

**Brzezinski v Tri-State Publ. Printing &
Fulfillment, Inc.**

2008 NY Slip Op 32754(U)

October 6, 2008

Supreme Court, Suffolk County

Docket Number: 22913/05

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 22913-05**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**PRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 8-4-08
SUBMITTED: 9-11-08
MOTION NO.: 001-MG; CASEDISP_____
SUSAN BRZEZINSKI, x

Plaintiff,

-against-

THE MAURO LAW FIRM
Attorneys for Plaintiff
33 Queens Street, Suite 103
Syosset, New York 11791TRI-STATE PUBLISHERS PRINTING &
FULFILLMENT, INC. and ANTHONY
ARMETTA,**FRANKLIN, GRINGER & COHEN, P.C.**
Attorneys for Defendants
666 Old Country Road, Suite 202
Garden City, New York 11530Defendants.
_____ x

Upon the following papers numbered 1 39 read on this motion for summary judgment; Notice of Motion and supporting papers (001) 1-15; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 35-38; Replying Affidavits and supporting papers 16-32; Other 33-34 - Def't's Mem/Law; 39 Plt's Mem/Law; it is,

ORDERED that the branch of the motion by the defendants, Tri-State Publishers Printing & Fulfillment, Inc., and Anthony Armetta, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted, and the complaint is dismissed with prejudice; and it is further

ORDERED that the branch of the motion which is for dismissal of the complaint for the failure to produce a copy of the defendant's deposition transcript is denied as academic.

This is an action wherein the plaintiff, Susan Brzezinski, seeks damages for wrongful termination in violation of Executive Law §296(1)(a) and slander per se arising out of the course of her employment with Tri-State Publishers Printing & Fulfillment, Inc. and Anthony Armetta. As set forth in the complaint, the plaintiff was hired as a production manager on June 16, 2003, by Anthony Armetta, owner and president of Tri-State. In 2005, Mr. Armetta called each employee into his office and accused each of stealing a gas pass and using it without his

consent. The plaintiff denied such accusation. In February 2005, the plaintiff advised Marie Fox, secretary to Mr. Armetta, that she was pregnant. Mr. Armetta asked her on April 14, 2004, if she was pregnant and then terminated her employment on April 18, 2005, advising her that business was slow and that she was acting weird. The plaintiff claims that Mr. Armetta has been informing people in the industry that she was terminated for stealing from the company and that she was advised of the same by Kevin Duckham of Tri-Flex Label and Russell Goldfeder, a former vendor of Tri-State. The plaintiff claims that on or about May 27, 2005, Mr. Armetta wrote to the New York State Department of Labor requesting an appeal of its determination that the plaintiff was entitled to unemployment benefits because she was terminated for stealing gas. After a hearing before Judge Leonard R. Shapiro on June 30, 2005, and July 13, 2005, a Decision and Opinion was issued stating the plaintiff was entitled to receive unemployment benefits as she was not terminated for misconduct.

The defendants seek summary judgment dismissing the complaint on the basis that Mr. Armetta did not know the plaintiff was pregnant and did not tell anyone that the plaintiff was fired for stealing as the plaintiff alleges.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065 [1979]).

Anthony Armetta set forth in his supporting affidavit that he did not know that the plaintiff was pregnant at the time of her termination and that she was not wearing maternity clothes. He stated that Ms. Brzezinski smoked cigarettes during her breaks from February 2005 until her termination, that no office memo circulated that she was pregnant, and that there was no office celebratory lunch for her. He claims he held positions open for other pregnant employees

on three occasions prior to the plaintiff's termination. He states he did not advise Kevin Duckham or Russell Goldfeder that the plaintiff was terminated because she had stolen from Tri-State. He stated she was an at-will employee.

Kevin Duckham set forth in his affidavit that he is the president of Tri-Flex Label Corp., which is not a competitor of Tri-State as they perform different functions in the industry, and that Mr. Armetta never advised him that the plaintiff had been terminated for stealing and that he never told the plaintiff that Mr. Armetta had informed anyone in the industry that she had been terminated for stealing. He further avers that it was the plaintiff herself who, without any prompting from him, advised him at her initial job interview that she had been terminated by Tri-State for stealing. He further states that he offered her a job at the conclusion of the interview as he reasoned that no one would offer that information if had it been true, but that she declined the job offer several weeks later.

Russell Goldfeder set forth in his affidavit that he is a sales representative of Argo Envelope Corp., that he had never been told by Mr. Armetta that Ms. Brzezinski was fired from Tri-State for stealing, and that he never advised her of the same. He states that what actually happened was that he missed a telephone call from the plaintiff and, upon calling her back, she told him during that conversation that she had been fired by Tony Armetta for alleged stealing.

Marie Fox sets forth in her affidavit that she is a former employee of the corporate defendant and the plaintiff's former co-worker. She does not recall that Mr. Armetta asked her if the plaintiff was pregnant and has no knowledge of the same, nor was she contacted by the plaintiff to verify the same. Ms. Fox states that, at the time, her father was suffering from terminal cancer, that she was out of the office many times and took an extended leave of absence after her father's death, and that her job was held open for her during her leave.

Jim Gibb set forth in his affidavit that he is the President of Avon Printing, a customer of Tri-State, and had no knowledge concerning the reason that the plaintiff was terminated.

Executive Law §296(1)(a) provides, in pertinent part, that it shall be an unlawful discriminatory practice 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, to bar, to discharge from employment, or to discriminate against such individual in compensation or in terms or conditions or privileges of employment.

Absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time for any reason or no reason by either party (**In the Matter of Pasuale De Petris v Union Settlement Association, Inc.**, 86 NY2d 406 [1995])

Based upon the foregoing, it is determined that the defendants have demonstrated their prima facie entitlement to summary judgment dismissing the complaint on plaintiff's claim that she was wrongfully discharged because she was pregnant. The defendants have demonstrated that the plaintiff was an at-will employee whose employment was not terminated due to her pregnancy in that Mr. Armetta was not aware of the plaintiff's pregnancy when she was terminated.

"The definition of libel is much broader than that of slander. Every slander is a libel if published by writing, but there are many libels which are not slander. Any false publication by writing which exposes one to ridicule, hatred, contempt or obloquy, or causes him to be shunned or avoided, is libel per se, though if spoken it may be no slander. The definition of slander per se is not general, like that of libel, but is restricted and specific (**Simpson v The Press Publishing Co.**, 33 Misc. 228, 67 NYS 401 [Kings County 1900]. Actionable words are those which (1) import a charge of some punishable crime; (2) impute some offensive disease which would tend to deprive a person of society, or (3) which tend to injure a party in his trade and occupation or business, or (4) which have produced some special damage (**Cady v The Brooklyn Union Publishing Co.** 23 Misc 409, 51 NYS 198 [Kings County 1898]).

The plaintiff annexed a copy of a letter dated May 27, 2005, to her summons and complaint sent from Anthony Armetta to the New York State Department of Labor. Mr. Armetta set forth in that letter the basis for his request for a hearing regarding the payment of unemployment benefits to Susan Brzezinski. His request was based, in part, upon her conduct at work and the allegation of her unauthorized use of the office gas card for her own personal use. Mr. Armetta stated in the letter that the plaintiff was stealing from his business.

In **Clegg v Bon Temps, Ltd.** (114 Misc 2d 805, 452 NYS2d 825 [New York County 1982]), the former employee filed a libel action against her former employer when she learned the former employer had made disparaging remarks about her in a letter to the Department of Labor when she was applying for unemployment insurance. The court stated that, when an employer writes to the Department of Labor concerning a former employee's right to unemployment benefits, that writing is privileged and cannot be the basis for a libel action by an employee because New York Labor Law §537 (1) and (2) prohibits the disclosure of such information. The court further stated that the defense of privilege in a libel action has been defined as follows: a communication fairly made by a person charged with some public or private duty, legal or moral, or in the conduct of his own affairs in a matter where his interest is concerned. Privilege depends upon occasions or relations and protects a defendant even though the facts underlying the defamatory material turn out to be false.

Based upon the foregoing, the court finds that the defendants have demonstrated their prima facie entitlement to summary judgment dismissing the complaint on the claim of libel and slander per se.

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The plaintiff has opposed this motion by submitting an attorney's affirmation, a copy of the Note of Issue, Certificate of Readiness and attorney's affirmation, and an uncertified copy of Decision and Notice of Decision of the Unemployment Insurance Appeal Board wherein it is set forth that the Department of Labor issued a determination that she was eligible to receive benefits because she denied any wrongdoing and her employer had not specified a final incident that resulted in her discharge. After a hearing on her employer's protest, an opinion was rendered determining she was eligible for benefits. The plaintiff has not submitted an affidavit opposing this motion.

Based upon the foregoing, it is determined that the plaintiff has failed to raise a triable issue of fact to preclude summary judgment dismissing the complaint. The plaintiff's claim for libel per se and slander per se must fail as the defendant has demonstrated, prima facie, by way of the affidavits of Kevin Duckham and Russell Goldfeder that Mr. Armetta never communicated to them, either verbally or in writing, that the plaintiff was terminated for stealing and that it was the plaintiff who apprised them at her interview and during a telephone conversation that she was fired for stealing. Mr. Armetta's letter to the Department of Labor requesting a hearing and his basis for requesting the same are protected by privilege as set forth above, and his letter may not serve as a basis for this action. No factual issue has been raised to preclude summary judgment on the issue of whether the plaintiff was wrongfully terminated in violation of Executive Law §296(1)(a).

Accordingly, the defendants' motion is granted, and the complaint is dismissed with prejudice. In that the complaint has been dismissed, that part of the defendants' application to dismiss the complaint based upon the failure of the plaintiff to provide a copy of the deposition transcript of Anthony Armetta has been rendered academic.

Dated: October 6, 2008

HON. ELIZABETH HAZLITT EMERSON

J.S.C.