

Pozner v Fox Broadcasting Co.
2019 NY Slip Op 33415(U)
November 15, 2019
Supreme Court, New York County
Docket Number: 652096/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

-----X

CLIFF POZNER

Plaintiff,

- v -

FOX BROADCASTING COMPANY,

Defendant.

-----X

INDEX NO. 652096/2017
MOTION DATE N/A
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 62

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action for, inter alia, breach of contract, defendant Fox Broadcasting Company ("Fox") moves to dismiss plaintiff Cliff Pozner's ("Pozner") third cause of action for retaliation pursuant to CPLR 3211(a)(7).

Pozner, a former executive vice president, was employed at Fox for more than 22 years. The amended complaint states that Pozner had a written contract with Fox which governed his employment from December 1, 2014 through November 30, 2016 and contained a one-year optional extension for the period December 1, 2016 through November 30, 2017 (the "Contract"). The Contract guaranteed a base salary of \$540,000.00 for the first year and \$562,000.00 for the second year. Pozner states that, on February 24, 2016, Fox exercised its option and extended the Contract's term to November 30, 2017 and provided a base salary of \$584,000 for the extension year.

In August 2016, Fox received internal complaints from two female employees concerning Pozner's alleged sexually harassing conduct towards them. Fox commenced an investigation and obtained information from other employees that allegedly corroborated the harassment claims against Pozner by the two original complainants and others. Fox then interviewed Pozner concerning the allegations and determined that he violated its Standards of Business Conduct and the policies enunciated in Fox Facts.¹ Pozner was terminated on September 10, 2016.

Pozner alleges that the female employees who complained to Human Resources about him did so "to take advantage" of the negative publicity surrounding Gretchen Carlson's complaints of sexual harassment about Roger Ailes in order to "coerce" management to allow them to remain in the Sales Department rather than be moved to the Finance Department. Pozner also states that the female employees initiated many of the sexually explicit conversations and never complained about these conversations prior to 2016.

Pozner alleges that his termination was actually due to anti-Semitism at Fox and states that he was treated differently than other non-Jewish Fox executives who were accused of sexual harassment and "more heinous conduct." Specifically, Pozner states that "at worst" he was accused of participating in "ribald or non-professional discussions" – the "impropriety" of which he denied – and he was "summarily terminated" whereas the non-Jewish employees accused of conduct such as "non-consensual touching and

¹ Fox states that Pozner was provided copies of, and agreed to comply with, the Standards of Business Conduct and Fox Facts as a condition of his employment.

unwelcome sexual advances” received “very generous retirement or separation packages, were promoted and given new contracts or were not disciplined at all.” Pozner states that even if Fox maintained the right to terminate him, it was still required to compensate him pursuant to the Contract through November 30, 2017.

In April 2017, Pozner filed a complaint against Fox alleging breach of contract and religious discrimination. In June 2017, Fox filed a verified answer and two counterclaims for breach of contract and breach of fiduciary duty. Pozner moved to dismiss the counterclaims and I found, in a decision and order dated July 10, 2017 (the “July 2017 Decision”), that Fox adequately pled a claim for breach of contract but I dismissed Fox’s counterclaim for breach of fiduciary duty.

Next, Pozner filed an amended complaint on August 1, 2018 which added a third cause of action that asserted that Fox’s counterclaims against Pozner constituted unlawful retaliation in contravention of New York Executive Law §296 and New York City Administrative Code §8-107. Fox now moves to dismiss the retaliation claim.

Discussion

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), a court must “accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Doe v. Bloomberg, L.P.*, No. 28254/16E, 2019 WL 4605568 at *2 (NY 1st Dept. Sept. 24, 2019) (citation omitted).

Pozner's retaliation claim alleges that Fox's counterclaims were brought solely as retaliation for Pozner's claims of discrimination and are therefore actionable. Fox argues that the cause of action for retaliation must be dismissed under both the federal *Noerr-Pennington* doctrine and New York state law.

The *Noerr-Pennington* doctrine holds "that parties may not be subjected to liability for petitioning the government" such as by filing litigation. *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 208 (1st Dept. 2005). Further, the immunity provided by the *Noerr-Pennington* doctrine applies "so long as the litigation is not a sham." *Matsushita Electronics Corp. v. Loral Corp.*, 974 F.Supp. 345, 355 (S.D.N.Y. 1997). Sham litigation in this context is defined as "litigation that is both (1) objectively baseless and (2) not 'sincerely and honestly felt or experienced,' i.e., brought in bad faith." *Id.* (citation omitted).

As Fox's counterclaim is a petition that seeks redress from the court, pursuant to the *Noerr-Pennington* doctrine it cannot be the basis of a claim for retaliation. And, the exception to the doctrine for sham litigation is not applicable because I previously determined, in the July 2017 Decision, that Fox adequately pled a breach of contract claim, thus the counterclaim is not objectively baseless. *See, e.g. I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 208 (1st Dept. 2005) (finding that where the record demonstrated that defendant's commencement of a prior declaratory judgment litigation was not objectively baseless, plaintiffs could not establish that it was a sham and overcome the *Noerr-Pennington* bar).

None of Pozner's arguments in opposition to Fox's motion to dismiss require a different conclusion. First, Pozner asserts that the *Noerr-Pennington* doctrine does not warrant dismissal of its retaliation claim but this argument is conclusory and fails to cite to any supporting cases. Pozner does attempt to distinguish Fox's cases by stating that none of the cases pertained to "discrimination or counter-claims based on retaliation for filing such claims."

Although the *Noerr-Pennington* doctrine "initially arose in the antitrust field, the courts have expanded it to protect First Amendment petitioning of the government from claims brought under Federal and State law." *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 107 (2d Dept. 2000). There are no New York cases either applying or prohibiting the *Noerr-Pennington* doctrine in the context of retaliation claims. However, given other courts' interpretations that the doctrine "applies equally in all contexts," and the importance of the right to petition, I find that it applies here. *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000).

Second, Pozner asserts that Fox's counterclaims were salacious and prurient and therefore retaliatory. The fact that Fox expounded on an allegation about sexual harassment that Pozner made in his complaint as part of its defense does not eliminate the immunity afforded by the *Noerr-Pennington* doctrine. Nor does it constitute retaliation.

Third, Pozner contends that cases from the Southern District of New York hold that counterclaims like Fox's can be actionable as retaliatory.² The SDNY cases do not

² The cases are *Yankelevitz v. Cornell University*, No. 95 CIV. 4593, 1996 WL 447749, (S.D.N.Y. Aug. 7, 1996), *Kreinik v. Showbran Photo, Inc.*, No. 02 Civ. 1172, 2003 WL

address the *Noerr-Pennington* doctrine, fail to take precedence over federal law and hence do not bar the doctrine's application here.

In light of my finding that the *Noerr-Pennington* doctrine bars Pozner's claim, Fox's motion to dismiss the retaliation claim is granted. *See, e.g., Arts4All Ltd v. Hancock*, 25 A.D.3d 453, 454 (1st Dept. 2006) (holding that plaintiffs' tort claim was properly dismissed "because plaintiffs failed to overcome defendant's showing that the claim was barred by the *Noerr-Pennington* doctrine").³

22339268 (S.D.N.Y. Oct. 14, 2003) and *Fei v. WestLB AG*, No. 07CV8785, 2008 WL 594768 (S.D.N.Y. Mar. 5, 2008) (collectively, the "SDNY cases"). As noted above, the SDNY cases do not alter the *Noerr-Pennington* analysis. In addition, the SDNY cases are distinguishable. *Yankelevitz* involved a cross-motion to strike plaintiff's affirmative defense to defendant's counterclaim that the counterclaim was retaliatory and the court stated that it was "unwilling to adopt a rule stating that compulsory counterclaims, or any other legal cause of action, cannot, as a matter of law, constitute retaliation in violation of the employment discrimination laws." *Yankelevitz*, 1996 WL 447749 at *4. *Yankelevitz* is procedurally and factually distinguishable from this case and thus inapposite.

In *Kreinik*, plaintiff sought to amend his complaint to add a claim that defendants' counterclaim, alleging trade name infringement, constituted retaliation under section 510 of the Employee Retirement Income Security Act ("ERISA"). *Kreinik*, 2003 WL 22339268 at *1. The court permitted the claim to be added because it found that the ERISA statute allowed for such a claim. *Id.* at *5. In *Fei*, after plaintiff brought a claim for violation of the wage and hour provisions of the Fair Labor Standards Act ("FLSA"), the defendant brought a counterclaim alleging misappropriation of confidential information and plaintiff moved to dismiss and to amend his complaint to add a retaliation claim. *Fei v. WestLB AG*, 2008 WL 594768 at *1. The court permitted plaintiff to amend his complaint citing no prejudice to defendant and fact that the FLSA prohibits actions taken in retaliation against employees exercising their rights under the statute. *Id.* at *2-3. *Kreinik* and *Fei* are also distinguishable because the counterclaims raised in those cases, unlike the counterclaim in the case before me, raised allegations not referenced in the plaintiffs' original complaints and were narrowly applicable to ERISA and FLSA.

³ Although not specifically addressed herein, none of Pozner's other arguments would change the outcome of this motion.

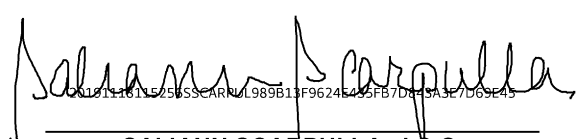
In accordance with the foregoing, it is

ORDERED that Fox's motion to dismiss Pozner's claim for retaliation is granted in its entirety; and it is further

ORDERED that counsel for the parties are directed to appear for a compliance conference in Room 208, 60 Centre Street, on January 15, 2020 at 2:15 p.m.

This constitutes the decision and order of the court.

11/15/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE