Trujillo v Transperfect Global, Inc.

2017 NY Slip Op 30369(U)

February 27, 2017

Supreme Court, New York County

Docket Number: 654442/2016

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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ROY TRUJILLO,

Plaintiff,

-against-

TRANSPERFECT GLOBAL, INC., TRANSPERFECT TRANSLATIONS INTERNATIONAL, INC. and ELIZABETH ELTING,

Defendants.

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DECISION AND ORDER

Index No. 654442/2016

Mot. Seq. 001

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, unpaid compensation, breach of contract, intentional infliction of emotional distress and violation of labor law §195(1), plaintiff Roy Trujillo ("plaintiff" or "Trujillo") moves for a judgment of no less than $5 million against Transperfect Global, Inc. ("Transperfect"), Transperfect Translations International, Inc. ("Transperfect International") and Elizabeth Elting ("Elting" and together with Transperfect and Transperfect International, "defendants").

Defendants' move for an order dismissing all of plaintiffs' counts pending against them pursuant to CPLR 3211(a)(1) on the basis of documentary evidence and 3211(a)(7) for failure to state a claim (mot. seq. 001). Plaintiff opposes.

Facts

Transperfect is the parent organization of Transperfect International and is the largest privately owned language services firm in the world. Complaint ("Compl.") ¶6. Transperfect's founders, principal shareholders and co-CEO's are Elting and Philip Shawe ("Shawe"). Id. ¶9. Plaintiff was an acquaintance of both Elting and Shawe and in 2000 became the CEO and Secretary of Translations.com, Inc., which eventually merged into Transperfect. Id. ¶15. Since this time, Trujillo has served as the Chief Operating Officer and Secretary of Transperfect and is currently responsible for overseeing all of Transperfect's operations, except for sales and various other aspects of the business including production and human resources. Id. ¶¶15-17.

Allegedly, for the better part of 2013, Trujillo had attempted to meet with Shawe and Elting regarding his compensation but was not able due to continuing disagreements among Shawe and Elting. Id. ¶39; see generally, id. ¶¶21-38. In June 2013, Trujillo allegedly met with Shawe and Elting and agreed to a minimum salary of $250,000 with a minimum of $25,000 end of year payment for 2013 and any subsequent year that he was employed with Transperfect, a $7,000 performance bonus for 2013, an annual raise of 7.5% per annum, and full appreciation value for phantom stock. Id. ¶41.

Phantom stock is an alleged incentive plan in which plaintiff would receive payment for any increase in the value of the shares above the price at the time of the

prior distributions. Id. ¶42-43. Plaintiff allegedly received 528 shares with an incremental value of $158,131.08. Id. ¶44.

The agreement contains a set of handwritten notes that plaintiff alleges created a binding employment contract from 2013 to present. Specifically, the handwritten notes state that the "2013 Expected Comp Value [is] $257K." Fasman Aff. Ex. 3. The alleged agreement also contains notations of "250K" circled by an arrow and two sets of calculations including "225 + 7.5 = 232.5 +25" and "225 + 10 = 235". Id. In the lower portion of the document there is a box that contains the word "+ Phantom" as well as other notations around the box including "7.5". Id.

In December 2013, Elting allegedly placed Trujillo on notice that if he did not consent to various demands that dealt with the inner workings of the company, he would not be paid and his staff would suffer. In the beginning of 2014, plaintiff did not receive his year-end payment. Id. ¶49. After numerous inquiries about his salary, Elting allegedly berated plaintiff on numerous occasions, threatened his job and career and stated that she did not have to pay Trujillo at all. Id. ¶¶51-52. Additionally, plaintiff alleges that he was the victim of multiple retaliatory acts. Id. ¶54.[1] Although plaintiff alleges that Elting fake fired him on multiple occasions, plaintiff continues to work for Transperfect. See id. ¶¶55-56, 66, 69-70.

[1] Specifically, plaintiff alleges that Elting directed plaintiff's direct reports that he had no authority over them and was not their supervisor; Elting publically pretended to fire Elting and sent an email to a large distribution list stating that Trujillo had been terminated; had HR escort plaintiff out of the building; threatened to call the police and have plaintiff forcibly removed from the building in front of staff; publically berated plaintiff; removed money from the accounts

Based on these allegations, plaintiff seeks damages for unpaid compensation (first cause of action), violation of labor law §195(1) (second cause of action), breach of contract (third cause of action), and intentional infliction of emotional distress (fourth cause of action). Defendants' oppose and seek to dismiss based upon CPLR 3211(a)(1) and (a)(7).

Analysis

Legal Standard

On a motion to dismiss on the ground that defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. CPLR 3211(a)(1); Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

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of employees who were plaintiff's direct reports in order to embarrass plaintiff; falsely advised a Ford dealership that plaintiff was trying to purchase a vehicle for the company with a stolen check; falsely advised senior staff members that plaintiff was going to jail for fraud; refused to pay plaintiff any reimbursements; reassigned projects to other employees; and prohibited plaintiff from speaking with Elting directly or properly staffing his department. Id. ¶54(a)-(p).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994).

The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). "[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Plaintiff's Cause of Action for Unpaid Compensation

Defendants' motion to dismiss plaintiff's first cause of action for unpaid compensation is granted. Plaintiff makes a claim for unpaid compensation against TransPerfect under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). New York has explicitly adopted the provisions and exemptions of the FLSA. See NYCRR §142-2.2; Clougher v. Home Depot U.S.A., Inc., 696

F.Supp.2d 285, 289 (S.D.N.Y. 2010). NYLL only applies to "clerical and other workers" and excludes "any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week." NYLL §191(d); §190(7); see also Eden v. St. Luke's-Roosevelt Hosp. Ctr., 96 A.D.3d 614, 615 (1st Dept 2012) ("As a professional earning more than $900 a week...plaintiff is expressly excluded from the protections of Labor Law §191.").

Plaintiff earns well in excess of $900 per week. See Compl. ¶¶41, 55 (alleging that plaintiff was to earn a minimum of $250,000 for 2013 without incentives). Additionally, plaintiff is excluded from making a claim under NYLL §191 as he serves in an executive capacity at Transperfect. See Compl. ¶¶15-17 (alleging that plaintiff is responsible for the oversight of Transperfect's operations, directly oversees more than 100 employees, and currently acts as the Chief Operating Officer and Secretary of Transperfect).

For these reasons, plaintiff is precluded from making a claim under NYLL §191[2] and defendants' motion to dismiss plaintiff's first cause of action for unpaid compensation is granted without leave to replead.[3]

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[2] Additionally, plaintiff has failed to state a cause of action under the FLSA, which only deals with minimum wages and overtime payments. See Nakahata v. N.Y.-Presby. Health Sys., 723 F.3d 192 (2d Cir. 2013); Lundy v. Catholic Health Sys. Of Long Is., 711 F.3d 106 (2d Cir. 2013). As discussed, *supra*, plaintiff is not entitled to overtime or minimum wages and therefore FLSA is inapplicable.

[3] As part of its first cause of action, plaintiff seeks to recover for alleged unpaid compensation. To the extent that this cause of action relates to the alleged agreement, it is subsumed and discussed as part of the breach of contract claim, *infra*.

Plaintiff's Cause of Action for Violation of Labor Law §195(1)

Defendants' motion to dismiss plaintiff's second cause of action for violation of labor law §195(1) is granted. NYLL §195(1) (whose amendment is also referred to as the Wage Theft Prevention Act ("WTPA")) requires an employer to provide his or her employees at the time of hiring a notice containing various wage related and other information. See NYLL, §195(1). This requirement went into effect on April 9, 2011.

Although plaintiff was hired in 2000, before the applicability of the WTPA, he argues that section 195 should apply retroactively. Although not binding, this court finds the holdings from the Second Circuit and Southern District of New York persuasive regarding the inability of a party to claim retroactivity for a claim under section 195. See Inclan v. New York Hospitality Group, Inc., 95 F.Supp.3d 490, 501 (S.D.N.Y. 2015) ("the failure...to provide...notice at the time of hiring cannot support a claim under the WTPA, as the Second Circuit has held that the WTPA does not apply retroactively"); Gold v. N.Y. Life Ins. Co., 730 F.3d 137, 143-44 (2d Cir. 2013) (finding no support for retroactivity either in the text or the legislative history). This court finds plaintiff's additional arguments regarding retroactivity unpersuasive.

Therefore, defendants' motion to dismiss plaintiff's second cause of action for violation of NYLL §195(1) is granted without leave to replead.

Plaintiff's Cause of Action for Breach of Contract

Defendants' motion to dismiss plaintiff's third cause of action for breach of contract is granted in part. N.Y. General Obligations Law §5-701(1) states that

> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking…[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime.

Id; see also Parma Tile Mosaic & Marble Co., Inc. v. Estate of Short, 87 N.Y.2d 524 (1996).

Here, the document is not subscribed by the party to be charged. See Sheehy v. Clifford Chance Rogers & Wells LLP, 3 N.Y.3d 554, 559-60 (2004) (finding that an agreement is void if it is not in writing and "subscribed by the party to be charged therewith."); Rosenfeld v. Schreiber, 139 A.D.3d 609 (1st Dept 2016) (where a written agreement is among other things, signed by the parties to be charged, it satisfies the statute of frauds at the motion to dismiss stage of litigation); Nemelka v. Questor Management Co., LLC, 40 A.D.3d 505, 506 (1st Dept 2007) (unsigned documents do not satisfy the statute of frauds); Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v. Elman Invs., Inc., 117 A.D.3d 447, 448-49 (1st Dept 2014) (finding that the General Obligations Law requires that the agreement be subscribed by the party to be charged.). Therefore, the agreement is void.

The court's inquiry does not end here. "In order to remove an agreement from the application of the statute of frauds, both parties must be able to complete their performance of the contract within one year." Sheehy, 3 N.Y.3d at 560 (2004). "The statute is narrowly construed and applied only to contracts which, by their terms, have absolutely no possibility of full performance within one year." Marini v. D'Apolito, 162 A.D.2d 391, 393 (1st Dept 1990); see also D&N Boening, Inc. v. Kirsch Beverages, Inc., 63 N.Y.2d 449 (1984); Kermanshah Oriental Rugs, Inc. v. Latefi, 51 A.D.3d 562 (1st Dept 2008).

At this stage of the litigation, plaintiff has adequately pled a cause of action for breach of contract as it relates to the employment agreement for 2013. The document plaintiff relies upon states "2013 expected comp value, $257K." See Fasman Aff., Ex. 3. Taking the allegations in the complaint as true, as this court must on a motion to dismiss, this adequately pleads the requirements of an employment contract. See Elite Technology N.Y. Inc. v. Thomas, 70 A.D.3d 506, 508 (1st Dept 2010); Durso v. Baisch, 37 A.D.3d 646 (2d Dept 2007). Looking to the four corners of the agreement, it appears only to cover plaintiff's employment for 2013. See Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998) ("As long as the agreement may be 'fairly and reasonably interpreted' such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame"); Stucklen v.

Kabro Assocs., 795 N.Y.S.2d 256, 257 (2d Dept 2005) (Generally when an agreement is terminable at will, it is not subject to the statute of frauds, as it could be completed within one year); Devany v. Brockway Development, LLC, 72 A.D.3d 1008, 1008-09 (1st Dept 2010) ("Where an employment agreement is silent as to duration, absent a limitation on the employer's right to discharge the employee, there is a rebuttable presumption of an at-will employment relationship.").

The writing only states the total compensation value for 2013, which is $257,000. See Fasman Aff., Ex. 3. The agreement is silent as to whether Trujillo's employment is at-will or guaranteed for the entire year. Id. Absent any language to the contrary, this court must presume an at-will employment relationship. See Devany, 72 A.D.3d at 1008-09; Goldman v. White Plains Center for Nursing Care, LLC, 11 N.Y.3d 173, 177 (2008) (finding that in New York there is the "well-established rule that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party.") (internal citations omitted). Because Trujillo was an at-will employee, the agreement, which only covers Trujillo's employment for 2013, is not subject to the statute of frauds as he can be terminated within the year. See Cron, 91 N.Y.2d at 366; Stucklen, 795 N.Y.S.2d at 257; N.Y. Gen. Ob. Law §5-701(1). Therefore, the statute of frauds is not a bar to this cause of action because by its

terms, the agreement is fully performable within one year. See Sheehy, 3 N.Y.3d at 560.

As to any of the alleged years beyond 2013, the pleadings are insufficient to make a determination as to whether there is an oral at will employment agreement outside the statute of frauds. Plaintiff's counsel argues in his brief that the parties had an oral at will employment agreement. See Plaintiff's Memo. in Opp., pp. 6-8. However, plaintiff has not submitted an affidavit. See Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Nor are there any allegations in the verified complaint as to an oral at will employment agreement. Therefore, the court will not consider these arguments. However, plaintiff is granted leave to replead.

Defendants' motion to dismiss plaintiff's cause of action related to phantom stock is granted.

Since the writing plaintiff relies on is not subscribed, the agreement is void. See *supra*, at pp. 8-9. Nor by its terms can the agreement be consummated within one year of its making. This court finds the Southern District's reasoning in KJ Roberts & Co. Inc. v. MDC Partners Inc., 2014 WL 1013828 (S.D.N.Y. Mar. 14, 2014), persuasive. In KJ, the parties agreed that upon termination of the agreement, plaintiff would receive further capital payments based on the number of years he worked at the company before being terminated. Id. at *2 (for example, in KJ, if plaintiff worked with the company for one year, he would be entitled to an additional

eighteen months of compensation). The court held that because plaintiff would be entitled to payments after his termination, even if he was terminated within a year, the agreement could not have conceivably been completed within a year and was therefore subject to the statute of frauds. Id. at *5-6.

The facts of KJ are analogous to those presented here. Trujillo alleges that he is owed the value of certain phantom stock that he was promised in the agreement. See Compl. ¶41. Plaintiff also alleges that the parties agreed that plaintiff would maintain his shares of phantom stock and that he would receive payment for any increase in the value of the shares, which is not alleged to be tied in any way to his employment status at Transperfect. Id. at ¶¶42-43. Defendants' obligations to Trujillo would necessarily extend beyond his time of employment. Therefore, the agreement could not be completed by both parties within one year. See Cron, 91 N.Y.2d at 371 (finding that the statute of frauds does not apply when compensation could be earned and fixed within a year.).

Plaintiff's reliance upon Stucklen v. Kabro Associates, 18 A.D.3d 461 (2d Dept 2005) and Arias-Zeballos v. Tan, 2008 U.S. Dist. LEXIS 25852 (S.D.N.Y. Mar. 28, 2008), is without merit. Both of these cases rely upon the general proposition that "the exercise of the right of termination associated with a hiring at will is a means of completion of the contract", which will bar the application of the statute of frauds as the employment can be terminated within one year. Stucklen, 18

A.D.3d at 256; see also Tan, at *12-13 (finding that an oral contract for employment is not barred by the statute of frauds where the employment is at will and can be terminated within one year).

These cases are readily distinguishable. In Tan, the underlying cause of action dealt with a written employment agreement that was allegedly breached when Tan's assistant was terminated. Tan, at *3-4. There was no agreement for additional compensation beyond termination and there was no agreement for indefinite payments of any kind after termination. Id. The only claim was for compensation owed during the time that the assistant worked for Tan. Id. Similarly, in Stucklen, the only issue presented was whether absent a fixed duration in an employment agreement, the statute of frauds will act as a bar to enforcement of an alleged oral agreement. 18 A.D.3d at 461-62. The court in Stucklen did not address whether alleged post-termination agreements regarding compensation are subject to the statute of frauds. As both of these cases are silent as to whether an agreement to pay stock incentives indefinitely is subject to the statute of frauds, they are inapplicable.

Here, the agreement to pay Trujillo for any increase in value of the stocks under the phantom stock agreement could not have been completed within one year even if Trujillo was terminated, as Trujillo would be owed the increase in the value of his stock after termination for an indeterminate amount of time. See Compl. ¶¶41-44. In KJ, the court explicitly states that where an agreement cannot be completed

within one year due to future payments extending beyond that year, the reasoning in cases such as Stucklen is inapplicable. See KJ, at *6.

Therefore, defendants' motion to dismiss plaintiff's claim for breach of contract as it relates to phantom stock is granted without leave to replead.

Plaintiff's Cause of Action for Intentional Infliction of Emotional Distress

Defendants' motion to dismiss plaintiff's fourth cause of action for intentional infliction of emotional distress is granted. A cause of action alleging intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). "The first element – outrageous conduct – serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine." Id. at 121.

The element of outrageous conduct is "rigorous and difficult to satisfy." Prosser and Keaton, Torts §12 at 61 (5th ed. 1984). Therefore, liability will only be found where the "conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983); see also Brown v. Sears Roebuck

& Co., 297 A.D.2d 205, 212 (1st Dept 2002); Taggart v. Costabile, 131 A.D.3d 243, 250 (2d Dept 2015); Marmelstein v. Kehillat New Hempstead, 11 N.Y.3d 15, 22-23 (2008). "The outrageousness element is the one most susceptible to determination as a matter of law." Howell, 81 N.Y.2d at 121; see also Chanko v. American Broadcasting Companies, Inc., 27 N.Y.3d 46, 57 (2016)

In the employment context, courts have consistently held that behaviors similar to the ones alleged by plaintiff do not meet the outrageous conduct threshold required. See Krawtchuk v. Banco Do Brasil, S.A., 183 A.D.2d 484 (1st Dept 1992) (terminating an at-will bank employee, characterizing her threat to remove and publish bank records as theft and extortion, requiring her to close her employee bank account, and refusing to give her a favorable letter of reference do not rise to the level of extreme and outrageous conduct); Lapidus v. New York City Chapter of the New York State Ass'n for Regarded Children, Inc., 118 A.D.2d 122 (1st Dept 1986) (discharging an employee during the workday, directing him not to return to his office, and disclosing the fact of discharge to other employees does not give rise to a cause of action for intentional infliction of emotional distress); Arrington v. Liz Claiborne, Inc., 260 A.D.2d 267 (1st Dept 1999) (questioning plaintiffs about the falsification of time sheets and escorting plaintiffs to their desks to remove their personal items does not satisfy the requirement of outrageous conduct).

Even conduct such as using vulgar epithets to refer to an employee, permitting crude and offensive statements of a sexually derisive nature to occur in the workplace and subjecting an employee to unwanted sexual advances, physical contact and verbal harassment does not give rise to a cause of action for intentional infliction of emotional distress. See Dillon v. New York, 261 A.D.2d 34 (1st Dept 1999); Shea v. Cornell University, 192 A.D.2d 857 (3d Dept 1993); Zephir v. Inemer, 305 A.D.2d 170 (1st Dept 2003).

Plaintiff's reliance on Collins v. Willcox Inc., 158 Misc.2d 54 (Sup. Ct. N.Y. Cnty. 1992), is misguided. In Collins, the court characterized the employer's unwanted sexual advances as possibly being considered outrageous particularly because it was directed at a married person in an attempt to induce violation of that person's marital vows and trust. Id. at 57. This is particularly the case where the employer was aware of the employees' marital state at the time of the alleged harassment. Id.

Here, there is no claim of continuous sexual harassment, rather the plaintiff seeks to apply the Collins court's reasoning as it relates to the aggregation of behavior. However, this reasoning was in addition to the particular facts of that case including the serial sexual harassment of a married woman whom the employer knew to be married. Here, plaintiff was an employee who is not claiming any form of continuing sexual harassment, but rather undesirable working conditions. The

facts here are so distinguishable as to render the reasoning in Collins inapplicable in this context.

Plaintiff has failed to state conduct that is so outrageous and beyond all possible bounds of decency as to be actionable for a claim of intentional infliction of emotional distress. Defendants' and Elting in particular has certainly made plaintiff's job difficult by undermining his authority, pretending to fire him, berating him in front of other employees and escorting him from the building. Elting has also disparaged plaintiff's reputation through various actions taken within the office such as telling others that he was going to jail for fraud and by threatening to call the police. However, these actions have already been held by the courts to not be actionable for a cause of action for intentional infliction of emotional distress, even when taken in the aggregate.

Therefore, defendants' motion to dismiss plaintiff's fourth cause of action for intentional infliction of emotional distress is granted.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's first cause of action for unpaid compensation is granted without leave to replead; and it is further

ORDERED that defendants' motion to dismiss plaintiff's second cause of action for violation of labor law §195(1) is granted without leave to replead; and it is further

ORDERED that defendants' motion to dismiss plaintiff's third cause of action for breach of contract is granted in part with leave to replead; and it is further

ORDERED that defendants' motion to dismiss plaintiff's fourth cause of action for intentional infliction of emotional distress is granted without leave to replead.

Date: February 27, 2017
New York, New York

Anil C. Singh