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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ROSALYN RICHTER PART 24
*Justice*

Greenberg & Reicher LLP

- v -

Hyman, Julie

INDEX NO. 117703/2004

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

PARTIES SHALL APPEAR IN PART 24, ROOM 418 at 60 CENTRE ST. FOR A PRELIMINARY CONFERENCE ON AUGUST 10, 2005.



Dated: 7/8/05

Rosalyn Richter
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

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GREENBERG & REICHER, LLP and
EDWARD GREENBERG

Plaintiffs,

-against-

DECISION & ORDER
Index No. 117703/2004

JULIE HYMAN.

Defendant.

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**RICHTER, J.:**

Defendant Julie Hyman ("Hyman") moves to dismiss the complaint for failure to state a cause of action pursuant to 3211(a)(7). Plaintiffs Greenberg & Reicher, LLP ("G&R") and Edward Greenberg ("Greenberg") oppose this motion arguing that the complaint alleges sufficient facts for the claims of breach of loyalty and "actionable defamation."

Defendant Hyman was employed at G&R as an associate attorney from September 2002 until November 3, 2004 as an "at will" employee. Plaintiffs' complaint alleges two causes of action. The first cause of action consists of the following allegations. On November 3, 2004, defendant terminated her employment from G&R without notice causing plaintiffs to incur great expense in reviewing files, making photocopies, drafting opposition papers, and making court appearances on defendant's behalf. Plaintiffs also allege that defendant removed personalty, specifically computer discs, from G&R's offices, solicited G&R's clients prior to her withdrawal from the firm, and that defendant advised a former client of G&R to dispute fees owed by the client to G&R. Plaintiffs' second cause of action alleges that subsequent to defendant's withdrawal, defendant made comments to a G&R employee, Mark Formosa, that were "false,

defamatory, constitute slander, slander *per se*..." Specifically, the complaint alleges that defendant said that Greenberg was "difficult to work with" and "was abusive and nasty," that another employee of G & R, Barbara Greenberg, was "abusive and nasty," that opposing attorneys "offered her jobs" and stated that "Greenberg was difficult to work with" and "a person with whom you could not settle cases," and that she informed clients that she was leaving, and that she was owed money by G&R and had not been paid. Plaintiffs also argue that defendant's statements to Mr. Formosa constitute actionable defamation.

Defendant argues that plaintiffs' pleadings fail to state a cause of action. When determining a motion made pursuant to 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Also, "...any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff." *Gibralter Steel Corporation v. Gibralter Metal Processing*, 2005 WL 1378364 (4th Dept. 2005). *See generally 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). The standard is "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d at 88..

Plaintiffs' first cause of action is dismissed as to the allegations that defendant, who was an "at will" employee, provided no notice to plaintiff G&R prior to leaving and that because of defendant's withdrawal, plaintiffs incurred costs. In New York, "[a]t will employment permits either party to terminate the employment relation without advance notice, and neither party has any cause of action against the other for terminating the employment." *Kotick v. Desai*, 123 A.D.2d 744, 745 (2nd Dept. 1986). Thus, no cause of action exists based merely on defendant's

lack of notice.

However, the allegations raised in plaintiffs' pleadings and submissions in opposition are sufficient to constitute a cause of action for breach of duty of loyalty – as to whether defendant was promoting her own business while still employed by plaintiff G&R, whether she was using G&R's time and resources, *Wallack Freight Lines, Inc. v. Next Day Express, Inc.*, 273 A.D.2d 462 (2nd Dept. 2000), and whether defendant removed computer discs from G&R, which contain information on one of G&R's cases. "It is well established that an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or duties...and may not use his or her principal's time, facilities, or proprietary secrets to build a competing business." *Mega Group Inc. v. Halton*, 290 A.D.2d 673, 675 (3rd Dept. 2002). Defendant denies that she told any of G&R's clients of her intention to leave while employed at the firm. She also denies that she removed the computer discs. She argues that it would have been impossible for her to advise clients of her withdrawal because she made the decision based on a conversation that took place with plaintiff Greenberg on November 2, 2004. Defendant also submits an affidavit from a former client of G&R, who is currently engaged in a malpractice suit against G&R, stating that the client was not advised of defendant's withdrawal prior to November 3, 2004 and that the client asked to retain defendant's services on November 4, 2004. These factual affidavits go to the merits of the claims, but do not establish that plaintiffs have failed to plead a cause of action at all.

Plaintiffs' also claim that defendant made defaming statements to a G&R employee after defendant terminated her employment. In pleading defamation, plaintiffs must meet the specificity requirements of CPLR § 3016 which requires plaintiffs to "describe the nature of any

alleged defamatory statement" and "provide the time, place, and manner of the purported defamation," *Buffolino v. Long Island Sav. Bank, FSB*, 126 A.D.2d 508 (2nd Dept. 1987) and to whom the publication was made. *Seltzer v. Fields*, 20 A.D.2d 60, 64 (1st Dept. 1963). Although plaintiffs meet the first requirement as the particular words complained of are set forth in the complaint, *Kahn v. Friedlander*, 90 A.D.2d 868 (3rd Dept. 1982); *see also Geddes v. Princess Properties Intern., Ltd.*, 88 A.D.2d 835 (1st Dept. 1982), plaintiffs fail to describe the time, place, and manner of the defamatory statements. Plaintiffs indicate to whom the statements were made to, but fail to mention when, where, and the manner in which the statements were made to Mr. Formosa. Furthermore, a legitimate argument can be made that the alleged statements were an expression of opinion, which is not actionable. *Schwartz v. Nordstrom, Inc.*, 160 A.D.2d 240 (1st Dept. 1990). An action for defamation cannot be sustained unless it is premised on "published assertions of fact." *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). The alleged statements that defendant made such as that plaintiff Greenberg was "abusive and nasty" and "difficult to work with" do not have a precise meaning, but rather are merely an indication of the defendant's own views of Greenberg's temperament.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part and the second cause of action of the complaint is dismissed; and it is

ORDERED that defendant shall answer the complaint within 20 days of the date below.

The parties shall appear in Part 24, Room 418, 60 Centre St. for a preliminary conference on August 10, 2005.

July 8, 2005

Rosalyn Richter

Justice Rosalyn Richter