

Lintner v New York City Hous. Auth.

2021 NY Slip Op 31531(U)

May 5, 2021

Supreme Court, New York County

Docket Number: 152530/2020

Judge: David Benjamin Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

INDEX NO. 152530/2020

MARTIN LINTNER,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY HOUSING AUTHORITY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for PARTIAL DISMISSAL.

In this retaliation action commenced by plaintiff Martin Lintner pursuant to Article I, Section 8 of the New York State Constitution, New York Labor Law §740, New York Labor Law Article 6; and Civil Service Law section 75, defendant New York City Housing Authority (“NYCHA”) moves, pursuant to CPLR 3211(a)(7), for partial dismissal of the complaint. Plaintiff opposes the motion in part and cross-moves, pursuant to CPLR 1001 and 3025, to add the City of New York (“the City”) as a party defendant. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the captioned action by filing a summons and complaint on March 6, 2020. Doc. 1. In his complaint, plaintiff alleged that he began his career at the New York City Department of Investigation (“DOI”), Office of the Inspector General (“OIG”), Public Assistance and Grants Unit, where he worked from 2000 until 2005, at which time he was hired

as a Confidential Investigator (“CI”) for NYCHA, a New York State public benefit corporation which provides public housing to over 400,000 New York City residents and receives funds from, among other sources, New York State and the United States government. Doc. 1.

As a CI at NYCHA, plaintiff spearheaded new procedures to detect fraudulent practices by welfare, SSI, and SSA recipients and his superiors accepted the new procedures and acknowledged their effectiveness. Doc. 1. In 2011, plaintiff’s work on a housing fraud case uncovered the largest scheme of its kind in NYCHA history, resulting in multiple arrests. Doc. 1. Although this accomplishment allegedly established plaintiff “as first among equals in his division,” his colleagues were displeased when he was asked to detect internal fraud by NYCHA employees and implemented new procedures to detect vehicle mileage abuse by NYCHA employees. Doc. 1.

Due to his sensitive work assignment and his desire to protect himself from retaliatory discharge, plaintiff took and passed a civil service examination in 2016. Plaintiff did so in an attempt to change from provisional status, i.e., an at will employee, to a tenured civil servant. Doc. 1. His colleague, Kris Kingpayom, also passed the same examination. Doc. 1. Plaintiff’s supervisor, Ralph Iannuzzi, approved Kingpayom’s conversion, but inexplicably did not approve his. Doc. 1.

In 2017, plaintiff was assigned to a high profile case involving a tragic 2015 elevator accident that killed an octogenarian named Olegario Pabon at a NYCHA building. Doc. 1. During his investigation, he discovered facts that contradicted NYCHA’s public narrative regarding how the incident occurred and realized that this could lead certain NYCHA employees to face discipline or even imprisonment. Doc. 1. Specifically, the plaintiff learned that NYCHA officials falsified elevator maintenance records to make it appear as if they were inspecting

elevators when they were not. Doc. 1. The plaintiff determined that this fraudulent scheme, and not the random malfunction of elevator parts, as NYCHA maintained publicly, was the true cause of Pabon's death. Doc. 1. Perhaps even more disturbing, alleged plaintiff, NYCHA elevator administrators were directed not to engage in preventive maintenance but rather to falsify maintenance records to make it appear that NYCHA was in compliance when it was not. Doc. 1.

In 2018, the Manhattan District Attorney's Office arrested 3 current and former NYCHA elevator administrators as a result of the plaintiff's investigation into Pabon's death. Doc. 1. Although the plaintiff told his superiors that he wanted to continue the investigation despite the arrests because he believed that there were others involved in the fraud, his superiors, mainly Iannuzzi, Pamela Sah and Douglas Schneider, dissuaded him from doing so and urged him to terminate his investigation. Doc. 1. The plaintiff asserted that the said superiors were responsible for the initial NYCHA report that falsely concluded that Pabon's death was due to an elevator malfunction. Doc. 1.

In 2019, after NYCHA failed to support the plaintiff's investigation in the Pabon case, the plaintiff discovered some "missing" elevator logs for the housing complex where Pabon died. The logs revealed that a deputy NYCHA director named Richard Solivan falsified the complex's elevator records. Doc. 1. Sah was especially hostile to the plaintiff after he discovered the missing logs, since she authored the original NYCHA investigation report that falsely concluded that Pabon's death was caused by a malfunction. When the plaintiff asked Sah whether she was aware that NYCHA administrators were falsifying logs and were instructed to not perform preventive maintenance, she maintained that that she was not aware of that when she wrote her report. The plaintiff claimed that, rather than praising him for his work, his superiors criticized

him for “prolonging the investigation” and quickly settled a lawsuit filed by Pabon’s estate. Doc.

1. Nevertheless, the plaintiff attempted to secure an arrest warrant for Solivan and anyone else who aided and abetted his falsification of the elevator logs. Doc. 1. At or about the same time, the plaintiff inquired about his conversion from provisional to tenured status and Iannuzzi told him that such a conversion could not occur despite the fact that Kingpayom, as well as at least 2 other individuals, were so converted. Doc. 1.

Plaintiff alleged that he continued to investigate the elevator case because he was concerned that additional people could be killed or injured if nothing was done about the situation. Doc. 1. He even claimed that he worked overtime investigating the elevator fraud and never put in a request to be paid for the extra time he worked because he did not want his superiors to pull him off the job under the pretext of exceeding their budget.

In January 2019, after the plaintiff advised his superiors that he was close to securing additional arrest warrants based on information he obtained during his investigation, NYCHA inexplicably removed him from his investigation unit and placed him in a different unit under a Deputy Inspector General Greg Deboer, who had been hostile towards him after he found the missing logs. On or about October 4, 2019, NYCHA terminated the plaintiff without explanation and unjustifiably withheld his final paycheck. Doc. 1.

As a first cause of action, the plaintiff alleged retaliation pursuant to Civil Service Law § 75-b (2). Doc. 1. As a second cause of action, the plaintiff alleged a violation of Article 6 of the Labor Law, which governs the payment of wages, claiming that the defendant “has illegally withheld and/or made illegal deductions from [p]laintiff’s wages in violation of the law.” Doc. 1. As a third cause of action, the plaintiff alleged a violation of Article I, Section 8 of New York State Constitution, which addresses freedom of speech. Doc. 1. As a fourth cause of action, the

plaintiff alleged a violation of New York Labor Law §740. Doc. 1. Finally, the plaintiff alleged that he is entitled to compensatory and punitive damages in an amount to be determined by a jury, plus costs, interest, and attorneys' fees.

NYCHA now moves, pursuant to CPLR 3211(a)(7), to dismiss the plaintiff's first three causes of action, asserting that the said claims all allege that NYCHA engaged in unlawful retaliation against him as a whistleblower and, thus, are barred by the election of remedies provision set forth in Labor Law §740(7). Doc. 3. Specifically, urges NYCHA, by filing a claim pursuant to Labor Law §740, the plaintiff waived his right to pursue his first three causes of action since those claims relate to his allegedly retaliatory and unlawful discharge. Doc. 3.

In partial opposition to the defendant's motion, the plaintiff argues that his second cause of action, alleging a violation of Labor Law Article 6, should not be dismissed since it is unrelated to his retaliation claim. Doc. 8. The plaintiff does not oppose the dismissal of his first cause of action claiming a violation of Civil Service Law §75-b (2) or the third cause of action claiming a violation of Article I, Section 8 of the New York State Constitution. Doc. 8.

The plaintiff also cross-moves, pursuant to CPLR 1001 and 3025, to add the City as an additional defendant. Doc. 7. The plaintiff argues that, although he was paid by the defendant, he was supervised by the OIG of the DOI and that, although the DOI is not part of the defendant, it is "a legal fiction tantamount to a City agency that is, in fact, part of [the City]." Doc. 8. Further, the plaintiff argues that, since the DOI managed all of the relevant parties, including the plaintiff, the City is a necessary party since it would have most of the documents sought during discovery, such as investigation records, employment records, and disciplinary records, which would be maintained by the City through the DOI. Doc. 8. Additionally, urges the plaintiff, the City also caused his injuries. Doc. 8. The defendant also maintains that the City would not be

prejudiced if named as a defendant since it was aware of this action since its inception via communications with the defendant. Doc. 8. Moreover, the plaintiff argues that, although the defendant was “entity responsible for paying [him]”, his time records were “submitted to, and maintained by DOI” and thus the DOI was the entity responsible for ensuring that its employees were paid. Doc. 8. Finally, the plaintiff argues that, pursuant to CPLR 203, all claims against the City relate back to those asserted against NYCHA in the initial complaint. Doc. 8.

Plaintiff annexes to his cross motion a proposed amended complaint naming the City and NYCHA as defendants and setting forth a first cause of action claiming a violation of Labor Law Article 6 and a second cause of action alleging a violation of Labor Law §740. Doc. 9.

In a reply memorandum of law in further support of the defendant’s motion to dismiss, the defendant reiterates its argument that the first three causes of action, including his claim for unpaid wages pursuant to Article 6 of the Labor Law, must be dismissed insofar as they each arise from the facts giving rise to his whistleblower claim. Doc. 11. Specifically, the defendant argues that “it strains credulity to suggest that [the defendant’s] alleged retaliatory withholding of [the plaintiff’s] final paycheck is not directly tied to [the retaliatory termination claim].” Doc. 11. The defendant also urges that, since the proposed amended complaint omits the claims brought pursuant to Civil Service Law §75-b (2) and Article I, Section 8 of the New York State Constitution, those claims must be deemed withdrawn. Doc. 11.

LEGAL CONCLUSIONS

The Defendant’s Motion for Partial Dismissal

It is well settled that, when deciding a motion to dismiss pursuant to CPLR 3211, the court should give the pleading a “liberal construction, accept the facts alleged in the complaint to

be true and afford the plaintiff the benefit of every possible favorable inference” (*Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]).

As noted previously, the defendant argues that each of the plaintiff’s first three causes of action must be dismissed on the ground that they were waived as a result of the plaintiff having brought the fourth cause of action pursuant to Labor Law §740(7).

New York Labor Law § 740 prohibits an employer from retaliating against an employee who discloses or threatens to disclose to a supervisor or public body that the employer is in violation of a law, rule or regulation which presents a substantial danger to public health or safety. Labor Law § 740(7) provides as follows:

Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

Initially, since the plaintiff does not oppose the branches of the defendant’s motion seeking dismissal of his first cause of action (retaliation pursuant to Civil Service Law § 75-b [2]) and third cause of action (violation of Article I, Section 8 of the New York State Constitution) on the ground that they were waived pursuant to the above-cited statute, he has manifested an intention to abandon those claims and they are dismissed (*See Gary v Flair Beverage Corp.*, 60 AD3d 413 [1st Dept 2009] [citation omitted]).

The remaining claim in dispute is the plaintiff’s second cause of action, alleging that the defendant violated Labor Law Article 6 by failing to pay him wages to which he was entitled

upon his termination. The Appellate Division, First Department has held that the waiver provision set forth in Labor Law §740(7) applies to any other cause of action asserted by the plaintiff “which arises from the allegedly unlawful discharge” (*Bones v Prudential Financial, Inc.*, 54 AD3d 589 [1st Dept 2008] [citation omitted]). The purpose of the waiver provision is to “prevent duplicative recovery” and it does not apply “when redress is sought for injury under a claim that is distinct from a statutory cause of action predicated on wrongful termination” (*Seung Won Lee v Woori Bank*, 131 AD3d 273, 277 [1st Dept 2015]).

Here, the plaintiff, in his second cause of action, alleges that the defendant “illegally withheld and/or made illegal deductions from [his] wages in violation of the law.” Doc. 1. However, the plaintiff’s sole allegation in this regard in the complaint is that “[the defendant] terminated [him] without explanation and has unjustifiably withheld his final paycheck.” Doc. 1. Since the plaintiff’s cause of action pursuant to Labor Law Article 6 arises from the allegation that he could not collect the compensation to which he would have been entitled had he not been terminated for whistleblowing, the claim pursuant to Article 6 arises from the same allegedly unlawful discharge which forms the basis for his claim pursuant to Labor Law §740 (*see Demir v Sandoz*, 2017 NY Misc LEXIS 590, 2017 NY Slip Op 30304[U] [Sup Ct New York County 2017], *affd* 155 AD3d 464 [1st Dept 2017] [plaintiff’s breach of contract/implied covenant of good faith claim waived where said claim arose from the same discharge which allegedly gave rise to her claim pursuant to Labor Law §740]; *but see Kelly v Advanced Care, Inc.*, 2008 NY Misc LEXIS 8882, 2008 NY Slip Op 32025[U] [Sup Ct Greene County 2008] [court, relying on *Collette v St. Luke’s Roosevelt Hospital*, 132 F. Supp. 2d 256 [SDNY 2001], held that plaintiff’s claim for “termination pay” pursuant to Labor Law §198-c and for unpaid wages pursuant to

Labor Law § 191 were distinct from her whistleblower claim and thus not waived by Labor Law §740]).

Notably, in *Owitz v Beth Israel Med. Ctr.*, 1 Misc3d 912(A) (Sup Ct, New York Co, 2004) (Kornreich, J.) a justice of this Court held that, “even if the *Collette* Court’s very narrow interpretation of the §740 waiver were to be adopted”, it would be constrained to dismiss the amended complaint since all of the claims therein “duplicate or overlap the statutory remedies for retaliation on account of whistleblowing activity.”

In light of the foregoing, the defendant’s motion is granted in all respects.

Plaintiff’s Cross Motion To Amend

As a general rule, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [citation omitted]).

In seeking to amend the complaint to name the City as a defendant, the plaintiff argues, in essence, that it would not be prejudicial for the City to be added as a defendant because the OIG was “tantamount to a City agency” and was responsible for making sure he was paid. However, the proposed amended complaint neither names the OIG as a defendant nor contains any allegations regarding the relationship between the OIG and the City. Thus, this Court finds that it is patently without merit, thereby warranting the denial of the cross motion.

The plaintiff further argues that, although its claims against the City may be time-barred, it can still bring an action against the City since its initial claims against NYCHA put the City on notice of the same. However, where, as here, a plaintiff seeks to add a new defendant under

the relation back doctrine, all of the following criteria must be met: "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Buran v Coupal*, 87 NY2d 173, 178 [1995] [internal quotation marks and citations omitted]).

It is evident that the plaintiff fails to meet this test. In his proposed amended complaint, the plaintiff merely asserts, in conclusory fashion, that "[a]ll [of its] claims relate back to the [City] pursuant to CPLR 203." Doc. 9. Although the plaintiff further alleges that NYCHA is a "New York State public benefit corporation", it sets forth absolutely no explanation in the proposed amended complaint or in its motion papers as to how or why it is united in interest with the City. Nor does the plaintiff establish that the City knew or should have known that, but for a mistake by the plaintiff, it would have been named as a defendant. Thus, the cross motion is denied.

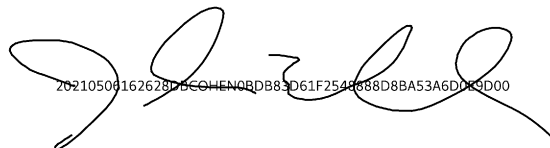
Accordingly, it is hereby:

ORDERED that the motion by defendant New York City Housing Authority to dismiss plaintiff Martin Lintner's first cause of action (retaliation pursuant to Civil Service Law § 75-b [2]), second cause of action (violation of Article 6 of the Labor Law), and third cause of action (violation of Article I, Section 8 of New York State Constitution) is granted in all respects, and these claims are severed and dismissed; and it is further

ORDERED that the fourth cause of action (violation of Labor Law §740) is to continue;

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on June 28, 2021 at 3:00 p.m. unless they first complete a bar coded preliminary conference form (to be provided by the Part 58 Clerk) and return it to Part 58 by email to SFC-Part58-Clerk@nycourts.gov at least two business days prior to the scheduled conference.


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DAVID BENJAMIN COHEN, J.S.C.

5/5/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE