

Potito v Fashion Fusion
2007 NY Slip Op 34208(U)
December 3, 2007
Supreme Court, New York County
Docket Number: 0600563/2007
Judge: Rolando T. Acosta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

Yvonne Potito,

Plaintiff,

– against –

Fashion Fusion, Luo Dezhi a/k/a Henry Luo,
Weimen Yue a/k/a William Yue and Yan
Zhang,

Defendants.

DECISION/ORDER

Index No. 600563/07

Motion Seq. 1

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

FILED
DEC 21 2007
NEW YORK COUNTY CLERK'S OFFICE

The following documents were considered in reviewing defendants' motion to dismiss plaintiff's complaint:

Papers

Notice of Motion, Affirmation in Support, Affidavits

Memorandum of Law in Support

Affirmation in Opposition, Affidavit in Opposition

Memorandum of Law in Opposition

Reply Memorandum of Law

Numbered

1, 2, 3 (Ex. 1-5), 6

7

8, 9 (Ex. A)

10 (Exhibits)

Plaintiff Yvonne Potito commenced this action against defendants on or about February 22, 2007 alleging causes of action for breach of contract, promissory estoppel, fraud, libel and libel *per se*. Specifically, plaintiff alleges that defendants Fashion Fusion and Luo Dexhi, as her employer, breached a two year oral agreement by terminating her employment prior to the expiration of the alleged contract term. In addition, plaintiff claims that defendants defamed her based upon two (2) inter-office e-mails dated December 18, 2006, which contained false information as to why plaintiff's employment was terminated, thus damaging her reputation. Defendants in turn bring the present motion to dismiss plaintiff's complaint in its entirety pursuant to C.P.L.R. § 3211(a)(5) and (7), and GOL § 5-701(a)(1). Defendants' motion is granted.

Plaintiff does not dispute that the parties never executed a written employment contract. Rather, plaintiff asserts that she and Fashion Fusion had a two year oral employment agreement, which she was assured by Fashion Fusion would be reduced to writing. However, she claims that she was terminated before the contract could be executed. The Statute of Frauds, as codified by GOL § 5-701(a)(1), provides that every agreement is void unless it is in writing and if by its terms it cannot be performed within one year. Here, plaintiff alleges that her employment with defendant was to be for two years, and therefore necessarily could not have been performed within one year. Thus, plaintiff's claim of "[o]ral assurances of a [two-year] term of employment, even if established, are void and unenforceable under the statute of frauds." Cunnison v. Richardson Greenshields Securities, Inc., 107 A.D.2d 50 (1st Dept. 1985) ; see also Sladden v. Rounick, 59 A.D.2d 882 (1st Dept. 1977) (complaint based upon oral contract of employment of two years' duration unenforceable).

Plaintiff's claim for promissory estoppel and fraud likewise fail. Plaintiff alleges in her complaint that she was fraudulently induced to work for defendants based upon their assurance that she would be given a written contract for a two year duration. However, such a claim is merely redundant of plaintiff's breach of contract cause of action wherein plaintiff claims she was prematurely terminated and cannot withstand defendant's motion to dismiss, for "[a] cause of action for fraud does not arise when the only fraud charged relates to the breach of a contract." Tesoro Petroleum Corp. v. Holborn Oil Co., 108 A.D.2d 607 (1st Dept. 1985). Thus "although plaintiff's [third] cause of action alleges "fraud" in the inducement of the employment contract by claiming that defendant "never intended to employ plaintiff for a period of two years", that cause of action essentially is a restatement of her first cause of action for breach of contract and is unable to withstand defendants' challenge to its insufficiency in law." Chase v. United Hospital, 60 A.D.2d 558 (1st Dept. 1977) (internal citations omitted).

Where, as here, the statute of frauds bars the enforcement of oral employment contracts, New York courts have been reluctant to allow plaintiffs to utilize the doctrine of promissory estoppel. Croce v. Hirsch, 1991 WL 95397 (S.D.N.Y.). This is so because a plaintiff's ability to escape the requirements of the statute of frauds by pleading promissory estoppel would in essence render the statute of frauds a nullity. "An oral promise cannot be relied upon to estop a plea of Statute of Frauds unless the circumstances are 'such as to render it unconscionable to deny' the oral promise upon which the promisee has relied. Id. at *3. (Internal citations omitted). The facts of this case do not render defendants'

decision to terminate plaintiff as unconscionable. Indeed, unconscionable action must be greater than defendants' failure to perform the oral promise, which is the crux of plaintiff's argument for her promissory estoppel claim. See Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34 (2d Cir. 1977).

Plaintiff's causes of action for libel and libel *per se* are also dismissed. The basis for plaintiff's claim for defamation against defendants are based upon two separate interoffice e-mails dated December 18, 2006. Initially it should be noted that these e-mails were responses to an earlier e-mail sent by plaintiff on December 15, 2006. These e-mails were sent to Fashion Fusion employees expressing her disappointment with the company. A review of the e-mails sent by defendants demonstrate that they were not libelous. Rather, they were sent in the context of explaining to Fashion Fusion employees why plaintiff was fired, and represented the company's opinion as to why her termination was justified. See Gross v. New York Times Co., 82 N.Y.2d 146 (1993). Indeed, the second e-mail sent by defendants was to clarify the first confusing e-mail that the company suspected the plaintiff stole from the company. See Parks v. Steinbrenner, 131 A.D.2d 60 (1st Dept. 1987) (statements are "pure opinion" and fall outside of defamation if it is a statement of opinion, and if it is accompanied by a recitation of facts upon which it is based). Accordingly, based upon the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint in its entirety is GRANTED; and it is further

ORDERED that the caption is amended to reflect and incorporate the related matter of Fashion Fusion, Inc. and Luo Dezhi a/k/a Henry Luo, 106276/07, and the amended caption will read as follows:

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Weimen Yue a/k/a William Yue and Yan
Zhang,

Hon. Rolando T. Acosta
Supreme Court Justice

Defendants.

Fashion Fusion, Inc. and Luo Dezhi a/k/a
Henry Luo,

Index No. 106276/07

Plaintiff,

Motion Seq. 1

– against –

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

Yvonne Potito,

Defendant.

and it is further

ORDERED that the Clerk of this Court and the Clerk of Trial Support
Office (Room 158), upon service on each of them of a copy of this order with
notice of entry, shall mark their records to reflect the amendment.

This constitutes the Decision and Order of the Court.

Dated: December 3, 2007

ENTER

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DEC 21 2007
NEW YORK
COUNTY CLERK'S OFFICE



HON. ROLANDO T. ACOSTA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION