

Karrat v Sloan Asset Mgt., LLC

2008 NY Slip Op 31516(U)

May 19, 2008

Supreme Court, New York County

Docket Number: 0603958/2006

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Renee Karrot

INDEX NO. 603958/06

- v -

MOTION DATE _____

MOTION SEQ. NO. 003

Sloan Asset Mgmt, LLC

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Memos of Law M1-M3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/19/08

Marcy Friedman
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

RENEE KARRAT,

Plaintiff,

- against -

SLOAN ASSET MANAGEMENT, LLC, et al.,

Defendants.

_____ x

Index No.: 603958/06

DECISION/ORDER

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action arising out of a former employment relationship, defendants Sloan Asset Management, LLC (“Sloan”), Life Share Group, LLC (“Life Share”), Joshua Siegel (“Siegel”) and James Ackerman (“Ackerman”) move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint.

The complaint alleges a first cause of action against defendants Sloan and Life Share for “anticipatory breach of contract”; a second cause of action against Sloan and Life Share for a declaratory judgment based on the alleged breach; a third cause of action against all defendants for sexual harassment under the human rights law, a fourth cause of action against all defendants for “constructive discharge” of plaintiff in violation of the human rights law; fifth and sixth causes of action against defendant Siegel for assault and battery, respectively; a seventh cause of action against defendant Siegel for intentional infliction of emotional distress; an eighth cause of action against defendants Sloan and Life Share for promissory estoppel; ninth and tenth causes of action against Sloan and Life Share for implied in fact contract and breach of the covenant of

good faith and fair dealing; and eleventh and twelfth causes of action against Sloan and Life Share for quantum meruit and unjust enrichment.

Defendants do not move to dismiss the fifth and sixth causes of action. Plaintiff concedes that the ninth and tenth causes of action are not maintainable, but otherwise opposes the motion to dismiss. (See Memo. In Opp. at 12.)

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

As to the first and second causes of action, the complaint pleads that “Ms. Karrat agreed to work for SAM [Sloan] at a below-market salary because SAM promised, among other things, to provide her with a \$1 million payment, and a 10% equity ownership interest in SAM, once

SAM obtained at least \$100 million in funding, as well as to maintain her various securities licenses.” (Complaint, ¶¶ 39, 45.) The complaint further pleads that “Ms. Karrat performed all of the duties called for under the agreement. In the alternative, to the extent Ms. Karrat has not performed all of her duties under the agreement, it is because the defendants’ illegal and tortious conduct made it impossible for her to perform and resulted in her constructive termination.” (Id., ¶¶ 42, 48.)

Defendants contend that plaintiff’s claim for compensation is barred by the fact that she was an at-will employee as well as by the statute of frauds. To the extent the complaint pleads a claim for compensation that accrued before plaintiff ceased her employment with defendant Sloan, her status as an at-will employee is not a bar to her claim for compensation. (See Mirchel v RMJ Secs. Corp., 205 AD2d 388 [1st Dept 1994]; O’Connor v Harbrew Imports, Ltd., 4 Misc 3d 1016(A), 2004 WL 1872882 [Sup Ct, New York County]. See also Ullmann v Norma Kamali, Inc., 207 AD2d 691 [1st Dept 1994].) Plaintiff’s claim is also not barred by the statute of frauds insofar as the claim is for accrued compensation, rather than for commissions based on an employment contract of indefinite duration. (Compare Zupan v Blumberg, 2 NY2d 547 [1957].)

To the extent the complaint pleads, in the alternative, that plaintiff was required to perform additional services to be entitled to future compensation under the alleged agreement but that defendants made her performance impossible, defendants fail to submit legal authority on whether the impossibility of performance claim may be raised in the context of an at-will employment. Defendants’ motion to dismiss the first and second causes of action will therefore be denied.

The third and fourth causes of action for discrimination under the Human Rights Law

based on sexual harassment are also sufficiently pleaded to withstand the motion to dismiss. While defendants assert that Sloan was not an “employer” within the meaning of the Human Rights Law because it did not employ four employees (see Executive Law § 292(5)), the documentary evidence does not establish this contention as a matter of law. Moreover, the court declines to convert the motion to one for summary judgment as the parties’ conflicting affidavits raise a triable issue of fact as to the number of employees employed by Sloan.

The seventh cause of action for intentional infliction of emotional distress pleads a protracted pattern of sexual harassment that included assault and battery. This claim is adequately pleaded to withstand the motion to dismiss. (Compare O’Reilly v Executone of Albany, Inc., 121 AD2d 772 [3d Dept 1986]; Koster v Chase Manhattan Bank, N.A., 609 F Supp 1191 [SD NY 1985] [applying New York Law], with Zephir v Inemer, 305 AD2d 170 [1st Dept 2003]. See generally Fischer v Maloney, 43 NY2d 553 [1978].)¹

The eighth cause of action for promissory estoppel must be dismissed. This cause of action is not stated based on the claim that defendants’ promise of employment and offer of compensation to plaintiff led plaintiff to leave her former employment. (See Mayer v Publishers Clearing House, 205 AD2d 506 [2d Dept 1994].)

The eleventh and twelfth causes of action for quantum meruit and unjust enrichment are maintainable to the extent the complaint pleads a cause of action for compensation accrued prior to plaintiff’s termination.

¹In so holding, the court notes that if plaintiff proves a claim for sexual harassment under the Human Rights Law, she will not also be permitted to recover damages under the cause of action for intentional infliction of emotional distress. (See McIntyre v Manhattan Ford, Lincoln-Mercury, Inc., 256 AD2d 269 [1st Dept 1998], appeal dismissed 93 NY2d 919 [1999].)

Defendant Ackerman's claim that he is not personally liable is not established solely by documentary evidence and without supplemental affidavits, as required by CPLR 3211(a)(1). However, defendant Life Share demonstrates as a matter of law, based on the documentary evidence, that it is not liable to plaintiff. The complaint fails to plead any allegations that Life Share, which was incorporated after plaintiff's employment ceased, ratified the alleged contract between Sloan and plaintiff or that it independently committed any tort.

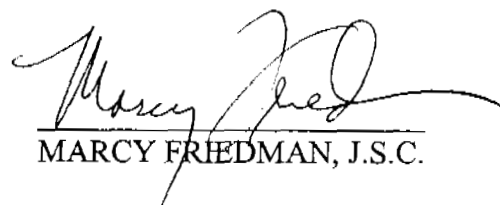
It is accordingly hereby ORDERED that defendants' motion to dismiss the complaint is granted to the extent of dismissing the ninth and tenth causes of action without opposition, and dismissing the complaint as against defendant Life Share, and is otherwise denied; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the parties shall appear for a status conference in Part 57 of this Court on May 29, 2008, at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
May 19, 2008


MARCY FRIEDMAN, J.S.C.

FILED
JUN 03 2008
COUNTY CLERKS OFFICE
NEW YORK