Flowers v District Council 37 AFSCME
2015 NY Slip Op 31435(U)
July 20, 2015
Supreme Court, New York County
Docket Number: 161683/13
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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SWAYNE FLOWERS,

Plaintiff (s),

-against-

DISTRICT COUNCIL 37 AFSCME, AFL-CIO, and NEW YORK CITY HEALTH AND HOSPITALS CORP.,

Defendant (s).

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DECISION/ ORDER
Index No.: 161683/13
Seq. No.: 001, 002

PRESENT:
Hon. Lynn R. Kotler
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers - 001	**Numbered**
Def HHC'S n/m, ZS affirm, exhs	1
SDP opp affirm in opp, exhs	2

Papers - 002	**Numbered**
Def DC37's n/m, XC affirm, exhs	1
SDP opp affirm in opp, exhs	2

Upon the foregoing papers, the decision and order of the Court is as follows:

In this action, plaintiff alleges that defendant District Council 37 AFSCME, AFL-CIO ("DC37") failed to properly process his grievances and complaints, and defendant New York City Health and Hospitals Corp. ("HHC") breached a collective bargaining agreement and stipulation of settlement. Both defendants move, pre-answer, to dismiss the causes of action asserted against them. Plaintiff opposes the motion and has amended his complaint, a copy of which is attached to his attorney's affirmation in opposition. The court's decision follows.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and

if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference (*Morone v. Morone*, 50 NY2d 481 [1980]; *Beattie v. Brown & Wood*, 243 AD2d 395 [1st Dept 1997]).

The following facts are based on the amended complaint. Plaintiff is a member of DC37 and was been employed with HHC as Laborer since 1988. DC37 is the collective bargaining agent and representative of certain persons employed by HHC, including plaintiff. Plaintiff alleges that he, as an African-American, is "paid at a lower salary rate, than the primarily Caucasian occupied trade positions." Plaintiff claims that HHC "repeatedly assigned him the out of title job specifications of a Sheet Metal Worker, a trade position" in breach of the collective bargaining agreement while paying plaintiff "at the lower rate of pay, applicable to a Laborer." Specifically, "beginning in or about 2004 and continuing for approximately two years until 2006, defendant HHC, assigned [plaintiff] to perform sheet metal work, without compensating him. At that time, plaintiff worked at Lincoln Hospital." On or about February 26, 2006, plaintiff filed a grievance with DC37, asserting that his out of title work violated Article V, Section 1C of the applicable Laborers Non-Economic Agreement. On or about July 2, 2007, HHC resolved plaintiff's grievance by paying him the difference between a Laborers' and a Sheet Metal Worker's salary, for part of the period plaintiff performed the duties of a Sheet Metal Worker.

On or about December 17, 2007, HHC promoted plaintiff to the position of Sheet Metal Worker. "At no time did defendant HHC take the position, or otherwise inform [plaintiff] that the promotional upgrade was subject to summary termination by his supervisor." Plaintiff's promotional upgrade "abruptly ended, after Joseph Lopopolo, a Caucasian, became the head of

the Maintenance Department at Lincoln Hospital." Lopopolo demoted plaintiff to the position of Laborer without "reason or explanation." Lopopolo "assured [plaintiff] that the demotion would last for only approximately forty-five (45) days." Meanwhile, plaintiff was not reinstated within that timeframe. Plaintiff complained to "management personnel at HHC, pointing out that the demotion was the result of racial discrimination, and violated the settlement terms of his grievance."

Plaintiff claims that DC37, and Chandler Henderson, "has a pattern and practice of misleading its members... regarding actions purportedly being taken to address their complaints and grievances." In or about 2009, Henderson supposedly assured plaintiff that he would address plaintiff's complaint, "but either failed to show up for the meetings or cancelled them at the last minute."

Meanwhile, instead of giving plaintiff assignments suitable for the Laborer title, HHC assigned plaintiff to perform custodial duties. Plaintiff now performs out of title work in the Mason Shop as a Mason Tender. HHC is allegedly aware of this but has not compensated plaintiff for his work at the rate of a Mason Tender nor subsisted from "violat[ing] the collective bargaining agreement." This assignment is allegedly "because of [HHC and Lopopolo's] discriminatory animus directed against [plaintiff] because of his race and color" and "in retaliation for [plaintiff's] complaints regarding their discriminatory conduct." In addition, in 2009, Lopopolo began denying plaintiff overtime work and became abusive and belligerent towards plaintiff. Plaintiff provides an example: "Lopopolo assigns the Caucasian workers with sufficient manpower to complete job assignments. When [Lopopolo] assigns [plaintiff] a project to complete, he assigns [plaintiff] as the sole Laborer to complete the project, when at least two workers are needed on the project."

The remainder of the allegations are generally as follows. Plaintiff repeatedly complained to HHC about Lopopolo's discriminatory and retaliatory conduct and HHC did not take any action with respect thereto. Plaintiff complained to Henderson about the out of title work and Lopopolo's discriminatory conduct and Henderson repeatedly represented to plaintiff that he is working on resolving plaintiff's complaints. However, Henderson cancelled meetings or failed to show up where these issues were supposed to be addressed. On or about July 28, 2013, plaintiff filed a formal grievance with DC37, regarding Lopopolo's conduct. "At no time did Henderson inform Flowers that any of the matters set forth in the grievance, including denial of overtime work, were not the proper subject of a grievance under the collective bargaining agreement." Flowers repeatedly called Henderson and sent him emails, but Henderson did not respond In late October 2013, Flowers again tried to ascertain from Henderson, the status of his grievance, without any success.

Plaintiff has asserted four causes of action: [1] against HHC for breach of the collective bargaining agreement and the implied covenant of good faith and fair dealing; [2] against DC37 for breach of the duty of fair representation; [3] against DC37 for fraud; and [4] against HHC for racial discrimination, hostile work environment and retaliation in violation of the NYC Admin Code § 8-107 *et seq*.

Defendants now move to dismiss the complaint. DC37 argues that plaintiff's duty of fair representation claim is untimely and otherwise plaintiff's claims should be dismissed for failure to state a claim. HHC claims that all violations of the NYC Admin Code § 8-107 *et seq*. prior to December 19, 2010 are barred by a three-year statute of limitations and that otherwise the complaint fails to state a cause of action. HHC has provided a copy of the collective bargaining agreement reached between HHC and DC37 for Laborers for the term from April 1, 2000 to June

30, 2002. HHC also argues that plaintiff's fourth cause of action is precluded since plaintiff has elected his remedies. HHC has provided copies of two verified complaints filed by plaintiff with the New York State Division of Human Rights ("NYSDHR"). Both complaints were filed by plaintiff against HHC and Lincoln Medical and Mental Health Center. The first complaint bears Case No. 10133939 and was sworn to by plaintiff on May 21, 2009 and the second bears Case No. 10134582 and as sworn to June 18, 2009. In both complaints, plaintiff makes a number of allegations similar to or identical to those raised in this action. HHC has also provided two "Determinations and Order After Investigations" rendered by NYSDHR, both dated August 16, 2011, which found "NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful practice complained of" and dismissed both of plaintiff's complaints.

First cause of action

The elements of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Express Industries and Terminal Corp. v. New York State Dept. of Transp.*, 93 NY2d 584 [1999]). To prevail on a cause of action for unjust enrichment the plaintiff must establish that [1] the defendant benefitted; [2] at the plaintiff's expense; and [3] that equity and good conscience require restitution *(Ashwood Capital, Inc. v. OTG Management, Inc.*, 99 AD3d 1 948 NYS2d 292 [1st Dept. 2012]).

There is no dispute that there is an effective collective bargaining agreement between HHC and plaintiff. Here, plaintiff has alleged that HHC breached the collective bargaining agreement in a number of material ways. HHC's argument that plaintiff cannot show he

exhausted the grievance process under the collective bargaining agreement is premature since this is a pre-answer motion to dismiss and the court does not have an admissible copy of the effective collective bargaining agreement before it. Plaintiff claims that he made complaints to management personnel at HHC and that HHC failed to take any action. These claims are sufficient at this stage of the litigation to survive a motion to dismiss. Accordingly, HHC's motion to dismiss the first cause of action must be denied.

Second cause of action

In order to establish a claim for breach of the duty of fair representation against a union, plaintiff must show that "the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith" (*Civil Service Employees Ass'n, Inc. v. Public Employment Relations Bd.*, 132 AD2d 430 [3d Dept 1987]). This claim is subject to a four month statute of limitations from the date the employee knew or should have known that the breach has occurred, or within four months of the date the employee suffers actual harm, whichever is later (CPLR § 217). This action was commenced on December 11, 2013. Therefore, any claim arising from breach of the duty of fair representation against DC37 that accrued on or before August 11, 2013 is time-barred.

At the outset, the court rejects DC37's arguments based upon the same copy of the 2000-2002 collective bargaining agreement, since it is not in admissible form and moreover, the agreement was not effective at the relevant time periods.

With that said, the only claim plaintiff asserts which could be timely arises from the grievance plaintiff filed in July 2013 regarding "Lopopolo's conduct". According to plaintiff's amended complaint, "in August 2013, [plaintiff] repeatedly called Henderson, leaving numerous messages for him to return his calls. [Plaintiff] thereafter sent Henderson several emails,

inquiring about the status of his grievance. In one of those email (sic) [plaintiff] asked Henderson to either provide him with the status of the grievance, or let him know whether he did not want to represent him on the matter. Henderson did not reply to the email." Plaintiff tried to contact Henderson again in October 2013 to find out the status of his grievance. These allegations are sufficient to allege a timely cause of action (*see i.e. Benjamin v. Keyspan Corp.*, 104 AD3d 891 [2d Dept 2013]).

DC37's substantive argument, that plaintiff has failed to prove that the union's conduct toward him was "arbitrary, discriminatory or in bad faith," is unavailing. Plaintiff's burden to survive this motion is relatively light. All plaintiff must do to at this stage of the litigation is allege sufficient facts to support every element of the cause of action. Here, plaintiff has met his burden. The issue of whether plaintiff knew or should have known that DC37 did not file a grievance on his behalf within the four months prior to the commencement of this action remains to be determined (*see i.e. Benjamin v. Keyspan Corp.*, *supra*). Accordingly, DC37's motion to dismiss the second cause of action must be denied.

Third cause of action

The essential elements of a cause of action sounding in fraud are "representation of a material existing fact, falsity, scienter, deception and injury" (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). The alleged fraud against DC37 is that DC37's employees, including Henderson, engaged in a pattern of falsely inducing union members to believe that they are addressing or will address union members' complaints/grievances. Specifically, Henderson told plaintiff he would file a grievance on his behalf and didn't pursue it, to plaintiff's detriment. Again, these allegations are sufficient to survive a motion to dismiss. Therefore, DC37's motion to dismiss this cause of action must also be denied. While it may be true, as

DC37 contends, that no grievance was filed because a grievance can only be filed with the employer, the focus on a motion to dismiss is whether plaintiff's allegations, when read in the most favorable light, state a cause of action.

Fourth cause of action

Plaintiff's fourth cause of action alleges that HHC subjected plaintiff to disparate treatment based upon his ethnicity, color, and race, retaliated against him for filing complaints, and subjected him to a hostile work environment, in violation of the NYC Admin Code § 8-107 *et seq*.

NYCCA § 8–502 provides in pertinent part as follows:

> Any person claiming to have been aggrieved by an unlawful discriminatory practice ... shall have a cause of action in any court of competent jurisdiction ... unless such person has filed a complaint with the city commission on human rights or the state division of human rights with respect to such unlawful discriminatory practice or act of discriminatory harassment or violence.

In general, a litigant claiming discrimination has the right to file a discrimination claim either in court or with an appropriate administrative agency. If the claim is filed with the agency, then the court is deprived of jurisdiction to hear the matter (*Benjamin v. New York City Dept. of Health*, 57 AD3d 403 [1st Dept 2008]). Here, since plaintiff's claims are based on the same allegedly discriminatory underlying conduct asserted in the NYSDHR proceedings, plaintiff has elected his remedies and the fourth cause of action must be dismissed. Nor does the fact that some of the complained of discriminatory conduct in the amended complaint occurred after NYSDHR made its determinations save the fourth cause of action. Plaintiff's allegations which occurred after the NYSDHR proceedings were concluded are a continuation of the same discriminatory and retaliatory conduct which was the subject of the NYSDHR proceedings

(*Benjamin v. New York City Dept. of Health*, *supra* at 404 citing *Bhagalia v State of New York*, 228 AD2d 882 [1996]).

Conclusion

In accordance herewith, it is hereby

ORDERED that HHC's motion to dismiss (motion sequence number 001) is granted only to the extent that the fourth cause of action asserted in the amended complaint is severed and dismissed; and it is further

ORDERED that HHC's motion is otherwise denied; and it is further

ORDERED that DC37's motion to dismiss (motion sequence number 002) is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: July 20, 2015
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.C.C.