Rieser v Plaza College, Ltd.
2013 NY Slip Op 32819(U)
September 23, 2013
Supreme Court, Queens County
Docket Number: 701782/12
Judge: Jeffrey D. Lebowitz
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: **HON. JEFFREY D. LEBOWITZ** IAS PART 16
Justice

---X

ROY RIESER,

Plaintiff,

-against-

PLAZA COLLEGE, LTD., MARIE DOLLA, and CHARLES E. CALLAHAN,

Defendants.

---X

Index No.: 701782/12
Motion Seq. No.: 1

ORDER

The following papers numbered 1 to 12 read on this motion by defendants to dismiss the plaintiff's complaint on the grounds that the complaint fails to state a cause of action.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.......	1 - 4
Affidavit of Charles E. Callahan-Exhibits................	5 - 6
Memorandum of Law in Support..............................	7
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Defendants, PLAZA COLLEGE LTD., MARIE DOLLA and CHARLES E. CALLAHAN (hereinafter collectively referred to as "defendants") seek an Order, pursuant to CPLR §3211 (a)(1) and/or (a)(7), dismissing the plaintiff's complaint on the grounds that it fails to state a cause of action; or in the alternative with respect to plaintiff's sixth cause of action , an Order pursuant to CPLR §3212 granting summary judgment. Plaintiff has opposed and defendants replied.

Plaintiff commenced the instant action alleging eight separate causes of action with respect to his termination as an Adjunct Instructor at Plaza College, Ltd. Specifically, plaintiff alleges that he was employed by defendants as a Permanent Part-Time Faculty member commencing September 5, 2011. Plaintiff acknowledges that he received two Adjunct Faculty Agreements and the Faculty Handbook which delineates the rules and procedures relating to the duties and responsibilities of the teachers and the College.

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QUEENS COUNTY

Plaintiff alleges, *inter alia*, that he was forced to undertake extensive work and responsibilities above what he assigned; that he was not compensated for the excess work; that defendants offered plaintiff a full time position which he accepted; and that based upon said full time position plaintiff did not seek employment elsewhere.

Plaintiff also states that he advised defendants that certain faculty members were not instructing their classes as required by the syllabi, and that they did not possess the required credentials as mandated by various State and Federal monitoring education agencies, and that in his opinion, defendants were defrauding State and Federal agencies to maintain its accreditation. Plaintiff states that the last email that he sent to the defendants concerning the above allegation was forwarded on April 10, 2012. On April 16, 2012 plaintiff's employment was terminated, which plaintiff claims was in retaliation and unlawful.

Plaintiff asserts eight causes of action, to wit: breach of contract; retaliation; fraud in the inducement; conspiracy; whistleblower; unjust enrichment; breach of contract (pertaining to health insurance); and intentional infliction of emotional distress.

Motion to Dismiss

Defendants move this Court to dismiss plaintiff's complaint on the grounds that it fails to state a cause of action, pursuant to CPLR §3211(a)(7); or in the alternative, with respect to the sixth cause of action sounding in unjust enrichment, for summary judgment pursuant to CPLR §3212. Plaintiff argues that defendants' post-answer motion to dismiss is procedurally defective and should be denied. Defendant replies stating that their Affirmative Defenses set forth in their Answer preserved their right to make this motion.

CPLR §3211(a)(e) provides:

> "...A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading..."

Inasmuch as defendants move under paragraph seven of subdivision (a), said motion is not defective.

When determining a motion to dismiss a complaint for failure to state a cause of action, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*See*, Guggenheimer v. Ginzburg, 43 NY2d 268; Foley v. D'Agostino, 21 A.D.2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3211:24, p. 31; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3211.36).

Further, the court must accept the facts as alleged in the complaint as true and accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts

as alleged fit within any cognizable legal theory" (*See*, Bokhour v. GTI Retail Holdings, Inc. 94 A.D.3d 682; Sokol v. Leader, 74 A.D.3d at 1181). 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus' " (*See*, Sokol v. Leader, *supra*, quoting EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19).

It is well settled that the standard to be applied here is whether the plaintiff's complaint states a cause of action, not whether the plaintiff has a cause of action" (*See*, Guggenheimer v. Ginzburg, *supra*; Sokol v. Leader, *supra*; Guido v. Orange Regional Medical Center, 102 A.D.3d 828).

First Cause of Action Alleging Breach of Contract

The first cause of action interposed in plaintiff's complaint is for breach of contract. Said cause of action alleges that plaintiff was improperly and wrongfully terminated by the defendants without just cause.

Defendants argue that said cause of action fails as a matter of law inasmuch as in New York, absent a written agreement, an employment relationship is presumed to be "at-will" employment. In support of their argument, they rely on the Adjunct Faculty Agreements provided to the plaintiff, as well as the Plaza College Faculty Handbook, both of which were concededly received by plaintiff. On page one of said handbook, it is expressly stated, "Employment with the company may be terminated at any time with or without cause or notice by the employee or the company. This notice applies to all employees regardless of date of hire".

At stated, there were two Adjunct Faculty Agreements provided to the plaintiff by defendant. The first was for the semester commencing September 8, 2011 through December 19, 2011, and the second was for the semester commencing January 5, 2012 through April 15, 2012. Both Agreements contain the express acknowledgment that the position may be terminated "at will" as indicated in the faculty handbook. Accordingly, defendants assert that plaintiff's employment was unequivocally "at-will", and therefore no cause of action for breach of contract lies herein.

In opposition, plaintiff argues that not only were there two Adjunct Faculty Agreements, but there was a third oral agreement made on April 10, 2012 for the semester commencing on May 2, 2012 through August 2, 2012. It is plaintiff's position that he was offered, and accepted, a full time employment position with a fixed duration, and in reliance on that agreement plaintiff did not seek and/or accept any other positions.

Additionally, plaintiff contends that since the first two Adjunct Faculty Agreements were for a fixed period of time, they should be deemed as employment contracts.

The Court of Appeals has repeatedly stated, "New York law is clear that absent 'a

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constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired'". (*See*, Murphy v. American Home Products Corporation, 58 NY2d 293; Smalley v. Dreyfus Corporation, 10 NY3d 55). Accordingly, it is clear that there is an "at-will" presumption in New York. (*See*, Monheit v. Petrocelli Elec. Co., Inc., 73 A.D.3d 714).

It is an established precedent that the Court will not infer a contract, which would limit the employer's right to terminate employment, at any time, for any reason, absent an express agreement that is relied upon by the employee. (*See*, Diskin v. Consolidated Edison Co. of N.Y., 135 AD2d 775; Paolucci v. Adult Retardates Center, Inc., 182 AD2d 681).

It has further been established by Courts of this State that oral assurances made to an employee were insufficient to limit the employer's right to discharge the employee at any time. (*See*, Paolucci v. Adult Retardates Center, Inc., *supra*; Sabetay v. Sterling Drug, 69 NY2d 329; Murphy v. American Home Products Corporation, *supra*).

Assuming arguendo that plaintiff's position that the Adjunct Faculty Agreements constituted an employment contract, his cause of action for breach of said contract fails as a matter of law. First, plaintiff was terminated on April 16, 2012. The second Adjunct Faculty Agreement stated that it covered the period of January 5, 2012 to April 15, 2012. Further, said Agreements, and the Faculty Handbook contain clear, unambiguous statements that all employees are "at-will" employees. The plain language of these documents, which plaintiff relies on as the basis of his breach of contract claim, establishes "at-will" employment herein.

Plaintiff's complaint has failed to allege circumstances establishing anything other that an at-will employment relationship, and accordingly the first cause of action for breach of contract is dismissed.

Second and Fifth Cause of Action Alleging Retaliation and Whistleblower

The second cause of action for retaliation alleges that the defendants terminated plaintiff in retaliation for plaintiff advising the defendant that there were teachers who were teaching classes not in conformity with the required syllabi, and that certain teachers did not possess the required credentials to hold their positions. The complaint further asserts that defendants retaliated against plaintiff because plaintiff uncovered a conspiracy by the defendants to defraud State and Federal agencies to maintain accreditation.

The plaintiff basis his retaliatory cause of action on Labor Law §215(1)(a), which prohibits an employer to discharge an employee in retaliation for making a complaint that the employer has violated any provision of the Labor Law, or because an employee commenced a proceeding sounding in Labor Law, on Labor Law §740. (*See*, Kelly v Xerox Corp., 256 A.D.2d 311).

The fifth cause of action alleges violation of Labor Law §740, commonly referred to as the "whistleblower statute". The plaintiff alleges in the complaint that the he "..notified the defendants that he believed the conduct of the defendants was illegal, and in retaliation for same defendants fired plaintiff".

Defendants move to dismiss these causes of actions on the grounds that said claims fail as a matter of law. With respect to Labor Law §215(a)(a), defendants aver a violation of same requires the pleading and proving of a violation of a section of the Labor Law. Defendants argues that the complaint does not identify the predicate provision of the Labor Law. The Court disagrees.

The fifth cause of action alleges violation of Labor Law §740, the whistleblower statute. It is clear that in a motion to dismiss, the complaint is to be afforded liberal construction. (*See*, CPLR §3026; Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372; Schulman v Chase Manhattan Bank, 268 AD2d 174). The allegations contained in the fifth cause of action allege that plaintiff was a whistleblower who deserved protection under the law. The term "whistleblower" is codified in Labor Law §740. However, to succeed on the second cause of action, the fifth cause of action must withhold judicial scrutiny herein. If no cause of action is found to exist under §740, then the cause of action based on §215 must also fail.

Turning to the "whistleblower statute", there is a plethora of cases which hold that in order to state a cause of action under this statute, the plaintiff must allege, with particularity and specificity, an *actual* violation of a specific law, rule or regulation in the complaint, which creates a substantial and specific danger to the public health and safety. (*See*, Labor Law §740(2)(a) and (c); Khan v. State University of New York Health Science Center at Brooklyn, 288 AD2d 350; Blumenreich v. North Shore Health Sys., 287 AD2d 529; Deshpande v. TJH Medical Services, P.C., 52 AD3d 648).

An employee's uncorroborated and unsubstantiated opinion, or good-faith reasonable belief that the employer violated a law, rule or regulation is insufficient. (*See*, Khan v. State University of New York Health Science Center at Brooklyn, *supra*; Bordell v. General Elec. Co., 88 NY2d 869; Hughes v. Gibson Courier Servs. Corp., 218 AD2d 684).

Moreover, the alleged violation by the employer must have created a substantial and specific danger to public health and safety. (*See*, Deshpande v. TJH Medical Services, P.C., *supra*; Lamagna v. New York State Association for the Help of Retarded Children, Inc., et al, 158 AD2d 588; Easterson v. Long Island Jewish Medical Center, 156 AD2d 636).

The complaint at hand fails to state any actual law, rule or regulation that defendant violated. Rather it states that plaintiff "believed" the defendant's conduct was illegal. Further, it fails to demonstrate that any of the defendants' acts actually created a substantial and specific danger to the public's health and safety. Accordingly, the second and fifth causes of action are dismissed.

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Third Cause of Action Alleging Fraud in the Inducement

The third cause of action sounding in fraud in the inducement, alleges that the defendants falsely and fraudulently represented to the plaintiff that his employment would be renewed and he would be promoted to Full Time Faculty member. Plaintiff alleges that he relied on said representations to his detriment in that he did not seek and/or accept gainful employment elsewhere. This cause of action alleges that said misrepresentations were intended to induce plaintiff to act, and that the defendants conduct was malicious, fraudulent, oppressive and/or recklessly committed.

Defendant argues that this cause of action also fails as a matter of law in that it merely constitutes a restatement of the breach of contract claim. As an at-will employee, plaintiff cannot establish the requisite reliance to support this cause of action. Further, plaintiff does not plead fraud with sufficient specificity.

Plaintiff argues that since the Adjunct Faculty Agreement stated a commencement and ending date, he was not an employee at will, and assuming arguendo he is considered an at will employee, defendants' representation included both present facts and future promise.

It is well settled that in order to state a cause of action for fraud in the inducement, the plaintiff must allege an injury separate and distinct from the termination of their at will employment. (*See*, Smalley v. Dreyfus Corporation, 10 NY3d 55). In *Smalley*, the Court of Appeals held that the employee's allegation that they decided to accept or remain at their job based upon a representation by their employer, and then were terminated, failed to state a fraudulent inducement claim against the former employer in that they did not allege an injury that was separate and distinct from their termination.

In light of the fact that this Court has found plaintiff to be an "at-will employee", and that the "injury" alleged by the plaintiff was his termination of employment, the third cause of action will not withstand defendant's challenge to its insufficiency in law, and is hereby dismissed.

Fourth Cause of Action Alleging Conspiracy

Plaintiff's fourth cause of action alleges that the defendants conspired to defraud Federal and State accreditation agencies, and upon plaintiff notifying defendants that he was concerned by their conduct he was fired in retaliation.

Defendant argue that plaintiff has not alleged any actionable tort to support a "conspiracy" claim herein. The allegations that defendants conspired to defraud the accreditation agencies without identifying an actionable tort, said cause of action fails.

It is clear that New York does not recognize a substantive tort of civil conspiracy. (*See*, Burns Jackson Miller Summit & Spitzer v. Lindner, 88 AD2d 50; Noble v. Creative Technical

Services, Inc., 126 AD2d 611). Allegations of conspiracy can only be used to tie a defendant to an actionable tort. (*See*, Brackett v. Griswold, 112 NY 454, Noble v. Creative Technical Services, Inc., *supra*).

Inasmuch as plaintiff's cause of action sounding in fraud is dismissed, plaintiff action for conspiracy must be similarly dismissed.

Sixth Cause of Action Alleging Unjust Enrichment

The sixth cause of action of plaintiff's complaint is one sounding in unjust enrichment. The complaint alleges that plaintiff was forced to work additional hours and teach other classes above and beyond what was required of him.

A review of the Adjunct Faculty Agreement reveals that said agreement specifically delineates plaintiff's duties and responsibilities, and salary for the semester. The complaint does not allege that plaintiff was not compensated pursuant to said agreement.

It is well settled , "[t]o prevail on a claim of unjust enrichment, a Plaintiff must establish that the Defendant benefitted at the Plaintiff's expense and that equity and good conscience require restitution" (*See*, Whitman Group Realty, Inc. v. Galano, 41 AD3d 590, *citing* Kay v. Grossman, 202 F.3d 611, 615–616).

New York law is clear that a plaintiff may not allege his former employer was "unjustly enriched" where the employer compensated plaintiff by paying him a salary. (*See*, Levion v. Societe Generale, 822 F.Supp.2d 390, S.D.N.Y.,2011; Karmilowicz v. The Hartford Fin. Servs. Group, No. 11 Civ. 539, 2011 WL 2936013, July 14, 2011).

There are no allegations in the complaint that plaintiff was not paid the agreed upon salary as set forth in the Adjunct Faculty Agreement.

Moreover, it is noted that the unjust enrichment claim is interposed as and against all defendants individually. However, there are no allegations how the individual defendants herein were "unjustly" enriched. Accordingly, plaintiff's sixth cause of action must fail.

Seventh Cause of Action Alleging Breach of Contract

Plaintiff interposes another claim for breach of contract, alleging that even though he was employed as an part time "Adjunct" faculty member, he worked full time for defendants, thereby requiring defendants to offer plaintiff health insurance. The complaint further asserts that the plaintiff was a full time employee who deserved protection under various New York State "health insurance" laws and regulations.

What the complaint omits is, that even if the plaintiff was entitled to health insurance,

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there are no allegations that the defendants failed to "offer" same to the plaintiff. This cause of action further fails to identify what "various" law and regulations plaintiff was allegedly protected under.

Defendants contend plaintiff has failed to plead the existence of any agreement under which defendants were required to "offer" health insurance, and, therefore, cannot establish the required elements of a breach of contract claim.

Inasmuch as the seventh cause of action completely fails to state any cognizable cause of action for breach of contract, the same is dismissed.

Eighth Cause of Action for Intentional Infliction of Emotional Distress

In his eighth cause of action, plaintiff alleges that as a result of defendant's wrongful termination of plaintiff's employment, plaintiff has experienced sever emotional distress; and that defendant intentionally terminated plaintiff's employment in order to cause plaintiff severe emotional distress.

Defendant argues this cause of action should be dismissed on the grounds that the conduct alleged does not meet the requisite "extreme and outrageous" standard required to sustain a claim for intentional infliction of emotional distress.

The required elements of intentional infliction of emotional distress are extreme and outrageous conduct; intent to cause, or a disregard as to a substantial likelihood of causing, severe emotional distress; causation; and severe emotional distress. (*See*, Klein v. Metropolitan Child Services, Inc., 100 AD3d 708; Howell v. New York Post Co., 81 NY2d 115).

The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency..." (*See*, Murphy v. American Home Prods. Corp., *supra*, *quoting* Restatement [Second] of Torts §46, comment d; Klein v. Metropolitan Child Services, Inc., *supra*). Conclusory allegations are insufficient to set forth a cause of action for intentional infliction of emotional distress. (*See*, Welsh v. Haven Manor Health Care Ctr., 15 AD3d 572).

Further, it is well settled that the termination of an at will employment may not form the basis of an action for intentional infliction of emotional distress. (*See*, Minovici v. Belkin BV, 109 AD3d 520). If the act of terminating an at will employment relationship could serve as a basis herein, it would circumvent the at will rule as recognized in New York. (*See*, Fama v. American Intl. Group, 306 AD2d 310; Murphy v. American Home Prods. Corp., *supra*).

Here, the complaint states nothing more than a conclusion that plaintiff suffered severe distress as a result of defendants terminating his at will employment. Even accepting as true the allegations herein, the conduct alleged was not so outrageous in character, and extreme in degree, that it goes beyond all possible of decency, or is regarded as atrocious and utterly intolerable in a

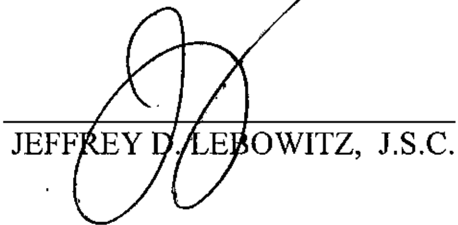
civilized community to sustain this cause of action. (*See*, Mazzacone v. Corlies Associates, 21 AD3d 1066; Fischer v. Maloney, 43 NY2d 533). Accordingly, this cause of action is dismissed.

Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion to dismiss the plaintiff's complaint on the grounds that it fails to state a cause of action is hereby granted; and it is further

ORDERED that the complaint of the plaintiff, ROY RIESER, is hereby dismissed.

DATED: September 23, 2013



JEFFREY D. LEBOWITZ, J.S.C.