

**Taylor v New York University Medical Center**

2003 NY Slip Op 30188(U)

January 6, 2003

Supreme Court, New York County

Docket Number: 109216/02

Judge: Diane A. Lebedeff

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

PRESENT: DIANE A. LEBEDEFF

PART 8

*Justice*

Mark Taylor

INDEX NO. 109216/02

- v -

MOTION DATE 11/15/02

MOTION SEQ. NO. 001

New York University Medical Center

MOTION CAL. NO. 1

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for disc

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

} 1-6

**SCANNED**

JAN 10 2003

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JAN 06 2003



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: I.A.S. PART 8

-----X

MARK TAYLOR,

Plaintiff,

-against-

Index No. 109216/02  
Mot. Seq. No. 001

NEW YORK UNIVERSITY MEDICAL, CENTER  
and ANNETTE JOHNSON,

Defendants.

-----X

**DIANE A. LEBEDEFF, J.:**

Defendants New York University Medical Center, or the School of Medicine (“NYUSM”), and Annette Johnson, who is a vice dean and general counsel of NYUSM, move to dismiss the complaint brought by Mark Taylor based on a defense founded upon documentary evidence (CPLR 3211[a][1]), and for failure to state a cause of action (CPLR 3211[a][7]). The complaint asserts one cause of action for retaliation under Article 8 of the New York City Administrative Code, and a second cause of action for tortious interference with plaintiffs existing and prospective business and contractual relations with his former employer, MSB Strategies, Inc. (“MSB”) and its owner, Martin S. Begun.

Factual Background

Plaintiff has a separate lawsuit pending against NYUSM, in which he alleges the termination of his employment in October, 1997, was the result of sexual orientation discrimination. In early February, 2002, the Appellate Term affirmed a decision denying

NYUSM's motion for summary judgment, leaving plaintiffs claim for discriminatory termination to be tried (see *Taylor v. New York University Medical Center*, 2002 WL 257570, 2002 N.Y. Slip Op. 50060 [App. Term, 1st Dept. 2002]). The *New York Times* published an article reporting on the decision on February 13, 2002 (motion, exhibit F).

At the time the article was published, plaintiff was employed as a "consultant" by MSB, (complaint paras. 12-14), and was also the chair of Community Board 6 in Manhattan (see motion exhibit C). Mr. Begun also was formerly employed by NYU, and his company, MSB, was retained by NYUSM for public relations and lobbying work. Plaintiff alleges that, the day after the *New York Times* article was published, defendant Johnson faxed the article to Begun, and spoke to him by telephone (*id.*, paras. 15-17). He further alleges that Mr. Begun terminated plaintiffs employment with MSB the next day, and that within days thereafter NYUSM paid MSB past due invoices for lobbying work (*id.*, paras. 18-19).

In support of its motion to dismiss, NYUSM submits evidence that on February 12, 2002, plaintiff, in his capacity as chairman of Community Board 6, had distributed a letter to at least 50 people, including defendant Johnson and four others at NYUSM, using MSB's fax machine. Taylor's letter, dated February 11, 2002, urged the City's Independent Budget Office to investigate questions concerning East River Science Park, which defendants describe as a major biomedical research-related initiative to promote development of life science enterprises and research in the City, and to supplement and improve medical research central to the School of Medicine's mission (Meloy affidavit, exhibits C and D). According to NYUSM, MSB and Begun had been engaged by NYUSM

to assist with governmental relations related to the East River Science Park project, and other matters (*id.*, exhibits I and J).

Defendants argue that plaintiffs February 11th letter raised an obvious conflict of interest, and that plaintiff voluntarily left MSB's employ after his conflict of interest became evident. Ms. Johnson's fax to Mr. Begun on February 13th enclosed both Taylor's February 11, 2002, letter, and the New York *Times* article concerning Taylor's lawsuit (Meloy affidavit, exhibit E). Defendants also submit a letter from Mr. Begun to plaintiff, which states that plaintiffs "departure" from MSB was "entirely at your initiative," and that NYU did not ask that he discontinue the relationship (*id.*, exhibit H). There is also documentary evidence showing that payment requests for MSB's retainer were processed before February 11, 2002, not days after plaintiff left MSB (Meloy affidavit para. 12 and exhibits I and J). In reply, defendants submit affidavits of Mr. Begun and Ms. Johnson, who state that Ms. Johnson did not ask MSB to terminate its relationship with Mr. Taylor, and that Mr. Taylor severed his "consulting relationship" with MSB because of the conflict of interest resulting from his activities on behalf of the Community Board (Begun affidavit, para. 4; Johnson, affidavit para. 3).

#### Motion to Dismiss

Dismissal based on documentary evidence "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 A.D.2d 243, 246 [1st Dept. 2000]). Defendants' evidentiary submissions raise issues of fact that cast doubt on plaintiffs ability to prevail on his claims, but they do not "conclusively" establish any

defense. In particular, plaintiff denies that his departure from MSB was voluntary, and contests defendants' assertion that MSB represented NYUSM in connection with East River Science Park. Accordingly, dismissal is not warranted under CPLR 3211(a)(1).

When considering a motion to dismiss on the face of the pleadings, it is well settled that "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268,275 [1977]). The factual allegations of the complaint are to be taken as true, and the complaint must be interpreted in a fair and reasonable manner (see, e.g., *Tobin v. Grossman*, 24 N.Y.2d 609,612 [1969]; *Williams v. Williams*, 23 N.Y.2d 592 [1969]).

Plaintiffs first cause of action is based on section 8-107 of the Administrative Code of the City of New York Human Rights Law ("HRL"), which, among other things, makes it unlawful for an employer in its employment practices to discriminate against any person because of sexual orientation (HRL § 8-107[1][a]). Plaintiff brings suit under HRL § 8-107(7) which makes it "an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has ... (iii) commenced a civil action alleging the commission of **an** act which would be an unlawful discriminatory practice under this chapter."

To establish a prima facie case of retaliation, **an** employee must show that (1) he was engaged in a protected activity, (2) the employer was aware of the activity, (3) the employer thereafter took some adverse employment action against him, and (4) a causal connection exists between participation in the protected activity and the adverse

employment action (*Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 [2d Cir.1996]; accord *Cifra v. General Electric Co.*, 252 F.3d 205,216 [2d Cir.2001]). Although neither party addresses the issue, NYUSM was not plaintiffs “employer” in February, 2002, and did not take “adverse employment action” against him at that time (see *Smith v. AVSC Intern., Inc.*, 148 F. Supp.2d 302, [SDNY 2001]; see *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 542 [1984], **an** “employer” under the State Human Rights Law is a person with either **an** ownership interest in the company or some form of control over the plaintiffs employment status). Under these circumstances, plaintiff does not have a claim against NYUSM and Johnson under the Administrative Code in relation to the termination of his relationship with the Begun **firm**.

**As** to the cause of action for tortious interference with contract, the elements of such claim are “the existence of a valid contract, the tortfeasor’s knowledge of the contract and intentional interference with it, the resulting breach and damages” (*Hoag v. Chancellor, Inc.*, 246 A.D.2d 224,228 [1st Dept. 1998]). The complaint does not allege that plaintiff was employed pursuant to a contract for a definite term, and it appears from the submissions that plaintiff had an at-will consulting arrangement with MSB (see Taylor affidavit, para. **8** “during the time in question I worked virtually full time in Mr. Begun’s offices”). It is well-established that, because at-will agreements are classified as only “prospective contractual relations,” they cannot support a claim for tortious interference with existing contracts (*Thawley v. Turtell*, 289 A.D.2d 169 [1st Dept. 2001]). Accordingly, plaintiffs tortious interference claim can only be for interference with business relations.

To establish such a claim, a “plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff” (*Scalise v. Adler*, 267 A.D.2d 295 [2d Dept. 1991]). Plaintiff has not alleged that defendants were “motivated solely by a desire to harm him” (*Snyder v. Sony Music Entertainment, Inc., supra*, 252 A.D.2d at 300), and, in light of the evident conflict of interest, such an allegation could not be made. As to wrongful means, the complaint alleges that defendant Johnson faxed an article and letter to Mr. Begun, and discussed them with him, after which plaintiff was fired and MSB received payment on overdue invoices. While, as plaintiff argues, a causal connection between these events may be inferred, “defendants’ actions, as alleged, amount to no more than ‘simple persuasion,’ and, as such, do not constitute the sort of coercive, maliciously motivated wrong required to support a cause of action for tortious interference with prospective business relations” (*Dilimetin & Dilimetin v. Stein*, 297 A.D.2d 601 [1st Dept. 1999]; see also, *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294,299-300 [1st Dept. 1999], summary judgment granted absent showing of wrongful means or that sole motive was to harm employee, and given evidence that plaintiffs outside work put his employment by law firm at risk).

Accordingly, defendants’ motion to dismiss the complaint is granted. No sooner than five days after service of a copy of this order with notice of entry upon defendant and a proposed judgment, the clerk shall enter judgment accordingly upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: January 6, 2003

A handwritten signature in black ink, appearing to be 'D. J. C.', written above a horizontal line.

J.S.C.