

**Bzhelyansky v North Shore-Long Island Jewish  
Health Sys.**

2012 NY Slip Op 31867(U)

July 10, 2012

Sup Ct, Queens County

Docket Number: 23766/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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ALEXANDRA BZHELYANSKY,

Plaintiff,

-against-

NORTH SHORE-LONG ISLAND JEWISH  
HEALTH SYSTEM, INC. and HERCELIA  
CHEVARRO,

Defendants.  
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Upon the foregoing papers it is ordered that this motion by defendant, North Shore-Long Island Jewish Health System Inc. pursuant to CPLR 3211(a) (1) and (7) dismissing the first and third causes of action in the Verified Complaint of plaintiff, Alexandra Bzhelyansky prior to submission of an Answer is hereby decided as follows:

Plaintiff, Alexandra Bzhelyansky is a healthcare professional, hired by the moving defendant as a registered nurse in or about March 2003. Plaintiff maintains that she was summarily discharged from the moving defendant for an alleged "theft of time", without having an opportunity to be heard or a period of probation. It is undisputed that plaintiff failed to "clock out" on January 7, 2011. Plaintiff brings causes of action against moving defendant, North Shore-Long Island Jewish Health System Inc. for: promissory estoppel and defamation. North Shore-Long Island Jewish Health System Inc. now moves to dismiss the first cause of action against it for promissory estoppel and the third cause of action against it for defamation.

On a motion to dismiss pursuant to CPLR 3211, the pleading

is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (219 Broadway Corp. v. Alexanders, Inc., 46 NY2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; Hoag v. Chancellor, Inc., 246 AD2d 224 [1<sup>st</sup> Dept 1998]).

#### **A. CPLR 3211 (a) (7)**

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the first and third causes of action in the Verified Complaint against moving defendant for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; Leon v. Martinez, 84 NY2d 83) and a determination by the court as to whether the facts alleged fit within any cognizable legal theory (1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc., 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (Jericho Group, Ltd. v. Midtown Development, L.P., 32

AD3d 294 [1<sup>st</sup> Dept 2006][internal citations omitted]).

### **Promissory Estoppel**

"To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise" (Rogers v. Town of Islip, 230 AD2d 727 [2d Dept 1996][internal citations omitted]).

This Court finds that the Verified Complaint states a cause of action for promissory estoppel via inter alia, ¶'s 27-33 of the Verified Complaint, specifically, a promise is alleged in paragraph 28, reasonable and foreseeable reliance is alleged in paragraphs 31 and 32, and injury sustained in reliance on the promise is alleged in paragraph 33.

Accordingly, that branch of the motion seeking to dismiss the first cause of action for promissory estoppel pursuant to CPLR 3211(a)(7) is denied.

### **Defamation**

"Under New York law, a claim for defamation must allege: (1) a false statement about the complainant; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused special damages" (Fuji Photo Film U.S.A., Inc. v. McNulty, 669 F Supp 2d 405 [SDNY 2009]).

This Court finds that the Verified Complaint states a cause of action for defamation via, inter alia, ¶'s 42-47 of the Verified Complaint, specifically, paragraph 45 alleges that a false statement about plaintiff was made, ie. that she was fired for Cause, falsifying time records, and misconduct, paragraph 45 indicates that the statements were made to third parties, ie. prospective employers, and paragraphs 44 and 46 allege that she was injured in her trade, profession, or business ["A false statement constitutes defamation *per se* when it . . . tends to injure another in his trade, business or profession]" (MVB Collision Inc. v. Kirchner, 2012 NY Slip Op 31284U [Sup Ct, Nassau County 2012]).

Accordingly, that branch of the motion seeking to dismiss the third cause of action for defamation pursuant to CPLR

3211(a)(7) is denied.

**B. CPLR 3211(a)(1)**

That branch of moving defendant's motion to dismiss plaintiff's first and third causes of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence \*\*\*." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim \*\*\*" (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v. Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 AD2d 248.)

The documentary evidence submitted in the instant matter consists of: a copy of an Employee Handbook distributed to plaintiff, a letter from one of moving defendant's Operating Technicians, defendant Herculia Chevarro to the Operating Room Director for North Shore's Forest Hills Hospital facility, and a copy of moving defendant's written notice of employment termination sent to plaintiff.

This documentary evidence is insufficient to dispose of the first or third causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (Held v. Kaufman, 91 NY2d 425 [1998]; Teitler v. Max J. Pollack & Sons, 288 AD2d 302 [2001]). Here, such documents are insufficient to dispose of the first and third causes of action, as factual issues remain. Accordingly, this branch of the motion is denied.

Accordingly, that branch of the motion seeking to dismiss the first cause of action pursuant to CPLR 3211(a)(1) is denied.

**Conclusion**

Moving defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211(a) motion (see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).

Accordingly, as moving defendant has failed to satisfy its burden as the proponents of a motion for summary dismissal, moving defendant's motion is denied in its entirety.

Defendants may serve an Answer within twenty (20) days of service of a copy of this order with Notice of Entry.

The foregoing constitutes the decision and order of this court.

Dated: July 10, 2012

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**Howard G. Lane, J.S.C.**