

Durso v Baisch

2005 NY Slip Op 30309(U)

July 7, 2005

Supreme Court, Suffolk County

Docket Number: 01-24903

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 3-12-04
CAL. DATE 12-8-04
Mot. Seq. # 001 - MD

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JAMES E. DURSO and JOAN M. DURSO, :
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 Plaintiffs, :
 :
 - against - :
 :
 MARK E. BAISCH, LAMB VENTURES OF :
 SUFFOLK, LTD., LANDMARK PROPERTIES :
 OF SUFFOLK LTD., OAK CHASE :
 DEVELOPMENT, LTD., PB DEVELOPERS, INC. :
 and SPECTACULAR HOLDING, LTD., :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 12; Notice of Cross-Motion and supporting papers _____;
Answering Affidavits and supporting papers 13 - 19; Replying Affidavits and supporting papers 20 - 21;
Other 22 - 23; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the defendants for partial summary judgment dismissing plaintiff's first, second, third and sixth causes of action is granted.

In this action, plaintiffs seek damages alleging, *inter alia*, breach of an employment contract, discrimination due to a disability and intentional infliction of emotional distress. The facts as alleged in the verified complaint are as follows. The plaintiff, James E. Durso (Durso) is an attorney duly admitted to practice law in New York. Durso contends that the defendant, Mark E. Baisch (Baisch), individually, and in his corporate capacity as the sole shareholder and director

of each of the individually named corporate defendants¹, jointly and severally, entered into a written employment agreement effective on or about June 1, 2000. Durso claims that under the agreement he was to be employed by the defendants for a term of five (5) years as the president, chief executive officer and general counsel for each of the individually named corporations. Durso also contends that he was Baisch's personal attorney under a general retainer for the same term of years.

Under the alleged agreement Durso's compensation consisted of: 1) ten thousand (\$10,000.00) dollars per month gross; 2) company benefits; and 3) ten (10%) percent of the combined profits of the defendant corporations except that in the year 2000 he would receive a prorata share consisting of 7/12 of ten (10%) percent of the combined profits. Durso alleges that the agreement also provided for the sale of Durso's residence and office to defendants. In return defendants agreed to finance Durso's purchase of a new residence which is evidenced by two (2) promissory notes dated July 23, 2000 and August 15, 2000 in the amounts of fifteen thousand (\$15,000.00) dollars and two hundred eighty five thousand (\$285,000.00) dollars, respectively. Durso contends that he performed the required services under the employment agreement and on or about June 6, 2001, defendants terminated Durso's employment, cancelled his benefits, failed to pay his June 2001 salary in the amount of ten thousand (\$10,000.00) dollars and did not pay the agreed percentage of the combined profits of the defendant corporations for the year 2000 nor have they paid him his share of the combined profits, although demanded, for the years 2001 - 2005. Durso alleges that due to defendants' anticipatory breach he is entitled to damages and to be discharged from any obligation to repay the balance of the principal and interest due under the promissory notes issued for his purchase of a new residence.

Durso further alleges that on or about April 18, 2001 he suffered a heart attack and underwent coronary by-pass surgery. He returned to work on April 26, 2001. Durso alleges that he was subsequently discharged on June 6, 2001 due to a perceived disability concerning his medical condition and on the basis of a disability, his heart condition, as that term is defined in Executive Law 292 (21).² Durso contends that his discharge was malicious, willful and intolerable under the circumstances and seeks damages for intentional infliction of emotional distress.

Defendants now move for partial summary judgment dismissing Durso's first, second,

¹ Lamb Ventures of Suffolk, Ltd., Landmark Properties of Suffolk, Ltd., Oak Chase Development, Ltd., PB Developers, Inc. and Spectacular Holding, Ltd.

² Plaintiff's fourth and fifth causes of action sounding in discriminatory discharge were not included in defendants motion and are excluded from discussion herein.

Defendants now move for partial summary judgment dismissing Durso's first, second, third and sixth causes of action. Defendants submit in support of the motion, *inter alia*, a copy of the purported agreement, a copy of the summons and verified complaint, excerpts from the deposition transcript of Mark Baisch dated December 3, 2002, excerpts from the deposition transcript of James Durso dated November 22, 2002, memoranda between Durso and Baisch and the respective promissory notes.

In opposition, plaintiff submits, *inter alia*, his personal affidavit, excerpts from his deposition, a verification of employment letter signed by Baisch and a memorandum from Durso to Baisch dated July 23, 2000.

Durso's first, second and third causes of action allege: 1) breach of an employment contract; 2) breach of contract requiring an accounting of the combined profits of the defendant corporations and 3) breach of contract requiring discharge of the balance due of principal and interest on the two promissory notes. The first issue on this motion for partial summary judgment is whether the documents presented by Durso are an enforceable employment agreement under the statute of frauds.

It is well settled in a contract action that in order for a contract to be enforceable a memorandum sufficient to meet the requirements of the Statute of Frauds (General Obligations Law 5-701) must contain expressly, or by reasonable implication, all the material terms of the agreement between the parties (*Intercontinental Planning, Ltd. v Daystrom, Inc.*, 24 NY2d 372, 378-79, 300 NYS2d 817, 822 [1969]). The elements of an effective employment contract consist of the identity of the parties, the terms of employment, which include the commencement date, the duration of the contract and salary (*Merschrod v Cornell University*, 139 AD2d 802, 805, 527 NYS2d 109,111 [1988]). Multiple writings may satisfy the requirements of the Statute of Frauds where the terms of an agreement are established by a combination of signed and unsigned documents, letters or other writings between the parties. However "at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged, while the unsigned document must on its face refer to the same transaction as that set forth in the one that was signed" (*Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 56 [1953]).

In the instant case, the alleged written employment agreement presented by Durso in support of his breach of contract claim consists of two (2) pages of handwritten notes, dated only with the notation "6/12/00" on one page and "6/12" on the subsequent page. The only names identified in the body of the purported agreement are "Durso", "Baisch", "Landmark", "PB Dev", "Lamb", "Spectacular, et al" and "Marbai". The documents are not signed by Baisch, either individually or in his corporate capacity as sole shareholder and director of any of the individual corporate defendants. The only indication that the memoranda concern the

w/Baisch” which Durso admits is his handwriting and was not written by Baisch. Further, the alleged agreement does not identify the position or positions to be held by Durso nor is there any reference on either of the two pages of a date commencing the agreement, a termination date for the agreement or the duration of the agreement. The only reference to a five (5) year term is contained on the second page of the purported agreement concerning speculative future profits presumably of the corporate defendants. In opposition herein, Durso submitted a letter signed by Baisch which verified his employment with Lamb Ventures, Inc. as president and chief executive officer, and also verified his compensation and annual bonus for 2000. This letter however does not make reference to the duration of employment and is limited to Lamb Ventures, Inc. This letter does not establish a contractual relationship between Durso and the defendants even though it is signed by Baisch (*Crabtree v Elizabeth Arden Sales Corp.*, *supra*). Without an express agreement, courts will not infer a contractual limitation on an employer’s right to terminate at-will employment (*see, Doynow v Nynex Publishing Company*, 202 AD2d 388, 608 NYS2d 683 [1994]). Since there is no enforceable agreement under the Statute of Frauds, Durso was an at-will employee and defendants’ motion dismissing the first, second and third cause of action for breach of contract is granted.

Durso’s sixth cause of action for intentional infliction of emotional distress for wrongful termination is also dismissed. Liability for intentional infliction of emotional distress requires conduct which is so outrageous that it transcends the bounds of decency and is regarded as atrocious and intolerable in a civilized society (*Buccieri v Franzreb*, 201 AD2d 356, 358, 607 NYS2d 330, 332 [1994]). To support an intentional tort it must be established that a defendant, by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress (*Doin v North American Carbide of New York, Inc.*, 112 AD2d 499, 490 NYS2d 910 [1985]). The defendants’ acts of requesting the return of a leased car from Durso’s wife while he was in the hospital, excluding Durso from meetings after he returned to work and finally, termination of his employment are not so extreme and outrageous to sufficiently support an intentional infliction of emotional distress cause of action (*Fama v American International Group, Inc.*, 306 AD2d 310, 760 NYS2d 534 [2003]) in circumvention of the “at-will” employment rule in New York (*Id.*, *see, Murphy v American Home Products Corp.*, 58 NY2d 293, 461 NYS2d 232 [1983]).

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial (*see, Romano v St. Vincent’s Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1991]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (*see, Schulz v Esposito*,

210 AD2d 307, 619 NYS2d 774 [1994]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where the material issue of fact is "arguable," summary judgment must be denied (*see, Salino v IPT Trucking*, 203 AD2d 352, 610 NYS2d 77 [1994]).

The plaintiff failed to raise a triable issue of fact in opposition to the defendant's prima facie showing of entitlement to judgment dismissing the first, second, third and sixth causes of action for breach of contract and intentional infliction of emotional distress (*see, Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]). Therefore, the first, second, third and sixth causes of action are dismissed. The remaining causes of action are severed and shall continue.

Dated: JUL 07 2005

Rae Helen
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION