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

PRESENT: HON. PAUL G. FEINMAN PART 12
Justice

Index Number : 650231/2011
SONTAG, DINA
vs.
EMMIS COMMUNICATIONS
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 650231/11E
MOTION DATE
MOTION SEQ. NO. 001
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

DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER

Dated: 10/17/2011

Paul G. Feinman
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: CIVIL TERM: PART 12

----------X

DINA SONTAG,

Plaintiff,

- against -

EMMIS COMMUNICATIONS CORPORATION and ANDREA BARONE,

Defendants.

----------X

Index No. 650231/2011E
Mot. Seq. No. 001

**DECISION AND ORDER**

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| **Papers considered in review of this motion**: | **E-File Document Number** |
|---|---|
| Notice of motion, Krebs affirmation in support and annexed exhibits A - F | 3 - 3-7 |
| Defendants' memorandum of law in support | 4 |
| Plaintiff's memorandum of law in opposition | 6; 8-2 |
| Armstrong affirmation in opposition | 7; 8-1 |
| Reply Krebs affirmation | 9 |
| Defendants' Reply memorandum of law in further support | 10 |
| Transcript of oral argument | 11 |

**PAUL G. FEINMAN, J.:**

Defendant, Emmis Communications Corporation, moves (1) to dismiss plaintiff's first and second causes of action, sounding in breach of contract and fraud, pursuant to CPLR 3211 (a) (1), (2) for sanctions and costs, pursuant to 22 NYCRR 130-1.1, and (3) a stay of discovery, pursuant to CPLR 3214. Plaintiff, Dina Sontag, opposes. For the reasons provided below, the branch of the motion seeking dismissal of the plaintiff's first and second causes of action is granted and the motion is otherwise denied.

***Background***

Plaintiff brings this action against her former employer, Emmis Communications Corporation ("Emmis"), and former supervisor, Andrea Barone, alleging (1) breach of contract, (2)

fraud, (3) violations of the New York State Human Rights Law, and (4) violations of the New York Administrative Code § 8-107. According to the complaint, Emmis is a corporation headquartered in Indianapolis, Indiana with a division, Emmis New York, located in New York, New York. The complaint alleges that at all relevant times, Barone was employed at the Emmis New York division as the General Sales Manager of Hot 97 and WRXP. Plaintiff was employed by Emmis at its WRKS-FM radio station from September 2000 to August 2003, and then again starting on January 12, 2009. Plaintiff reported to her manager, Barone, from January 2009 until September 2009, when she was assigned to work under a different manager, Leon Clark. The complaint alleges that this reassignment was made after plaintiff complained to the Human Resources department of "harassment, hostility and abuse towards her by Defendant Barone" (Doc. 3-2, Compl. at ¶ 13). Plaintiff reported to Clark until his retirement on March 5, 2010, at which time she was directed to report to Barone again. Ten days later, on March 15, 2010, plaintiff's employment was terminated. The complaint alleges, upon information and belief, that Barone made the decision to terminate plaintiff. Also, the complaint alleges that plaintiff was subjected to a hostile, abusive and harassing work environment during the time that she reported to Barone. It claims that Barone, a female, "openly, consistently and demonstrably favored male employees of ... Emmis over female employees ... regarding the terms, conditions and rewards of employment ..." (Doc. 3-2, Compl. at ¶ 42).

In connection with plaintiff's first cause of action against Emmis for breach of contract, the complaint alleges that Emmis maintained express, written company policies of anti-harassment and anti-retaliation "that required its employees to report certain misconduct and made a reciprocal promise to protect employees - including [p]laintiff - from retaliation for reporting such conduct" (*id.* at ¶ 102). Further, it alleges that "Emmis made [p]laintiff aware of its Anti-Harassment and

Anti-Retaliation Policies and, in doing so, encouraged her reliance thereon" (*id.* at ¶ 104). The policies, the complaint asserts, constitute "an exception to [p]laintiff's at-will relation, which is an implied employment contract" (*id.* at ¶ 104). This implied contract was allegedly breached by Emmis when it terminated plaintiff's employment because plaintiff had reported misconduct toward her by Barone.

Plaintiff's second cause of action against Emmis, sounding in fraud, alleges that Emmis "materially misrepresented to [p]laintiff that it prohibited any form of retaliation against her for filing a complaint pursuant to the provisions of the Anti-Retaliation Policy" (*id.* at ¶ 110). Emmis allegedly made these statements with the intent of deceiving its employees into believing that Emmis would not retaliate against them filing complaints pursuant to the Anti-Harassment policy, even though Emmis had no intention of prohibiting such retaliation (*id.* at ¶ 111). Finally, the complaint alleges that plaintiff relied on Emmis's misrepresentation when she "reported the hostility, harassment and discriminatory conduct she suffered by ... Barone" (*id.* at ¶ 112).

Attached to the complaint is an un-notarized statement, dated April 9, 2010, from Leon Clark addressed to "Dina." (Doc. 3-2, Clark statement). Clark "confirms" that while he managed plaintiff at KISS-FM, he had "every intention of keeping [her] on [his] team, as [he] was extremely happy with [her] performance" (*id.*). The statement also says that he "was in the room, with six or seven other sales staff on (or about) February 25, 2010, when Andrea Barone told all of us the following, or words to this effect: '[t]hough Leon has decided to leave the company, there is no reason to worry, as you all have a job and a role here'" (*id.*).

In support of the instant motion, Emmis has attached a copy of its employee handbook and related acknowledgment form, which was signed by plaintiff on January 20, 2009, roughly a week after she started to work for Emmis on January 12, 2009. The acknowledgment form states

> "[r]egarding my employment relationship with the Company, I acknowledge and agree that there is no specified length of employment, nor have I received any promise of continued employment. Accordingly, I understand that I am an 'employee-at-will,' which means that either I or the Company may terminate the employment relationship at-will, with or without cause, and with or without notice, at any time. I understand and agree that no individual, other than a Company officer, has any authority to enter into an agreement with me for employment that is other than at-will. Moreover, if such an agreement is reached, I understand that it must be in writing and signed by an authorized Company officer"

(Doc. 3-4, ex. C, Acknowledgment form at 1). Next, it provides

> "I understand that the Handbook is not an employment contract, express or implied, nor is it intended to be an offer, statement, or confirmation of any guaranteed terms or conditions of employment. I also acknowledge and agree that the Company has the right to change my position, title, compensation, or any other term or condition of employment at any time at its discretion, and that any such change shall not affect my at-will employment status"

(*id.* at 1). It further states that "I acknowledge and agree that the information, policies, and benefits described in the Handbook are subject to unilateral revision or deletion by the Company at its discretion at any time ... but that I am personally responsible for ensuring that I am aware of all of Emmis' employment policies and practices" (*id.*).

***Analysis***

**1. Motion to dismiss**

In general, on a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, the court must liberally construe plaintiff's complaint, presuming the truth of all allegations contained therein and according plaintiff the benefit of every possible favorable inference (*see* CPLR 3026; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dept 2001]). However, where "the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]). On a motion to dismiss under CPLR

3211 (a) (1), the test is whether the evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*see 511 West 232nd Owners Corp.*, 98 NY2d at 152; quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

**A. Breach of employment contract**

In New York, a presumption exists that employment is "terminable at will in the absence of an express limitation in an employment contract, or other document, personnel policy or procedural handbook" (*Ullmann,* 207 AD2d at 692; *see also De Petris v Union Settlement Assoc., Inc.*, 86 NY2d 406, 410 [1995] ["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"]). However, an employee may recover for breach of contract by establishing that the employer made the plaintiff aware of its express written policy limiting its right of discharge and plaintiff detrimentally relied on that policy in accepting employment (*see De Petris*, 86 NY2d at 410; *see also Ferring v Merrill Lynch & Co., Inc.*, 244 AD2d 204, 204 [1st Dept 1997]). Where these elements are shown, "the employee in effect has a contract claim against the employer" (*De Petris*, 86 NY2d at 410]).

In *De Petris*, plaintiff could not recover for breach of an employment contract where he could not point to any provision of his employee manual limiting the employer's right to terminate his at-will employment or obligating the employer to follow certain personnel procedures (*id.* at 410). The Court of Appeals specifically noted the provision in the employee manual where employer expressly reserved the right to revise the employment manual at any time (*id.* at 411). In *Ferring*, 244 AD2d at 204, the Appellate Division, First Department, held that a claim for wrongful termination in violation of an employee handbook policy was properly dismissed where two manuals containing the allegedly violated policy did not limit the employer's right of discharge and, in any case, plaintiff could not have detrimentally relied on the policy because the manuals were not

provided to plaintiff until after plaintiff accepted the job. In *Ullmann*, in the context of a motion to dismiss under CPLR 3211 (a) (7), the Appellate Division, First Department, dismissed the plaintiff's breach of contract claim where defendants introduced an employment application signed by plaintiff which specifically provided that plaintiff understood and agreed that his employment was not for definite period of time and may be terminated at any time without cause (207 AD2d at 692). Furthermore, the court held that a breach of contract claim could not be supported by "plaintiff's unsubstantiated allegation of oral assurances of employment by the defendants" (*id.*).

Here, the complaint alleges that that "(1) [d]efendant Emmis made [p]laintiff aware of its express written Anti-Retaliation Policy set forth in, *inter alia*, the Employee Handbook and the Business Code of Conduct, which limit [d]efendant Emmis's right to terminate employees in retaliation for reporting discrimination and harassment; and (2) [p]laintiff relied on this policy when she reported [d]efendant Barone's hostility, abuse and harassment" (Doc. 8-2, Plaintiff's mem. of law at 7).

In support of this motion to dismiss, Emmis argues plaintiff has failed to allege the existence of a writing sufficient enough to overcome the presumption that plaintiff's employment was terminable at will. Emmis points to a provision in the employee handbook acknowledgment form signed by plaintiff on January 20, 2009, which includes, among other things, the statement "I understand that the Handbook is not an employment contract, express or implied, nor is it intended to be an offer, statement, or confirmation of any guaranteed terms of conditions of employment" (Doc. 3-4, ex. C, Acknowledgment form). It also refers to the portion of the handbook that provides that all employees are employed "at-will" and are subject to "termination at the company's discretion" (Doc. 4, Emmis mem. of law at 8).

In opposition, plaintiff contends that the court cannot simply look at the language found in

the employment handbook acknowledge form, but must instead look to the "totality of the circumstances" (Doc. 8-2, Plaintiff's mem. of law at 6; citing *Skelly v Visiting Nurse Assoc. of Capital Region, Inc.*, 210 AD2d 683 [3rd Dept 1994]). Here, plaintiff argues, that the totality of the circumstances includes that Emmis's anti-harassment "reporting requirement and reciprocal promise of protection from retaliation is not only included in the Employee Handbook, but: (a) also included in the company's Business Code of Conduct, which does not include a disclaimer; [and] (b) likely contained in other express, written policies that will be revealed during discovery" (*id.* at 7). Furthermore, plaintiff posits that "both the Employee Handbook and the Acknowledgment Form signed by [p]laintiff (and relied upon heavily by [d]efendants in making this motion) state that [d]efendant Emmis reserve[] the right to modify or revoke any of the stated policies at any time without prior notice to employees" (*id.*). Based on this language, plaintiff argues that the documentary evidence offered by Emmis - the employee handbook and acknowledgment form - has not been "conclusively established as the Employee Handbook in effect at all relevant times" (*id.* at 8).

Even viewing the complaint's allegations in a light most favorable to plaintiff, she has failed to plead a cause of action for breach of contract. Even assuming that employee handbook could be considered an express written policy limiting Emmis's right of discharge, plaintiff did not rely on the statements made in the handbook in accepting employment. The complaint alleges plaintiff started her employment on January 12, 2008, but she did not receive a copy of the handbook until January 20, 2008, as shown by the date of her signature on the acknowledgment form. Thus, she could not have relied on any policy contained in the handbook, or any possible revisions to the handbook made available to employees on the company's website, to her detriment in accepting employment with Emmis (*see De Petris*, 86 NY2d at 410). Furthermore, plaintiff could not have

detrimentally relied on any policy contained in the handbook where plaintiff expressly acknowledged that handbook is not a contract and that the policies contained therein did not alter the fact that her employment was at-will (*see Priovolos v St. Barnabas Hosp.*, 1 AD3d 126, 127 [1st Dept 2003]). In addition, plaintiff could not have relied on the handbook because she acknowledged that any policy stated in the handbook was subject to revision or deletion without prior notice at Emmis's sole discretion. To the extent plaintiff claims that she relied on the anti-retaliation policy found in Emmis's Code of Business Conduct and Ethics, plaintiff did not receive a copy of this code until May 7, 2009, and thus she could not have relied on it in accepting employment in January of 2009. Furthermore, the letter plaintiff received accompanying the Code of Business Conduct and Ethics states, "[t]his Code sets forth general principles and does not supersede the specific policies and procedures covered in Emmis' Employee Handbook or in separate specific policy statements" (Doc. 8-1, ex. 1, May 7, 2009 letter).

Plaintiff has failed to allege the existence of any written policy on which she detrimentally relied in accepting employment. Because plaintiff has not established that the narrow exception to the at-will employment doctrine applies, the branch of Emmis's motion seeking dismissal of plaintiff's first cause of action for breach of contract is granted.

**B. Fraud**

To state a cause of action for fraud, plaintiff must plead with particularity an intentional misrepresentation by the employer upon which plaintiff relied to his or her detriment (CPLR 3016 [b]; *Nikitovich v O'Neal*, 40 AD3d 300, 301 [1st Dept 2007]). A cause of action for fraud is properly dismissed where plaintiff is "merely attempting to circumvent the at-will employee rule" and where "the alleged fraud claim [is] indistinguishable from the breach of contract claim" (*id.* at 301; citing *Ullmann*, 207 AD2d at 692; *Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept

2001]).

Here, plaintiff's fraud theory is as follows. Plaintiff claims that Emmis represented to plaintiff and all of its employees through its anti-retaliation policy that it prohibited retaliation for filing complaints for violations of its anti-harassment policy. Plaintiff further contends that at the time this representation was made, Emmis in fact had no intention of preventing retaliation against its employees. Plaintiff argues that she relied on the Emmis's representation when she reported Barone's "hostility, harassment and discrimination" to Emmis and was then injured by Emmis's fraud when it retaliated against her by terminating her employment (Doc. 8-2, Plaintiff's mem. of law at 11). She contends that Emmis's argument in support of the instant motion, claiming that the acknowledgment form disclaims that any obligation on the part of Emmis is created by the handbook, constitutes an admission that Emmis never intended to prohibit retaliation (*id.* at 12).

In support of its motion to dismiss, Emmis argues that plaintiff's cause of action is an impermissible attempt to circumvent the employment-at-will doctrine. Furthermore, it contends that plaintiff could not have relied on the policies found within the handbook because the handbook and acknowledgment form explicitly informed plaintiff that she was not entitled to rely on its provisions and that they were merely guidelines that were subject to change without notice and at Emmis's sole discretion.

Plaintiff's second cause of action sounding in fraud is nothing more than an attempt to circumvent the employment-at-will doctrine by recasting plaintiff's breach of contract claim as a cause of action for fraud (*see Ullmann*, 207 AD2d at 692). The facts alleged by plaintiff in support of both causes of action are indistinguishable, as each center of Emmis's alleged noncompliance with its anti-harassment and anti-retaliation policies. In any event, in light of the express language quoted above that is found in the acknowledgment form signed by plaintiff, as well as that found in

the letter accompanying Emmis's Code of Business Conduct and Ethics, plaintiff could not have relied on the statements made in these policies, which were subject to change at Emmis's sole discretion at any time. Accordingly, the branch of Emmis's motion seeking dismissal of plaintiff's second cause of action is granted.

**2. Motion for Sanctions**

Pursuant to 22 NYCRR 130-1.1 (a) the court may sanction any party or attorney costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. The court may also impose financial sanctions for frivolous conduct. For purposes of this rule, conduct is "frivolous" if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). In determining whether the conduct undertaken was frivolous, the court may consider "the (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*id.*).

Here, Emmis argues that plaintiff engaged in frivolous conduct by bringing the first two causes of action, sounding in breach of contract and fraud, because "they are completely without merit" (Doc. 4, Emmis's mem. of law at 12). Emmis further contends that plaintiff had ample time between March 15, 2010, when plaintiff was terminated, until January 27, 2011, when the complaint was filed, to perform the factual and legal investigation necessary for bringing the claim. It also notes that prior to filing the complaint, plaintiff's attorney sent a draft complaint to Emmis. In

response, Emmis's counsel advised plaintiff and her counsel in writing of "the pure frivolity of going forward with claims for breach of contract and fraud" (*id.* at 13). Emmis's attorney warned plaintiff in multiple letters that if she persisted with these claims, Emmis would seek sanctions pursuant to 22 NYCRR 130-1.1.

In opposition, plaintiff argues that this branch of Emmis's motion must be denied because "the law is well-settled that sanctions are not applicable when a litigant advances reasonable legal theories in commencing a case, even if the suit is eventually dismissed on the merits" (Doc. 8-2, Plaintiff's mem. of law at 14; citing *Poley v Sony Music Entertainment, Inc.*, 163 Misc. 2d 127, 138 [Sup Ct, NY County 1994]; *Rivkin v Brackman*, 167 AD2d 239 [1st Dept 1990]; *Esannason by Bowers v NYC Hous. Auth.*, 163 AD2d 160 [1st Dept 1990]). Plaintiff continues, "Further, [d]efendants' contention that [p]laintiff should be sanctioned because she did not blindly accept the legal research, analysis and conclusion of [d]efendants' counsel that her claims lacked merit is belied by the law, the facts, and common sense" (*id.* at 15).

Plaintiff had adequate time available to investigate the factual or legal basis of her claims. She needed to look no further than the express words of the written policies that she relies upon in support of her claims to see that they were without merit. Furthermore, Emmis's attorney pointed out the specific, relevant language in a letter sent to plaintiff's attorney even prior to plaintiff's commencement this action. Upon receipt of a draft version of the complaint ultimately filed, Emmis's attorney also informed plaintiff's counsel that it would not only seek dismissal of plaintiff's first and second causes of action but also seeks sanctions under 22 NYCRR 130-1.1 (Doc. 3-5, ex. D, Dec. 6, 2010 letter). Thus, "plaintiff's counsel was well aware of the fact that sanctions might be forthcoming if [the first and second cause of action were] pursued" (*Yenom Corp. v 155 Wooster*, 33 AD3d 67, 73 [1st Dept 2006]; citing *Timoney v Newmark & Co. Real Estate*, 299 AD2d

201, 202 [1st Dept 2002] [sanctions imposed for frivolous appeal where defendant made efforts to warn plaintiff that action had no merit and should be withdrawn]). Nonetheless, the court finds that the record does not support Emmis's claim that plaintiff has engaged in frivolous conduct warranting sanctions under the particular circumstances of this case. This branch of the defendant's motion is denied.

Accordingly, it is

ORDERED that the motion of defendant, Emmis Communications Corporation, seeking partial dismissal of plaintiff's complaint is granted, and the Clerk of Court shall enter judgment dismissing the complaint's first (breach of contract) and second (fraud) causes of action; and it is further

ORDERED that the remainder of the complaint is severed and continued under this index number; and it is further

ORDERED that the branch of the defendant's motion which seeks to impose sanctions upon plaintiff pursuant to 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that Emmis Communications Corporation is directed to serve an answer to the complaint with respect to plaintiff's third and fourth causes of action within 20 days of entry of this order; and it is further

ORDERED that all parties shall appear by counsel fully authorized to enter into a preliminary conference order on November 30, 2011, at 2:15 p.m. in Part 12, Room 212, 60 Centre Street, New York, NY 10007.

This constitutes the decision and order of the court.

Dated: October 17, 2011
New York, New York

Paul G. Feinman
J.S.C.

(2011 Pt 12D&O_650231_2011_001(employdiscrim_MTD_contr_fraud)