

Gerszberg v National Empl. Council, Inc.

2015 NY Slip Op 30494(U)

April 2, 2015

Sup Ct, New York County

Docket Number: 157859/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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EMILY GERSZBERG,

Plaintiff,

- v -

NATIONAL EMPLOYERS COUNCIL, INC.,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Index No.
157859/2014

**DECISION
and ORDER**

Mot. Seq. #001

This is an action for negligence, breach of fiduciary duty, and breach of contract based on a human resource compliance consultant’s alleged failure to properly advise an employer that terminating its employment relationship with a pregnant employee was not lawful. Plaintiff, Emily Gerszberg (“Plaintiff”), brings this action as successor in interest to MEE Direct, LLC (“MEE Direct”). Plaintiff claims that in or about January 2013, MEE Direct owned and operated a retail clothing store located in Washington State (the “Washington Store”), where non-party Jennifer Alme (“Alme”) worked as one of MEE Direct’s employees.

Plaintiff claims that in or about January 2013, MEE Direct wished to terminate its employment relationship with Alme. At the time, Alme was pregnant and had just completed a twelve weeks of leave under the Family Medical Leave Act (“FMLA”). Plaintiff claims that MEE Direct sought professional advice from defendant, National Employers Council, Inc. (“Defendant”), as to whether MEE Direct could lawfully terminate Alme for non-discriminatory reasons. Plaintiff claims that Defendant advised MEE Direct that MEE Direct could lawfully terminate its pregnant employee, and that MEE Direct, in reliance upon Defendant’s advice, terminated Alme. Plaintiff claims that Alme’s termination was not lawful, that Alme commenced a pregnancy, disability, and employment discrimination lawsuit against MEE Direct (the “Alme Litigation”), and that MEE Direct sustained damages totaling \$26,000 in defending and settling the Alme Litigation. Plaintiff claims that Defendant failed to properly advise MEE Direct that terminating its

pregnant employee was not lawful, and brings this action to recover damages arising from MEE Direct's unlawful termination of its pregnant employee.

Plaintiff commenced the instant action on August 8, 2014, by summons and complaint. Defendant interposed an answer on September 30, 2014, denying material allegations and asserting various affirmative defenses.

Plaintiff now moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff and against Defendant in the amount of \$26,000, plus pre-judgment interest running from a date no later than March 27, 2014. In support, Plaintiff submits: pages from Defendant's website describing Defendant's HR Compliance Hotline; a written contract between Defendant and NIA Group, LLC; Defendant's notes regarding Defendant's consultation with MEE Direct; a statement of account for MEE Direct's legal fees in connection with the Alme Litigation; the affidavits of Plaintiff and Plaintiff's husband, Seth Gerszberg, (collectively, the "Gerszberg Affidavits") attesting to Plaintiff's status as successor in interest to MEE Direct's claims; the attorney affirmation of Gregg Donnenfeld, Esq., dated January 6, 2015; and, a "statement of undisputed material facts", dated January 6, 2015.

Defendant opposes. Defendant cross-moves for an Order, pursuant to CPLR §§ 3124 and 3126, compelling Plaintiff to respond to outstanding interrogatories and notice for discovery and inspection. In support of its opposition and cross-motion, Defendant submits: the attorney affirmation of Maureen E. Maney, dated January 21, 2015; copies of all parties' pleadings; copies of the Gerszberg Affidavits; Plaintiff's first set of interrogatories to Defendant; Plaintiff's first demand for production of documents; Preliminary Conference Schedule Order, dated November 12, 2014; Defendant's first set of interrogatories to Plaintiff; Defendant's request for documents to Plaintiff; the complaint and amended complaint in the Alme Litigation; and, the affidavit of Erin Sjuve, Defendant's employee, dated January 2015.

Plaintiff opposes Defendant's cross-motion.

Turning first to Plaintiff's motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier

of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

Pursuant to CPLR 3212 § 3212(b), “[a] motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.” CPLR § 3212(f) further provides:

Should it appear from affidavits submitted in opposition to the motion [for summary judgment] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Here, Defendant argues that Plaintiff has not responded to Defendant’s discovery demands. Defendant argues that Defendant must be allowed conduct discovery to inspect the underlying documents relating to Alme’s employment with MEE Direct, and to ascertain the identity and location of those individuals who may have additional knowledge relating to the underlying claims. Defendant also argues that it recently obtained copies of the pleadings in the Alme Litigation. Defendant claims that these pleadings contain several factual assertions which were not shared with Defendant when MEE Direct contacted Defendant regarding Alme’s employment and termination, and that Defendant intends to amend its responses to Plaintiff’s interrogatories as a result.

Additionally, Defendant argues that there are issues of fact as to whether MEE Direct relied on Defendant’s advice in terminating Alme. In the affidavit of Sjuve, Sjuve avers that she recalls “receiving a phone call from Gabrielle in MEE Direct’s Human Resources department relating to a female employee in the State of Washington. [Sjuve] later learned that the MEE employee of whom Gabrielle spoke was a woman named Jennafer Alme.” Sjuve avers that she “had two conversations with Gabrielle in connection with MEE’s decision to terminate Ms. Alme. The first took place on January 24, 2013 and the second was on March 5, 2013.” Sjuve avers that she created notes with respect to each phone call shortly after each conversation ended, and that, “as reflected in [the] January 24, 2013 entry, Gabrielle informed [Sjuve] when she called that they had already made a decision to terminate Ms. Alme’s employment before contacting NEC.”

Accordingly, insofar as it appears from Defendant's affidavits submitted in opposition to Plaintiff's motion for summary judgment and in support of Defendant's cross-motion to compel discovery that facts essential to justify opposition may exist but cannot then be stated in light of the outstanding discovery, Plaintiff's motion for summary judgment is denied.

As for Defendant's cross-motion to compel discovery, CPLR § 3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." Accordingly, Defendant is entitled to conduct discovery and Plaintiff is directed to respond to Defendant's outstanding discovery requests.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendant's cross-motion is granted to the extent that Plaintiff is directed to provide responses to Defendant's outstanding interrogatories and notice for discovery and inspection within 30 days of receipt of a copy of this Order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 2, 2015

APR 02 2015



EILEEN A. RAKOWER, J.S.C.