

Suskin v Oehl

2022 NY Slip Op 34184(U)

December 8, 2022

Supreme Court, New York County

Docket Number: Index No. 153635/2022

Judge: Richard Latin

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

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

JOEL SUSKIN,

Plaintiff,

- v -

RONALD OEHL, TLM REALTY CORP.

Defendant.

-----X

INDEX NO. 153635/2022

MOTION DATE 09/23/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants Ronald Oehl and TLM Realty Corp.’s motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) is determined as follows:

As alleged in the complaint, plaintiff was the Chief Operating Officer for defendant TLM Realty Corp. (TLM) from April 2014 until January 11, 2022. Defendant Oehl is the President, Chief Executive Officer, and owner of TLM. Plaintiff was 63 years old at the time of the complaint.

Plaintiff’s employment contract included an annual base salary of \$350,000, an annual bonus, and long-term incentive compensation. His base salary was subsequently raised to \$400,000. Plaintiff received “partial payments” towards his bonus for 2016 and 2017. For 2018 through the year of his termination, plaintiff received no annual bonus. During the duration of his employment, plaintiff did not receive any long-term incentive compensation.

Plaintiff alleges that in or around late 2019 and early 2020, defendant Oehl began to “strip [plaintiff] of his COO responsibilities, relegating his duties to largely administrative functions that are not within COO duties.” These duties were completely stripped in March 2020. Oehl gave all

or most of plaintiff's responsibilities "to an employee approximately 20 years his junior." Prior to being stripped of his COO responsibilities, "several TLM employees reported directly to [plaintiff], including the Head of Leasing, Development and Property Management, the Controller, and the Property Accountant." Further, plaintiff alleges that "[t]hese employees" and "other staff" regularly consulted with plaintiff.

Around March 17, 2021, plaintiff sent Oehl a written letter complaining of the "compensation issues and age discrimination." On January 11, 2022, plaintiff was terminated "for Cause."

Defendants now move to dismiss plaintiff's second, third, fourth, fifth, and seventh causes of action. Plaintiff's second and third causes of action seek recovery under the New York Labor Law (NYLL) for unpaid wages and retaliation. Plaintiff's fourth cause of action seeks recovery under the New York State Human Rights Law, Executive Law § 296 (NYSHRL) for age discrimination. Plaintiff's fifth and seventh causes of action seek recovery under the New York City Humans Rights Law, New York City Administrative Code § 8-107 (NYCHRL) for age discrimination and retaliation.

Defendants provided the employment contract between plaintiff and TLM, dated March 5, 2014, which set out the terms of plaintiff's compensation. Plaintiff was eligible for an annual bonus and long-term incentive compensation. Section 2(b)(ii) of the employment contract states, "The actual Annual Bonus payable shall be determined by the Company in its sole discretion based on the actual performance of the Executive and the Company during such calendar year" and the factors considered in determining the bonus include "increases in property cash flows, reductions in operating expense, the closing of acquisitions or divestitures and other actions that enhance the value of the Company and its properties (and the extent to which the Executive was responsible

for such positive developments).” As for the long-term incentive compensation, section 2(b)(iii) states, “The terms, conditions and amounts of any such long-term incentive compensation opportunities shall be determined by the Company in its sole discretion . . . and shall take the form of an indirect right to a portion of the cash or profits the Company . . . receives off particular investments or properties.” The employment contract further states that if plaintiff’s employment was terminated without cause, TLM must pay plaintiff three months base salary plus one month base salary for every full year of employment.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must accept all allegations in the complaint as true, draw all inferences in a light most favorable to plaintiff, and determine only whether the facts fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). On a motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1), dismissal is warranted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Defendants first argue that TLM is not a covered employer under the NYCHRL. The term “employer” under the NYCHRL does not include an employer with fewer than four employees (*see* NYC Administrative Code § 8-102 [5]). In the complaint, plaintiff alleges that prior to the removal of his responsibilities, there were multiple employees at TLM that reported directly to him, including the Head of Leasing, Development and Property Management, the Controller, and the Property Accountant. Further, plaintiff points to “other staff” that consulted with plaintiff. The affidavit of Andrew Greene produced by defendants – stating that TLM had no more than two employees during the relevant period – does not conclusively establish that TLM employed fewer than four people, as it is belied by the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268,

275 [1977] [When evidentiary material is considered . . . unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate”). Thus, accepting the allegations in the complaint as true and drawing all inferences in plaintiff’s favor, plaintiff has sufficiently alleged that TLM was an “employer” for the purposes of the NYCHRL.

To state a claim for age discrimination under both the NYCHRL and the NYSHRL, a plaintiff must allege that (1) he is a member of a protected class, (2) he was qualified to hold the position, (3) he was terminated from employment or suffered another adverse employment action, and (4) the discharge or adverse action took place under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). NYCHRL claims must be construed liberally in order to fulfill the city law’s uniquely broad and remedial purposes (*see* NYC Administrative Code § 8-130; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009]). The NYSHRL was amended in 2019 to include such language similar to that of the NYCHRL (*see* Executive Law § 300; *Hosking v Mem. Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 64 n [1st Dept 2020]).

The parties dispute only the fourth element under these claims, namely that the adverse action occurred under circumstances giving rise to an inference of discrimination. At this stage, plaintiff’s allegation that his job responsibilities were transferred to an employee “approximately 20 years his junior” is sufficient to support an inference that the removal of his responsibilities and ultimately his termination were due to his age (*see Hosking v Mem. Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 67 [1st Dept 2020] [“The fact that plaintiff was replaced by a person nearly 30 years younger than her suffices to support an inference that her termination was motivated by age-based animus”]; *Grella v St. Francis Hosp.*, 149 AD3d 1046, 1048 [2d Dept 2017] [“The fact that an

employee was replaced by a substantially younger employee gives rise to an inference of discrimination sufficient to make a prima facie case of age discrimination”]).

As to plaintiff’s retaliation claim under the NYCHRL, defendants’ argument only relies on the definition of “employer” under the NYCHRL previously addressed.

Therefore, the branch of defendants’ motion related to plaintiff’s claims under the NYCHRL and the NYSHRL (plaintiff’s fourth, fifth, and seventh causes of action) is denied.

Plaintiff seeks to recover unpaid compensation, including his annual bonus, long-term incentive compensation, severance pay, and accrued but unused vacation pay. Under Labor Law § 193, “No employer shall make any deduction from the wages of an employee,” except under certain conditions not relevant here.¹ Labor Law § 190 (1) defines “wages” as “the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis.” The Court of Appeals has distinguished between earned compensation based on the employee’s efforts and discretionary compensation. The definition of wages “excludes incentive compensation based on factors falling outside the scope of the employee’s actual work” (*Truelove v Northeast Capital & Advisory, Inc.*, 95 NY2d 220, 224 [2000] [quotation marks omitted]). “Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer’s entrepreneurship, falls outside the protection of the statute” (*id.*). Executives are excluded from certain provisions of the NYLL, but are included as employees for the purpose of Labor Law § 193 (*see Pachter v Bernard Hodes Group, Inc.*, 541 F3d 461, 463 [2d Cir 2008] [“ . . . executives are employees for purposes of Labor Law article 6, except where expressly excluded”]).

¹ A recent amendment to the NYLL clarified that the failure to pay wages constitutes a “deduction” under Labor Law § 193 (*see Quallen v Impendi Analytics, LLC*, 2021 N.Y. Slip Op. 32783[U], 6 [N.Y. Sup Ct, New York County 2021]).

Plaintiff's recovery under NYLL hinges on whether the compensation he alleges he is owed falls within the definition of "wages." As to plaintiff's annual bonus and the long-term incentive compensation plan, plaintiff's employment contract states that the amounts are in defendants' "sole discretion." Section 2(b)(ii) of the employment contract specifically lists factors TLM may use in determining plaintiff's bonus, only parenthetically including plaintiff's own work as a factor. The cases cited by plaintiff to support the proposition that unpaid bonuses can constitute "wages" are clearly distinguishable because those are cases where the court determined the compensation at issue was not discretionary, was indicated as a sum certain, or was already vested (*see Ryan v Kellogg Partners Institutional Services*, 19 NY3d 1, 16 [2012] [bonus linked to plaintiff's work and non-discretionary]; *Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011] [bonus was sum certain and non-discretionary]; *Carlson v Katonah Capital, L.L.C.*, 10 Misc 3d 1076(A) [Sup Ct 2006] [although discretionary, the bonus payments had become vested in each plaintiff]). That is not the case here where the documentary evidence shows that plaintiff's annual bonus and long-term incentive compensation were within the sole discretion of TLM and due predominantly to the success of TLM. As a result, plaintiff has no claim for this compensation under Labor Law § 193.

As to plaintiff's severance and vacation pay, the definition of wages under Labor Law § 190 (1) includes "benefits or wage supplements" as defined in § 198-c. Labor Law § 198-c (2) states that "the term 'benefits or wage supplements' includes, but is not limited to, reimbursements for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." Labor Law § 198-c (3) states, "This section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week." The Appellate Division has held that the limitation in § 198-c (3) applies to claims for wage deductions under § 193 (*see Naderi v N. Shore-Long Is. Jewish Health Sys.*, 2014 N.Y. Slip

Op. 30485[U] [N.Y. Sup Ct, New York County 2014], *affd*, 2016 N.Y. Slip Op. 00452 [1st Dept 2016]; *Fraiberg v 4Kids Entertainment, Inc.*, 75 AD3d 580, 583 [2d Dept 2010]; *Cohen v ACM Med. Lab., Inc.*, 178 Misc 2d 130, 135 [Sup Ct 1998], *affd*, 265 AD2d 839 [4th Dept 1999]). Plaintiff, a COO with an annual salary of \$400,000, was undoubtedly a bona fide executive and thus unable to assert a claim for severance and vacation pay under Labor Law § 193.

Accordingly, defendants' motion to dismiss plaintiff's cause of action for recovery of unpaid wages under the NYLL is granted.

Finally, plaintiff alleges unlawful termination in retaliation for his written complaint. Under Labor Law § 215 (1) (a), it is unlawful to retaliate against an employee "because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner." While a plaintiff must allege that he complained about a specific violation of the Labor Law in order to assert a claim for retaliation (*Epifani v Johnson*, 65 AD3d 224, 236 [2d Dept 2009]), all that is required is a complaint to be of a "colorable violation" of the law, not a citation to a specific statute (*Weiss v Kaufman*, 2010 N.Y. Slip Op. 33261[U] [N.Y. Sup Ct, New York County 2010]).

Here, plaintiff alleges that he complained to Oehl in a written letter "of the foregoing treatment (including the compensation issues and age discrimination as noted above)." Affording the plaintiff the benefit of every favorable inference, plaintiff's complaint alleges a reasonable, good faith belief that he complained about a purported violation of the Labor Law, namely § 193's prohibition against wage deduction, as those are the "compensation issues" raised in the complaint.

The Court finds that the defendants' motion to dismiss plaintiff's cause of action for retaliation under the NYLL is denied.

Accordingly, it is ORDERED that defendants' motion to dismiss is granted only as to plaintiff's second cause is action and is otherwise denied.

This constitutes the decision and order of the Court.

12/8/2022

DATE



RICHARD LATIN, J.S.C.

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