

Espinal v MPI Mgt. LLC

2023 NY Slip Op 33827(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 161177/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X

EDDY ESPINAL,

Plaintiff,

- v -

MPI MANAGEMENT LLC, ALEX LEVINE, KASHAWN
BRAXTON

Defendant.

-----X

INDEX NO. 161177/2022

MOTION DATE 03/20/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument which occurred on May 23, 2023 with Jesse Rose, Esq. appearing for Plaintiff Eddy Espinal (“Plaintiff”) and Stephen P. Pischl, Esq. appearing for Defendants MPI Management LLC d/b/a Olshan Properties (“Olshan”), Alex Levine and Ka’Shawn Braxton (collectively “Defendants”), Defendants’ Motion to dismiss Plaintiff’s Complaint is granted.

I. Background

Defendant Olshan manages a residential apartment building located at 60 West 76th Street in Manhattan (the “Property”) (NYSCEF Doc. 14 at p. 7). On July 5, 2022, Plaintiff began working for Defendant Olshan as a Superintendent of the Property (NYSCEF Doc. 2 at ¶12). Service Employees International Union, Local 32BJ (the “Union”), represents certain building service employees of Olshan’s, including Plaintiff, as their exclusive collective bargaining agent (NYSCEF Doc. 10. At ¶5). The terms and conditions of Plaintiff’s employment are governed by a collective bargaining agreement, the “2018 Resident Managers and Superintendents Agreement

between Realty Advisory Board on Labor Relations Incorporated and Service Employees International Union, Local 32BJ, Effective June 21, 2018 to June 20, 2022” (the “CBA”), negotiated between the Union and the Realty Advisory Board on Labor Relations, Inc. (the “RAB”) (NYSCEF Doc. 12).

Plaintiff’s employment was terminated effective September 12, 2022 (NYSCEF Doc. 14 at p. 6). In response to his termination, Plaintiff initiated an unfair labor practice charge before the National Labor Relations Board on September 23, 2022 (“NLRB”) (Case No. 02-CA-304031), alleging that he “reported hazardous work conditions and got fired” (NYSCEF Doc. 13 at P. 7).

On December 20, 2022 Plaintiff brought the instant workplace retaliation action against Defendants under New York Labor Law §740, claiming that his employment was terminated as retaliation for his reporting of what he contends were dangerous conditions at the Property relating to an ongoing asbestos abatement project (NYSCEF Doc. 2).

On March 20, 2023, Defendants brought the present motion to dismiss Plaintiff’s Complaint on the grounds of a defense founded upon documentary evidence and the Court’s lack of subject matter jurisdiction over the matter (NYSCEF Doc. 8 at p. 1). In support of the motion, Defendants filed the Affirmation of Stephen P. Pischl, Esq. (NYSCEF Doc. 10), and a Memorandum of Law (NYSCEF Doc. 14) on March 20, 2023. Plaintiff filed a Memorandum of Law in Opposition on March 28, 2023 (NYSCEF Doc. 15). On April 3, 2023, Defendants filed a Memorandum of Law in Reply (NSYCEF Doc. 20) and a Reply Affirmation of Stephen P. Pischl, Esq. (NYSCEF Doc. 21).

II. Discussion

Defendants move to dismiss Plaintiff’s Complaint on the grounds that: (1) pursuant to CPLR 3211(a)(1) a defense is founded upon documentary evidence; and (2) pursuant to CPLR

3211(a)(2) the Court does not have jurisdiction of the subject matter of the cause of action (NYSCEF Doc. 8).

A. Defendants' Motion to Dismiss Pursuant to CPLR 3211(a)(2) is Granted.

Pursuant to CPLR 3211(a)(2), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “the court has not jurisdiction of the subject matter of the cause of action.”

Section 7 of the National Labor Relations Act (“NLRA”) broadly guarantees employees the right to engage in “concerted activities for...mutual aid or protection” (29 U.S.C. §157). The First Department has construed this right to include “employee conduct aimed at protesting adverse working conditions” (*Hoesten v Best*, 34 AD3d 143, 154 [1st Dept 2006]). Further, employee complaints made on behalf of other union members are considered for “mutual aid and protection” even where “the complaints were made by... a union employee, and not by the “concerted activities” of the other employee-members themselves (*Hoesten* at 154).

It is well settled that “[w]here conduct is clearly protected or prohibited by the NLRA, the NLRB, and not the states, should serve as the forum for disputes arising out of the conduct” (*People v Amazon* 205 AD3d 485, 486 [1st Dept 2022]). Further, the First Department has held that Labor Law §740 claims “alleging retaliation against workers based, in part, on their participation in protests against unsafe working conditions plainly relate to the workers’ participation in concerted activities for the purpose of mutual aid or protection... are protected by the NLRA...and therefore...the claims are preempted” (*Id.*).

Plaintiff’s Complaint asserts a Labor Law §740 claim stating that “Defendants acted in an unlawful and retaliatory manner following Plaintiff’s objection to and refusal to act in accordance with Defendants’ violations of law which presented a substantial and specific danger to the public

health or safety and/or Plaintiff's refusal to participate in any such activity, policy or practice in violation of a law, rule or regulation" (NSYCEF Doc. 2 at ¶32).

The Court finds that Plaintiff's Complaint alleges retaliation based, at least in part, on his participation in protests against unsafe working conditions for the mutual aid and protection of other employees. Accordingly, "the NLRB, and not the states, should serve as the forum" for the dispute (*People v Amazon* at 486). Accordingly, Plaintiff's claims must be dismissed with no further analysis (*Id.* at 486).

Notwithstanding the above grounds for NLRB preemption, Plaintiff's claims are also preempted based on a close relationship between the controversy raised by Plaintiff in the instant action and the controversy raised by Plaintiff before the NLRB (*Latin Quarter Café, Inc. v. Am. Guild of Variety Artists*, 300 NYS2d 753 [1st Dept 1969]). The First Department has held that "inasmuch as the subject matter of [an] action involves a labor dispute which is the subject of charges pending before the NLRB, exclusive primary jurisdiction over the matters in controversy belongs to the board" (*Id.* at 753). Plaintiff's September 23, 2022 NLRB action alleges that Plaintiff "reported hazardous work conditions and got fired" (NYSCEF Doc. 13 at p. 7). Because Plaintiff's NLRB action involves the same labor dispute at issue in the present action, the NLRB has exclusive primary jurisdiction over the matter, and this court's jurisdiction is preempted (*Id.* at 753).

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B. Defendants' Motion to Dismiss Pursuant to CPLR 3211(a)(1) is Granted.

Pursuant to CPLR 3211(a)(1), 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.”

Even if, *arguendo* and contrary to law and fact, the Court was to deny dismissal on the grounds of preemption, Plaintiff's Complaint must also be dismissed for failure to abide by required conditions precedent imposed by the CBA.

In the CBA, the Union explicitly agreed on behalf of its members to arbitration “as the sole and exclusive remedy” for “claims of workplace discrimination, harassment and retaliation as covered in the No Discrimination Clause” (NYSCEF Doc. 12 at p 8). Specifically, the No Discrimination Clause, which is found in Section 15(A) of the CBA, states that

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. Section 1981, Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Code, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination (NYSCEF Doc. 12 at pp. 7-8)

Further, Section 15(B) of the CBA contains a protocol (the “Protocol”) for processing such covered claims and outlines a “system of mediation and arbitration [that is] applicable to all such Covered Claims, whenever they arise” (NYSCEF Doc. 12 at p. 9). While the Protocol provides an avenue for an employee to attempt to bypass the mandatory arbitration proceedings and pursue claims directly in state or federal courts, CBA Section 15(B)(4) specifies that

it is a mandatory prerequisite before any bargaining unit member attempts to file a Covered Claim in any court that the bargaining unit member...notify in writing the RAB and the Employer that the Employee is attempting to bypass the protocol. The notice required by this section (the "Bypass Notice") shall specify the Covered Claim(s) alleged with sufficient detail, the court where the action is to be filed, and the reason(s) for attempting to bypass the Protocol process...Providing the Bypass Notice is a condition precedent prior to bringing a Covered Claim in any forum (NYSCEF Doc. 12 at p. 12).

Section 15(B)(4)(b) of the CBA further states that "[a]bsent compelling good cause, the Bypass Notice must be mailed by first-class certified mail, return receipt requested at least 60 days before the bargaining unit member plans to commence a lawsuit in any court" (NYSCEF Doc. 12 at p. 16).

In this case, Plaintiff commenced his claim alleging workplace retaliation on December 20, 2022 and failed to plead or allege that he complied with the required Bypass Notice requirements before commencing suit (NYSCEF Doc. 2). As Plaintiff's has failed to adhere to the CBA prerequisites required before any bargaining unit member may attempt to file such a claim in any court, Plaintiff's Complaint must be dismissed in its entirety.

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Accordingly, it is hereby,

ORDERED that Plaintiff Eddy Espinal's complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

10/26/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | |
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| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |
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