

Batista v Triumph Constr. Corp.

2020 NY Slip Op 35536(U)

August 26, 2020

Supreme Court, Bronx County

Docket Number: Index No. 24573/2019

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 6

Index No. 24573/2019

JENNIFER BATISTA,

Plaintiff,

-against-

TRIUMPH CONSTRUCTION CORP.,
ZOFIS ENGINEERING, P.C., CARLO CUZZI,
CARMINE FERRARO, ALEXANDER URENA, and
MUHAMMAD AMRAY, in their Professional and
Individual Capacities,

Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to dismiss complaint:

Papers

Numbered

Notice of Motion by Defendant Alexander Urena, Affirmation of David S. Greenhaus, Esq. dated April 27, 2020 in Support of Motion, Memorandum of Law by David S. Greenhaus, Esq. dated April 27, 2020 in Support of Motion, and Exhibit (“A”).....	1
Affirmation of Christopher J. Berlingieri, Esq. dated June 1, 2020 in Opposition to Motion, Affidavit of Jennifer Batista dated June 1, 2020 in Opposition to Motion, Memorandum of Law by Christopher J. Berlingieri, Esq. dated June 1, 2020 in opposition to Motion, and Exhibit (“A”).....	2
Reply Memorandum of Law by David S. Greenhaus, Esq. dated June 22, 2020.....	3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendant Alexander Urena (“Urena”) seeks an order dismissing the plaintiff’s amended complaint as against him in its entirety pursuant to CPLR Rule 3211(a)(7). The motion is granted.

The plaintiff seeks monetary damages and equitable relief on nine cause of action as follows:

1. the defendants violated New York State Human Rights Law (“NYSHRL”) § 296 by discriminating against her based on sex;
2. the defendants violated NYSHRL 296 by retaliating against her;
3. the defendants violated New York City Human Rights Law (“NYCHRL”) 8-107(1) by discriminating against her based on gender and sexual harassment;
4. the defendants violated NYCHRL 8-107(1) by retaliating against her;
5. the defendants violated New York Labor Law (“NYLL”) 195(3) by willfully failing to furnish her with accurate and conforming wage statements;
6. the defendants violated NYLL 195(1) by willfully failing to furnish her a conforming wage notice at the time of hire, on an annual basis, or when she received a pay raise;
7. the defendants were negligent and vicariously liable under respondent superior for failing to maintain a safe and harassment free workplace;
8. the defendants were negligent in the hiring, supervision, and training of their employees, servants, or agents; and
9. the defendants violated NYCHRL 8-107(13) as employers liable for the unlawful discriminatory practices of their employees or agents.

The plaintiff concedes that Urena was not an employer as defined by the NYLL and does not oppose the motion to dismiss the fifth, sixth, seventh, and eighth causes of action (*see* Berlingieri Memorandum of Law, p. 3). Accordingly, these claims are dismissed without opposition.

With respect to the remaining cause of action against Urena, the plaintiff’s amended complaint makes the following allegations:

1. that Urena was and is a “person” and “independent contractor” within the meaning of the NYSHRL and NYCHRL;
2. that Urena was and is a manager for Zofs Engineering, P.C. and Muhammad Amray;
3. that Urena was an “employer” within the meaning of the NYSHRL and NYCHRL;
4. that Urena is an assistant manager for Zofs Engineering, P.C.;
5. that Urena subjected the plaintiff to sexual harassment; and
6. that Amray failed to investigate any complaints from the plaintiff regarding Urena’s sexual harassment.

In addition, the plaintiff submits an affidavit dated June 1, 2020 stating, in pertinent part, as follows:

1. “I believe that Defendant Urena was a supervisor on the jobsite, to this day I do not know who he worked exactly, but had reason to believe that he was in charge on the worksite of at least some workers that I worked with”;
2. “I texted Defendant Muhammad Amray about Defendant Urena and Defendant Carmine Ferraro’s sexual harassment, however Defendant Amray failed to take any action”;
3. “I know that Defendant Amray has his own company Defendant Zofs Engineering, P.C.”;
4. “I know that I was paid from Triumph Construction, Inc., however that Defendant Urena, Ferraro, and Amray controlled my employment on a day to day basis at the . . . jobsite”;
5. “I was subjected to sever sexual harassment at the jobsite and it was orchestrated by Defendant Urena who constantly made jokes and disputed with me over trivial instances . . . “;
6. “Defendant Urena is inherently involved in this case, he is someone who made comments to me in a supervisory authority . . . “.

In ruling on a motion to dismiss a complaint for failure to state a cause of action, the court is to determine whether the plaintiff has stated a recognized cause of action after liberally construing the pleadings, assuming the truth of the allegations set forth in the complaint and according every possible inference to the plaintiff (*see Leon v. Martinez*, 84 NY2d 83 [Ct App 1994]). In addition, a court may consider a plaintiff’s affidavit to remedy any defects in the complaint in determining whether the plaintiff has stated a cause of action (*see High Definition MRI, P.C. v. Travelers Companies, Inc.*, 137 AD3d 602 [1st Dept 2016]). However, factual allegations that consist of bare legal conclusions are not entitled to such consideration (*see Skillgames, LLC v. Brody*, 1 AD3d 247 [1st Dept 2003]). With respect to the remaining claims, Urena contends that the plaintiff cannot establish that Urena is individually liable for sexual harassment and/or retaliation under the NYSHRL or the NYCHRL. The plaintiff argues that she has sufficiently plead that Urena was an “employer” for purposes of liability under the NYSHRL and the NYCHRL.

Individuals can be liable under NYSHRL § 296 if they meet the definition of an employer – the individual has ownership in the corporate entity or the authority to do more than carry out personnel decisions made by others (*see Patrowich v. Chemical Bank*, 63 NY2d 541 [Ct App 1984]). For example, allegations that an individual is a co-founder and managing member of the offending

company with the power to hire and fire the plaintiff are sufficient (*see Pepler v. Coyne*, 33 AD3d 434 [1st Dept 2006]). A complaint that fails to allege that the individual had the authority to hire or terminate the plaintiff or the ability to do more than simply execute personnel decisions made by others does not state a cause of action under the NYSHRL and will be dismissed (*see Edwards v. Jericho Union Free School District*, 904 F Supp 2d 294 [ED NY 2012]).

Similarly, an individual will be liable under NYCHRL 8-107(13) only where it is alleged that he has an ownership interest in the corporation or has the power to do more than carry out personnel decisions made by others and that the individual encouraged, condoned or approved the specific conduct which gives rise to the claim (*see Doe v. Bloomberg, L.P.*, 178 AD3d 44 [1st Dept 2019]). Such individual liability has been limited to instances where the individual was the individual owner of the corporate employer (*see Boyce v. Gumley-Haft, Inc.*, 82 AD3d 491 [1st Dept 2011], an officer of the corporate employer (*see McRedmond v. Sutton Place Restaurant & Bar, Inc.*, 95 AD3d 671 [1st Dept 2012]), or similar positions of authority (*see Burhans v. Lopez*, 24 F Supp 3d 375 [SD NY 2014] (Speaker of the New York State Assembly)). NYCHRL 8-107(1) subjects fellow employees to liability only where they “act with or on behalf of the employer in hiring, firing, paying, or in administering the terms, conditions or privileges of employment” and not for their “independent and unsanctioned contribution to a hostile environment” (*see Priore v. New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003]).

Here, the plaintiff has failed to allege any facts from which it can be inferred that Urena possessed the authority required to be subject to individual liability under either the NYSHRL or the NYCHRL. Even assuming that any of the various capacities that the plaintiff attributes to Urena – from “independent contractor” to “manager for Zofs” to “assistant manager for Zofs” to “supervisor on the jobsite” – is correct, these contradictory and undefined allegations do not describe the level of decision-making required to impose employer liability under either the NYSHRL or the NYCHRL. The inadequacy and speculative nature of these allegations is reinforced by the plaintiff’s admitted uncertainty as to Urena’s exact authority or position with the corporate employer. The plaintiff admits that she does not know who Urena worked for, only that he appeared to be in charge of some of the workers on the jobsite. Her complaint alleges that Urena was a supervisor of some sort who, among others, controlled her employment on the jobsite on a daily basis. Notably, the plaintiff does not allege that Urena was involved in the decision to terminate her employment. Mere supervisory duties with a company which may or may not be the plaintiff’s employer are clearly insufficient to support a

cognizable claim against Urena as an employer.

This uncertainty belies the plaintiff's contention that Urena was her employer. The blanket legal conclusion that Urena was an employer is insufficient to withstand dismissal. The complaint and the plaintiff's affidavit are devoid of any allegation that they had an employer-employee relationship, that Urena owned either Zofs or Triumph, or that Urena had the authority to hire and fire her. To the contrary, she specifically states that Zofs was Amray's company and that she was paid for her work by Triumph (*see also*, Berlingieri Memorandum of Law, p. 3). This indicates that Urena had no ownership interest in Zofs and no relationship to the plaintiff's admitted employer, Triumph.

Finally, the plaintiff's concession that Urena does not qualify as an employer under the NYLL is damning, since an individual is considered an employer under the NYLL if he hires and fires employees, supervises and controls employees' work schedules, determines the method and rate of pay, keeps employment records, and approves any vacations (*see Bonito v. Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]). If Urena did not possess these qualifications, then it is difficult to see how he qualifies as an employer under the very similar definitions applied by the NYSHRL and NYCHRL.


Since Urena cannot be found individually liable under the NYSHRL and NYCHRL, the Court need not reach Urena's alternative grounds for dismissal.

Accordingly, it is hereby

ORDERED that the plaintiff's amended complaint as against defendant Alexander Urena is dismissed in its entirety pursuant to CPLR Rule 3211(a)(7).

The foregoing constitutes the Decision and Order of this Court.

DATED: August 26, 2020
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.