department, evidencing some interrelation of operations under the single employer doctrine. However, the most important factor is centralized control of labor relations, and the only evidence Musiello refers to was CBS Corporation's involvement in termination decisions regarding CBS Radio employees leading up to the merger with Entercom, but she does not specifically refer to Lockwood's termination. She also has no personal knowledge of what motivated Lockwood's termination, or who made the final decision, as she resigned in February 2017, before

Lockwood was terminated in July 2017. Under the joint employer doctrine, Lockwood’s claims are insufficient, as she has not presented enough facts to demonstrate that CBS Corp. had a right to control the “means and manner of [her] performance” (Brankov, 142 A.D.3d at 446). Therefore, since there is no evidence that CBS Corporation “hired the plaintiff, fired the plaintiff, or supervised [her] work on a daily basis,” defendant CBS Corporation’s motion to dismiss is granted (Woodell, 357 F.Supp.2d at 769).

This constitutes the decision and order of the Court.

ENTER:



Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER