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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 603935/2004
SLAVEN, JESSICA
VS
KEEFE BRUYETTE & WOODS
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: APR 09 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Jessica Slaven,

Plaintiff

-against-

Keefe, Bruyette & Woods, Inc. and Bernard Caffrey,

Defendants.

----------x

DECISION/ORDER
Index No.: 603935/04
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Defs n/m (3212) w/MMC affirm, exhs	1
Pltff's opp w/GJR affirm, JSlaven, JSalisa, exhs	2

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by Jessica Slaven ("Slaven" or "plaintiff"), a former employee of defendant Keefe Bruyette & Woods, Inc. ("KBW"). Slaven has asserted employment discrimination claims against KBW and Bernard Caffrey ("Caffrey"), KBW's Senior Vice President and Director of operation, individually. KBW and Caffrey (collectively "defendants") now move for summary judgment dismissing the complaint on the basis that plaintiff cannot establish a case against them. Since issue has been joined, the note of issue filed, and this motion is timely it will be heard on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision and order is as follows.

Motions for Summary Judgment and Applicable Law

Plaintiff has asserted 4 causes of action against the defendants. Her 1st and 2nd causes of action allege violations of Article 15 § 292 et seq of the Executive Law of New York State ("NYSHRL"), i.e. discrimination based upon her disability (1st cause of action) and retaliatory termination (2nd cause of action). Her 3rd and 4th causes of action are identical, but asserted under Title 8 of the New York City Administrative Code, Chapter 1 § 8-107 (1) (a) ("NYCHRL").

NYSHRL and NYCHRL are in accord with and apply Federal law and Federal standards, though NYCHR provides for additional remedies. Bracker v. Cohen, 204 A.D.2d 115 (1st Dept. 1994). Therefore these human rights provisions are analyzed according to the same standards. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295 (2004).

As with any other motion for summary judgment, the defendants must present a *prima facie case* demonstrating entitlement to judgment as a matter of law on their discrimination claims. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If successful, the burden then shifts to the party opposing summary judgment (here, plaintiff) who must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. Zuckerman v. City of New York, supra. Thus, defendants (e.g. movants) have to prove either plaintiff's failure to establish every element of her intentional discrimination claims, or having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their actions were pretextual. Forrest v. Jewish Guild for the Blind, *supra* at 391.

Defendants contend as an alternative basis for summary judgment that they have a complete defense to the complaint because plaintiff signed a general release and waiver (discussed, *infra*). This is an unpled defense. The court is not barred, however, from considering this defense in support of their motion for summary judgment because there is no element of surprise. Transatlantic Marine Claims Agency, Inc. v. KLM Royal Dutch Airlines, 5/7/90 NYLJ 31 (col. 3). Moreover plaintiff does not argue that the court cannot consider this defense. Instead, plaintiff argues that she signed an agreement containing a general release and waiver, but challenges defendants' contention that it legally bars this action. Therefore, the release and waiver claims, as well as plaintiff's challenges thereto, are analyzed and resolved by the court in this decision.

The Claims and Allegations

Plaintiff was hired by KBW in September 2000. She claims that she was terminated in June 2003 because she suffers from psychological disabilities, and not because of her inadequate performance. She claims further that because she complained about certain menial tasks that were assigned to her after Caffrey learned about her disability, and no one in Human Resources heeded her complaints or intervened on her behalf, her employer retaliated against her by firing her.

Some facts are not disputed. It is undisputed that plaintiff was employed at KBW on September 11, 2001 and although she and some of her fellow workers were rescued, some 67 other KBW employees perished when the Tower they were in collapsed. Caffrey, who was deposed on behalf of the defendants, has testified that

plaintiff returned to work immediately when KBW opened its temporary office in New Jersey the following week. Both sides agree that plaintiff maintained the same title and even received scheduled pay increases while employed at KBW. It is also undisputed that up until November 2001, plaintiff reported directly to Caffrey because he was in charge of all operations.

The disputes begin with the events taking place in November 2001. Up to that point, there had been a single operations department. Plaintiff was a clerk in that department and her responsibilities included reconciling trade breaks and reviewing reports for monetary discrepancies. In November 2001, the operations department was divided into "equity operations" and "fixed income operations." Toivo Almodovar ("Almodovar") was hired and made the manager of equity operations. Later, in May or June 2002, Robert Snyder ("Snyder") was hired and made the manager of fixed income operations.

Both Almodovar and Snyder reported to Caffrey. Plaintiff testified at her EBT that she thought she was qualified for Almodovar's job. She shared her opinion with Caffrey who disagreed and told her she was "too close" to the staff following the September 11th tragedy to be a department manager. Caffrey has testified that plaintiff's first six months on the job were rocky, and that he was unsatisfied with her work. He told her so "numerous times," and decided to put her into intensive training. She then improved and became "dependable."

It is undisputed that plaintiff suffered a severe anxiety attack on June 2, 2002 while at work and she was taken to the hospital by ambulance. Plaintiff took a few days

off and returned to work. Plaintiff had other attacks in the following weeks, some of which required her to be absent from work. KBW has an unlimited sick leave policy and plaintiff has not testified that anyone had a problem with the number of days she was absent. There is, however, one email by Caffrey to another employee that plaintiff claims shows he was upset by her absences. In the email Caffrey writes that he intends to speak to plaintiff about how much time she is spending in another department with "Mel." Caffrey also writes that "[m]ore importantly even if she is in, is she really here!! Thats [*sic*] the important question because if she is not, she has no value to me or the firm. Physically not being here is an issue that I will address [. . .] when I get back."

Thereafter in September 2002, plaintiff's desk was moved. The move coincided with her taking September 11, 2002 off, which some other workers did as well. In an email to Josephine Fink, Senior Vice President and Corporate Secretary (Human Resources Dept) ("Fink"), plaintiff wrote that she was "still interested in a transfer." Plaintiff also opined that she did not understand why her desk was moved to where another employee who was "[Snyder's] employee" sat.

Plaintiff then obtained a doctor's note indicating she was suffering from post traumatic stress disorder and anxiety. The note, recommending a leave of absence, was sent to Fink. The paperwork for plaintiff's leave under the Family Medical Leave Act was completed by Fink and plaintiff was out for two months. She returned in December 2002. She could have returned earlier to work (e.g. in mid-November), however, and plaintiff attributes the employer's delay in reinstating her to as another

example of how they have discriminated against her.

It is undisputed that plaintiff's responsibilities changed over time, after KBW hired Almodovar and up to the time she was fired in June 2003. Plaintiff held the same title, and still had overtime, but she started working with the new managers (Almodovar and Snyder), and stopped reporting directly to Caffrey. Caffrey was still, however, the overarching "boss" and any assignments were indirectly approved by him. Thus, according to Caffrey, he believes in cross training his employees so they can learn other people's jobs and fill in for them, which is why he allowed plaintiff to learn the fixed income side of the operations. Plaintiff attributes the change in her assignments to her disabilities. She has testified that she had a lot of down time and that she was subjected to a tug of war between Almodovar and Snyder. She has also testified that although she expressed an interest in taking on more responsibilities, and working directly with brokers, she was told only Almodovar could do that.

Fink has testified on behalf of the defendants that plaintiff approached her about her desk being moved, and complained that she had too many bosses. Plaintiff did not, however, complain to her about any discriminatory practices. Fink has testified that plaintiff's medical file was kept separate from her employment file and that plaintiff's supervisors' approval was not required for her September 2002 leave (or return to work). Fink also testified that a complaint about discriminatory practices would have been documented.

A clerk in operations ("Salica") who befriended plaintiff, asked Caffrey whether plaintiff could work with her but was told "no" because, according to Caffrey, plaintiff

was in the process of cross training and learning a new job. Caffrey has testified that plaintiff only had down time because she was self-selecting her assignments, was not as busy as she should have been, and did not like answering to Almodovar who she thought was an "idiot." Caffrey has testified that plaintiff was not being phased out or demoted at all, but was obstinate, insubordinate, and had clashes with other employees.

Caffrey has testified that both Almodovar and Snyder complained to him about plaintiff's poor work attitude, her disrespect of them and her disparaging remarks about other employees. Almodovar no longer works for KBW. Neither he nor Snyder were deposed by either side. Defendants, however, rely upon a memorandum dated March 19, 2003. Plaintiff has also testified about the memorandum that is from Snyder and Almodovar to plaintiff with carbon copies to Fink, Caffrey and "file." This memorandum was presented to plaintiff the day she was fired. It recounts an earlier meeting among plaintiff and two managers in February 2003. Plaintiff has testified that she was asked to sign the memorandum but refused. She recalls meeting with Snyder, as set forth in the memorandum, but not with Almodovar, and states that she could never get them in a room together before that day (e.g. March 13, 2003).

Plaintiff has testified that the day before she got fired, and after she talked to Snyder in February 2003, she went to see Tom Michaud, KBW's Vice President and CEO, because she wanted to be removed from the department she was in. She testified that she had complained to "everybody that [she] could possibly think of" about being unhappy within her department, so she decided to go to Michaud. Plaintiff has

testified that she was fired because she complained to Michaud, though she admits no one told her that. Caffrey has testified that plaintiff was fired for several reasons. He fired her because of the complaints to him by his managers about her work. He also fired her because of her insubordination and refusal to do the assignments she was given. He also fired her because the day of their meeting she starting shouting and became agitated. Caffrey and plaintiff have each testified that she said "if you don't want me here and won't let me leave, why don't you get rid of me?" Whereupon both Caffrey and plaintiff agree that he fired her.

After she was fired, Plaintiff called Fink who told her there was nothing she could do for her and also that she would be sending plaintiff a letter stating that plaintiff would receive two months' severance pay. Plaintiff has testified that Fink told her she had to sign it and return it "within three days after [you] get it." The letter provides in relevant part as follows:

> "Your responsibility with KBW will end on March 19, 2003. Except as set forth in this letter, you will not be entitled to any salary or bonus payments that are paid after that date.
>
> You are eligible for severance pay and KBW will pay you a lump sum equal to two months salary. In addition you will also receive payment to cover two months premium for the continuation of medical insurance coverage under COBRA. These payments will be made to you in the pay period ending March 31.
>
> To the extent required under applicable law and regulations, any and all payments in respect of wages made by KBW hereunder after the termination of you employment will be made net of any required deduction for applicable Federal, state and local withholding or other applicable taxes.
>
> [. . .]

In consideration of the performance by KBW of its obligations under this letter agreement, you hereby full and completely release, discharge and waive any and all claims, complaints, cause of action, actions, suits, controversies, agreements, promises or demands whatsoever, in law or in equity, which you have or may have against KBW or any of its directors, officers, shareholders, employees or affiliates arising from the employment relationship among the parties or your termination. This waiver shall not apply to claims KBW may have against you resulting from future discoveries of willful, reckless or grossly negligent violations of law which may have occurred during the course of employment. By virtue of the foregoing, neither party is deemed to have waived or released any rights to payment or performance of any actions by the other expressly set forth in this letter or as otherwise required by law to be performed.

This letter represents the sole agreement of you and KBW relating to the termination of your employment.

If you are in agreement with the foregoing terms, please sign this letter and return it to us, whereupon it will become a binding agreement between you and KBW.

[KBW signature block]

"Acknowledgment and Agreement

I have read and understand the terms of separation set forth above and agree and accept terms as binding.

_____/s/_____ March 25, 2003
"Jessica Slaven"

Discussion

Defendants claim the release and waiver legally bars this action. Plaintiff argues that the release was the product of duress, and cannot be asserted to bar her claims against them.

The traditional bases for setting aside a written agreement with a release are the presence of duress, illegality, fraud, or mutual mistake, otherwise the release is

enforceable. Toledo v. West Farms Neighborhood HDFC, Inc., 34 AD2d 428 (1st Dept 2006); Davis & Associates, Inc. v. Health Management Services, Inc., 168 F.Supp.2d 109 (S.D.N.Y. 2001). Thus, under New York Law, the validity of such a release is governed by principles of contract law, and a clear and unambiguous release which is "knowingly and voluntarily" entered into will be enforced. Laramee v. Jewish Guild for the Blind, 72 F. Supp.2d 357 (S.D.N.Y. 1999).

Under Title VII, a waiver of claims by an employee against an employer will be enforced if "knowing and voluntary". Livingston v. Bev-Pak, Inc., 112 F Supp.2d 242 (N.D.N.Y. 2000). In determining whether a waiver of claims alleged under Title VII is "knowing and voluntary," certain relevant factors may be considered. They include: 1) the plaintiff's education and business experience; 2) the amount of time the plaintiff had the release before signing it; 3) her role in deciding the terms of the release; 4) the clarity of the release; 5) whether the plaintiff was represented by counsel; 6) whether the consideration given in exchange for the employee's waiver exceeds the benefits she would have been entitled to by contract or law; 7) whether the employee was encouraged to consult a lawyer; and 8) whether the individual had a fair opportunity to do so. Thus, the court is required to apply a "totality of the circumstances" test in evaluating whether the agreement and waiver is enforceable. Somoza v. NYC Dept of Educ., __ F.Supp.2d __, 2007 WL 541713, S.D.N.Y., February 21, 2007 (No. 06 CV 5025(VM); Wright v. Eastman Kodak Co., 445 F Supp 2d 314 (W.D.N.Y. 2006). Not all of these factors have to be present, nor is this an exhaustive list. Somoza v. NYC Dept of Educ., supra; Wright v. Eastman Kodak Co., supra. Moreover, the "totality of the circumstances test" necessitates a "detailed look at the circumstances surrounding

execution of the release in addition to, rather than as a replacement for, ordinary contract considerations." Reid v. IBM, 74 Fair Emp Prac Cases (BNA), 1997 WL 357969 (S.D.N.Y. 1997) (*nor*).

Even if an employee is misinformed about having to sign a release "right away" to receive some employment benefit, such as vacation pay, for example, the release may be enforced, depending on the circumstances. *For example,* Bachiller v. Turn on Products, Inc., 86 Fed.Appx. 465 (C.A.2 [N.Y.] 2004) (*summary order*). Nor can a discharged employee avoid enforcement of a release to a former employee by arguing that she signed the release because it was her only means of insuring that she would be paid for the hours she worked, or because she did not fully read the document or understand its significance. Collins v. E-Magine, LLC, 291 AD2d 350 (1st Dept 2002).

By her own account, plaintiff was excited and upset at the March 19, 2003 meeting with Almodovar, Snyder and Caffrey. However, when she finally spoke to Fink two days later and Fink told her about the severance agreement, plaintiff made no further inquiries. She did not ask whether she could have more time to consider the package, whether she could get a different package, or what would happen if she did not sign it. Even after she received the agreement, plaintiff did not take any steps to talk to anyone about it, not even Fink. Plaintiff was not asked to read and sign the agreement immediately the day she was fire, but it was sent to her at home. Therefore, she had some time for reflection and to carefully read its contents. No one discouraged her from seeking legal advice or talking about the agreement to any one else she trusted.

Although plaintiff now contends that the agreement is the product of "duress" and

"illegality," these claims are based upon her feeling that she had "no choice" but to sign it, otherwise she could not pay her rent. "Duress" is established "when the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." Joseph v. Chase Manhattan Bank, N.A., 751 F.Supp. 31 (E.D.N.Y. 1990). Fink's statements to her were not threats, but merely stated the procedures that had to be followed, and the standards applicable to unemployment benefits once an employee is terminated because of poor job performance. Thus, whether plaintiff could have negotiated a better severance package or she should have qualified for unemployment benefits are not the issues before the court. Matter of Ranni's Claim, 58 N.Y.2d 715 (1982).

Plaintiff is not seeking to set the agreement aside, nor does she claim it is unenforceable. Rather, her claim is that the general release in the agreement is not binding upon her and should not bar this action. She argues that because she only has a high school degree, was not told to consult with a lawyer, and was given a deadline to return the agreement this was undue pressure, therefore, under the totality of the circumstances, the release - but not the agreement - should be disregarded.

Parties cannot select the provisions in an agreement that please them, but disregard those unfavorable to them. Wilson v. Neppell, 253 AD2d 493 (2nd Dept. 1998); Beutel Beutel, 55 NY2d 957 (1982). A valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into between the parties will be enforced as a private agreement between them. Dunn v. Nissan Motor Co., Ltd., 262 AD2d 444, 445 (2nd Dept 1999).

Although plaintiff may now regret the deal she struck with her former employer,

there is no basis for the general release that she signed voluntarily to be simply disregarded. Her economic concerns about being able to pay her rent do not present a triable factual dispute whether the agreement with attendant waiver was the product of duress, as she now claims.

Applying the totality of the circumstances test and traditional contract principles, the agreement with general release and waiver bars the present action by plaintiff. Therefore, defendants' motion for summary judgment dismissing this action must be granted. This action is dismissed with prejudice.

The court need not go further to evaluate the merits of the claims waived in light of the knowing and voluntary waiver that exists. Toledo v. West Farms Neighborhood HDFC, Inc., *supra*.

Conclusion

Defendants' motion for summary judgment dismissing the complaint is granted in its entirety for the reasons set forth above. The complaint is hereby dismissed. The clerk shall enter judgment in favor of defendants Keefe, Bruyette & Woods, Inc. and Bernard Caffrey, against plaintiff Jessica Slaven.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 9, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.