

Martin v Tosca Café Inc.
2020 NY Slip Op 32009(U)
May 27, 2020
Supreme Court, Bronx County
Docket Number: 24778/2018E
Judge: Robert T. Johnson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART IA-12

.....X
Nicolette Martin,

Plaintiff,

- against -

DECISION and ORDER
Index No. 24778/2018E

Tosca Café Inc., et al.,

Defendants.

.....X

Robert T. Johnson, J.

Upon the foregoing papers, defendants move to dismiss the complaint, which was commenced on August 24, 2018, pursuant to CPLR 3211. Plaintiff opposes the motion.

Plaintiff alleges, in essence, that the defendants hired her as a manager/bookkeeper, and that they employed her from January 28, 2015 to April 24, 2015, when she was terminated. The complaint states that plaintiff, as well as other employees, were paid in check and in cash, but that they signed a form indicating that the cash received was actually less than had been paid. Plaintiff alleges that she complained about this practice numerous times. She further alleges that she also complained that records were not maintained from prior employment, and that the defendants directed her to file false sales and use tax forms. She alleges that when she complained of these practices, she was fired.

In considering a motion to dismiss a cause of action on the ground that it is barred by the statute of limitations, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the movant bears the initial burden of establishing, prima facie, that the time in which to sue has expired (*Cataldo v Herrmann*, 154 AD3d 641, 642, 62 N.Y.S.3d 130 [2d Dept 2017]). In this regard, the movant must establish, inter alia, when the cause of action accrued (*Matter of Asch*, 164 AD3d 787, 788, 83 N.Y.S.3d 307 [2d

Dept 2018]). If the movant satisfies this burden, the burden shifts to the opponent to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period (*U.S. Bank Nat'l Ass'n v. Gordon*, 158 AD3d 832, 835, 72 N.Y.S.3d 156 [2d Dept 2018]).

Plaintiff asserts a first cause of action under the Labor Law for failure to pay wages, and that “[s]hould New York Labor Law not protect Plaintiff from Defendants' willful and malicious conduct, Plaintiff claims that equity and good conscience require restitution of her wages earned under a theory of quantum meruit.” The second cause of action seeks recovery for discrimination under the State Finance Law.

With respect to the first cause of action, it appears that plaintiff is seeking compensation owed to her when she was terminated from her employment. The complaint does not seek recovery under an oral contract theory, but only under the Labor Law. Plaintiff has shown that the various Labor Law sections dealing with wages do apply here. Further, to the extent the complaint may be construed as seeking recovery for retaliation under Labor Law § 215, a plaintiff must adequately plead that while engaged in a protected activity as defined by Labor Law § 215 and while employed by the defendant, he or she made a complaint about the employer's violation of New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result (*Oram v SoulCycle LLC*, 979 F Supp 2d 498, 508 [SDNY 2013]). This cause of action is governed by a two-year statute of limitations (*see Reilly v Natwest Markets Group, Inc.*, 178 F Supp 2d 420, 427 [SDNY 2001] [dismissing NYLL §215 retaliation claim, applying New York Law and holding “[a]n employee must bring such a claim within two (2) years of the alleged retaliatory conduct”]), and is accordingly untimely.

Further, insofar as the first cause of action seeks recovery under a theory of quasi-contract, the claims for unjust enrichment and quantum meruit fail. “Since the plaintiff has fully performed under a written contract . . . whose terms cover the subject matter of the dispute, we find that the plaintiff neither has a cause of action for unlawful enrichment nor a claim for quantum meruit.” (*Zolotar v. New York Life Ins. Co.*, 172 A.D.2d 27, 33, 576 N.Y.S.2d 850, 854 [1st Dept. 1991].) The same reasoning applies to the oral employment contract herein.

The second cause of action alleges retaliation and wrongfully discharge by defendants in violation of the State False Claims Act. (State Finance Law 187 *et seq.*)¹ To state a claim for retaliation under a false claims statute, a plaintiff must show that: (1) the employee engaged in conduct protected under the statute; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged, discriminated against or otherwise retaliated against the employee because of the protected conduct. (*McAllan v Von Essen*, 517 F Supp 2d 672, 685 [SDNY 2007]; *Faldetta v. Lockheed Martin Corp.*, 2000 U.S. Dist. LEXIS 16216, at *38 [S.D.N.Y. 2000]).

As the First Department stated in *Landfield v. Tamares Real Estate Holdings, Inc.* (112 A.D.3d 487, 487-488, 976 N.Y.S.2d 381, 382 [1st Dept. 2013]):

“Although internal complaints alone may constitute efforts to stop the violation of a false claims statute and thus rise to the level of protected conduct (*see Manfield v Alutiiq Intl. Solutions, Inc.*, 851 F Supp 2d 196, 202 [D Me 2012]; *Guerrero v Total Renal Care, Inc.*, 2012 US Dist LEXIS 32615, *14, 2012 WL 899228, *4-5 [WD Tex, Mar. 12, 2012, No. EP-11-CV-449-KC]), the allegations here show that plaintiff’s job responsibilities as Chief Financial Officer and Chief Operating Officer included managing the financial affairs of

¹ N.Y. State Fin. Law 191 states in part, “Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole.”

the company. Thus, plaintiff was required to show that his complaints of noncompliance with the tax laws went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligations (*see United States ex rel. Schweizer v Oce N.V.*, 677 F3d 1228, 1238-1239, 400 US App DC 284 [DC Cir 2012]). Plaintiff has not done so, and accordingly, the complaint was properly dismissed.”

Whether the complaint pleaded a cause of action under the State False Claims Act is questionable, as only internal complaints were alleged to have been made, and no claim of fraud was alleged to have been levied by the plaintiff prior to termination. Plaintiff, however, now asserts in an affidavit that she stated to the defendants that she would report the defendants’ conduct to the “proper authorities” if not stopped. This sufficiently supports a cause of action for retaliation at the pleading stage by showing that the plaintiff was asserting actual fraud on the part of the defendants. (*State of New York ex rel. Banerjee v Moody's Corp.*, 2016 N.Y. Misc. LEXIS 4599, 50 N.Y.S.3d 28 [Sup Ct NY Co].)

Plaintiff has alleged that each of the defendants was her employer. As it is not factually clear which of the defendants exercised the authority to hire and fire, etc., the allegations of the complaint, accepted as true, are sufficient in this regard.

Accordingly, the motion s granted to the extent of dismissing the first cause of action of the complaint. The defendant is directed to file an answer within 30 days after the entry hereof, subject to such COVID-19 regulations and orders as may affect the filing of the answer.

This is the Decision and Order of the Court.

Dated: _May 27,2020



Robert T. Johnson, J.S.C.