

Cheong v MHN Hair Restoration
2015 NY Slip Op 32480(U)
December 14, 2015
Supreme Court, Queens County
Docket Number: 708358/2015
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote

IAS TERM, PART 33

Acting Supreme Court Justice

Kim Cheong, X
Plaintiff

Index
Number 708358 2015

- against -

Motion
Date October 2, 2015

MHN Hair Restoration and Diane
Pluccio, individually and severally,
Defendant

Motion Seq. No. 1

X

FILED
DEC 16 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 11 were read on this motion by defendants to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (5) and (7), and cross motion by plaintiff for leave to amend the complaint, pursuant to CPLR 3025.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibit.....	1-4
Notice of Cross Motion - Affirmation - Exhibits.....	5-8
Reply Affirmation - Exhibits.....	9-11

Upon the foregoing papers, it is ordered that defendants' motion, and plaintiff's cross motion, are determined as follows:

In this action arising from plaintiff's former employment at MHN Hair Restoration (MHN), plaintiff seeks to recover damages for breach of an employment contract, defamation, assault and battery, intentional infliction of emotional distress, harassment, tortious interference with contract, and punitive damages. Defendant, Dianne Puccio, is alleged to be an employee and officer of MHN. Defendants move to dismiss all of the causes of action, except the claim for breach of contract, in plaintiff's complaint, pursuant to 3211 (a) (5) based on statute of limitations, and/or 3211 (a) (7), for failure to state a cause of action. Plaintiff cross-moves for leave to amend her complaint, pursuant to CPLR 3025.

Addressing plaintiff's cross motion first, plaintiff seeks leave to amend her complaint to respond to the specificity bases for defendants' motion to strike the causes of action in the complaint. In support of her cross motion, plaintiff submits an unverified copy of the proposed amended complaint, which differs from the original complaint only in the addition of a 28th paragraph to the fourth cause of action, alleging defamation. Consequently, the court will consider plaintiff's cross motion solely with respect to the fourth cause of action of the proposed amended complaint.

Leave to amend a pleading will be freely given unless the proposed amendment is palpably insufficient, is patently devoid of merit, or prejudices or surprises the opposing party (*see DeLuca v Pecoraro*, 109 AD3d 636 [2 Dept 2013]; *Spodek v Neiss*, 104 AD3d 758 [2 Dept. 2013]). Accepting as true the allegations in the proposed amendment to plaintiff's fourth cause of action, i.e., that defendant stated plaintiff "stole from us" and that she "is a thief", plaintiff has still failed to plead with sufficient particularity a defamation cause of action. A claim for defamation must not only contain the "particular words complained of," but it must "provide the time, place and manner of the purported defamatory statement" (*Grynberg v Alexander's, Inc.*, 133 AD2d 667, 668 [2 Dept 1987]), "and to whom such statements were made" (*Lesesne v Lesesne*, 292 AD2d 507, 509 [2 Dept 2002]). As such, plaintiff's proposed amendment to her complaint is not pleaded with sufficient particularity, is patently devoid of merit, and the cross motion to amend her complaint is denied.

Defendants' motion seeks dismissal of the first, second, fourth, fifth, sixth, seventh and ninth causes of action. Initially, the sole criterion to dismiss a complaint, or part thereof, is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. Of America*, 94 NY2d 330 [1999]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2014]).

The branch of defendants' cross motion seeking to dismiss plaintiff's first cause of action, for intentional infliction of emotional distress, is granted. Initially, the summons and complaint herein were filed on August 7, 2015. Consequently, all of the claimed wrongful conduct on the part of defendants prior to plaintiff's firing, on July 23, 2013, occurred without the one-year period of the applicable statute of limitations for such intentional act (CPLR 215 [3]; *see Mo v Chan*, 17 AD3d 156 [2 Dept 2005]). Despite plaintiff's assertion that that some of the incidents of allegedly actionable conduct occurred after her firing, plaintiff failed to aver that the dates of such conduct took place within the year prior to August 11, 2015. As such, plaintiff cannot maintain that those later incidents amounted to continuous harm extending into the limitations period, thereby saving this time-barred cause of action (*see Weisman v Weisman*, 108 AD2d 853 [2 Dept

1985]). Further, to survive a motion to dismiss, plaintiff must allege conduct “so extreme and outrageous” as to go beyond all possible bounds of decency and be considered as utterly intolerable in a civilized community (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]; see *Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]; *Baumann v. Hanover Community Bank*, 100 AD3d 814 [2 Dept 2012]), and plaintiff must claim “severe emotional distress” as a result (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; see *Taggart v Costabile*, 131 AD3d 243 [2 Dept 2015]). The facts as alleged by plaintiff fail to ascend to these lofty measures.

The branches of defendants’ cross motion seeking dismissal of plaintiff’s second and fourth causes of action, both for defamation, are granted. The pertinent statute of limitations for this intentional act is one year from the initial utterance (CPLR 215 [3]; see *Blair v Meth*, 112 AD3d 769 [2 Dept 2013]). Plaintiff alleges that the defamatory statement by defendant, Puccio, was made on July 26, 2013, almost two years before commencement of this action. As noted previously, plaintiff has failed to indicate when any allegedly defamatory comments were made after her firing. The fact that Puccio’s alleged accusation that plaintiff “stole” may be slanderous *per se*, does not relieve plaintiff from the necessity of timely commencement of the action. With regard to the fourth cause of action, the allegation that defendants made “knowingly false” statements about plaintiff, at some unstated time, not only permits dismissal for expiration of the statute of limitations, but runs afoul of the “strictly enforced” pleading requirement of CPLR 3016 (a) (*Horbul v Mercury Ins. Group*, 64 AD3d 682, 683 [2 Dept 2009]; see *Abe’s Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690 [2 Dept 2007]).

Plaintiff’s fifth cause of action, alleging assault and battery, is dismissed. CPLR 215 (3) sets a one-year statute of limitations for these intentional acts, and plaintiff alleges they occurred on June 28, 2013, two years prior to commencement of the action (see *Mo v Chan*, 17 AD3d 356).

Plaintiff’s sixth cause of action alleges harassment. “New York does not recognize a common-law cause of action to recover damages for harassment” (*Daulat v Helms Bros., Inc.*, 18 AD3d 802, 803 [2 Dept 2005]; see *Adeniran v State of New York*, 106 AD3d 844 [2 Dept 2013]). Any claim that this cause of action is appropriately one charging a “hostile work environment,” pursuant to Title 42, U.S.C.A., is belied by plaintiff’s failure to allege that the MHN workplace was permeated with abusive conduct such that a reasonable person would determine it to be an objectively hostile environment (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918 [2 Dept 2015]; *Chiara v Town of New Castle*, 126 AD3d 111 [2 Dept 2015]). Consequently, this branch of defendants’ cross motion is granted, and plaintiff’s sixth cause of action is dismissed.


The branch of defendants' cross motion seeking dismissal of plaintiff's seventh cause of action, for "tortious interference with contractual relations", is granted. The elements of a claim for tortious interference with contract are "(1) the existence of a valid contract between the plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of contract, and (5) resulting damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; see *Flushing Expo, Inc. v New World Mall, LLC*, 116 AD3d 826 [2 Dept 2014]). In the case at bar, plaintiff has failed to allege that defendants' conduct intentionally induced a breach of a specific, existing contract between plaintiff and a third party, or that defendant caused an actual breach of contract.

The branch of defendants' cross motion seeking dismissal of the ninth cause of action, for punitive damages, is granted. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]; see *Randi A.J. v Long Is. Surgi-Center*, 46 AD3d 74 [2 Dept 2007]). "[P]unitive damages are not available for mere breach of contract for in such a case only a private wrong, and not a public right, is involved" (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]; see *Taranto v Fritz*, 83 AD2d 864 [2 Dept 1981]). In a breach of contract action, punitive damages may only be available as an additional and exemplary remedy, and only when defendant's conduct is actionable as an independent tort, and "is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future" (*Walker v Sheldon*, 10 NY2d 401, 404 [1961]).

In the case at bar, all of the causes of action have hereby been dismissed, save for the eighth, alleging breach of employment contract. The claim in that cause of action merely seeks payment of plaintiff's salary for the last month of her service at MHN before she was fired. As such, the allegations of this cause of action have failed "to identify a tort independent of the contract" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]), thereby warranting dismissal of the punitive damages cause of action herein.

Accordingly, defendants' motion, seeking dismissal of plaintiff's first, second, fourth, fifth, sixth, seventh, and ninth causes of action, is granted. Plaintiff's cross motion, seeking leave to amend her complaint, is denied.

Dated: December 14, 2015


Leonard Livote, A.J.S.C.

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