[* 1]

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

PRESENT: JANE S. SOLOMON PART 55

Justice

FILED
AUG 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Peter Ryan

- v -

WestLB AG

INDEX NO. 115074/07

MOTION DATE 2/15/08

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-7
Replying Affidavits	8-11

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

N.B. -- Preliminary Conf scheduled for 9/25/08 at 12 noon. D to serve answer to amended complaint w/in 20 days of receipt hereof.

Dated: 8/14/08

JANE S. SOLOMON J.S.C.

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

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 55

----------X

PETER RYAN,

Plaintiff,

-against-

WESTLB AG,

Defendant.

----------X

DECISION and ORDER

Index No. 115074/2007

SOLOMON, J.:

In this breach of contract, wrongful termination, defamation, and age discrimination action, defendant WestLB AG moves pursuant to CPLR 3211 (a) (7), to dismiss the complaint on the ground that the pleading fails to state a cause of action.

Plaintiff Peter Ryan cross-moves to amend his complaint, pursuant to CPLR 3025 (b), and attaches his proposed revision.

Defendant is an international commercial bank with an office in Manhattan. It hired plaintiff Peter Ryan on July 17, 2004 for the Credit Risk Management (CRM) group in its New York City office. In 2006, he was promoted to Executive Director to lead the CRM Energy group.

In March 2007, plaintiff received an excellent performance review that resulted in a 14% increase in his base salary and a $120,000 bonus. On April 30, 2007, plaintiff was fired with the explanation that he had broken the law in three jurisdictions and put the bank at risk. Defendant was making reference to plaintiff's efforts to assist it in retaining Ignacio Alegria (Alegria), an Argentine national, originally hired by defendant as a summer intern.

Defendant hired Alegria on a full-time basis for the New York office after he completed

his masters in business administration from New York University. Alegria was highly thought of as an employee, receiving favorable reviews. With the participation of his direct supervisor, George Carrick, plaintiff was directed to attempt to arrange for Alegria to continue working for defendant, either in the United States or in one of defendant's international offices, while Alegria awaited his H-1B Visa, which would allow him to work in the United States. Plaintiff avers that at all times he acted reasonably and properly, and with the full knowledge, direction, and authorization of his supervisor.

Plaintiff also claims that at the time his employment was terminated, he was forty-eight years old, and his job duties were given to younger employees. At about the same time, four other employees who were fifty years old or older also were dismissed. He alleges that defendant used the Algeria incident as a pretext to fire him, and its actual purpose was age discrimination.

Defendant argues that it is entitled to dismissal because the complaint fails to state a cause of action. Defendant further argues that it is entitled to dismissal because there is documentary evidence, namely, a copy of defendant's employee manual along with supporting affidavits, that refute plaintiff's allegation that he is entitled to severance pay. Defendant also argues that plaintiff's claim for defamation is legally deficient because he failed to plead the defamatory statements with particularity and failed to identify to whom the defamatory statements were made, and the alleged statements in dispute were true and protected as a qualified privilege.

Plaintiff argues that defendant is not entitled to dismissal because if this court assumes that all of the facts presented in plaintiff's amended verified complaint are true, the well-pleaded allegations of the amended verified complaint more than adequately plead valid causes of action

for breach of contract, wrongful termination, defamation, and age discrimination.

Under CPLR 3025, the decision to allow a plaintiff to amend his or her pleading is within the court's discretion and permission to amend a pleading should be freely granted (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *G.K. Alan Assoc., Inc. v Lazzari,* 44 AD3d 95, 99 [2d Dept 2007], *affd* 2008 WL 2571852, 2008 NY LEXIS 1927; *Ancrum v St. Barnabas Hosp.,* 301 AD2d 474, 475 [1st Dept 2003]). New York courts will freely grant leave to amend a pleading absent a showing of prejudice or surprise resulting directly from the delay (*Ancrum v St. Barnabas Hosp.,* 301 AD2d 474, *supra*). Because there has been no showing of prejudice or surprise, and in the interest of judicial economy, the motion to dismiss will be addressed to the amended complaint to obviate the need for further motion practice on the same issues with respect to the amendments.

Upon a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), a court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], *lv denied* 10 NY3d 703 [2008]). Furthermore, "the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference" (*id.*). However, "while the allegations in the complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*id.*).

In his amended complaint, plaintiff has sufficiently pleaded a cause of action for breach of contract. Plaintiff avers that he relied on an employee manual to establish defendant's

contractual obligation to pay him, a management level employee, severance pay, equal to a year's salary following his termination.

However, dismissal is warranted because defendant has submitted documentary evidence that conclusively establishes a defense to the asserted contract claim as a matter of law (*Goldman v Metro Life Ins. Co.*, 5 NY3d 561, 571 [2005]). Courts have held that "[r]outinely issued employee manuals, handbooks, and policy statements should not lightly be converted into binding employment agreements" (*Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 317 [2001]). Although New York "does recognize an action for breach of contract when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment" (*id.* at 316), there is no such showing here. The employee manual upon which plaintiff bases a claim to an entitlement of severance pay incorporates a disclaimer that it does not create an employment contract, and that defendant may modify or change the policies stated in the manual without notice in individual cases. (Manual, Exhibit B, Affirmation of Jason Habinsky, 7). "An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer" within that same document (*Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 317 [2001]).

Plaintiff has not stated a valid cause of action for wrongful termination. "The long settled rule in New York was that 'where an employment was for an indefinite term it was presumed to be a hiring at will which might be freely terminated by either party at any time for any reason or even for no reason [*citation omitted*]' " (*Horn v New York Times,* 100 NY2d 85, 91 [2003]). Here, plaintiff concedes that he was an at-will employee, and has not pleaded any exception to

the general rule except for the discrimination claim addressed below.

Plaintiff has not stated a valid cause of action for defamation. Defamation has long been recognized to arise from "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999] [*internal quotation marks and citations omitted*]). The elements of a cause of action for defamation are a "'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se [citation omitted]' " (*Salvatore v Kumar*, 45 AD3d 560, *supra*). "The complaint also must allege the time, place and manner of the false statement and specify to whom it was made" (*Dillon v City of New York*, 261 AD2d at 38). In determining whether a plaintiff has successfully pleaded a cause of action for defamation, the court must evaluate the context of the entire statement or publication as a whole, and tested against the understanding of the average man, and if those words are not construed to have a defamatory meaning, they are not actionable (*id.*).

The amended complaint alleges that statements were made about plaintiff when several of defendant's former and/or current employees said that he was "abruptly terminated" and immediately "escorted out of the building." Plaintiff does not allege that these statements are false, and truth is a complete defense to a defamation claim (*Dillon v City of New York*, 261 AD2d at 39).

Plaintiff also claims that he was defamed by defendant's statement that he had broken the law in three jurisdictions. The complaint does not state who made this statement, to whom it was

made, or when. At best, it can be inferred that someone made the statement to plaintiff in explaining his sudden discharge from employment. Courts have held that "[i]nternal employment reviews 'may be protected speech, either as an expression of opinion, or in recognition of the principle that 'an employer has the right to assess an employee's performance on the job without judicial interference' " (*Dillon v City of New York*, 261 AD2d at 39 *[citations omitted]*). However, that privilege is not absolute, "it may be overcome and defeated by a showing based on evidentiary facts that the defamatory statements were motivated by either 'actual malice', 'actual ill-will' or 'personal spite' " or " 'culpable recklessness or negligence' " (*Stillman v Ford*, 22 NY2d 48, 53 [1968]). Here, there is no showing of either actual malice, ill-will, personal spite, culpable recklessness, or negligence (*id.*).

Moreover, the amended complaint fails to state the particular person or persons to whom the allegedly defamatory statements were made, or specifically by whom they were made or when, and these failures further warrant dismissal. "CPLR 3016 (a) provides that in an action to recover damages for libel or slander, the particular words complained of shall be set forth in the complaint. A cause of action sounding in defamation which fails to comply with these special pleading requirements must be dismissed" (*Fusco v Fusco*, 36 AD3d 589, 590 [2d Dept 2007]).

Plaintiff has successfully pleaded a cause of action for age discrimination pursuant to Administrative Code of the City of New York § 8-107 (fourth cause of action) and the Human Rights Law (fifth cause of action).

Administrative Code § 8-107 provides:

> 1. Employment. It shall be an unlawful discriminatory practice:

> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions, or privileges of employment.

Although not specifically identified in the amended complaint, plaintiff apparently relies on Executive Law § 296 (1) (a), also known as the Human Rights Law, which provides:

> 1. It shall be an unlawful discriminatory practice:
>
> > (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

"'To support a prima facie case of age discrimination under the Human Rights Law, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination" (*Ferrante v American Lung Ass'n,* 90 NY2d 623, 629 [1997]).

Taking all of the allegations in the amended complaint as true, and resolving all inferences which reasonably flow therefrom in favor of plaintiff, as required on a motion to dismiss under CPLR 3211 (a) (7), the complaint sufficiently alleges a cause of action to recover

damages under Administrative Code § 8-107 and the Human Rights Law (*see Terranova v Liberty Lines Tr.*, 292 AD2d 441, 442-443 [2d Dept 2002]). The complaint alleges that plaintiff is a member of a protected class by reason of his advanced age, that he was actively discharged from employment, that he was given excellent performance reviews and recently promoted, permitting an inference that he was qualified for the position he held, and that he was replaced by younger workers after his termination. Defendant submits evidence that plaintiff's allegation that he was replaced by younger workers is false, but this presents a factual dispute not properly resolved on a motion to dismiss. Accordingly, it is

ORDERED that the cross-motion to amend the complaint is granted, and the complaint is deemed amended in the form annexed to the cross-motion and in accordance with the foregoing decision; and it further is

ORDERED that defendant is directed to serve an answer to the surviving claims in the amended complaint within 20 days after receipt of the courtesy copy hereof being mailed to counsel by my staff; and it further is

ORDERED that the motion to dismiss is granted only as to the first, second, and third causes of action of the amended complaint, and these causes of action are dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it further is

ORDERED that the motion to dismiss is denied as to the fourth and fifth causes of action of the amended complaint; and it further is

ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY on September 29, 2008 at 12 noon for a preliminary conference.

Dated: August 14, 2008

ENTER:

J.S.C.

JANE S. SOLOMON