Landry v K&A Engg. Consulting P.C.
2024 NY Slip Op 35583(U)
April 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 60841/2022
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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BRYAN LANDRY,

Plaintiff,

– against –

K&A ENGINEERING CONSULTING P.C. and PURNA KHAREL INDIVIDUALLY,

Defendants.

-- x

Index No.: 60841/2022

Motion Seq. 002

DECISION & ORDER

In this underlying action alleging unlawful retaliation in violation of the New York Labor Law, plaintiff Bryan Landry moves, pursuant to CPLR 3211 (b) to strike all of defendants' affirmative defenses.

Papers Considered **NYSCEF DOC NO. 19-26; 76-82**

1. Notice of Motion/Affirmation of Dylan James Wiley, Esq./Memorandum of Law/Exhibits 1-3
2. Affirmation of Purna Kharel in Opposition/Exhibits A-E/Memorandum of Law in Opposition

FACTUAL AND PROCEDURAL BACKGROUND

The Court assumes the familiarity with the record and the relevant facts are as follows: This action was commenced with the filing of the summons and complaint on May 16, 2022. Defendant K&A Engineering Consulting, P.C. and defendant Purna Kharel, individually (collectively, defendants) joined issue with the filing of their answer, affirmative defenses and counterclaim on July 22, 2022. The Corporate Defendant is an engineering firm with over 350 employees that specializes in electric power delivery and energy engineering. Kharel is the President and Chief Executive Officer of the Corporate Defendant. The complaint alleges that plaintiff was employed by defendants from March 2020 through March 2022 and that plaintiff was employed as Head of Finance.

According to plaintiff, Kharel advised plaintiff that in order for plaintiff to keep his employment with defendants, plaintiff would have to submit falsified financial revenue projection to Signature Bank. Plaintiff advised defendants' employees that he refused to submit the falsified documentation. He also advised defendants' employees, among other things, that he would report defendants' actions to the appropriate agencies if defendants did not take steps to correct the violations. Plaintiff was subsequently terminated in February 2022.

The complaint sets forth two causes of action for retaliation under the New York Labor Law (NYLL or Labor Law). The first cause of action, retaliation in violation of NYLL 215, states that plaintiff was terminated in response to complaining about unlawful practices. The second cause of action, retaliation in violation of NYLL 740 (known as the Whistleblower Law), alleges that defendants wrongfully terminated plaintiff's employment in response to plaintiff's threat of reporting defendants' purported financial fraud. Among other requested relief, plaintiff is seeking lost wages, benefits and damages allowable as provided for in NYLL 215 and NYLL 740.

The answer contains 11 affirmative defenses and one counterclaim for conversion. The answer admits that plaintiff sent an email on February 11, 2022, however, defendants allege that the email asserted false and erroneous accusations against defendants. Defendants claim that plaintiff's termination was lawful and nonretaliatory, as plaintiff was terminated for performance reasons and prior to making any complaints of any alleged illegal activity. The answer states that plaintiff was told on February 1, 2022 that his employment with defendants would be terminated and that defendants met with plaintiff over the next couple of weeks to discuss the terms of the separation and proposed severance agreement.

With respect to the counterclaim for conversion, defendants allege that plaintiff was provided with a new laptop in November 2021. Although defendants requested for plaintiff to return the older laptop, he has yet to do so. After plaintiff was formally terminated on February 14, 2022, he was again asked to return the computer equipment. Plaintiff to date, has still not returned any of the computer equipment. The laptops allegedly contain proprietary and confidential business information. Defendants allege that plaintiff improperly retained their property, and are seeking damages in return.

Plaintiff moves to strike the defendants' affirmative defenses within its answer. Plaintiff argues that the documentary evidence shows that plaintiff was terminated on February 14, 2022, subsequent to his complaint on February 11, 2022. Although the termination letter is redacted, th letter advised plaintiff that he was terminated as of February 14, 2022. According to plaintiff, the letter further states, "[a]s you were informed on [February 14, 2022], we have decided to immediately terminate your employment." As a result, affirmative defenses alleging that plaintiff was terminated for a nonretaliatory reason prior to the assertion of false accusations, are contradicted by the documentary evidence and should be dismissed. Plaintiff also argues that the affirmative defenses should be dismissed as they fail to give plaintiff proper notice of the transactions and occurrences to support the defense.

In opposition to plaintiff's motion, defendants submit the affirmation of Kharel, the president and CEO. Kharel states that defendants had decided to terminate plaintiff in January 2022. According to Kharel, plaintiff was advised on January 31, 2022 that his work product was falling below expectations and that he would not be able to stay in his current position of Director of Finance. Kharel affirms that he had offered plaintiff the possibility of a temporary transitional consulting role but made it clear that he would be removed from the Director of Finance role. Human Resources allegedly spoke with plaintiff on February 1, 2022 about the terms of the separation. On February 11, 2022, plaintiff sent an email to defendants, including defendants' General Counsel, alleging that he had been instructed to submit falsified information, otherwise be terminated. General Counsel allegedly investigated these allegations but did not find any merit. Plaintiff subsequently purportedly attempted to extort defendants by seeking an exorbitant severance payment and/or threatening legal action. Kharel states that defendants subsequently decided that it would no longer offer plaintiff a transitional role and must terminate him effective immediately.

DISCUSSION

Pursuant to CPLR 3211 (b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On a motion to dismiss affirmative defenses pursuant to CPLR 3211 (b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law. *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 (2d Dept 2006). Further, "a defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *Warwick v Cruz*, 270 AD2d 255, 255 (2d Dept 2000).

For the sake of brevity, the defense, the parties' arguments regarding the defense, and the Court's position, will be set forth one after another.

The first affirmative defense asserts that the complaint fails to state a claim. Even though this is "mere surplusage," this affirmative defense is not dismissed, "because failure to state [a claim] may be asserted at any time even if not pleaded . . . ." *San-Dar Assoc. v Fried*, 151 AD3d 545, 545-546 (1st Dept 2017) (internal quotation marks and citations omitted).

The second affirmative defense asserts that plaintiff's claims are barred, in whole or in part, by the doctrines of unclean hands, bad faith, estoppel, acquiescence, consent, and/or release. Defendants do not plead any facts to support these defenses in the answer. However, in response to plaintiff's motion, defendants address the defenses of unclean hands and bad faith.

Accordingly, at the outset, the defenses of estoppel, acquiescence, consent, and/or release are dismissed, as they "merely plead conclusions of law without any supporting facts." *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, (2d Dept 2008). The defense of unclean hands is also dismissed, as "the doctrine of unclean hands is an equitable defense that is unavailable where, as here, the action is exclusively for damages." *Greco v Christoffersen*, 70 AD3d 769, 771 (2d Dept 2010).

Defendants assert that plaintiff acted in bad faith by allegedly attempting to extort defendants for a higher severance. Kharel affirms that plaintiff's "accusations in the February 11, 2022 Email Complaint are false, and upon information and belief, were made by Plaintiff in a deliberate effort to extort money from and interfere with K&A's business." Courts have held that a defense should not be stricken where there are "triable issues of fact." *Jacob Marion, LLC v Jones*,168 AD3d 1043, 1045 (2d Dept 2019). Accordingly, at this time, the affirmative defense of bad faith is not dismissed. *Compare Robbins v Growney*, 229 AD2d 356, 357 (1st Dept 1996) ("In this affirmative defense, defendants set forth no factual basis for the allegations of laches or bad faith and merely allege that the allegations in the complaint are untrue").

The third affirmative defense sets forth that plaintiff's claims fail because defendants terminated plaintiff's employment for a lawful, non-retaliatory reason, and there exists no actual case or controversy.

This affirmative defense is dismissed as duplicative of the first and fourth affirmative defenses.

The fourth affirmative defense states that the complaint is barred, as defendants terminated plaintiff's employment for a lawful, non-retaliatory reason prior to plaintiff's assertion of false accusations against defendants which form the erroneous basis for the claims herein, and there exists no actual case or controversy. Plaintiff argues that this affirmative defense should be struck as it is flatly contradicted by documentary evidence. Plaintiff points to the termination letter, which was dated after plaintiff allegedly complained to defendants. The letter purportedly advised plaintiff that he was terminated as of February 14, 2022. Further, the letter states that he was informed on February 14, 2022 that defendants have decided to immediately terminate his employment.

Defendants' answer proffers that plaintiff was terminated on February 1, 2022. In opposition to plaintiff's motion, defendants submit the affirmation of Kharel, along with their own documentary evidence to support their allegation that plaintiff was terminated for performance reasons and prior to complaining about his whistleblower complaint. It well settled that "[o]n a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems." *Sargiss v Magarelli*, 12 NY3d 527, 531 (2009). As previously noted, Kharel affirms that defendants had decided to terminate plaintiff in January 2022 and that he was advised on January 31, 2022 that his work product was falling below expectations and that he would not be able to stay in his current position of Director of Finance. Human Resources allegedly spoke with plaintiff on February 1, 2022 about the terms of the separation. On February 11, 2022 plaintiff sent an email to defendants, including to defendants' General Counsel, alleging that he had been instructed to submit falsified information or be terminated. Accordingly, in light of defendants' assertions, plaintiff has not met his burden to demonstrate that this affirmative defense is without merit as a matter of law.

The fifth affirmative defense alleges, in sum and substance, that plaintiff failed to allege sufficient facts to render plausible the assertion that he reasonably believed defendants engaged in a violation of law, rule or regulation or posed a substantial and specific danger to the public health or safety.

However, this defense is dismissed, as plaintiff provides facts, including purported dates and other details, related to this claim.

The sixth affirmative defense states that the complaint is barred in whole or in part as the alleged activity or conduct plaintiff accuses defendants of engaging in, which defendants expressly deny, does not violate or implicate any federal or state law or regulation, or pose a substantial and specific danger to the public health or safety.

While this affirmative defense is not artfully plead, the Court will allow it to remain at this time because Kharel affirms that plaintiff's accusations about having to submit falsified financial data are false. Courts have held that "if there is any doubt as to the availability of a defense, it should not be dismissed." *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 (2d Dept 2008).

The seventh affirmative defense states that Plaintiff s claims are barred, in whole or in part, due to his failure to mitigate damages.

This affirmative defense is dismissed, as defendants which merely plead conclusions of law without any supporting facts. To the extent defendants claims that dismissal of this affirmative defense is premature, defendants are granted leave to replead the seventh affirmation defense, if supported, after completion of discovery.

The eight affirmative defenses states that plaintiff's monetary claims should be barred, as plaintiff has not suffered any injury or damage as a result of any actions allegedly taken by defendants. For example, upon termination of employment, plaintiff was compensated for time worked and accrued.

This affirmative defense is dismissed. Although plaintiff received this compensation, plaintiff has consistently sought additional monetary damages. To the extent that defendants claim that the termination was lawful, this defense is covered under other affirmative defenses. *See e.g. Emigrant Bank v Myers*, 147 AD2d 1027, 1028 (2d Dept 2017) ("The plaintiff demonstrated, prima facie, that the affirmative defenses and counterclaims were without merit or merely duplicative. In opposition, the defendant failed to raise a triable issue of fact").

The ninth affirmative defense states that to the extent plaintiff has suffered injury, which defendants deny is the result of any actions allegedly taken by defendants, any such injury is the result of acts or omissions of the plaintiff, and not any act or omission of defendants. Defendants provided a generalized response in opposition to dismissal of the third, fourth, fifth, sixth, eight, ninth and tenth affirmative defenses; namely that the plaintiff was terminated for nonretaliatory reasons. Accordingly, the ninth affirmative defense is dismissed as duplicative of the other defenses and also for lacking the supporting facts particular to this affirmative defense.

The tenth affirmative defense states that all actions taken by defendants with respect to plaintiff were non-retaliatory, were based on sound business judgment, were not arbitrary, and were undertaken in good faith and in compliance with the New York Labor Law. As previously stated, the answer and defendants' opposition provides support for this affirmative defense, and it is not dismissed at this time.

The eleventh affirmative defense states that plaintiff is not entitled to damages or attorney's fees because plaintiff acted in bad faith by asserting false and derogatory accusations against defendants as retribution for the lawful termination of his employment and then instituted this lawsuit, in a transparent effort to damage the reputation of defendants and extract a settlement.

Defendants do not address this defense in response to plaintiff's motion. Further, this affirmative defense appears to be a combination of bad faith and failure to state a claim, which remain as affirmative defenses. Accordingly, the eleventh affirmative defense is dismissed as duplicative.

All other arguments raised on this motion by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion to strike affirmative defenses is granted in part, such that the second (except for the affirmative defense of bad faith), third, fifth, seventh, eighth, ninth, and eleventh affirmative defenses are dismissed; and it is further

ORDERED that plaintiff's motion to strike affirmative defenses is denied with respect to the remainder of the affirmative defenses; and it is further

ORDERED that to the extent defendants claim that dismissal of the seventh affirmative defense is premature, defendants are granted leave to replead the seventh affirmation defense, if supported, after completion of discovery.

The parties are reminded of their upcoming virtual trial readiness conference scheduled for April 26, 2024 at 12:00 p.m.

Dated: White Plains, New York
April 17, 2024

HON. WILLIAM J. GIACOMO, J.S.C.