Mancusi v Cortlandt Cemetery Assoc.
2014 NY Slip Op 33779(U)
December 3, 2014
Supreme Court, Westchester County
Docket Number: 60309/2014
Judge: Charles D. Wood
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHAEL MANCUSI,

Plaintiff,

- against -

CORTLANDT CEMETERY ASSOCIATION,

Defendant.

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FILED
AND
ENTERED
ON 12-3 2014
WESTCHESTER
COUNTY CLERK

DECISION AND ORDER

Index No. 60309/2014
Seq. No. 1

WOOD, J.

The following papers numbered 1-12 were read in connection with defendant's motion to dismiss:

Defendant's Notice of Motion, Counsel's Affirmation, Smith's Affidavit, Summons, Verified Complaint, Case Law.	1- 5
Plaintiff's Counsel's Affirmation in Opposition, Plaintiff's Affidavit, Verified Complaint.	6-8
Defendant's Counsel's Reply Affirmation, Smith's Reply Affidavit.	9-10
Plaintiff's Counsel's Sur-Reply Affirmation, Plaintiff's Sur-Reply Affidavit.	11-12

In the underlying action, plaintiff is suing defendant for compensatory and punitive damages for alleged violations of the New York State Executive Law §290, commonly known as the New York State Human Rights Law, for discriminatory practices. Plaintiff filed the summons and complaint via the New York State Courts Electronic Filing system on July 7, 2014. Plaintiff's

complaint alleges that while employed by defendant he was injured on the job, became disabled, and was discharged by plaintiff due to this disability.

NOW, based upon the foregoing, the motion is decided as follows:

It is well settled that pursuant to CPLR (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[1] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 A.D.3d 1180, [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may

[1]Internal citations omitted.

also be considered to "establish conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009])..

More succinctly, under CPLR 3211(a) (7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

The controversy in the instant motion centers on whether defendant is an employer within the meaning of the New York State Human Rights Law §292. Section 292(5) of the New York State Human Rights Law reads in relevant part: "The term "employer" does not include any employer with fewer than four persons in his or her employ." Defendant points out that while defendant did employ four persons during the period of the alleged discriminatory practices, this figure is reached only including the employer/controlling stockholder, Richard C. Brown. Richard C. Brown attests that he is plaintiff's employer, as he hired plaintiff and supervised his work and subsequently dismissed him. Additionally, he is the vice-president of defendant and is a majority stockholder, owning 103 shares of an outstanding 196 shares of stock in defendant. Accordingly, defendant seeks an order dismissing plaintiff's verified complaint pursuant to CPLR 3211(7). In support of its position, defendant offers the affidavit of Doris Smith, employed as secretary for defendant, who represents that Richard C. Brown receives a paycheck from

defendant in his capacity as Vice-President and majority stockholder of defendant.

The Court of Appeals held that a necessary condition for an employee to be classified as an employer for purposes of the Human Rights Law is that the employee have an ownership interest in the company or the power to do more than carry out personnel decisions made by others (Patrowich v Chem. Bank, 63 NY2d 541, 542 [1984]). "While there may be instances where principals may be counted as employees for purposes of the Executive Law, generally speaking the section envisions a situation where the employer engages four persons other than himself or herself" (In State Division of Human Rights v. GTE Corporation, 109 A.D.2d 1082, 1083, [4th Dept.1985]; Germakian v Kenny Intern. Corp., 151 AD2d 342, 343 [1st Dept 1989]).

Generally, four elements are considered in determining whether the relationship of employer and employee exists: "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct. The really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter" (36 NY Jur, Master and Servant § 2) (State Div. of Human Rights on Complaint of Emrich v GTE Corp., 109 AD2d 1082, 1083 [4th Dept 1985]).

Here, notably defendant has not submitted Mr. Browns's paycheck or any tax forms that might enlighten the court as to his true status as employer or employee. Moreover, plaintiff contends that Mr. Brown was the vice-president and carried out his duties with the understanding that he worked for Donald Horton, the president of the company. Plaintiff also claims that Mr. Brown usually completed much of the office paperwork, was responsible for maintaining the cemetery grounds, and completing physically demanding tasks as other employees. Plaintiff also

raises the issue of other employees working for defendant.

Based upon the record, the documentary evidence submitted does not demonstrate conclusively that during the relevant time period defendant employed fewer than four persons and therefore was not an employer as defined by the State Human Rights Law (Executive Law § 292[5]).

Under these circumstances, the arguments submitted by the parties raise more questions than they answer as the submissions are inconclusive. Accordingly, giving plaintiff the benefit of every possible inference, the Court finds that dismissal on the merits is unwarranted at this early stage of these proceedings.

Accordingly, based on the stated reasons, it is hereby

ORDERED, that defendant's motion to dismiss (Seq1) is denied; and it is further

ORDERED, that plaintiff shall serve a copy of this order upon defendant within ten (10) days of notice of entry, and file proof of service within five (5) days of service; and it is further

ORDERED, that the remaining parties are directed to appear in the Preliminary Conference Part on January 26, 15 **at 9:30 a.m. in Room 811 of the Westchester County Courthouse.**

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York
December 3 , 2014

CHARLES D. WOOD, J.S.C.