

Phillips-Johnson v Lucky 8 TV LLC

2021 NY Slip Op 32151(U)

November 4, 2021

Supreme Court, New York County

Docket Number: Index No. 161155/20

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SANDRA PHILLIPS-JOHNSON

INDEX NO. 161155/20

MOT. DATE

- v -
LUCKY 8 TV LLC, et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s).
NYSCEF DOC No(s).
NYSCEF DOC No(s).

In this action, plaintiff, Sandra Phillips-Johnson (plaintiff or Phillips-Johnson), asserts claims against defendants Lucky 8 TV, LLC (Lucky 8) and A&E Television Networks, LLC (A&E) for retaliation and unlawful termination. Defendants now move, pre-answer, to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7), on the grounds that: (i) plaintiff's complaint fails to state a cause of action upon which relief can be granted; and (ii) plaintiff's claim against A&E under New York Labor Law Section 740 ("Section 740") is time-barred under the relevant statute of limitations. Defendants further move for an order striking plaintiff's jury demand; prohibiting plaintiff from filing an amended complaint; and awarding attorney's fees under Section 740(6). Plaintiff opposes the motion. The court's decision follows.

Based on that complaint, plaintiff alleges the following. Plaintiff is a news producer with over 20 years of experience, produced number one rated news shows and worked on commercial productions for nationally known brands. Plaintiff alleges, upon information and belief, that Lucky 8 contracted with A&E to produce a television documentary titled "Narcoland" regarding the impact of the opioid epidemic in middle America. To report this story, the plan was for cast and crew members of the Lucky 8 production team to secretly embed in a local Indiana jail (the "jail team"), in known areas of drug activity in a small community in Kentucky and with local law enforcement agencies in both states. Cast members included a journalist, a border patrol agent, and several individuals with prior histories of drug abuse and in various stages of recovery. Cast members, known as the "street team," were also embedded in the local community in known areas of drug activity.

Defendants hired plaintiff as a Field Producer for the "street team". Plaintiff alleges that from the beginning, she observed an attitude of disinterest in the health, safety, security or confidentiality of cast members and a tolerance for unsafe and illegal activity by defendants' cast and crew members. Plaintiff attended meetings with both Lucky 8 and A&E regarding the filming of the series, at which defendants instructed plaintiff how the show should be produced, directed the subject matter and material for the show and instructed plaintiff to find and establish connections to the "cartels".

Dated: 11/4/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

For example, plaintiff alleges that defendants encouraged crewmembers to engage in illicit drug use on camera, that the "street team" was expected to seek out drug activity and engage drug dealers to purchase narcotics and that the activities of the "street team" were not supervised by local law enforcement and served no legitimate law enforcement purpose. Plaintiff alleges that she and a co-executive producer leased property in their names for the "street team" to use and reside in during the production. Plaintiff alleges that defendants instructed them to permit crewmembers to hold a house party, open to the public, at the residence leased under plaintiff and the co-executive producer's name, knowing that illegal drugs would be distributed and used during the party.

Plaintiff communicated on numerous occasions with Executive Producer/"Show Runner" Russell Muth regarding concerns with crewmembers using illegal drugs. She claims that she made numerous complaints of unsafe working conditions to Co-Executive Producer Erin Sax and made complaints to management level officials of Lucky 8 regarding numerous unsafe and illegal practices, taking place on and off set by cast and crew, involving the "jail team" and the "street team". Plaintiff also complained about the use of drugs by cast and crew, including in the premises leased in their names, the possession of drugs by cast and crew, and the purchase and distribution of drugs by cast and crew.

Plaintiff alleges that as a result of Erin Sax's complaint to A&E, A&E representatives were sent to the set and spent two days meeting with the Lucky 8 production team. Upon the arrival of A&E representatives, plaintiff raised her concerns with an A&E employee. Plaintiff claims that as a result of her complaint to A&E, Muth threatened plaintiff's employment and instructed her, "keep your mouth shut if you know what's good for." On or about August 25, 2018, Plaintiff submitted a formal written complaint to Sax regarding unsafe and unlawful activity taking place on set. Upon information and belief, Sax forwarded Plaintiff's email to Devon Hammonds ("Hammonds"), A&E's Vice President of Development and Programming.

Soon after making complaints of unsafe and illegal practices involving the "jail team" and the "street team," defendants terminated Sax. In or around October 2018, plaintiff reiterated her concerns that the production team was causing a significant danger to the public and as a result, defendants terminated Plaintiff and instructed Plaintiff to go home for the remainder of the production.

Before this case was filed, plaintiff commenced an action entitled *Phillips and Sax v. Lucky 8 TV, LLC*, 19-cv-8187, in the United States District Court, Southern District of New York, in or about September 2019. Plaintiff filed her first amended complaint in December 2019 that named Lucky 8 and A&E as defendants and then filed her second amended complaint on March 26, 2020. Defendants filed a motion to dismiss plaintiff's second amended complaint in June 2020. On September 29, 2020, the Honorable Lorna Schofield directed defendants to "file a letter identifying the members of each defendant LLC to demonstrate citizenship (domicile) for purposes of diversity jurisdiction." On October 8, 2020, Judge Schofield opined that the federal court did not have diversity jurisdiction and ordered plaintiff to explain why the matter should not be dismissed for lack of subject matter jurisdiction. On October 12, 2020, plaintiff filed a voluntary dismissal without prejudice pursuant to Rule 41(a)(1)(A)(i).

Plaintiff then filed the instant action against both Lucky 8 and A&E in December 2020.

Parties' arguments

Defendants argue that New York Labor Law Section 740 fails because the conduct about which she alleges she expressed concerns does not rise to a "substantial and specific danger to the public health or safety" as required under the statute; that plaintiff's Section 740 claim against A&E is time-barred under its one-year statute of limitations as plaintiff did not assert any claims against A&E until December 20, 2019; Plaintiff's "public policy" claim under Kentucky law must also be dismissed because it is procedurally deficient insofar as the statute upon which she relies provides the available civil remedies. Furthermore, defendants argue that the allegations in the complaint fail to state a claim because defendants never affirmatively requested her to violate any law as required in Kentucky; and that plaintiff's Section 740 claim against both defendants is time-barred because she voluntarily dismissed

her federal court lawsuit and, therefore, does not benefit from the extended statute of limitations under CPLR 205(a).

Meanwhile, plaintiff contends that she has alleged sufficient facts against defendants because she complained of illegal activity which created and presented a substantial and specific danger to the public health or safety; that both defendants Lucky 8 and A&E were joint employers of plaintiff; that plaintiff engaged in protected activity with respect to A&E and was subjected to an adverse employment action and that plaintiff's claims are not time-barred vis-à-vis the relation-back doctrine.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Labor Law 740

Labor Law Section 740(2), provides in relevant part, prohibits employers from taking any retaliatory personnel action against an employee because such employee:

- (a) discloses, or threatens to disclose to a supervisor ... 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 ...
- (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

Defendants argue that the 740 claims should be dismissed because plaintiff's alleged violations of law do not create and present a substantial and specific danger to the public health or safety and do not constitute "a certain quantum of dangerous activities", that "the supposed complaints relate to conduct that may have only affected those employed by Lucky 8" and that plaintiff's allegations "rest primarily upon the purported illegal use and possession of unidentified drugs by an unknown number of co-workers".

Plaintiff argues in opposition that Lucky 8's own handbook states that drug and alcohol use in the workplace, "poses serious health and safety risks to employees and members of the public, which is not tolerated.". Plaintiff contends that she complained to several supervisors about the illegal drug use and that her allegations "sufficiently and clearly state that her complaints regarded actual violations of the law" in the State of Kentucky.

In Reply, defendants argue that plaintiff's reliance on the *Barker* and *Webb-Weber* cases are not comparable to the instant case and that "by contrast, complaints here relate solely to co-worker drug use, with no negative effects alleged to extend beyond the environs of the users themselves." Finally, defendants argue that "plaintiff's reliance on Lucky 8's drug and alcohol policy does not aid in transforming this ostensible production "feature" into a public hazard".

Plaintiff's Labor Law 740 claim is dismissed. Here, plaintiff allegedly complained to several supervisors on the film set. However, other than a conclusory statements, plaintiff's complaint fails to allege how these violations amount to substantial and specific danger to the public. Furthermore, plaintiff's allegations assert purported illegal use and possession of unidentified drugs by unknown number of co-workers, which fails show how this presents a substantial and specific danger to the public health or safety...". Rather plaintiff's allegations are limited and are focused on activities that occurred on a film set. Even if defendants violated its own policy set forth in its handbook, plaintiff failed to show how those violation(s) threatened the health or safety of the public. Finally, plaintiff's reliance on the *Barker*

and *Webber* cases to support the proposition that it effects the public safety is misplaced as both those cases dealt with medical and healthcare workers and related issues while the facts here are specific to the detention of a person in jail and the alleged drug use, possession by cast and crew on a film production set and do not effect the public's safety or health.

Based on the foregoing, plaintiff's New York Labor Law Section 740 claim is dismissed.

Section 740 Claim Against A&E

Defendants argue that plaintiff's 740 claim against A&E is time-barred because she never identified A&E as a defendant or potential witness in her first amended complaint filed in federal court on or about December 20, 2019.

Plaintiff contends that her claims against A&E are not time-barred under the relation back doctrine because her "claims arise out of the same conduct, transaction or occurrence (her employment with Defendants); most notably, both Lucky 8 and AETN are united in interest as they are represented by the same counsel and will not be prejudiced in maintaining a defense; and Plaintiff initially brought this action *pro se* on September 3, 2019 and mistakenly failed to include AETN as a defendant. Plaintiff's counsel further asserts: "Once our office was retained as counsel, we immediately took steps to amend the complaint (even prior to Defendants filing a responsive pleading) to correct the Complaint. Moreover, by Order dated December 11, 2019, the Court extended Plaintiff's time to serve the summons and complaint no later than January 17, 2020. Plaintiff filed her FAC on December 20, 2019, and Defendants were served January 14, 2020. Thus, all prongs are satisfied and Plaintiff's claims against AETN should not be dismissed as time barred."

Defendants disagree and on reply argue that "plaintiff cannot have it both ways – she cannot argue that AETN dictated the manner in which she performed her job and then claim she mistakenly failed to include AETN without so much as an explanation of the nature of the mistake or the reason for the mistake." and that courts are not hesitant to deny a *pro se* plaintiff's attempts to add a new defendant under the relation back doctrine because she was originally *pro se*.

The court agrees with defendants. Labor Law Section 740(4)(a) has a one-year statute of limitations. "For the rule allowing relation back to the date of service or filing of the original complaint under CPLR 203(b) or (c) to be operative in an action in which a party is added beyond the applicable limitations period, a plaintiff is required to prove that (1) both claims arose out of the 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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well". *Cardamone v. Ricotta*, 47 AD3d 659, 850 NYS2d 511 [2nd Dept 2008] "Once a defendant has demonstrated that the statute of limitations has expired, the burden is on the plaintiff to establish the applicability of the [relation back] doctrine." *Id.*

It is undisputed that plaintiff named A&E as a defendant more than one year after she was allegedly terminated in or about October 2018. Therefore, it is plaintiff's burden to show the applicability of the relation back doctrine. While plaintiff may be able to satisfy the first prong under CPLR 203, she is unable to establish the third prong. The court rejects plaintiff's claim that she "mistakenly failed to include AETN as a defendant". Here, plaintiff's failure to name A&E was not the result of a mistake as to its identity based on her own argument. In fact, plaintiff alleges that Lucky 8 and A&E are joint employers, and that A&E controlled the manner in which she performed her work. If that allegation is accurate, then there is no reasonable excuse as to why plaintiff failed to name A&E in the federal case as she was well aware of A&E's identity while she was on the set in Kentucky. Moreover, it is of no moment that plaintiff was *pro se* in the federal court action. See, *Neal v. Wilson*, 239 F.Supp3d 755 [SDNY

2017], *Smith v. Glenwood Mgt. Corp.*, 2021 NY Slip Op 30035(U). Finally, plaintiff is unable to satisfy the second prong in light of the reasoning set forth above.

Based on the foregoing, plaintiff's 740 claim against A&E under the relations back doctrine is severed and dismissed.

Joint Employer Claim under Section 740

Even assuming that A&E remains a party in the instant action under the relation back doctrine, plaintiff's claim that Lucky 8 and A&E are joint employers under Section 740 nonetheless fails. Plaintiff's argument that "AETN controlled the production of Narcoland, and in turn controlled the conditions of Plaintiff's employment" and that "Molly Ebinger held supervisory authority over Plaintiff with regard to her employment, controlling many tangible aspects of Plaintiff's employment, including the ability to hire/fire." is rejected.

Plaintiff's allegations are nothing more than vague, conclusory statements and are insufficient to withstand defendants' motion to dismiss. Moreover, there are no allegations that A&E hired plaintiff, paid plaintiff, terminated plaintiff or had any involvement with the day-to-day filming of the production. The mere fact that plaintiff alleges in a vague and conclusory fashion that Lucky 8 and A&E are joint employers and that A&E exercised control over plaintiff's employment absent a factual underpinning is not only insufficient to establish control, but also cannot survive a motion to dismiss.

Furthermore, plaintiff's claim that she engaged in a protected activity by "rais[ing] her concerns with an [unnamed] A&E employee" also fails for the same/similar reasons as set forth above. Finally, plaintiff's claim that A&E took a retaliatory action against her is vague and conclusory. Moreover, plaintiff's use of the plural "defendants" is insufficient without any factual support to survive defendants' motion.

Plaintiff's Kentucky Law Claim

In Kentucky, employment is at-will unless a discharge violates public policy. *Alexander v. Eagle Mfg. Co.*, 714 F. App'x 504, 507 (6th Cir. 2017). A cause of action arising from an employment termination exists in Kentucky under a "narrow public policy exception" that applies in only three circumstances: (i) where there are "explicit legislative statements prohibiting the discharge," (ii) where "the alleged reason for the discharge ... was the employee's failure or refusal to violate a law in the course of employment," or (iii) when "the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment." *Mitchell v. Univ. of Ky.*, 366 S.W.3d 895, 898 (Ky. 2012) (quoting *Hill v. Ky. Lottery Corp.*, 327 S.W.3d 412, 422 (Ky. 2010)).

"A plaintiff can satisfy the relevant public policy exception: (i) where an "employer affirmatively requests that the employee violate the law"; or (ii) "when an employee learns of illegal activity and, although not directly invited to participate by his employer, knows he will inevitably become complicit in the illegality by performing his normal work responsibilities." *Alexander v. Eagle Mfg. Co., LLC*, 714 F. App'x 504 [6th Cir. 2017].

Plaintiff contends that her claim arises under subsection (ii) and "that she was terminated for her refusal to violate Kentucky laws and public policy". Plaintiff alleges that "defendants instructed plaintiff to lease an apartment for a member of the "street team," Richard Webber, to use during production. Defendants then instructed plaintiff to permit crewmembers to hold a house party, open to the public, at the residence leased under plaintiff's name. Defendants were well aware of the fact that illegal drugs would be distributed and used during this party. By instructing Plaintiff to permit illegal drug use in a property where her name was on the lease, Defendants forced Plaintiff to inevitably become complicit in the illegality by performing her normal work responsibilities."

In opposition, defendants argue that plaintiff's claims must be dismissed because Kentucky law Section 338.121 provides its own civil remedies and that under the relevant policy exception plaintiff failed to allege that either defendant "affirmatively requested" she violate the law.

The court again agrees with defendants. Here, plaintiff has failed to allege that defendants made an affirmative request of her to violate the law. Merely stating that defendants were "well aware" is not the same as making an affirmative request. Further, plaintiff's allegation that she "become complicit in the illegality by performing her normal responsibilities is nothing more than a regurgitation of the language of the statute. Finally, Ky. Rev. Stat. § 338.121 ("Section 338.121") provides its own civil remedies for such conduct and that plaintiff did not avail herself of the administrative remedies set forth in Section 338.121.

Accordingly, plaintiff's claim under Kentucky law is also severed and dismissed.

In light of the foregoing, defendants' argument to strike plaintiff's jury demand is denied as moot.

Defendants' request for attorney' fees is denied.

CONCLUSION

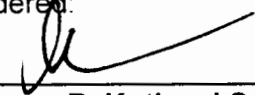
Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent that plaintiff's complaint is dismissed and the clerk is directed to enter judgement accordingly; and it is further

ORDERED that the balance of the motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 11/4/21
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.