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

PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

SUZY SPAROZIC,

Plaintiff,

- v -

HOGAN & HARTSON, L.L.P. and SQUADRON ELLENOFF PLESENT & SHEINFELD, LLP,

Defendants.

INDEX NO. 108966/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers, numbered 1 to 3 were read on this motion to/for dismiss complaint.

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	

Cross Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is disposed of as set forth below.

Background

Suzy Sparozic, plaintiff *pro se* (plaintiff or Sparozic), brings this action to recover damages from defendants Hogan & Hartson, L.L.P. (H&H) and Squadron Ellenoff Plesent & Sheinfeld, LLP (SEPS), based upon her allegedly improper termination in July 2003 from the law firm of H&H.

Ms. Sparozic alleges that she joined the law firm of SEPS in 1996 as a "tax professional" (Affirmation of Shana Melendez, Esq. in Support of Motion [Melendez Aff.], Ex. C [Complaint] at ¶ 4). In late 2001, H&H desired to merge with SEPS and began performing "due diligence", including an "in-depth assessment of review of [SEPS'] employees" (Complaint at ¶ 5 [parenthetical supplied]). At this point in time, Ms. Sparozic alleges, "(t)he merging entities agreed to secure the employment of the [SEPS] employees for two years subsequent to the merger to deter employees from leaving" (*id.*). Prior to its merger with SEPS, H&H performed extensive

"due diligence" with every SEPS employee, including Ms. Sparozic, requiring them to submit a resume and an employment application and to be interviewed by H&H (Complaint at ¶ 6; Melendez Aff., Ex. B [Plaintiff's Application]). Ms. Sporazic's employment application with H&H stated, above her signature, that she understands that "employment with [H&H] is 'at will' and can be terminated with or without notice or cause at any time by [H&H] or the employee" (Application [parentheticals supplied]). As a result of this review process, H&H decided which SEPS employees to extend offers to retain after the merger, and which employees would not be retained (Complaint at ¶ 6).

Ms. Sparozic asserts that she had "maintained a perfect record for many years" at SEPS (Complaint at ¶ 7). Immediately before H&H's "due diligence review" of the SEPS employees, Ms. Sparozic alleges that she had a discussion with the "head of the tax department", presumably at SEPS, regarding his suggestion that she pursue a master's degree, and he allegedly said "that he wanted to employ Plaintiff for the rest of her career" (*id.*).

In a letter dated February 26, 2002, H&H wrote to Ms. Sparozic that many of the partners of SEPS had agreed to become affiliated with H&H and to cease practicing through SEPS, as a separate entity (Complaint at ¶ 8; Melendez Aff., Ex. B [February 26, 2002 letter]). H&H offered Ms. Sparozic employment as a "Legal Assistant", effective on the date of the merger, and advised her of her salary, hours of work, and credited her with her tenure at SEPS, for the purposes of accrual and vesting in the 401(k) plan and the awarding of "holiday gifts" based upon tenure (Complaint at ¶ 8; February 26, 2002 letter). The letter further stated that Ms. Sparozic will, however, be subject to H&H's annual review and evaluation process (February 26, 2002 letter).

Ms. Sparozic began her employment with H&H on or about March 1, 2002 (Complaint ¶ 8). On or about July 2, 2003, H&H terminated Ms. Sparozic's employment immediately and gave her two weeks severance pay and immediately ended her health benefits (Complaint at ¶ 9). Ms. Sparozic alleges that, under the alleged agreement between SEPS and H&H "that was to secure the jobs of Squadron Ellenoff employees for two years subsequent to the merger, [she] should have

received full pay and benefits through to at least the two year anniversary" (Complaint at ¶ 10 [parenthetical supplied]). Alternatively, Ms. Sparozic alleges that she should "have been afforded the same treatment as the other [SEPS] employees who were given nine months notice ... during which they continued to receive full pay and benefits" (*id.*).

Ms. Sparozic seeks damages in the amount of $69,506.00, representing her salary and benefits, plus interest for the period from July 3, 2002 through February 28, 2004, presumably representing the time remaining until her completion of two years of employment with H&H (Complaint at ¶ 12). In addition, Ms. Sparozic seeks a total of $135,706.00 in damages for "emotional distress" and "damage to her reputation" (Complaint at ¶ 13).

Discussion

Defendants bring this motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, and pursuant to CPLR 3211 (a) (5), as any alleged oral employment agreement is barred by the Statute of Frauds (General Obligations Law [GOL]§ 5-701 [a] [1]). On a motion to dismiss pursuant to CPLR 3211 (a) (7) generally, the factual allegations in the complaint are liberally construed in favor of the plaintiff and accepted as true, for the purpose of determining whether the complaint states any legally cognizable claim (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sanders v Winship*, 57 NY2d 391, 394 [1982]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). The court may consider affidavits submitted by the plaintiff, for the purpose of remedying defects in the complaint (*see Leon v Martinez*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Defendants assert that the application signed by plaintiff for employment at H&H establishes that she was hired as an "at will" employee who could be discharged "absent a constitutionally impermissible purpose, a statutory proscription or an express limitation in the individual contract of employment" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305 [1983]). In *Murphy*, the Court of Appeals held that New York does not recognize a cause of action based upon a tort of abusive discharge of an at-will employee (*id.* at 300-302). Further, an

employment for an indefinite term is presumed to be a hiring at will (*id.* at 300).

New York recognizes an exception, however, allowing a terminated at-will employee to recover from an employer for breach of contract under certain limited circumstances:

> "An employee may recover, however, by establishing that the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment."

(*Matter of De Petris v Union Settlement Assn., Inc.*, 86 NY2d 406, 410 [1995]; *see also Sabetay v Sterling Drug, Inc.*, 69 NY2d 329, 336 [1987]).

Viewing the allegations in the complaint, as supplemented by her affidavit in opposition, most favorably to plaintiff, who is proceeding *pro se*, Ms. Sparozic is seeking to recover the salary and benefits allegedly due through the two-year anniversary of her employment with H&H, based upon an alleged agreement between SEPS and H&H "to secure the employment of [SEPS] employees for two years subsequent to the merger to deter employees from leaving" (Complaint at ¶ ¶ 5, 10 and 11; *see also* Sparozic Aff. in Opp., at ¶ ¶ 3, 7 and 11). Under the applicable legal standards, Ms. Sparozic has a heavy burden, to establish that, prior to her accepting employment with H&H, she was specifically made aware of an express written agreement or policy providing, among other things, that H&H would continue to employ the SEPS employees it hired for two years after the merger of the two firms, or would pay the former SEPS employees it terminated prior to their two-year anniversary with H&H salary and benefits through the two-year period. Ms. Sparozic must also establish that she relied upon this express written agreement when she accepted employment with H&H. Defendants emphasize the fact that the employment application Ms. Sparozic signed and submitted to H&H, advising her that she was an "at will" employee, and the February 26, 2002 letter from H&H offering her a position with the firm after the merger, do not refer to any written agreement guaranteeing her employment, or salary and benefits for a two-year period, and may be inconsistent with the existence of such an agreement. Nevertheless, this Court will not dismiss, at the pleading stage, Ms. Sparozic's claim to recover salary and benefits through her two-year anniversary with H&H, to the extent this claim is based upon an express written

agreement by H&H, as discussed above.

Ms. Sparozic's other claims, however, must be dismissed. Defendants are correct that an alleged oral agreement to either guarantee employment of former SEPS employees for two years or to require H&H to pay the salary and benefits of terminated SEPS employees through the second anniversary of the merger is barred by the Statute of Frauds, as such an agreement "[b]y its terms is not to be performed within one year from the making thereof" (GOL § 5-701 [a] [1]; *see also Andrews v Cerberus Partners*, 271 AD2d 348 [1st Dept 2000]; *O'Neill v Atlantic Sec. Guards*, 250 AD2d 493 [1st Dept 1998]). Nor can Ms. Sparozic recover from H&H based upon her vague allegations, that prior to the "due diligence" review by H&H, a partner who was the "head of the tax department" had stated that he wanted to employ her "for the rest of her career" (Complaint at ¶ 7), in the absence of an express written agreement by H&H either guaranteeing her employment, or the payment of salary and benefits for a specific period of time.

Further, Ms. Sparozic cannot recover salary and benefits from H&H based solely upon general allegations that H&H treated her differently from other former SEPS employees. She has not alleged that her discharge resulted from unlawful discrimination or any specific statutory violation. There is no implied obligation of good faith and fair dealing limiting an employer's right to terminate an at-will employee (*see Matter of DePetris v Union Settlement Assn., Inc.*, 86 NY2d at 410; *Sabetay v Sterling Drug, Inc.*, 69 NY2d at 335-336; *Murphy v American Home Prods. Corp.*, 58 NY2d at 306).

Lastly, Ms. Sparozic's claim for damages in the amount of $135,706.00, based upon emotional distress and damage to reputation, resulting from her termination, must be dismissed. Ms. Sparozic cannot recover under other tort theories, for example intentional infliction of emotional distress or prima facie tort, to circumvent the fact that New York does not recognize a tort claim for abusive discharge of an at-will employee (*see Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 188-189 [1989]; *Murphy v American Home Prods. Corp.*, 58 NY 2d at 303).

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted, to the extent of dismissing plaintiff's claim for damages in the amount of $135,705.00, based upon emotional distress and damage to reputation, and the motion is otherwise denied; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon defendants a copy of this decision and order, together with notice of entry and, within 20 days of service of this decision and order, with notice of entry, defendants shall serve their answer to the complaint.

This constitutes the Decision and Order of the Court.

HON. DORIS LING-COHAN

Dated: 4/9/07 **ENTER:** _____,
Doris Ling-Cohan, JSC

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if Appropriate: [ ] DO NOT POST [ ] REFERENCE

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