SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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NICHOLAS PISANO,

Plaintiff,

- v -

MICHAEL T. REYNOLDS, RITA GAIL JOHNSON, GUS CHRISTENSEN, PAUL WENTWORTH ENGEL, ARAMINA VEGA FERRER, VICTOR GOINES, ROBERT HALL, BRIAN MCLENDON, KATHLEEN PAVLICH, ANDREW PETERS, IAN ROWAN, ELISABETH SMART, WOODLAWN CEMETERY

Defendants.

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INDEX NO. 653347/2022

MOTION DATE 05/19/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISS.

Defendants' motion to dismiss the amended complaint is granted.

Background

Plaintiff styles this matter as a whistleblower action in which he contends that there is widespread corruption and kickbacks at Woodlawn Cemetery ("Woodlawn") in the Bronx. He argues that he worked as the cemetery's director of finance and was eventually promoted to CFO, Treasurer, and Vice President. He claims he uncovered kickbacks involving upper management and contractors and was subsequently fired for bringing these issues to light.

Plaintiff maintains that the cemetery used a certain independent contractor ("Pinebrook") for many years to do various maintenance, capital improvement work, as well as smaller tasks. He insists that the cemetery paid over $6 million to this entity in the years he worked for Woodlawn. Plaintiff questioned why Woodlawn would use only one contractor to do this work and not engage in a competitive bidding process or hire its own workers as part of an effort to

reduce expenses. He contends there was some sort of kickback scheme with this contractor and various Woodlawn employees. Plaintiff stresses that he told the board of Woodlawn about his concerns but his claims were never investigated. Instead, plaintiff says, defendants relied on pre-textual reasons to fire him. Plaintiff brings two causes of action. One is for violation of New York's Not-For-Profit Law § 715(b) and the other for violations of Labor Law § 740.

Defendants move to dismiss on the ground that Labor Law § 740 does not apply retroactively and therefore is not a basis upon which plaintiff can seek relief. They also claim that the other cause of action, based upon the Not-For-Profit Law, does not imply a private right of action for someone with plaintiff's position (a treasurer and Vice President of such an entity).

Labor Law § 740

Defendants claims that Labor Law § 740 became effective on January 26, 2022, about six weeks after plaintiff's termination and therefore its provisions do not apply to this matter. They insist that this new Labor Law section made substantial changes, created new rights for employees and eliminated certain defenses previously available to employers. Defendants maintain that under the old version of section 740, employees could not seek relief under the statute for reporting violations that did not concern public health and safety. They conclude that the alleged financial impropriety at issue here would not fall under that statute.

In opposition, plaintiff contends that the law passed on October 28, 2021 and that put defendants on notice about these changes in section 740. Plaintiff argues that the statute has retroactive application because the new section 740 has remedial effect. He acknowledges that 740 is not explicit about whether it has any retroactive effect and instead claims that the legislative history surrounding this law suggests it should have retroactive effect. Plaintiff

maintains that the two cases that have addressed this issue, one in Supreme Court in Rensselaer County and another in federal court, have concluded this statute has retroactive effect.

There is no question that Labor Law § 740's new version became effective after plaintiff brought this case and plaintiff concedes he would not have a cognizable claim under the prior version. The question, then, is whether this statute should have retroactive effect for the claims asserted by plaintiff.

"A statute has retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights" (*Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, 35 NY3d 332, 365, 130 NYS3d 759 [2020] [internal quotations and citations omitted]).

The parties disagree about the formulation of what constitutes a retroactive statute, particularly concerning the invocation of a substantive right component. Plaintiff insists that defendants have improperly added a substantive rights exception to retroactivity.

The Court of Appeals has, in the past, insisted that "In determining whether a statute should be given retroactive effect, we have recognized two axioms of statutory interpretation. Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose. Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative

judgment about what the law in question should be" (*In re Gleason (Michael Vee, Ltd.)*, 96 NY2d 117, 122, 726 NYS2d 45 [2001]).

The parties agree that the legislature did not make any specific pronouncements about section 740's retroactive effect. Because plaintiff is seeking retroactive relief, this Court must therefore assess whether it is a remedial statute. "A remedial statute is one which is designed to correct imperfections in prior law, by generally giving relief to the aggrieved party" (*Matter of Mia S.*, 212 AD3d 17, 22, 179 NYS3d 732 [2d Dept 2022], *lv to appeal dismissed*, 39 NY3d 1118 [2023]). This Court must explore the exact changes to section 740.

> "Section 740 was amended, signed into law in October 2021, and became effective January 26, 2022, to now prohibit retaliation against an employee who 'discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety.' Section 740 no longer requires that an actual violation have occurred or that the violation actually created or presented a substantial and specific danger to the public health or safety, or constituted health care fraud; the plaintiff's reasonable belief that a violation had occurred or that the alleged violation would be a substantial and specific danger is now sufficient" (*Zhang v Centene Mgt. Co., LLC*, 21CV5313DGCLP, 2023 WL 2969309, at *14 [ED NY 2023]).

The relevant change here is that the violation—here, alleged financial impropriety—need not pose a specific danger to the public health or safety in order for plaintiff to bring a claim based on this statute. In other words, the statute now encompasses a broader set of alleged wrongs because a plaintiff, such as the plaintiff here, can bring a claim under section 740 without having to plead that there is a danger to public health or safety. The Court finds that this change is not remedial and instead provided plaintiff a new right or basis upon which to sue defendants. Specifically, as it applies to plaintiff's claim, the statute did not correct a defect. Instead, the legislature decided to broaden the scope of the claims covered under the statute. That is, before this amendment went into effect, as long as the alleged wrongdoing was only financial, the

employee would get no benefit by whistleblowing; it was only when the alleged misconduct posed a specific danger that the employer had to worry about the employee bringing a case.

The cases cited by plaintiff, both of which are not binding on this Court, concerned other portions of the statute. In *Williams v Arc of Rensselaer County* (77 Misc3d 212 [Sup Ct. Rensselaer County 2022]), the Supreme Court found that the portion of section 740 that permitted a plaintiff to seek a jury trial (where he could not before) was a remedial statute and therefore had retroactive effect. Whether or not a plaintiff is entitled to a jury trial is not a substantive right and is, in this Court's view, a remedial portion of the statute. It merely corrects a perceived deficiency and changes a procedural rule. It pertains to who decides the case - it does not create a new basis to bring a case.

In *Zhang v Centene Mgt. Co., LLC* (21CV5313DGCLP, 2023 WL 2969309 [ED NY 2023]), a federal court found that the portion of section 740 that now permits a plaintiff to bring a claim where he or she has a reasonable belief that a violation of law occurred (as opposed to an actual violation) is remedial. That part of the new section 740 merely lessens the burden for plaintiffs to bring a claim – it doesn't directly allow the plaintiffs to bring claims they could not bring before the amendment. Again, this case largely addressed plaintiff's lesser burden and did not specifically opine about the circumstances here, where a plaintiff readily admits he could not have brought the instant claim under the previous statute.

The Sponsor Memorandum for Labor Law § 740 states that:

> "Current law provides that an employee is only protected if they disclose to a supervisor or public body an unlawful activity, policy, or practice of the employer that creates and presents a substantial danger to the public health or safety, or that which constitutes health care fraud. Thus, an employee reporting any myriad of illegal activities that do not directly affect public health or safety, from sexual harassment to tax evasion, may be at risk for being retaliated against by their employer with no protection in law" (Sponsor Memorandum, available at https://www.nysenate.gov/legislation/bills/2021/s4394/amendment/a).

This rationale yields the conclusion that the point of the amendment was to expand, substantially, the range of alleged violations upon which an employee of a private company could bring a Labor Law § 740 cause of action. The Court finds this expansion was not remedial as it was not a clarification or an effort to clean up a confusing statute. The statute purposefully increased the substantive rights available to potential whistleblowers by expanding the universe of claims and increasing the potential damages and penalties to a private employer (*see e.g.*, Labor Law § 740[5] [detailing the remedies available to a successful plaintiff in this type of claim]). Increasing a party's liability for past conduct makes this statute's application here impermissibly retroactive.

And, even if the statute could be construed as remedial, it did not overcome the presumption that statutes are generally applied only prospectively. "Classifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584, 673 NYS2d 966 [1998] That principle, combined with the fact that this statute included a 90-day window to become effective instead of taking immediate effect, compels the Court to find that this portion of Labor Law § 740 has only prospective effect. Therefore, plaintiff cannot pursue this claim as the events that form the basis of his claims occurred long before this statute went into effect.

N-PCL 715-b

The question, under this claim, is whether this statute provides a private right of action.

> "Where, as here, a statute does not explicitly provide for a private right of action, recovery may only be had under the statute if a legislative intent to create such a right of action may fairly be implied in the statutory provisions and their legislative history. This inquiry involves three factors: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Ferris v Lustgarten Found.*, 189 AD3d 1002, 1004-05, 138 NYS3d 517 [2d Dept 2020] [internal quotations and citations omitted]).

"Although Not-For-Profit Corporation Law § 112 (a) (7) provides for the Attorney General's protection of the rights of members, directors, or officers of not-for-profit corporations, that statute does not include employees" (*id*. at 1006).

Here, plaintiff was, according to the amended complaint, Woodlawn's CFO, Treasurer and Vice President. The Court finds, therefore, that he was an officer of Woodlawn (a not-for-profit corporation) and so he does not have a private right of action under N-PCL § 715(b) (*Rosen v Zionist Org. of Am.*, 2023 N.Y. Slip Op. 31004[U] at 5-6 [Sup Ct, New York County 2023] [finding that an Executive Vice President of defendant did not have a private right of action under N-PCL § 715[b] because the Attorney General is empowered to protect such a corporation's officers]). This claim is therefore dismissed as well.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and the Clerk is directed to enter judgment accordingly in favor of defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

5/23/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**