SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 47

DENISE A. RUBIN,

Plaintiff,

- against -

NAPOLI BERN RIPKA SHKOLNIK, LLP, WORBY GRONER EDELMAN & NAPOLI BERN, LLP, NAPOLI BERN & ASSOCIATES, LLP, and PAUL J. NAPOLI,

Defendants.

Index No.: 154060/2015

DECISION & ORDER

PAUL A. GOETZ, J.:

In this action, plaintiff Denise Rubin (Rubin) alleges employment discrimination and breach of contract against her former employers, defendants Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, and Napoli Bern & Associates, LLP (collectively, the law firm defendants or the law firms), and one of the law firms' partners, defendant Paul J. Napoli (Napoli). Rubin moves to amend her complaint (seq. no. 007) to add a cause of action for retaliation and an additional breach of contract claim against the law firms for failure to provide insurance. All defendants oppose the motion, and Napoli cross-moves, in the alternative, to dismiss the retaliation claim against him. By separate motion (seq. no. 009), the law firm defendants move for partial summary judgment dismissing plaintiff's second cause of action for breach of contract and granting them judgment on their counterclaim for breach of contract and liquidated damages. The motions are consolidated for purposes of disposition.

BACKGROUND

Plaintiff was employed by one or more of the law firm defendants, as an associate attorney and general counsel, from 2003 until September 2014. Plaintiff entered into a written

employment agreement with the law firm defendants in 2004 and again in 2007, which agreement remained in effect until her employment was terminated in September 2014. *See* 2007 Employment Agreement (Employment Agreement), Ex. C to Margulis Aff. in Support of Law Firm Defendants' Motion (Margulis Aff.) Plaintiff alleges that during her tenure at the law firms, she was paid less in base salary and bonuses than several less experienced and less skilled male attorneys, was denied a promotion to partner when less experienced and less skilled male attorneys were promoted, and was fired without cause when male attorneys with performance issues remained employed. Complaint, Ex. A to Molloy Aff. in Opp. to Plaintiff's Motion, ¶¶ 16, 17, 19. She also claims that defendants agreed to but did not pay her a guaranteed bonus for matters on which she performed work. *Id.*, ¶ 18. She further alleges that after Napoli told her she was fired, she continued to work on the law firms' matters, at the direction of Marc Bern (Bern), another partner at the law firms, but was not paid for work she performed from October 14, 2014 until early December 2014. *Id.* ¶¶ 20-21.

Plaintiff commenced this action on April 24, 2015 (first action). The original complaint alleged four causes of action against all defendants: sex-based employment discrimination in violation of the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of New York [Administrative Code] § 8-107) (first); breach of contract for failure to pay a promised bonus (second); breach of contract for failure to pay salary or benefits from October 14, 2014 until early November 2014 (third); and quantum meruit, for work performed from October 14, 2014 until early December 2014 (fourth). The law firm defendants answered the complaint in or around August 2015. *See* Answer, Ex. E to Margulis Aff. Napoli made a pre-answer motion (seq. no. 001), in or around June 2015, to dismiss the action against him

--

individually, based on Partnership Law § 26, and plaintiff cross-moved for sanctions. Napoli's motion was granted and plaintiff's cross motion was denied, by decision and order dated September 2, 2015. *See* Decision & Order, Ex. B to Skala Aff. in Opp. to Plaintiff's Motion (Skala Aff.).

In October 2015, plaintiff commenced a new action under a separate index number against Napoli individually (*Rubin v Napoli*, Index. No. 160474/15) (second action), asserting one cause of action under the NYCHRL for employment discrimination. Napoli moved to dismiss the complaint on res judicata grounds. The court denied Napoli's motion in February 2016, finding that the complaint sufficiently corrected the defects of the complaint in the first action and sufficiently alleged Napoli committed discriminatory acts, and consolidated the second action with the first action. *See* Decision & Order, Ex. C to Skala Aff.

On or about March 30, 2016, Napoli filed an answer in the consolidated action without asserting counterclaims, and then separately filed "Counterclaims of Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, Napoli Bern & Associates LLP and Paul J. Napoli," which set out five counterclaims on Napoli's behalf, for intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contractual relations, defamation, and defamation per se; and three counterclaims on behalf of the law firm defendants, for tortious interference with contractual relations, breach of contract, and fraud. *See* NYSCEF Doc. No. 68. Soon after, on April 5, 2016, Napoli filed his First Amended Counterclaims, asserting the above five counterclaims on his behalf, and omitting the counterclaims asserted on behalf of the defendant law firms. *See* First Amended Counterclaims, Ex. B. to Solotaroff Aff. in Support of Plaintiff's Motion (Solotaroff Aff.)

--

Plaintiff moved to dismiss Napoli's counterclaims (seq. no. 002) on the grounds, among others, that stand-alone counterclaims served separately from a defendant's answer were not permitted under CPLR 3011. Granting plaintiff's motion, the court, by decision and order dated June 15, 2016, dismissed Napoli's counterclaims as procedurally improper. *See* Decision & Order, Ex. D to Solotaroff Aff. On July 5, 2016, Napoli moved for leave to amend his answer (motion seq. no. 005) to include the five counterclaims previously dismissed. *See* NYSCEF Doc. Nos. 168,171. Napoli also, on June 20, 2016, commenced a separate action against Rubin (*Napoli v Rubin*, Index No. 155162/2016) (third action), similarly asserting claims for intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contractual relations, defamation, and defamation per se. *See* Complaint, Ex. E to Solotaroff Aff.

By decision and order dated September 29, 2016, the court granted Napoli's motion to amend his answer solely to the extent of permitting him to assert a counterclaim for tortious interference with contractual relations. *See* Decision & Order, Ex. E to Skala Aff.. Napoli appealed the denial of his motion to amend his answer with respect to his defamation claims, and the Appellate Division affirmed the court's decision on June 20, 2017. *See* NYSCEF Doc. No. 309. Napoli filed his amended answer with the sole remaining counterclaim on November 1, 2016. *See* Amended Verified Answer with Counterclaim (Counterclaim), NYSCEF Doc. No. 220. The third action was dismissed, by decision and order dated March 1, 2017, on res judicata grounds with respect to the infliction of emotional distress and defamation claims, and with respect to the tortious interference claim on grounds that the same claim was pending in another action. *See* Decision & Order, Ex. F to Solotaroff Aff.

--

In or around May 2016, Napoli moved to seal documents submitted by plaintiff with her papers in support of her motion to dismiss Napoli's counterclaims (seq. no. 003). This motion was resolved by stipulation of the parties dated May 17, 2016. NYSCEF Doc. No. 146; *see also* Stipulation dated Sept. 9, 2016, NYSCEF Doc. No. 202. The law firm defendants then moved, on or about May 24, 2016, to compel plaintiff to return all documents in her possession to which she had access during her employment with the law firms, including documents containing confidential, privileged, proprietary or sensitive information related to the law firms' matters and clients (seq. no. 004). This motion also was resolved pursuant to a stipulation of the parties on or about June 14, 2016. *See* NYSCEF Doc. No. 166; Ex. M to Margulis Aff.

On or about August 18, 2016, the law firm defendants moved for leave to amend their answer to include a counterclaim for breach of contract (seq. no. 006), alleging that plaintiff breached her employment agreement by disclosing privileged and confidential information related to the law firms' business and clients, in documents submitted to the court in support of her motion to dismiss Napoli's counterclaims (seq. no. 002), and claiming they are entitled to liquidated damages under the contract. *See* NYSCEF Doc. Nos. 179, 180, 181. Their motion was granted by decision and order dated December 5, 2016. *See* NYSCEF Doc. No. 229; Ex. P to Margulis Aff.

In February 2017, Napoli brought a third-party action against Bern and Alan Ripka, another partner in the law firms, seeking indemnification and contribution and alleging unjust enrichment and breach of contract. *See* NYSCEF Doc. No. 236. Third-party defendant Bern moved to dismiss the third-party complaint against him on May 12, 2017 (seq. no. 008) (NYSCEF Doc. No. 263); the motion was denied when he failed to appear in court for oral

--

argument on November 2, 2017. *See* NYSCEF Doc. No. 347.

The case was referred by the court to the Alternative Dispute Resolution Program of the Commercial Division in late November 2016 and again in January 2017 (*see* NYSCEF Doc. Nos. 228, 231), and a mediation was scheduled for May 2017. *See* Stipulation, dated April 18, 2017, NYSCEF Doc. No. 260. Mediation apparently was not successful and these motions ensued. *See* NYSCEF Doc. Nos. 262, 325.

Rubin now seeks to amend her complaint to add a cause of action for retaliation against all defendants, based on their conduct during this and other litigation, and to add an additional cause of action for breach of contract against the law firm defendants for failing to provide "tail" insurance. The law firm defendants move for summary judgment dismissing the second cause of action for breach of contract based on allegations that they failed to pay a non-discretionary bonus to plaintiff; and granting judgment in their favor on their breach of contract counterclaim in the amount of $100,000.

DISCUSSION

Plaintiff's Motion to Amend

Under CPLR 3025 (b), a party may amend a pleading "at any time by leave of court," which "[l]eave shall be freely given" absent prejudice or surprise to the opposing party. *See Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 (2014); *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983). "[T]he decision whether to grant leave to amend a complaint is committed to the discretion of the court." *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 (2015) (internal quotation marks and citation omitted); *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983).

--

Courts have held that, "to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated." *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 (1st Dept 2005); *see Bag Bag v Alcobi*, 129 AD3d 649, 649 (1st Dept 2015); *360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 (1st Dept 2011). A party moving for leave to amend a pleading, however, need not establish the merit of her proposed new allegations, but must simply submit sufficient support to show that "the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1st Dept 2010); *see Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 (1st Dept 2015); *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 (1st Dept 2007) (sufficient to show alleged facts support the proposed amendment); *see also Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007) ("'court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face'" [citation omitted]) .

Numerous courts have held that "'a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.'" *Bag Bag*, 129 AD3d at 649, quoting *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116 (1st Dept 1998); *see e.g. Velarde v City of New York*, 149 AD3d 457, 457 (1st Dept 2017); *Matthews v City of New York*, 138 AD3d 507, 508 (1st Dept 2016); *JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 (1st Dept 2013); *Greentech Research LLC v Wissman*, 104 AD3d 540, 541 (1st Dept 2013); *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 (1st Dept 2006). However, recent decisions in the First Department have clearly stated that movants are "not required to submit an affidavit of merit or

--

make any other evidentiary showing in support of their motion" to amend. *Boliak v Reilly*, 161 AD3d 625, 625 (1st Dept 2018); *see Berkeley Research Group, LLC v FTI Consulting, Inc.*, 157 AD3d 486, 490 (1st Dept 2018); *Hickey v Steven E. Kaufman, P.C.*, 156 AD3d 436, 436 (1st Dept 2017); *see also Delta Dallas Alpha Corp. v South St. Seaport L.P.*, 127 AD3d 419, 420 (1st Dept 2015) (failure to submit an affidavit of merit in support of motion to amend "is not fatal to the motion; plaintiff need only show that the proposed amendment is not palpably insufficient or clearly devoid of merit").

At the outset, defendants contend that plaintiff's motion to amend should be denied because the proposed amended complaint does not show what changes were made to the pleading, as required by CPLR 3025 (b). As plaintiff remedied this omission by subsequently submitting a "redlined" copy of the proposed amended complaint, this "technical defect" will be overlooked by the court. *See Berkeley Research Group, LLC* 157 AD3d at 490; *see also Medina v City of New York*, 134 AD3d 433, 433 (1st Dept 2015) (failure to submit proposed amended pleading was a technical defect, which the court should have overlooked, particularly after plaintiff provided those documents with his reply). Although plaintiff also failed to submit with her moving papers a verified complaint or an affidavit of merit, such omission, in view of recent caselaw, is not dispositive. *See Berkeley Research Group, LLC*, 157 AD3d at 490; *Delta Dallas Alpha Corp.* 127 AD3d at 420. Plaintiff, in any event, later filed an affidavit of merit, prior to oral argument on the motion, to which defendants did not object. *See* Rubin Affidavit, dated November 7, 2017, NYSCEF Doc. No. 349.

Retaliation under the NYCHRL

The NYCHRL prohibits retaliation "in any manner" against an employee who complains

--

about, or otherwise opposes, unlawful discrimination in the workplace. Administrative Code § 8-107 (7). Like other provisions of the NYCHRL, Administrative Code § 8-107 (7) must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *see Fletcher v The Dakota*, 99 AD3d 43, 51 (1st Dept 2012). In analyzing claims brought under the NYCHRL, courts must consider the statute's "'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009).

To maintain a retaliation claim under the NYCHRL, plaintiff must allege that (1) she engaged in a protected activity known to the employer; (2) the employer took an action that disadvantaged plaintiff; and (3) a causal connection existed between the protected activity and the adverse action. *Fletcher*, 99 AD3d at 51-52; *see Harrington v City of New York*, 157 AD3d 582, 585 (1st Dept 2018); *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 (1st Dept 2015). The NYCHRL, unlike its state and federal counterparts, does not require that retaliatory action rise to the level of "an ultimate action," such as termination, or a "materially adverse change in the terms and conditions of employment," but, rather, it "must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7); *see Fletcher*, 99 AD3d at 51; *Williams*, 61 AD3d at 71. A causal connection can be established either directly, through evidence of retaliatory animus, such as verbal or written comments, or indirectly, by showing that the employer's action closely followed in time the protected activity or that other similarly situated persons were treated differently. *See Dotson v J.C. Penney Co., Inc.*, 159 AD3d 1512, 1514 (4th Dept 2018); *Thomas v Mintz*, 60 Misc 3d 1218 (A), 2018 WL

--

3652302, 2018 NY Misc LEXIS 3282, *12-13 (Sup Ct, NY County Aug. 1, 2018); *Russell v New York Univ.*, 2018 WL 3115795, 2018 US App LEXIS 17138, *11-12 (2d Cir 2018); *Hicks v Baines*, 593 F3d 159, 170 (2d Cir 2010).

Under the NYCHRL, "[t]here is no requirement that the retaliatory conduct occur against a current employee." *Landwehr v Grey Advertising*, 211 AD2d 583, 584 (1st Dept 1995) (citations omitted); *see Hruska v Bohemian Citizens' Benevolent Socy. of Astoria, Inc.*, 2016 WL 4938738, 2016 NY Misc LEXIS 3297, *12, 2016 NY Slip Op 31727(U) (Sup Ct, NY County 2016); *Yanai v Columbia Univ.*, 2006 WL 6849491, 2006 NY Misc LEXIS 9354, *40, 2006 NY Slip Op 30640(U) (Sup Ct, NY County 2006); *Stathatos v Gala Resources, LLC*, 2010 WL 2024967, 2010 US Dist LEXIS 50511, *35-36 (SD NY 2010). Courts recognize that anti-retaliation provisions, under anti-discrimination laws and other labor laws, "extend[ ] beyond strictly employment-related and workplace-related actions. . . . Thus, any action by an employer that would dissuade a reasonable employee from opposing discriminatory conduct can support a claim of retaliation . . . includ[ing] actions taken outside the context of the plaintiff's employment." *Shih v JPMorgan Chase Bank, N.A.*, 2013 US Dist LEXIS 32500, *15-16 (SD NY 2013), citing *Burlington N. & Santa Fe Ry. v White*, 548 US 53, 67 (2006) (other citations omitted); *see also Ozawa v Orsini Design Assocs.*, 2015 WL 1055902, 2015 US Dist LEXIS , *26-27 (SD NY 2015) (same analysis of retaliation claims applies under Title VII and FSLA because both are remedial statutes). Accordingly, "[w]hile typically an adverse employment action must occur during the tenure of a plaintiff's employment, 'in some circumstances plaintiffs can bring retaliation claims against former employers for post-employment conduct.'" *Liu v Elegance Rest. Furniture Corp.*, 2017 WL 4339476 , 2017 US Dist LEXIS 160110, *13

--

(ED NY 2017) (addressing FLSA and NYLL claims) (citations omitted); *see Torres v Gristede's Operating Corp.*, 628 F Supp 2d 447, 472 (SD NY 2008).

Courts, further, "have held that baseless claims or lawsuits designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions, even though they do not arise strictly in an employment context." *Torres*, 628 F Supp 2d at 472 (citations omitted); *see Fischkoff v Iovance Biotherapeutics, Inc.*, 2018 WL 4574890, 2018 US Dist LEXIS 112839, *16-18 (SD NY July 5, 2018); *Marchiano v Berlamino*, 2012 WL 4215767, 2012 US Dist LEXIS 135109, *11-12 (SD NY 2012); *see also Arevalo v Burg*, 129 AD3d 417, 417 (1st Dept 2015) (applying Title VII analysis of retaliation claims to Labor Law). Thus, "[l]awsuits in response to a former employee's attempt to vindicate his [or her] rights can constitute retaliation" (*Fei v WestLB AG*, 2008 WL 594768, 2008 US Dist LEXIS 16338, *7 [SD NY 2008]), including counterclaims "with a concrete, adverse impact on the plaintiff." *Kreinik v Showbran Photo, Inc.*, 2003 WL 22339268, 2003 US Dist LEXIS 18276, *30 (SD NY 2003); *see Torres*, 628 F Supp 2d at 472-473.

Nonetheless, as "'anti-retaliation provisions . . . are designed principally to deal with conduct that occurs outside the judicial system' . . . [i]t is the rare case that the filing of a counterclaim can serve as the basis for a retaliation claim." *Klein v Town & Country Fine Jewelry Grp.*, 283 A.D.2d 368, 369 (1st Dept 2001) (citations omitted); *see Arevalo*, 129 AD3d at 417; *Alizadeh v Pei*, 2017 WL 6337549, 2017 NY Misc LEXIS 4767, *13-15 (Sup Ct, Kings County 2017); *Fischkoff*, 2018 US Dist LEXIS 112839, at *17; *see also Marchuk v Faruqi & Faruqi, LLP*, 100 F Supp 3d 302, 312-313 (SD NY 2015) . To set forth a retaliation claim based on the filing of a counterclaim, a plaintiff must allege facts showing that the counterclaim

--

"'could have a direct, adverse impact on [plaintiff's] present employment or future employment prospects.'" *Arevalo*, 129 AD3d at 417, quoting *Kreinik*, 2003 US Dist LEXIS 18276, at *23; *see Fischkoff*, 2018 US Dist LEXIS 112839, at *17; *D'Amato v Five Star Reporting, Inc.*, 80 F Supp 3d 395, 420 (ED NY 2015); *Fei*, 2008 US Dist LEXIS 16338, at *8. A plaintiff also must "plead facts to support an inference of causation, a requisite element to a retaliation claim under both the NYSHRL and NYCHRL." *Gaughan v Rubenstein*, 261 F Supp 3d 390, 419 (SD NY 2017), citing *Taylor v City of New York*, 207 F Supp3d 293, 308-09 (SD NY 2016) (even under the broader NYCHRL, a "plaintiff must still plead some facts that her employers' actions disadvantaged her and that the action was connected to her protected activity')

Plaintiff's retaliation claim against the law firm defendants is based on allegations that, in May 2016, they moved for the return of allegedly privileged documents submitted by plaintiff to the court, which motion was settled by permitting plaintiff use of the documents under a confidentiality agreement; they then moved to amend their answer to include a breach of contract counterclaim, based on plaintiff's disclosure of the privileged documents, seeking liquidated damages; and they filed a disciplinary complaint against her based on her use of the documents. *See* Proposed Amended Complaint, Ex. A to Solotaroff Aff., ¶¶ 29, 30, 35, 37.

By plaintiff's own acknowledgment, the law firm defendants' motions were made not in response to her complaint but in response to her opposition to defendant Napoli's motion to dismiss the complaint against him. The law firm defendants' actions were taken more than a year after the action was commenced, after discovering that plaintiff possessed certain documents, and were narrowly focused on plaintiff's use of the documents. Plaintiff does not allege any retaliatory comments or other facts to show direct retaliatory animus, and no inference

--

of a causal connection is raised based on temporal proximity; and, contrary to plaintiff's assertion, the counterclaim has not been found by the court to be retaliatory. Plaintiff also does not allege that defendants' motions or "interposition of the counterclaim in any way chilled plaintiff's exercise of her rights" (*Klein*, 283 AD2d at 369; *see Arevalo*, 129 AD3d at 417), and includes no factual allegations to show that the law firm defendants' actions had a direct, adverse impact on her employment prospects. *See Fischkoff*, 2018 US Dist LEXIS 112839, at *16-18. Therefore, plaintiff's retaliation claim against the law firm defendants is legally insufficient.

With respect to the retaliation claim against Napoli, plaintiff alleges that he asserted frivolous counterclaims against her in this action; that he and his wife, attorney Marie Napoli, separately, filed frivolous malpractice actions against her in Nassau and Suffolk counties; that Marie Napoli harassed plaintiff after commencing the Nassau County action by repeatedly sending messengers to her office and residence to serve multiple copies of the summons and complaint; and that Napoli has pressured and harassed attorneys to stop referring cases to plaintiff and has interfered with her relationship with her insurance carrier by stating to the carrier that she posed a high risk for nonpayment. Proposed Amended Complaint, Ex. A to Solotaroff Aff., ¶¶ 28, 34, 39, 41-45.

Napoli asserted counterclaims shortly after his motion to dismiss the second action was denied; and when the counterclaims were dismissed on procedural grounds, he moved to amend his answer and at the same time started a separate action asserting the same claims. In his First Amended Counterclaims, Napoli alleged a litany of bad behavior and unsavory conduct on the part of his former law partner, Marc Bern (Bern), mostly related to Bern's personal life and family difficulties, and he connected plaintiff to that conduct by alleging that she knew about

--

Bern's conduct and its affect on the law firm and fed into it, and, despite knowing the personal and medical challenges Napoli was dealing with, she assisted Bern in his attempts to force Napoli out, by hiding information from him and lying to him about Bern's actions. He claims that plaintiff betrayed him at "his darkest hour" and attacked him and his family when he was most vulnerable. First Amended Counterclaims, Ex. B to Solotaroff Aff., ¶¶ 149, 158.

After four of his five counterclaims were dismissed, Napoli filed an Amended Answer with Counterclaim (Counterclaim). *See* Counterclaim, NYSCEF Doc. No. 220. In his remaining counterclaim, for tortious interference with contractual relations, Napoli again alleges that Rubin conspired with Bern, during the summer of 2014, while Napoli was undergoing treatment for a serious illness and dealing with other personal and medical struggles, to undermine Napoli and take control of the firm from him. *Id.*, ¶¶ 127, 162, 164-165. The allegations underlying the tortious interference claim are that, by "feeding [Bern's] distrust and alienation of Napoli," plaintiff "interfered with the partnership, ultimately leading to the partnership's demise" (*id.*, ¶ 163); and that she interfered with his partnership agreement with Bern by excluding Napoli from discussions about law firm business, and making threatening comments about him in emails to Bern. *Id.*, ¶¶ 203-206.

Although the court found Napoli's allegations sufficient to state a cause of action for tortious interference with contractual relations, the merits of the counterclaim were not reached. Considering the temporal proximity of the counterclaims, and the nature of the allegations themselves, as well as allegations that Napoli interfered with attorneys' attempts to refer cases to her and with her attempts to obtain insurance coverage, plaintiff has sufficiently alleged that Napoli's actions may be causally connected to her discrimination complaint and may have an

--

impact on her employment or prospective employment. *See Fei*, 2018 US Dist LEXIS 16338, at *7. Without reaching the merits, the court finds that, under the circumstances, plaintiff's allegations are sufficient to permit amendment of her complaint to add a retaliation claim against Napoli; and to deny Napoli's cross motion. *See Miller v Cohen*, 93 AD3d 424, 425 (1st Dept 2012) (finding court prematurely reached the merits of the proposed amendment which was adequately pleaded and not clearly devoid of merit).

As to Napoli's other alleged retaliatory acts, plaintiff claims that Napoli and his wife further retaliated against her by lying about her in other litigation, and by commencing other lawsuits against her. She alleges that, in February 2017, Marie Napoli, in an unrelated action brought by her in Nassau County against another former employee of the law firms, made false representations in court papers that plaintiff had represented her and then worked with defendant's attorney in the action. Proposed Amended Complaint, Ex. A to Solotaroff Aff., ¶ 38. She also alleges that, in February 2017, Marie Napoli filed a lawsuit against plaintiff in Nassau County, alleging malpractice and breach of fiduciary duty; and that Napoli filed an identical lawsuit against plaintiff in March 2017 in Suffolk County, alleging plaintiff had disclosed attorney-client privileged communications. *Id.*, ¶ 42. Even assuming that Napoli's wife's actions cannot be imputed to him, and although the cases were brought in 2017, circumstances, including that Marie Napoli is or was representing Napoli on the counterclaims, and that they each brought similar if not identical actions against plaintiff, support allowing amendment of the complaint, and the lack of temporal proximity of these actions is not dispositive. *See Harrington v City of New York*, 157 AD3d 582, 586) 1st Dept 2018) (lack of temporal proximity "is not necessarily fatal to a retaliation claim, where . . . there are other facts

--

supporting causation"); *Ito v Suzuki*, 57 AD3d 205, 208 (1st Dept 2008) ("circumstances surrounding the proposed cause of action are sufficiently stated to support amendment of the complaint"); *Miller v New York City Health & Hosp. Corp.*, 2004 US Dist LEXIS 17050, *20, (SD NY 2004) ("not necessarily true, that lack of temporal proximity defeats a plaintiff's *prima facie* case"), *affd* 198 Fed Appx 87 (2d Cir 2006).

Proposed Breach of Contract claim

Plaintiff also moves for leave to amend her complaint to add a breach of contract claim against the law firm defendants for failure to maintain professional liability insurance for her after her employment was terminated, for work done while she was employed by the law firm defendants. The Proposed Amended Complaint alleges that the Employment Agreement provided her with professional liability insurance for her work during the time she was employed by the law firms; that, because the statute of limitations period for legal malpractice is three years, the law firm defendants were obligated to provide tail insurance for three years after her employment was terminated; that less than a year after her employment was terminated, Napoli asserted claims against her alleging professional malpractice; and that when she sought a defense from the law firms' insurance carrier, she was advised that the policy had lapsed. Proposed Amended Complaint, ¶¶ 63-71.

In opposition to this branch of plaintiff's motion to amend, the law firm defendants argue that Section 4.3 of the Employment Agreement clearly demonstrates that plaintiff's claim has no merit and her motion should be denied. *See* Employment Agreement, Ex. B to Molloy Aff. Section 4.3 of the Employment Agreement provides, in pertinent part:

> "The Law Firm agrees that Attorney shall be covered as an employee of the Law Firm under the Law Firm's

--

> malpractice liability insurance policies for work performed in the course and scope of their employment with NAPOLI BERN RIPKA, LLP."

The law firm defendants contend that the language "covered as an employee" can only be interpreted to mean that plaintiff was entitled to the law firms' insurance coverage only during the time period that she was an employee and not during any period after her employment ended; and that nothing in the contact requires them to purchase "tail coverage" for the period after her employment ended. Plaintiff contends that the clause is ambiguous and the law firms' interpretation would frustrate the purpose of the agreement by requiring employees to purchase their own tail insurance to cover work done for the law firms.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. . . . [and] '[t]he best evidence of what parties to a written agreement intend is what they say in their writing.' Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'" *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002) (internal citations omitted); *see Marin v Constitution Realty, LLC*, 28 NY3d 666, 673 (2017);*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 (2009). "Further, a contract should be 'read as a whole, and . . . interpreted as to give effect to its general purpose.'" *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 (2007), quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003); *see Marin*, 28 NY3d at 673. "'[P]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby.'" *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 (2018), quoting *Kolbe v Tibbetts*, 22 NY3d 344, 353 (2013). "[I]mportantly, '[i]n construing a

--

contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless.'" *Georgia Malone & Co. v E&M Assoc.*, 163 AD3d 176, 186 (1st Dept 2018) (citation omitted); *see Cortland St. Recovery Corp.*, 31 NY3d at 39; *Beal Sav. Bank*, 8 NY3d at 324.

"Whether an agreement is ambiguous or unambiguous 'is an issue of law for the courts to decide.'" *Marin*, 28 NY3d at 673, quoting *Greenfield*, 98 NY2d at 569; *see Beal Sav. Bank*, 8 NY3d at 324; *Kass v Kass*, 91 NY2d 554, 566 (1998). "A contract is unambiguous if the language it uses has 'a definite and precise meaning' . . . [and] the agreement on its face is reasonably susceptible of only one meaning." *Greenfield*, 98 NY2d at 569-570 (citation omitted); *see Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 (2016); *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014). "Conversely, '[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" *Goldman Sachs Group, Inc. v Almah, LLC*, 85 AD3d 424, 426 (1st Dept 2011), quoting *Feldman v National Westminster Bank*, 303 AD2d 271, 271 (1st Dept 2003); *see Ellington*, 24 NY3d at 244; *Chimart Assoc. v Paul*, 66 NY2d 570, 573 (1986).

Considering the intent of Section 4.3 to provide coverage to plaintiff for claims arising out of work done while in the employ of the law firm defendants, and viewing the language in the context of the law firms' obligation to insure plaintiff for work performed on the law firms' behalf, the court finds that the language of Section 4.3 is reasonably susceptible of different interpretations, one of which is that defendants "meant to protect plaintiff against any liability she might be subjected to for work done while in [the law firms'] employ." *Frederick v Clark*,

--

150 AD2d 981, 983 (3d Dept 1989) (finding phrase "liability insurance will be provided for you" could reasonably be interpreted to require purchase of tail insurance). Plaintiff accordingly will be permitted to amend her complaint to assert a cause of action for breach of contract against the law firm defendants based on their failure to provide her with insurance. *See Almah LLC v AIG Empl. Servs., Inc.*, 157 AD3d 416, 416 (1st Dept 2018) (if contract is ambiguous, complaint should not be dismissed before the development of a full factual record as to the parties' intent); *Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 403 (1st Dept 2010) (same); *see also Georgia Malone & Co.*, 163 AD3d at 188 (agreement reasonably susceptible of more than one interpretation requires a trial to determine the parties' intent).

Law Firm Defendants' Motion for Partial Summary Judgment

The law firm defendants move for summary judgment dismissing plaintiff's second cause of action, which alleges breach of contract based on failure to pay her a promised bonus on the grounds that there was no agreement to pay plaintiff the claimed non-discretionary bonus. In support of their motion, the law firm defendants submit the Employment Agreement in effect at times relevant to the claim, and contend that the contract specifically sets out the terms of plaintiff's compensation, which do not include the alleged promise for a bonus. The Employment Agreement provides that plaintiff was entitled to compensation consisting of a salary, referral fees under certain circumstances, and vacation and other "'fringe benefits' . . . which from time to time may be made available to the Law Firm's employees." Employment Agreement, Ex. C to Margulis Aff., ¶¶ 2.3-2.5. The Employment Agreement further included a merger clause providing that it "sets forth the entire understanding between the parties . . . and no amendment nor variation of the terms of this Agreement shall be valid unless in writing." *Id.*,

--

¶ 4.7 The law firm defendants contend that the Employment Agreement thus requires dismissal of plaintiff's second cause of action.

In opposition, plaintiff does not dispute that the Employment Agreement was in place at relevant times, and does not argue that it included the claimed bonus as part of her compensation. Rather, she argues that defendants, during salary negotiations in 2013 (*see* Complaint, ¶ 26), or in 2010 (*see* Rubin Aff. in Opp., ¶ 9), orally modified the Employment Agreement by promising to pay her a non-discretionary bonus of "five percent of all NB's net attorney fees recovered in matters assigned to Ms. Rubin or on which Ms. Rubin was 'materially involved,." Complaint, ¶ 26. She further claims that defendants paid her the promised bonus on five occasions, and that she continued to work long hours on complex matters in reliance on and with the expectation of receiving the bonus. Rubin Aff. in Opp., ¶¶ 8-11.

"As a general rule, where a contract has a provision which explicitly prohibits oral modification, such clause is afforded great deference." *Healy v Williams*, 30 AD3d 466, 467 (2d Dept 2006); *see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 (1977); *Tierney v Capricorn Investors, L.P.*, 189 AD2d 629, 631 (1st Dept 1993); *see also* General Obligations Law § 15-301 (1). Thus, "where a contract contains a merger clause, a court is obliged 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'" *Schron v Troutman Sanders LLP*, 20 NY3d 430, 434 (2013), quoting *Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599 (1997). A merger clause "evinc[es] the parties' intent that the agreement 'is to be considered a completely integrated writing.'" *Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 (2001) (citation omitted); *see also* General Obligations Law § 15-301 (1). There are well recognized exceptions

--

to that rule, however, and, under certain circumstances, "the inclusion of a general merger clause does not preclude an oral modification of the agreement." *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 49 (1st Dept 1990); *see Rose*, 42 NY2d at 343 (contractual prohibition against oral modification may be waived); *B. Reitman Blacktop, Inc. v Missirlian*, 52 AD3d 752, 754 (2d Dept 2008) (parties "mutual departure from the written agreement" supported finding of oral modification).

"[E]ven if a contract expressly provides for modifications to be in writing, an oral modification will be enforced where it has been fully performed." *J & R Landscaping, Inc. v Damianos*, 1 AD3d 563, 564 (2d Dept 2003); *see Rose*, 42 NY2d at 343; *Healy*, 30 AD3d at 467. An oral modification also is enforceable if there is partial performance of the modification, which is "unequivocally referable to the oral modification." *Rose*, 42 NY2d at 343; *see Healy*, 30 AD3d at 467-468; *Calica v Reisman, Peirez & Reisman, LLP*, 296 AD2d 367, 369 (2d Dept 2002); *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 (1st Dept 2000); *see also DLJ Mtge. Capital, Inc. v Fairmont Funding, Ltd.*, 2009 WL 2198265, 2009 NY Misc LEXIS 6037, **10, 2009 NY Slip Op 31562(U), *8 (Sup Ct, NY County 2009), *affd* 81 AD3d 563 (1st Dept 2011) (waiver of merger clause may be shown by words or conduct, including partial performance).

In addition, if "a party to a written agreement has induced another's significant and substantial reliance upon an oral modification," equitable estoppel may permit proof of the oral modification. *Rose*, 42 NY2d at 344. Like "the requirement that partial performance must be unequivocably refererable to the oral modification, . . . conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written." *Id.* If, however, "the only

--

proof of an alleged agreement to deviate from a written contract is the oral exchange between the parties, the writing controls." *Id.* at 343; *see Matter of Irving O. Farber, PLLC v Kamalian*, 16 AD3d 506, 506-507 (2d Dept 2005).

Here, although plaintiff claims that there was partial performance, she offers no evidence that she was paid the alleged non-discretionary bonus or that there was any other partial performance unequivocally referable to the alleged oral agreement. *See Tsabbar v Auld*, 289 AD2d 115, 115-116 (1st Dept 2001). Her conclusory, unsubstantiated assertion that five payments were made is insufficient to raise a triable issue of fact. Similarly, although she asserts that she relied on the oral modification, she offers no evidence "of conduct unequivocably referable to a clear and unambiguous promise of the type required for promissory estoppel." *Id.* Moreover, even assuming a bonus was contemplated or promised, "a mere statement of an intention, even if expressed unconditionally and unequivocally does not, on its own, give rise to a binding contract." *Smith v Smith*, 66 AD3d 584, 585 (1st Dept 2009); *see Sabo v Delman*, 3 NY2d 155, 160 (1957) (mere promissory statements as to what will be done in the future are not actionable).

The law firm defendants' motion, therefore, is granted to the extent that it seeks dismissal of the second cause of action. The branch of their motion seeking summary judgment on their counterclaim for liquidated damages, however, is denied.

Defendants claim that plaintiff violated the confidentiality provision (Section 4.1) of the Employment Agreement by filing four documents with the court during earlier motion practice in this case, and contend that they are entitled to $100,000 in liquidated damages, or $25,000 for each violation, under Section 4.15. Assuming, without deciding, that the four documents at

--

issue, or any one of them, contain confidential "business information, trade secrets and other proprietary information and data" subject to Section 4.1 of the Employment Agreement, the court cannot determine, as a matter of law, on the record before it, that the disclosure of such information was done "knowingly, intentionally or willfully." Plaintiff attests that she did not believe that she was breaching the confidentiality provision of the employment agreement when she submitted the documents in question to the court, raising issues of fact. Nor have defendants demonstrated what, if any, injury or loss they sustained as a result of the disclosure of the four documents at issue.

It is accordingly hereby,

ORDERED that plaintiff's motion to amend is granted to the extent that the court grants leave to amend the complaint to add a breach of contract claim against the law firm defendants for failure to provide insurance and to add a retaliation claim against Napoli only, and the motion is otherwise denied; and it is further

ORDERED that Napoli's cross motion is denied; and it is further

ORDERED that the law firm defendants' motion is granted to the extent that the second cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff shall serve and file an Amended Complaint that comports with this order; and it is further

--

ORDERED that the parties shall appear for a status conference in Part 47 Room 320, 80 Centre Street, on December 13, 2018, at 9:30 AM.

Dated: October 29, 2018

ENTER:

PAUL A. GOETZ, J.S.C.

--