SHORT FORM ORDER

INDEX # 15388-06
RETURN DATE: **9-15-06**
MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x
DEBRA J. MORELLO,

Plaintiff,

-against-

JOSEPH M. VITAGLIANO, D.M.D., P.C.,

Defendant.
----------x

CALENDAR DATE: April 18, 2007
MNEMONIC:. MG; MD;C/Disp.

PLTF'S/PET'S ATTORNEY:

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DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to ____ read on this motion to dismiss and cross motion to amend ; Notice of Motion/Order to Show Cause and supporting papers 1-7 ; Notice of Cross-Motion and supporting papers 8-13 ; Answering Affidavits and supporting papers 14-18 ; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant to dismiss the plaintiff's breach of contract action pursuant to CPLR §3211(a)(1) and (7) based upon documentary evidence and for failure to state a cause of action is granted and the plaintiff's action is dismissed. The plaintiff's cross-motion to amend her complaint pursuant to CPLR §3025(b) to assert a cause of action for retaliatory firing in violation of New York Labor Law §741 is denied.

The plaintiff commenced this lawsuit for damages resulting from an alleged breach of a written contract, dated June 25, 2002, between herself and the defendant based upon an employee-employer relationship. The plaintiff was hired as the front desk receptionist in May 1997 by the defendant's father, Pasquale A. Vitagliano, to work at their orthodontic practice. On June 25, 2002 the parties entered into a written letter agreement drawn up by the plaintiff and subscribed by both parties best characterized as an employment agreement. The defendant claims to have signed the agreement as presented to him by the plaintiff without changes. This is clearly evident because the next to last paragraph of the letter agreement provides that the plaintiff "has carte blanche... to take off whenever she deems necessary." However, the letter agreement provides in the second paragraph:

> "Dr. Joseph Vitagliano has also guaranteed Debra J. Morello, with the assumption their working relationship is mutually agreeable, employment as his Office Manager in his orthodontic practice as long as he is in business."

The plaintiff was terminated from her employment by the defendant in February 2006 because of poor job performance and this lawsuit for breech of contract thereafter ensued.

The defendant now moves to dismiss the plaintiff's complaint pursuant to CPLR §3211(a) (1) & (7) on the grounds that documentary evidence establishes that the termination of the plaintiff was lawful and her complaint fails to state a cause of action upon which relief may be granted. The plaintiff opposes the requested relief and cross-moves for permission to file an amended complaint asserting an additional cause of action for retaliatory firing in violation of New York Labor Law §741.

For the following reasons, the defendant's motion to dismiss pursuant to CPLR §3211(a) (1) & (7) is granted and the plaintiff's action is dismissed based upon documentary evidence and for failure to state a cause of action upon which relief can be granted. The plaintiff's motion to amend her complaint pursuant to CPLR §3025 (b) is denied.

The defendant argues that the letter agreement (contract) signed by the parties on June 25, 2002 is too indefinite in its terms to constitute a contract upon which to support the plaintiff's lawsuit. The defendant claims the agreement between the parties carries specific language that the employment guarantee is conditioned on "their working relationship is mutually agreeable" and therefore the plaintiff is an employee at will and subject to being terminated when the working relationship was no longer "mutually agreeable." The plaintiff argues that the defendant breached this letter agreement when he terminated the plaintiff on February 27, 2006. The plaintiff claims that the letter agreement guaranteed employment "as long as he is in business." but then attempts to explain the "mutually agreeable" language exception by stating that the two parties will remain mutually agreeable until such time that there is evidence presented to the contrary. This is a strained interpretation of a contract term which basically states that the plaintiff's employment is assured as long as both parties agree to the continued employment of the plaintiff.

In ***LoCascio, MD v. Aquavella, MD*** , 206 AD2d 96, 619, NYS2d 430 (4th Dept. 1994) the Court noted that:

> "The threshold determination to be made is whether the material terms in the letter of intent concerning the formation of the parties' relationship are sufficiently certain and specific 'so that what was promised can be ascertained'...*** The very essence of a contract is '[d]efiniteness as to material matters *** [W]ithout it a court could not intervene without imposing its own conception of what the parties should or might have undertaken, rather than

> confining itself to a bargain to which they have mutually committed themselves [citation omitted]' (***Bernstein v. Felske***, 143 AD2d 863, 864-865, 533 NYS2d 538)."

Generally a contract should contain all the necessary elements for the court and should have ascertainable dates of commencement and termination and "such dates should be determinable from the recitations in the contract itself. 17A Am Jur 2nd. "Contracts" §191. Thus in ***Lobel v. Maimonides Medical Center et al.***, 39 AD3rd 275, 835 NYS2d 28 (1st Dept. 2007) the Court found that

> "[S]ince defendants established that there was no agreement setting forth a fixed duration for plaintiff's continued employment, the court determined that plaintiff was an at-will employee as of July 1, 2001 and properly dismissed her wrongful termination of employment claims"

As a general rule, in a contract action, if the court can determine the intent of the parties from the terms of the written agreement itself, without resort to extrinsic or parol evidence, the question can then be decided by the court as a matter of law. ***Rom Terminals, LTD. V. Scallop Corp.***, 141 AD2d 358, 529 NYS2d 304 (2nd Dept.1988), app den. 73 NY2d 707, 539 NYS2d 300. In ***Teal v. Place***, 85 AD2d 788, 455 NYS2d 309 (3rd Dept.1981) the Court stated:

> "'[t]he first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein' (citing *Nichols v. Nichols,* 306 NY490, 496, 119 N.E.2nd 501). Where the intention of the parties is fully determinable from the language employed in the agreement (see 4 Williston, Contracts §600, at p. 280), there is no need to resort to evidence outside the written words to determine their intention. Thus, no question of fact is presented, only a question of law-the interpretation of the March 7, 1980 written contract, and summary judgment was proper (***Long Is. R.R. Co. V. Northville Inds. Corp.***, 41 NY2nd 455, 461, 393 NYS2d 925, 362 N.E.2nd 558; ***Mallad Constr. Corp. V. County Fed. Sav. & Loan Assn.***, 32 NY2nd 285, 291, 344 NYS2d 925, 298 N.E.2nd 96)"

Here, in the case at bar, the terms of the letter agreement (contract) for the employment of the plaintiff are very clear. The plaintiff's continued employment was conditioned on there being a "mutually agreeable" working relationship. Obviously, the plaintiff's termination by the defendant was indicative of a working relationship which was not

mutually agreeable and the termination of the plaintiff's working relationship fails to support a cause of action for either contract breach or wrongful termination.

In a recent pronouncement on this issue, the court in ***DeSimone v. Supertek, Inc.***, 308 AD2d 501, 764 NYS2d 846 (2nd Dept. 2003) said:

> "It is well settled that absent a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party, for any reason or even for no reason."

In this case, the contract terms drawn up by the plaintiff should be read exactly as set forth in the letter agreement. The plaintiff's continued employment in the defendant's orthodontic practice would continue as long as their working relationship was "mutually agreeable" to both parties. Once the working relationship was not "mutually agreeable" as clearly indicated by the defendant, then the employment terms of the letter agreement allowed the plaintiff's termination. The plaintiff's complaint sets forth that she entered into an employment agreement previously described that guaranteed her a job as the defenant's Office Manager as long as he was in business (paragraph 9) and that the defendant terminated her employment and therefore breached the agreement. Clearly, the conditioned language that the employment "working relationship" be mutually agreeable sets forth the parameters of the plaintiff's employment.

> "On a motion to dismiss where an unambiguous contract controls the rights of the parties, the contract provisions prevail over allegations in the complaint." ***Day Op of North Nassau, Inc. V. Viola***, 16 Misc3d 1122(a) WL 2305035 decided August 1, 2007.

The use of the words in the employment agreement that the working relationship be "mutually agreeable" is fatal to the plaintiff's claim that the defendant breached the terms of the employment and her complaint cannot stand. Accordingly, the defendant's motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a)(1) and (7) based upon documentary evidence and for failure to state a cause of action is granted and the plaintiff's action is dismissed. The plaintiff's attempt to save her complaint by seeking to amend her complaint pursuant to CPLR §3025 to allege a cause of action of a retaliatory firing under New York State Labor Law §741 is hereby denied. The plaintiff attempts to argue that she "objected to all activities, policies and practices in the office that I believed compromised the quality of patient care." and therefore her complaints resulted in her termination.

In exercising its discretion in determining whether to grant leave to amend the complaint, the Court should consider how long the amending party was aware of the facts upon which the motion to amend is predicated, whether a reasonable excuse for the delay is offered and whether prejudice would result from the granting of the motion. ***Haller v. Lopane***,

305 AD2d 370, 759 NYS2d 504 (2nd Dept. 2003). In ***Joyce v. McKenna***, 2 AD3d 592, 768 NYS2d 358 (2nd Dept. 2003), the Court finding that "it is incumbent upon the movant to make 'some evidentiary showing that the claim can be supported'." is a requirement that must present some basis. The failure to set forth such basis requires that such amendment should be denied. See also, ***Johnson v. Allstate Insurance Co.***, 33 AD3d 665, 823 NYS2d 415 (2nd Dept. 2006); McKinney's Commentaries CPLR §3211, C3211:64. Here, the plaintiff sets forth no claim that she is a protected "employee" involved in performing or delivering health care services as required under NY Labor Law §741, who is entitled to such protections since the letter agreement covers her as "office manager" and not as a care giver or health care provider. See, ***Lloyd v. Cardiology & Internal Medicine of Long Island***, 16 Misc3d 1129(A) WL 2410853 (2007); ***Reddington v. Staten Island University Hospital***, 373 F. Supp2d 177 (E.D.N.Y. 2005).

Finally, in ***Pipia v. Nassau County***, 34 AD3d 664, 826 NYS2d 318 (2nd Dept. 2006) this very issue was addressed

> "A complaint asserting a violation of Labor Law §741(2)(a) must nonetheless allege conduct that 'constitutes improper quality of patient care,' which is defined as conduct creating 'a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient' (Labor Law §741[1][d]). The allegations in the proposed amended complaint do not satisfy this standard, and were thus insufficient to establish a 'good ground' for granting leave to amend."

By the same token, the plaintiff's allegations that the defendant "compromised the quality of patient care" are general claims made as an office manager and not a health care provider. These unspecific allegations are insufficient to establish a good basis for granting her motion to amend. ***Pipia v. Nassau County***, supra.

The defendant's motion to dismiss is granted and the plaintiff's action is dismissed. The plaintiff's cross-motion to amend her complaint pursuant to CPLR §3025 (b) to assert an additional cause of action under Labor Law §741 of retaliatory firing is denied.

The foregoing constitutes the decision of the Court.

Dated: October 2, 2007

Peter H. Mayer
J.S.C.