SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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GINA DELUCIA,

Plaintiff,

-against-

VITO ABBONDANDOLO, CPA, P.C., AND VITO ABBONDANDOLO, INDIVIDUALLY,

Defendants.

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TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 005793-10

MOTION SEQ. NO:2

SUBMIT DATE:1/2/13

The following papers having been read on this motion:

Notice of Motion.....1
Memorandum of Law.....2
Opposition.....3
Reply.....4

The defendants, Vito Abbondandolo, CPA, P.C. and Vito Abbondandolo, Individually [hereinafter the Abbondandolo defendants], move pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint (Sequence #002).

In November of 1999, the plaintiff was hired by St. Luke's Episcopal Church [hereinafter St. Luke's] as a part-time bookkeeper (*see* DeVito Affirmation in Support at Exh. D at pp. 36,37,38). In the *interim*, on or about October 2, 2000, the plaintiff procured a second part-time job as an accountant with the Abbondandolo defendants (*id.* at A at ¶4; Exh. D at pp. 39, 40,42). During the course of this concurrent employment, the plaintiff was considered a 1099 independent contractor (*id.* at Exh. D at pp. 38,40,42). On July 21, 2009, the plaintiff was laid off from her position at St. Luke's due to budgetary constraints and as a consequence thereof filed a claim for unemployment benefits on August 3, 2009 (*id.* at pp. 67,75,76).

Subsequent to the plaintiff filing for unemployment, the defendants herein received various notifications from the New York State Department of Labor [hereinafter NYSDOL], including a Request for Employment and Wage Data, in response to which Mr. Abbondandolo informed the

NYSDOL that the plaintiff was "paid via 1099"and was still employed in his office (*see* DeVito Affirmation in Support at ¶ 64; Exh. D). Thereafter, by letter dated, September 22, 2009, the Unemployment Insurance Division of the NYSDOL requested additional information to determine whether the plaintiff "was actually an employee or an independent contractor"(*id.* at ¶¶65,68; Exh. D). By letter dated, October 16, 2009, the NYSDOL informed Mr. Abbondandolo that after reviewing all relevant documentation it had determined that the plaintiff was an "employee" and as a result, he would be required "to submit amended quarterly reports and pay contributions on the earnings of Gina Delucia and all other persons similarly employed beginning with at least the first quarter of 2006" (*id.* at Exh. D). Several weeks later, between November 17 and December 7, 2009, the plaintiff received a series of emails from Mr. Abbondandolo, the first three of which informed her that her hours would be reduced and the last of which informed her that for "economic reasons" her employment had been terminated (*id.* at Exh. A at ¶12;Exh. D at pp. 149,150,151,154-157,161).

On March 23, 2010, the plaintiff commenced the underlying action alleging that the reduction in her hours, as well as her ultimate termination collectively constitute impermissible retaliation under Labor Law §215 and that said actions were deliberately undertaken by the defendants as a result of her having instituted a claim for unemployment benefits (*id.* Exh. A at ¶¶6,12,14,14). The defendants' within application for summary judgment thereafter ensued and is determined as set forth hereinafter.

In support of the instant application, counsel contends that given the plaintiff's status as an at will employee, the defendants were free to terminate her employment at any time and for any reason (*see* DeVito Affirmation in Support at ¶¶88,89). Counsel further argues that as the plaintiff never made any complaints to a governmental agency that Mr. Abbondandolo violated specific provisions of the Labor Law coupled with the plaintiff's failure to adequately allege in precisely what manner Mr. Abbondandolo engaged in retaliatory conduct, the within action must be dismissed (*id.* at ¶¶ 95,100-107,109,110, 119). In addition to the foregoing, counsel asserts that the plaintiff's termination was strictly based upon economic necessity and was not in any respect pretextual (*id.* at ¶¶121-129). Finally, counsel contends that no liability may be assessed against Mr. Abbondandolo in his individual capacity (*id.* at ¶138).

In opposing the defendants' application, counsel for the plaintiff argues, *inter alia*, that given the defendants' violations of Labor Law §215, the plaintiff's at will status is irrelevant and does not serve as a bar to maintaining the underlying action (*see* Plaintiff's Memorandum of Law at p. 4). Counsel additionally argues that in consideration of the sharply contrasting deposition testimony adduced from the plaintiff and Mr. Abbondandolo with respect to the circumstances precipitating the plaintiff's termination, summary judgment is not appropriate (*see* Plaintiff's Memorandum of Law at pp. 1,3,5,6, 8). Counsel further asserts that contrary to the arguments set forth by the defendants' attorney, the plain language of Labor Law §215 explicitly allows for liability against individuals who have violated the provisions thereof (*id.* at p.9).

It is well settled that a motion for summary judgment is a drastic remedy which should only be granted upon a showing by the moving party of an absence of material issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). When entertaining such an application, the function of the Court is not to determine either issues of fact or credibility, but rather to determine whether such issues indeed exist (*Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]). Further, inasmuch as summary judgment is the procedural equivalent of a trial it "must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable " (*id.; Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]). Within the particular context of a motion for summary judgment seeking dismissal of an action based upon retaliation, a defendant can demonstrate *prima facie* entitlement to relief by establishing that any "adverse employment action" taken in relation to the plaintiff/employee was done for reasons having no connection to the plaintiff having engaged in a protected activity (*Balsamo v Savin Corp.*, 61 AD3d 622 [2d Dept 2009]).

As noted above, the plaintiff's within complaint charges that the defendants engaged in retaliatory conduct in violation of Labor Law §215(1)(a), the language of which provides, in part, that "[n]o employer * * * shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee * * * (iii) because such employee has caused to be instituted * * * a proceeding under or related to this chapter, * * *." As employed in the statute, the phrase "this chapter" specifically "refers to any provision of the Labor Law" (*Kelly v Xerox Corporation*, 256 AD2d 311 [2d Dept 1998]).

In order to successfully establish a *prima facie* case of retaliation, it is incumbent upon the plaintiff to establish the following: "(1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action" (*Straebler v NBC Universal, Inc.*, 2013 WL 541524 [SD NY 2013] *id.* quoting *Jute v Hamilton Sundstrand Corp.*, 420 F3d 166 [2d Cir 2005] at 173). Of particular relevance herein, it has been held that the act of "filing for unemployment benefits is a proceeding under chapter 31 of the Labor Law, * * * and therefore constitutes protected activity" within the purview of the statute (*Liverpool v Con-Way, Inc.*, 2010 WL 4791697 [ED NY 2010]). Moreover, the termination of employment has been held to be an "adverse employment action" under the provisions of Labor Law § 215 (*Higueros v New York State Catholic Health Plan,* 526 F Supp 2d 342 [ED NY 2007]).

As to the separate and distinct issue of causation between engaging in protected activity and a subsequent adverse employment action, a plaintiff can establish a causal relationship suggestive of retaliation by demonstrating the protected activity in which he or she has engaged was undertaken at a point "close in time to the adverse action" (*Espinal v Goord,* 558 F3d 119 [2d Cir 2009] at 129; *Gordon v New York City Bd. of Education,* 232 F3d 111 [2d Cir 2000]). In determining the defendants' instant application, the Court has carefully reviewed the record and upon such review finds that the defendants have failed to demonstrate the absence of material issues of fact with respect to the circumstances surrounding the plaintiff's termination and whether same was or was not improperly based upon the plaintiff having filed for unemployment (*Balsamo v Savin Corp., supra*). In moving for summary judgment, counsel for the defendants asserts that the basis for the plaintiff's termination was due solely and exclusively to economic necessity and in so asserting relies principally upon the deposition testimony of Mr. Abbondandolo and the numerous documents annexed thereto. However, a review of the defendant's testimony, as well as that of the plaintiff, reveals factual questions surrounding the circumstances leading up to the plaintiff's termination, together with attendant issues of credibility, the resolution of which is for the trier of fact (*Dykeman v Heht, supra*). With respect to the documents proffered by the defendants, same include a copy of the plaintiff's resume, a series of 1099 forms from several of the plaintiff's prior employers, a W-2, as well as a lengthy recitation of the wages paid by the defendants to the plaintiff. However, contrary

to defense counsel's assertions, the substance of these documents simply does not establish that the defendants' rationale for the plaintiff's termination was due to economic necessity (*Balsamo v Savin Corp., supra; Andre v Pomeroy, supra*;).

In addition to the foregoing, the Court finds the various legal arguments offered in support of the defendants' instant application to be substantively unavailing. As recited above, defense counsel argues that the plaintiff's status as an at will employee fatally comprises the viability of the underlying claim sounding in retaliation. As a general proposition, " 'an employer's right at any time to terminate an employment at will remains unimpaired' " except in the face of a statutory proscription (*Smalley v. Dreyfus Corp.*, 10 NY3d 55 [2008] quoting *Murphy v American Home Products Corp.*, 58 NY2d 293 [1983] at 305). The Court of Appeals has specifically recognized the provisions embodied in Labor Law §215, which expressly bar an employee's discharge "for participating in a proceeding related to the Labor Law", as just such a proscription (*Murphy v American Home Products Corp, supra* at 303 n 1; *Liebowitz v Bank Leumi Trust Co. of New York*, 152 AD2d 169 [2d Dept 1989]). Thus, given this judicially recognized statutory proscription, which serves to limit the general parameters of an at will employment relationship, coupled with the unresolved factual issues surrounding the plaintiff's termination, the Court finds that the underlying action may be properly maintained irrespective of the plaintiff's at will status (*id.*).

Further, this Court is not persuaded by defense counsel's assertion that in order to state a claim under the statute, the plaintiff is required to establish that she made a complaint about the defendants to a government agency. When interpreting a statute, the Court's function is to "attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Ryder v City of New York*, 32 AD3d 836 [2d Dept 2006] quoting *Matter of Elgut v County of Suffolk*, 1 AD3d 512 [2d Dept 2003] at 513; Statutes §94). Here, the language embodied in Labor Law §215 unambiguously provides a mode of relief to employees who have been discharged because such employee "has caused to be instituted * * * a proceeding under or related to this chapter, * * *." Accordingly, to accept defense counsel 's assertion would require this Court to ignore the plain language of the statute and concomitantly thwart the intent articulated by the legislature by narrowing the circumstances which trigger relief thereunder (*id.*). Finally, with respect to the

defendants' argument that Mr. Abbondandolo may not be sued in his individual capacity, this Court also finds same to be equally unavailing (*id.*). Here again the express terms of the statute under which the plaintiff is seeking relief plainly state that "[a]n employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section" (Labor Law §215[2][a]; *id.*).

As the defendants have failed to establish *prima facie* entitlement to summary judgment, this Court need not consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]; *Lameni v Verizon*, 34 AD3d 535 [2d Dept 2006]).

Based upon the foregoing, the application interposed by the defendants, Vito Abbondandolo, CPA and Vito Abbondandolo, individually, which seeks an order granting summary judgment dismissing the plaintiff's complaint, is hereby DENIED (Sequence #002).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

ENTER

DATED: March 11, 2013

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J. S.C.

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