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

PRESENT: EILEEN BRANSTEN PART 6
Justice

In the Matter of the Application of
ROBIN ROSS

For an Order to Examine

INDEX NO. 101647/07

MOTION DATE 2/20/07

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., W HOTELS and CAROLYN JONES,

MOTION SEQ. NO. 001

Before Trial, Prior to Institution of Suit

The following papers, numbered 1 to 2 were read on this motion for PRE-ACTION DISCLOSURE.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4-3-07

EILEEN BRANSTEN, *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 SIX

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In the Matter of the Application of
ROBIN ROSS,

For an Order to Examine

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., W HOTELS and CAROLYN JONES

Before Trial, Prior to Institution of Suit

----------X

Index No.:101647/07
Motion Date: 02/20/07
Motion Seq. No.: 01

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3102(c), Petitioner Robin Ross ("Ms. Ross") moves for an order compelling Starwood Hotels & Resorts Worldwide, Inc. ("Starwood"), W Hotels and Carolyn Jones ("Ms. Jones") (hereinafter "Respondents") to comply with *Subpoenae Duces Tecum* and *Subpoenae Ad Testificandum*. Respondents oppose Ms. Ross's application.

Background

On October 12, 2004, Ms. Ross was hired as Senior Director of Marketing for W Hotels, part of Starwood. Affidavit of Ms. Ross ("Ross Aff."), at ¶ 1; Affirmation in Opposition ("Opp."), Ex. A, at 1. At the time, Ms. Jones was the Vice President of Human Resources for W Hotels. Ross Aff., at ¶ 1.

About nine months into her employment, on August 25, 2005, Ms. Ross attended a client event, the Taste of Tennis, in her capacity as Senior Director of Marketing. Ross Aff.,

at ¶ 8. Respondents allege that at the event, Ms. Ross carried an alcoholic beverage in violation of company policy. Ross Aff., at ¶ 9.

Seven days later, on September 1, 2005, Ms. Jones and other W Hotels executives met with Ms. Ross to discuss her conduct. Ross Aff., at ¶ 11. During the meeting, they fired Ms. Ross and asked her to leave the premises immediately. Ross Aff., at ¶ 14.

On September 8, 2005, Ms. Jones wrote a letter to Ms. Ross that explained,

> "We received numerous complaints about your unprofessional conduct on company business. Upon investigation, it was concluded that this conduct did occur and that this most recent incident at the Taste of Tennis event was not an isolated incident. As a company, we do not tolerate berating, inappropriate comments and unprofessional conduct, especially from someone in a leadership capacity. Accordingly, the decision was made to terminate your employment."

Affidavit in Support of Motion ("Aff."), Ex. A, at 1.

Shortly thereafter, Ms. Ross applied for unemployment benefits. Ross Aff., at ¶ 19. Her application was denied, however, because W Hotels had terminated her for cause. *Id.*

Ms. Ross then appealed to the New York State Unemployment Insurance Appeals Board ("Appeals Board"). Ross Aff., at ¶ 20. Prior to the Appeals Board hearing on October 30, 2006, Ms. Ross asked Respondents to produce all materials related to her employment history and their determination to fire her. Ross Aff., at ¶ 21. Respondents argue that they produced over 100 pages of responsive documents. Opp., at ¶ 3. Ms. Ross alleges, by

contrast, that there was no compliance because the documents produced did not bear on the company's decision to terminate her. Ross Aff., at ¶ 22.

In anticipation of the Appeals-Board hearing, Ms. Ross also subpoenaed her immediate supervisor Mr. Klein and Ms. Jones to testify. The two, however, did not appear. Ross Aff., at ¶¶ 22-24. Upon application, the Administrative Law Judge ("ALJ") overseeing the hearing ruled that Mr. Klein and Ms. Jones could testify by telephone. Ross Aff., at ¶ 26; Opp., at ¶ 4. This was unsatisfactory to Ms. Ross, who walked out of the hearing after learning the ALJ's ruling. Opp., at ¶ 4. In the end, the ALJ determined that Ms. Ross was fired for cause and was not entitled to unemployment benefits. *Id.*

Since the hearing, Ms. Ross states that she has received offers from other employers, each of which has been retracted after the prospective employer called Respondents. Ross Aff., at ¶¶ 27-28.

Ms. Ross now moves for pre-action disclosure pursuant to CPLR 3101(c). In particular, she moves for an order compelling compliance with *Subpoenae Duces Tecum* and *Subpoenae Ad Testificandum*. Ms. Ross alleges that Respondents wrongfully terminated her and defamed her character by discouraging potential employers from hiring her. Aff., at ¶ 2. She argues, moreover, that she is entitled to pre-action discovery because she cannot find out specifically who defamed her or what those persons said without such disclosure. Aff., at ¶¶ 6,7. Ms. Ross alleges that the information is necessary to draft her complaint. *See,*

Matter of Gleich, 111 A.D.2d 130, 131 (1st Dept. 1985) (complaint for defamation must set forth the particular words claimed to be uttered and the time, place and manner of their publication).

In opposition, Respondents aver that Ms. Ross is not entitled to pre-action disclosure because: (1) her claims are subject to binding arbitration that has not been commenced; (2) she has failed to demonstrate a meritorious cause of action for defamation; and, (3) Ms. Ross does not have a breach-of-contract cause of action because she was an at-will employee. Memorandum of Law in Opposition ("Opp."), at 2.

Respondents are correct.

Analysis

To obtain pre-action disclosure, a potential plaintiff must, as a threshold matter, demonstrate the existence of a meritorious cause of action by presenting *prima facie* proof of an actionable wrong. *Uddin v. New York City Tr. Auth.*, 27 A.D.3d 265, 266 (1st Dept. 2006); *Application of Hoo*, 225 A.D.2d 504 (1st Dept. 1996); *Stump v. 209 East 56th St. Corp.*, 212 A.D.2d 410 (1st Dept. 1995); *Matter of Gleich*, 111 A.D.2d 130, 131 (1st Dept. 1985). Plaintiff must then show that the disclosure sought is "material and necessary" to establishing that the actionable wrong occurred. *Stump v. 209 East 56th St. Corp.*, 212

A.D.2d, at 111; *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536 (1st Dept. 1989); *Matter of Gleich*, 111 A.D.2d, at 131.

Further limitations apply. Most significantly, pre-action disclosure will not be granted as a tool to discover whether a cause of action exists. *Stump v. 209 East 56th St. Corp.*, 212 A.D.2d, at 410; *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d, at 537. Nor will it be granted to permit a potential plaintiff to explore different theories of liability. *Uddin v. New York City Tr. Auth.*, 27 A.D.3d, at 266.

Here, Ms. Ross has not met her initial burden of demonstrating a meritorious cause of action. She alleges without any evidentiary support that Respondents committed defamation and wrongfully terminated her. She does not make out a *prima facie* case as to either claim.

To maintain a cause of action for defamation, plaintiff must show that defendants made a false statement that "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] * * *." *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996). Statements of opinion – even those that are false and inflammatory – are not defamatory. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 287 (1986).

Ms. Ross has not presented any evidence that Respondents made false statements about her or that such statements caused her damage. She merely infers that Respondents must have said something unfavorable about her because her subsequent offers of

employment were retracted. Indeed, she has not offered any evidence that Respondents spoke with her prospective employers.

Ms. Ross, moreover, cannot show that Respondents' response to employment inquiries, if there were any, did not merely convey expressions of opinion. *Steinhilber v. Alphonse*, 68 N.Y.2d, at 287. If Respondents opined that Ms. Ross was a bad employee, and there is no record evidence that such a communication was made, such a statement would not be actionable and Ms. Ross would have no cause of action against Respondents.

Further, Respondents have demonstrated that any statements made would be subject to a qualified privilege. *Stump v. 209 East 56th St. Corp.*, 212 A.D.2d 410 (pre-action disclosure on defamation action denied because defendants demonstrated existence of a qualified privilege); *Matter of Gleich*, 111 A.D.2d, at 132.

Starwood and its employees, without fear of legal recourse, may make a "good-faith, bona fide communication upon a subject in which [it] has an interest, or a legal, moral or societal interest to speak [if] the communication is made to a person with a corresponding interest." *Demas v. Levitsky*, 291 A.D.2d 653, 658 (3d Dept. 2002), *lv. dismissed*, 98 N.Y.2d 728; *accord*, *Foster v. Churchill*, 87 N.Y.2d, at 751. Specifically, as Ms. Ross's former employers, Respondents are permitted to speak with prospective employers about Ms. Ross's job qualifications, and any statements made during such discussion – even those that might later prove to be false – are protected and not actionable. *See, Foster v. Churchill*, 87

N.Y.2d, at 751; *see also, Serratore v. Amer. Port Servs. Inc.*, 293 A.D.2d 464, 465-66 (2d Dept. 2002) (former employer qualified privilege).

Ms. Ross has also failed to establish that she is entitled to pre-action disclosure related to a cause of action for wrongful termination. Ms. Ross's contract provides that, "In accepting this offer, you acknowledge and agree that your employment with the Company is at will, and may be terminated by Starwood at any time, without or without notice and for any or no reason." Opp., Ex. A, at 3.

Case law is clear that, absent extraordinary circumstances involving fraud and whistle-blowing, New York does not recognize a cause of action for breach of contract or wrongful termination of an at-will employee. *Murphy v. Amer. Home Prods. Corp.*, 58 N.Y.2d 293, 296 (1983). Indeed, an at-will employee in New York may be terminated at any time with or without cause. *Id.*, at 300.

Finally, Ms. Ross has not presented sufficient justification that the information sought is "material and necessary" to establishing either of her claims. *Stump v. 209 East 56th St. Corp.*, 212 A.D.2d, at 111; *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d, at 536; *Matter of Gleich*, 111 A.D.2d, at 131. Indeed, she concedes that she seeks the information to determine whether Respondents said or did anything actionable. *Stump v. 209 East 56th St. Corp.*, 212 A.D.2d, at 410 (pre-action disclosure is not a tool to discover whether a cause of action exists); *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d, at 537.

Accordingly, it is

ORDERED that Ms. Ross's motion pursuant to CPLR 3102(c) is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
~~March~~ ___, 2007
April 3 2007

ENTER

Hon. Eileen Bransten