

Sandles v. Magna Legal Services, LLC

62 Misc. 3d 761, 90 N.Y.S.3d 843, 2018 N.Y. Slip Op. 28411

Civil Court of the City of New York, New York County · December 18, 2018

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Sandles v Magna Legal Servs., LLC 2018 NY Slip Op 28411 [62 Misc 3d 761] December 18, 2018 Ramseur, J. Civil Court of the City of New York, New York County Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. As corrected through Wednesday, February 27, 2019

[62 Misc 3d 761] [*1] Ellen Sandles, Plaintiff, v Magna Legal Services, LLC, Defendant.

Civil Court of the City of New York, New York County, December 18, 2018

APPEARANCES OF COUNSEL

Littler Mendelson, P.C. (Eli Freedberg and Maria Caceres-Boneau of counsel) for defendant.

Ellen Sandles, plaintiff pro se.

[62 Misc 3d 762] OPINION OF THE COURT Dakota D. Ramseur, J.

Plaintiff Ellen Sandles, pro se, commenced this action against defendant Magna Legal Services, LLC to recover \$20,500 for retaliation in violation of the Freelance Isn't Free[62 Misc 3d 763] Act (FIFA) (Administrative Code of City of NY § 20-930). Defendant moves, pursuant to CPLR 3211 (a) (1), (2), and (7), to dismiss based on documentary evidence, lack of subject matter jurisdiction, and failure to state a cause of action, respectively. For the reasons and to the extent below, the motion is granted, and the complaint, as supplemented by plaintiff's affidavit in opposition, is dismissed.

[*2] Background Facts¹

Beginning in 2016, plaintiff, a freelance stenographer, performed court reporting services for defendant on a per-assignment basis (defendant Previ's aff ¶ 2; plaintiff's aff at 1). There is no dispute that defendant timely paid plaintiff for all assignments based on assignment type, day, and time (defendant Previ's aff ¶ 2).² During this time period, plaintiff advocated for freelance workers, including for the enactment of FIFA by the New York City Council. FIFA, effective May 15, 2017, "establishes an administrative complaint procedure and a private right of action" (Michael Fahner, Promising Protection: An Assessment of New York City's Freelance Isn't Free Act, 14 NYU JL & Bus 1049, 1056 [2018], citing Administrative Code of

City of NY § 20-931), and codifies certain protections for freelance work exceeding \$800, including the requirement of an itemized, written contract upon request, timely payment in full, and protection from a hiring party's retaliation against the exercise of those, or any other, rights guaranteed by FIFA (Administrative Code of City of NY §§ 20-928 [a]; 20-929, 20-930).

On July 24, 2017, defendant solicited court reporters, including plaintiff, to transcribe a July 25, 2017 deposition within 24 hours (plaintiff's aff; defendant's exhibit A). Plaintiff, knowing that she would be unavailable on July 26, 2017, and therefore unable to timely complete the July 25 assignment, declined the assignment several times. Despite "emails that included Plaintiff's willingness to still work for Defendant," defendant did not offer plaintiff any further freelance opportunities (plaintiff's aff at 2).

In late 2017, plaintiff filed a complaint with the New York City Department of Consumer Affairs, Office of Labor Policy and Standards (OLPS) (defendant Previ's aff, exhibit A; [62 Misc 3d 764] plaintiff's exhibit 2).³ In the OLPS complaint, plaintiff alleged "lack of a formal contract under the Freelance Isn't Free Legislation" and "retaliation in the form of no longer offering [plaintiff] work as [defendant] had consistently done since 2016" (defendant Previ's aff, exhibit A at 5).⁴ Plaintiff alleges that defendant retaliated by ultimately ceasing to offer any assignments to plaintiff (id.). OLPS sent defendant a copy of the complaint on January 22, 2018 (defendant Previ's aff, exhibit A). On June 8, 2018, plaintiff commenced this action, alleging a "violation of section 20-930, 'retaliation' of the Freelance Isn't Free Legislation." Defendant now moves, pursuant to CPLR 3211 (a) (1), (2), and (7), to dismiss the civil complaint, as well as any allegation that defendant failed to provide plaintiff with a written contract, based on documentary evidence, lack of subject matter jurisdiction, and failure [*3] to state a cause of action, respectively.

Discussion

Timeliness of Defendant's Motion to Dismiss

As a threshold matter, plaintiff argues that defendant's motion is untimely. A defendant has 30 days from the time that the affidavit of service is filed to answer or otherwise move (see NY City Civ Ct Act § 402 [b]). Plaintiff filed an affidavit of service on June 19, 2018, stating that defendant had been served at its address in Philadelphia. Because service had not been made "within the City of New York," defendant had 30 days—as plaintiff notes, by July 19, 2018—to answer or otherwise move. Because the court stamp indicates that defendant filed the motion on July 19, 2018, the motion is timely.

CPLR 3211 (a) (2) (Subject Matter Jurisdiction)

Defendant argues that the court should dismiss the complaint pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction because plaintiff, by filing an OLPS complaint, is barred from filing a subsequent judicial action. In opposition, plaintiff argues that, because she has exhausted her administrative [62 Misc 3d 765] remedies and nothing remains pending before OLPS, she is empowered to

seek relief from the courts. In reply, defendant argues that there is insufficient evidence that OLPS concluded its investigation.

To support its argument that plaintiff's election of an administrative remedy precluded subsequent judicial relief, defendant unsuccessfully compares the New York State Human Rights Law (NYHRL) to FIFA by arguing that the court should apply NYHRL's election-of-remedies provision to FIFA.

"It is a fundamental principle of statutory construction that the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (*People v White*, 188 Misc 2d 394, 397 [Sup Ct, NY County 2001], citing *People v Finnegan*, 85 NY2d 53 [1995]; *McKinney's Cons Laws of NY*, Book 1, Statutes § 74; see also *Calvin Klein Trademark Trust v Wachner*, 129 F Supp 2d 254, 258-259 [SD NY 2001] ["The equitable doctrine of (contractual) election of remedies—centuries old and deeply rooted in a balance of fairness to both sides—cannot be overridden by mere supposition or extended inference, but only by explicit language entirely absent here"]).

NYHRL provides that

"[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate . . . unless such person had filed a complaint hereunder or with any local commission on human rights" (Executive Law § 297 [9]). [*4]

[1] "[T]he NYHRL and [analogous New York City Human Rights Law] claims, once brought before the [New York State Department of Human Rights], may not be brought again as a plenary action in another court" (*York v Association of Bar of City of New York*, 286 F3d 122, 127 [2d Cir 2002]). The remedies are "mutually exclusive" (*Magini v Otnorp, Ltd.*, 180 AD2d 476, 477 [1st Dept 1992]). Unlike NYHRL, however, FIFA does not preclude a civil action if an OLPS complaint was previously filed. Rather, FIFA's only jurisdictional limitation provides that OLPS loses jurisdiction when

"(a) Either party to the contract has initiated a civil action in a court of competent jurisdiction alleging a violation of this chapter or a breach of contract arising out of the contract that is the subject of the [62 Misc 3d 766] complaint filed under subdivision a of this section, unless such civil action has been dismissed without prejudice to future claims; or "(b) Either party to the contract has filed a claim or complaint before any administrative agency under any local, state or federal law alleging a breach of contract that is the subject of the complaint filed under subdivision a of this section, unless the administrative claim or complaint has been withdrawn or dismissed without prejudice to future claims" (Administrative Code of City of NY § 20-931 [c] [1]).⁵

Indeed, in addition to the above provision FIFA expresses elsewhere a preference for resolution in a judicial forum (see e.g. Administrative Code of City of NY § 20-931 [b] [providing that upon the filing of an administrative complaint, "the director shall refer the freelance worker to the navigation program identified

in section 20-932"]; see also Administrative Code of City of NY § 20-934 [a] [1]; [b] [authorizing Corporation Counsel to commence a civil action to recover up to \$25,000 for "a pattern or practice of violations"]. Accordingly, in the absence of any election-of-remedy provision from FIFA, the court cannot, as defendant urges, insert one, or insert a provision limiting court jurisdiction.

In opposition, plaintiff argues that judicial redress is available because she has exhausted all administrative remedies,⁶ explaining that an OLPS representative, at a Freelancers Union meeting on May 2, 2018, informed her that no determination would be made, and that plaintiff would receive "a package referring her to the courts so that a decision may be rendered by a Judge" (plaintiff's aff at 2).

An important corollary to the principle that a party must exhaust its administrative remedies before pursuing judicial review is that "in the absence of any provisions for administrative review of a challenged determination of a body or officer, exhaustion of [*5]administrative remedies cannot be required as a[62 Misc 3d 767] prerequisite to seeking judicial review." (6 NY Jur 2d, Article 78 § 21; *Matter of Isabella Geriatric Ctr., Inc. v Novello*, 38 AD3d 356, 357 [1st Dept 2007] [reversing dismissal on the ground of failure to exhaust administrative remedies where "there is no administrative remedy for challenging the rate-setting methodology of the Department of Health"].) Similarly, exhaustion is not required where administrative review would prove futile (*Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 408 [1st Dept 2013] [exhaustion not required where respondent "made clear that it would not grant petitioners' request"]; see also *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] [exceptions to requirement of administrative exhaustion include when exhaustion of administrative remedies "would be futile . . . or . . . would cause irreparable injury"]).

FIFA's structure suggests that plaintiff has exhausted all available administrative remedies. For example, FIFA strips OLPS jurisdiction upon the filing of a civil action (Administrative Code of City of NY § 20-931 [c] [1] [a]). Additionally, upon receipt of the complaint, the OLPS must refer the complainant to the court navigation program, which provides general information about the court system and obtaining legal assistance (Administrative Code of City of NY § 20-932). Plaintiff did, in fact, receive a "court navigation guide" (plaintiff's exhibit 3).

Additionally, FIFA's complaint mechanism does not authorize any administrative adjudication or enforcement. Rather, FIFA merely provides that the OLPS must notify the hiring party of the complaint (Administrative Code of City of NY § 20-931 [d]), wait for that party to respond (Administrative Code of City of NY § 20-931 [e] [1]), and send that response (or notice of non-response) to the complainant, together with materials informing the complainant that an action may be brought in a court of competent jurisdiction, information about the status of the complaint, and—for a second time—information about the court navigation program (Administrative Code of City of NY § 20-932 [e] [2], [3]).⁷

Moreover, FIFA mandates a judicial forum, for plaintiff, or any freelance worker, to receive a monetary award (Administrative Code of City of NY § 20-933 [a] [1] [FIFA provides that "a freelance worker

alleging a violation of this chapter may bring[62 Misc 3d 768] an action in any court of competent jurisdiction for damages"). To prevailing plaintiffs, the statute awards reasonable attorneys' fees and costs, as well as damages specific to the type of claim: \$250 for the failure to provide a written contract pursuant to section 20-928 (plus the value of the underlying contract if also successful on any other provision), double damages and injunctive relief for unlawful payment practices pursuant to section 20-929, and statutory damages equal to the value of the underlying contract for retaliation pursuant to section 20-930 (Administrative Code of City of NY § 20-933 [b] [1]-[4]).

Accordingly, because FIFA does not require an election of remedies, the branch of defendant's motion seeking dismissal for lack of subject matter jurisdiction is denied.

CPLR 3211 (a) (7) (Failure to State a Cause of Action)

[*6]

Defendant argues that plaintiff's retaliation claim should be dismissed because the complaint "contains not a single factual allegation in support" (defendant's mem of law at 6-7). In opposition, plaintiff argues that defendant retaliated against her by refusing her future assignments because plaintiff either declined an unreasonable, last-minute assignment or because of plaintiff's advocacy for FIFA's passage, including testimony to the New York City Council.

In determining a motion to dismiss a complaint pursuant to section 3211 (a) (7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts [as] alleged in the [complaint] as true and accord [plaintiffs] . . . 'the benefit of every possible favorable inference [and] determine only whether the facts as alleged fit [into] any cognizable legal theory' " (*Siegmund Strauss, Inc.*, 104 AD3d at 403; *Nonnon v City of New York*, 9 NY3d 825 [2007]).

Moreover, "[i]n assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]; see *High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 603 [1st Dept 2016][62 Misc 3d 769] [plaintiff's affidavit sufficiently particular to give the court and parties notice of the cause of action]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims]; see *Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 616 [1st Dept 2017] [a court may also consider plaintiff's bill of particulars to determine whether a claim is stated]).

[2] A FIFA retaliation claim requires that a plaintiff demonstrate that a hiring party undertook efforts to threaten, intimidate, discipline, harass, deny a work opportunity to or discriminate against a freelance

worker, or take any other action that penalizes a freelance worker for, or is reasonably likely to deter a freelancer worker from, exercising or attempting to exercise any right guaranteed under this chapter, or from obtaining future work opportunity because the freelance worker has done so (Administrative Code of City of NY § 20-930).

FIFA protects the rights to a written contract upon request and prompt payment, and therefore retaliation against the exercise or attempted exercise of those rights (Administrative Code of City of NY §§ 20-928, 20-929). In this case, however, plaintiff contends that defendant retaliated against the exercise of plaintiff's right "as a 1099 independent contractor to control their own schedule," and against plaintiff's advocacy for FIFA.

Neither is a right guaranteed by FIFA, and therefore, neither can serve as predicates for a FIFA retaliation claim. First, plaintiff does not—and cannot—identify the portion of FIFA which protects a contractor's right to "control their own schedule," precluding any retaliation claim under FIFA. As to plaintiff's advocacy for FIFA's enactment, plaintiff does not cite to the portion of the official record which includes her testimony, or any other evidence in support.^[*7] Similarly, the letter from Freelancers Union executive director Caitlin Pearce attached to plaintiff's opposition is unsworn (plaintiff's exhibit 4). Nevertheless, even crediting plaintiff's assertion that her participation was instrumental in FIFA's passage and content, advocacy for FIFA—or any other legislation—is not, unlike the rights to a written contract and prompt payment, "guaranteed under [FIFA]" (Administrative Code of City of NY § 20-930). Indeed, plaintiff's advocacy could not have been protected by FIFA because it chronologically preceded FIFA's passage and effective date.

To the extent that plaintiff argues in opposition that defendant failed to submit the entirety of the OLPS complaint, including^[62 Misc 3d 770] supporting documents and audio, the court is unable to assess the impact of any omissions because plaintiff also fails to attach them.

Finally, the court notes that, as defendant argues, plaintiff is unable to quantify her requested damages of \$20,500. To the extent that plaintiff promises to "demonstrate to the Court that the damages were not 'pulled out of thin air' but rather were thoughtfully calculated and determined under the guidelines of FIFA," no further explanation is provided (plaintiff aff in opp at 4). Accordingly, the court grants defendant's motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

CPLR 3211 (a) (1) (Documentary Evidence)

Defendant argues that plaintiff's OLPS complaint refutes any claim that plaintiff requested, and defendant refused to provide, a written contract (defendant mem of law at 3-5). Plaintiff's opposition, in sum and substance, is that defendant's submission of the OLPS complaints selectively omits important attachments (plaintiff aff in opp at 2-3).

As an initial matter, it is unclear whether plaintiff actually seeks to assert any violation of FIFA's written-contract requirement (Administrative Code of City of NY § 20-928). That is, the assertion appears only in the OLPS complaint. Plaintiff's argument that defendant omitted supporting documents and audio from the OLPS complaint appears to be directed solely toward plaintiff's retaliation claim—understandably so, if plaintiff did not intend to assert a claim for defendant's failure to provide a written contract. To the extent, however, that plaintiff does seek to assert such a cause of action, that claim is dismissed with prejudice.

Pursuant to CPLR 3211 (a) (1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only [where] the documentary evidence . . . utterly refutes [the complaint's] factual allegations . . . conclusively establish[ing] a defense . . . as a matter of law," and "only if the documentary evidence submitted . . . conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [2014]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).^[62 Misc 3d 771]

[3] To be considered "documentary," evidence must be unambiguous and of undisputed [*8]authenticity (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010], citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10; *Raske v Next Mgt., LLC*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51514[U] [Sup Ct, NY County 2013]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 498 [1st Dept 2008] [documentary evidence "apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based"]). To constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept 2014], citing David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10). "[P]rior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211 (a) (1)" (*Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 80 [1st Dept 2003]).

Administrative Code of City of NY § 20-933 (a) (5) requires that "[a] plaintiff who solely alleges a violation of [Administrative Code of City of NY § 20-928] must prove that such plaintiff requested a written contract before the contracted work began." Here, defendant argues that plaintiff's "affirm[ed]" OLPS complaint refutes any claim for the violation of Administrative Code of City of NY § 20-928 because plaintiff responded "no" to a question asking whether defendant had refused to execute a written contract upon plaintiff's request. The court, giving plaintiff every favorable inference—including the inference that plaintiff meant to include in her civil court complaint what she had previously alleged in the OLPS complaint—agrees with defendant and finds that any claim respecting the lack of a written contract is

refuted by plaintiff's earlier statement that she never requested one. Accordingly, the branch of defendant's motion seeking dismissal pursuant to CPLR 3211 (a) (1) is granted.

Conclusion/Order

For the above reasons, it is hereby ordered that the branch of defendant's motion to dismiss, with the exception of the branch of the motion seeking dismissal pursuant to CPLR 3211[62 Misc 3d 772] (a) (2) is granted, and the Clerk of Court shall dismiss the complaint.

Footnotes

Footnote 1:The court, as it must on a motion to dismiss, views the facts in the light most favorable to plaintiff.

Footnote 2:Compensation amounts were memorialized in a rate sheet.

Footnote 3:Defendant argues that plaintiff filed the OLPS complaint on January 16, 2018, likely basing that conclusion on the date accompanying plaintiff's signature on the OLPS complaint (defendant Previ's aff, exhibit A at 4). Though the discrepancy is immaterial, the court notes that the OLPS complaint attached to defendant's papers notes a case number of FL-2017-0335, corroborating plaintiff's time line.

Footnote 4:Despite alleging the lack of any "formal"—presumably written—contract, the OLPS complaint acknowledged that defendant sent a "job sheet" confirming a continuing deposition on July 25, 2017.

Footnote 5:"Where the director lacks jurisdiction over a complaint," OLPS must also notify the parties (Administrative Code of City of NY § 20-931 [c] [2]).

Footnote 6:It appears that plaintiff misapprehends defendant's argument. Defendant argues that the action is precluded entirely because plaintiff's election of an administrative remedy precluded pursuit of a judicial remedy, not that this action is premature because plaintiff failed to exhaust available administrative remedies. Nevertheless, for the sake of completeness, the court addresses plaintiff's argument.

Footnote 7:The statute also directs follow-up data collection and periodic reporting to the New York City Council (Administrative Code of City of NY § 20-936).