

<b>Rubin v Napoli Bern Ripka Shkolnik, LLP</b>
2016 NY Slip Op 32399(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 154060/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
DENISE RUBIN,

Plaintiff,

**DECISION/ORDER**  
**Index No. 154060/2015**

-against-

NAPOLI BERN RIPKA SHKOLNIK, LLP, WORBY  
GRONER EDELMAN & NAPOLI BERN, LLP, NAPOLI  
BERN & ASSOCIATES LLP, PAUL NAPOLI

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiff Denise A. Rubin commenced the instant action alleging employment discrimination and breach of contract against her former law firms and one of the firms' managing partners. Defendants Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP and Napoli Bern & Associates LLP (hereinafter referred to as the "Firms" or the "Firm Defendants") now move for an Order pursuant to CPLR § 3025(b) granting them leave to file an amended answer. For the reasons set forth below, the Firm Defendants' motion is granted.

The relevant facts and procedural history of this case are as follows. In or around April 2015, plaintiff commenced the instant action against Paul J. Napoli ("Napoli") in his individual capacity and against the Firm Defendants by which she was employed and at which Napoli was a partner asserting four causes of action for (1) violation of New York City Administrative Code § 8-107, for alleged sex discrimination; (2) breach of contract for failing to pay bonuses/salary increases; (3) breach of contract for failing to pay plaintiff from October 14, 2014 through November, 2014; and (4) *quantum meruit*. Thereafter, Napoli moved to dismiss the action as against him individually, which this court granted pursuant to Partnership Law § 26 on the ground that "the Firms are all limited liability partnerships and

plaintiff fails to allege that Napoli personally committed a discriminatory act against her to hold him personally liable.”

Thereafter, plaintiff commenced an action under a separate index number against Napoli in his individual capacity asserting one cause of action for employment discrimination. Napoli then moved to dismiss that action in its entirety or, in the alternative, for an Order consolidating the new action with the instant action. This court denied Napoli’s motion to dismiss finding that “the complaint in [the new] action sufficiently corrects the defects and omissions which were fatal to the complaint in the [instant action]” but granted Napoli’s motion to consolidate the new action with the instant action. On or about March 30, 2016, Napoli filed an answer to the complaint in the consolidated action but did not assert a counterclaim against plaintiff. However, also on that date, Napoli’s “counterclaim counsel,” Napoli Shkolnik, PLLC, filed a document entitled “Counterclaims of Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, Napoli Bern, LLP, Napoli Bern & Associates, LLP and Paul J. Napoli” which asserted eight separate standalone counterclaims against plaintiff. On or about April 5, 2016, Napoli Shkolnik, PLLC filed the “First Amended Counterclaim” which asserted five counterclaims solely on behalf of Napoli in his individual capacity.

Plaintiff then moved to dismiss the counterclaims and for sanctions against Napoli. In support of her motion to dismiss, plaintiff attached various exhibits which, the Firm Defendants allege, contained confidential and privileged information, and filed them in the public record. Specifically, the Firm Defendants assert that such documents included e-mails and correspondence which included confidential information relating to both clients and the business of the Firm Defendants as well as documents protected by attorney-client privilege. Thus, in or around April 2016, Napoli moved by Order to Show Cause seeking an Order sealing those exhibits that contained privileged information. The motion was resolved by a so-ordered stipulation pursuant to which certain exhibits were placed under seal and others were redacted.

The Firm Defendants assert that the documents filed by plaintiff in the public record fell within the scope of a certain employment agreement pursuant to which plaintiff agreed to treat such documents as confidential and not to divulge or use for any purpose during or after her employment (hereinafter referred

to as the “Agreement”). Thus, in or around May 2016, the Firm Defendants moved by Order to Show Cause seeking an Order directing plaintiff to immediately return and/or destroy such documents. The motion was resolved by a so-ordered stipulation pursuant to which plaintiff agreed not to use or make publicly available the confidential documents at issue for any purpose other than this litigation. However, the Firm Defendants now move to amend their answer to assert a counterclaim against plaintiff for breach of the Agreement based on her public filing of said documents.

Pursuant to CPLR § 3025(b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted). On a motion for leave to amend, “the court should examine the sufficiency of the merits of the proposed amendment when considering such motions.” *Heller v. Lous Provenzano, Inc.*, 303 A.D.2d 20, 25 (1<sup>st</sup> Dept 2003).

In the present case, the court finds that the Firm Defendants’ motion for leave to amend their answer to assert a counterclaim against plaintiff for breach of the Agreement is granted as such amendment is not palpably insufficient or patently devoid of merit. To sufficiently state a cause of action for breach of contract, the party asserting such a claim must allege (1) the existence of a contract; (2) that party’s performance under the contract; (3) the other party’s breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010).

Here, the proposed counterclaim sufficiently alleges a claim for breach of contract. Specifically, it alleges the existence of the Agreement between plaintiff and non-party Napoli Bern Ripka, LLP (“NBR”); that NBR fully performed under the Agreement; that during the course of the litigation, plaintiff filed a motion to dismiss Napoli’s counterclaims and in connection with such motion, she “filed into the public record various documents that came into her possession as a result of her prior employment with NBR,” which “included emails and correspondence that contained confidential information relating to both clients of NBR and the business of NBR, as well as documents protected by the attorney-client privilege,” that plaintiff knew that the information she disclosed was confidential, that she did not have consent of NBR,

Napoli or any of the Firm Defendants to disclose the information and that plaintiff's "filing of the...documents and information constituted a breach of the Agreement"; and that based on said breach, the Agreement provides for liquidated damages to be paid by plaintiff. Additionally, the proposed counterclaim alleges that NBR assigned any claim it had against plaintiff to defendant Napoli Bern & Associates, LLP.

To the extent plaintiff asserts that the Firm Defendants' motion to amend their answer should be denied on the ground that the counterclaim will not ultimately be successful because plaintiff properly possessed the documents at issue and because the documents at issue were not within the scope of the confidentiality provisions of the Agreement, such assertion is without merit. The standard for whether to grant a motion to amend a pleading to add a claim is whether the proposed claim is palpably insufficient or patently devoid of merit and not whether the movant will ultimately be successful on the proposed claim. *See Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370 (1<sup>st</sup> Dept 1989).

To the extent plaintiff asserts that the Firm Defendants' motion to amend their answer should be denied on the ground that there has been undue delay in seeking leave to amend, such assertion is without merit. Specifically, plaintiff asserts that because the Firm Defendants knew, at the time they filed their original answer in August 2015, that plaintiff possessed the documents at issue, they should have included the proposed counterclaim in their original answer or at least moved for leave to amend shortly after filing their original answer. However, the Firm Defendants are not seeking leave to amend their answer to assert a claim for breach of the Agreement based on plaintiff's possession of the documents at issue. Rather, the Firm Defendants seek leave to amend their answer to assert a claim for breach of the Agreement based on plaintiff's public filing of the documents at issue when she filed her motion to dismiss in April 2016.

To the extent plaintiff asserts that the Firm Defendants' motion to amend their answer should be denied on law of the case grounds, specifically, that the issues presented in the instant motion were heard and decided by this court in a prior motion, such assertion is without merit. In support of this assertion, plaintiff points to motion sequence 004, the Firm Defendants' motion for an Order directing plaintiff to immediately return and/or destroy the documents at issue, and asserts that because issues with regard to the documents were raised and decided by this court in resolving the motion, the Firm Defendants may not now

seek leave to amend their complaint to assert a claim with respect to said documents. Motion sequence 004 was resolved pursuant to a stipulation which states as follows:

The documents at issue in this motion will be designated as confidential pursuant to the So Ordered Confidentiality Agreement, with the exception of Plaintiff's personal non-firm related documents and form files, and shall not be used or made publicly available for any purpose other than this litigation and for defense of any disciplinary complaints against plaintiff related to the parties herein, if any, provided that plaintiff advise the Disciplinary Committee that any such document is subject to the confidentiality order of this court and will provide a copy to the D.C.

Thus, all that was determined in the stipulation resolving motion sequence 004 was that the documents at issue, with certain exceptions, were to be designated as confidential and that plaintiff's use of said documents would be limited. Contrary to plaintiff's assertion, nowhere in the stipulation did the court make any determination as to whether plaintiff breached the Agreement when she publicly filed the documents at issue along with her motion to dismiss in April 2016 as that issue was not before the court in motion sequence 004.


To the extent plaintiff asserts that the Firm Defendants' motion to amend their answer should be denied on the ground that NBR, the party with whom she entered into the Agreement, is not a party to this lawsuit, such assertion is without merit. The Firm Defendants' proposed counterclaim specifically alleges that NBR assigned all claims and rights to recover liquidated damages from plaintiff to Napoli Bern & Associates, LLP, an entity that is a party to this lawsuit.

Finally, plaintiff's request, in opposition to the motion, that the court preclude the Firm Defendants from making any further "vexacious (sic) motions and filings" is denied as plaintiff has failed to provide a sufficient basis for such relief.

Accordingly, the Firm Defendants' motion for an Order pursuant to CPLR § 3025(b) granting them leave to amend their answer to add a counterclaim against plaintiff for breach of contract is granted. It is hereby

ORDERED that the Amended Answer, in the form annexed to the Firm Defendants' motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action. This constitutes the decision and order of the court.

DATE : 12/5/16

  
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KERN, CYNTHIA S., JSC  
**HON. CYNTHIA S. KERN**  
**J.S.C.**