Febres v Lixi Hospitality White Plains LLC
2016 NY Slip Op 31666(U)
September 2, 2016
Supreme Court, New York County
Docket Number: 150998/2016
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

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OSCAR FEBRES, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

Index No.: 150998/2016

LIXI HOSPITALITY WHITE PLAINS LLC, d/b/a SHERATON TARRYTOWN, XIAO SHEN, and any other related entities,

DECISION/ORDER

Defendants.

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Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion to Dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1,
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	
Exhibits.....	
Other.....memorandum.....	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants Lixi Hospitality White Plains LLC d/b/a Sheraton Tarrytown (Lixi) and Xiao Shen (Xiao), move, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and (a) (10), to dismiss plaintiff Oscar Febres's complaint. Defendants also seek attorneys fees and costs pursuant to section 130-1.1 of New York Codes, Rules, and Regulations, due to plaintiff's alleged failure to voluntarily dismiss this action.

On February 5, 2016, plaintiff "individually and on behalf of others similarly situated"

filed a class action complaint against Lixi and Xiao, alleging that such defendants unlawfully withheld gratuities.

Defendants argue that plaintiff's complaint must be dismissed because they had not employed plaintiff at any time or in any capacity, and that Lixi did not own the hotel or subject premises until four years after plaintiff alleges he was working at that location. Defendants contend that they had asked plaintiff to voluntarily dismiss this lawsuit and that his counsel had a telephone conversation with Brett R. Cohen, Esq. (Cohen), counsel for plaintiff, in which it was explained that defendants did not exist or own the subject hotel or premises until after plaintiff claims he worked there.

On April 15, 2016, defendants' counsel sent a letter to plaintiff's counsel stating that plaintiff should discontinue the lawsuit or defendants would have to file a motion to dismiss the complaint. On May 27, 2016, defendants filed a motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and (a) (10).

While defendants contend that the complaint must be dismissed pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and (a) (10), plaintiff fails to address such claims in opposition to defendants' motion. *See Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 (2d Dept 2011) (holding the part of defendant's motion "to dismiss the fifth through eighth causes of action for failure to state a cause of action should have been granted, since the petitioners failed to oppose that branch of the motion"); *Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003) (holding that because plaintiff did not oppose that branch of defendant's summary judgment motion which dismissed the wrongful termination cause of action, plaintiff's claim for wrongful termination was abandoned). Therefore, because plaintiff submits no opposition to this part of the motion,

the part of defendants' motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and (a) (10) must be granted.

Defendants argue that plaintiff should be sanctioned for filing a frivolous action and for refusing to voluntarily dismiss this action. Defendants contend that plaintiff's refusal to dismiss this action has created financial injury to Lixi and Xiao because they had to resort to motion practice. Defendants argue that plaintiff should be required to pay their attorneys' fees and pay the costs for making the motion.

Cohen maintains that, on April 6, 2016, he spoke with Frederick J. Wilmer, Esq. (Wilmer), counsel for defendants. Wilmer explained that plaintiff was not employed by defendants as defendants did not come into possession of the subject premises until four years after plaintiff alleged to have worked at the Sheraton. Cohen maintains that he explained to Wilmer that his firm has represented many workers in similar lawsuits, that a common defense is that a plaintiff was not an employee of the defendant being sued, and that service workers in similar lawsuits are rarely aware of corporate structures for which they are working. Cohen requested to see proof from Wilmer that defendants did not own or manage the subject building at the time of plaintiff's accident.

Cohen contends that, on April 15, 2016, Wilmer sent him a letter with a two-page excerpt from the "Agreement of Purchase and Sale" (the agreement) which discussed "Employee Matters" between defendants and the prior owner of the hotel. However, with the exception of one paragraph, the remaining text of the agreement was redacted.

On April 20, 2016, Cohen called Wilmer with the intention of requesting an unredacted

version of the agreement. He emailed the same request, stating that the agreement could be

marked confidential for settlement purposes. On April 29, 2016, Wilmer responded by email, stating that he had been away in Europe, that he would not be back until the following week, and that he would speak with Cohen when he returned.

Cohen contends that Wilmer did not initiate further contact with him. Cohen argues that if he had a copy of the unredacted agreement, plaintiff would have been in a better position to evaluate and confirm defendants' prior representations. Plaintiff was also concerned that Xiao may have been involved in the ownership and/or management at the subject hotel when plaintiff was working there.

On May 25, 2016, Cohen left a voicemail for Wilmer and emailed him in order to "obviate the need" for an answer to be filed. Cohen maintains that Wilmer responded that defendants were filing a motion. Cohen argues that defendants' motion was filed before discovery commenced which would have allowed for the exchange of information.

Title 22, section 130-1.1 (a) of New York Codes, Rules, and Regulations provides in part:

> "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart . . . ."

The Appellate Division, First Department, has held:

> "[t]he Rules of the Chief Administrator of the Courts grant the court discretion to impose financial sanctions and/or costs on a party or the party's attorney for engaging in frivolous conduct (22 NYCRR 130.1.1 [a], [c] [2]). Unless there is a clear abuse of discretion, we will defer to a trial court regarding a determination on imposing such sanctions."

Grozea v Lagoutova, 67 AD3d 611, 611 (1st Dept 2009).

Here, while defendants contend that plaintiff's lawsuit is frivolous, Cohen affirms that he attempted to obtain information regarding defendants' ownership of the premises, which was not available to him. Cohen affirms that he requested from Wilmer a copy of the agreement since he was previously only shown one paragraph. Furthermore, no other discovery has taken place.

Therefore, as counsel for plaintiff made attempts to obtain discovery before the motion was filed in order to resolve the dispute, the court declines to find that plaintiff's behavior constituted frivolous behavior which would require sanctions. Therefore, the part of defendants' motion which seeks attorneys' fees and costs must be denied.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the part of defendants Lixi Hospitality White Plains LLC d/b/a Sheraton Tarrytown and Xiao Shen's motion, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and (a) (10), to dismiss plaintiff Oscar Febres's complaint is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that the part of defendants' motion seeking attorneys fees and costs, is denied.

Dated: September 2, 2016

GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court