

**Cognata v Next Mgt. LLC**

2009 NY Slip Op 30598(U)

March 18, 2009

Supreme Court, New York County

Docket Number: 607890/08

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 602890/2008

**COGNATA, MARIA**

vs.

**NEXT MANAGEMENT, LLC**

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the accompanying numbered papers.*

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

**FILED**

MAR 20 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/18/09

*W*  
**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
MARIA COGNATA

Plaintiff,

Index No. 607890/08  
Mtn Seq. 001

-against-

NEXT MANAGEMENT LLC, JOEL WILKENFELD,  
FAITH KATES, and MILIE PELLET,

Defendants.

**FILED**  
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COUNTY CLERK'S OFFICE  
NEW YORK

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**WALTER B. TOLUB, J.:**

This action arises from plaintiff's 2008 job termination as the Vice President of defendant Next Management, LLC ("Next Management"). By this motion and pursuant to CPLR 3211, defendants Next Management, Joel Wilkenfeld ("Wilkenfeld"), Faith Kates ("Kates") and Milie Pellet ("Pellet") (collectively, "defendants") move to dismiss plaintiff's complaint in its entirety.

Background

Plaintiff began working in the model talent management industry in 1989 and met defendant Wilkenfeld while working for him at Spectrum Model Agency ("Spectrum") (Complaint, ¶10). In 1992, Spectrum merged with Next Model Management, owned by defendant Kates (id.). It appears that Next Model Management eventually became known as Next Management, LLC.

On March 1, 2007, plaintiff and defendant Next Management, executed an employment agreement ("the 2007 employment agreement"). Under the terms of the agreement, which covered a

\* 3 ]

period of five years, plaintiff was to serve as Vice President of Next Management in exchange for a compensation package which included a \$375,000 annual salary and medical benefits (Notice of Motion, Exhibit B). The 2007 employment agreement additionally contained provisions governing non-compete clauses, and provisions governing Next Management's ability to terminate plaintiff "for cause" (id. Article 8).

Beginning in March of 2008, plaintiff claims that numerous events transpired at the hands of the individual defendants which collectively acted to "undermine" plaintiff's credibility and reputation, ultimately resulting in plaintiff's job being terminated in September of 2008. These events included a short-lived attempt to relocate her division and staff from the sixth to the seventh floors of Next Management's office space which left plaintiff "isolated" on the seventh floor with her assistant (Complaint ¶¶ 19-23) and a series of job modifications which redirected plaintiff's duties and took her away from her established client base (id. ¶¶ 22-23, 30-33). Plaintiff also claims that the individual defendants intentionally misled her with respect to company practices which are claimed to have impacted on plaintiff's job responsibilities (id. ¶27-29), and refused to respond to questions and concerns expressed over her new responsibilities (id. ¶ 24, 25, 32), and at times, even ignored her (id. ¶38).

[\*4]

Plaintiff was ultimately terminated from her job with defendant Next Management on September 26, 2008. This action seeking recovery under theories of breach of contract, tortious interference with contractual relations, tortious interference with prospective business relations, and defamation/slander per se, followed.

#### Discussion

Defendants contend that notwithstanding plaintiff's allegations, plaintiff's facts, as alleged, fail to maintain any cognizable legal theory upon which she may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]). See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36.01 et seq.). This court, having reviewed the papers submitted, is inclined to largely agree.

A necessary procedural requirement for a claim asserting either defamation or slander per se, is the inclusion, in the complaint, of the particular words complained of (CPLR 3016(a)). Plaintiff's complaint however, only contains the general assertion that on September 26, 2008, defendants publicly announced that plaintiff had resigned from her position with the company, effective immediately (Complaint, ¶63) and that defendants had given out "false information" to "clients and

models". Not only is plaintiff's allegation improperly pleaded under the CPLR because the allegations are vague, the statements plaintiff accuses defendants of making, on their own, are simply not actionable under either defamation or slander *per se* standards.

Success on a defamation requires plaintiff to establish the existence of (1) a false and defamatory statement; (2) made about the plaintiff; (3) which was published by a defendant to a third party; and (4) caused the plaintiff to sustain damages. By contrast, a successful slander *per se* claim requires plaintiff to establish the existence of a statement made by a defendant which either (1) charges plaintiff with a serious crime; (2) injures plaintiff in his or her trade, business or profession; (3) alleges that plaintiff has a loathsome disease; or (5) imputes unchastity to a woman (Lieberman v. Gelstein, 80 NY2d 429 [1992]).

"Allegedly harmful words must be construed in context and interpreted reasonably, and are only actionable if susceptible of a defamatory meaning" (Aguinaga v. 342 East 72<sup>nd</sup> Street Corp, 14 AD3d 304, 305 [1<sup>st</sup> Dept. 2005]). In the instant action, plaintiff states that defendants told some of plaintiff's clients that she had resigned. According to plaintiff's affidavit in opposition, nonparty Karen Chanti told Dawn Stauffacher of J.C. Penney that plaintiff had simply resigned, and told Merlo Faundex of Spiegel that plaintiff had resigned because she had not been

happy at Next Management. Defendant Wilkenfeld told Oliver Daube, owner of Lumier, that plaintiff had resigned because she had decided to stay at home with her children (Affidavit of Maria Cognata ¶11). Interpreted reasonably, none of these comments convey any harm, nor do they support the inference that plaintiff's business would be, or was, injured (see, Liberman v. Gelstein, 80 NY2d 429 [1992]; Culverhouse v. Cooke Center for Learning and Development, Inc., 177 Misc2d 365 [Sup Ct. NY Co. 1998]). As such, dismissal of plaintiff's fourth cause of action is warranted.

Plaintiff's third cause of action which alleges tortious interference with prospective business or business relations, also fails. A necessary requirement for a claim of tortious interference of business is the existence of a specific business relationship coupled with the claim that a defendant's conduct thwarted the establishment or continuation of that relationship (Korn v. Princz, 226 AD2d 278 [1<sup>st</sup> Dept 1996]). Plaintiff's claim that defendants used "improper means" to interfere with her business relationships with "clients" and "models" does not meet this requirement. As such, the third cause of action is dismissed.

Plaintiff's second cause of action for tortious interference with a contract similarly fails. Establishment of this claim, advanced only as to the individual defendants, requires plaintiff

to plead (1) the existence of a valid contract between plaintiff and a third party; (2) a defendant's knowledge of that contract; (3) the intentional acts of defendant causing the breach; and (4) damages (Foster v. Churchill, 87 NY2d 744, 749-750 [1996]).

While there is little question that plaintiff can establish that the individual defendants knew of the existence of her valid employment contract with Next Management, it is doubtful that plaintiff will be able to establish the third and fourth requirements necessary to her claim. The individual defendants, who plaintiff claims interfered with her employment contract by changing and restricting her job duties, are all corporate officer of Next Management. This is significant, because in the absence of evidence of the commission of individual separate tortious acts, a corporate officer cannot be held personally liable for inducing a corporation to terminate the employment contract of an at-will employee (Bonanni v. Straight Arrow Publishers, Inc., 133 AD2d 585 [1<sup>st</sup> Dept 1987]). Since plaintiff's complaint is devoid of any claims that any of the individual defendants performed separate tortious acts, plaintiff's second cause of action must be, and is, dismissed.

Plaintiff's remaining cause of action for breach of contract is advanced solely as to Next Management. Inasmuch as there has been no arguments adequately supporting dismissal of this cause of action, defendant's motion to dismiss plaintiff's first cause

of action is denied.

As such, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted solely as to the second, third, and fourth causes of action, and the claims advanced as against Joel Wilkenfeld, Faith Kates, and Milie Pellet are dismissed; and it is further

ORDERED that the balance of this action, advanced as against defendant Next Management, LLC, shall continue; and it is further

ORDERED that within 20 days of service of a copy of this order with notice of entry, defendant Next Management, LLC shall serve its Answer.

Counsel for the remaining parties are directed to appear in IA Part 15, Room 335, 60 Centre Street, New York New York on May 1, 2009 at 11:00 a.m. for a Preliminary Conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/18/09

**FILED**  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

*[Signature]*  
WALTER B. TOLUB, J.S.C.