Ruppmann v Broadreach Group, Inc.
2010 NY Slip Op 34070(U)
April 7, 2010
Supreme Court, New York County
Docket Number: 103141/09
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3

----------x

CHRISTOPHER RUPPMANN,

Plaintiff,

- against -

Index Number 103141/09
Motion Date: 1/27/10
Motion Sequence No: 001

BROADREACH GROUP, INC. and BRIAN GROVER,

Defendants.

----------x

EILEEN BRANSTEN, J.:

Defendants Broadreach Group, Inc. ("Broadreach") and Brian Grover move to dismiss the amended complaint as against them, pursuant to CPLR 3211 (a) (1) and (7), on the basis of documentary evidence and failure to state a cause of action, respectively. Plaintiff Christopher Ruppmann opposes.

Background

Broadreach is an employment recruitment and placement agency founded and managed by defendant Brian Grover. Broadreach hired Ruppmann on May 17, 2007. The parties executed an employment contract on February 25, 2008. Ruppmann was therein named Vice President of Broadreach and provided the ability to withdraw $5,000 monthly against commissions (Affirmation of Mitchell S. Cohen in Support of Defendants' Motion Pursuant to CPLR 3211 [a] [1] and [a] [7] to Dismiss the Complaint with Prejudice ["Cohen Aff."], Ex. B (the "Contract"). Broadreach terminated Ruppmann on or about October 16, 2008.

Plaintiff's amended complaint asserts causes of action for (1) employment discrimination and retaliation; (2) unlawful discriminatory practices in violation of the Administrative Code of the City of New York § 8-502 (a); (3) breach of contract; (4) violation of New York Labor Law § 191-c, which prescribes the methods for paying commissioned salespersons; and (5) defamation (Affirmation of Daniel J. Kaiser ["Kaiser Aff."], Ex. B ("Amended Compl.").

Analysis

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). On a motion to dismiss for failure to state a cause of action, the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*id.*, at 87-88).

I. Plaintiff's First and Second Causes of Action For Alleged Employment Discrimination

The amended complaint claims that on May 6, 2008, and May 19, 2008, defendant Grover "suggested" that Ruppmann have sexual relations with a female client (Amended Compl., ¶¶ 31, 33). When Plaintiff declined, "Grover then proceeded to explain how it

would greatly benefit his career and . . . identified a series of women he [Grover] had slept with in order to advance his career" (*id.*, ¶¶ 34-36). Broadreach partner Raffaele Pisacane approved the "inappropriate suggestion" when Ruppmann reported Grover's statement to him (*id.*, ¶¶ 37-38). Thereafter, "Grover began to treat [Plaintiff] with hostility" and Ruppmann "became increasingly uncomfortable being around Mr. Grover" (*id.*, ¶¶ 39-40). Plaintiff alleges that these actions amounted to "discriminat[ion] against plaintiff because of his gender and [that defendants] retaliated against him for resisting and objecting to the illegal discrimination" (*id.*, at ¶ 54). Ruppmann presents no other facts in support of his first cause of action[1] and does not otherwise identify or describe hostile conduct or a hostile working environment.

Ruppmann cites two cases in support of his allegation that the defendants sexually harassed him by creating a hostile work environment and, ultimately, fired him because he refused to have sexual relations with a female client. Ruppmann first cites to *Lopes v Caffe Centrale LLC* (548 F Supp 2d 47 [SD NY 2008]) for support. Therein, the court denied summary judgment to dismiss the complaint. Plaintiff in the case was a male restaurant employee who alleged that he was encouraged by his manager to tolerate the homosexual advances of a customer. The court found that plaintiff's "version of the facts, more

---

[1] Ruppmann does name the client about whom the alleged statement was made. The name need not be repeated here.

specifically the requirement that he submit to a customer's sexual demands in order to keep his job, if true, appear to set forth a claim of sexual harassment such that a reasonable fact-finder could conclude that Lopes was subject to a hostile working environment and constructive discharge" (*Lopes*, 548 F Supp 2d, at 51).

Ruppmann then cites to *Richards v New York City Dept. of Homeless Servs.* (2009 WL 700695, 2009 US Dist LEXIS 20410 [ED NY Mar 15, 2009]), wherein the court granted summary judgment to dismiss the complaint. Plaintiff in the case, a male employee, alleged that his female supervisor made sexual advances to him. The court found that plaintiff's allegations that his supervisor told him that he needed a "real woman," touched his buttocks twice, came in close physical proximity to him on several occasions, and, subsequently, assigned him unfavorable tasks such as bathroom cleaning "standing alone [were not] severe enough to establish a hostile work environment" (*Richards*, (2009 WL 700695, *7).

Lopes and *Richards* are not controlling and use a different standard of review than the instant motion. However, the cases are instructive, though not as Plaintiff might hope. The opinions speak of a combination of alleged discriminatory words and actions that stand in dramatic contrast to Ruppmann's conclusory allegations *(Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999], quoting *Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept], *affd* 66 NY2d 946 [1985] [complaint may not be afforded favorable inferences when it contains only "'allegations consisting of bare legal conclusions'"]).

Plaintiff merely contends, in his amended complaint and opposition to this motion, that he was fired five months after two unpleasant conversations with Grover, his boss. His version of the conversations on May 6 and 19, 2008 repeat no threats or remonstrations by Grover. Rather, on May 6, 2008, "Grover suggested that he engage in a sexual relationship" (Amended Compl., ¶ 31) and, on May 19, 2008, "Grover again suggested that Mr. Ruppmann have sex" with the client (*id.*, ¶ 33). Ruppmann contends that Grover displayed hostility towards him, but he does not offer any information as to when, where and how the hostility was manifested. "A 'hostile work environment' exists . . . when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment" (*Espaillat v Breli Originals*, 227 AD2d 266, 267 [1st Dept 1996] [affirming the dismissal of an employment discrimination complaint]). Ruppmann's conclusory allegations are insufficient to sustain the causes of action for employment discrimination. Defendants motion to dismiss Plaintiff's first and second causes of action is granted.

II. Plaintiff's Third and Fourth Causes of Action for Breach of Contract and Violation of New York Labor Law § 191-c

The contract between Plaintiff and Broadreach states that "[t]his Agreement constitutes the full and complete understanding and agreement of the parties with respect to the subject matter hereof and supersedes any and all prior understandings and agreements between the parties hereto, whether oral or written, concerning the subject matter of this

Agreement" (Contract, p. 7). It contains no mention of a bonus for Ruppmann, guaranteed or otherwise, nor does it contain any reference to "a $5,000 internal recruitment fee" he alleges that he is owed (Amended Compl., 27-30). Ruppmann provides no other basis supporting his claim for a bonus or internal recruitment fee owed under the Contract, and the contract contains an "entire agreement" clause (Contract, p. 7). Plaintiff has therefore presented no basis for a breach of contract claim on these grounds (*Kraus v Visa Intl. Service Assoc.*, 304 AD2d 408, 408 [1st Dept 2003] [affirming dismissal for failure to state a cause of action on plaintiff's breach of contract claims where plaintiff failed to allege the breach of any particular contractual provision]).

Plaintiff bases the balance of his third cause of action and his entire fourth cause of action on Broadreach's alleged failure to pay at least $210,000 in commission payments claimed due to Ruppmann (*see* Amended Compl., ¶ 17). Commission structure is delineated on page two of the Contract. On page four, the Contract states that: "Employees who are terminated or leave voluntarily automatically forfeit any claim to commissions not yet paid to Broadreach Group on the day the Employee is terminated or resigns." Ruppmann claims that he is owed commissions on deals invoiced before his termination (*id.*, ¶ 20), and that deals for which payment was collected before his termination generated approximately

$122,000 in commissions (*id.*, ¶ 22).[2] In fact, he maintains that his success and the attendant large commissions outstanding were the real reason he was fired (*id.*, ¶¶ 11-12, 25-26, 51).

Defendants argue that "plaintiff has failed to allege any facts in support of his claim for Commissions" (Defendants Memorandum of Law in Support of Defendants' Motion to Dismiss, p. 15). Defendants are incorrect. The amended complaint names five individuals allegedly placed by Ruppmann for which "the fees were collected prior to his departure" (*id.*, ¶ 21). Additionally, the charts, mentioned at n 2 *supra*, while unclear in places, list nine names with corresponding percentages and dollar amounts, including the five persons named in the amended complaint. With the exception of his claims regarding bonus payments and an internal placement fee, Plaintiff has stated sufficient facts to plead a claim for breach of contract and possible violation of New York Labor Law § 191-c.

III. Plaintiff's Fifth Cause of Action for Defamation

In order to properly allege a claim for defamation, Plaintiff must plead the making of a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept

---

[2] Attached to the Amended Complaint are two charts, apparently created by Broadreach, detailing Ruppmann's deals. However, poor quality reproduction obscures some data and compromises their value in reconciling the arithmetic.

1999]).

Ruppmann alleges that, in a telephone call to Broadreach client Two Sigma two days before Broadreach terminated him, Grover stated that: "1) Two Sigma was the only client Mr. Ruppmann worked with; 2) [Ruppmann] is not a team player; 3) [Ruppmann] comes to work only one or two days a week; and 4) Ruppmann has not closed a single deal all year" (Amended Compl., ¶¶ 43-44). Plaintiff characterizes these remarks as false and defamatory *per se* "because they injured Mr. Ruppmann in the context of his profession" (*id.*, ¶ 46).

Defendants argue that Plaintiff's defamation claim fails and should be dismissed because the alleged defamatory statements are subject to a qualified privilege as statements between Broadreach and its clients.

A qualified privilege applies "to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty" (*Byam v Collins*, 111 NY 143, 151 [1888]). *Byam* is an early statement of the common interest qualified privilege. The case involves a defamatory letter to a young woman about a romantic suitor. The court found that the letter was not subject to a qualified privilege, as a "claim of a moral duty will not be sustained when a person as a volunteer has made defamatory statements against another in a matter in which he has no legal duty or personal interest, unless he can find a justification in some pressing emergency." (*id.*, 143).

The situation in *Byam* is akin to the instant circumstances in which Grover, on his own, told a client about Ruppmann's conduct as a Broadreach employee. While Ruppmann had done business with Two Sigma, the information conveyed to Two Sigma had no more than anecdotal value to it. Additionally, the relationship between Broadreach, a placement agency, and Two Sigma, a financial services firm, was random and episodic. There was nothing exclusive or unique in their dealings.

The cases cited by defendants regarding the common interest qualified privilege demonstrate a vital link or concern among the communicants that is missing from the instant case. For instance, *Liberman v Gelstein* (80 NY2d 429 [1992]), involved accusations against a landlord by a member of the tenants' association; *Ramos v Madison Square Garden Corp.* (257 AD2d 492 [1st Dept 1999], involved employer's statements to plaintiff's co-employees; *Thanasoulis v National Assn. for Specialty Foods Trade* (226 AD2d 227 [1st Dept 1996]), involved notice to trade show exhibitors about the credit worthiness of an attendee; *Kasachkoff v New York* (107 AD2d 130 [1st Dept 1985]), involved an unfavorable employee performance review; *Anas v Brown* (269 AD2d 761 [4th Dept 2000]), involved a faculty memorandum critical of a university department chair; *Weir v Equifax Servs.* (210 AD2d 944 [4th Dept 1994]), involved information about a former employee provided on a background check; and *Gordon v. Allstate Ins. Co.* (71 AD2d 850 [2d Dept 1979]), involved other employees learning the reasons for a co-worker's termination. Defendants and Two Sigma,

involved in a two-party business relationship, do not share the common interest, link or concern found in these cases. The comments at issue are not subject to a qualified privilege.

Defendants rely entirely upon the common interest qualified privilege to dismiss Ruppmann's cause of action for defamation cause of action. For the above reasons, defendants' motion to dismiss the claim is therefore denied. However, only the purportedly factual statements may be considered moving forward, that is, that Two Sigma was Ruppmann's only client, that he came to work only one or two days each week, and that he had closed no deals in 2008 prior to his termination. Grover's statement that Ruppmann was not a team player is purely opinion and is therefore not actionable (*Miller v Richman*, 184 AD2d 191, 192-193 [4th Dept 1992] [concluding that pre-termination comments that a legal secretary was "'one of the worse [sic] secretaries at the firm,' that her 'work habits [were] bad' [and that] her 'performance [was] bad,'" and comparing her unfavorably to other secretaries at the firm are, were, as a matter of law, nonactionable expressions of opinion").

Conclusion and Order

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint against them is granted only to the extent that the first and second causes of action are dismissed, and the claims regarding bonus payments and an internal placement fee shall be dismissed from the third cause of action; and it is further

ORDERED that the third cause of action as modified herein, and the fourth and fifth causes of action shall continue; and it is further

ORDERED that defendants shall answer the amended complaint as remains within 20 days of receipt of this order with notice of entry.

Dated: April 7, 2010
New York, NY

ENTER:

Eileen Bransten, J.S.C.