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

PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

LINDA A. STARK, ESQ.,

Plaintiff,

-against-

MOLOD SPITZ DeSANTIS et al.,

Defendants.

INDEX NO. 105073/04

MOTION SEQ. NO. 001

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001 and 002 are consolidated herein for decision. Initially, the court notes that the case management system incorrectly indicates that motion sequence number 001 was decided on June 8, 2004. It was not. On that date, the court merely issued a temporary restraining order.

Plaintiff Linda Stark is a personal injury lawyer who was a contract employee with the defendant law firm Molod Spitz & DeSantis. Soon after her employment was terminated on May 22, 2003, she commenced a special proceeding against the firm in this court by order to show cause (NY Co Index No 109625/03). The petition sought an order (1) substituting plaintiff in place of the firm in various personal injury cases in which a consent to change attorney form had been signed by the clients, (2) requiring the firm to turn over all of the relevant case files to her, (3) declaring that the firm need not be reimbursed for disbursements which it had expended until the completion of each case, (4) directing the firm to compensate plaintiff for her unused vacation time, unpaid salary and expenses and (5) prohibiting the firm from working on or billing those cases in which its clients had indicated that they wished plaintiff to be their attorney. In opposing the petition, the firm cross-moved for an order directing plaintiff to return various files which she had allegedly removed prior to her departure.

The proceeding was discontinued on June 17, 2003 pursuant to a stipulation "so ordered" by the court which resolved all of the issues raised between the parties in the petition. The stipulation required, *inter alia*, that the firm execute substitution stipulations in cases where the clients agreed that plaintiff would be taking over as the attorney of record. The firm also agreed to permit plaintiff to defer the payment of disbursements to the firm until the conclusion of each case. Plaintiff agreed to open a joint escrow account in the amount of $38,000 which would be used to pay any disbursements owed to the firm at the conclusion of each case.

On October 8, 2003, plaintiff purported to commence a plenary action in this court seeking relief which was almost identical to the relief demanded in the special proceeding. Upon the defendants' motion, the court dismissed the complaint, finding that it was a nullity because plaintiff had failed to purchase a new index number and had simply served defendants with a summons and complaint bearing the same index number as the special proceeding which had been discontinued. In dismissing the complaint, the court noted that if plaintiff wished to set aside or enforce the stipulation of settlement, she was required to commence a plenary action since the stipulation terminated her earlier lawsuit. *See Teitelhaum*

Holdings, Ltd. v. Gold, 48 NY2d 51, 53 (1979); *HCE Assocs. v. 3000 Watermill Lune Realty Cor.*, 131 AD2d 543 (2nd Dept. 1987).

Plaintiff has now instituted this action in which she asserts five causes of action. None of these causes of action seek to set aside or enforce the stipulation. Rather, the first cause of action seeks damages for breach of contract. The second cause of action seeks damages for gender-based discrimination and harassment in violation of the New York City Charter and the New York City Human Rights Law (NYC Admin. Code § 8-107). The third cause of action is for damages incurred as the result of the firm's allegedly withholding client files from plaintiff after she was terminated. The fourth cause of action seeks damages for the firm's allegedly improper withholding of salary, benefits and vacation pay from plaintiff. The fifth cause of action is for defamation.

In motion sequence number 001, defendants have moved to dismiss the complaint on the ground that plaintiff's claims in the first four causes of action are identical to the claims she asserted in the prior special proceeding and in her nullified complaint. Defendants argue that these claims either were resolved by the stipulation of settlement or are subject to arbitration pursuant to plaintiff's employment agreement with the firm. Alternatively, defendants seek a permanent stay of those claims which are subject to arbitration. Defendants also move to dismiss plaintiff's fifth cause of action for defamation on the ground that plaintiff has failed to plead with particularity the specific words that she alleges to have been defamatory. In turn, plaintiff has cross-moved for an order restraining defendants from making any application, pursuant to section 475 of the Judiciary Law, for the determination and payment of legal fees and/or disbursements in various personal injury cases which have been or are before other courts. Plaintiff has also cross-moved for summary judgment on her fourth cause of action for compensation for unpaid wages, vacation time and unreimbursed expenses. In motion sequence number 002, plaintiff repeats her application for an order restraining the defendants from commencing any actions or otherwise applying to the courts for legal fees from her or her clients

Discussion

As already noted, in motion sequence number 001, defendants have moved to dismiss the first four causes of action on the ground that these claims either were resolved by the stipulation of settlement or are subject to arbitration pursuant to plaintiff's employment agreement with the firm. Alternatively, they seek a permanent stay of any claims raised herein which are subject to arbitration.

In her first cause of action for breach of contract, plaintiff alleges that she was wrongfully terminated by the firm after she refused to renegotiate her employment contract. Her alleged damages include loss of back pay and job benefits, as well as emotional and physical injuries. This claim is substantially identical to the claim in plaintiff's original petition in which she sought an order compensating her for unused vacation time, unpaid salary and expenses she accrued while employed by the firm. These claims were resolved pursuant to the stipulation of settlement. It is well established that a stipulation of settlement is contractual in nature and to be strictly enforced, and that a party will not be relieved from its consequences unless he or she can establish a sufficient basis to invalidate a contract, such as fraud, collusion, mistake or accident. *See Quality Ceramic Title & Marble Co., Ltd., v. Cherry Valley Limited Partnership*, 259 AD2d 607 (2nd Dept. 1999); *HCE Associates v. 3999 Watermill Lune Realty Corp.*, 131 AD2d 543 (2nd Dept. 1987). Here, plaintiff has not alleged that there are grounds to set aside the stipulation of settlement. Indeed, her complaint fails to even mention the stipulation of settlement. The first cause of action must therefore be dismissed.

As to the second cause of action for discrimination and harassment based on gender, defendants argue that this claim is subject to binding arbitration pursuant to the terms of the parties' employment agreement. The court agrees. The employment contract contains an arbitration clause which requires that all disputes arising out of the terms and conditions of the agreement be submitted to binding arbitration. Plaintiff's second cause of action is clearly subject to arbitration since it relates to the terms and conditions of her employment agreement with the firm. However, an agreement to arbitrate cannot be the basis for a motion to dismiss. *See Allied Building Inspectors International Union of Operating Engineers, Local Union NO. 211, AFL-CIO v. Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738 (1978); *Blatt v. Sochet*, 199 AD2d 451, 453 (2nd Dept. 1993). Nevertheless, under CPLR 7503(a), it can provide the basis for an order compelling arbitration and permanently staying the action where, as here, the movant has sought a stay. *See Marshall Ray Corp. v. Haedke & Co.*, 16 NY2d 967, 969 (1965); *Heimlich v. Charlton Lithographing, Inc.* 103 Misc2d 741, 743 (Sup Ct. New York County 1979); *A. Burgart, Inc. v. Foster-Lipkins Corp.*, 63 Misc2d 930 (Sup Ct. Monroe County 1970), *aff'd*, 38 AD2d 779 (4th Dept), *aff'd*, 30 NY2d 901 (1972).

There is no merit to the plaintiff's argument that defendants have waived the arbitration provision in the employment agreement by entering into the June 17, 2003 stipulation of settlement. Indeed, prior to settling the petition, defendants argued that the claims raised were subject to the arbitration clause in the employment agreement. At no time did the defendants abandon or waive their right to have the contractual disputes between the parties resolved in the arbitration forum. Nor is there any merit to plaintiff's argument that defendants' various applications for the allocation of legal fees in personal injury cases in which defendants claim an interest constitute a waiver of the arbitration clause in the parties' employment agreement. These applications were made pursuant to section 475 of the Judiciary Law and are entirely separate and discrete proceedings from any of the matters initiated by plaintiff. Plaintiff did not previously object to these applications for fee allocation or argue that the dispute over legal fees was related to her claims for breach of the employment agreement. Under the circumstances, the court is persuaded that the second cause of action should be permanently stayed and the parties directed to proceed to arbitration on this claim.

As to plaintiff's third cause of action, her claim that she sustained damages when defendants locked her out of her office and withheld client files from her was resolved by the stipulation of settlement. Since she is therefore barred from again asserting this claim, the third cause of action should be dismissed.

In her fourth cause of action, plaintiff alleges that defendants withheld salary, vacation pay, expense money and bonus money from her. As noted above, this claim was already raised in the special proceeding and resolved by the stipulation of settlement. It must therefore be dismissed.

The defendants have also moved to dismiss the fifth cause of action for defamation. The complaint alleges that the defendants made disparaging and false accusations about plaintiff in various letters and affirmations to judges, clients, lawyers and members of the community. In moving to dismiss, defendants argue that the complaint is deficient because the particular words complained of are not set forth as required under CPLR 3016(a). The court agrees and further notes that to the extent any of the allegedly defamatory language was used in, or was pertinent to, any judicial proceedings, it is protected by an absolute privilege. *See Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 (1st Dept. 1999). Relying on a letter written by defendants to the New York State Insurance Liquidation Department claiming that plaintiff had not timely filed substitution of attorney forms, plaintiff requests an opportunity to replead her defamation cause of action. This letter, however, falls far short of what is required to establish a defamation claim. The fifth cause of action must therefore also be dismissed.

As already noted, plaintiff has cross-moved for an order restraining defendants from making any application, pursuant to section 475 of the Judiciary Law, for the determination and payment of legal fees and/or disbursements in various personal injury cases which have been or are before other courts. In motion sequence 002, plaintiff has moved by order to show cause for the identical relief. It is well settled that in order to obtain such a preliminary injunction, the movant has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a balancing of the equities in its favor. *See Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 (1990). Plaintiff does not even address these standards. In any event, the plaintiff has not provided this court with any reason or legal basis for preventing the defendants herein from applying for legal fees to the particular judges who have been assigned to preside over a particular personal injury action. Plaintiff's cross-motion must therefore be denied.

Accordingly, in motion sequence number 001, defendants' motion to dismiss is granted to the extent that the first, third, fourth and fifth causes of action are hereby dismissed. Their alternative application for a permanent stay is granted with respect to the second cause of action. The second cause of action is hereby permanently stayed and the parties are directed to proceed to arbitration on this claim. Plaintiff's cross-motion is denied. In motion sequence number 002, plaintiff's motion for a preliminary injunction is also denied. The temporary restraining order which the court previously issued is hereby lifted.

The Clerk Shall Enter Judgment Herein

Dated: 10/4/04

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION