Alizadeh v Pei

Supreme Court of New York, Kings County

December 11, 2017, Decided

502375/17

Reporter
2017 N.Y. Misc. LEXIS 4767 *; 2017 NY Slip Op 32585(U) **

[1]** SOPHIA ***ALIZADEH*** and BARBARA VELLUCCI, Plaintiffs), -against- I. M. PEI, CHIEN CHUNG PEI, and LI CHUNG PEI, Defendant(s). Index No. 502375/17

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

counterclaims, cause of action, retaliation, plaintiffs', retaliation claim, defendants', amended complaint, motion to dismiss, overtime wages, home care, retaliatory, employees, damages, terminated, frivolous, pleadings, unpaid

Judges: **[*1]** Hon. Bernard J. Graham, Judge, Supreme Court Justice.

Opinion by: Bernard J. Graham

Opinion

DECISION / ORDER

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

Defendants, I.M. Pei, Chien Chung Pei, and Li Chung Pei, have moved for an Order, pursuant to *CPLR § 3211(a)(7)*, to dismiss the fourth cause of action (retaliation in violation of the Labor Law) of the plaintiffs, Sophia ***Alizadeh***, ("Ms. ***Alizadeh***") and Barbara Vellucci ("Ms. Vellucci"), as against said defendants, based upon the argument that the defendants have the right to assert valid and good faith counterclaims in response to plaintiffs' complaint. The plaintiffs oppose the relief sought in defendants' motion, having maintained that the complaint pleads a cause of action, the content of defendants' counterclaim is frivolous, and the fourth cause of **[**2]** action in their amended complaint was filed in good faith.

Background:

Defendant I.M. Pet is an accomplished architect who was well-known for his structural designs. On or about June 2014, Chien Chung Pei and Li Chung Pei, (family members of I.M. Pei and co-defendants herein), hired Home Care Solutions to provide home care aides to assist I.M. Pei who was at an advanced age. The plaintiffs **[*2]** were two of the aides that were assigned by Home Care Solutions to care for Mr. Pei. The plaintiffs allegedly provided nursing, personal and household services for the defendants, by performing various tasks that ranged from cooking meals, washing dishes, cleaning, doing laundry, and shopping for the Pei family to dressing, showering, feeding and shaving I.M. Pei. The defendants dispute the services that the plaintiffs alleged they performed, and instead maintain that the plaintiffs primarily provided daily personal care only to I.M. Pei, which included addressing his personal hygiene, administering medicine, occasional food preparation, companionship, assisting in his dressing, and exercising, as well as performing light

housekeeping.

The plaintiffs allege that they worked for the defendants from July 10, 2015 through June 2016, during which time the plaintiffs Were paid $30,00 per hour. It is further alleged that at least through the period of February 2016, they regularly worked 12 hours per day and 6 to 7 days per week. Despite the fact that they worked in excess of 40 hours per week, plaintiffs allege they were not adequately compensated, as they were not paid time-and-a-half or **[*3]** overtime wages. Additionally, plaintiffs assert that they were not given written notice of their wage rates or wage statements as required by *Labor Law § 195(1)*.

It is alleged that in 2015 the plaintiffs had approached the defendants and requested that they be permitted to continue to work for the defendants as independent contractors rather than as **[**3]** employees because they were of the opinion that the agency (Home Care Solutions) had been paying them in an unfair and untimely manner. The defendants agreed with this proposal believing that it would save them money, and upon the defendants paying the agency the sum of $10,000.00, the plaintiffs were released from their employment contract with the agency.

In the spring of 2015, I.M. Pei allegedly fell while in the care of Ms. ***Alizadeh***. Thereafter, I.M. Pei underwent six weeks of physical therapy. In December 2015, a home health care aid, Eter Nikolaishvili, allegedly grabbed and twisted the arm of I.M. Pei, which was in response to the latter threatening to report tile aid to the police for "something bad". As a result of the incident, I.M. Pei allegedly sustained lacerations, bleeding, torn skin and bruising. It was alleged that Ms. ***Alizadeh*** was present **[*4]** in the Pei home during that incident, but ignored the call for assistance by I.M. Pei. It was further alleged that Ms. ***Alizadeh*** failed to seek medical assistance for I.M. Pei, did not inform his family members of the incident nor was it reported to the police. As a result of this incident, the defendants maintain that they reduced the work hours of both of the plaintiffs, while the defendants sought other home care options. Thereafter, the defendants terminated the employment of the plaintiffs.

Following the termination of plaintiffs' employment, an action seeking damages for unpaid overtime wages in violation of the NY Labor Law, and for failure to provide wage notices and wage statements in violation of *Labor Law §§ 195(1)* and *195(3)*, was commenced by plaintiffs' counsel on behalf of the plaintiffs.

A summons and complaint dated February 6, 2017, was served upon the defendants and filed with the Clerk of the Court In said complaint, the plaintiffs seek to remedy unpaid overtime wages in violation of the New York State Labor Law, due to the failure of the defendants to provide wage notices and wage statements in violation of *Labor Law § 195(1)* and *Labor Law § 195(3)*; as well as for retaliation in violation of the Labor Law. *Labor Law § 195(1)(a)* states that **[**4]** every **[*5]** employer shall provide his or her employees with the rate of pay and whether paid by the hour, shift, day, week, salary, etc. *Labor Law § 195(3)* provides that every employer shall furnish each employee with a statement with every payment of wages which lists the date of work covered by that payment of wages; rates of pay and basis thereof, whether paid by hour, shift, day, week, salary, etc. For all employees who are not exempt from overtime compensation. . . the statement shall include the regular hourly rates of pay, the overtime rates of pay, the number of regular hours worked, and the number of overtime hours worked.

On March 30, 2017, in response to the complaint, the defendants served and filed an answer which included counterclaims. Thereafter, the plaintiffs served and Filed an amended complaint which included the cause of action of retaliation which is the subject of defendants' Motion to Dismiss. In the retaliation cause of action, the plaintiffs assert that defendants retaliated against plaintiffs in response to plaintiffs' complaints of unpaid overtime wages

and that defendants' retaliatory actions were intentional. As a result of defendants' retaliatory actions, plaintiffs allege that they **[*6]** have suffered and continue to suffer emotional distress, loss of reputation, attorney's fees and costs, among other damages to be determined. It is alleged by the defendants that the plaintiffs filed the amended complaint in response to the filing of the counterclaims by the defendants. On April 7, 2017, the plaintiffs filed a reply to defendants' counterclaims.

Defendants' contentions:

The defendants, in moving to dismiss the fourth cause of action (retaliation) of the plaintiffs in the amended complaint, maintain that they have every right to assert their timely and good-faith counterclaims in defending this action, there is no merit to the plaintiffs having asserted this cause of action, and the cause of action is not adequately pled.

[5]** The defendants contend that the plaintiffs took advantage of them and were delinquent in performing their duties. This is evidenced by the plaintiffs having convinced the defendants to pay a sizeable fee in order to terminate the home care agent employment contracts with Home Care Solutions, and as a result, by defendants hiring the plaintiffs directly, it afforded the latter flexibility in terms of job performance, hours, and the ability to work for **[*7]** others, and were paid at rates above the market level. In addition, when a co-worker of Ms. ***Alizadeh*** physically assaulted Mr. Pei, Ms. ***Alizadeh*** failed to take reasonable measures to safeguard his health and well-being.

Defendants assert that in order to state a claim for retaliation under *New York Labor Law § 215*, a plaintiff must adequately plead that . . . "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". (*Day v. Summit Sec. Servs. Inc., 53 Misc.3d 1057, 1061, 38 N.Y.S.3d 390 [Sup. Ct. NY County 2016]*). Defendants contend that the plaintiffs have not satisfied their pleading requirement in that they have failed to allege any facts to establish that they were subjected to an adverse employment action.

Defendants assert that case law in New York has sharply limited retaliation claims based upon the filing of counterclaims. Courts have applied the standard that was set forth in *Klein v. Town & Country Fine Jewelry Group, 283 AD2d 368, 369, 725 N.Y.S.2d 42 [1st Dept. 2001]*, in dismissing retaliation claims. In Klein, the Court stated that the ability to assert a retaliation claim does not rest on the factual merits of the counterclaim, but whether the counterclaims adequately state a valid cause of action at the pleadings stage.

Defendants assert **[*8]** that the plaintiffs cannot and have not alleged any facts which demonstrate that the counterclaims are baseless or that they would threaten to chill plaintiffs' exercise of rights. The plaintiffs recite bare legal conclusions without any factual specificity to show why or how the counterclaims have had a chilling effect on plaintiffs exercising their rights.

[6]** The defendants maintain that the plaintiffs' reliance upon conclusory allegations (the defendants filed illegitimate and frivolous counterclaims; the counterclaims are contrived against plaintiffs in response to their complaints of unpaid overtime wages) should be disregarded by the Court. Defendants further contend that the counterclaims are not frivolous when considering that the defendants have detailed the assault upon I.M. Pei and the misconduct of the plaintiffs, and plaintiffs are in possession of photographic evidence.

Defendants maintain that the plaintiffs' amended complaint does not allege that the counterclaims fail to state a cause of action. The plaintiffs cannot attack the merits of the counterclaims by the assertion of new facts in their Opposition papers which were not contained in the amended complaint.

The defendants **[*9]** also contend that based Upon the *First Amendment of the United States Constitution*, the plaintiffs' retaliation claim should be dismissed. Defendants maintain that they have a constitutional right to petition the Court to seek legal redress through their counterclaim. The presence of "ill will is not uncommon in litigation", and the fact that such ill will exists does not mean disputes are not genuine. Thus, in the context of the *First Amendment*, it would be problematic to regulate a false expression based upon the presence of ill will (see *BE & K Constr. Co. v. NLRB, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 [2002])*.

Plaintiffs' contentions:

The plaintiffs in opposing defendants' Motion to Dismiss maintain that the counterclaim lacks merit, and as such, the plaintiffs should be entitled to proceed with the fourth cause of action in their amended: complaint. The plaintiffs contend that no employee should be concerned about losing their employment or their ability to obtain future employment by asserting their fights pursuant to the Domestic Worker Bill of Rights and the Labor Law.

[7]** The plaintiffs assert that they could not and did not take advantage of I.M. Pei, as they almost exclusively dealt with his adult children, Instead, it was the adult children, who are well-educated and more sophisticated than the plaintiffs, who took advantage **[*10]** of the latter in denying them their rightful wages.

The plaintiffs maintain that they were not present at the time that Mr. Pei was injured, and instead were diligent in reporting his injuries upon learning of them. The plaintiffs contend that the claims of the defendants raised in the counterclaim should have been addressed at an earlier time and are untimely, as the plaintiffs continued to be employed by the defendants for a period of six months after that incident. It is further alleged, Upon information and belief, that the defendants have also failed to commence an action against the person who is accused of having committed the assault upon I.M. Pei.

The plaintiffs assert that in determining the merits of a motion to dismiss, pursuant to *CPLR § 3211(a)(7)*, the sole criteria is whether the complaint sets forth a cause of action. The pleadings are to be liberally construed and the non-moving party shall be afforded the benefit Of every favorable inference (see *511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 145, 773 N.E.2d 496, 746 NYS2d 131 [2002])*.

The plaintiffs maintain that the holding of the court in *Klein v. Town & Country Fine Jewelry Group, 283 AD2d at 369*, should not have the effect of precluding the plaintiffs from proceeding with a claim for retaliation in response to a counterclaim, where the counterclaim that is pled is frivolous, **[*11]** serves as an adverse employment action or has a chilling effect. Plaintiffs contend that courts have held that baseless claims or lawsuits that are designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions (see *Darveau v. Detecon, Inc., 515 F3d 334, 343 [4th Cir. 2008])*.

[8]** *Discussion*:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law, in making this determination with respect to the motion by the defendants which seeks a dismissal of plaintiffs' fourth cause of action contained in plaintiffs amended complaint.

At issue before this Court, is whether the fourth cause of action in plaintiffs' amended complaint (retaliation in violation of the Labor Law), pleads a cause of action as against the defendants, as a result of the defendants having filed a counterclaim against the plaintiffs.

In the underlying matter, the plaintiffs have sought

damages as a result of the failure of the defendants to pay overtime wages in violation of the "New York State Labor Law, and for the failure to provide wage notices and wage statements in violation of *Labor Law § 195(1)* and *Labor Law § 195(3)*; as well as for retaliation in violation of the Labor **[*12]** Law. The defendants likewise seek damages as specified in their counterclaims.

In determining a motion to dismiss, pursuant to *CPLR § 3211(a)(7)*, the role of the court is ordinarily limited to determining whether the complaint (or in this case the fourth cause of action) states a cause of action (see *Frank v. DaimlerChrysler Corp., 292 AD2d 118, 741 NYS2d 118, 741 NYS2d 9 [1st Dept. 2002]*). Upon such a motion, the court must accept the facts alleged as true and determine whether plaintiffs' facts fit within any cognizable legal theory (see *Morone v. Morone, 50 NY2d 481, 413 N.E.2d 1154, 429 NYS2d 592 [1980]*). Even though reasonable inferences are drawn in favor of the plaintiff, "bare legal conclusions" are hot presumed to be true (see *Godfrey v. Spano, 13 NY3d 358, 920 N.E.2d 328, 892 N.Y.S.2d 272 [2009]*).[1]

[9]** In order to set forth a claim based on retaliation, the plaintiffs must demonstrate that: (1) they engaged in statutorily protected activity; (2) the employee suffered a materially adverse action by the employer or former employer; and (3) there was a causal connection between the protected activity and that adverse action". (*Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F3d 10, 14 [2nd Cir. 2013]* citing *Lore v. City of Syracuse, 670 F.3d 127, 157 [2nd Cir. 2012]*; *Dechberry v. New York City Fire Dep't, 124 F. Supp.3d 131 [EDNY 2015]*; *EEOC v. K & J. Mgmt., Inc., 2000 U.S. Dist. Lexis 8012 [U.S.D.C. No. Dist. Ill.]*).

The defendants in seeking to dismiss the retaliation claim maintain that this cause of action consists of bare legal conclusions without factual specificity. The fourth cause of action contained in the amended **[*13]** complaint states: "Defendants retaliated against plaintiffs in response to plaintiffs Complaints of unpaid overtime wages". "Defendants retaliatory actions were; intentional". Thus, this Court when considering the motion to dismiss the retaliation claim of plaintiffs which was based upon defendants assertion of a counterclaim, has to determine whether the elements of a retaliation claim were adequately pled, and whether the plaintiffs provided facts to counter the assertions contained in the counterclaims or demonstrated that even if the counterclaims were deemed to be true, there is no basis in law (see *Tang v. Vaxin, Inc., 2015 U.S. Dist. Lexis 41640 [N.D. Al. 2015]*).

This Court finds that even affording a liberal interpretation of the pleadings to this fourth Cause of action as it is set forth, the plaintiffs have nonetheless failed to satisfy their pleading requirements neither do plaintiffs allege facts that address the standards that are needed to properly plead a retaliatory cause of action. The plaintiffs rely simply upon conclusory allegations in stating this claim. None of the elements necessary for pleading a retaliatory cause of action are present in this pleading.

The Court in *Klein v. Town & Country Jewelry Group, 283 AD2d at 369*, which **[**10]** addressed issues pertaining to an action for termination **[*14]** of employment and a counterclaim by the employer, determined that employers should not be discouraged from expressing their own potential claims. The Court in dismissing the plaintiffs claim of retaliation reasoned that "it is the rare case that the filing of a counterclaim can serve as the basis for a retaliation claim" (citing *Equal Empl. Opportunity Comm. v. K & J Mgmt., at 2000 U.S. Dist. Lexis 8012*), and they had no "reason to believe that the interposition of the counterclaim in any way chilled plaintiff's exercise of her rights". "

[1] In considering the merits of this matter presented in this motion, courts in New York have considered and relied upon federal case law for precedent as many of the reported decisions involving retaliation claims have emanated from cases initiated in the federal courts.

A party sued by an employee is already placed in a defensive posture and a counterclaim, while itself an offensive action, does not vitiate the initial defense of the defendant employer". (see *Equal Empl. Opportunity Comm. v. K & J Mgmt., at 2000 U.S. Dist. Lexis 8012*.

In *Arevalo v. Burg, 129 AD3d 417, 10 N.Y.S.3d 231 [1st Dept. 2015]*, a case which followed Klein v. Town & Country Jewelry Group, the Court held that "defendants interposition of what appears to be valid counterclaims would not dissuade a reasonable worker from suing his or her employer for violating the Labor Law".

The Court in *Rosas v. Balter Sales Co., No. 12-CV-6557, 2015 U.S. Dist. Lexis 176625 [SDNY 2015]*, held that the "filing of counterclaims is only actionable as retaliation: when the counterclaims are without merit".

In *Beltran v. Brentwood North Health Ctr. LLC., 426 F. Supp. 2d 827 [N.D. Ill. 2006]*, the Court in dismissing the retaliation **[*15]** claim of plaintiff's employees, determined that a counterclaim must be baseless to support a retaliation claim and a counterclaim is baseless if State law makes the claim frivolous. Moreover, the court: stated that "this is not one of the rare cases where conduct occurring within litigation provides grounds for a retaliation claim".

In addition, a review of the content of defendants' counterclaim will indicate that it arose not just from their disputed contractual agreement, but also due to the alleged "intentional and recklessly negligent misconduct" Of Ms. ***Alizadeh***, who allegedly endangered the health and **[**11]** safety of Mr. Pei by failing to safeguard him from an assault, concealed his injuries and then failed to obtain proper medical care. The defendants in asserting these counterclaims have sought to recover damages for Ms. ***Alizadeh***'s misconduct and the resulting pain, suffering and emotional distress that I.M. Pei had endured, and for the emotional distress of co-defendants, Chien Chung Pei and Li Chung Pei, as well as for breach of contract. As such, the nature of the counterclaim was not merely limited to the circumstances surrounding the employment agreement between the parties, **[*16]** but seeks damages for the injuries that I.M. Pei sustained while in the care of the plaintiffs.

This Court finds that the dismissal of plaintiffs' fourth cause of action will not in arty way limit their ability to pursue their claims, pursuant to *Labor Law § 135(1)* and *Labor Law § 195(3)*. The plaintiffs, by initiating this action, have subjected themselves to the defenses available to the defendants, and by the latter asserting these counterclaims it does not appear to adversely affect the plaintiffs (employees) from pursuing: their claims against a former employer who was allegedly not in compliance with its statutory obligations towards its employees.

Conclusion:

The motion by defendants, I.M. Pei, Chien Chung Pei, and Li Chung Pei, for an Order, pursuant to *CPLR §3211(a)(7)*, to dismiss the fourth cause of action (retaliation in violation of the Labor Law) of the plaintiffs, Sophia ***Alizadeh***, and Barbara Vellucci, is granted.

This shall constitute the decision and order of this Court.

Dated: December 11, 2017

Brooklyn, New York

/s/ Bernard J. Graham

Hon. Bernard J. Graham, Justice

Supreme Court, Kings County

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