Employee Relations
LAW JOURNAL

From the Courts

Discrimination and Non-Competition Developments in New York

By Kenneth A. Novikoff

This column discusses a number of recent employment discrimination cases and cases involving complaints stemming from non-competition agreements. All of the decisions analyzed in this column are by New York courts – federal and state. The courts' decisions have broad applicability and illustrate key principles about federal and state employment discrimination laws as well as the enforceability of non-compete agreements under New York law.

In summary:

- The U.S. Court of Appeals for the Second Circuit has issued an important decision in a case that presented the question of what a plaintiff asserting employment discrimination under Title VII of the Civil Rights Act of 1964 must allege to plead the existence of an employer-employee relationship pursuant to the "joint employer" doctrine.

- A federal court in New York has concluded that a plaintiff's employment discrimination claims should be dismissed because

Kenneth A. Novikoff, a senior partner and trial attorney in Rivkin Radler LLP's Commercial Litigation and Employment & Labor Practice Groups, has over 30 years of experience in federal and state courts, as well as in alternative dispute resolution ("ADR") forums, representing public and private corporations of all sizes, municipalities and individuals in varied and high-exposure complex commercial litigations, partnership disputes, non-compete/non-solicitation litigations, employment, housing and Americans with Disabilities Act of 1990 ("ADA") discrimination litigation, and wage and hour litigation. Mr. Novikoff may be contacted at ken.novikoff@rivkin.com.

she had not filed a complaint with the Equal Employment Opportunity Commission before she filed her lawsuit.

- The U.S. District Court for the Southern District of New York has dismissed an employment discrimination complaint alleging that the plaintiff was wrongfully terminated. The court found that the plaintiff's complaint did not allege facts showing that the defendants' actions were based on any federally protected characteristics and that the plaintiff did not identify his race or any other characteristics that were protected under federal law.

- The U.S. District Court for the Southern District of New York has dismissed a plaintiff's claims for employment discrimination and hostile work environment against his former employer, ruling that the plaintiff failed to allege facts that would support his claims.

- The U.S. District Court for the Eastern District of New York has dismissed a plaintiff's employment discrimination action against her former employer and a number of individual defendants after finding that she had not alleged discrimination on the basis of a protected status, such as race, color, gender, religion, national origin, age or disability.

- A federal district court in New York has stayed a plaintiff's employment discrimination lawsuit so that her claims under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981 could be arbitrated, as provided in a collective bargaining agreement that covered the plaintiff.

- An appellate court in New York has reversed a trial court's decision to dismiss a plaintiff's lawsuit against her former employer in favor of arbitration, finding that the plaintiff's employment agreement did not "expressly and unequivocally establish" that the parties had agreed to arbitrate the plaintiff's claims for wrongful termination and unpaid commissions.

- A trial court in New York has granted a preliminary injunction enjoining defendants from accessing certain of the plaintiff's confidential information allegedly in the defendants' possession and enjoining the defendants from soliciting certain identified customers of the plaintiff.

- The Supreme Court, New York County, has granted a defendant's motion to dismiss a lawsuit asserting that it interfered with an employment agreement by hiring the plaintiff's employee.

SECOND CIRCUIT ANNOUNCES STANDARD FOR "JOINT-EMPLOYER" LIABILITY IN TITLE VII EMPLOYMENT DISCRIMINATION ACTIONS

The U.S. Court of Appeals for the Second Circuit has issued an important decision in a case that presented the question of what a plaintiff asserting employment discrimination under Title VII of the Civil Rights Act of 1964 must allege to plead the existence of an employer-employee relationship pursuant to the "joint employer" doctrine.

The Case

The United States Tennis Association ("USTA") contracts with security firms that employ and assign security guards to work at USTA events – most notably, the U.S. Open Tennis Championship ("U.S. Open"). In 2016, AJ Squared Security ("AJ Security"), a security firm, hired the plaintiff as a security guard and assigned him to work at the 2016 U.S. Open.

On August 29, 2016, the plaintiff's AJ Security supervisor sent the plaintiff to pick up his security credentials from the USTA. The plaintiff alleged, however, that the USTA refused to issue his security credentials, thereby prohibiting him from working at the U.S. Open. The plaintiff sued the USTA for employment discrimination and retaliation under Title VII. Among other things, he alleged that the USTA denied his credentials in retaliation for a lawsuit that he had previously filed in 2012 against CSC Security Services ("CSC"), another firm providing security to the USTA.

The USTA moved to dismiss, arguing, among other things, that the plaintiff had not alleged a proper case of employment discrimination or retaliation because the USTA was not the plaintiff's employer.

The U.S. District Court for the Southern District of New York granted the USTA's motion to dismiss. The district court determined that the plaintiff had not stated a claim under Title VII because he had not established that an employer-employee relationship "existed between the parties at the time of the alleged unlawful conduct."

The district court noted that the plaintiff was not a formal employee of the USTA, because he was never hired by or compensated by the USTA. It also reasoned that the plaintiff had not adequately alleged that he was entitled to relief under any alternate theory of employer liability, including under the "single employer doctrine" (which applies "where two nominally separate entities are actually part of a single integrated enterprise") or under the "joint employer doctrine" (which applies when an "employee is at the same time constructively employed by another entity"). As to the joint employer doctrine in particular, the district court remarked that the plaintiff "ha[d] not alleged that the USTA shared immediate control over him with AJ Security or CSC, and thus joint employer liability [was] inapplicable."

The plaintiff appealed to the Second Circuit.

The Second Circuit's Decision

The Second Circuit upheld the district court's decision to dismiss the plaintiff's Title VII claims.

In its decision, the Second Circuit explained that the existence of an employer-employee relationship is a primary element of Title VII claims. Therefore, the circuit court continued, when a plaintiff is found to be an independent contractor and not an employee, the plaintiff's Title VII claim must fail. Put differently, the plausible existence of a requisite employer-employee relationship is "a cornerstone of an adequately pled Title VII complaint."

Despite that, the Second Circuit, continued, in alleging an employer-employee relationship, an employee is not necessarily limited to claims against his or her formal employer. According to the circuit court, pursuant to the "joint employer doctrine," an employee may assert Title VII liability against a "constructive employer" – that is, an entity that shares in controlling the terms and conditions of a plaintiff's employment. The Second Circuit said that, most commonly, the "joint employer doctrine" applies "where the plaintiff's employment is subcontracted by one employer to another, formally distinct, entity."

The circuit court stated that although it had not previously identified a specific test for determining what rendered an entity a "joint employer" in a Title VII case, it would join other circuit courts of appeals in concluding that "non-exhaustive factors drawn from the common law of agency, including control over an employee's hiring, firing, training, promotion, discipline, supervision, and handling of records, insurance, and payroll, are relevant to this inquiry."

In essence, the Second Circuit ruled that it would find a joint employer relationship when two or more entities shared "significant control of the same employee." This means, the circuit court continued, "that an entity other than the employee's formal employer has power to pay an employee's salary, hire, fire, or otherwise control the employee's daily employment activities, such that we may properly conclude that a constructive employer-employee relationship exists."

The Second Circuit then rejected the plaintiff's contention that his complaint adequately alleged that the USTA was his joint employer and, therefore, that it was subject to Title VII's prohibitions on discrimination and retaliation. The circuit court explained that an entity can only be liable under Title VII as a joint employer for rejecting the temporary assignment of a contractor's employee if the entity would have been the employee's joint employer had it accepted the employee's assignment. The circuit court stated that, to plausibly allege that the parties intended to enter into a joint-employment relationship, a plaintiff must allege that the entity would have exercised significant control over the terms and conditions of the plaintiff's employment by, for example, training, supervising, and issuing the plaintiff's paychecks.

According to the circuit court, the plaintiff in this case did not allege, for example, that the USTA instructed AJ Security to fire the plaintiff upon refusing to issue his credentials; that AJ Security hired him for the sole purpose of working at the USTA and that the USTA was aware that by denying his credentials it was effectively terminating his employment with AJ Security; or that the USTA exerted any control over AJ Security's independent hiring process.

The Second Circuit added that the plaintiff also did not allege that the USTA would have been involved in training him, supervising him, issuing his paychecks, covering his insurance or other benefits, or controlling other means of his employment (such as providing his uniform or other tools needed for his position). Absent these types of factual allegations, the circuit court added, it simply had "no basis" to conclude that the USTA would have been the plaintiff's joint employer.

The Second Circuit also found that the plaintiff did not plausibly allege that the USTA was his employer merely by asserting that it refused to issue his credentials. Without further allegations that the USTA would have significantly controlled the manner and means of the plaintiff's work as a security guard, the complaint did "not cross the line from speculative to plausible on the essential Title VII requirement of an employment relationship." For this reason, the circuit court ruled that the district court did not err in dismissing the plaintiff's Title VII claims.

The case is *Felder v. United States Tennis Association*, 27 F.4th 834 (2d Cir. 2022).

FEDERAL DISTRICT COURT SAYS PLAINTIFF'S TITLE VII DISCRIMINATION CLAIMS SHOULD BE DISMISSED WHERE SHE FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES

A federal court in New York has concluded that a plaintiff's employment discrimination claims should be dismissed because she had not filed a complaint with the Equal Employment Opportunity Commission ("EEOC") before she filed her lawsuit.

The Case

The plaintiff in this case alleged in her employment discrimination lawsuit that, while employed as the practice director for William N. Capicotto, M.D., P.C. (the "Practice"), she was subjected to sexual harassment and a hostile work environment by William N. Capicotto, M.D. ("Dr. Capicotto"), the owner of the Practice.

She alleged that the stress she endured while working for the Practice caused her to suffer from anxiety and depression and that it also negatively affected her marriage. The plaintiff contended that she gained

more than 50 pounds while working for the Practice and that she was prescribed medication for her emotional distress. Among other things, the plaintiff asserted three claims for employment discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law ("NYSHRL"), including hostile work environment, sex-based discrimination and retaliation (collectively, the "employment discrimination claims").

The Practice and Dr. Capicotto moved to dismiss the plaintiff's employment discrimination claims due to the plaintiff's failure to exhaust her administrative remedies as required by Title VII.

For her part, the plaintiff argued that her employment discrimination claims were not barred by her failure to exhaust her administrative remedies because administrative exhaustion would have been futile.

The Court's Decision

The court said that the defendants' motion to dismiss should be granted.

In its decision, the court explained that Title VII requires a plaintiff to exhaust administrative remedies before filing an employment discrimination lawsuit in federal court. Specifically, the court continued, exhaustion of administrative remedies through the EEOC is an "essential element of the Title VII . . . statutory scheme" and a "precondition to bringing such claims in federal court."

The court then rejected the plaintiff's contention that exhaustion of administrative remedies would have been futile in her case. The court pointed out that, in the context of employment discrimination claims brought pursuant to Title VII, courts have consistently held that "[b]efore bringing a Title VII suit in federal court," a plaintiff must first present "the claims forming the basis of such a suit . . . in a complaint to the EEOC or the equivalent state agency."

The court said that the only court decision it could find pertaining to futility as excusing the need to exhaust administrative remedies prior to bringing a Title VII employment discrimination claim in federal court was the suggestion by the U.S. Court of Appeals for the Second Circuit in *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015), that futility may excuse a Title VII plaintiff's need to exhaust when "an agency has previously 'taken a firm stand' against a Plaintiff's position."

The court concluded by pointing out that, in the plaintiff's case, the plaintiff had referenced no case law, and it said that its own research had revealed none, indicating that the EEOC had taken a stance against the type of employment discrimination claims the plaintiff asserted, i.e., hostile work environment, sex-based discrimination and retaliation.

The case is *Kashuba v. Capicotto*, No. 20-CV-1629V(F) (W.D.N.Y. May 27, 2022).

FEDERAL DISTRICT COURT IN NEW YORK DISMISSES FAULTY EMPLOYMENT DISCRIMINATION COMPLAINT

The U.S. District Court for the Southern District of New York has dismissed an employment discrimination complaint alleging that the plaintiff was wrongfully terminated. The court found that the plaintiff's complaint did not allege facts showing that the defendants' actions were based on any federally protected characteristics and that the plaintiff did not identify his race or any other characteristics that were protected under federal law.

The Case

The plaintiff's employment discrimination complaint alleged that he was wrongfully terminated from his employment by Manpower, a job staffing human resource company, as part of the New York State COVID-19 vaccine program operated by Maximus in partnership with the New York State Department of Health.

The court considered whether to dismiss the plaintiff's complaint.

The Court's Decision

The court dismissed the complaint.

In its decision, the court explained that, at the pleading stage in an employment discrimination action, a plaintiff must plausibly allege that (1) the employer took adverse employment action against the plaintiff, and (2) a protected trait, such as the plaintiff's race, color, sex, age or disability, was a motivating factor in the employment decision.

The court added that, as to the second element, a plaintiff alleging age discrimination also must allege that the relevant protected trait was the "but-for" cause of the employer's adverse action.

The court pointed out that the federal antidiscrimination statutes prohibit employers from mistreating an individual because of the individual's protected characteristics or retaliating against an employee who has opposed any practice made unlawful by those statutes. Importantly, the court added that mistreatment at work that occurs for a reason other than an employee's protected characteristic or opposition to unlawful discriminatory conduct is not actionable under these statutes.

The court then ruled that the plaintiff's complaint did "not show" that he was entitled to relief. The court reasoned that the plaintiff did not allege facts showing that the defendants' actions were based on any federally protected characteristics and that the plaintiff did not identify his race or any other characteristics that were protected under federal law.

Therefore, the court found, it could not determine whether the plaintiff was entitled to relief. The court said that although it was doubtful that the plaintiff could cure the deficiencies in his complaint, it would grant him 60 days to file an amended complaint.

It is worth noting that the court observed that the plaintiff did not allege in his complaint that he had exhausted his administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The court acknowledged that the plaintiff was not required to plead and prove that he had met these requirements, but it noted that a defendant could raise failure to exhaust as a defense that precludes relief on a complaint that states an otherwise viable federal discrimination claim. Thus, the court concluded, if the plaintiff had exhausted his administrative remedies, he might wish to include in his amended complaint facts regarding any charge he filed with the EEOC.

The case is *Grazette v. Manpower*, No. 21-CV-4296 (LTS) (S.D.N.Y. May 16, 2022).

EMPLOYMENT DISCRIMINATION AND HOSTILE WORK ENVIRONMENT CLAIMS FAIL IN FEDERAL COURT

The U.S. District Court for the Southern District of New York has dismissed a plaintiff's claims for employment discrimination and hostile work environment against his former employer, ruling that the plaintiff failed to allege facts that would support his claims.

The Case

The plaintiff in this case alleged that he was employed at a restaurant in Queens, New York, from on or about June 2, 2019, until his employment was terminated on or about December 21, 2019, on allegations that he was stealing tips from other servers and illicitly obtaining their payroll information from the restaurant's computer. The plaintiff, an African American man, alleged that he and two employees of Hispanic descent were treated differently from other employees who were white or of Asian descent.

The plaintiff asserted claims against the restaurant and various individuals associated with the restaurant for employment discrimination on the basis of race and for hostile work environment, both in violation of 42 U.S.C. § 1981.

The defendants moved to dismiss. They argued that the plaintiff had not pleaded sufficient facts to support his claims. In particular, they asserted that the plaintiff's employment discrimination claim had to be dismissed because the plaintiff did not allege that he performed his work satisfactorily or that he suffered an adverse employment action under

circumstances giving rise to an inference of discrimination. The defendants also contended that the plaintiff's hostile work environment claim failed because he had not alleged facts to support that he was subject to a hostile work environment, that the environment unreasonably interfered with his work performance, or that the environment was hostile as a result of his race.

The Court's Decision

The court granted the defendants' motion to dismiss.

In its decision, the court explained that employment discrimination claims brought under 42 U.S.C. § 1981 are subject to the same standards as those under Title VII of the Civil Rights Act of 1964. The court noted that, in the absence of "direct evidence" that an adverse employment decision was motivated at least in part by the plaintiff's race, a plaintiff can plead a case of discrimination by alleging facts that would plausibly support that the plaintiff:

- Is a member of a protected class;
- Was qualified;
- Suffered an adverse employment action; and
- Alleged at least minimal support for the proposition that the employer was motivated by discriminatory intent.

The court ruled that the plaintiff's complaint did not plead the minimal inference of discrimination as part of his case. The court noted that the plaintiff relied on the allegation that others who were white or of Asian descent received preferential treatment, but the court emphasized that the plaintiff did not allege "that those others were similarly situated."

As the court noted, an employee was similarly situated to co-employees if they were (1) subject to the same performance evaluation and discipline standards, and (2) engaged in comparable conduct. The plaintiff's "barebones pleading" did not satisfy this standard, according to the court. It said that although the plaintiff identified two employees whom he claimed received preferential treatment to the treatment he received, he did not identify anything about either employee other than that each was white and "worked with" the plaintiff.

In particular, the court said, the plaintiff did not plainly allege the job he was hired to perform or the jobs that either of the alleged "comparators" (that is, the other two employees) were hired to perform. In fact, the court continued, the plaintiff's complaint made it "as or more plausible that he had different job responsibilities because he was hired to perform different job responsibilities."

Thus, the court ruled, the plaintiff's employment discrimination claim had to be dismissed.

Regarding the plaintiff's hostile work environment claim under 42 U.S.C. § 1981, the court explained that the plaintiff had to plead that the defendants' conduct:

- Was objectively severe or pervasive in that it created an environment that a reasonable person would find hostile or abusive;
- Created an environment that the plaintiff subjectively perceived as hostile or abusive; and
- Occurred because of the plaintiff's protected characteristic.

In particular, the court added, to plead conduct that was pervasive, a plaintiff must allege incidents that were "more than episodic; they must be sufficiently continuous and concerted." Thus, isolated incidents usually will not suffice to establish a hostile work environment (although the U.S. Court of Appeals for the Second Circuit has noted that even a single episode of harassment can establish a hostile work environment if the incident was sufficiently "severe").

The court then ruled that the plaintiff had not alleged facts sufficient to state a claim for a hostile work environment. The court decided that the tasks that the plaintiff alleged that he was forced to take did not amount to conduct by the defendants "that a reasonable person would find hostile or abusive" but, rather, were functions that were typically performed in a restaurant.

The court concluded that, in the absence of any allegations that would satisfy the three prongs of a hostile work environment claim, the plaintiff's hostile work environment claim had to be dismissed.

The case is *Wallace v. Crab House, Inc.*, No. 21-cv-5757 (LJL) (S.D.N.Y. May 12, 2022).

FEDERAL COURT DISMISSES PLAINTIFF'S EMPLOYMENT DISCRIMINATION SUIT FOR FAILING TO ALLEGE ANY "PROTECTED STATUS"

The U.S. District Court for the Eastern District of New York has dismissed a plaintiff's employment discrimination action against her former employer and a number of individual defendants after finding that she had not alleged discrimination on the basis of a protected status, such as race, color, gender, religion, national origin, age or disability.

The Case

The plaintiff in this case was a home health aide at Alliance for Health, Inc., for approximately three months before being terminated on February 25, 2021. She filed a lawsuit against Alliance and other defendants claiming wrongful termination, unequal terms and conditions of employment, and retaliation. The plaintiff did not allege that her termination was based on any "protected status." Rather, the plaintiff alleged that she was "wrongfully terminated" because of a 90-day "inactivity" report in her employer's case assignment system, despite the fact that the plaintiff "accept[ed] cases."

The plaintiff sought the reversal of her termination.

The court considered whether to dismiss her complaint.

The Court's Decision

The court dismissed the plaintiff's complaint.

In its decision, the court explained that, at the pleading stage, a plaintiff claiming employment discrimination need not prove discrimination, or even allege facts establishing every element of a case of discrimination. Instead, a plaintiff must only plead facts sufficient to give "plausible support" to the plaintiff's "minimal" initial burden, which is governed by the statute under which the claim is brought.

Here, the court decided, it lacked jurisdiction over the plaintiff's claims.

First, the court said, the plaintiff's claims were not premised on the violation of any federal law. The court reasoned that the plaintiff did "not attribute her termination to any protected status, such as race, color, gender, religion, national origin, age or disability." Hostility or unfairness in the workplace that was not the result of discrimination against a protected characteristic was "simply not actionable," the court added.

The court granted the plaintiff leave to file an amended complaint if she sought to proceed under a federal employment discrimination statute. It added that if the plaintiff elected to file an amended complaint, she would have to indicate the basis for the discrimination (e.g., race, color, gender, religion, national origin, age or disability), set forth facts to support her claim, and indicate the dates for each alleged discriminatory act. The court concluded by advising the plaintiff that individuals are not subject to liability for claims brought under Title VII of the Civil Rights Act of 1964 and that, to the extent she sough to file an amended complaint and proceed under Title VII, her action could not be sustained against the individual defendants.

The case is *Holder v. Alliance for Health Inc.*, No. 22-CV-96 (E.D.N.Y. April 12, 2022).

EMPLOYMENT DISCRIMINATION LAWSUIT STAYED PENDING ARBITRATION OF PLAINTIFF'S STATUTORY DISCRIMINATION CLAIMS

A federal district court in New York has stayed a plaintiff's employment discrimination lawsuit so that her claims under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981 could be arbitrated, as provided in a collective bargaining agreement ("CBA") that covered the plaintiff.

The Case

The plaintiff's lawsuit alleged that she was a Hispanic female of Colombian origin who worked as a cleaner for Pritchard Industries LLC ("Pritchard") from 1997 to 2017; that her position required that she be assigned to different office locations; and that her last assignment was with The Macquarie Group ("Macquarie"). The plaintiff contended that Pritchard and Macquarie discriminated against her on the basis of race, sex and national origin during her tenure. Her complaint asserted claims pursuant to Title VII of the Civil Rights Act of 1964 for discrimination based on race, sex and national origin, and pursuant to 42 U.S.C. § 1981.

The defendants moved to dismiss, arguing that the plaintiff's employment discrimination claims under Title VII and Section 1981 were subject to mandatory arbitration and, therefore, could not be litigated. Specifically, the defendants relied on a private dispute resolution process for employment discrimination claims set forth in the parties' collective bargaining agreement ("CBA"). The clause provided:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, 42 U.S.C. [§] 1981, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Article V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

The Court's Decision

The court stayed the litigation pending arbitration of the plaintiff's employment discrimination claims.

In its decision, the court agreed with the defendants that the plaintiff's employment discrimination claims were covered by the arbitration provisions in the CBA. The court then agreed with other courts in the U.S. Court of Appeals for the Second Circuit that have held that the same or substantially similar alternative dispute resolution provisions of the parties' CBA were applicable to discrimination claims made by covered employees. *See, e.g., Germosen v. ABM Indus. Corp.*, No. 13-CV-1978 ER (S.D.N.Y. Aug. 26, 2014).

The court explained that the parties did not dispute the validity or enforceability of the arbitration provisions of the CBA. The court added that, on a plain reading, the CBA contemplated resolution of the case by a third party specifically for discrimination claims arising under a statute, including under Title VII and Section 1981.

Simply put, the court concluded, the plaintiff's lawsuit was "contemplated by the CBA" and fell "within its scope" as it asserted federal claims under Title VII and Section 1981 on the basis of discrimination and retaliation.

Accordingly, the court granted a stay of the litigation pending arbitration of the plaintiff's statutory discrimination claims under Title VII and Section 1981.

The case is *Garcia v. Pritchard Industries, LLC*, No. 1:20-CV-10858-ALC (S.D.N.Y. March 18, 2022).

NEW YORK APPELLATE COURT RULES THAT PROVISION IN EMPLOYMENT AGREEMENT DID NOT REQUIRE ARBITRATION OF PLAINTIFF'S EMPLOYMENT CLAIMS

An appellate court in New York has reversed a trial court's decision to dismiss a plaintiff's lawsuit against her former employer in favor of arbitration, finding that the plaintiff's employment agreement did not "expressly and unequivocally establish" that the parties had agreed to arbitrate the plaintiff's claims for wrongful termination and unpaid commissions.

The Case

In the complaint the plaintiff filed against the defendants, the plaintiff alleged that she had been employed by the defendants from 2007 through August 2018 and that, pursuant to an employment agreement between the parties, she was to receive, among other things, commissions based on the sales that she made.

According to the plaintiff, however, the defendants continuously deferred payments of these commissions due to her gender, and terminated her employment after she refused to accept an offer that would have settled her commission dispute for less than one-fifth of the amount that she claimed was owed.

The defendants moved to dismiss the plaintiff's complaint. In support of their motion, the defendants submitted the plaintiff's employment agreement, which consisted of a "binding contract" and an annex to a non-compete agreement (the "Annex").

The Annex set forth, among other things, the plaintiff's salary and the commission structure. In addition, the tenth paragraph of the Annex stated: "Third party in case of a disagreement: Rabbi Shlomo Gross (Belze Dayan) or Rabbi Meir Labin."

In the defendants' view, this provision constituted an arbitration agreement that was intentionally drafted to broadly encompass any possible employment-related dispute that arose between the parties. The defendants contended that because the allegations in the plaintiff's complaint were based on her employment, she was bound by the arbitration clause and, therefore, her complaint should be dismissed.

In response, the plaintiff argued that the language in the tenth paragraph of the Annex was too ambiguous to constitute a binding arbitration agreement because it merely referred to disagreements and did not specify the types of disputes or disagreements to which it applied.

The Supreme Court, Kings County, dismissed the plaintiff's complaint, finding a valid and enforceable arbitration clause that was binding on the plaintiff.

The plaintiff appealed.

The Appellate Court's Decision

The appellate court reversed.

In its decision, the appellate court explained that arbitration is a matter of contract and that arbitration clauses must be enforced according to their terms. It then stated that a party will not be compelled to submit to arbitration – rather than litigating – without evidence that "affirmatively establishes" that the parties expressly agreed to arbitrate their disputes. An agreement to arbitrate, the appellate court added, "must be clear, explicit and unequivocal and must not depend upon implication or subtlety."

In this case, the appellate court ruled, the language in the tenth paragraph of the Annex – "Third party in case of a disagreement: Rabbi Shlomo Gross (Belze Dayan) or Rabbi Meir Labin." – did not "expressly and unequivocally establish" that the parties agreed to arbitrate the plaintiff's claims for wrongful termination or unpaid commissions.

Moreover, the appellate court stated, this provision ambiguously referred to a disagreement, but did not specify the types of disagreements

to which it applied or otherwise state that it applied to any dispute that may arise between the parties.

Accordingly, the appellate court ruled, the trial court should not have dismissed the plaintiff's complaint.

The case is *Rubinstein v. C & A Marketing, Inc.*, No. 522835/18 (2d Dep't May 11, 2022).

NEW YORK TRIAL COURT ENJOINS DEFENDANTS' USE OF PLAINTIFF'S CONFIDENTIAL INFORMATION

A trial court in New York has granted a preliminary injunction enjoining defendants from accessing certain of the plaintiff's confidential information allegedly in the defendants' possession and enjoining the defendants from soliciting certain identified customers of the plaintiff.

The Case

The plaintiff in this case, a financial services firm providing personalized financing solutions to small businesses, alleged that Jason Javich began working for the plaintiff in February 2020 as an account executive and that he was employed as a manager at the time of his resignation. According to the plaintiff, in addition to managing his own customers, Javich also was responsible for managing a team of seven account executives that worked under him. The plaintiff asserted that Javich oversaw the sales process for all of his team members, and that the plaintiff entrusted Javich with access to its proprietary client list database and other sensitive information.

For his part, Javich asserted that he joined the plaintiff as an entry level funding broker, that his work did not require any specialized abilities, training, education or experience, and that before he began working for the plaintiff his only full-time job had been as an administrative assistant in a radiologist's office.

The plaintiff also contended that, in connection with his employment, Javich executed an employment agreement that included a covenant not to compete for one year after termination from the plaintiff's employment in any business that competed with the plaintiff within 1,500 miles of the defendant's workplace. The employment agreement, the plaintiff added, also prohibited Javich from disclosing the names, addresses or any information about the plaintiff's customers or clients and from soliciting the plaintiff's customers or employees for one year after termination from the plaintiff's employment.

The plaintiff alleged that when Javich resigned on October 1, 2021, he informed the plaintiff of his intention to immediately begin working for Streamline Funding, LLC d/b/a Fundible ("Fundible"), a

competitor that had been established in 2020 by former employees of the plaintiff.

The plaintiff sent a cease-and-desist letter to Javich, Fundible and its founders (collectively, the "defendants") on October 7, 2021, and, after a standstill period, the parties entered into a settlement agreement on January 14, 2022. Sections 9, 10, and 11 of the settlement agreement provided for a series of audits to determine whether the defendants were using any of the plaintiff's confidential information. Section 2 of the settlement agreement provided that Javich could commence employment with Fundible starting on April 1, 2022.

The plaintiff asserted that the results of the first audit revealed that, contrary to the defendants' certifications, the defendants had misappropriated the plaintiff's confidential information and had solicited the plaintiff's customers. Fundible admitted that Javich showed it a list of customers whose funding Javich had closed while working with the plaintiff ("Javich's Contact List"), but Fundible denied that the information was confidential or proprietary and it asserted that it had not funded any deals respecting any of the customers on Javich's Contact List.

Fundible also asserted that Fundible deleted the information that Javich shared, but that the reason the audit uncovered remnants was because the deleted data had not yet been overwritten on its computer system and, therefore, was recoverable.

After the audit, negotiations between the parties broke down because, in part, the defendants believed that the plaintiff's audit impermissibly went beyond the scope of Javich's Customer List.

The plaintiff then filed a lawsuit against the defendants and asked the trial court to enjoin:

- The defendants from accessing, disclosing, using or exploiting the plaintiff's confidential information;

- The defendants from contacting, soliciting or servicing any customer of the plaintiff identified in information the plaintiff alleged the defendants misappropriated from the plaintiff; and

- Javich from working at Fundible.

The plaintiff argued that the injunctive relief it sought was appropriate given the nature of the information involved and the defendants' reinforcement of the confidentiality and non-solicitation terms via the settlement agreement. In particular, the plaintiff argued that "courts routinely enforce contractual confidentiality terms and one-year customer non-solicitation restrictions, especially [when] they are reinforced in a settlement agreement."

The defendants opposed the plaintiff's motion, arguing that the plaintiff had not demonstrated the enforceability of the agreement.

The Court's Decision

The court refused to bar Javich from working at Fundible but it enjoined the defendants from using Javich's Contact List.

In its decision, the court first explained that enforcement of non-compete clauses in employment contracts is limited to circumstances where they are "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."

The court then stated that although restrictive covenants for a one-year time period, like the one in this case, were reasonable, the same could "not be said about the prohibition here on competition within 1,500 miles of the workplace." Moreover, the court added, the plaintiff "failed to articulate the reasonableness of such a large geographic scope for Javich's work with plaintiff, which involved funding small businesses."

The court then ruled that even if, for argument's sake, the non-compete had a reasonable geographic scope, the plaintiff failed to demonstrate the necessity of enjoining Javich from working at Fundible to support its legitimate interest. As the court explained, New York courts have held that an employer has a legitimate interest in preventing:

- Misappropriation of the employer's trade secrets or of confidential customer lists;
- Competition by a former employee whose services are unique or extraordinary; and
- Exploitation by former employees of the goodwill of a client or customer that has been created and maintained at the company's expense, to the employer's competitive detriment.

With respect to the second category, the court ruled that it could not be said that Javich's services were "unique or extraordinary," adding that his job could not be considered a "learned profession."

With respect to the first category, the court noted that the defendants admitted that Javich shared Javich's Contact List with Fundible but asserted that the information on the list was not confidential and that in any event they agreed to delete it or had already deleted it. The court ruled that, to the extent the defendants still had access to Javich's Contact List, because of how computers store deleted information or otherwise, the plaintiff's "legitimate interest in protecting its confidential information" could be protected with "tailored enforcement of the non-disclosure and non-solicitation portions of the employment agreement," without overly burdening Javich by enjoining his working at Fundible. Accordingly, the court refused to enjoin Javich from working at Fundible.

The court then addressed the balance of the plaintiff's request for relief.

The court found that Javich breached his employment agreement by sharing with Fundible Javich's Contact List and allegedly soliciting former clients. It then ruled that the plaintiff had established a prima facie case for its legitimate interest in preventing misappropriation of its confidential customer lists.

The court also found that the plaintiff had adequately demonstrated that it was likely to suffer irreparable harm in the event that Javich's Contact List or other confidential information of the plaintiff was used to support the defendants' solicitation of the plaintiff's customers.

Accordingly, the court issued an injunction effective until October 1, 2022, barring Javich from disclosing or otherwise using the information in Javich's Contact List or other of the plaintiff's confidential information or soliciting those of the plaintiff's customers that Javich worked with while in the plaintiff's employ. The court also enjoined the other defendants from using the plaintiff's confidential information, including Javich's Contact List, that they may have obtained from Javich or by virtue of information deleted but not overwritten or stored in their email or other customer management systems.

The case is *Mission Capital LLC v. Javich*, No. 650576/2022 (Sup. Ct. N.Y. Co. April 5, 2022).

NEW YORK TRIAL COURT DISMISSES CLAIM THAT DEFENDANT INTERFERED WITH EMPLOYMENT AGREEMENT PLAINTIFF HAD WITH ITS FORMER EMPLOYEE

The Supreme Court, New York County, has granted a defendant's motion to dismiss a lawsuit asserting that it interfered with an employment agreement by hiring the plaintiff's employee.

The Case

In November 2018, Rockaway HD LLC, a business entity providing provides dialysis services, entered into an employment agreement with Stephanie Grunstein pursuant to which Grunstein was hired to work at Rockaway's office in Queens, New York. The agreement required a 90-day written notice for either party to terminate, and further provided that Grunstein would not engage in, or become an employee of, any business in competition with Rockaway within a 10-mile radius of Rockaway's office.

On February 14, 2020, Grunstein terminated the employment agreement without giving Rockaway a 90-day notice. She immediately was hired by Avantus Upper East Side Dialysis Center, which also was a provider of dialysis services.

Rockaway sued Avantus, alleging that it knew or should have known about its agreement with Grunstein, that it improperly induced Grunstein to terminate her employment agreement, and that Grunstein was in violation of the termination notice and non-compete provision of the agreement. Rockaway asserted causes of action for conspiracy, "intentional" and "malicious" interference with a contract, and "business intentionally interfered with" against Avantus. It also sought punitive damages.

Avantus moved to dismiss the complaint. It argued that Rockaway's allegation that it induced Grunstein to breach her employment agreement was conclusory and unsupported by any facts, and that the causes of action for intentional interference with a business, conspiracy and punitive damages were not recognized in New York. Avantus asked the court to take judicial notice that its office was more than 15 miles "as the crow flies" and 22 miles by land transport from Rockaway's office. It thus argued that Rockaway's non-compete agreement with Grunstein was inapplicable.

For its part, Rockaway contended that it had sufficiently pleaded the elements of its claims, and that a dismissal of its cause of action for punitive damages would be premature.

The Court's Decision

The court granted the motion to dismiss.

In its decision, the court explained that, to state a claim for tortious interference with contract, Rockaway had to allege that it had a valid contract with Grunstein, that Avantus knew of the contract, that Avantus intentionally procured Grunstein's breach of the contract without justification, that there was an actual breach of the contract, and that damages resulted from the breach.

The court noted that Rockaway alleged the existence of a contract with Grunstein and that it sustained damages. The court then said that the issues it had to explore was whether Rockaway sufficiently alleged that Avantus knew of its employment agreement with Grunstein, and whether Avantus intentionally induced her to breach the agreement without justification.

The court ruled that because Rockaway did not allege that Avantus engaged in any specific conduct, it failed to sufficiently allege that Avantus not only knew of the agreement but that it intended to induce a breach of it.

The court also decided that Rockway's claims for civil conspiracy and punitive damages could not survive absent an underlying tort claim.

Given these conclusions, the court added that it did not have to consider Avantus' argument regarding its distance from the non-compete area.

The case is *Rockaway HD LLC v. Grunstein*, No. 156204/2020 (Sup. Ct. N.Y. Co. March 2, 2022).