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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

Index No. 3964/2013
Submission Date: 4/8/2014

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Motion Dec. 001: MD

-----X
MICHAEL KANOWITZ, an individual,

Plaintiff(s),

**ORDER DENYING
MOTION TO DISMISS
THE COMPLAINT**

-against-

**BROADRIDGE FINANCIAL SOLUTIONS, INC.,
and JOHN OLIVERI, an individual,**

Defendant(s).
-----X

Upon consideration of the Notice of Motion by the defendants Broadridge Financial Solutions, Inc. and John Oliveri, an individual [collectively "the defendants"], for an order dismissing the complaint for failure to state a cause of action dated February 25, 2014, the moving affirmation, exhibits A through C, the supporting memorandum of law, the memorandum of law in opposition to the dismissal motion on behalf of the plaintiff, Michael Kanowitz, an individual ["the plaintiff"], the plaintiff's affirmation in opposition, exhibits A through L, and the defendants' reply memorandum of law in further support of the defendant's motion; it is now

ORDERED that the defendants' motion to dismiss the complaint for failure to state a cause of action is denied.

Unless otherwise indicated, the facts are taken from the plaintiff's complaint which was filed on February 6, 2013. In April and May of 2012 the plaintiff complained to his employer, the defendant Broadridge Financial Solutions, that the employer was unlawfully withholding earned wages in the form of a bonus from his and his subordinates' pay. The defendants retaliated against the plaintiff for these complaints by, inter alia, terminating him on June 29, 2012.

The complaint contains a single cause of action pursuant to Labor Law § 215. Section 215 entitled "Penalties and civil action; prohibited retaliation", provides:

- 1. (a) No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten,

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penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, or to the attorney general or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner (ii) because such employer or person believes that such employee has made a complaint to his or her employer, or to the commissioner or his or her authorized representative, or to the attorney general, or to any other person that the employer has violated any provision of this chapter, or any order issued by the commissioner (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter, or (iv) because such employee has provided information to the commissioner or his or her authorized representative or the attorney general, or (v) because such employee has testified or is about to testify in an investigation or proceeding under this chapter, or (vi) because such employee has otherwise exercised rights protected under this chapter, or (vii) because the employer has received an adverse determination from the commissioner involving the employee.

An employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section.

Subsection 2 (b) further provides that at or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee. There is no dispute that the plaintiff failed to serve a notice of claim upon the Attorney General in compliance with the statute until September 13, 2013, when advised that the defendants intended to move to dismiss the complaint on this basis.

The defendants contend that the failure to serve the requisite notice of claim in accordance with the statute is a condition precedent to the commencement of the action mandating a dismissal of the complaint with prejudice, *citing Crosland v. City of New York*, 140 F.Supp.2d 300, *affirmed* 54 Fed.Appx. 504, 2002 WL 31867823 [2d Cir. 2001]).

The reported cases that have examined this issue are sparse; with the exception of *Crosland*, each has taken the view that the failure to file a notice of claim with the attorney general is not fatal and does not require dismissal of the complaint (*Robledo v. Number 9 Perfume Leasehold*, 2013 WL 1718917 [S.D.N.Y. 2013] [Freeman, Mag. J.]; *Quintanilla v. Suffolk Paving Corp.*, 2011 WL 1323033 [E.D.N.Y. 2011] [Tomlinson, Mag. J.]; *Estrella v. Coqui Check Cashing, Inc.*, 2010 WL 2975765 [E.D.N.Y. 2010] [Gold, Mag. J.]; *see also Aurelian v Albert Augustine, Ltd.*, 2012 WL 6221085 [Sup Ct. N.Y.]; *but see Antolino v Distribution Management Consolidators Worldwide*, 2011 N.Y.Slip Op. 33138 (U) [Sup. N.Y.] [dismissing action without prejudice for failure to serve the attorney general]). Neither the New York Court of Appeals, nor any of the Appellate Divisions has addressed the issue.

The court is unpersuaded that *Crosland* is authority for the proposition that failure to timely comply with the notification requirement at issue requires dismissal. As pointed out by Magistrate

Gold in *Estrella*,¹ *supra*, in *Crosland*, the court dismissed the Section 215 claims because there had been no notice prior to the expiration of the statute of limitations. It was not possible to determine, Magistrate Gold found, “whether plaintiffs’ § 215 claim in *Crosland* would have been dismissed solely for failure to give notice, or if notice had been made within the limitations period but after the filing of the complaint.”

Here, the acceleration of complaints over unpaid bonuses by the plaintiff occurred in April and May of 2012 and was followed by the plaintiff’s termination at the end of June, 2012. An employee must bring a claim for retaliation within two (2) years of the alleged retaliatory conduct (*see* LABOR LAW §§ 215[1], [2]). The action was commenced in February of 2013, well within the two year period of limitations.

The plaintiff has failed to persuade the court that the statutory requirement is a condition precedent to the commencement of the action or that the notice requirement was intended for any other purpose than to apprise the attorney general that such an action was commenced (*see Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp.*, 28 N.Y.2d 117, 129, 268 N.E.2d 790, 320 N.Y.S.2d 57 [1971]).

Accordingly, the motion to dismiss the complaint for failure to state a cause of action is denied.

Dated: 6.24.2014



ANDREW G. TARANTINO, JR., A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION

¹ Supplemental Report & Recommendation, *Estrella v. Coqui Check Cashing, Inc.*, 2010 WL 2975765 at *1 (E.D.N.Y. July 21, 2010).