

**Excelaire Serv., Inc. v Wolkiewicz**

2006 NY Slip Op 30676(U)

August 23, 2006

Supreme Court, Suffolk County

Docket Number: 04-20047

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 2-28-06  
ADJ. DATE 3-21-06  
Mot. Seq. # 001 - MG; CASEDISP

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EXCELAIRE SERVICE, INC.,	:	GUTMAN & GUTMAN, LLP
	:	Attorneys for the Plaintiff
Plaintiff,	:	19 Roslyn Road
	:	Mineola, New York 11501
- against -	:	
	:	BRACKEN & MARGOLIN, LLP
	:	Attorneys for the Defendant
SCOTT WOLKIEWICZ,	:	One Suffolk Square, Suite 300
	:	1601 Veterans Memorial Highway
Defendant.	:	Islandia, New York 11749
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 11 - 14; Replying Affidavits and supporting papers 15 - 20; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that defendant Scott Wolkiewicz 's motion for summary judgment dismissing the plaintiff's complaint is granted.

Plaintiff Excelaire Service, Inc., commenced this action against defendant Scott Wolkiewicz to enforce a provision in its employment contract with the defendant entitling it to reimbursement for the cost of pilot training he received while working for the corporation. The contract provision provided that Excelaire Service, Inc., ("Excelaire"), an aircraft charter company, would be entitled to reimbursement for the cost of training its employees to become pilots in the event that the employee received such training and resigned prior to the end of their first year of employment with the corporation. Excelaire alleges that it is entitled to reimbursement from defendant Scott Wolkiewicz ("Wolkiewicz") because he successfully completed pilot training and worked as a pilot with Excelaire from July 7, 2003 until February 9, 2004 when he resigned prior to the end of the one year period required by the contract after finding more lucrative employment elsewhere.

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Defendant Wolkiewicz is now seeking summary judgment dismissing the plaintiff's complaint on the ground that Excelaire breached their employment contract when it eliminated the position for which he was trained and significantly reduced his salary, thereby constructively discharging him from his employment with the corporation and forcing him to resign prior to the one year period specified in the employment contract.

In support of his motion defendant Wolkiewicz submits, *inter alia*, copies of the pleadings; an affidavit in support of his motion; a copy of his employment contract with Excelaire; a copy of the plaintiff's response to written interrogatories, as well as copies of portions of the U.S. Federal Aviation Regulations governing pilot training.

In opposition Excelaire argues that defendant's summary judgment motion should be denied because contrary to defendant Wolkiewicz's assertions that he was forced to resign, Wolkiewicz breached the terms of his employment contract by voluntarily resigning prior to the one year period designated in his contract because he found more lucrative employment elsewhere. Excelaire also contends that it acted within the terms of its employment contract which did not guarantee defendant a particular salary and required employees to return to work even if they are furloughed and then recalled to work.

In his supporting affidavit defendant Wolkiewicz indicated that he officially went on the payroll of Excelaire on July 7, 2003 at a salary of forty-five thousand dollars per year until September 20, 2003 when he was informed that the aircraft to which he was assigned would be out of service indefinitely and that his salary would be cut by sixty percent. Defendant Wolkiewicz also indicated that he ended his employment with Excelaire on February 9, 2004 and sought alternate employment due to economic hardship and difficulties in his working conditions.

The Pilot Training Contract submitted by defendant Wolkiewicz provides that Excelaire would pay for its employee's pilot training on the condition that the employee agrees to work with Excelaire in the capacity of pilot for a minimum of one year. The contract further provides that if the employee resigns prior to the minimum one year period, he or she will be required to reimburse the employer for the costs of their training. The contract also states that after the employee's six-month anniversary, the reimbursement amount owed will be prorated on a decreasing basis. For example, if the pilot resigns halfway through the term of the agreement, he will be responsible for the full training costs. After the twelve-month anniversary, the reimbursement costs will have decreased to zero. The contract also lists five exceptions under which the pilot will not be required to reimburse the employer for the training costs. The Pilot will not be required to reimburse the employer if: first, the pilot fails to complete the training through no fault of his/her own; second, if the Pilot's skills are judged by an instructor or check airman to be inadequate to pass the required FAA check ride; third, if the Pilot cannot obtain, or

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loses the FAA medical certificate required for the trained position; fourth, if the position for which the pilot was trained is eliminated; or fifth, if the Pilot is fired.

In its response to defendant's written interrogatories the plaintiff states that the aircraft to which defendant Wolkiewicz was assigned went down for maintenance on September 19, 2003 and Mr. Wolkiewicz was then notified that he would be converted to part time status and would be paid 40% of his salary due to the loss of the aircraft. The response also gave a break down of the cost of pilot training which included \$18,000.00 for Aircraft and Simulator, \$750.00 for Traveling expenses and \$1,050.00 for lodging.

In opposition to defendant's motion, Excelaire submitted the affidavit of its Director of Operations, George Kyriacou; a copy of a letter from Excelaire management notifying defendant Wolkiewicz that the aircraft he piloted would be grounded from service for maintenance and that he could only continue his employment with Excelaire on the condition that he accept a demotion from a full time pilot to a part time status. Excelaire also submitted a copy of defendant Wolkiewicz's letter of resignation.

In his affidavit George Kyriacou, Director of Operations at Excelaire indicated that defendant Wolkiewicz was notified that the aircraft to which he was assigned was grounded for maintenance and that he would be converted to a part time status and receive only 40% of his starting pay as a pilot during the maintenance period. Mr. Kyriacou also indicated that while Wolkiewicz's employment contract contained a clause requiring him to work with Excelaire for a minimum of one year, the employment contract did not contain any specific agreement regarding the amount of money Wolkiewicz would be paid during this period. Mr. Kyriacou indicated that the employment contract also contained provisions requiring pilots to return for duty even if they are furloughed and then recalled, and that if they failed to return thereafter they would be responsible for repayment of the pilot training costs pro rata. Mr. Kyriacou also denied the defendant's assertion that he was forced to leave, and indicated that unlike the defendant, Excelaire complied with the contract and is now entitled to the pro rata costs of the defendant's pilot training.

In its letter dated September 19, 2003, Excelaire's representative Steve Carroll informed defendant Wolkiewicz that due to its need to minimize overhead, Excelaire could not afford to continue his employment as a full time pilot during the aircraft maintenance period unless he agreed to be reduced to a part time employee and have his salary reduced by 40%. The letter also informed defendant Wolkiewicz that he was being offered an alternative agreement wherein he would be re-instated as a full-time employee with full pay once the aircraft was out of maintenance and able to fly again. The letter also stated that the alternative offer was conditioned on Wolkiewicz agreeing to return to Excelaire on a full time basis for at least six months thereafter once the company advised him that the aircraft was fixed and ready to fly. The letter further stated that in the event Wolkiewicz failed to return after the six month maintenance period, or leave the employ of Excelaire during that time, upon demand he would be liable for all

monies paid to him and paid on his behalf during the maintenance period.

In defendant Wolkiewicz's resignation letter to Excelaire he states that his reasons for leaving include the cut in his salary, unpleasant working conditions and finding a more lucrative position elsewhere.

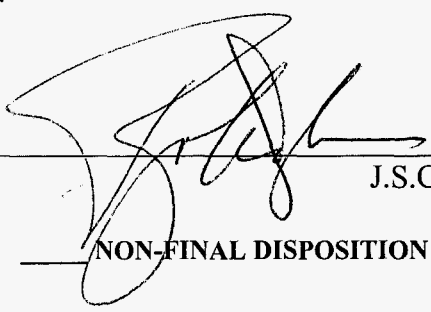
In order to obtain summary judgment, the movant must establish his cause of action or defense sufficiently, by tender of evidentiary proof in admissible form, to warrant the court to direct judgment in his favor as a matter of law. On the other hand, to defeat a summary judgment motion, the opposing party must show facts sufficient to require a trial of any issue of fact. Thus, on a motion for summary judgment the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Nevertheless, mere conclusions or unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

An employer may be deemed to have constructively discharged an employee if the employer breaches the employee's contract to fill a particular position by unjustifiably reducing the employee's rank or salary, or materially changing the employee's duties under the employment contract (*Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 330 NYS2d 33 [1972]; *Aurielen Lintermans, Inc., v Resca*, 222 AD2d 253, 653 NYS2d 23 [1995]; *Lynch v Pharmaceutical Discovery Corp.*, 208 AD2d 906, 617 NYS2d 883 [1994]; *Zeumer v Fire Burglary Instruments*, 210 AD2d 318, 619 NYS2d 782 [1994]; *Hondares v TSS-Seedman's Stores Inc.*, 151 AD2d 411, 543 NYS2d 442 [1989]). Constructive discharge may also be evidenced by the fact that the employer has made the employee's working conditions so intolerable that a reasonable person would feel forced to resign (*Batra v D'Youville College*, 2001 NY App Div LEXIS 1750; *Romano v Basicnet, Inc.*, 238 AD2d 910, 661 NYS2d 135 [1997]; *Fischer v KPMG Peat Marwick*, 195 AD2d 222, 607 NYS2d 309 [1994]).

Notwithstanding Excelaire's contention that the defendant voluntarily resigned because he found more lucrative employment elsewhere, defendant Wolkiewicz has demonstrated that Excelaire unilaterally and materially changed his duties as pilot under their employment contract and made his working conditions so intolerable that he was forced into involuntary resignation (*Rudman v Cowles Communications, Inc.*, *supra*; *Aurielen Lintermans, Inc., v Resca*, *supra*; *Lynch v Pharmaceutical Discovery Corp.*, *supra*; *Zeumer v Fire Burglary Instruments*, *supra*; *Hondares v TSS-Seedman's Stores Inc.*, *supra*; *see also Romano v Basicnet, Inc.*, *supra*; *Fischer v KPMG Peat Marwick*, *supra*). The employment contract explicitly stated that Wolkiewicz would be hired as a pilot and work in that capacity for at least one year. Although Excelaire's September 19, 2003 letter notified defendant Wolkiewicz that his aircraft would be downed for maintenance and he would be placed on a part-time status with a sixty percent decrease in his pay for four to eight weeks until the aircraft was repaired, the uncontradicted

evidence indicates that during the four months that followed the defendant was neither reassigned to another aircraft nor notified of any efforts to find him another commission or reinstate him in another full time pilot position. Excelaire's letter also advised defendant Wolkiewicz that his position would be terminated if he did not accept the "alternative arrangement" outlined in the letter. After eight weeks passed and without any improvement of his working conditions in sight not only did Excelaire breach the terms of its own purported "alternative arrangement", but defendant Wolkiewicz was constructively discharged and forced to resign due to the intolerable work conditions under which he found himself (*Zeumer v Fire Burglary Instruments, supra; Fischer v KPMG Peat Marwick, supra, Romano v Basicnet, Inc., supra; see also Hondares v TSS-Seedman's Stores Inc., supra*). The plaintiff has also failed to raise any triable issue of fact warranting denial of defendant's summary judgment motion (*see, Zuckerman v New York, supra*). Accordingly, defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

Dated:           AUG 23 2006          

  
\_\_\_\_\_  
J.S.C.

  X   FINAL DISPOSITION                 NON-FINAL DISPOSITION