

Molhem v Aldo Group
2017 NY Slip Op 31190(U)
May 26, 2017
Supreme Court, New York County
Docket Number: 156197/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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KRISTINA MOLHEM,

Index No. 156197/2015

Plaintiff

- against -

DECISION AND ORDER

ALDO GROUP d/b/a ALDO and KELLY MENKE,
Individually and in her Official
Capacity,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover damages for breach of a contract, retaliatory and wrongful discharge, a prima facie tort, and intentional and negligent infliction of emotional distress, when defendant Menke, defendant Aldo Group's district manager, terminated plaintiff's employment with Aldo Group April 20, 2015. Defendants move to dismiss the amended complaint based on its failure to state a claim. C.P.L.R. § 3211(a)(7). For the reasons explained below, the court grants defendants' motion.

II. APPLICABLE STANDARDS

Upon defendants' motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court accepts the complaint's allegations as true and draws all inferences in plaintiff's favor. Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); Art & Fashion Group Corp. v. Cyclops Prod., Inc., 120 A.D.3d 436, 437 (1st Dep't 2014); Amsterdam Hospitality Group, LLC v. Marshal-Alan

Assoc., Inc., 120 A.D.3d 431, 432 (1st Dep't 2014); Cabrera v. Collazo, 115 A.D.3d 147, 150 (1st Dep't 2014). Dismissal is warranted under C.P.L.R. § 3211(a)(7) only if the complaint fails to allege facts that fit within any cognizable legal theory. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005); Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014); Cabrera v. Collazo, 115 A.D.3d at 151.

III. PLAINTIFF'S FIRST CLAIM: BREACH OF A CONTRACT

Plaintiff relies in an oral employment agreement with defendants and Menke's instruction to plaintiff to follow Aldo Group's policy that, as a cashier, she was not to leave her cash register unattended during her work shift. Plaintiff does not indicate whether that policy is oral or written or whether it is such an essential term or condition of her relationship with defendants as to constitute a contract. See Monaco v. New York Univ., 145 A.D.3d 567, 568 (1st Dep't 2016); Fowler v. American Lawyer Media, 306 A.D.2d 113, 113 (1st Dep't 2003). Plaintiff does not allege that her employment depended on her compliance with the policy or that it required defendants to investigate her complaint regarding her supervisor's and co-employee's breach of the policy. See O'Neill v. New York Univ., 97 A.D.3d 199, 211-12 (1st Dep't 2012). Nor does plaintiff allege a policy or regular practice, on which she relied, that employees were only to be terminated for cause. Lobosco v. New York Tel. Co./NYNEX, 96 N.Y.2d 312, 316 (2001); Sabetay v. Sterling Drug, 69 N.Y.2d 329,

336 (1987); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 305 (1983); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 465 (1982).

Plaintiff's allegations focus on her supervisor's direction to leave her cash register unattended while she performed another task for him. Although she left her register locked, when she returned to it, it had been unlocked and cash had been removed. Only supervisors and plaintiff possessed keys to the register. She complained to Menke that the supervisor and a co-employee opened the register. Menke refused to investigate plaintiff's complaint; accused plaintiff of stealing the removed cash; searched her person and personal property, but did not find the cash; threatened her with arrest and a lie detector test, and terminated her employment.

As unfair and hurtful as this alleged conduct by defendants may be, it fails to show that defendants breached their policies. Gary v. New York Univ., 48 A.D.3d 235, 236 (1st Dep't 2008). Plaintiff's compliance with the policy, moreover, does not create a breach of contract claim based on defendants' lack of good faith in terminating her employment. Murphy v. American Home Prods. Corp., 58 N.Y.2d at 304.

IV. SECOND AND FOURTH CLAIMS: RETALIATION AND WRONGFUL DISCHARGE

Plaintiff's claims of retaliation and of wrongful discharge are identical. New York law does not recognize a claim for wrongful discharge that is not based on a contract, statute, or constitutional guarantee. Murphy v. American Home Prods. Corp.,

58 N.Y.2d at 301-302. An employer may terminate an employee's employment at will unless prohibited by an express contractual provision, a statute, or the federal or state Constitution. Sullivan v. Harnisch, 19 N.Y.3d 259, 262 (2012); Murphy v. American Home Prods. Corp., 58 N.Y.2d at 305. Plaintiff's report of a co-employee's or supervisor's misconduct does not create an exception based on public policy to the employer's right to terminate plaintiff's employment at will. Lobosco v. New York Tel. Co./NYNEX, 96 N.Y.2d at 316.

Since plaintiff does not allege any agreement that she was hired for a fixed period or that her employment was to continue absent specified circumstances, she was an at-will employee. Id.; Sabetay v. Sterling Drug, 69 N.Y.2d at 333; O'Neill v. New York Univ., 97 A.D.3d at 207, 210. Neither does plaintiff plead any statutory or constitutional claims. E.g., N.Y. Exec. Law § 296(7); N.Y. Labor Law § 740(2); N.Y.C. Admin. Code § 8-107(7).

V. THIRD CLAIM: PRIMA FACIE TORT

The elements of a prima facie tort are: (1) intentional infliction of harm, (2) causing special damages, (3) without justification or excuse, (4) by otherwise lawful acts. Posner v. Lewis, 18 N.Y.3d 566, 570 n.1 (2012); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983). Plaintiff must plead a "specific and measurable loss" from the tortious conduct to establish special damages. Freihofer v. Hearst Corp., 65 N.Y.2d at 143. See

Curiano v. Suozzi, 63 N.Y.2d at 117; DeMicco Bros., Inc. v. Consolidated Edison Co. of N.Y., Inc., 8 A.D.3d 99, 100 (1st Dep't 2004); Vigoda v. DCA Prods. Plus, 293 A.D.2d 265, 266 (1st Dep't 2002); Havell v. Islam, 292 A.D.2d 210 (1st Dep't 2002). Malevolence must be the sole motivation for defendants' injurious actions. Posner v. Lewis, 18 N.Y.3d at 570 n.1; Curiano v. Suozzi, 63 N.Y.2d at 117; Burns Jackson Miller & Spitzer v. Lindner, 59 N.Y.2d at 333. Simply alleging defendants' infliction of harm without justification does not demonstrate the requisite malevolence as defendants' sole motivation. Murphy v. American Home Prods. Corp., 58 N.Y.2d at 303-304.

Plaintiff may not use a prima facie tort claim, as here, to substitute for a wrongful discharge claim that, as set forth above, New York law does not recognize. Weinstein v. City of New York, 103 A.D.3d 517, 517 (1st Dep't 2013); Russek v. Dag Media Inc., 47 A.D.3d 457, 458 (1st Dep't 2008). Nor does a prima facie tort claim substitute for a failed breach of contract claim where plaintiff has failed to allege any conduct by defendants to support a prima facie tort beyond the conduct alleged to constitute their breach of a contract. Susman v. Commerzbank Capital Mkts. Corp., 95 A.D.3d 589, 590 (1st Dep't 2012). Finally, by demanding the same damages for the alleged prima facie tort as for her other claims, instead of detailing her losses, plaintiff further fails to allege special damages. Wigdor v. SoulCycle, LLC, 139 A.D.3d 613, 614 (1st Dep't 2016); Phillips v. New York Daily News, 111 A.D.3d 420, 421 (1st Dep't

2013); Stauber v. New York City Tr. Auth., 10 A.D.3d 280, 282 (1st Dep't 2004).

VI. FIFTH AND SIXTH CLAIMS: INTENTIONAL AND NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

To sustain plaintiff's claim of intentional infliction of emotional distress, plaintiff must show (1) defendants engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between defendants' acts and plaintiff's injury, and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); Suarez v. Bakalchuk, 66 A.D.3d 419, 419 (1st Dep't 2009). To support the first element alone, plaintiff must show that defendants' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Murphy v. American Home Prods. Corp., 58 N.Y.2d at 303; Suarez v. Bakalchuk, 66 A.D.3d 419.

Negligent infliction of emotional distress must be based on defendants' breach (1) of a duty owed to plaintiff (2) that unreasonably endangered her or caused her to fear for her safety. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dep't 2004). Extreme and outrageous conduct is also an element of negligent infliction of emotional distress. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 592; Lau v. S&M Enters., 72

A.D.3d 497, 498 (1st Dep't 2010); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d 506, 508 (1st Dep't 2009); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 362 (1st Dep't 2005).

The allegations that defendants refused to investigate plaintiff's complaint regarding her supervisor's conduct, accused plaintiff of theft, and threatened her with arrest and a lie detector test do not rise to the level of a deliberate campaign of harassment, to support plaintiff's emotional distress claims. Corsini v. Morgan, 123 A.D.3d 525, 527 (1st Dep't 2014); Chinese Consol. Benevolent Assn. v. Tsang, 254 A.D.2d 222, 222 (1st Dep't 1998). See 164 Mulberry St. Corp. v. Columbia Univ., 4 A.D.3d 49, 57-58 (1st Dep't 2004); Vasarhelyi v. New School for Social Research, 230 A.D.2d 658, 661 (1st Dep't 1996); Elson v. Consolidated Edison Co. of N.Y., 226 A.D.2d 288, 289 (1st Dep't 1996). The absence of any alleged facts showing that plaintiff was not an at-will employee, as discussed above, in turn fails to show that her firing constituted extreme or outrageous behavior on which to base an emotional distress claim. Murphy v. American Home Prods. Corp., 58 N.Y.2d at 303; Bailey v. New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 125 (1st Dep't 2007).

VII. CONCLUSION

For all the reasons discussed above, the court grants defendants' motion to dismiss each of plaintiff's claims and dismisses the amended complaint. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order and judgment of dismissal.

DATED: May 26, 2017



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