

Gorelik v Mount Sinai Hospital Center

2003 NY Slip Op 30148(U)

October 9, 2003

Supreme Court, New York County

Docket Number: 0112865/2003

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

011286512003
GORELIK, DR. LYWBOV Y.

INDEX NO.

0112865/03

MOUNT SINAI HOSPITAL CENTER

MOTION DATE

8/21/03 to 10/6/03

SEQ 1

MOTION SEQ. NO.

1

DISMISS ACTION

MOTION CAL. NO.

29

The following papers, numbered 1 to 17 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

SCANNED		PAPERS NUMBERED
OCT	17	1-9, 10
		11-15, 16
		17

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

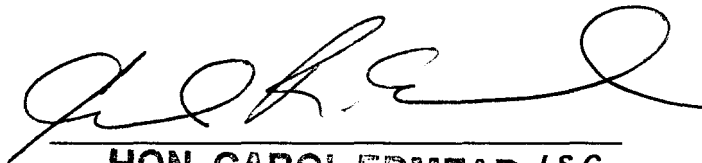
ORDERED that defendants' application pursuant to CPLR § 3211[a] [7] to dismiss plaintiffs Complaint with respect to the gender harassment claim and plaintiffs attempt to challenge the decision to place her on probation is granted, but denied in all other respects; and it is further

ORDERED that defendants' application pursuant to CPLR § 3212 for summary judgment is denied; and it is further

ORDERED that all parties are directed to appear before Justice Carol Edmead, Part 35, 71 Thomas Street, New York, **NY** on November 18, 2003 at 2:15 P.M.; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with Notice of Entry upon counsel for defendants within 20 days from the date of entry of this Order.

Dated: 10-10-03



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____x

DR. LYUBOV Y. GORELIK,

Plaintiff,

-against-

Index No. 112865/03

Decision and Order

MOUNT SINAI HOSPITAL CENTER,
DR. MICHAEL SERBY, DR. KENNETH DAVIS,
'John Doe,' 'Jane Doe,' representing
people unknown to the plaintiff at this time who aided
and participated in the acts complained of in this action,

Defendants.

_____x

Hon. Carol Edmead, J.S.C.

MEMORANDUM DECISION

Defendants move, pursuant to CPLR § 3211[a] [7], for an order dismissing the Complaint with prejudice, or in the alternative, pursuant to CPLR § 3212 for *summary* judgment.

Defendants raise four bases for dismissal of the complaint: (1) plaintiffs gender harassment claim should be dismissed because it is time barred; (2) plaintiffs breach of contract claim based on the House Staff Manual (the "Manual") should be dismissed because that Manual does not create a contract of employment; (3) plaintiffs breach of contract claim based on the residency contract between Mount Sinai and Plaintiff dated August 18, 1998; March 8, 1999 and May 25, 2000 (the "House Contract") should be dismissed because plaintiff failed to identify the specific provisions of that Contract upon which her claim is based; and (4) plaintiffs attempt to challenge the decision to place her on probation in the guise of a breach of contract claim should

be dismissed because the hospital's decision to place her on disciplinary probation was not arbitrary and capricious.

Plaintiff counters stating that "Plaintiffs Complaint sets forth only one cause of action. The Complaint clearly states that 'Davis and Serby's acts as detailed in [the Complaint] paragraphs 13- 17, 19-20 were proscribed by the [Manual] and breached plaintiffs contractual rights.'" (emphasis supplied)

Discussion

To the degree that the Complaint raises issues concerning (1) plaintiffs gender harassment claim; and (4) plaintiffs attempt to challenge the decision to place her on probation, defendants' motion to dismiss these claims is granted based on plaintiffs concession that no such issues exist in this case.

With respect to defendants' (2) basis to dismiss plaintiffs breach of contract claim, based on the fact that the Manual does not create a contract of employment; that application is denied.

In the case at bar, plaintiff clearly was a contract employee.' The issue is whether plaintiff can properly maintain her cause of action based on the House Contract's incorporation by reference of relevant provisions of the Manual.

CPLR § 3211[a] [7]

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the

'See House Contract (McEvoy Aff, Exh. B).

benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]).

An action to recover damages for the breach of an employment contract may be maintained where the existence of a limitation by express agreement, and reliance thereon, is demonstrated under certain circumstances (*see, Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 457 NYS2d 193, 443 NE2d 441 [1982]). However, in order to sustain a cause of action for breach of an employment contract in such an event, the Manual must contain clear and unambiguous expression of the incorporated rights and obligations. Plaintiff must also establish reliance on such an express language in the Manual (*see, Marvin v Kent Nursing Home*, 153 AD2d 553 [2d Dept 1989]).

In this case, plaintiff has sufficiently incorporated the Manual as it is so referenced to and

described in the House Contract, that it may be identified beyond all reasonable doubt.² The terms of the House Contract are specific as to employment, such as contract renewal, re-appointment and disciplinary actions. While plaintiff has established that the Manual is sufficiently referenced in the House Contract, at this juncture, it is premature to determine the second prong of that test: plaintiff's reliance thereon.

This court finds persuasive those portions of said Manual referenced in opposition to the motion which contain such provisions; hence this case is analogous to *Weiner v McGraw-Hill, Inc., supra*. In that case, an employee was permitted to maintain a claim against his employer for breach of a specific provision in a personnel handbook (to which his employment was made subject) which stated that employee dismissals would only occur for just and sufficient cause. Since similar facts are present in the instant case, the plaintiff's contractual claim must not be dismissed at this juncture (*contra, O'Connor v Eastman Kodak Co.*, 485 NYS2d 345 [2d Dept 1985]; *Sabetay v Sterling Drug*, 114 AD2d 6 [1st Dept 1986]).

With respect to defendants' motion to dismiss plaintiff's (3) breach of contract claim based on the House Contract because plaintiff failed to identify the specific provisions of the House Contract upon which her claim is based, that application, too, is denied. Contrary to defendants' contention, plaintiff identifies specific provisions in the Complaint that are sufficient to proceed. To wit: (1) "defendant Michael Serby, engaged in a repeated pattern of acts of sexual harassment and abuse as proscribed by the Manual" (complaint, par. 14); (2) "restrictions were placed on plaintiff's privileges" (Complaint, par. 19); (3) "Serby reversed his decision to fire plaintiff because he was threatened with reprisals from other residents" (Complaint, par. 23, 24);

²See House Contract (McEvoy Aff, Exh. B, ¶9).

* 6]
and (4) “Serby reversed himself again and terminated plaintiffs probation after terminating her an then modifying her termination” (Complaint, Par. 25). Therefore, in the instant matter, plaintiff sufficiently alleges the breach of the employment contract claim to maintain this action.

CPLR § 3212

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (*Id.*). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial or material questions of fact on which he rests his claim or must demonstrate an acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (*Alvord & Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276,281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910,912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285,290 [1973]). Contrary to plaintiffs contention, whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment (*see* CPLR § 3211 [c]).

In the instant action, defendants have failed to make *prima facie* showing of entitlement to judgment as a matter of law that they did not breach the House Contract. Thus, in light of the above, at this juncture, summary judgment is inappropriate. Accordingly, it is hereby

ORDERED that defendants’ application pursuant to CPLR § 3211[a] [7] to dismiss plaintiffs Complaint with respect to the gender harassment claim and plaintiffs attempt to

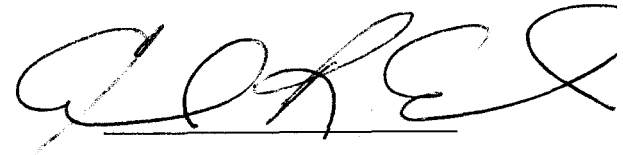
challenge the decision to place her on probation is granted, but denied in all other respects; and it is further

ORDERED that defendants' application pursuant to CPLR § 3212 for *summary judgment* is denied; and it is further

ORDERED that all parties are directed to appear before Justice Carol Edmead, Part 35, 71 Thomas Street, New York, ~~NY~~ on November 18, 2003 at 2:15 P.M.; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with Notice of Entry upon counsel for defendants within 20 days from the date of entry of this Order.

Dated: October 9, 2003

A handwritten signature in black ink, appearing to read 'CAROL EDMEAD', written over a horizontal line.

Hon. Carol Edmead