

Edelstein v Extreme Linen LLC
2007 NY Slip Op 31743(U)
June 12, 2007
Supreme Court, New York County
Docket Number: 0603552/2006
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justicia

PART 17

Index Number : 603552/2006

EDELSTEIN, MAL

INDEX NO. _____

vs
EXTREME LINEN LLC

FILED

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS DEFENSE

JUN 21 2007

MOTION CAL. NO. _____

COUNTY CLERK'S OFFICE
NEW YORK

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 *be decided per attached*

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

Dated: 6/12/07

EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x

Mal Edelstein,
Plaintiff,

-against-

Extreme Linen, LLC,
Defendant.

-----x

Emily Jane Goodman, J.S.C.:

Index No. 603552/06

FILED

JUN 21 2007

COUNTY CLERK'S OFFICE
NEW YORK

In this alleged breach of an employment contract action, defendant Extreme Linen, LLC (Extreme Linen), moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the action and awarding costs and sanctions pursuant to 22 NYCRR 130-1.1 for commencing a frivolous action.

Extreme Linen manufactures home linen products. It has three owners, Jonathan Joseph (president) Mesh Gelman (vice-president), and Yigal Barmucha (also vice-president). Plaintiff Mal Edelstein commenced her employment with Extreme Linen on January 3, 2006 after she was hired by Mr. Barmucha as a design director. Her employment ended on September 5, 2006 and no reason was given for the termination. No written employment contract existed, and the employment was based on an oral understanding. In paragraph 4 of her complaint, plaintiff alleges that the terms of her employment included reimbursement of business expenses such as cell phone usage, transportation within New York City or elsewhere, company-paid parking in New York City, and the purchases of fabrics and other items intended for the purpose of showing Extreme Linen's products to customers. In paragraph 5 of her complaint plaintiff further alleges that she and defendant agreed that her initial salary was \$140,000.00 per year, to be increased to \$150,000.00 on June 30, 2006, which would be retroactive to January 3, 2006. In paragraph 15

of her complaint plaintiff states that, on September 6, 2006, after her termination, Mr. Joseph told her that she would be paid her retroactive salary increase and asked her to provide the information to the bookkeeper. Plaintiff's affidavit confirms the above allegations and further claims that plaintiff confirmed her salary arrangements via written memoranda with Mr. Gelman, dated February 21, 2006, and with Mr. Joseph on August 28, 2006 and that Mr. Barmucha and Mr. Gelman promised her a year end bonus.

Defendants dispute plaintiff's claim regarding the promise to pay a retroactive salary. In paragraph 2 of his affidavit, Mr. Barmucha states that the defendant only agreed that after a six-month probationary period, it would review plaintiff's performance to determine whether her performance warranted an increase.

As stated in her affidavit, plaintiff calculated her retroactive salary to be \$6,538.54. On September 8, 2006, two separate checks, check # 5692 and check # 5693, were issued to the plaintiff in the amounts of \$4,004.90 and \$2,218.15, respectively, totaling \$6,223.05, which plaintiff claimed represented her severance payment. Extreme Linen's payroll check register reflects that the \$4,004.90 check includes pay for the Labor Day holiday (see Notice of Motion, Exhibit G). Plaintiff claims that these checks did not include the retroactive salary payment or holiday pay.

The complaint asserts five causes of action. The first cause of action seeks \$6,538.54 as payment for a retroactive salary increase. The second cause of action seeks \$82.00 as payment for materials purchased on behalf of Extreme Linen. The third cause of action seeks \$50.77 for payment of her August cell phone bill. The fourth cause of action seeks \$576.92 as payment for the Labor Day holiday which occurred prior to receiving her termination notice on September 5,

2006. The fifth cause of action seeks punitive damages in the amount of \$7,248.23 (\$6,538.54 + \$82.00 + \$50.77 + \$576.92).

As a matter of law, a claim for punitive damages cannot be pleaded as a separate cause of action (*see APS Food Systems v Ward Foods*, 70 AD2d 483 [1st Dept 1979]).¹ Thus, the fifth cause of action should be dismissed. As to the fourth cause of action, the record before the court, via Notice of Motion Exhibit G, clearly indicates that plaintiff received a salary payment for the Labor Day holiday. Thus, the fourth cause of action should be dismissed. Regarding the third cause of action, the defendant's motion papers are silent regarding payment for her August cell phone bill. Plaintiff alleges that this was part of her employment contract. Allegations in a complaint must be accepted as true and liberally construed in the pleader's favor (*see AG Capital Funding Partners, L.P. v State Street Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). Despite the minimal amount sought, a basis exists for this cause of action.

Regarding the second cause of action, plaintiff alleges that she is also entitled to an \$82.00 reimbursement for material goods bought on behalf of her former employer (*see* Notice of Motion, Exhibit D, paragraphs 25 to 29 of the complaint; *but see* Plaintiff's Affidavit in Opposition, Exhibit C [contains an \$80.00 material reimbursement reference]). Defendant argues that plaintiff is entitled to nothing, and submits three exhibits in support of its argument (*see* Notice of Motion, Exhibits B, E and F). However, these three exhibits (1) merely show that there was a "Mango Breeze 3x6 pillar" purchased by plaintiff on August 23, 2006 along with other items (Exhibit B); (2) imply that a request was made by the plaintiff for a reimbursement of

¹In any event, punitive damages cannot be awarded in this action because damages for breach of contract are limited to contract damages, unless needed to vindicate a public-not private, right (*see NYU v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Soviero v Carrol Grp. Intl., Inc.*, 2006 NY LEXIS 2734 [1st Dept 2006]).

"\$82.92," not "80.00," for the purchase of these goods (Exhibit E); and (3) indicate that defendant reimbursed plaintiff \$66.66 of the requested amount (Exhibit F). The amount of \$66.66 was calculated by adding the \$15.00 cost of the mango breeze pillar plus \$1.26 for tax, and deducting \$16.26 from the requested amount (see Exhibit D). Mr. Barmucha indicates in his affidavit that plaintiff was entitled to only \$66.66 because the pillar was a personal item that plaintiff purchased for herself. The court is not an expert in the realm of dry goods or household linen production. It does not know what a Mango Breeze pillar is nor how it may be used in relation to customer sales. These are questions for a trier of fact to resolve. The court reiterates that allegations in a complaint must be accepted as true. Whether plaintiff is entitled to \$82.92, \$80.00, \$16.26 or nothing, a basis exists, at this juncture, for this cause of action.

There are conflicting statements in plaintiff's and Mr. Barmucha's affidavits regarding the issue of the retroactive salary. Further, there is no affidavit from Mr. Joseph in the motion papers, and therefore no affidavit to contradict plaintiff's contention that Mr. Joseph made certain promises. At this juncture, plaintiff's allegation, that she is entitled to \$6,538.54, constitutes a basis for her first cause of action (*ibid.*; compare *Loyal Supply Corporation v Gregg*, 202 AD2d 836, 838 [3rd Dept 1994] [conflicting affidavits raise questions of fact and issues of credibility]). Because of the contradictory statements, the case cited by defendant, *Dwyer v Burlington* (295 AD2d 745 [3rd Dept 2002]) does not compel dismissal of plaintiff's claim. In that case, it was undisputed that although the plaintiff was originally orally promised to be paid commissions when customers she procured paid for advertisements, the company modified that oral agreement, in writing, and plaintiff assented to the modification by continuing employment. Here, there is no evidence of a change in company policy. Rather, according to

plaintiff's contentions, the retroactive salary had already been earned by the time she was terminated and was consistently promised to be paid (*compare Simpson v Lakeside Engineering, P.C.*, 26 AD3d 882 [4th Dept 2006] [where a bonus is already earned by the time the employer decides not to pay it, the employer cannot argue that the bonus is discretionary and therefore, the failure to pay it, constitutes breach of contract]).

Defendant LLC seeks return of the entire amount of \$6,223.05 paid to the plaintiff on September 8, 2006. This demand would, illogically, include return of plaintiff's Labor Day holiday pay, which defendant concedes defendant paid and plaintiff was entitled to receive. Defendant seeks return of this money on the premise that, as plaintiff was an at-will employee, she was not entitled to a bonus. Other than determining that a portion of check # 5692 was the Labor Day holiday pay, it has not been established what the remainder of the \$6,223.05 amount represented. Further, this court cannot, at this juncture, resolve the matter of the return of any portion of that \$6,223.05 since defendant did not serve an answer and counter claim for the relief it seeks.

Because the court has found a basis for three of the claims in the complaint, the part of the motion which seeks sanctions is denied.

Accordingly, it is

ORDERED that defendant is granted the relief it seeks as to the fourth and fifth causes of action, and those causes of action are dismissed, but the motion is otherwise denied; and it is further

ORDERED that, after the action is transferred to Civil Court, defendant is directed to serve an answer and responsive papers within 20 days of the transfer; and it is further

ORDERED that this action bearing Index number 603552/06 be, and it hereby is, removed and transferred to the Civil Court, of the City of New York, County of New York, and it is further

ORDERED that the clerk of the New York State Civil Supreme Court, County of New York, shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers in this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index number without payment of any additional fees, and it is further

ORDERED that the above-entitled cause be, and it is, hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325 (d).

This Constitutes the Decision and Order of the Court.

Dated: June 12, 2007

ENTER:



FILED

JUN 21 2007

J.S.C.
EMILY JANE GOODMAN

**COUNTY CLERK'S OFFICE
NEW YORK**