Sciddurlo v Financial Indus. Regulatory Auth.
2014 NY Slip Op 33400(U)
December 16, 2014
Supreme Court, Richmond County
Docket Number: 100459/14
Judge: Desmond A. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

JOSEPH SCIDDURLO,

Plaintiff,

-against-

FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Defendant.

DCM Part 3
Present:
Hon. Desmond A. Green

DECISION AND ORDER

Index No. 100459/14
Motion No. 1509-001

The following papers numbered 1 to 3 were fully submitted on the 29th day of October, 2014:

	Pages Numbered
Notice of Motion to Dismiss by Defendant, with Supporting Papers, Exhibits and Memorandum of Law (dated May 1, 2014)	1
Affirmation in Opposition by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated June 4, 2014)	2
Reply Memorandum of Law in Further Support of Motion to Dismiss (dated June 17, 2014)	3

Upon the foregoing papers, defendant's motion is granted and the complaint is dismissed.

This action arises out of allegations of employment discrimination on the basis of age against plaintiff, a former employee of defendant the Financial Industry Regulatory Authority (hereinafter "defendant" or "FINRA"). According to the Verified Complaint, plaintiff, who is currently 58 years old, was employed by FINRA as a "Level 47 Principal Examiner" from May 21, 2007 to May 17, 2011 (*see* Verified Complaint, paras 2-3). It is alleged that plaintiff received high performance ratings each year based on the reviews of his supervisors, and that from 2007 through 2009, he was rated as a "high contributor" (id. at 10). In 2010, plaintiff "detected a flaw in the FINRA system, which allowed larger broker-dealers to be over leveraged... [in violation of] SEC rule 15c3-1(a)(1)" (id. at 11), and "in the later part of 2010, [he] devised and completed the CAMELS project, which would prevent such improper leveraging in the future..." (id. at 12). In the complaint, plaintiff alleges that "executives at FINRA had no desire or intention of correcting this flaw, which permitted

broker dealers to circumvent SEC guidelines" (id. at 13). It is further alleged that "plaintiff was suddenly and without justification downgraded from the status of a Level 4 'high contributor' to a Level 3, 'solid contributor'" (id. at 14). In February of 2011, plaintiff's request to be transferred to the Cycle Department was denied (id. at 16-17), and in early 2011, "plaintiff was told by his superiors to stop using CAMELS or 'Cash Flow Analysis' even though his 'Cash Flow Analysis' correctly predicted the demise of a large broker-dealer in 2008" (id. at 18). In April of 2011, plaintiff was placed on probation and subsequently on May 17, 2011, FINRA terminated his employment, a year before his pension was due to vest (id. at 19).

Plaintiff further alleges that other older employees, including Robert Errico, Denise Barbarin and Hans Reich, "were also forced to leave and were replaced with younger employees, including Susan Axelrod" (id. at 26). It is alleged that plaintiff's age was the basis of his downgrade, denial of transfer and termination (id. at 29-38).

Based on the foregoing allegations, plaintiff asserts causes of action for age discrimination under New York State Human Rights Law §296, New York City Human Rights Law (New York City Administrative Code §8-102[5]) and ERISA §510.

On April 5, 2013, approximately one year prior to initiating the current action, plaintiff commenced an action against FINRA in the United States District Court, Southern District of New York (*see* Defendant's Exhibit "A").[1] In that action, plaintiff asserted similar, if not identical, claims to the instant action, and additional causes of action alleging, inter alia, violations of the Age Discrimination in Employment Act ("ADEA") under 29 USCS §630, the New York State Whistleblower Law under Labor Law §740 and the Dodd-Frank Act under 15 USC §78u-6(h) (id.). In an Order filed on November 12, 2013, FINRA's motion to dismiss the federal action was granted and plaintiff's cross motion to amend the complaint was denied as "the proposed amendments fail

[1] *Sciddurlo v. The Financial Industry Regulatory Authority and Richard Ketchum*, Docket No. 13 cv 2272. Defendant Richard Ketchum was alleged to be the Chief Executive Officer of FINRA.

to cure all deficiencies" (*see* Defendant's Exhibit "F"). In his Order, the Honorable Alvin K. Hellerstein held that "the federal age-discrimination claims cannot be alleged because plaintiff had neglected first to file his claim with the EEOC, a statutory prerequisite" (id.). Judge Hellerstein also denied plaintiff's proposal to amend the complaint to add an ERISA claim, stating that "it is illogical to believe that age was the 'purpose' of firing plaintiff to deny him pension rights", and determined that it "would be futile to grant further leave to plaintiff to amend his complaint" (id.). Accordingly, the action was "dismissed for lack of subject matter jurisdiction, *without prejudice to plaintiff's non-federal claims* should they be re-alleged in state court" (id.).

Defendant now moves to dismiss the complaint[2] on the basis that the previously alleged Whistleblower claim, although not asserted in the present action, acts as a waiver of plaintiff's remaining claims.

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Minogue v. Good Samaritan Hosp*, 100 AD3d 64, 69 [2nd Dept 2012]).

A cause of action based upon Labor Law §740, known as the Whistleblower Law, is available to any employee who discloses or threatens to disclose an employer activity or practice which (1) is in violation of a law, rule or regulation, and (2) creates a substantial and specific danger to the public health (*see Minogue v. Good Samaritan Hosp*, 100 AD3d at 69). Thus, Labor Law §740 (4) creates a cause of action in favor of an employee who has been unlawfully discharged as a consequence of engaging in certain protected conduct (id.).

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[2]To the extent that defendant seeks to dismiss the complaint pursuant to CPLR 3211(a)(1) through the submission of (1) an affidavit by Sheila Haney, FINRA's surveillance director, (2) copies of a probation memo executed by plaintiff and (3) a termination memo (*see* Defendant's Exhibits "1", "2"), the Court finds that, severally or in combination, these documents fail to conclusively establish a defense to the action as a matter of law (*see Biro v. Roth*, __AD3d__, 2014 NY Slip Op 06790 [2nd Dept]).

Labor Law §740 (7) has been recognized by the Court of Appeals as an election-of-remedies provision, in which a plaintiff must choose whether to file a whistleblower cause of action or some other claim (*see Reddington v. Staten Is Univ Hosp*, 11 NY3d 80, 87 [2008]; *Minogue v. Good Samaritan Hosp*, 100 AD3d at 71-72). Thus, the mere commencement of an action under Labor Law §740 (4) constitutes a waiver of any other claims relating to the alleged retaliatory discharge, irrespective of their disposition (id. at 72 *citing Pipia v. Nassau County*, 34 AD3d 664, 667 [2nd Dept 2006]). Moreover, Labor Law §740 (7) specifically provides that the institution of an action in accordance therewith shall be deemed a waiver of the rights and remedies available to a plaintiff under any other contract, collective bargaining agreement, law, rule or regulation or under the common law (*see Charite v. Duane Reade, Inc.*, 120 AD3d 1378 [2nd Dept 2014]). This waiver also applies to any causes of action arising out of or relating to the same underlying claim of retaliation (id.).

In the opinion of this Court, the causes of action asserted in the present action arise out of and/or relate to the same underlying claim of retaliation asserted by plaintiff in the federal action, which included a Labor Law §740 Whistleblower cause of action, and contained similar if not identical allegations to the complaint at bar. Plaintiff's claims are therefore barred by the election of remedies provision in Labor Law §740(7) (*see Charite v. Duane Reade, Inc.*, 120 AD3d 1378 [waiver applies to any other claims relating to the alleged retaliatory discharge in subsequent actions]). Here, since all of the causes of action in the complaint relate to plaintiff's allegedly unlawful discharge, the motion to dismiss pursuant to CPLR 3211(a)(7) must be granted.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

J.S.C.

DATED: 12/16/14

Hon. Desmond A. Green
J.S.C.