

Stern v Milestones Psychology Group, PLLC

2021 NY Slip Op 32382(U)

November 16, 2021

Supreme Court, New York County

Docket Number: Index No. 654602/2020

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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MICHELLE STERN,

Plaintiff

Index No. 654602/2020

-against-

DECISION AND ORDER

MILESTONES PSYCHOLOGY GROUP, PLLC,
KIRSTEN CULLEN SHARMA, and
LAURA KIRMAYER,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendants move to dismiss the amended verified complaint's seventh cause of action based on documentary evidence and failure to state a claim. C.P.L.R. § 3211(a)(1) and (7). Upon such a motion, the court considers the facts alleged in the complaint and presumes them to be true. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 175 (2021); Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 141 (2017); Seaman v. Schulte Roth & Zabel LLP, 176 A.D.3d 538, 538 (1st Dep't 2019).

I. THE ALLEGED FACTS

According to the amended verified complaint, plaintiff was employed by defendant Milestones Psychology Group, PLLC, as a mental health therapist from June 25, 2018, to January 15, 2020. Am. V. Compl., NYSCEF No. 17, ¶¶ 4, 13. Milestones is a psychology practice that specializes in working with children and

their families and schools from preschool through college. Id. ¶

6. Defendant Kirsten Cullen Sharma, Psy.D., is an owner of Milestones and works for it as a clinical psychologist. Id. ¶¶

7-9. Defendant Laura Kirmayer, Ph.D., M.S.W., works for Milestones as a clinical psychologist and was plaintiff's direct supervisor. Id. ¶¶ 10-12.

Plaintiff worked for Milestones pursuant to an employment agreement that provided she would receive 35% of the payments collected for her clinical services until she became a Licensed Clinical Social Worker (LCSW), at which point she would receive 50% of the payments collected for her services. Id. ¶¶ 14, 20. To acquire the LCSW designation, plaintiff, who already held a Masters of Social Work degree, was required to obtain a Licensed Master of Social Work (LMSW) designation, which she obtained in April 2019, and to complete 2,000 hours of supervised clinical social work in diagnosis, psychotherapy, and assessment-based treatment plans. Id. ¶ 18; 8 N.Y.C.R.R. § 74.3(a). Milestones was to provide plaintiff a qualified supervisor so plaintiff could complete the 2,000 hours of supervised clinical social work experience required for the LCSW designation.

Milestones assigned Kirmayer as plaintiff's supervisor. Am. V. Compl. ¶ 19. Since Kirmayer was not a qualified supervisor, plaintiff's clinical hours that Kirmayer supervised will not count toward the licensing requirements. Id. ¶¶ 10-12.

Plaintiff discovered Kirmayer was not a qualified supervisor only after plaintiff's employment with Milestones ended January 16, 2020. Id. ¶ 22. In addition to plaintiff's claims challenging her termination based on discrimination due to her pregnancy and disability in violation of New York City and State Human Rights Laws, plaintiff claims that defendants breached her employment contract, the seventh cause of action at issue.

II. MOTION TO DISMISS THE BREACH OF CONTRACT CLAIM

A. Grounds for the Motion

In moving to dismiss the breach of contract claim pursuant to C.P.L.R. §§ 3211(a)(1), based on documentary evidence, defendants maintain that the employment agreement definitively shows they owed no contractual obligation to provide a qualified supervisor, so any failure to do so was not an actionable breach of contract. Alternatively, defendants contend that they provided qualified supervisors, as shown by other documentary evidence that both Sharma and Kirmayer were qualified supervisors after plaintiff received the LMSW designation, which was the first point when she was qualified to accumulate supervised clinical hours toward the LCSW designation. Finally, even if plaintiff alleges a breach of the agreement, defendants contend that she fails to state a viable cause of action that she lost income or benefits, since the employment contract provided for "At Will" employment. Aff. of Kirsten Cullen Sharma Ex. A.

NYSCEF No. 19, at 3.

B. Applicable Standards

Upon defendants' motion to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(7), defendants bear the burden to establish that the amended complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). In evaluating defendants' motion, the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in her favor. Doe v. Bloomberg L.P., 36 N.Y.3d 450, 454 (2021); Connolly v. Long Island Power Auth., 30 N.Y.3d at 728; JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dep't 2020). The court will not give such consideration, however, to allegations that consist of only bare legal conclusions. Myers v. Schneiderman, 30 N.Y.3d 1, 11 (2017); Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d at 5. Instead, the court accepts as true only plaintiff's factual allegations that set forth the elements of a legally cognizable claim and from them draws all reasonable inferences in her favor. Dismissal is warranted if the amended complaint fails to allege facts that fit within any cognizable legal theory. Sassi v. Mobile Life Support Servs., Inc., 37 N.Y.3d 236 (2021); Faison v. Lewis, 25 N.Y.3d 220, 224 (2015).

To succeed on a motion to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(1), the documentary evidence that forms the basis of a defense must "utterly refute[] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175 (quoting Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). See Atsco Footwear Holdings, LLC v. KBG, LLC, 193 A.D.3d 493, 494 (1st Dep't 2021). As under § 3211(a)(7), the court considers the facts alleged in the complaint as true and affords plaintiff the benefit of every favorable inference. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175. Factual claims flatly contradicted by documentary evidence, however, as well as allegations consisting of bare legal conclusions, are not entitled to any such consideration. Myers v. Schneiderman, 30 N.Y.3d at 11; Array BioPharma, Inc. v. AstraZeneca AB, 184 A.D.3d 463, 464 (1st Dep't 2020). C.P.L.R. § 3211(a)(1) does not explicitly define documentary evidence, but the documents must be unambiguous and of undisputed authenticity, with contents that are essentially undeniable, to establish a conclusive defense. VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189, 193 (1st Dep't 2019).

Defendants point to plaintiff's employment contract as

documentary evidence of the parties' agreement that establishes a conclusive defense. The parties stipulate that the employment contract submitted by defendants, Sharma Aff. Ex. A, is authenticated and admissible and that the court may consider it for purposes of defendants' motion.

C. Interpretation of the Employment Contract

As set forth above, defendants contend that the contract does not require Milestones to provide supervision for the supervised hours plaintiff required for her LCSW designation, so defendants' failure to provide a qualified supervisor may not form the basis for a breach of contract. Defendants also suggest that plaintiff's claim requires the court to consider parol evidence outside the terms of the written agreement, and, when that evidence is considered, the claim fails.

Plaintiff responds that, while the contract does not explicitly require Milestones to provide a qualified supervisor, the contract shows the parties intended that plaintiff would attain LCSW status, implying an obligation to provide the required supervisor for her to do so. Plaintiff presents documents showing Kirmayer scheduling and tracking the hours that she supervised plaintiff, acknowledging such an obligation.

Where a contract's terms are unambiguous, those terms, considered in the context of the whole agreement, determine the parties' intent. Tomhannock, LLC v. Roustabout Resources, LLC,

33 N.Y.3d 1080, 1082 (2019). In reviewing the contract to discern the parties' intent, the court must read the agreement in the context of the parties' industry, history, and relationship and avoid an interpretation contrary to the parties' reasonable expectations. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 359 (2019); Wells Fargo Bank, N.A. v. Lloyd's Syndicate AGM 2488, 195 A.D.3d 434, 435 (1st Dep't 2021).

The parties' employment contract provides that plaintiff will achieve the LCSW designation. Sharma Aff. Ex. A, at 2. Milestones is in the business of providing psychological counseling services, raising the inference that Milestones' officers or supervisory employees are aware of the LCSW accreditation requirements. N.Y. Educ. Law § 7704. The contract further requires plaintiff to "devote full-time, all of her professional time and efforts to and for the benefit of Milestones Psychology" and bars her from "render[ing] professional or clinical services to any person, whether or not for compensation, except as an employee of Milestones Psychology, unless [she] shall first have obtained the written consent of Milestones Psychology." Sharma Aff. Ex. A, at 3-4. These terms, reasonably interpreted, indicate that the parties intended plaintiff to perform the required hours of clinical social work at Milestones and under defendants' supervision.

At minimum, the contract is ambiguous, so as not to preclude

plaintiff's interpretation as a matter of law, and therefore does not support dismissal of her breach of contract claim. In fact, the documents showing defendants' acceptance of the obligation to schedule and compile plaintiff's supervised hours indicate that defendants interpreted the terms of her employment consistent with her interpretation.

D. Availability of a Qualified Supervisor

Defendants also contend that the breach of contract claim fails because other documentary evidence shows plaintiff had access to a qualified supervisor when she was eligible to accrue supervised clinical services hours. According to the records of the New York State Office of the Professions, as shown by defendants' print-out from the Office of the Professions' official database, Sharma was a licensed psychologist. Aff. of Kirsten Cullen Sharma Ex. B, NYSCEF No. 21; N.Y. Educ. Law § 7704(2)(c). Defendants contend that this license alone qualified her as a supervisor for the duration of plaintiff's employment. Defendants add that, while Kirmayer may not have been a qualified supervisor when plaintiff was hired, plaintiff was not eligible to accrue supervised hours toward her LCSW designation until she achieved the LMSW designation. Defendants rely on 8 N.Y.C.R.R. § 74.3(a)(1): "Experience obtained in New York must be obtained as a licensed master social worker" They omit the remainder of this provision, however: "except the [education] department

may . . . accept other experience . . . in an authorized setting and under the supervision of a qualified supervisor." 8

N.Y.C.R.R. § 74.3(a)(1).

The parties do not dispute that plaintiff received the LMSW designation April 16, 2019. Defendants present similar documentary evidence showing Kirmayer was a licensed psychologist as of April 17, 2019, Sharma Aff. Exs. F-G, NYSCEF Nos. 25-26, and similarly contend that this license alone qualified her as a supervisor as of that date. Therefore, according to defendants, when plaintiff became eligible to accrue supervised clinical hours toward her LCSW certification, two qualified supervisors were available.

First, plaintiff alleges that Milestones assigned Kirmayer, not Sharma, as plaintiff's supervisor. Plaintiff further contests Kirmayer's status as a qualified supervisor, not only before April 17, 2019, which defendants concede, but also afterward, because qualification requires more than the license. A qualified supervisor not only must be licensed, but also must be:

qualified in psychotherapy as determined by the department based upon a review of the psychologist's education and training, including but not limited to education and training in psychotherapy obtained through completion of a program in psychology registered pursuant to Part 52 of this Title or a program in psychology accredited by the American Psychological Association.

8 N.Y.C.R.R. § 74.6(c)(2)(ii). Defendants present no documentary

evidence that Kirmayer met this requirement.

Defendants reply that plaintiff now takes a new position, that Kirmayer was unqualified, rather than unlicensed, and plaintiff bears the burden to establish that Kirmayer was unqualified. Plaintiff does not bear that burden in opposing defendants' motion to dismiss her breach of contract claim. Her allegation that defendants breached the parties' contract by failing to provide a qualified supervisor is enough. Defendants' document showing Kirmayer was licensed as of April 17, 2019, does not conclusively establish that she was qualified pursuant to 8 N.Y.C.R.R. § 74.6(c)(2)(ii) as a matter of law, since the regulation indicates a further qualitative or discretionary analysis beyond licensure. Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175; Atsco Footwear Holdings, LLC v. KBG, LLC, 193 A.D.3d at 494.

Plaintiff also relies on 8 N.Y.C.R.R. §§ 74.3(a)(1) and 74.6(a), which permit a social worker without a LMSW designation to accrue supervised clinical social work hours in "an authorized setting." 8 N.Y.C.R.R. § 74.3(a)(1). Defendants present no documentary evidence or other law to establish that Milestones was not an authorized setting.

In fact, the regulations suggest that Milestones was an authorized setting. Although they do not define those terms, 8

N.Y.C.R.R. § 74.3(a)(2) requires that: "The supervised experience shall be obtained in a setting acceptable to the department as defined in section 74.6(a)" Section 74.6(a)(1) in turn sheds light on the meaning of "authorized" setting in listing categories of "acceptable" settings, including a "professional service limited liability company authorized to provide services that are within the scope of practice of licensed clinical social work." 8 N.Y.C.R.R. § 74.6(a)(1)(i) (emphasis added): Section 74.6(a)(1) also lists "(vi) a program or facility authorized under federal law to provide services that are within the scope of practice of licensed clinical social work" and "(vii) an entity . . . authorized under New York law to provide services that are within the scope of practice of licensed clinical social work." (emphases added) Given the parties' consistent descriptions of Milestones, it is doubtful that Milestones is not "authorized to provides services that are within the scope of practice of licensed social work." 8 N.Y.C.R.R. § 74.6(a)(1)(i). Therefore plaintiff sustains a viable claim that defendants denied her a qualified supervisor under whom plaintiff could accumulate supervised clinical hours before April 2019 when she received her LMSW designation, 8 N.Y.C.R.R. §§ 74.3(a) and 74.6(a) and (c)(2)(ii), which defendants' documentary evidence fails to refute.

In sum, defendants fail to refute plaintiff's allegations

that Kirmayer, rather than Sharma, was plaintiff's supervisor designated by Milestones and that Kirmayer was not a qualified supervisor, preventing plaintiff from accumulating needed supervised clinical hours. Defendants' documentary evidence other than the parties' contract, when analyzed under the applicable regulations, 8 N.Y.C.R.R. §§ 74.3(a), 74.6(a) and (c)(2)(ii), fails to support dismissal of plaintiff's breach of contract claim.

E. Lack of an Injury

A breach of contract claim requires allegations "of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." Markov v. Katt, 176 A.D.3d 401, 401-402 (1st Dep't 2019) (quoting Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010)).

Defendants insist that plaintiff's mere allegation that her supervised hours "may not count toward licensure," Am. V. Compl. ¶ 24, combined with her at will employment, precludes her claim for lost income and benefits. Defendants point to the absence of any allegation that a governing body has rejected plaintiff's supervised hours, that plaintiff has incurred any expense obtaining the supervised hours that defendants denied her, or why she would incur expenses to obtain those hours, rather than obtaining them as part of her future employment. Although plaintiff explains that it is possible to hire a qualified

supervisor if an employer does not provide one, she does not allege that she has done so.

Defendants' suggestion that plaintiff might be credited with her supervised hours at Milestones, however, pertains only to the hours Kirmayer supervised after April 16, 2019. Defendants admit that Kirmayer was unqualified to supervise plaintiff before then and maintain that Sharma supervised plaintiff before then, but plaintiff disputes Sharma's supervision. Plaintiff claims that, if she had had a qualified supervisor before April 16, 2019, she could have accumulated supervised hours before then, 8 N.Y.C.R.R. §§ 74.3(a)(1) and 74.6(a), but defendants do not suggest that a governing body might credit plaintiff with supervised hours before then.

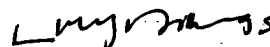
In any event, the amended complaint alleges that defendants' breach by failing to provide plaintiff a qualified supervisor, whether or not that failure extended back to the beginning of her employment, denied her the opportunity to obtain supervised clinical hours during her employment, which set her back in her career. Rather than having progressed toward eligibility for the LCSW designation when she left Milestones, she was required to begin again to accumulate the required supervised hours. Giving plaintiff the benefit of every inference, and considering whether the alleged facts support "any cognizable legal theory," not only a theory explicitly claimed, Himmelstein, McConnell, Gribben,

Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d at 175, this lost opportunity delayed her LCSW accreditation, set back her career, and caused her lost future income, as well as potential expenses to obtain those hours elsewhere. These claimed losses satisfy the requirement that plaintiff allege she was injured by defendants' failure to provide a qualified supervisor. Therefore the court denies defendants' motion to dismiss plaintiff's breach of contract claim based on her failure to allege any injury from the breach.

III. CONCLUSION

For all the reasons explained above, the court denies defendants' motion to dismiss plaintiff's breach of contract claim. C.P.L.R. § 3211(a)(1) and (7). Defendants shall serve and file their answer to the amended complaint within 20 days after entry of this order. C.P.L.R. §§ 3012(a), 3211(f). The parties shall appear for a Preliminary Conference to be held via Microsoft Teams, with a link to be provided by the court, at 10:00 a.m. December 14, 2021.

DATED: November 16, 2021



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.