

Zulauf v St. John's Church

2013 NY Slip Op 33187(U)

January 7, 2013

Supreme Court, New York County

Docket Number: 113917/11

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.
Justice

PART 11

Index Number : 113917/2011
ZULAUF, JAMES
vs.
ST. JOHN'S CHURCH
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 dismiss/amend

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 determined in accordance with the annexed decision and order

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

FILED

JAN 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 7, 2013

_____, 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 11

-----X
JAMES ZULAUF,

INDEX NO. 113917/11

Plaintiff,
-against-

ST. JOHN'S CHURCH, METROPOLITAN NEW YORK
SYNOD OF THE EVANGELICAL LUTHERAN
CHURCH IN AMERICA and LYNDON HARRIS,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
JAN 11 2013
NEW YORK
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Defendant Metropolitan New York Synod of the Evangelical Lutheran Church of America (the "Synod") moves for an other pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action. Plaintiff opposes the motion and cross-moves to amend the complaint.

Plaintiff alleges that from January 1, 2009 through July 1, 2010, he was employed as the Sexton of St. John's Evangelical Lutheran Church (the "Church"). As Sexton, he served as the superintendent of the Church and cared for its physical facilities. Plaintiff commenced this action on December 12, 2011, asserting three causes of action against all defendants for breach of contract, promissory estoppel and violation of New York Labor Law, alleging that defendants failed to pay him his total promised compensation for the period of May 2009 through June 2010.

In support of its motion to dismiss, defendant Synod argues that it cannot be held liable for breach of contract because it did not enter into an employment contract with plaintiff nor grant express or apparent authority to the Church or its employees to contract on its behalf; it cannot be liable under a theory of promissory estoppel because it did not make a promise on

which plaintiff relied to his detriment; and plaintiff's Labor Law claim fails because plaintiff and the Synod were not in an employment relationship, the Synod never paid him any wages, and therefore the Synod could not have improperly withheld his wages.

Plaintiff argues that the Synod's motion should be denied in view of his cross-motion for leave to amend the complaint to add "important additional factual allegations, which clarify the Synod's relationship to the factual circumstances giving rise to Plaintiff's causes of action." The new allegations include the following: 1) plaintiff was an employee of the Synod; 2) defendant Pastor Harris, whom the Synod fired, made promises on which plaintiff relied; and 3) the Church where plaintiff worked is a subsidiary of the Synod, and the Synod retained both control over the Church's functioning and administrative decisions, as well as hiring and firing power over Church employees.

The court will first consider plaintiff's cross-motion to amend the complaint. It is well settled that leave to amend a pleading shall be freely given absent prejudice or surprise from the delay. CPLR 3025(b); Miller v. Cohen, 93 AD3d 424 (1st Dept 2012); MBIA Insurance Corp v. Greystone & Co, Inc, 74 AD3d 499 (1st Dept 2010); Pier 59 Studios, LP v. Chelsea Piers, LP, 40 AD3d 363 (1st Dept 2007). On a motion for leave to amend the complaint, plaintiff need not establish the merit of his proposed new allegations, but must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." MBIA Insurance Corp v. Greystone & Co, Inc, supra; accord Miller v. Cohen, supra; Pier 59 Studios, LP v. Chelsea Piers, LP, supra.

Here, plaintiff's proposed amendment adding factual allegations relating to his relationship with the Synod, is neither plainly lacking in merit nor palpably insufficient.

Plaintiff seeks to add allegations as to defendant Synod's domination and control generally with respect to the transactions at issue, i.e. the hiring and firing of employees. While defendant Synod objects that the amendment fails to allege specific facts, the court finds that the claims as amended are adequately pleaded, since at this early stage of the action the complaint need not state specifics as to plaintiff. Further, defendant Synod fails to demonstrate prejudice or surprise resulting from the delay. Under these circumstances, the cross-motion is granted and plaintiff shall be permitted to amend the complaint. In view of this determination, defendant Synod's motion to dismiss is denied as moot.

Accordingly, it is

ORDERED that plaintiff's cross-motion to amend the complaint is granted and the proposed amended complaint in the form annexed to the cross-motion shall be deemed served on defendants upon service of a copy of this decision and order with notice of entry, and defendants shall serve and file an answer or an amended answer within 10 days of such service; and it is further

ORDERED that defendant Synod's motion to dismiss is denied as moot; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 31, 2013 at 9:30 a.m, in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: January 7, 2013

FILED
 JAN 11 2013
 NEW YORK
 COUNTY CLERK'S OFFICE

ENTER:

 J.S.C.