Week Publs., Inc. v Hernandez
2016 NY Slip Op 32606(U)
December 20, 2016
Supreme Court, New York County
Docket Number: 654007/2015
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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THE WEEK PUBLICATIONS, INC.,

Plaintiff, Index No. 654007/2015

- against -

SERGIO HERNANDEZ,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, plaintiff The Week Publications, Inc. ("TWPI") moves to dismiss the counterclaims of defendant Sergio Hernandez ("Hernandez") in its entirety, pursuant to CPLR 3211[a][7].

For the reasons set forth below, the Court grants TWPI's motion to dismiss on the ground that Hernandez failed to state a cause of action under New York Labor Law §§ 650, 215, and the supporting New York State Department of Labor ("NYCDOL") regulations.

Background

According to the complaint, TWPI is a media company that publishes *The Week*, a weekly magazine. Hernandez started working at TWPI in January 2013 as a senior editor, and maintained this position until he was discharged in April 2015. In January 2014, TWPI announced that it would compensate employees from the editorial department, wherein Hernandez worked, for each unobserved company holiday ("Holiday Pay") by paying employees in

cash, equal to their pro-rate daily rate ("day rate"). TWPI did not memorialize this arrangement in writing.

In August 2014, Hernandez allegedly inadvertently received confidential and sensitive information when he borrowed a company flash-drive from one of TWPI's on-site information technology ("IT") support professionals. Hernandez then copied this information onto his personal computer.

In September 2014, Hernandez, with the confidential information in mind, sought to negotiate a five percent increase in salary, raising his base salary to $57,750.08, which was to be applied to his regular earnings but not his miscellaneous earnings. In September 2014, Hernandez also complained to management that TWPI miscalculated his Holiday Pay. After several discussions, TWPI agreed to recalculate Hernandez's Holiday Pay.

Subsequently, Hernandez notified an IT professional employed at TWPI that the flash drive he received contained confidential files. On April 7, 2015, while meeting with the IT professional's supervisor, TWPI's CFO, and William Falk ("Mr. Falk"), the editor-in-chief for TWPI's Editorial Department, Hernandez admitted that he copied confidential files belonging to TWPI and agreed to destroy them. On April 10, 2015, TWPI terminated Hernandez's employment.

Hernandez filed an Unfair Labor Charge with the National Labor Relations Board ("NLRB") and subsequently filed a second

amended Unfair Labor Charge on November 30, 2015. Thereafter, on December 3, 2015, TWPI commenced this action, seeking injunctive relief and asserting claims for breach of fiduciary duty, breach of duty of loyalty, and breach of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. On February 15, 2016, Hernandez filed an answer with counterclaims, asserting claims for withholding wages, retaliation, and post-termination retaliation (this action) under New York Labor Law § 215.

Discussion

TWPI moves to dismiss Hernandez's counterclaims in their entirety for his failure to state a cause of action under CPLR 3211(a)(7).

In deciding a motion to dismiss under CPLR 3211[a][7], this Court must consider whether the complaint states a cause of action (*Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]). The Court must accept the facts as alleged to be true and to simply determine whether the [Defendant's] facts fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481 [NY 1980])(internal quotations omitted).

New York Labor Law § 650 provides that insufficient wage practices be eliminated as "rapidly as practicable without substantially curtailing opportunities for employment or earning power." NY Lab Law § 650. Under this provision, qualifying employees must be paid one and a half times the basic minimum

hourly rate for all hours worked in excess of a forty-hour work week (*Andryeyeva v New York Health Care, Inc.*, 45 Misc3d 820 [Sup Ct, Kings County, 2014]). The statute exempts employees employed "in a bona fide professional capacity" (NY Lab Law § 651[5][c]). Employment in a bona fide professional capacity includes work by an individual:

> (a) whose primary duty consists of the performance of work: requiring ... original and creative in character in a recognized field of artistic endeavor... and the result of which depends primarily on the invention, imagination or talent of the employee; and
> (b) whose work requires the consistent exercise of discretion and judgment in its performance;
> © whose work is predominantly intellectual and varied in character...

(NY Comp. Codes R. & Regs. tit. 12, § 142-2.14).

The issue is whether Hernandez was employed in a bona fide professional capacity, and is thus exempted from protection under the statute. TWPI asserts that Hernandez was employed in a professional capacity as he exercised significant discretion over his work. The moving papers assert that Hernandez's primary job duties "include pitching, researching, and writing twenty stories totaling approximately 2,647 words each week for *The Week's* three page business section and occasional items for other sections of the Week on a needs basis" (*See* Brooks Aff. Exh. 4 at p. 4 ¶7). Hernandez does not dispute this description. As such, New York Labor Law § 650 is inapplicable to the current matter. Even if New York Labor Law § 650 were to apply, Hernandez fails to allege

that TWPI violated the statute by depriving him of Holiday Pay.

At most, Hernandez's description of Holiday Pay meets the definition of a discretionary bonus and not a wage under New York Labor Law. A discretionary bonus which is based on other factors other than an employee's part-performance does not constitute wages under New York Labor Law (*Barber v Deutsche Bank Sec., Inc.*, 103 AD3d 512 [1st Dept 2013]). Because it was not set forth in writing and was simply an additional payment that TWPI gave to its exempt employees, Hernandez's Holiday Pay does not constitute "wages" under New York Labor Law (*Hunter v Deutsche Bank AG, New York Branch*, 56 AD3d 274 [1st Dept 2008]). Similarly, a decision to provide Holiday Pay does not serve as a conditional promise, but instead is a discretionary bonus imposing no obligation on the employer (*UBS Sec. LLC v RAE Sys. Inc.*, 101 AD3d 510 [1st Dept 2012]).

Here, Hernandez alleges that Holiday Pay constitutes wages for actually rendered labor and services, as the Holiday Pay serves as compensation for work actually performed. However, Hernandez does not allege that he was hired with the expectation of paid holidays. Holiday Pay was simply a bonus to reward employees for their hard work.

New York Labor Law § 215 also prohibits an "employer" from retaliating against an "employee" for participating in protected activities (*Widgor v SoulCycle*, LLC, 139 AD3d 613 [1st Dept

2016]). New York Labor Law § 215 provides that "no employer ..., or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has made a complaint to his or her employer... or to any other person that the employer has violated any provision of this chapter" (NY Lab Law § 215).

Another issue is whether Hernandez was terminated for engaging in a protected activity under New York Labor Law. A plaintiff must plead that while employed by the defendant, plaintiff made a complaint and as a result, suffered an adverse employment action (*Day v Summit Sec. Serv. Inc.*, 53 Misc3d 1057 [Sup Ct, NY County 2016]). Thus, relief under New York Labor Law § 215 requires that a plaintiff allege that he made a complaint about his or her employer's alleged violation of the statute, and was terminated or subject to adverse employment action as a result (*Castagna v Luceno*, 2011 WL 1584593, *12 [SDNY 2011]).

Hernandez claims that immediately after he filed an amended Unfair Labor Practice Charge with the NLRB, TWPI filed the instant action. However, the NLRB's findings indicate that Hernandez's was dismissed after TWPI learned of his access to and use of confidential and sensitive information. Moreover, NLRB has exclusive jurisdiction over claims involving retaliation and protected activities (*San Diego Building Trades Council v Garmon*, 359 US 236, 244 [1959]).

In addition, the retaliatory act must occur while the individual is an employee of the employer (NY Lab Law § 215). Employee is defined as "any individual employed or permitted to work by an employer in any occupation..." (NY Lab Law § 651[5]). Here, the alleged retaliatory act of bringing this action occurred approximately six months after Hernandez was terminated, and therefore he was no longer employed by or permitted to work for TWPI. Thus, Hernandez has failed to allege TWPI's specific violations of a section of New York Labor Law.

Further, there is insufficient causal nexus between the protected activity of complaining about monies allegedly owed and the adverse action of filing a complaint (*Diaz v New York State Catholic Health Plan,* 133 AD3d 473 [1st Dept 2015]). TWPI's complaint alleges that Hernandez knowingly and secretly copied confidential files, and does not even touch on the contested issue of Holiday Pay.

Hernandez argues that once he complained to TWPI about his allegedly owed Holiday Pay, he was reprimanded numerous times for showing up late to work, taking two weeks vacation, and other aspects of his job performance. These actions, although they occurred while Hernandez was employed by TWPI do not rise to the level of retaliation, and therefore do not create a cause of action under the statute. Thus, Hernandez fails to allege a causal nexus between the reprimands Hernandez received and his

complaints regarding Holiday Pay. Hernandez's failure to assert any legally cognizable injury warrants dismissal.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted.

DATED: December 20, 2016

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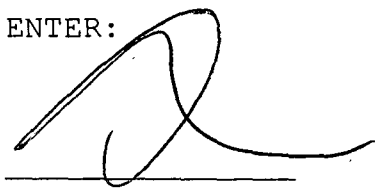

J.S.C.

CHARLES E. RAMOS