SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART _____

Index Number : 654052/2012
PERUNOVIC, GEORGE
vs.
EAST MIDTOWN PLAZA HOUSING
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/25/13

_____, J.S.C.

CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GEORGE PERUNOVIC,

Plaintiff,

Index No. 654052/2012

-against-

DECISION/ORDER

EAST MIDTOWN PLAZA HOUSING CO, INC.,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

This action arises from an arbitration award that was issued on August 17, 2012. Defendant now moves for an order pursuant to CPLR § 3211 (a)(7) dismissing plaintiff's complaint on the ground that it fails to state a cause of action. Plaintiff cross-moves for an order granting leave to serve an amended complaint to assert an additional claim for age-discrimination against defendant. For the reasons set forth below, defendant's motion is granted and plaintiff's cross-motion is denied.

The relevant facts are as follows. Plaintiff was employed by defendant as a superintendent from 1995 until his termination in March of 2012. During this time, plaintiff was a member of Local 32BJ, Service Employees International Union (the "Union") and his employment with defendant was governed by a Collective Bargaining Agreement (the "CBA"). After defendant's

termination, pursuant to the CBA agreement between defendant and the Union, the Union initiated a grievance on plaintiff's behalf alleging that his termination was arbitrary and requesting that the case be scheduled for arbitration.

On or about August 17, 2012, contract arbitrator John Lloyd Anner issued an Opinion and Award (the "Arbitration Award"), finding, in relevant part, that plaintiff failed to live up to his fiduciary and management responsibility and that this was a proper ground for his termination. However, the arbitrator found that plaintiff's conduct was not so egregious that he caused his own termination and ordered defendant to pay plaintiff "eleven weeks severance pay provided he vacates his apartment within thirty days of receipt by the Union of this Award."

On or about November 23, 2012, plaintiff commenced the instant action. In his complaint, plaintiff asserts two unlabeled causes of action. The first cause of action seems to be seeking vacatur of the Arbitration Award on the ground that it was arbitrary and irrational and violated plaintiff's due process rights. In his second cause of action, plaintiff asserts claims under New York Labor Law § 740 and New York Civil Service Law § 75-b. Additionally, in his cross-motion, plaintiff seeks to assert an additional claim for age discrimination under New York's Human Rights Law. Defendant moves to dismiss plaintiff's complaint in its entirety on the following grounds: (1) plaintiff lacks standing to vacate the Arbitration Award and, in any event, such claim is untimely; (2) New York Civil Service Law § 75-b only applies to public employers and employees, to which the parties are neither; and (3) plaintiff fails to allege an actual violation of any law, rule or regulation which creates specific danger to the public health or safety to maintain an action under New York Labor Law § 740. Additionally, defendant opposes plaintiff's cross-motion on the ground that the proposed additional claim for age discrimination would be subject to mandatory arbitration pursuant to the CBA.

As an initial matter, plaintiff's cross-motion for leave to file his proposed amended complaint is denied. Pursuant to CPLR § 3025 (b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." A proposed amendment is palpably insufficient or devoid of merit when it is apparent that it would "be futile in light of the evidence." *Altman v. New York Bd. of Trade, Inc.*, 52 A.D.3d 396, 397 (1st Dept 2008).

Here, plaintiff's proposed amendment is futile in light of the evidence as the claim he seeks to add to his complaint is subject to mandatory arbitration and cannot be brought in the instant action as a matter of law. The CBA, which governed plaintiff's employment with defendant, explicitly provides that all statutory discrimination claims, including those brought under the New York State Human Rights Law, are to be resolved by arbitration. Specifically, Article XVII (23) provides:

> There shall be no discrimination against any present or future employee be 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 VII) as sole and exclusive remedy for violations.

Accordingly, plaintiff's purported employment discrimination claim can only be addressed in arbitration and plaintiff is barred from raising any such claim in this action. As plaintiff only seeks to amend his complaint to add a purported age discrimination claim, his cross-motion for leave to amend is denied.

The court now turns to defendant's motion to dismiss. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every

favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (*citing Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

In the present case, plaintiff's first cause of action must be dismissed as he lacks standing to bring an Article 75 claim to vacate the Arbitration Award. It is well settled that where an employee is represented by the union at an arbitration and fails to show "that the union breached its duty of fair representation", the employee lacks standing to bring a petition to confirm or vacate the resulting award. *Moreira-Brown v. New York City Bd. of Educ.*, 288 A.D.2d 21 (1st Dept 2001); *see also, e.g., Cupka v. Lorenz-Schneider Co.*, 12 N.Y.2d 1, 5-6 (1962). The Court of Appeals has recognized a limited exception to this general rule in cases "where the provisions of the collective bargaining agreement specifically provide that an aggrieved employee is entitled to 'representation at each step of the disciplinary procedure by the union or any attorney selected by an employee or to represent himself or herself." *Case v. Monroe Cmty. Coll.*, 89 N.Y.2d 438, 443 (1997) (quoting *Diaz v. Pilgrim State Psychiatric Ctr.*, 62 N.Y.2d 693, 695 (1984)). Here, it is undisputed that plaintiff was represented by the Union during the arbitration and was not a named party. Moreover, plaintiff puts forth no argument that the Union's representation was insufficient. Additionally, contrary to plaintiff's contention, the *Case* exception is not applicable as the CBA between defendant and the Union clearly states that "[a]ll Union claims are brought by the Union alone" and does not give the employee the right to his own representation.

Additionally, plaintiff's second cause of action must be dismissed as he has failed to state a claim under either New York Labor Law § 740 or New York Civil Service Law § 75-b. New York Labor Law § 740 and New York Civil Service Law § 75-b were enacted by the Legislature in order to protect whistleblower employees. *See Frank v. State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 86 A.D.3d 183, 185-86 (3rd Dept 2011). While the language of each statute is similar, New York Civil Service Law § 75-b governs public employees and employers, while New York Labor Law § 740 applies to retaliatory conduct by private employers. *Id.* Labor Law § 740 provides in relevant part that:

> An employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates a presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud. N.Y. Labor Law § 740 (2)(a)

In order to sustain a claim under Labor Law § 740, there must be an actual violation of a law, rule or regulation by the employer. *See Bordell v. General Elec. Co.*, 88 N.Y.2d 869 (1996). Allegations of a "reasonable belief of a possible violation, but no proof of an actual violation" is insufficient to sustain a claim. *Id.*; *see also Pail v. Precise Imports Corp.*, 256 A.D.2d 73, 74 (1st Dept 1998).

Here, as an initial matter, plaintiff does not allege that defendant is a "public employer" or that he is a "public employee." Indeed, on the evidence before this court, it is clear that defendant is a private company. Accordingly, plaintiff cannot bring a claim under Civil Service Law § 75-b against defendant as a matter of law. Additionally, plaintiff fails to state a claim under New York Labor § 740 as he does not allege any actual "activity, policy or practice" of defendant "that is in violation of law, rule or regulation." The only allegations supporting plaintiff's claim under Labor

Law § 740 are:

> On January 16, 2012 Plaintiff notified the President of the Board of Directors of the Defendant about what amounted to unnecessary expenditures on HVAC contractor and a painting contractor procured by [defendant's property manager]; Plaintiff advised the President of the Board of Directors of the Defendant that the contractor [defendant's property manager] had hired was not following the rules of the complex; Plaintiff further informed the President of the Board that he suspected [defendant's property manager] may have been involved in illegal activities insofar as contractors of the defendant hired by [the property manager], did not complete job or perform them adequately and in accordance with the building rules and yet [the property manager], while known that the jobs were not completed or performed adequately still paid said contractors in full.

None of this alleged conduct amounts to an actual "violation of law, rule or regulation" by defendant. Instead, these allegations are nothing more than plaintiff's belief that defendants's property manger was incurring unnecessary expenditures and a suspicion that he was somehow involved in illegal activities with respect to work being performed by contractors. Thus, plaintiff's complaint fails to sufficiently state a claim under New York Labor Law § 740 as a matter of law.

Based on the foregoing, plaintiff's cross-motion for leave to amend is denied and defendant's motion to dismiss is granted. Accordingly, it is hereby ordered that plaintiff's complaint is hereby dismissed in its entirety. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 7/25/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.