SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

DIANE C. FERRIS

Plaintiff,

INDEX No. 606353/16

MOTION DATE: 12/14/16
Motion Sequence 001

-against-

LUSTGARTEN FOUNDATION,
CABLEVISION SYSTEMS CORPORATION,

Defendant.

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Support.....XX
Affirmation in Opposition.....X
Memorandum of Law.....XXX

Motion by defendant Lustgarten Foundation to dismiss the complaint for a defense founded upon documentary evidence, lack of standing, and failure to state a cause of action is **granted**.

This is an action for wrongful discharge by a former employee of a not-for-profit corporation. Defendant The Marc Lustgarten Pancreatic Cancer Foundation ("Lustgarten Foundation") is a not-for-profit corporation which raises funds to treat and cure pancreatic cancer. Plaintiff Diane Ferris was employed by Lustgarten as a database coordinator.

Ferris alleges that she discovered improprieties with regard to Lustgarten's fund raising activities, more specifically that an automobile being raffled off was won by a Lustgarten employee and an "NBA All-Star Package," that was to be auctioned for $5,000,

was sold to the brother-in-law of a Lustgarten official for $1,500 after there were no bids. Ferris reported these incidents anonymously through defendant Cablevision's ethics hotline. Ferris alleges that Cablevision determined that she was the source of the anonymous report and informed Lustgarten. Ferris alleges that, in retaliation, Lustgarten switched her schedule from 7:00 a.m. to 3:00 p.m. to 8:00 a.m. to 4:00 p.m. and gave her a highly negative evaluation. Ferris alleges that she was terminated by Lustgarten on December 7, 2015.

This action was commenced on August 19, 2016. In her first cause of action, plaintiff asserts a claim for violation of the Whistleblower policy statute, Not-For-Profit Corporation Law § 715-b. In her second cause of action, plaintiff asserts a claim for breach of an implied employment contract.

By notice of motion dated November 21, 2016, defendant Lustgarten Foundation moves to dismiss the complaint for defense founded upon documentary evidence, lack of standing, and failure to state a cause of action. Lustgarten argues that plaintiff does not have standing to bring a private action under Not-For-Profit Corporation Law § 715-b. Lustgarten alleges that Ferris was an at-will employee who was terminated for submitting a false time card.

In opposition, plaintiff argues that she is within the class of persons which § 715-b was intended to protect and a private right of action will further the legislative purpose of the law.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. Whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss but must await a summary judgment motion (**AG Capital Funding Partners v. State Street Bank and Trust Co.**, 5 NY3d 582, 591 [2005]).

Not-For-Profit Corporation Law § 715-b(a), which became effective July 1, 2014, provides that every corporation that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars shall adopt a "whistleblower policy" to protect from retaliation persons who report suspected improper conduct. Such policy shall provide that no employee who reports illegal corporate action in good faith shall suffer intimidation, harassment, discrimination, retaliation, or adverse employment consequence (Id). Subsection (d) provides that "Nothing in this section shall be interpreted to relieve any corporation from any additional requirements in relation to internal compliance, retaliation, or document retention required by any other law or rule."

In the absence of an express private right of action, plaintiffs can seek civil relief in a plenary action based upon a violation of the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history (**Cruz v TD Bank**, 22 NY3d 61, 70 [2013]). This determination is predicated on 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 (Id). The third criteria is the most important because the Legislature has both the right and the authority to select the methods to be used in effectuating its goals. Thus, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme (Id at 70-71).

As an employee of a not-for-profit corporation who reported suspected improper conduct, plaintiff is a member of the class for whose benefit Not-For-Profit Corporation Law § 715-b was enacted. Defendant Lustgarten argues that creating a private right of action would not be consistent with the legislative purpose because there is a separate whistleblower statute protecting employees from retaliatory action, Labor Law § 740. However, Labor Law § 740 protects only employees who have reported activity constituting "a substantial and specific danger to the public health or safety." Thus Labor Law § 740 does not protect Ferris' action.

However, the court notes that Not-For-Profit Corporation Law § 715-b is included within Article 7 of the statute, regulating the conduct of directors and officers of the not-for-profit corporation, including related party transactions, conflict of interest, loans to directors and officers, and whistleblower policy. Not-for-profit corporations are generally subject to the authority of the attorney general, and Not-For-Profit Corporation Law § 112(a)(7) authorizes the attorney general to maintain an action to enforce any right given under the Not-for-Profit Corporation Law to members, a director, or an officer of a charitable corporation. Thus, the Legislature presumably intended for the attorney general to be authorized to enforce the Whistleblower policy statute. The court concludes that recognizing a private right of action under § 715-b would be inconsistent with both the enforcement mechanism and the over-all statutory scheme of the Not-Not-for-Profit Corporation Law. Defendant Lustgarten's motion to dismiss plaintiff's first cause of action for violation of the Whistleblower policy statute for lack of standing and failure to state a cause of action is **granted**.

Absent a constitutionally impermissible purpose, a statutory prescription, or an express limitation in the individual employment contract, an employer's right at any time to terminate an employment at will remains unimpaired (**Smalley v Dreyfus Corp.**, 10 NY3d

55, 58 [2008]). Thus, either the employer or the employee generally may terminate the at-will employment for any reason, or for no reason (Id). Plaintiff's theory that there was an implied provision in her employment contract that she would not be retaliated against or discharged for whistleblowing activity is inconsistent with the at-will employment doctrine. Defendant Lustgarten's motion to dismiss plaintiff's second cause of action for breach of an implied employment contract for failure to state a cause of action is **granted**.

So ordered.

Date: JAN 17 2017

Stephen A. Bucaria
J.S.C.

ENTERED

JAN 20 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE