Akinboyo v MRM Worldwide
2011 NY Slip Op 33794(U)
August 8, 2011
Supreme Court, New York County
Docket Number: 652278/10
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART 48

Index Number : 652278/2010
AKINBOYO, OLORUNFUNMILALO
vs.
MRM WORLDWIDE
SEQUENCE NUMBER : 001
DISMISS ACTION

12
8/9/11
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INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

"This motion is decided in accordance with the annexed decision and order of the Court."

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JEFFREY K. OING
J.S.C.

Dated: 8/8/11

_____ J.S.C.
JEFFREY K. OING
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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OLORUNFUNMILALO AKINBOYO,

Plaintiff,

-against-

MRM WORLDWIDE, KATARINA LAGIS and ROSELYN DOS SANTOS,

Defendants.

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Index No.: 652278/10

Mtn Seq. No. 001

DECISION AND ORDER

JEFFREY K. OING, J.:

Defendants, MRM Worldwide ("MRM"), Katarina Lagis ("Lagis"), and Roselyn Dos Santos ("Dos Santos"), move, pursuant to CPLR 3211(a)[7], for an order dismissing the complaint.

Background

Plaintiff, Olorunfunmilalo Akinboyo, claims that on or about April 10, 2010, she received a call from Joseph Golden of defendant MRM (Akinboyo Aff., ¶ 5). Mr. Golden informed plaintiff of a job opening with MRM as a payroll assistant/coordinator because the employee currently occupying the position was resigning (Id.). Subsequently, plaintiff had a telephone interview for the position with Mr. Golden and defendant Lagis (Id., ¶ 6). On April 23, 2010, plaintiff went to MRM's Manhattan office to interview for the position. Plaintiff alleges that at the end of the interview defendants extended an offer of employment and directed plaintiff to resign from her current position with her employer, Population Council (Id., ¶ 8). Plaintiff claims she tendered her resignation from Population Council on or about April 25, 2010 (Id., ¶ 9). On

April 26 and 27, 2010, plaintiff completed a two-day job training program with MRM and was directed to begin her new position on May 5, 2010 (Id., ¶ 10). Plaintiff further claims that defendants processed all the necessary access documents, passes, and identification documents to the MRM office, as well as the necessary tax documents for her employment (Id.).

On or about April 30, 2010, plaintiff claims that defendant Dos Santos called her several times at Population Council and left several messages (Id., ¶ 11). When plaintiff returned the call, she was told that the opening for which she was hired was no longer available (Id.). Apparently, the individual plaintiff would have been replacing had decided not to resign and had asked to retain the position (Id.). Plaintiff claims that she immediately contacted Population Council to see if she could get her old position back, but her former employer told her that the position had already been filled (Id., ¶ 12).

Plaintiff commenced this action asserting eight causes of action for: 1) breach of contract; 2) misrepresentation; 3) intentional infliction of emotional harm; 4) negligent infliction of emotional harm; 5) tortious interference with economic advantage; 6) tortious interference with contractual relations; 7) negligent hiring, training, retention, and 8) respondeat superior.

First Cause of Action for Breach of Contract

Defendants argue that New York's at-will doctrine mandates dismissal of the breach of contract cause of action. In that

regard, the principle is well settled that where the employment is "at-will", it may be terminated by either party at any time for any reason or for no reason at all (Lobosco v New York Telephone Company/NYNEX, 96 NY2d 312 [2001]). Defendants point out that directly above the signature line of the employment application that plaintiff filled out plaintiff agreed that she understands that if she is employed the employment is "at will" and can be "terminated with or without cause and with or without notice at any time, at the option of [plaintiff] or the Company" (Lagis Aff., Ex. 2).

Plaintiff interposes no opposition to the branch of defendants' motion to dismiss the breach of contract cause of action. As such, because it is clear that plaintiff was hired as an at-will employee, the first cause of action for breach of contract is dismissed.

Second Cause of Action for Misrepresentation

In order to properly plead a claim for misrepresentation, plaintiff must allege a representation of a material, existing fact, falsity, scienter, deception, and injury (Friedman v Anderson, 23 AD3d 163 [1st Dept 2005]). Furthermore, plaintiff must set forth specific and detailed allegations that defendants personally participated in, or had knowledge of any alleged fraud (CPLR 3016[b]; Handel v Bruder, 209 AD2d 282 [1st Dept 1994]).

Defendants argue that the pleading does not identify what statements were false, who made them, or when. Nor does plaintiff allege any facts showing scienter - that defendants

made the representations with the intent to deceive (Friedman v Anderson, 23 AD3d at 163, supra).

To begin, plaintiff fails to plead with specificity the requisite allegations for fraud or misrepresentation. Further, plaintiff's allegations that defendants made a material misrepresentation to plaintiff when they informed her that she was hired and that she should resign from her current employment are insufficient. Plaintiff does not allege facts demonstrating scienter - that defendants knowingly and falsely offered plaintiff a job to induce her to quit her current job. Indeed, there can be no allegation of an ulterior motive to support scienter because plaintiff did not know or have any dealings with any of the individual defendants prior to applying for employment. Accordingly, the second cause of action is dismissed.

Third Cause of Action for Intentional Infliction of Emotional Harm

The elements of intentional infliction of emotional distress are: 1) extreme and outrageous conduct; 2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; 3) a causal connection between the conduct and the injury; and 4) the resultant extreme emotional distress. To plead properly the first element of extreme and outrageous conduct, a plaintiff must allege facts showing "conduct by a defendant 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" (Dillon v City of New York, 261 AD2d 34 [1st Dept 1999][internal quotation marks omitted]).

The facts alleged do not rise to the level of extreme and outrageous conduct. Further, plaintiff's reference to Vasarhelyi v New School for Social Research, 230 AD2d 658 [1st Dept 1996] is unavailing. Plaintiff refers to Vasarhelyi to support the argument that the extreme and outrageous conduct does not necessarily arise from what is done, but rather from abuse by defendant of some relation or position which gives defendant actual or apparent power to damage plaintiff's interests (Id.). That case is distinguishable because it involved a defendant who, as president of the institution that employed plaintiff, singled plaintiff out for an investigation involving possible criminal proceedings. The Appellate Division, First Department found that defendant in that case was in a position giving him apparent power to impair plaintiff's professional standing. And, further, that defendant's conduct of engaging criminal attorneys to conduct an investigation sufficiently intimated the threat of prosecution to bring the matter within the ambit of cases construing, as outrageous, threats of unjustified criminal charges or groundless litigation (Id.).

Here, plaintiff never actually worked for defendants and defendants rescinded the job offer for reasons that apparently had nothing to do with plaintiff or her professional abilities. Thus, the facts do not indicate that defendants were in a

position of actual or apparent power over plaintiff's interests. Accordingly, the third cause of action is dismissed.

Fourth Cause of Action for Negligent Infliction of Emotional Distress

Similar to a claim for intentional infliction of emotional distress, a claim for negligent infliction of emotional distress requires a showing of extreme and outrageous conduct, but is also premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for her own safety (Sheila C. v Povich, 11AD3d 120 [1st Dept 2004]).

Plaintiff interposes no opposition to this branch of defendants' motion and, further, the facts of this case do not support this cause of action. Accordingly, the fourth cause of action is dismissed.

Fifth Cause of Action for Tortious Interference with Economic Advantage

To establish a claim for tortious interference with economic advantage, plaintiff must demonstrate that defendants' interference with her prospective business relations was accomplished by wrongful means or that defendants acted for the sole purpose of harming the plaintiff (Snyder v Sony Music Entertainment, Inc., 252 AD2d 294 [1st Dept 1999]). Specifically, plaintiff must allege that defendants acted by unlawful means or with malicious intent (Interweb, Inc. v iPayment, Inc., 12 AD3d 164 [1st Dept 2004]).

There is nothing in this record to indicate that defendants acted unlawfully or had a malicious intent when they allegedly directed plaintiff to resign from Population Council, and then rescinded the employment offer. As such, the fifth cause of action is dismissed.

Sixth Cause of Action for Tortious Interference with Contractual Relations

The elements of tortious interference with contractual relations are: 1) the existence of a contract between the plaintiff and a third party, 2) defendant's knowledge of the contract, 3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and 4) damages to plaintiff (Anesthesia Assocs. of Mount Kisco, LLP v Northern Westchester Hospital Center, 59 AD3d 473 [2nd Dept 2009]).

Here, plaintiff fails to allege or demonstrate that she had a contract with Population Council. Accordingly, the sixth cause of action is dismissed.

Seventh and Eighth Causes of Action for Negligent Hiring, Training, Retention and Respondeat Superior

Defendants argue that these claims are for secondary liability and should be dismissed since plaintiff has not sufficiently pleaded primary liability. The argument is persuasive.

Here, there is no allegation that defendants Lagis and Dos Santos were acting outside the scope of their employment, thus no

claim may proceed against MRM for negligent hiring or retention (Karoon v New York City Transit Authority, 241 AD2d 323 [1st Dept 1997]). In addition, because plaintiff has not stated a primary cause of action against MRM's employees, the cause of action for vicarious liability must be dismissed. Plaintiff interposes no opposition to these branches of the motion. Accordingly, the seventh and eighth causes of action are dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/8/11

HON. JEFFREY K. OING, J.S.C.