

<b>Miller v New York Univ.</b>
2009 NY Slip Op 33317(U)
May 26, 2009
Supreme Court, New York County
Docket Number: 603020/08
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: Hon. \_\_\_\_\_

PART 39

Justice

MILLER, RICHARD

INDEX NO.

603020/08

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

New York University

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

FILED May 27 2009 NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are denied in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

Dated: 5/26/09

[Signature]

BARBARA R. KAPNICK J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 39

-----X  
RICHARD MILLER,

Plaintiff,

DECISION/ORDER

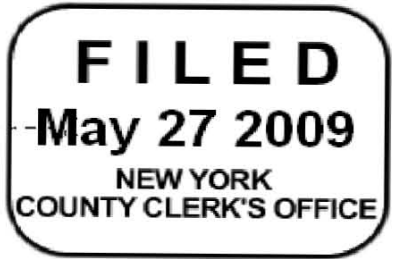
Index No. 603020/08  
Motion Seq. No. 001

- against -

NEW YORK UNIVERSITY, NYU MEDICAL CENTER,  
NYU HOSPITALS CENTER and NEW YORK  
UNIVERSITY SCHOOL OF MEDICINE, a division  
of NEW YORK UNIVERSITY,

Defendants.

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BARBARA R. KAPNICK, J.:



In or about October 2007, the Board of Trustees of New York University ("NYU") passed a resolution to restructure the NYU Hospitals Center ("NYUHC") by combining the NYUHC with the New York University School of Medicine ("NYUSOM") to form the NYU Medical Center ("NYUMC").

In or about May 2006, in preparation for the reorganization, NYU adopted a Transition Stabilization Plan ("TSP"). By letter dated May 1, 2006, Robert M. Glickman, M.D., then Dean of the NYUSOM and Chief Executive Officer of NYUMC, notified plaintiff Richard Miller, then Chief Financial Officer ("CFO") of NYUMC that he was "among a very select group of executives whom the University and Hospital trustees have designated as essential to the organization as we enter into a transitional period."

Dr. Glickman further stated, in relevant part, as follows:

The Transition Stabilization Plan approved by the University and Hospital trustees is organized in three phases, as described below.

From the date of my announcement that I would step down as Dean/CEO, which was March 2, 2006, through September 1, 2007, or 6 months after the new Dean/CEO begins at NYU, whichever is later (Phase One), if you are terminated from your current position for a reason other than cause, you will be entitled to a payment of 1.5 times your then current annual salary.

From the end of Phase One through March 1, 2009 (Phase Two), if you are terminated from your current position for a reason other than cause, you will be entitled to a payment of 1.0 times your then current annual salary.

If your employment continues through March 2, 2009, you will not be entitled to any payment under Phase One or Phase Two, but you will be paid a one-time retention bonus of 50 percent of your then current annual salary.

By letter dated January 3, 2008, Dr. Robert I. Grossman, M.D., CEO of NYUMC, notified plaintiff that his title within the new organization would be "Vice President for Medical Center Finance". Plaintiff subsequently resigned from his employment.

In a letter dated February 13, 2008 to Nancy Sanchez, Sr. Vice President and Vice Dean, Human Resources of NYUMC, plaintiff stated, in relevant part, as follows:

As I indicated in conversations with you, Richard Crater, and Andrew Litt, M.D., I viewed the termination of my position as NYUHC CFO and my subsequent demotion to Vice President, Finance very negatively. This action served to

diminish my stature both inside the organization and the healthcare industry. In addition, as I noted and it was agreed to by all parties, the action would have a negative impact on my future earnings potential, as a result of the lower compensation scale, for Vice Presidents as compared to Chief Financial officers, in industry salary surveys. While I acknowledge that I was verbally informed that the Medical Center leadership would take no action to reduce my salary at this time, the CFO position termination clearly limited my future earnings potential both inside and outside the organization.

Plaintiff contends that his "termination" from his "current position" as CFO "for a reason other than cause" triggered defendants' payment obligation under the TSP.

Plaintiff's Complaint seeks to recover damages for breach of contract (first cause of action) and detrimental reliance (second cause of action).

Defendants now move for an order pursuant to CPLR § 3211(a) (1) and (7) dismissing plaintiff's Complaint in its entirety on the grounds that plaintiff's claims are precluded by documentary evidence and fail to state a claim upon which relief can be granted as a matter of law.

Plaintiff opposes that portion of the motion seeking to dismiss his breach of contract claim and cross-moves for an order pursuant to CPLR § 3212(c) converting defendants' motion into a

motion for summary judgment, and granting summary judgment in favor of plaintiff on the first cause of action on the grounds that the documentation in this action establishes that he is entitled to judgment in his favor as a matter of law.

Defendants argue that plaintiff's first cause of action for breach of contract must be dismissed because: (i) plaintiff's at-will employment was not terminated; i.e., his salary and terms of employment remained the same, and his benefits actually increased; (ii) plaintiff's title change did not affect any of the material terms of his employment and the change in title actually constituted an expansion of plaintiff's responsibilities; and (iii) plaintiff voluntarily resigned his employment.

Plaintiff, however, argues that

[a] Vice President position is a substantial demotion from my former CFO position, and it was viewed as such. There were fewer than ten officers that had "Chief" in their titles, while I estimate and more than 30 "VP" level positions exist among defendants. "C" level positions have much more prestige both inside and outside NYU.

Plaintiff further claims that his potential for salary and other growth at NYU and his opportunity for advancement outside of NYU were both substantially limited as a result of his alleged "demotion" (*see, generally, Rudman v Cowles Communications*, 30 NY2d 1, 10 [1972] which held that "[i]f an employee, a fortiori

an executive employee, is engaged to fill a particular position, any material change in his duties, or significant reduction in rank, may constitute a breach of his employment agreement"), and constituted a "termination" within the meaning of the TSP.

Based on the papers submitted and the oral argument held on the record on March 24, 2009, this Court finds that there are disputed issues of fact as to whether or not the Vice President position constituted a demotion in the rank and responsibilities plaintiff held as CFO, and thus whether plaintiff was terminated from his "current position" within the meaning of the parties' agreement.

Accordingly, that portion of defendants' motion seeking to dismiss plaintiff's first cause of action for breach of contract and plaintiff's cross-motion for summary judgment on his first cause of action are both denied.

That portion of defendants' motion seeking to dismiss the second cause of action is granted without opposition.

Defendants shall serve an Answer to plaintiff's claim for breach of contract within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on July 15, 2009 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: May 26 2009

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

**FILED**  
**May 27 2009**  
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