

Mulholland v Kahan
2017 NY Slip Op 31040(U)
May 15, 2017
Supreme Court, New York County
Docket Number: 152988/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Brigitte Mulholland,

Index No.: 152988/2016

Plaintiff,

DECISION/ORDER

-against-

Jane Kahan, Individually, and d/b/a The Jane
Kahan Gallery, and The Jane Kahan Gallery,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Notice of Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	<u>2</u>
Opposition to Cross-Motion and Reply	<u>3</u>

ERIKA M. EDWARDS, J.:

Plaintiff Brigitte Mulholland (“Plaintiff”) brought this action against Defendants Jane Kahan, individually and d/b/a The Jane Kahan Gallery (“Kahan”), and The Jane Kahan Gallery (“Gallery”) seeking to recover damages for Defendants’ alleged slander, libel, defamation, breach of contract regarding commissions and salary, misrepresentation-fraud, breach of duty of good faith and fair dealing, unjust enrichment, conversion and theft of service. Defendant moved to dismiss each cause of action, except for the Fourth Cause of Action for breach of contract regarding commissions against Defendant Jane Kahan d/b/a The Jane Kahan Gallery and Defendant Gallery and the Fifth Cause of Action for breach of contract regarding salary against both Defendants, based on documentary evidence and failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (a)(7).

For the reasons set forth herein, Defendant's motion to dismiss is GRANTED in its entirety and the First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action are dismissed against both Defendants. Additionally, the court dismisses Plaintiff's Fourth Cause of Action for breach of contract regarding commissions against Defendant Kahan, individually, and d/b/a The Jane Kahan Gallery, even though Defendants only moved for dismissal against Defendant Kahan in her individual capacity. Therefore, only the Fourth Cause of Action remains against Defendant Gallery and the Fifth Cause of Action remains against both Defendants.

In her complaint, Plaintiff alleges in substance that Plaintiff was employed by both Defendants from 2007 until October 6, 2015, when she was wrongfully terminated. Over the years, Plaintiff was promoted from Gallery Assistant to Gallery Director and she worked as a personal assistant to Defendant Kahan. Plaintiff received numerous accolades and developed an excellent reputation in the art world, which was very important to her. Plaintiff further alleges that Defendants promised to pay Plaintiff 10% commissions on all sales she made. Although Defendants paid her a 10% commission on one sale, they only paid 8% on others and breached their promises and representations.

Plaintiff also alleges that Defendant Kahan wrongfully, maliciously and falsely disparaged Plaintiff to Gallery employees, the public and significant individuals in the art world, which damaged her reputation, character and career. As examples of such conduct, Plaintiff referenced three emails that Defendant Kahan wrote during the first week in October, 2015, which was the week prior to her termination. Defendant Kahan wrote an email to the President of the Fine Art Dealers Association and stated "[p]lease be very cautious with any dealings with Brigitte. Some terrible things have happened that may concern legal issues." Defendant Kahan

sent an email to some Gallery employees and others which stated Plaintiff is trying to control Defendant Kahan and Defendant Gallery and that Plaintiff is doing “all kinds of destructive things” behind Defendant Kahan’s back which is becoming apparent to everyone. Finally, Defendant Kahan sent an email to the head of a prestigious L.A. art show and others which stated that Plaintiff caused a “great deal of havoc and destruction” on Defendant Gallery, that Plaintiff threatened her privately and publicly and Plaintiff had not said a word to her about the L.A. art show.

Defendant moves to dismiss Plaintiffs’ complaint based on documentary evidence and for failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (a)(7). Defendants allege in substance that Plaintiff sued the wrong entity because she was employed by The Jane Kahan Gallery, Ltd; that she did not work for Defendant Kahan in her individual capacity; that Plaintiff failed to demonstrate how Defendant Kahan can be held liable for the alleged acts of the corporation; that there was no agreement or promise by either Defendant to pay Plaintiff a 10% commission for her sales made; and Plaintiff failed to set forth a prima facie case for any of the challenged causes of action.

Specifically, Defendants allege that Plaintiff’s First Cause of Action for slander must be dismissed because Plaintiff failed to set forth the specific words allegedly spoken in the complaint without the required specificity. Plaintiff’s Second Cause of Action for libel must be dismissed because the emails were hyperbole, opinions and not facts. Plaintiff’s Third Cause of Action for defamation is simply a duplicate of the First and Second Causes of Action. Plaintiff’s Fourth Cause of Action for breach of contract regarding commissions must be dismissed against Defendant Kahan, individually, because Plaintiff was employed by The Jane Kahan Gallery, Ltd. and an individual cannot be held liable for a corporation’s alleged breach of contract. Plaintiff’s

Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action for misrepresentation-fraud, breach of duty of good faith and fair dealing, unjust enrichment, conversion and theft of service, must be dismissed because they are all duplicative of Plaintiff's breach of contract cause of action and Defendant Kahan cannot be held liable for the corporation's alleged actions.

Plaintiff opposes the motion and argues in substance that Plaintiff worked for Defendant Kahan in her individual capacity and for the Gallery; that Defendant Kahan distinguished work for herself and work for the Gallery; and that the emails set forth in the complaint were by no means exhaustive of the disparaging, defamatory emails and words spoken by Defendant Kahan, many of which are not yet known to Plaintiff. Plaintiff further alleges that the complaint should not be dismissed because discovery has not yet been completed. Additionally, if Plaintiff sued the wrong corporate entity, then Plaintiff will request leave to amend the complaint and Defendants have already consented to adding The Jane Kahan Gallery, Ltd. as a defendant.

Dismissal is warranted based on documentary evidence only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

When considering Defendant's motion to dismiss Plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the Plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*,

179 AD2d 454, 457, 579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

Plaintiff's allegations are primarily based on defamation and breach of contract. Based on the facts set forth herein, the court agrees with many of Defendants' arguments and finds that Plaintiff failed to sufficiently set forth each element of any of the challenged causes of action set forth in the complaint and grants Defendant's motion to dismiss in its entirety. According to the documentary evidence submitted, including Plaintiff's W-2 and the NYS Department of State corporate records, it is clear that Plaintiff worked for non-party The Jane Kahan Gallery, Ltd. The court is not persuaded by Plaintiff's arguments that she worked as a personal assistant to and performed work for Defendant Kahan as an individual and that Defendant Kahan owed her salary and commissions.

To recover based on a cause of action for defamation, a plaintiff must prove that defendant made "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" (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted]). The complaint must set forth the particular words allegedly constituting defamation and it must also allege the time, place and manner in which the false statement was made, and specify to whom it was made (CPLR 3016[a]; *id.*; *Dillon v City of New York*, 261 AD2d 34, 38 [1999]). A defamatory statement is libelous per se "if the statement tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly

intercourse in society (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007] [internal quotations and citations omitted]).

“In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon*, 261 AD2d at 38 [citations omitted]). Certain statements are not actionable, like expressions of opinions, loose, figurative or hyperbolic statements, even if deprecating the plaintiff, or an employer’s assessment of an employee’s job performance (*id.*; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977] [internal quotations and citations omitted]). Certainly, truth is a complete defense to defamation (*Rinaldi*, 42 NY2d at 380). Whether a particular statement constitutes fact or opinion is a question of law (*id.* at 381).

It is a well-established principle that an allegation of a simple breach of contract is not considered as a tort unless a legal duty independent of the contract itself has been violated (*North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 179 [1968]).

In applying the relevant legal principles to the facts in the instant matter, the court dismisses Plaintiff’s First Cause of Action for slander against both defendants because Plaintiff failed to set forth the specific words allegedly spoken in the complaint without the required specificity.

The court dismisses the Second Cause of Action for libel because the emails were hyperbolic statements, opinions, and not facts. Additionally, some of the statements set forth in the emails are protected as an employer’s opinion regarding an employee’s job performance, particularly since plaintiff was terminated shortly after the emails were sent.

The court dismisses Plaintiff's Third Cause of Action for defamation because it is simply a category which encompasses the First and Second Causes of Action and must be dismissed for the same reasons.

Plaintiff's Fourth Cause of Action for breach of contract regarding commissions is dismissed against Defendant Kahan, individually and d/b/a The Jane Kahan Gallery, because the documentary evidence demonstrates that Plaintiff was employed by The Jane Kahan Gallery, Ltd. and plaintiff fails to set forth a sufficient basis to hold an individual liable for a corporation's alleged breach of contract. Additionally, Plaintiff failed to establish that there was an oral or written agreement between the parties for Defendants to pay Plaintiff 10% commissions for Plaintiff's sales.

The court dismisses Plaintiff's Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action for misrepresentation-fraud, breach of duty of good faith and fair dealing, unjust enrichment, conversion and theft of service, because they are all based on the same allegations that Defendants breached an agreement to pay Plaintiff 10% commission and are therefore duplicative of Plaintiff's breach of contract cause of action for the same reasons set forth above.

The court dismisses Plaintiff's Sixth Cause of action for misrepresentation-fraud as it only relates to Defendants' alleged breach of contract and because Plaintiff failed to set forth that Defendants made a misrepresentation of fact which they knew to be false, with the intent to induce plaintiff's reliance on it, and which caused harm to plaintiff for plaintiff's justifiable reliance upon it (*New York City Housing Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [1st Dept 2000]; *Tierney v Capricorn, L.P.*, 189 AD2d 629, 631 [1st Dept 1993]).

The court dismisses Plaintiff's Seventh Cause of Action for breach of duty of good faith and fair dealing because it appears to be based solely upon Defendants' alleged failure to act in

good faith in the performance of their alleged contractual obligations (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]).

Plaintiff's Eighth Cause of Action for unjust enrichment is dismissed as duplicative of Plaintiff's breach of contract claim and because Plaintiff alleges that an express contract exists (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Plaintiff's Ninth Cause of Action for conversion is dismissed against Defendants because it is duplicative of Plaintiff's breach of contract cause of action (*M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409 [1st Dept 2008]).

Finally, the court dismisses Plaintiff's Tenth Cause of Action for theft of service for failure to state a cause of action as the facts alleged do not support such claim (*Brock v Covenant House*, 2012 NY Slip Op 31511[U] [Sup Ct, New York County 2012]).

In her opposition, in lieu of dismissal, Plaintiff requested an opportunity to amend her complaint to add The Jane Gallery, Ltd. as a defendant, but the court declines to do so at this time, as such request would require a stipulation or motion with the amended caption and Plaintiff failed to set forth each element of any of her causes of action which are challenged by Defendants in this motion.

As such, the court grants Defendant's motion to dismiss in its entirety and dismisses Plaintiff's First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action against both Defendants and dismisses Plaintiff's Fourth Cause of Action for breach of contract regarding commissions against Defendant Kahan, individually, and d/b/a The Jane Kahan Gallery. Therefore, only the Fourth Cause of Action remains against Defendant Gallery and the Fifth Cause of Action remains against both Defendants.

ORDERED that Defendants Jane Kahan's, individually, and d/b/a The Jane Kahan Gallery, and The Jane Kahan Gallery's motion to dismiss Plaintiff Brigitte Mulholland's First, Second, Third, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action against both Defendants and Plaintiff's Fourth Cause of Action against Defendant Jane Kahan, individually, is granted and these causes of action are hereby dismissed without costs; and it is further

ORDERED that the court sua sponte dismisses Plaintiff's Fourth Cause of Action against Defendant Jane Kahan, d/b/a The Jane Kahan Gallery; and it is further

ORDERED that only the Fourth Cause of Action remains against Defendant The Jane Kahan Gallery and the Fifth Cause of Action remains against both Defendants; and it is further

ORDERED that Defendants are directed to serve and file an Answer within twenty (20) days of the date of this Order; and it is further

ORDERED that the parties must appear for a preliminary conference on August 10, 2017, at 9:30 a.m., in Part 47, Room #320, 80 Centre Street, New York, New York. ✓

This constitutes the decision and order of the court.

Date: May 15, 2017



HON. ERIKA M. EDWARDS