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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 108001/2011

DAMIAN CHRISTOPHER THIEBAULT

vs

CHELSEA 23RD ST. CORP

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

decided per the memorandum decision dated 2/3/2012
which disposes of motion sequence(s) no.

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/3/12

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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DAMIAN CHRISTOPHER THIEBAULT,

Plaintiff,

Index No.: 108001/2011

-against-

CHELSEA 23RD ST. CORP. and
ARNOLD TAMASAR,

DECISION AND ORDER

Defendants.

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For Plaintiffs:
Freya Melinda Peters, Esq.
200 East 10th Street, #118
New York, NY 10003

For Defendant:
Kane Kessler, P.C.
1350 Avenue of the Americas
New York, NY 10019

Papers considered in review of this motion to dismiss:

Notice of Motion 1
Mem of Law in Support
of Motion 2
Mem of Law in Opposition. 3
Aff's in Opposition 4
Reply Mem of Law 5

HON. SALIANN SCARPULLA, J.:

In this unlawful discharge action, defendants Chelsea 23rd Street Corporation ("Chelsea 23rd") and Arnold Tamasar ("Tamasar") (collectively "defendants") move pursuant to CPLR §§ 3211(a)(7) to dismiss the complaint against them.

Plaintiff Damien Christopher Thiebault's ("Thiebault") is a former employee of Chelsea 23rd, which owns and operates the Chelsea Hotel (the "Hotel"). Thiebault alleges that on or about May 5, 2011, Tamasar, the Hotel's General Manager, directed Thiebault

to accept service of the summons and complaint in another action against Chelsea 23rd, Rosenblatt v. David Elder et al., Index No. 11105276 (the "Rosenblatt matter").[1] Thiebault alleges that after accepting service in the Rosenblatt matter, Tamasar reduced Thiebault's working hours without explanation or warning.

Thiebault further alleges that on May 24, 2011, Tamasar asked him to sign an affidavit in connection with the Rosenblatt Matter. According to Thiebault, the affidavit falsely stated that Thiebault did not work for Elder, individually, that Thiebault was a front desk clerk on the day of service, and that Thiebault was wearing a uniform on the day of service. Thiebault alleges that after he refused to sign the affidavit, Tamasar fired him. Thiebault maintains that he received no official explanation for his termination, but contends that defendants were retaliating against him for refusing to sign the affidavit.

Thiebault commenced this action in July 2011, asserting violations of New York Labor Law § 740(2)(c), as well as causes of action for intentional and negligent infliction of emotional distress stemming from defendants' reduction of Thiebault's working hours and alleged retaliatory firing. In the complaint, Thiebault also alleges that Tamasar mismanaged the hotel and encouraged employees to consume alcohol and painkillers while working.

Defendants now move to dismiss the complaint, arguing that Thiebault may not maintain an unlawful discharge action under Labor Law § 740(2)(c) because perjury, the

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[1]David Elder ("Elder") was a member of Chelsea 23rd's Board of Directors.

illegality that Thiebault alleges he resisted and served as the basis for his discharge, does not pose a danger to the public safety. Defendants argue that the Court should dismiss the cause of action for intentional infliction of emotional distress because the conduct Thiebault alleges is not the type of extreme, outrageous conduct that would support such a claim. Defendants further argue that the Workers' Compensation Law is the exclusive remedy for an employer's negligence and thus bars the cause of action for negligent infliction of emotional distress.

In opposition, Thiebault argues that Labor Law § 740(2)(c) applies to any illegality, regardless of whether the violation would endanger the public safety and that, in any event, perjury poses a substantial danger to the public health or safety. Thiebault also argues that defendants' actions were sufficient to state a cause of action for either intentional or negligent infliction of emotional distress. Lastly, Thiebault contends that the Workers' Compensation Law does not bar the negligent infliction of emotional distress cause of action because Tamasar was not acting within the scope of his employment duties.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. The sole inquiry is whether, according the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out.

See Leder v. Spiegel, 31 A.D.3d 266 (1st Dept. 2006) *affd* 9 N.Y.3d 836 (2007); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dept. 1993).

In New York, where the terms of employment are indefinite, and no contract or agreement states otherwise, employment is at will and "may be freely terminated by either party at any time for any reason or even for no reason." *Shah v. Wilco Sys. Inc.*, 27 A.D.3d 169, 174 (1st Dept. 2005), quoting *Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001). New York Labor Law § 740(2)(c) carves out an exception to this rule, creating a cause of action for employees who were discharged because they refused to violate a law, rule or regulation, the violation of which poses a "substantial and specific danger to the public health and safety." *Remba v. Federation Employment & Guidance Serv.*, 76 N.Y.2d 801, 802 (1990).

Thiebault does not allege there was an agreement to employ him for a definite period, thus his employment is presumed to be at will. *See Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 174 (2d Dept. 1989). Further, because Thiebault did not allege in his complaint that committing perjury by signing a falsified affidavit would have created a danger to the public safety, he failed to state a cause of action under the Labor Law. *See Pipia v. Nassau County*, 34 A.D.3d 664, 666 (2d Dept. 2006). In any event, allegedly requiring an employee to falsely admit or deny facts relating to service of process in a private litigation does not pose a sufficient danger to the public to trigger § 740. *See Remba*, 76 N.Y.2d at 802-03 (fraudulent billing practices do not trigger § 740); *Green v.*

Saratoga A.R.C., 233 A.D.2d 821, 822-823 (3d Dept. 1996) (drug use by employees at a residence care facility does not trigger § 740 because the violation endangers only individual residents and not the general public). Accordingly, the Court dismisses Thiebault's cause of action under Labor Law § 740.

The Court also dismisses Thiebault's causes of action for intentional and negligent infliction of emotional distress. To maintain a cause of action for either, the plaintiff must allege that the defendant engaged in "extreme and outrageous" conduct. *Lau v. S&M Enters.*, 72 A.D.3d 497, 498 (1st Dept. 2010). Thiebault alleges that Tamasar, with the consent and knowledge of Chelsea 23rd, reduced Thiebault's working hours without explanation, changed Thiebault's shifts on short notice, and "dangled . . . employment prospects" in front of Thiebault to coerce him to sign the falsified affidavit. The Court does not find this conduct to be so extreme and outrageous as to be sufficient to sustain causes of action for intentional or negligent infliction of emotional distress.[1]

In any event, Tamasar was acting within the scope of his employment when he reduced Thiebault's hours and later discharged him. *See Pitter v. Prudential Ins. Co. of Americas*, 222 A.D.2d 491, 492 (2d Dept. 1995). Thus, the Workers' Compensation Law

[1]In his papers opposing this motion, Thiebault submitted affidavits from other Chelsea 23rd employees stating that Tamasar mismanaged the hotel, allowed his friends to drink and do drugs in hotel rooms, and gave preferential treatment to some employees. These inflammatory allegations are irrelevant to this motion. Because Thiebault does not allege in his complaint that this particular conduct caused him emotional distress, it may not serve as the basis for his intentional and negligent infliction of emotional distress causes of action. *See LoFaso v. City of New York*, 66 A.D.3d 425, 426 (1st Dept. 2009).

bars Theibault's negligent infliction of emotional distress cause of action as to any claims arising from these actions. *See Thomas v. Northeast Theatre Corp.*, 51 A.D.3d 588, 589 (1st Dept. 2008).

In accordance with the foregoing, it is

ORDERED that the motion by defendants Chelsea 23rd St. Corporation and Arnold Tamasar to dismiss the complaint against them is granted and the complaint dismissed; and it further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 3, 2012

ENTER:

Saliann Scarpulla, J.S.C.