Girard v VNU, Inc.
2004 NY Slip Op 30396(U)
November 19, 2004
Supreme Court, New York County
Docket Number: 109305/04
Judge: Karen S. Smith

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

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KEITH GIRARD and SAMANTHA CHANG,

Plaintiffs,

-against-

VNU, INC., VNU BUSINESS MEDIA, INC., VNU BUSINESS PUBLICATIONS (USA) INC., JOHN J. KILCULLEN and KEN SCHLAGER,

Defendants.

Index No.: 109305/04
Mot. Seq.: 001 and 002
Motion Date: 8/30/04

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.:

Motion sequence 001 and 002 are consolidated for disposition in this decision.

Motion sequence 001: Defendants VNU, Inc., VNU Business Media, Inc., VNU Business Publications (USA) Inc., John J. Kilcullen and Ken Schlager's motion for an order, pursuant to CPLR § 3211(a)(7), dismissing the sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action, is granted.

Motion sequence 002: Defendant VNU, Inc. motion for an order, pursuant to CPLR § 3211(a)(7), dismissing the complaint asserted against it on the basis that it fails to state a cause of action is denied.

This action alleges twelve causes of action based on plaintiffs' employment relationship with

defendants.

According to the complaint, in 2003, defendants recruited plaintiff Keith Girard for the position of editor in chief of Billboard magazine. Plaintiff asserts that in order to induce him to leave his former position, defendants made specific representations to him including that he would have full authority to hire and fire editorial staff and that he would be able to decide the editorial content of Billboard without regard to Billboard's advertisers or other business interests. Having accepted the position based on those representations, plaintiff thereafter hired plaintiff Samantha Chang as a senior editor. Defendant John J. Kilcullen was the president of defendant VNU's Music and Literary Group and was the publisher of Billboard. Defendant Ken Schlager was defendant's executive editor of Billboard and according to plaintiffs, had applied for but had been passed over for Girard's job as editor in chief. As a result, plaintiffs allege that Schlager attempted to undermine Girard and his policies.

Addressing motion sequence 002 first, defendant VNU, Inc. argues that it is entitled to have the complaint asserted against it dismissed on the basis that plaintiffs have alleged no justification for imposing liability on VNU, Inc. as plaintiffs worked only for its subsidiary, defendant VNU BMI, Inc. and they have not asserted facts sufficient to pierce the corporate veil.

In opposition to the motion to dismiss the action against VNU, Inc., plaintiffs submit their respective "Severance Agreement and Release" which (1) are on "VNU Business Media" letterhead, (2) state that the agreement is made by and between each plaintiff and "VNU, Inc.," (3) contain a signature line for "VNU, Inc.," and (4) contain an appendix entitled "Summary of Benefit Entitlements Under the VNU, Inc. Career Transition Plan." Plaintiffs also submit their respective job performance and reviews. Plaintiff Keith Girard's performance review is on "Links" letterhead,

and both the form and the comments refer to "VNU" without further designation. Plaintiff Samantha Chang's performance review is on "VNU Business Media" letterhead, without corporate designation and which also refers to "VNU."

Assuming the truth of the allegations in the complaint and the documents submitted in opposition to the motion, plaintiff has stated a cause of action against defendant VNU, Inc. based on VNU, Inc.'s involvement with defendants' employment. Where the pleading and supporting documentation contain allegations that there is consent by the parent company to be bound, here, as evinced by the severance agreement, and there are allegations of direct intervention by the parent in the management of the subsidiary to such an extent that parent company can be held liable as a party to its subsidiary's contract, a cause of action is stated against the parent corporation sufficient to withstand the motion to dismiss. *(See, Horsehead Industries v Metallgesellachaft,* 239 AD2d 171 [1st Dept 1997]; *see also, AW Fiur Co v Ataka & Co.,* 71 AD2d 370 [1st Dept 1979]).

Defendants' remaining motion seeks the dismissal of plaintiffs' sixth through twelfth causes of action.

On a motion to dismiss pursuant to CPLR § 3211 motion to dismiss, the court's task is to determine whether the complaint states a cause of action. (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]). The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Id).* Further, a court must liberally construe the complaint . . . and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion . . . [and] also accord plaintiffs the benefit of every possible favorable inference." (*Id 151-152).*

Plaintiffs' sixth cause of action alleges that defendants, directly and/or through one or more of their employees acting with authorization and/or within the scope of their employment, defamed them by falsely stating that they were engaged in a sexual relationship with each other, that Girard hired Chang to work at Billboard because of their alleged sexual relationship, that Girard showed favoritism to Chang because of their alleged sexual relationship and that Girard and Chang were terminated by VNU because of their alleged sexual relationship. Plaintiffs further allege that defendants, acting directly and/or through one or more of their employees acting within the scope of their employment, published the statements to other VNU employees and to other persons, including the on-line bulletin board "The Velvet Rope."

Defendants move for dismissal of the cause of action for defamation on the grounds that (1) the defamatory words are not pled with the requisite particularity, (2) no defendant published a defamatory utterance, (3) the alleged publication was subject to a qualified privilege and plaintiffs have failed to overcome that privilege by pleading sufficient evidentiary facts regarding malice, and (4) rumors can not be attributed to defendants.

Defamation has been defined as "the making of a false statement which tends to " 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society' [citation omitted." (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977]). While a statement may be defamatory, "there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter." (*Liberman v Gelstein,* 80 NY2d 429, 437 [1992]). However, that qualified privilege will be defeated by demonstrating a defendant spoke with malice. *(Foster v Churchill,* 87 NY2d 744, 751 [1996]).

Civil Practice Law and Rules § 3016 requires that in an action for defamation, "the particular words complained of shall be set forth in the complaint." A plaintiff need not specify exactly what words were spoken so long as a plaintiff "sufficiently sets forth the circumstances of the publication." (*Torres v Prime Realty Services*, 7 AD3d 343, 344 [1st Dept 2004]). A cause of action for defamation is insufficiently pled where "the claimed defamatory remarks were alleged to have been made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified." *(Bell v Alden Owners, Inc.* 299 AD2d 207, 208 [1st Dept 2002]).

Here, plaintiffs have failed to adequately set forth a claim of defamation with particularity in order to meet the pleading requirements of CPLR § 3016[a]. Without the requisite particularity in their pleading, plaintiffs assert little more than the presence of a rumor. While plaintiffs deny defendants' claim that the alleged defamation is subject to a qualified privilege, contending instead that the defamation continued after the investigation, in light of plaintiffs' failure to plead with the requisite specificity, the issue of a qualified privilege is not reached.

Accordingly, the sixth cause of action is dismissed. In addition, plaintiffs request for leave to replead is denied without prejudiceas they have failed to include any additional facts as to what would be repled.

The seventh cause of action is asserted by plaintiff Girard and alleges fraud in the inducement against the corporate defendants and defendant Kilcullen. Plaintiff alleges that these defendants represented to him that if he left his secure position as editor at Investment News to become editor in chief at Billboard, he would have full authority over hiring and firing his staff members and he would be able to maintain the editorial integrity of Billboard by choosing the editorial content

without regard to the interests of Billboard's advertisers. Plaintiff Girard further alleges that when these defendants made these representations, they made them for the purpose of his leaving his secure position notwithstanding that they knew or should have known that the representations were false. Plaintiff alleges that he relied on these representations to his detriment.

Absent a written contract containing the terms, duration and conditions of employment, all employment under New York law is at-will "which may be freely terminated by either party at any time for any reason or for no reason." *(Murphy v American Home Prods Corp.,* 58 NY2d 293, 300 [1983]). It is well settled that a claim for breach of contract cannot be converted to one for fraud "merely by alleging that the contracting party did not intend to meet its contractual obligations." *(Rocanova v Equitable Life Assurance Society of the US.,* 83 NY2d 603, 614 [1994]). Thus, for an at-will employee with no possible claim for breach of an employment agreement, a claim for fraudulent inducement must be distinct from any breach of contract claim. *(See, e.g. Tannehill v Paul Stewart, Inc.,* 226 AD2d 117 [1st Dept 1996]).

A cause of action for fraud, pursuant to CPLR § 3016, must be pled with particularity and a fraudulent inducement claim requires a plaintiff to allege and prove that it reasonably relied on a material misrepresentation by defendant and that it suffered an injury as a result of that reliance. *(Skillgames LLC v Brody,* 1 AD3d 247 [1st Dept 2003]). Fraud in the inducement of a contract requires "a promise made with the undisclosed intention not to perform it." (*Wagner Trading Co.*, 307 AD2d 701, 705 [4ht Dept 2003]). The alleged misrepresentation "should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform. [citation omitted]." (*Hawthorne Group, LLC v. RRE Ventures*, 7 AD3d 320, 323-324 [1st Dept 2004]).

Here, based on the at-will nature of plaintiff Girard's employment, he cannot establish reasonable reliance on the alleged fraudulent statements and he has failed to sufficiently allege that defendants had a present, undisclosed intention not to perform at the time they made any promises. Most importantly, the alleged misrepresentations were not extraneous to the employment contract involving a duty separate from or in addition to that imposed by the contract. Accordingly, the seventh cause of action is dismissed.

The eighth cause of action, asserted by plaintiff Girard against the corporate defendants and defendant Kilcullen, is for promissory estoppel. Plaintiff alleges that these defendants promised him that if he left his secure position as editor and came to Billboard, he would have full authority to hire and fire editorial staff members as he saw fit and he would be able to maintain the editorial integrity of Billboard. Plaintiff alleges that defendants breached their promises by refusing to allow him to hire and fire staff and by requiring plaintiff to subjugate the editorial content to that of Billboard's advertisers.

To state a cause of action for 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]) However, where an employee is "at-will" the fact that a defendant employer promised certain employment benefits, which induced plaintiff to leave his former job and forego the possibility of other employment in order to remain with defendant, does not create a cause of action for promissory estoppel. (*Dalton v Union Bank of Switzerland*, 134 A.D.2d 174 [1st Dept 1987]; *Arias v Women in Need, Inc.*, 274 AD2d 353 [1st Dept 2000]).

Plaintiff's claim for promissory estoppel is dismissed as plaintiff, as an at-will employee, cannot establish that he reasonably relied on defendant's representations.

In their ninth cause of action, plaintiffs Girard and Chang allege that defendant Schlager tortiously interfered with their business relationship with defendant VNU by maliciously and intentionally engaging in fraud, misrepresentations and/or threatening conduct in order to cause VNU to terminate plaintiffs without cause.

Defendants argue that this cause of action must be dismissed because defendant Schlager is not a third-party to the employment relationship and Schlager did not effect the termination of either plaintiff.

In order to state a cause of action for tortious interference, an at-will employee must allege that a third party engaged in the use of wrongful or unlawful means to secure a competitive advantage over plaintiffs, or that defendants acted for the sole purpose of inflicting intentional harm on plaintiffs. (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-191, 196 [1980]). "'Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant' [citation omitted]." *(Carvel Corp. v Noonen,* ___ NY3d___, [October 14, 2004]). The general rule is that the conduct of the defendant "must amount to a crime or an independent tort" or, an exception to that rule is where a defendant engages in conduct "for the sole purpose of inflicting intentional harm on plaintiffs." *(Id.).* The tort of interference with a prospective contract rights cannot lie against a co-worker, as agent for the employer, absent a showing that they acted outside the scope of their authority. (*Kosson v. "Algaze"*, 203 AD2d 112, 113 [1st Dept 1994]).

Plaintiffs have failed to make out a claim of tortious interference against defendant Schlager.

The complaint fails to plead sufficient nonconclusory allegations that the conduct taken by Schlager as executive editor of Billboard, was meant solely to harm plaintiffs, fell outside the scope of his employment, or that Schlager's conduct effected their termination. Accordingly, the cause of action for tortious interference with prospective business advantage is dismissed.

Plaintiffs' tenth cause of action for intentional infliction of emotional distress alleges that by reasons of their acts and omissions, defendants engaged in extreme and outrageous conduct as part of a deliberate and malicious campaign of harassment and intimidation, with the intent to cause severe emotional distress to both plaintiffs. Plaintiffs' factual allegations include that (1) VNU's employees including Kilcullen propogated false accusations that plaintiffs were engaged in a sexual relationship and that that relationship was the reason Girard hired Chang, (2) defendant Schlager made repeated sexual and erotic remarks to Chang, kept a green vibrator in his office and on one occasion screamed aggressively at her causing her to feel physically intimidated by him, and (3) VNU abruptly terminated plaintiffs, escorted them out of the building and failed to provide them with the support normally provided to senior employees.

Defendants request dismissal of this cause of action on the basis that the conduct alleged is insufficiently extreme and outrageous and that plaintiffs have failed to allege that defendants intended to cause severe emotional distress.

The tort of 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 NY2d 115, 121 [1993]). Conduct by the defendants must be "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 NY2d 293, 303 [1983]). Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss. (*Sheila C. v. Povich*, ___NY3d ___, [1st Dept Aug. 26, 2004]).

Plaintiffs tenth cause of action is dismissed. While the complained of conduct, as alleged, is objectionable, it is neither sufficiently extreme nor outrageous to support a claim for intentional infliction of emotional distress.

Plaintiffs eleventh and twelfth causes of action are, respectively, for punitive damages and attorneys' fees pursuant to New York City Human Rights Law § 8-502. Defendants correctly argue that these causes of action should be dismissed on the grounds that no such causes of action exist separately from causes of action brought under the New York City Human Rights Law. As there is no separate cause of action for these claim, the eleventh and twelfth causes of action are dismissed.

Accordingly, it is hereby

ORDERED that defendants VNU, Inc., VNU Business Media, Inc., VNU Business Publications (USA) Inc., John J. Kilcullen and Ken Schlager 's motion for an order, pursuant to CPLR § 3211(a)(7), to dismiss sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action is granted; and it is further

ORDERED that defendant VNU, Inc.'s motion for an order, pursuant to CPLR § 3211(a)(7), dismissing the complaint asserted against it is denied; and it is further

ORDERED that defendants are directed to serve and file an answer to the complaint within ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 44, Room 581

on January 13, 2004, at 11:30AM at 111 Centre Street.

This constitutes the decision and order of the Court.

Dated: November 19, 2004

ENTER:

J.S.C.