

Manas v VMS Assoc., LLC
2007 NY Slip Op 30574(U)
March 30, 2007
Supreme Court, New York County
Docket Number: 0602150/2006
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Daniela Manas

INDEX NO. 602150/06

MOTION DATE _____

- v -

VMS Associates LLC et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>& Memos</u>	<u>1, 2</u>
Answering Affidavits — Exhibits <u>Memo</u>	<u>3</u>
Replying Affidavits <u>Memo</u>	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is denied
in accordance with the attached memorandum decision

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

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

Dated: 3/30/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION [* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----- X
DANIELA MANAS,

Plaintiff,

INDEX NO.
602150/06

-against-

Motion Seq.
001

VMS ASSOCIATES, LLC d/b/a VIOLY AND
COMPANY, and VIOLY McCAUSLAND-SEVE,
Defendants.

----- X

DORIS LING-COHAN, J.:

FILED
APR 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants VMS Associates, LLC d/b/a Violy and Company ("VMS") and Violy McCausland-Seve ("Violy") move pursuant to CPLR 3211(a)7 and 3016(b) for an order: (i) dismissing Counts II and VI in plaintiff's complaint for failure to state a cause of action and failing to plead fraud with particularity; and (ii) dismissing Counts III, IV, V and VII for failure to state a cause of action.

Plaintiff commenced this action seeking to recover unspecified damages, including punitive damages, stemming from her former employment as a vice president for VMS.

According to the complaint: VMS is an international investment banking firm founded in 2003 by Violy. Plaintiff had been employed as a vice-president by VMS's predecessor, VBP, which ceased doing business in 2003. To secure plaintiff's services for VMS, Violy represented to plaintiff that she would receive adequate salary and bonus compensation for past and future services. Those representations involved a short-term and long-term compensation plan which included salary, bonus compensation, and other benefits. Plaintiff joined VMS as a vice-president in reliance on Violy's representations. With the exception of one bonus, plaintiff did

not receive the promised compensation, including bonuses, despite repeated assurances by Violy and her representatives that plaintiff would be appropriately compensated. In response to plaintiff's increasing complaints regarding outstanding sums of unpaid income, her services were terminated in April 2006. Thereafter, Violy made false and derogatory statements about plaintiff to members of the financial community, including plaintiff's former colleagues and clients.

Plaintiff commenced this action in June 2006. The complaint contains seven causes of action referred to as "Counts." Count I (breach of contract), asserted against VMS, alleges that VMS breached its contract with plaintiff by failing to pay the promised compensation. Count II (fraudulent inducement), asserted against both defendants, alleges that they fraudulently induced plaintiff to join VMS by falsely representing that she would receive certain short-term and long term compensation consisting of salary and bonuses. Count III (promissory estoppel), asserted against VMS, alleges a claim for estoppel based on defendant's allegedly false representations concerning plaintiff's short-term and long-term compensation, including bonuses. Count IV (unjust enrichment/restitution), asserted against VMS, alleges that defendant inequitably received and continues to receive the benefit of plaintiff's services without paying adequate compensation therefore. Count V (quantum meruit), asserted against VMS, tracks Count IV. Count VI (fraud), asserted against both defendants, alleges that they knowingly made false representations to plaintiff concerning her compensation to induce her to continue her employment at VMS. Punitive damages are sought on this Count based on defendants' "knowing and intentional conduct." Count VII (defamation) asserted against Violy alleges that she knowingly made numerous false, derogatory, and humiliating statements about plaintiff and her lack of competence as an employee and banker to VMS clients and other influential members of the banking industry with the intent of causing emotional harm to plaintiff. Punitive damages are

requested on this Count as well.

Defendants have moved to dismiss all Counts but the first (breach of contract). They argue that Counts II and VI (plaintiff's fraudulent inducement and fraud claims) must be dismissed because they are simply restatements of her breach of contract claims and because plaintiff fails to allege fraud or fraudulent intent with the requisite particularity. Defendants further argue that Count III must be dismissed because the purported promissory estoppel claim is a "carbon copy" of the Count II fraud claim which, in turn, is duplicative of the breach of contract claim and because plaintiff fails to allege a "clear and unambiguous" promise or any kind of "unconscionable injury." Next, defendants argue that Counts IV and V (unjust enrichment and quantum meruit) must be dismissed because they are duplicative of the breach of contract claim. Defendants also argue that Count VII (defamation) should be dismissed because the allegations of the complaint are insufficiently specific, plaintiff failed to plead special damages and some of the allegations concerning plaintiff are nothing more than expressions of opinion or are otherwise protected by a qualified privilege. Finally, defendants contend that plaintiff's claims for punitive damages must be dismissed because plaintiff's underlying tort claims cannot be sustained and because no harm directed at the public generally or morally reprehensible conduct is alleged.

The standards applicable to a motion to dismiss pursuant to CPLR 3211(a)7 are set forth by the First Department as follows:

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the

motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (Guggenheimer v Ginzburg, 43 NY2d 268, 275)

(*Khan v. Newsweek, Inc.* 160 AD2d 425, 426 [1st Dept 1990]). However, factual allegations that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration (see *Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 [1st Dept 1994]).

To state a claim for fraudulent inducement, plaintiff must allege that she reasonably relied on a material misrepresentation by defendant and that she suffered an injury as a result of that reliance (see *Skillgames, LLC v. Brody*, 1 AD3d 247, 250 [1st Dept 2003]). Count II of the complaint alleges, *inter alia*, that plaintiff reasonably relied to her detriment on defendants' misrepresentation that she would be compensated through a short-term and long-term compensation plan including salary, bonuses and other benefits if she accepted defendants' employment offer (see complaint, defendants' exhibit 1, ¶¶ 65-71). A promise made with a preconceived and undisclosed intention of not performing it constitutes a misrepresentation and not a mere promissory statement as to what will be done in the future (see *Deerfield Communications Corporation v. Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986], but see *Country-Wide Leasing Corp. v. Subaru of America, Inc.* 133 AD2d 735 [2d Dept 1987] app den 70 NY2d 615 [1988]). The court finds that Count II is validly pleaded.

To state a viable cause of action for promissory estoppel (Count III), the following elements must be present: (1) a sufficiently clear and unambiguous oral promise; (2) reasonable reliance on the promise; and (3) injury caused by the reliance (see *New York City Health and Hospitals Corporation v. St. Barnabas Hospital*, 10 AD3d 489, 491 [1st Dept 2004]). The doctrine of promissory estoppel is not properly invoked unless the plaintiff suffers

unconscionable injury and loss as a result of relying on the promise of another (see *American Bartenders School, Inc. v. 105 Madison Company*, 59 NY2d 716, 718 [1983]; *Melwani v. Jain*, 281 AD2d 276, 277 [1st Dept 2001]). The acts complained of herein do not add up to unconscionable injury. Accordingly, plaintiff's third cause of action for promissory estoppel is dismissed.

Counts IV and V (unjust enrichment and quantum meruit) are adequately pleaded. The general rule is that an enforceable written contract precludes recovery in quasi contract with respect to events arising from the same subject matter (see *Curtis Properties Corporation v. Greif Companies*, 236 AD2d 237, 239 [1st Dept 1997]). However, a plaintiff may proceed on both breach of contract and quasi-contract theories where there is a genuine dispute as to the existence of a contract (*id.*; see also CPLR 3014; *Auguston v. Spry*, 282 AD2d 489, 491 [2d Dept 2001] [causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively]). The fact that defendants are not seeking dismissal of plaintiff's first cause of action for breach of contract does not mean that they concede the existence of a valid contract. In addition, a quantum meruit recovery is proper where a defendant wrongfully prevents plaintiff's performance of a written agreement (which may or may not exist herein) (see *Curtis Properties Corporation v. Grief Companies, supra*).

"The essential elements of a cause of action for fraud (Count VI) are 'representation of a material existing fact, falsity, *scienter*, deception and injury [citation omitted]'" (*New York University v. Continental Insurance Company*, 87 NY2d 308, 318 [1995]). Count VI of the complaint alleges that defendants represented that they "would" clarify the firm's long-term compensation plan and "would" fairly compensate plaintiff with salary, bonus compensation and other benefits (see defendants' exhibit 1, ¶ 92 a and b). Defendants' promises of future rewards

do not qualify as a representation of a material existing fact. However, Count VI also alleges that defendants represented that VMS lacked sufficient funds to pay plaintiff the compensation owing to her (*id.* ¶ 92 c). Under the liberal standards applicable herein, this alleged representation prevents the dismissal of plaintiff's sixth cause of action.

The elements of defamation (Count VII) are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at minimum, a negligence standard, which causes either special harm or constitutes defamation *per se* (see *Dillon v. City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). In addition, CPLR 3016(a) requires that the particular words complained of be set forth in the complaint and the complaint must allege the time, place and manner of the false statement and to whom the statement was made (*id.*). Here, the complaint alleges in pertinent part as follows: Violy told Robert Lovejoy that she terminated plaintiff for her failure to properly advise Violy on the status of the Codere deal; Violy told plaintiff's colleagues and members of the Board of Advisors that plaintiff was fired for being a difficult employee and using an expletive with a co-advisor on the Vitro deal; and Violy told Arturo Alemany that plaintiff was terminated because VMS lost a prospective deal with the Cisneros group due to plaintiff's incompetence (see defendants' exhibit 1, ¶¶ 54-56). "Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation [citation omitted]" (*Armstrong v. Simon & Schuster, Inc.*, 85 NY2d 373, 380 [1995]).

The alleged statements are reasonably susceptible to a defamatory connotation and may arguably constitute defamation *per se*. Given the liberal standards applicable herein, the court finds that Count VII should be sustained.

Finally, the facts alleged do not establish willful, gross or wanton fraud or other morally

culpable or reprehensible conduct such as to warrant the imposition of punitive damages (see *Cohen v. Mazoh*, 12 AD3d 296, 297 [1st Dept 2004]; see also *New York University v. Continental Insurance Company*, *supra*, 87 NY2d at 315-316 [punitive damages available only in limited circumstances where it is necessary to deter gross, morally reprehensible or wantonly dishonest conduct or egregious conduct directed at the public generally]).

Accordingly, it is hereby

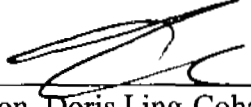
ORDERED that defendants' motion to dismiss is granted only to the extent that Count III (promissory estoppel) of the complaint and plaintiff's claims for punitive damages are hereby dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants' motion is in all other respects denied, and it is further

ORDERED that defendant shall serve an answer to the remaining counts in the complaint within twenty (20) days from service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

DATED: March 30 , 2007


Hon. Doris Ling-Cohan, J.S.C.

HON. DORIS LING-COHAN

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