Flynn v Rabbi Haskel Lookstein Middle School of Ramaz
2009 NY Slip Op 30817(U)
April 6, 2009
Supreme Court, New York County
Docket Number: 112639/08
Judge: Joan A. Madden

[*1]

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

PRESENT: Hon Joan A. Madden PART ____

Justice

Index Number : 112639/2008

FLYNN, KEVIN

VS.

RABBI HASKEL LOOKSTEIN MIDDLE SCHOOL

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 112639-08

MOTION DATE ____

MOTION SEQ. NO. #001

MOTION CAL. NO. ____

ere read on 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 annexed Memorandum Decision + Order.

Dated: April 6, 2009

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 11

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KEVIN FLYNN

Index No. 112639/08

Plaintiff,

-against-

THE RABBI HASKEL LOOKSTEIN MIDDLE SCHOOL OF RAMAZ, JUDITH FAGAN, and RABBI JEFFREY B. KOBRIN,

Defendants.

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JOAN A. MADDEN, J.:

Defendants Rabbi Haskel Lookstein Middle School of Ramaz ("Ramaz"), Judith Fagan ("Fagan"), and Rabbi Jeffrey B. Kobrin ("Kobrin") move to dismiss the complaint for failure to state a cause of action. Plaintiff Kevin Flynn ("Flynn") opposes the motion, which is granted in part and denied in part for the reasons below.

Background

This action arises out of Flynn's termination as Ramaz's "Coordinator of Athletics" and physical education instructor. Flynn's employment with Ramaz began in 1999 and during subsequent years, Ramaz gave Flynn a series of consecutive one-year employment contracts. In May 2007, another school offered to employ Flynn for a similar position. When Flynn notified Ramaz of his intention to accept the other school's offer, Ramaz offered Flynn an increase in his salary for the 2007-2008 academic school year. Flynn accepted Ramaz's offer and signed a one-year employment contract with Ramaz for the 2007-2008 academic school year. The contract was contained in a June 7, 2007 letter from Ramaz to Flynn which set forth Flynn's salary and responsibilities and provided that "[t]eachers must maintain competence and effectiveness in their classroom work and foster good relationships

with their students and the parents of Ramaz [and that] it is expected that you will read the Ramaz employee manual and abide by its policies and protocols."

On March 5, 2008, Flynn supervised a lunch period where he lead a prayer. Flynn noticed a student talking during the prayer and disciplined the student for doing so. Later that day, Kobrin told Flynn that Flynn's actions made the student "hysterical." Soon thereafter, Fagan told Flynn that Ramaz was requiring Flynn to attend anger-management counseling, which he attended and where it was determined that he did not have anger management issues. At the end of March 2008, Fagan informed Flynn that Ramaz was terminating his employment and would not renew his contract because Flynn had "lost effectiveness" as a teacher.

Flynn then brought this lawsuit for back pay, front pay, benefits, compensatory and punitive damages, and costs of suit including attorneys' fees. The complaint contains causes of action for employment discrimination under New York Executive Law § 296(1)(a) and New York City Administrative Code § 8-107(1)(a), wrongful termination, promissory estoppel, breach of the implied covenant of good faith and fair dealing, and defamation.

Defendants now move to dismiss each of the six causes of action. Defendants argue that Flynn has not established a *prima facie* case of employment discrimination as Flynn does not satisfy the requisite elements under both the New York Executive Law § 296(1)(a) and New York City Administrative Code § 8-107(1)(a). Defendants also argue that under New York law, an at-will employee like Flynn, does not have a cognizable claim for wrongful termination.

Defendants next argue that Flynn's claim for promissory estoppel must be dismissed since the complaint fails to allege that Ramaz unambiguously promised Flynn that his job

would be secure, and that even if it had made such a promise, Flynn's reliance on it was unreasonable since Flynn was an at-will employee.

Defendants further contend that the implied covenant of good faith and fair dealing does not apply to employment contracts when the employment relationship is at-will. Defendants also argue that the defamation claim must be dismissed as it fails to set forth the exact words of the alleged defamatory statements and that, in any event,the alleged statements are not defamatory, and are protected by a the common interest privilege.

Flynn opposes the motion asserting that the complaint pleads a *prima facie* case for employment discrimination under New York Executive Law § 296(1)(a) and New York City Administrative Code § 8-107(1)(a). Flynn further argues that he was not an at-will employee, and his claim for wrongful termination should not be dismissed. Specifically, Flynn contends that although his employment contract with Ramaz does not state a definite duration of employment, the contract and the Ramaz employee manual limits Ramaz's right of discharge.

With respect to the cause of action for promissory estoppel, Flynn contends that based on the employment contract, the employee manual, he justifiably relied on promises by Ramaz that he would be discharged only for good and just cause, and that he was damaged by such reliance since he rejected another school's offer of employment and was ultimately fired by Ramaz.

Flynn further argues that as he was not an at-will employee, Ramaz made the implied covenant that it would discharge Flynn only for good and just cause, and that it breached this this implied covenant of good faith when it terminated Flynn's employment.

Flynn also maintains that the complaint adequately alleges the defamatory statements, and thus meets the particularity in the pleadings requirement for the defamation cause of

action. Furthermore, Flynn argues that there was no common interest between Kobrin, the Ramaz faculty, and administration of other private-Jewish schools, and therefore the statements are not subject to a qualified privilege.

In reply, the Defendants maintain that Flynn fails to provide any facts evidencing that his employment was not at-will, and that the exceptions to the at-will rule do not apply under these circumstances. Defendants further argue that Flynn fails to allege any facts that give rise to an inference of any employment discrimination. Finally, Defendants contend that Flynn fails to satisfy the particularity requirement in the pleadings for the claims of slander or libel, which is strictly enforced and requires that the complaint set forth the "exact words" of the alleged defamatory statement.

Discussion

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference'" Morgenthow & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Bjondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader…is not a fact at all

and...no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

Employment Discrimination

The first two causes of action seek to recover damages for employment discrimination based on Flynn's national origin and religion, in alleged violation of the New York State Executive Law § 296(1)(a) and the City Human Rights Law provided under New York City Administrative Code § 8-107(1)(a). The complaint alleges that because Flynn was one of fewer than five non-Jewish faculty members employed by Ramaz, Flynn was treated less favorably than other members of the faculty. Specifically, Fagin referred to Flynn as having a "hot Irish temper" and Flynn was the only faculty member required to attend anger management counseling. Furthermore, the complaint alleges that the underlying bases for termination of Flynn's employment was Ramaz's discrimination against Flynn.

In determining whether Flynn can establish a *prima facie* case of discrimination, the shifting burden standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) must be applied.[1] See, Girma v. Skidmore College, 180 F.Supp.2d 326, 334 (N.D.N.Y. 2001). Under this analysis, a plaintiff claiming employment discrimination must

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[1]In Forrest v. Jewish Guild for the Blind, 309 AD2d 546, 552 (1st Dept 2003), aff'd, 3 NY3d 295 (2004), the Appellate Division, First Department wrote that "[t]he standard for recovery under section 296 of the Executive Law is in accord with the federal standards under Title VII of the Civil Rights Act of 1964, and the human rights provisions of New York City's Administrative Code mirror the provisions of the Executive Law." However, in 2005, the New York City Council passed the Local Civil Rights Restoration Act which amended the City Human Rights Law to emphasize that the City Human Rights Law should be liberally construed and interpreted more broadly than Federal and State civil rights statutes. See Williams v. New York City Housing Authority, __ AD3d ____, 872 NYS2d 27 (1st Dept 2009). However, at this stage of the litigation, the McDonnell Douglas Corp shifting burden analysis, can be applied to claims of discrimination brought under the City Human Rights Law. See Ochei v. Coler/Goldwater Memorial Hospital, 450 FSupp2d 275, 283 (SD NY 2006); Jordan v. Bates Adver. Holdings, Inc., 11 Misc3d 764, 770 (NY Sup Ct 2006).

first establish a *prima facie* case by demonstrating the following: "(1) membership in a protected class; (2) that she was qualified to hold the position; (3) termination from employment or other adverse employment action; and (4) that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent and nondiscriminatory reasons to support its employment decision[s].' If the defendant's evidence successfully rebuts plaintiff's initial presumption of discrimination, plaintiff may prove that the purportedly legitimate reasons proffered by defendant were merely a pretext for discrimination, by demonstrating that (1) the articulated reasons are false, and (2) discrimination was the real reason" Forrest, 309 AD2d at 552-553, quoting, Ferrante v. American Lung Assn., 90 NY2d 623, 629 (1997).

On a motion to dismiss, however, the courts have found that a claim for discrimination is adequately pleaded when the complaint alleges that plaintiff is a member of a protected class, and was subject to adverse treatment based on the defendant's animus towards that particular protected class. See Cohen v. Seward Park Housing Corporation, 7 Misc.3d 1015(A), 2005 WL 954867 (Sup Ct NY Co. 2005).

Ramaz argues that Flynn does not satisfy the first prong of the McDonnell Douglas Corp. analysis because Flynn fails to expressly state his religion and national origin in the pleadings. However, it can be inferred from the factual allegations in the complaint that Flynn is Irish and was a non-Jewish member of the faculty. Moreover, the burden of establishing a *prima facie* case under this analysis is minimal. Mandell v. County of Suffolk, 316 F3d 368, 378 (2nd Cir. 2003). Therefore, Flynn sufficiently alleged membership in a

protected class. Moreover, the complaint adequately alleges, and Ramaz does not dispute, that Flynn was qualified to hold the position and suffered an adverse employment action.

The next issue is whether the circumstances of Flynn's discharge give rise to an inference of discrimination. "A plaintiff may raise such an inference by showing that the employer subjected him to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group." Girma v. Skidmore College, 180 F.Supp.2d at 339, quoting, Graham v. Long Island Rail Road, 230 F.3d 34, 39 (2d Cir 2000). Here, the complaint alleges that no other member of the faculty was required to attend anger management counseling nor were they terminated for an encounter with a student such as Flynn's encounter on March 5, 2008. The complaint further alleges that Flynn was one of fewer than five faculty members who were not Jewish and that none of the employees, including the non-Jewish employees, were subject such treatment. These allegations are sufficient at this juncture to establish an inference and a *prima facie* case of discrimination.

Ramaz responds that there was a legitimate and non-discriminatory ground for the conduct of which Flynn complains, and in particular that the reason for requiring Flynn to attend anger management was a result of his encounter with the student, and its belief that Flynn's anger management issues caused him to lose effectiveness as a teacher. However, prior to discovery, it would be premature to dismiss the complaint based on these assertions, particularly as Flynn may be able to show that the reasons offerred by Ramaz were merely a pretext for discrimination. See Levine v. Feldman, 215 AD2d 182 (1st Dept 1995) (dismissal of plaintiff's age discrimination claim was premature without the benefits of discovery; plaintiff could prove that defendants' claim of economic necessity was a pretext in her termination); Cohen v. Seward Park Housing Corp., 7 Misc 3d 1015(A) (pre-answer motion to dismiss complaint alleging religious discrimination was premature). Accordingly, the first

and second causes of action seeking to recover for discrimination are sufficient to state a claim.

Wrongful Termination

The third cause of action seeks to recover damages for Ramaz's alleged wrongful termination of Flynn. The complaint alleges that based on the employment contract between Flynn and Ramaz, the Ramaz employee manual, and Ramaz's oral promises, Flynn's employment could only be terminated only for good and just cause, and that such cause did not exist.

New York does not recognize the claim of wrongful termination under circumstances of at-will employment. Murphy v. American Home Products Corp., 58 NY2d 293, 301 (1983). "Where the term of employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason." Lobosco v. New York Telephone Co./NYNEX, 96 NY2d 312, 316 (2001). An exception to the at-will rule exists "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.

The employment contract between Flynn and Ramaz does not provide any definite period of time for employment or expressly limit Ramaz's right of termination. However, Flynn argues that the general guidelines provided in the employment contract should be interpreted to mean that Flynn's employment could only be terminated for good and just cause. The contract provides that "[t]eachers must maintain competence and effectiveness in their classroom work and foster good relationships with their students and with the parents of Ramaz.... It is expected that you will read the Ramaz employee manual and abide by its

policies and protocols." Flynn contends that this language limits Ramaz's right of discharge and thus he was not an employee at will.

Flynn's argument is unavailing. While the employment contract requires Flynn to abide by Ramaz's general guidelines and obligations, it does not provide that Flynn can only be terminated in the event of his failure to do so. In other words, while the contract requires Flynn to perform his duties and abide by Ramaz's guidelines, it does not limit Ramaz's right to terminate him.

Flynn next argues that even if he is found to have been an employee at-will, his claim for wrongful termination should not be dismissed since the Ramaz employee manual provides a limitation on Ramaz's right of discharge, citing Weiner v. McGraw-Hill, Inc., 57 NY2d 458 (1982). This argument is without merit. In Weiner, the court denied defendant's motion to dismiss when the complaint alleged that the defendant employer assured plaintiff that its policy was not to terminate its employees without just cause, and the employment application signed by the plaintiff stated that it was subject to the provisions in defendant's employee handbook which contained an express written policy limiting the rights of discharge to sufficient cause. Here, the complaint does not allege any facts evidencing such a limitation on Ramaz's right of termination and thus is distinguishable from Weiner. Moreover, the Ramaz employee manual, as indicated above, does not contain any express limitation on the right of discharge, and the general provisions of the manual relied on by Flynn are insufficient. See Murphy v. American Home Products Corp., 58 NY2d at 305. Therefore, Flynn is an employee at-will and his claim for wrongful termination must be dismissed.

Promissory Estoppel

Flynn's next claim is for promissory estoppel. The complaint alleges that Ramaz promised Flynn job security in order to induce Flynn to continue working for Ramaz and to reject the other school's offer. Furthermore, the complaint alleges that Flynn relied on this promise and as a result was injured when Ramaz terminated his employment.

To state a cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is clear and unambiguous; (2) reasonable reliance on the promise; and (3) injury caused by the reliance. New York City Health and Hospitals Corporation v. St. Barnabas Hospital, 10 AD3d 489, 491 (1st Dept. 2004).

Here, the complaint fails to allege a clear and unambiguous promise of job security. Dalton v. Union Bank of Switzerland, 134 AD2d 174, 176-177 (1st Dept 1987). Moreover, even if such a promise was sufficiently alleged, the complaint would be subject to dismissal since as an employee at-will, Flynn cannot establish that his reliance on Ramaz's alleged promise of job security was reasonable. Arias v. Women In Need, Inc., 274 AD2d 353 (1st Dept 2003); Dalton v. Union Bank of Switzerland, 134 AD2d at 176,177; compare Rogers v. Town of Islip, 230 AD2d 727 (2d Dept 1996) (complaint stated a claim for promissory estoppel when plaintiff was allegedly terminated in violation of his seniority rights). Therefore, Flynn's cause of action for promissory estoppel must be dismissed.

Implied covenant of good faith and fair dealing

The complaint alleges that Ramaz breached the implied covenant of good faith and fair dealing by terminating Flynn's employment without good or just cause.

Under New York law, all contracts carry with them an implied covenant of good faith and fair dealing in the course of performance. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144, 153 (2002). However, the duties of good faith and fair dealing "do not imply obligations inconsistent with the terms of the contractual relationship." Id. (internal

citation and quotation omitted). Thus, when, as here, a plaintiff is an at-will employee he cannot successfully challenge his termination based on the purported breach of the implied convenant of good faith and fair dealing. Murphy v. American Home Products Corp., 58 NY2d at 304-305 (noting that in the context of an employment at-will "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination.... [T]o imply such a limitation from the existence of an unrestricted right would be internally inconsistent").

Accordingly, the cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed.

Defamation

Flynn seeks to recover damages for defamation based on Ramaz's allegedly defamatory statement made to the Ramaz faculty members and administrative staff of other private Jewish schools in New York City. The complaint alleges that on or about May 27, 2008, at a meeting between Ramaz administration and the school Faculty Council, Kobrin stated, in response to inquiries by other members of the Ramaz faculty that "in sum and substance that [Flynn's] termination was 'not due to one incident with one student,' and that [Flynn] had been subject to previous discipline in 'several steps taking [sic] along the way, including documentation'"(Complaint, ¶ 37). The complaint further alleges that Kobrin and Fagin published the allegedly defamatory statements to administrators at other private Jewish schools in New York City, which impaired Flynn's ability to secure employment at these schools.

CPLR 3016 (a) requires that in a defamation action "the particular words complained of be set forth in the complaint." Dillon v. City of New York, 261 AD 2d 34, 38 (1st Dept 1999) (citation omitted). This pleading "requirement is strictly enforced and the exact words must be set forth. Any qualification in the pleading thereof or use of the words 'to the effect'

'substantially' or words of similar import generally renders the complaint defective.'" Gardner v. Alexander Rent-a-Car, Inc., 28 AD2d 667 (1st Dept 1967); Varela v. Investors Ins. Holding Corp., 185 AD2d 309, 310 (2d Dept 1992), aff'd, 81 NY2d 958 (1993) ("[t]he requirement that the defamatory words must be quoted verbatim is strictly enforced). A claim for defamation must also allege "the time, place and manner of the false statement and specify to whom it was made." Dillon, 261 AD2d at 38.

In this case, the complaint does not satisfy the pleading requirements of CPLR 3016(a) since the exact words complained of are not contained in the complaint. In fact, the complaint prefaces its description of the alleged statements with the phrase "in sum and substance" thus rendering the complaint defective. Gardner, 28 AD2d 667. Moreover, with regard to statements that were published to other private-Jewish schools, the complaint does not allege anything with respect to the time, place, manner, and does not specify to which schools the statements were made.

Accordingly, as the complaint does not sufficiently plead a cause of action for defamation, the court need not address Ramaz's additional arguments that the statements are not defamatory and are subject to a qualified privilege.

Conclusion

In view of the above, it is

ORDERED that defendant's motion to dismiss is granted to the extent of dismissing the third, fourth, fifth, and sixth causes of action; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, New York, New York on April 30, 2009 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: ~~March ,2009~~ April 6, 2009

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.