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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III PART 56

Index Number : 601056/2005

SMALLEY, KENNETH D.

VS

DREYFUS

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
FEB 08 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/6/2006

RICHARD B. LOWE III
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

----------x

KENNETH D. SMALLEY, GERALD E. THUNELIUS, MARTIN FETHERSTON, MICHAEL ALLEN, and DARLENE HAUT,

Plaintiffs,

- against -

THE DREYFUS CORPORATION, STEVEN R. BYERS, STEPHEN E. CANTER, MARTIN G. MCGUINN, and MELLON FINANCIAL CORPORATION,

Defendants.

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Index No. 601956/2005

DECISION AND ORDER

RICHARD B. LOWE, III, J.:

Defendants The Dreyfus Corporation (Dreyfus), Stephen R. Byers (Byers), Stephen E. Canter (Canter), Martin G. McGuinn (McGuinn), and Mellon Financial Corporation (Mellon) (collectively, the "defendants") move to dismiss the Second Amended Complaint, pursuant to CPLR 3211 (a) (1) and (7), for failure to state a cause of action for fraud, breach of contract, and quantum meruit, and pursuant to CPLR 3016 (a), for failure to provide particular information as to libelous and slanderous statements allegedly made by the defendants in the plaintiffs' cause of action for defamation.

BACKGROUND

Plaintiffs Kenneth D. Smalley (Smalley), Gerald E. Thunelius (Thunelius), Martin Fetherston (Fetherston), Michael Allen (Allen), and Darlene Haut (Haut) (collectively, the "plaintiffs"), bring suit for alleged misrepresentations relating to the plaintiffs' continued employment with defendant Dreyfus' Taxable Fixed Income Group (the "Group"). The plaintiffs claim that even while these misrepresentations were being made to the plaintiffs, Dreyfus was actually planning to terminate and merge the Group into Standish Mellon Asset Management, LLC (Standish), a subsidiary of Dreyfus'

parent, defendant Mellon. Further, the plaintiffs claim that the defendants defamed the plaintiffs by speaking and allowing knowingly false and degrading statements regarding their job performance and professional competence and integrity to be printed. Finally, the plaintiffs allege that McGuinn, Chief Executive Officer of Dreyfus' parent company Mellon, knew and allowed these statements and misrepresentations to be made.

Thunelius was director of the Group and was employed for more than fifteen years prior to his termination from Dreyfus in January 2005. In or about October 2000, Thunelius was advised by Canter, the Chief Executive Officer of Dreyfus, to share his strategies and his pitch book with Scott Powers, a Mellon employee who competed directly with Thunelius' Group. Thunelius learned of a rumor that Mellon was planning to purchase another taxable fixed income manager, Standish. Thunelius asked Canter about the future of the Group, to which Canter denied any acquisition rumors. Similarly, Thunelius' conversation with Byers, Chief Investment Officer of Dreyfus, yielded the same information. Nonetheless, Mellon announced the acquisition of Standish in 2001, and Scott Powers was soon named an officer of Standish.

Canter and Byers again assured Thunelius that there were no plans to merge the Group into Standish. Based upon these assurances, Thunelius hired new employees for the Group, and offered bonuses of 1.5 times their base salaries as well as other performance incentives. In early 2001, Fetherston left his former position with Guardian Life to be employed at Dreyfus, based on the assurances made that the Group would stay in tact and that his job was secured. Similarly, Smalley turned down an offer from Credit Suisse First Boston and accepted employment at Dreyfus. In 2002, based upon Byers' representations, Haut also left her position at Debt Traders to be employed at Dreyfus.

Throughout the period until mid 2003, Dreyfus management continued to deny the rumors of merger, and offered to increase Thunelius' payroll budget to grow the Group. In August 2003, plaintiff Allen, who was employed at UBS at that time, also left his former position with UBS and accepted employment with Dreyfus.

The Group's performance in 2003 was profitable, as it was in 2004. However, the plaintiffs allege that the bonuses promised in 2003 were not provided. Coupled with the merger rumors, Thunelius began active employment discussions with other companies. Canter met with the Group on April 23, 2004 and reiterated Dreyfus' commitment to the Group as well as increased the Group's target bonus and fee participation incentives. However, on December 2, 2004, Byers met with the Group and informed them that the Group was to be merged with Standish due to "poor performance." The plaintiffs allege that these statements were false and were made by the defendants knowing that they were false. The plaintiffs also allege that Dreyfus characterized the Group in news articles as a "golf cart" with mediocre to pathetic performance.

The defendants terminated the plaintiffs' employment soon after the merger.

The plaintiffs filed a Summons and Complaint on August 8, 2005, alleging fraud against all the defendants (first cause of action), breach of contract against Dreyfus (second cause of action), quantum meruit against Dreyfus (third cause of action), and defamation against all the defendants (fourth cause of action).

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211 (a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant

(*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). Here, the defendants argue that because the plaintiffs were at-will employees, the plaintiffs have no cause of action for fraud, breach of contract, or for quantum meruit. As to the claim for defamation, the defendants argue that the plaintiffs fail to show that the defendants themselves made libelous or slanderous statements, and, further, fail to demonstrate that the words used were libelous or slanderous.

A. Fraud

The defendants aver that because the plaintiffs were at-will employees, the plaintiffs could not reasonably rely upon promises of continued employment or masquerade breach of contract claims as fraud claims. The court agrees.

To state a legally cognizable claim of fraud or fraudulent inducement, the Complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). However, claims for fraud or fraudulent inducement will be dismissed where it is redundant to the breach of contract claim (*see First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 [1st Dept 1999]). Furthermore, in the context of an employment claim, where the employment is at-will, a cause of action for fraud or fraudulent inducement will not lie because there can be no claim of reasonable reliance (*see Tannehill v Paul Stuart, Inc.*, 226 AD2d 117, 118 [1st Dept 1996]; *Arias v Women in Need, Inc.*, 274 AD2d 353 [1st Dept 2000]).

Here, even in giving the non-movants all favorable inferences, the plaintiffs have failed to show any reasonable reliance upon any of the defendants' representations. Each of the signed employment agreements specifically provide that employment with Dreyfus is terminable "at-will, with or without cause, at any time for any reason" (*see* Fox Aff, Ex. B [Thunelius Employment Application]), "with or without notice" (*id.*, Ex. C [Allen, Fetherston, Haut, Smalley Employment

Applications]). Furthermore, each individual either signed or initiated his or her consent next to the paragraph indicating that employment was terminable at will. Even if the defendants represented to the plaintiffs that there was no possibility of any merger between Standish and the Group or that the rumors were "false," there could not be any reasonable reliance on these representations on the part of the plaintiffs precisely because the plaintiffs were at will employees, dischargeable at the behest of either party. Furthermore, the argument that the plaintiffs were fraudulently induced to leave their respective former employments for Dreyfus is unavailing, especially where the First Department has found that there could not be reasonable reliance on the employer's commitment to continued employment with an at-will employer (*Tannehill*, 226 AD2d at 118; *see also Skillgames LLC v Brody*, 1 AD3d 250-51 [1st Dept 2003]). In short, the plaintiffs have failed to show fraud or fraudulent inducement.

These misrepresentations and inducements also relate to the plaintiffs' underlying claim of breach of contract. Here, the plaintiffs argue that they were induced to either stay with Dreyfus or left their former employments due to the income and bonuses possibilities at Dreyfus and defendants' statements to their continued employment. As the First Department in *Tannehill* noted, while these allegations "set forth an *injury* separate from that alleged with respect to her insufficient breach of contract claim for wrongful termination . . . the wrongful *act* alleged in support of the fraud claim does not differ from the purely contract-related allegation that defendant did not intend to perform at the time it entered into the agreement" (226 AD2d at 118 [emphasis in original]). Because these allegations relate to the breach of contract claim, there is no cause of action for fraud (*see Dalton v Union Bank of Switzerland*, 134 AD2d 174, 176 [1st Dept 1987]).

Accordingly, the defendants' motion to dismiss the cause of action for fraud is granted.

B. Breach of Contract

The plaintiffs allege that the defendants made three oral agreements with the plaintiffs: (a) Dreyfus agreed to pay to the plaintiffs year end target bonuses of at least 1.5 times their base salaries; (b) Dreyfus agreed to distribute to members of the Group, including the plaintiffs, the entirety of any performance fees earned; and (c) Dreyfus agreed, on or about May 1, 2004, to maintain the Group intact as an independent fixed income shop for at least one year (Complaint ¶ 67). The defendants argue that because the plaintiffs were at-will employees, they could have been terminated at any time, with or without cause, and, accordingly, there could not be any breach of contract. Further, the defendants argue that any oral agreements regarding the payment of bonuses are controverted by documentary evidence. Finally, the defendants aver that the bonuses were already paid and, as such, the cause of action is moot.

In an at-will employment relationship, "the presumption . . . is . . . [that employment] may be freely terminated by either party at any time without cause or notice" (*Horn v N.Y. Times*, 100 NY2d 85, 90-91 [2003], quoting *Martin v New York Life Ins. Co.* (148 NY 117 [1895]). Accordingly, one may not rely on any statements made within the confines of an at-will employment situation unless there is evidence to the contrary (*Tannehill*, 226 AD2d at 118). To rebut the presumption that the statements made were different from the at-will employment context, the plaintiffs are not to show their "subjective intent," nor "any single act, phrase or other expression," but "the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*Weiner v. McGraw-Hill, Inc.*, 57 NY2d 458, 466-67 [1982], quoting *Brown Bros. Elec. Contrs. v Beame Constr. Corp.*, 41 NY2d 397, 400 [1977]).

Even in giving all favorable inferences to the non-movants, the plaintiffs have failed to demonstrate that there was a breach of contract as to any of the alleged oral agreements made by the

defendants. As to the issue of bonuses and performance fees, the defendants have demonstrated that such bonuses are at the "complete discretion" of Dreyfus, pursuant to the employee handbook and various incentive plans (*see* Fox Aff, Ex. G, H, I). Further, as indicated in the employee handbook, managers and supervisors have no authority to bind the company as to employment or benefit matters without the approval of the senior manager, in writing (*id.*, Ex. D). In addition, there is no dispute that the plaintiffs were paid bonuses and performance fees as stipulated in their employment letters, guaranteeing them at least minimum bonuses for the first year of employment. Finally, even if defendants Cantor and Byers indicated that such bonuses and fees were to be paid to the plaintiffs, payment of such bonuses and fees are at the discretion of the company and are subject to the plaintiffs' actual performance on the job. Because bonuses and performance fees are discretionary and are subject to amendment or termination at the "sole discretion" of the company, "with or without notice, at any time, including during the performance period" (*id.*, Ex. G, H, I), there is no cause of action for breach of contract.

As to the to issue of maintenance of the Group for at least one year from May 1, 2004, again, the court notes that this employment was at-will, and was terminable at any time by any of the plaintiffs or by the defendants, with or without cause. Giving incentives to induce the plaintiffs to remain with a company does not change the fact that they were at-will employees. Regardless of the incentives offered by Dreyfus, the plaintiffs' status as at-will employees - which was confirmed by the employment application as well as by the employee handbook - "renders unreasonable the plaintiffs' claimed reliance on defendant's alleged representation (or promise)" that Dreyfus was committed to maintaining the Group (*Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003]; *Parker v Hill & Knowlton, Inc.*, 282 AD2d 397 [1st Dept 2001]). There is no breach of contract.

Accordingly, the defendants' motion to dismiss the second cause of action for breach of

contract is granted.

C. Quantum Meruit

The defendants also move to dismiss the third cause of action for quantum meruit, arguing that because the plaintiffs' status at Dreyfus were at-will and because the employee handbook provided for each plaintiff's employment relationship with Dreyfus, there is no cause of action for quantum meruit.

To state a viable claim for quantum meruit, plaintiffs must allege their good faith performance of services, the defendants' acceptance of those services, an expectation of compensation for the services, and the reasonable value of those services (*see Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 266-67 [1st Dept 1995]). Equity requires that plaintiffs recover for their services "in order to avoid the unjust enrichment of defendants" at their expense (*id.*, quoting *Bradkin v Leverton*, 26 NY2d 192, 196-97 [1970]).

Here, the plaintiffs have again failed to demonstrate a cause of action for quantum meruit. Even in reading the Complaint liberally and in favor of the plaintiffs, the court does not see how the defendants failed to provide the plaintiffs with the reasonable value for the services rendered by the plaintiffs. As each letter extending employment to the plaintiffs stated, the plaintiffs were provided a base salary and were eligible to participate in Dreyfus' bonus plans (*see* Fox Aff, Ex E). However, the bonus plans themselves are subject to revision and amendment by Dreyfus and is totally discretionary (*see id.*, Ex. G, H, I). Further, there is no dispute that the plaintiffs were paid at least their base compensation for their work at Dreyfus. Nor is there any dispute that Dreyfus provided bonus compensation to the plaintiffs, as required by the letters extending employment to the plaintiffs. Even so, there can not be any reasonable expectation of a bonus precisely because Dreyfus paid these bonuses based upon the work done by the plaintiffs as well based on the discretionary

judgment of the defendants. Finally, the court fails to see how an employee performing his or her requisite job duties causes unjust enrichment to the employer. The court will not expand the rubric of unjust enrichment in this context.

For the reasons indicated, the defendants' motion to dismiss the cause of action for quantum meruit is granted.

D. Defamation

Finally, the defendants move to dismiss the last cause of action for defamation because the plaintiffs have failed to allege specific statements attributable to the defendants that are either slanderous, libelous, or otherwise defamatory to the plaintiffs. The court agrees.

Pursuant to CPLR 3016, in an action for libel or slander, "the particular words complained of shall be set forth in the complaint." In an action for libel, which is predicated upon a writing or publication, the alleged libel or the contents thereof, as well as the time of the issuance of the libel and to whom it was published must be pled (*Liffman v Booke*, 59 AD2d 687 [1st Dept 1977], citing *Bennet v Commercial Advertiser Assn.*, 230 NY 125 [1920]). "Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc." (*id.*). "In such an action the particular words complained of must be set forth in the complaint" (*id.*). It is obvious that the words must be attributable to the persons or entities who alleged spoke or wrote such words.

Here, even in construing the Complaint liberally, the court finds that the plaintiffs do not have a cause of action for defamation. First, the statements alleged are vague and conclusory in that the terms "pathetic" and "mediocre" performance do not lend themselves to a defamatory action (*accord Alanthus Corp. v Travelers Ins. Co.*, 92 AD2d 830 [1st Dept 1983] [A vague and conclusory allegation that the defendant has falsely stated in the business community at large that the plaintiff was unable to perform its duties under a[n] . . . agreement does not meet the minimum statutory

requirements]). In addition, the alleged remarks made are expressions of opinion, which are not actionable causes of action (*see Schwartz v Nordstrom, Inc.*, 160 AD2d 240 [1st Dept 1990], *app dismd without op* 76 NY2d 845 [1990], and *app den* 76 NY2d 711 [1990]).

Furthermore, the plaintiffs fail to demonstrate how these words are attributable to the defendants. While the plaintiffs allege that the defendants made oral remarks to a group of people regarding the poor performance of the Group, the plaintiffs fail to note who made the remark or to whom the statement was made. Finally, the plaintiffs argue that the defendants had an opportunity to correct misstatements that were in published news stories as to the Group being called a "golf cart." However, even if the defendants had an opportunity to correct any misstatements and chose not to, there is still no evidence or allegation that these statements came from the defendants, nor have the plaintiffs indicated who specifically provided such statements.

For the reasons set forth above, the defendants' motion to dismiss the cause of action for defamation is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants The Dreyfus Corporation, Stephen R. Byers, Stephen E. Canter, Martin G. McGuinn, and Mellon Financial Corporation's Motion to Dismiss is granted and the Second Amended Complaint is dismissed in its entirety, with costs and disbursements to the defendants as taxed by the Clerk of the court; it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: February 6, 2006

ENTER:

RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.

FILED

FEB 08 2006

COUNTY CLERK

NEW YORK OFFICE