

Rosen v Zionist Org. of Am.

2023 NY Slip Op 31004(U)

March 29, 2023

Supreme Court, New York County

Docket Number: Index No. 159365/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LORI S. SATTLER **PART** **02TR**

Justice

-----X

JOHN ROSEN,

Plaintiff,

- v -

ZIONIST ORGANIZATION OF AMERICA, MORTON KLEIN,
DAVID SCHOEN

Defendant.

-----X

INDEX NO. 159365/2022

MOTION DATE 01/31/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISS.

In this retaliation action, Defendants Zionist Organization of America (“ZOA”), Morton Klein (“Klein”) and David Schoen (“Schoen”) (collectively “Defendants”) move to dismiss the Verified Complaint pursuant to CPLR 3211 (a)(1) and (7) or, in the alternative, striking certain allegations contained therein. Plaintiff John Rosen (“Plaintiff”) opposes the motion.

This action was commenced by filing a summons and complaint on November 1, 2022. According to the Complaint (NYSCEF Doc. No. 1), Plaintiff asserts that Manhattan-based ZOA retaliated against him for complaining about “improper conduct at ZOA” in violation of the New York Not-for-Profit Corporation Law (“N-PCL”), New Jersey Law Against Discrimination (“NJLAD”) and New Jersey Conscientious Employee Protection Act (“NJCEPA”). Plaintiff provides a lengthy account of the actions that he contends precipitated the lawsuit. Prior to his termination, he was the Executive Vice President at ZOA. Klein is the President of ZOA. Plaintiff asserts that he was hired to be Klein’s right-hand man and that he was in charge of

ZOA's operations. He states that he discovered that ZOA "was rife with dysfunction and impropriety."

The Complaint levels several complaints about Klein, who Plaintiff contends dominated all decision making at ZOA, and alleges that because of Klein's actions, ZOA turned into an organization that followed his decisions without question. Plaintiff states that Klein created a toxic work environment, made misogynistic and racist comments, and that he has been abetted in this conduct by ZOA's Board of Directors ("Board"). In 2020, Plaintiff contends that an outside attorney was hired to investigate the organization after Klein "engaged in sexist and racist behavior toward female and Black employees" and that a report was issued with recommendations that were not supported by Klein and "those allied with him." In 2021, an outside consultant conducted a strategic review of ZOA. According to Plaintiff, that report was critical of Klein and the Board, but the Board was not shown the full report due to Klein's actions.

In late February 2022, Plaintiff, in what he states was a "show of defiance" filed a 229-page "whistleblower complaint" to Schoen, the newly appointed Chair of the Board. He claims that two weeks later he was shut out of ZOA's operations, his responsibilities were slowly taken away, and that he became isolated from his colleagues and any decision-making powers to the point that he was only working one hour per day. On August 8, 2022, he was terminated due to his "unspecified" poor performance.

Defendants characterize this action as a "vindictive lawsuit by a disgruntled former ZOA employee arising out of his failed attempt to oust Morton Klein, National President of ZOA, and take control of the Organization" (NYSCEF Doc. No. 9). Defendants move to dismiss Plaintiff's cause of action based on Section 715-b of the N-PCL because they claim that it does not provide

a private right of action for Officers. Defendants state that Plaintiff was not “merely an employee of Defendant ZOA” because he was an Executive Vice President and therefore an officer. They claim dismissal is appropriate since implying a private right of action would interfere with the legislative enforcement scheme which allows only the Attorney General to bring an action to enforce the rights of members, director, and officers. Therefore, they claim Plaintiff lacks standing to bring an action under Section 715-b.

Defendants further move to dismiss on the basis that the causes of action based on New Jersey law may not be raised in this New York proceeding. They assert that Plaintiff was only working from his New Jersey home due to the COVID-19 pandemic and had returned to work in ZOA’s New York office on a modified basis. Defendants note that the “whistleblower complaint” referred to incidents that occurred from January 2017 to December 2021 and one incident in January 2022. None of the claimed incidents occurred in the State of New Jersey where Plaintiff resides.

Lastly, Defendants point to various allegations contained in the Complaint which they contend have no relevance to Plaintiff’s claims. They specifically state that certain claims about Klein are “venomous” and the tax issues raised only serve to sully the reputations of Klein and ZOA. Thus, they contend that these allegations should be stricken.

CPLR 3211(a)(1) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence.” Dismissal under 3211(a)(1) is warranted “where the documentary evidence utterly refutes a plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also 511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]). “Factual affidavits . . . do not

constitute documentary evidence within the meaning” of 3211(a)(1) (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), “the court is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). “Factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions . . . are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

N-PCL § 715-b

Defendant contends that N-PCL §715-b does not provide a private right of action, pointing to the fact that there is no reference for that right under the section. They indicate that other sections of § 715 mention the possibility of enforcement by someone other than the Attorney General but no such relief is set forth in the statute with respect to § 715-b (*see* N-PCL § 715-i [“In any action by a person or entity other than the attorney general . . .”). They further point to N-PCL § 720, which permits actions to be brought against officers, directors, and key persons under certain circumstances.

The Court has found that where a statute does not explicitly provide for a private right of action, recovery may only be had “if a legislative intent to create such a right of action is ‘fairly implied’ in the statutory provisions and their legislative history” (*Brian Hoxie’s Painting Co. v Cato-Meridian Cent. School District*, 76 NY2d 207, 211 [1990], quoting *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]). In determining whether a private cause of action is

implied, the court must conduct a three-factor inquiry: “(1) whether plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme” (*Carrier v Salvation Army*, 88 NY2d 298, 302 [1996]).

N-PCL § 715-b(a) sets forth a whistleblower policy for not-for-profit organizations with twenty or more employees and annual revenue in excess of \$1,000,000. Under the terms of the statute, Plaintiff does fall within the class for whose benefit the statute was enacted thus satisfying the first factor. “Such policy shall provide that no director, officer, key person, employee or volunteer of a corporation who in good faith reports any action or suspected action . . . shall suffer intimidation, harassment, discrimination or other retaliation . . .” (*id.*). The second factor is also satisfied as it can be said that permitting a private right of action in a whistleblower case would promote the legislative purpose of the statute.

It has been noted that the third factor is generally the “most critical” (*Brian Hoxie’s Painting Co.*, 76 NY2d at 212). In *Ferris v Lustgarten Foundation*, 189 AD3d 1002, 1006 (2d Dept 2020), the Court found that the third prong had been satisfied because there was no regulatory agency to enforce compliance on behalf of an employee and therefore a private right of action does exist for employees. The Court further noted that “[a]lthough Not-For-Profit Corporation Law § 112(a)(7) provides for the Attorney General’s protection of the rights of members, directors, or officers of not-for-profit corporations, that statute does not include employees” (*id.*).

Here, it is acknowledged that Plaintiff was Executive Vice President of ZOA. He contends that he was not recognized or treated as an officer. He further asserts that the 2014

ZOA Constitution, which was annexed as an exhibit, did not specifically provide for an Executive Vice President.

Defendants state that there have been multiple revisions to the Constitution since 2014. They claim that the 2021 Constitution belies Plaintiff's assertion that he was not an officer. They further point to the Complaint in which Plaintiff acknowledges his position as Executive Vice President (Complaint ¶ 1). The Complaint also states that Plaintiff was the "second-senior most executive" at ZOA (*id.*).

Upon reviewing the 2021 ZOA Constitution submitted by Defendants as an exhibit to their opposition papers, the Court finds that Rosen was an officer of ZOA and not an employee. Section VII-3 ("Powers and Duties") of the 2021 Constitution states: "a) National President: The National President, in conjunction with the Chairman and the Executive Vice President (1) is responsible for the general supervision and direction of *the other officers*; agents and employees and employees of the ZOA, including the hiring and termination of employees . . ." (NYSCEF Doc. No. 32 [emphasis added]). By referring to "the other officers," the language of the section conveys that the National President, Chairman, and Executive Vice President positions are also officers. Accordingly, it cannot be found that Plaintiff is an employee with a private right of action, based upon the 2021 Constitution's definition of his title and his own characterization of his position.

Because N-PCL § 112(a)(7) provides for the Attorney General's protection of the right of officers of a not-for-profit organization, allowing Rosen, an officer, a private right of action under N-PCL § 715-b would be inconsistent with the legislative scheme (*see Carrier*, 88 NY2d at 302). Accordingly, Plaintiff's first cause of action is dismissed pursuant to CPLR 3211(a)(1).

NJLAD and NJCEPA Claims

Plaintiff contends that his working from home in New Jersey during the COVID-19 pandemic supports causes of action under the NJLAD and NJCEPA. He states that he worked almost exclusively from his home from March 2020 through August 2022 and that Defendants were aware that he was working from his home as opposed to the ZOA office in New York.

Defendant asserts that ZOA is a New York based not-for-profit organization, that all the work performed by Plaintiff was from his home which was not an authorized ZOA office, that he was taxed as a New York employee, and that the allegations contained in his whistleblower complaint did not take place in New Jersey. They assert that permission to work at home was due to restrictions put in place from the state and local government due to the COVID-19 pandemic and was not intended to be permanent. They contend Plaintiff returned to ZOA's headquarters on June 18, 2020 and worked there on 19 occasions in 2021 through May 2022 (NYSCEF Doc. No. 30).

It is undisputed that ZOA is a New York not-for-profit and that it has no office in New Jersey. Both parties acknowledge that Plaintiff was hired in 2017 to work full time in the New York office and that he did so until the onset of the COVID-19 pandemic. Neither party indicates that it was contemplated that Plaintiff's job location was to permanently change to New Jersey, nor is it suggested that any of the conduct complained of occurred in that state.

A plaintiff only states a cause of action under NJLAD where they are employed in New Jersey (*Dong Chul Kim v Harte Hanks, Inc.*, 425 F Supp 3d 246, 261-262 [SD NY 2019]).

Although there is no requirement for a physical New Jersey office, an inquiry will not be based on a party's place of residence but rather where the party's workplace was located (*id.*).

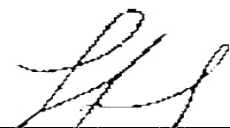
Plaintiff's contention that he is a New Jersey worker is not supported by the circumstances of his

employment. Plaintiff was employed by a New York not-for-profit, hired to work at its New York office, and physically worked in that office until the COVID-19 pandemic caused him and other office employees to work remotely. Although not on a full-time basis, he did return to the New York office on multiple occasions prior to his termination. Plaintiff does not assert that he was reassigned from the New York office or that he was engaged to work exclusively in New Jersey. His temporary displacement due to the COVID-19 pandemic does not convert his state of employment to New Jersey for the purposes of the NJLAD. The Court notes that ZOA does not have a physical New Jersey office and that Plaintiff paid New York taxes on his salary. Accordingly, Plaintiff’s claims under the NJLAD are dismissed.

For the reasons set forth above, the NJCEPA claim must also fail. Like the NJLAD, a claim brought under the NJCEPA generally requires that a plaintiff be employed in New Jersey (*see Norris v Harte-Hanks, Inc.*, 122 Fed Appx 566, 569 [3d Cir 2004], quoting *Brunner v Allied Signal, Inc.*, 198 FRD 612, 614 [D NJ 2001] [“it is well-established in New Jersey that claims of a New Jersey resident, relating to out-of-state employment, are governed by the law of the state in which that New Jersey resident is employed”]). Since Plaintiff was hired to work in New York, worked in New York full-time until the pandemic, and thereafter periodically returned to the office in New York, it cannot be said that he was employed in New Jersey.

Accordingly, it is hereby:

ORDERED that the motion to dismiss is granted and the Complaint is dismissed.

<p><u>3/29/2023</u> DATE</p>	 _____ LORI S. SATTLER, J.S.C.																	
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