SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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INDEX NO. 150348/2014

SCOTT SHEVLIN,

Plaintiff,

- v -

WONDER WORKS CONSTRUCTION & DEVELOPMENT CORP., WONDER WORKS CONSTRUCTION CORP., 421 KENT DEVELOPMENT, LLC, and XIN DEVELOPMENT MANAGEMENT EAST, LLC.

DECISION AFTER TRIAL

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, the plaintiff, Scott Shevlin (Shevlin), seeks to recover damages for the alleged violation of New York Labor Law (Labor Law) § 740, also known as the whistleblower law. Shevlin contends that, upon his refusal to comply with his employer's directive to keep a certain gate open at a construction site during times when it should have been closed, his employment was terminated. Thus, he avers that he was discharged from employment as a consequence of his refusal to participate in violating New York City Building Code (the Building Code) § 3307.3.4, which regulates the opening and closing of gates in sidewalk sheds, fences, barriers, and railings at construction sites. He asserts that this provision of the Building Code was enacted to protect the public from entering work sites and thereupon being injured, and that a violation thereof would present a substantial and specific danger to the public safety. The defendants aver, *inter alia*, that Shevlin was discharged for a legitimate, non-retaliatory reason

and that, in any event, Shevlin cannot recover as against defendants other than Wonder Works Construction Corp. because no employer-employee relationship existed with those defendants.

A nonjury trial was conducted on March 5, 2018, March 6, 2018, and March 8, 2018. The parties presented documentary evidence. Shevlin testified on his own behalf and presented the testimony of Eugene Namyotov, an employee of defendant Wonder Works Construction Corp. Eric Brody, the Vice President of Wonder Works Construction Corp. and director of construction for Wonder Works Construction Corp. during the relevant period, testified on behalf of the defendants. At the close of the trial, the court dismissed the action as against defendant Wonder Works Construction & Development Corp.

The court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

II. FINDINGS OF FACT

A. The Parties

The plaintiff Scott Shevlin (Shevlin) is a construction safety manager who was hired by Wonder Works Construction Corp. (Wonder Works) in 2013 as a site superintendent for a construction project (the Kent Avenue project) located at 421 Kent Avenue (the property) in Brooklyn. The property was owned by defendant 421 Kent Development, LLC (421 Kent). Defendant Xin Development Management East, LLC (Xin), was the developer of the Kent Avenue project. Wonder Works was hired by 421 Kent as the construction manager for the Kent Avenue project.

Eugene Namyotov (Namyotov) was an employee of Wonder Works and a senior project manager for the project at the relevant time period. Namyotov was Shevlin's immediate

supervisor. Eric Brody (Brody) is the vice president of Wonder Works and was the director of construction for Wonder Works during the relevant time period. Ryan Black (Black) was the authorized signatory for 421 Kent and 421 Kent's representative for the Kent Avenue project.

B. The Kent Avenue Project

The property is situated in Brooklyn between South 8th Street and South 9th Street from south to north and Kent Avenue and Wythe Avenue from east to west. When Wonder Works and Shevlin initially arrived at the property, there existed a fence around three sides of the perimeter that had been left there by a previous owner. The sides that were fenced in were Kent Avenue, South 8th Street, and Wythe Avenue.

The site adjacent to the property (the neighboring property) was also undergoing construction during the relevant period. South 9th Street, a private road, ran between the property and the neighboring property, with the property line running down the center of the road. South 9th Street was to be closed to the public during construction at the property pursuant to a permit issued in connection with the Kent Avenue project. South 9th Street had rolling gates at the Wythe Avenue entrance and the Kent Avenue entrance (the rolling gates) which prevented public access to South 9th Street. Wonder Works was responsible for keeping the rolling gates on the Kent Avenue project side closed when not in use and the owner of the neighboring property (the Neighbor) was responsible for the rolling gates on the opposite side. The rolling gates would meet in the middle when closed. They were chained and locked in the evenings. Shevlin, Namyotov, and the Neighbor's employees had the key to the lock.

In November 2013, Wonder Works built a fence (the interior fence) on the property parallel to South 9th Street. The interior fence was set back from the property line. The interior

fence was erected in response to a stop-work order issued by the New York City Department of Buildings (DOB).

C. The Rolling Gates Controversy

Shevlin had a good working relationship with his counterpart at the neighboring property, but they had an ongoing disagreement about the rolling gates. The Neighbor wanted to keep the gates open, while Shevlin wanted to keep them closed when not in use, as required by the Building Code, which forbids public access to construction sites and requires sites to be fenced, with gates closed when not being used. Occasionally, when the Neighbor left the rolling gates open, the public would use South 9th Street as a shortcut between Kent and Wythe Streets. Brody and Black made comments to Shevlin indicating that he should leave the gates alone and that they did not care about the Building Code.

After the interior fence was constructed in 2013, the DOB continued to warn the plaintiff against keeping the rolling gates open when not in use. The DOB did not express to the plaintiff that the interior fence relieved Wonder Works of its obligations under the Building Code to keep the rolling gates closed when not in use. Namyotov and Shevlin both testified that the rolling gates were still required to be kept closed after the construction of the interior fence.

After the interior fence was constructed and until Shevlin's termination, Black repeatedly communicated to Shevlin that he did not have to concern himself with the rolling gates. Conversely, Namyotov, Shevlin's immediate supervisor, instructed Shevlin to keep the rolling gates closed in accordance with the Building Code. The subject of the rolling gates continued to come up at weekly coordination meetings.

D. Shevlin's Removal and Termination

Section 4.6 of the written contract between Wonder Works and 421 Kent for the provision of construction management services, dated October 29, 2013 (the Contract), provides, in relevant part,

> [421 Kent] reserves the right to direct the removal of any of [Wonder Works'] staff for cause (at [421 Kent's] sole discretion) including Key Personnel, and [Wonder Works] shall promptly replace such individuals with competent substitutes acceptable to [421 Kent].

On January 7, 2014, Wonder Works received a letter from Black, as the representative for 421 Kent, (the removal letter) which stated, in relevant part,

> Per the executed Wonder Works contract with 421 Kent Development, LLC, section 4.6, executed on the 29th day of October, 2013; [421 Kent] hereby directs [Wonder Works] to replace Scott Shevlin with alternative competent personnel for cause.
>
> [421 Kent] has spent significant time developing a relationship with the community and expects all jobsite employees to foster a sense of fiduciary duty to maintain such relationship as it is a paramount component of the projects [sic] success. On multiple occasions, Mr. Shevlin has demonstrated a lack of fiduciary responsibility and a retaliatory approach in dealing with daily issues.
>
> These issues have been brought to the attention of Mr. Shevlin directly as well as with Wonder Works supervisory personnel. We feel that he has created an unrepairable relationship between himself and the adjacent property owner. Interfacing with the adjacent contractor/owner is a vital part of Mr. Shevlin's duties and responsibilities as the project moves forward. Given the relationship that has developed we do not believe Mr. Shevlin is capable of carrying out the responsibilities inherent to his position.

Brody removed Shevlin from the Kent Avenue project in response to the removal letter. He showed Shevlin the removal letter when he told Shevlin that he was being removed.

Brody testified that he previously received oral complaints from Black about Shevlin's relationship with the Neighbor, but could not recall any details about what the dispute was. He later admitted to hearing from Black "broad strokes" about access, but not gates. Nonetheless,

Brody testified that he did not tell Shevlin that the removal had anything to do with the rolling gates controversy. Conversely, Shevlin testified that Brody told him he was being terminated "because of the arguments with the gates." Shevlin did not recall when the conversation occurred. However, based on Brody's account that the only in-person conversation he had with Shevlin following receipt of the removal letter and prior to sending Shevlin written notice of his termination was the conversation wherein he advised Shevlin of his removal, the court concludes that Shevlin was recollecting the same meeting.

On January 9, 2014, Brody wrote to Black, stating that "in accordance with the request made in your letter of January 7, 2014, we have terminated Scott Shevlin's employment effective this date." Brody testified that Wonder Works terminated Shevlin after his removal because Wonder Works did not have another construction project where it could employ Shevlin. On January 9, 2014, Brody sent Shevlin an email advising that Shevlin was terminated. Twelve minutes after Brody sent the email, Shevlin responded, in relevant part,

> That is not what you said at all. It was made clear that due to political reasons over a gate that was to be kept closed due to Department of Buildings rules and regulations I had to be removed according to Ryan Black. We discussed how I should not lose even a days [sic] pay because I did no wrong whatsoever. You even agreed someone can't be fired for following the rules and doing their job.

Brody responded to Shevlin but did not dispute the plaintiff's characterization of the reasons behind his removal and termination. Shevlin subsequently sent another email to Brody in which he stated, "it is unacceptable for you to expect me to lose even a days [sic] pay for following the rules and regulations of the Department of Buildings." Again, Brody did not address Shevlin's characterization of the reasons behind his removal and termination.

On January 12, 2014, the plaintiff emailed Joseph Klaynberg (Klaynberg), another principal of Wonder Works, stating, "How is it I was fired for doing my job? How is it I as fired

for following and enforcing NYC building code 3307.3.4 (keeping the site gate closed when not in use)." Klaynberg responded that removal was the owner's decision and that he "d[id] not believe that [Shevlin] did anything wrong."

Namyotov testified that he believed Shevlin's removal and termination was prompted by a specific incident involving the rolling gates. The Neighbor tried to access the neighboring construction site through the rolling gates while the Kent Avenue project was shut down due to emergency wind. Shevlin had secured the gates from the inside with chains, but not locks, to secure them from swinging open due to the weather conditions, apparently preventing the Neighbor from accessing the neighboring property. Namyotov opposed the decision to terminate Shevlin and argued with Brody about the same.

The court credits Shevlin's testimony that his removal and subsequent termination was prompted by the disagreement Shevlin had with the Neighbor about keeping the rolling gates closed. Shevlin's testimony on this matter was supported by contemporaneous documentary evidence, including emails he sent within minutes of receiving notice of his termination. Shevlin's version of events in the emails was not controverted by Brody. Nor was it disputed by Klaynberg days later. Moreover, Namyotov's testimony, including his assertions that he strenuously opposed Shevlin's removal and termination, tends to support Shevlin's account that the impetus for his removal and termination was related to Shevlin's dispute with the Neighbor about leaving the rolling gates open. The court finds that the specific incident referenced by Namyotov was one in a series of incidents and arguments constituting the rolling gates controversy. Indeed, as Brody testified, the removal letter was not the consequence of a single incident but of an ongoing dispute between Shevlin and the Neighbor. The evidence presented at

trial establishes that the ongoing dispute was based on Shevlin's insistence that the rolling gates remain closed when not in use.

The court does not find Brody's testimony that Shevlin was not removed or terminated because of the rolling gates controversy to be credible. Brody's self-serving assertion that Shevlin was not removed for any reason related to the rolling gates strikes the court as disingenuous in light of his insistence throughout his testimony that he did not remember any details about the dispute between Shevlin and the Neighbor, referenced only in general terms in the removal letter. Brody's admission that the dispute was about "access" supports Shevlin's version of events, since the rolling gates controversy was about precisely that. The court finds no compelling evidence that Black's complaints about Shevlin to Brody concerned anything other than the rolling gates.

Moreover, the court finds that Brody was aware that Shevlin's removal was requested because of the dispute with the Neighbor about leaving the rolling gates open. Nonetheless, he did not question the request, even though Brody admitted that the Contract did not empower 421 Kent to remove Wonder Works employees because of their insistence on strict adherence to the Building Code. Instead, Brody and Wonder Works complied with Black's request, likely because, as Brody testified and Klaynberg stated in an email, Wonder Works did not yet have the contract for the entire Kent Avenue project and was "on probation" at the time of the relevant events.

While Shevlin's subsequent termination was purportedly due to the absence of work for Shevlin, it was the direct consequence of Shevlin's removal from the Kent Avenue project and would not have occurred absent removal. Thus, the court finds that both the removal and

termination of Shevlin was caused by Shevlin's insistence that the rolling gates remain closed when not in use, in accordance with the Building Code.

E. Shevlin's Post-Termination Earnings/Employment

While employed by Wonder Works, Shevlin was paid $3,614.80 every two weeks, an annual salary of $93,984.80. Shevlin and Wonder Works had agreed that after six months, Shevlin's salary would be renegotiated and Shevlin would be eligible to receive benefits.

After his termination, Shevlin made daily efforts to find new employment, including making phone calls to contacts in the industry, searching online, and working with headhunters. Based on his testimony, Shevlin found the following employment after his termination:

- employment in Florida for three to four weeks, paying $25 per hour, working 30 hours per week (amounting to $750 per week, and between $2,250 and $3,000 in total for the entire period of employment);
- from mid-November 2014 through mid-March 2015, employment where he earned more than his Wonder Works salary;
- in April 2015, three weeks' employment where he again earned more than his Wonder Works salary;
- from August 2015 through August 2017, part-time work paying $50 per hour and averaging 56 hours per month ($2,800 per month, and $67,200 over 24 months of part-time employment); and
- as of July 17, 2017, full-time employment fully mitigating his damages.

Based on the periods of employment described above, the plaintiff's lost earnings are as follows:

- for 310 days of unemployment between January 9, 2014 until the middle of November, 2014, omitting four weeks of part-time employment in Florida and $3,000 in earnings in Florida, at $3,614.80 per pay period, $77,042.00 in lost earnings;
- for 153 days of unemployment between the middle of March, 2015 until August, 2015, omitting three weeks of full employment, at $3,614.80 per pay period, $34,082.40 in lost earnings; and
- for 702 days of underemployment from August 2015 until July 17, 2017, omitting $1,302.32 per pay period for part-time employment, at $3,614.80 per pay period, $115,954.07 in lost earnings.

In light of the foregoing, Shevlin's total lost earnings are $227,078.47.

III. CONCLUSIONS OF LAW

A. Liability as Against Wonder Works

New York Labor Law § 740(2) provides, in relevant part,

> An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
>
> (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;
>
> …
>
> [or] (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

During the relevant time period, Section 3307.3.4 of the applicable version of the Building Code (Section 3307.3.4) provided as follows: "Openings in sidewalk sheds, fences, barriers, and

railings for loading and unloading purposes shall be kept closed at all times except during actual loading and unloading operations." Section 3307.3.4, which is meant to protect the public from serious hazards present at active construction sites, constitutes a "law, rule or regulation" of which violation "creates and presents a substantial and specific danger to the public health or safety." "Retaliatory personnel action" within the meaning of the Labor Law includes "any adverse employment action." Labor Law § 740(1)(e).

Labor Law § 740(4)(c) provides, in relevant part, "It shall be a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section."

The evidence presented at trial, including Shevlin's testimony, the documentary evidence submitted by Shevlin, and Namyotov's testimony, establishes that Wonder Works removed Shevlin because Shevlin objected to keeping the rolling gates open in violation of Section 3307.3.4. As the court has stated in its findings of fact, Shevlin's termination, while nominally based on the absence of work for Shevlin outside the Kent Avenue project, was directly caused by his removal. Thus, both the removal and termination, each of which constitute adverse employment actions, constitute retaliatory personnel action predicated on Shevlin's exercise of his rights under the Labor Law.

While Brody testified that Shevlin's removal was prompted by the Contract's provision that Wonder Works was to remove employees at 421 Kent's direction, that provision only allowed 421 Kent to direct removal "for cause." The Contract does not define "cause," other than to say that termination "for cause" shall be within 421 Kent's sole discretion. In any event, Brody admitted in his testimony that the Contract did not permit 421 Kent to direct the removal of an employee because he strictly adhered to the Building Code. Moreover, to the extent the

"for cause" provision was intended to punish protected whistleblower activity, it would plainly undermine the Labor Law and be void as against public policy. Shevlin's insistence on strict compliance with Section 3307.3.4, which the court has found prompted the removal letter, cannot form the basis for the "for cause" removal contemplated by the Contract.

"[I]n order to *recover* under a Labor Law § 740 theory, the plaintiff has the burden of proving that an actual violation occurred, as opposed to merely establishing that the plaintiff possessed a reasonable belief that a violation occurred." Webb-Weber v Community Action for Human Services, Inc., 23 NY3d 448, 452 (2014) (emphasis in original). At trial, Shevlin established a violation of Section 3307.3.4 sufficient to support his recovery under Labor Law § 740(2)(c). Shevlin testified that the Neighbor wanted to leave the rolling gates open when not in use, and that the Neighbor actually did so on multiple occasions. Shevlin further testified that both Black and Brody reprimanded him for arguing about the gates with the Neighbor and told him to "[l]eave the gates alone" and that "[n]obody cares about the Building Code." Black also told him that the rolling gates could be left open after the construction of the interior fence, without basis. Even if Wonder Works did not instruct Shevlin to open the rolling gates when they were not in use, Brody and Black each directed Shevlin to leave the rolling gates alone even when they had been left open by the Neighbor and were not being used. Such instruction is tantamount to a directive that Shevin permit a violation of the Building Code to continue. Thus, it constitutes engagement in the violation of Section 3307.3.4.

Additionally, that there was a permit for the fencing around the Kent Avenue project site does not render Section 3307.3.4 inapplicable, as the defendants aver in their post-trial submissions. Building Code § 3307.3, which is the umbrella statute that contains Section 3307.3.7, states that the minimum standards of which Section 3307.3.7 is a part apply "[u]nless

the street is officially closed to the public during the construction or demolition operations pursuant to a permit from the Department of Transportation." While South 9th Street was to be closed to the public during construction, none of the other streets encompassing the subject property, including Wythe Avenue and Kent Avenue, were closed to the public. The rolling gates closed off the construction site to the public, in the interest of safety, at both the Wythe Avenue and Kent Avenue entrances to South 9th Street. Accordingly, Section 3307.3.4 was applicable to the rolling gates.

B. Liability as Against 421 Kent and Xin

Labor Law § 740 prohibits "employers" from taking retaliatory action against "employees." "Employer" is defined by the statute as "any person, firm, partnership, institution, corporation, or association that employs one or more employees." An "employee" is defined as "an individual who performs services for and under the control and direction of an employer for wages or other remuneration." The evidence is unequivocal that Shevlin responded to Wonder Works alone for his wages. Nor does Labor Law § 740, or any other authority, provide for aider and abettor liability on whistleblower claims against non-employers. Thus, 421 Kent and Xin, who are not Shevlin's employers, may not be held liable under the statute. See, e.g., Ruiz v Lenox Hill Hosp., 146 AD3d 605 (1st Dept. 2017); Freese v Willa, 89 AD3d 795 (2nd Dept. 2011). The complaint is dismissed as against those defendants.

C. Damages

Labor Law § 740(5)(d) authorizes the court, in an action brought pursuant to the statute, to award compensation for lost wages, benefits, and other remuneration. Shevlin testified that his lost wages amount to $227,078.47. While Shevlin did not provide supporting documentation beyond his W-2 for his claims, his detailed testimony was sufficient to support the conclusion

that Shevlin's lost wages, did, in fact, total $227,078.47. This is particularly so in light of the defendants' failure to present any concrete challenge to Shevlin's testimony on lost wages at trial. See Kane v Coundorous, 11 AD3d 304 (1st Dept. 2004); Grinnell v City of New York, 244 AD2d 171 (1st Dept. 1997).

IV. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that, pursuant to Labor Law § 740(5)(d), the plaintiff shall have judgment against Wonder Works Construction Corp. for back pay in the sum of $227,078.47, with statutory interest from January 9, 2014, the date of the plaintiff's termination; and it is further

ORDERED and ADJUDGED that the complaint is dismissed against 421 Kent Development, LLC, and Xin Development Management East, LLC; and it is further

ORDERED that the plaintiff shall submit any application for attorneys' fees pursuant to Labor Law § 750(5)(e) within 60 days and notify the Part 42 Clerk of any such filing, and failure to timely comply with this directive shall result in the waiver of any such application; and it is further

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

DATED: October 26, 2021