SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** 28M

Justice

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JAMES REGAN,

Plaintiff,

- v -

STREAMLINE USA, LLC, ERIC ORTENSE, LIAM TREANOR, and ORIN ZELENAK,

Defendants.

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INDEX NO. 157306/2020

MOTION DATE 03/03/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for an alleged violation of *Labor Law §215*, defendants, Streamline USA, LLC (Streamline), Eric Ortense (Ortense), Liam Treanor (Treanor) and Orin Zelenak (Zelenak) (collectively, defendants), move, pursuant to *CPLR §3212*, for summary judgment dismissing the complaint. Plaintiff James Regan opposes the motion, and defendants filed a reply affirmation.

Background

Defendant Streamline, a New York limited liability company, is a construction management and general contracting firm that maintains its principal place of business in New York County. (*NYSCEF Doc No. 94, plaintiff's response to defendants' statement of material facts, ¶ 1; NYSCEF Doc No. 68, Treanor aff, Ex B, ¶ 4*). Defendant Ortense is Streamline's chief executive officer. Defendant Treanor is Streamline's chief operating officer. Defendant Zelenak are Streamline's and chief financial officer. (*NYSCEF Doc No. 94, ¶¶ 2-4*). Streamline hired plaintiff James Regan in August 2015, and promoted him to the position of "Resource and Logistics Manager" in February 2016. (*Id.*, ¶ 5).

On August 24, 2018, Streamline, as "Client" or "Client Company," entered into a "Client Leasing Agreement" (the leasing Contract) with nonparty, South East Personnel Leasing, Inc. ("South East Personnel Leasing") whereby South East Personnel Leasing would furnish staffing, payroll, and human resources services to Streamline in exchange for a service fee. (*NYSCEF Doc No. 69, Treanor aff, Ex C at 1*). South East Personnel Leasing is a Florida corporation, (*NYSCEF Doc No. 67, ¶ 40*) and is registered in New York as a "professional employer company." (*NYSCEF Doc No. 94, ¶ 10*). South East Personnel Leasing's services included the "[p]ayment of wages to Leased Employees to the extent required by applicable law and preparation, administration, compilation, and filing of all payroll information and distribution of payroll checks to Leased Employees from South East Personnel Leasing's own accounts following invoicing and payment of Client of Service Fee." (*Id).*

Procedural History

Plaintiff commenced this action on September 10, 2020, by filing a Summons and Complaint asserting a single cause of action for retaliation, an alleged violation of *Labor Law*

§215. The complaint alleges that "plaintiff reasonably believed that it was illegal for defendants, through stealth and deception, to misrepresent the South East Personnel Leasing, Inc documents as merely a change in payroll companies," and that it was illegal under *Labor Law §191* for defendants to withhold plaintiff's wages. (*Id.*, ¶¶ 65-67). The complaint further alleges that plaintiff's complaints about alleged violations of the Labor Law were a motivating factor in his termination. (*Id.*, ¶ 68).

Defendants interposed an Answer asserting several affirmative defenses, including a seventh defense that plaintiff was an at-will employee and a fifteenth defense that defendants did not engage in retaliatory conduct. (*NYSCEF Doc No. 68, ¶¶ 17 and 25*).

Defendants now move for summary judgment dismissing the complaint on the grounds that defendants did not violate any provision of the Labor Law, the plaintiff has not identified a Labor Law violation and defendants did not take any adverse employment actions against him. In support of the motion, defendants submit, *inter alia*, an affidavit from defendant Treanor, Streamline's chief operating officer, the employer agreement, referred to as the "South East Personnel Leasing, Inc. Contract," an unsigned employment application and agreement, text messages between defendant Treanor and plaintiff, as well as the New York State Department of Labor Unemployment Insurance Notice of Potential Charges addressed to Streamline regarding the plaintiff.

In opposition, plaintiff contends, *inter alia*, that the motion is premature as discovery is incomplete. Plaintiff further argues, *inter alia*, that he is not required to plead a specific Labor Law violation to state a claim under *Labor Law §215*. Plaintiff argues that that he had a reasonable, good faith belief that defendants had violated *Labor Law §191*, that defendants withheld his wages the day after he complained that Streamline's use of South East Personnel Leasing, Inc. was illegal, and that he was terminated because he complained that he had not been paid. Plaintiff submits his own affidavit, text messages between plaintiff and defendants, and various discovery demands and responses.

Discussion

A party moving for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The motion must be supported by evidence in admissible form. *See, Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980), and by the pleadings and other proof such as affidavits, depositions, and written admissions. *See, CPLR §3212*. Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

In this action, the plaintiff filed a complaint for a single cause of action for retaliation under *NYLL §215*. Under *Labor Law § 215(1)(a)*, which provides, in relevant part, that:

> "No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer … or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter."

Labor Law § 215(1)(a).

Pursuant to *Labor Law §215(1)(a)*, "[a]n employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section." *Labor Law §215(1)(a)*. Thus, an informal complaint is enough to trigger the statute's protection. *See, Duarte v. Tri-State Physical Med. & Rehabilitation, P.C.*, 2012 WL 2847741, *3, 2012 US Dist LEXIS 96249, *10 (SD NY, July 11, 2012, No. 11 Civ. 3765 (NRB)). The "complaint to the employer [must] be of a colorable violation of the statute." *Mitchell v. Ceros, Inc.*, 2022 WL 748247, *7, 2022 US Dist LEXIS 43262, *22 (SD NY, Mar. 10, 2022, No. 21 Civ. 1570 (KPF)) [*internal quotation marks and citation omitted*].

In addition, under *Labor Law §215*, the plaintiff must plead that he or she was engaged in a protected activity, that the employer was aware the plaintiff had participated in a protected activity, and that the plaintiff was subjected to an adverse employment action. *See, Day v. Summit Sec. Servs. Inc.*, 159 A.D.3d 549, 550 (1st Dep't 2018). In response to a complaint, the employer must have taken an adverse action that disadvantaged the plaintiff. *See, Kassman v. KPMP LLP*, 925 F Supp 2d 453, 472 (SD NY 2013). There must also be a causal connection between the plaintiff's complaint and the adverse employment action. *See, Petrisko v. Animal Med. Ctr.*, 187 A.D.3d 553, 554 (1st Dep't 2020). Retaliation claims brought under *Labor Law §215* are analyzed under the burden-shifting framework where once the plaintiff employee establishes a *prima facie* case of retaliation, the defendant employer "bears the burden of articulating a legitimate, non-retaliatory reason for its actions. If it does so, the plaintiff must then produce evidence that the non-retaliatory reason 'is a mere pretext for retaliation'" *DeLuca v Sirius XM Radio, Inc.*, 2017 WL 3671038, *23, 2017 US Dist LEXIS 127278, *68-69 [SD NY, Aug. 7, 2017, No. 12-cv-8239 (CM)] [same]).

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), *citing*, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). While an at-will employment relationship may be terminated for any reason or no reason at all, plaintiff has alleged that he was terminated shortly after he complained about having not been paid. *Villarin v. Rabbi Haskel Lookstein School*, 96 AD3d 1, 2 (1st Dep't 2012). Plaintiff alleges in the complaint that defendants' failure to pay his wages constituted a violation of *Labor Law §191* and that his complaints were a motivating factor in the decision to terminate him. (NYSCEF Doc No. 67, ¶¶ 66-68). As is relevant here, *Labor Law §191* regulates the frequency of payments made by an employer to its employees. *See, Gutierrez v. Bactolac Pharm., Inc.*, — AD3d —, 2022 NY Slip Op 06233, *3 (2d Dep't 2022).

According to his affidavit, plaintiff complained about his missing wages for the first time on September 14, and after he complained a second time on September 17 about not having been paid, he was terminated that same day. (NYSCEF Doc No. 78, ¶¶ 22 and 24). Plaintiff submits that he "was never given the option to either accept employment with South East Personnel Leasing, and keep my job or quit." (NYSCEF Doc No. 78, ¶ 16). To the contrary, defendant Treanor contends that he notified Streamline's employees that as of August 24, 2018, Streamline would no longer maintain employees on its payroll, and those who wished to continue working at Streamline would have to sign an employment agreement with South East Personnel Leasing. (NYSCEF Doc No. 65, ¶¶ 16 and 22). Defendant Treanor also states that "under Streamline's agreement with South East Leasing, Streamline was not allowed to employ any individuals or issue payment of wages directly to any employees." (*Id.*, ¶ 17).

In viewing the facts in the light most favorable to plaintiff, the motion for summary judgment is denied. *See, Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011). Here, this

Court finds it appropriate to deny this summary judgment motion since depositions have not yet been held in this case. *See, Nick's Poultry, Inc. v. Seaman Radio Dispatcher, Inc.*, 198 A.D.3d 462, 463 (1st Dep't 2021) [denying a summary judgment motion where the motion was made before deposition had been taken]; *see also*, *Marabyan v. 511 W. 179 Realty Corp*., 165 A.D.3d 581, 582 (1st Dep't 2018). Under the burden-shifting framework used to evaluate *Labor Law § 215* claims, once the plaintiff employee establishes a *prima facie* case of retaliation, the defendant employer "bears the burden of articulating a legitimate, non-retaliatory reason for its actions. If it does so, the plaintiff must then produce evidence that the non-retaliatory reason 'is a mere pretext for retaliation'." *See*, *DeLuca*, *supra*. Here, the plaintiff has not had an opportunity to depose any of the defendants to ascertain whether their proffered reason for terminating him was legitimate, and plaintiff should be allowed to complete those depositions.

Accordingly, it is hereby

ORDERED that the motion of defendants Streamline USA, LLC, Eric Ortense, Liam Treanor and Orin Zelenak for summary judgment to dismiss pursuant to *CPLR §3212* is denied as premature; and it is further

ORDERED that the parties shall proceed with all further discovery expeditiously and in good faith; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

This Constitutes the Decision/Order of the Court.

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12/9/2022
DATE

LISA S. HEADLEY, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED		[ ] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE