

Branesch v Scully & Scully, Inc.

2009 NY Slip Op 32036(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 103534/2009

Judge: Marcy S. Friedman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Index Number : 103534/2009
BRANESCH, FELICIA
VS.
SCULLY & SCULLY, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 103534/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to ~~for~~ dismiss

PAPERS NUMBERED

1
2
3

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

Cross-Motion: Yes No

Memo of Law M1

Upon the foregoing papers, it is ordered that this motion *is determined per accompanying decision/order dated 9-8-09*

RECEIVED
SEP 09 2009
CLERK OF THE COURT
BY: [Signature]

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

WLL

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

Dated: 9-8-09

[Signature]
MARCY S. FRIEDMAN
NON-FINAL DISPOSITION

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
FELICIA BRANESCH,

Plaintiff(s),

Index No.: 103534/2009

- against -

SCULLY & SCULLY, INC.

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECLIN/ORDER

In this action, plaintiff alleges that she was wrongfully terminated from her employment with defendant Scully & Scully, Inc. (“Scully”) due to her conviction, while employed, for petit larceny, and that her termination violates Correction Law §§ 750 et seq. Defendant Scully moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss plaintiff’s complaint against it.

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 unsupported 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

[*3]

denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(e)(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].)

In seeking dismissal of plaintiff’s complaint based on documentary evidence, defendant appears to rely on plaintiff’s employment application and Scully’s employee handbook, which states that employee misconduct, including “theft or dishonesty,” may lead to discharge. (D.’s Motion, Ex. D, at 11-12.) However, plaintiff’s complaint alleges that her termination violates the anti-discrimination sections of Correction Law §§ 750 et seq., and these documents fail to show Scully’s entitlement to terminate her under the statute. The branch of the motion dismiss based on documentary evidence will accordingly be denied.

Scully also moves to dismiss plaintiff’s complaint for failure to state a cause of action. Scully argues that Correction Law § 752, which affords employees protection from adverse employment actions due to criminal convictions, does not apply to plaintiff because she was charged with a crime, and pled guilty to petit larceny, while employed by Scully as the director of its bridal registry department.

Correction Law § 752 provides:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal

offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753(1) provides that “[i]n making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider” seven enumerated factors.¹

In moving to dismiss plaintiff’s claim under these sections, Scully argues that Correction Law § 752 protects employees only from termination for criminal convictions occurring prior to employment. Scully submits no authority for this contention and, indeed, the Appellate Division of this Department has applied the protections of section 752 to adverse acts against current employees for criminal convictions that appear to have occurred during the course of their employment. (See Matter of Association of Surrogates and Supreme Ct. Reporters v State of New York Unified Ct. Sys., 48 AD3d 228 [1st Dept 2008]; Matter of Rosa v City Univ. of New York, 13 AD3d 162 [1st Dept 2004], lv denied 5 NY3d 705 [2005].) Moreover, prior to 2007, the protections against adverse acts based on criminal convictions had applied to “application[s] for any license or employment.” In 2007, section 752 was amended to expand the protections to denial of “employment or [a] license.” In light of the above authority and the expansion of

¹ The factors enumerated by section 753(1) are as follows: “(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person. (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities. (d) The time which has elapsed since the occurrence of the criminal offense or offenses. (e) The age of the person at the time of occurrence of the criminal offense or offenses. (f) The seriousness of the offense or offenses. (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct. (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.”

protections under the statute, the court rejects defendant's contention that section 752 applies only to convictions occurring prior to employment.

Scully also argues that, even assuming arguendo that Corrections Law § 752 applies to plaintiff's termination, a direct relationship exists between plaintiff's guilty plea to petit larceny and her duties as a manager of a retail sales department, and that defendant was therefore entitled to terminate plaintiff under the exception provided in section 752(1). Scully correctly argues that there is a direct relationship between plaintiff's guilty plea to petit larceny and her employment as a manager of a retail sales department, in which plaintiff handled the cash and credit card receipts of Scully's customers. (See P.'s Aff. in Opp., ¶18.) However, in arguing that the exception of section 752(1) applies, Scully ignores that section 753(1) provides that the enumerated factors "shall" be considered "[i]n making a determination pursuant to section seven hundred fifty-two" of the Correction Law. The Court of Appeals has held that the enumerated factors of section 753(1) shall be applied in those contexts in which the exception of 752(1) applies:

Section 753 must also be applied to the direct relationship exception because the prefatory language of section 753 (1) and (2), properly construed, specifies that the section shall apply to all parts of section 752. When considering the effect of section 753 on the direct relationship exception, however, a different analysis is required because "direct relationship" is defined by section 750 (3), and because consideration of the factors contained in section 753 (1) does not contribute to determining whether a direct relationship exists. We read the direction of section 753 that it applies "[i]n making a determination pursuant to section seven hundred fifty-two" to mean that, notwithstanding the existence of a direct relationship, an agency or private employer must consider the factors contained in section 753, to determine whether employment or a license should, in its discretion, issue.

(Bonacorsa v Van Lindt, 71 NY2d 605, 613-614 [1988].)

Here, plaintiff's complaint expressly pleads that Scully failed to consider the factors

[* 6]

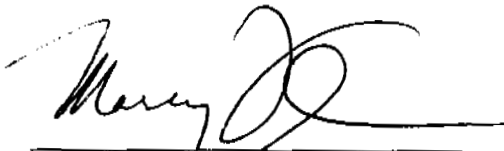
required under section 753(1). (Complaint, ¶ 92.) This motion, which is addressed to the face of the pleadings, does not eliminate issues as to whether defendant undertook the requisite consideration of the statutory factors. The motion must therefore be denied.

It is accordingly hereby ORDERED that Scully's motion to dismiss the complaint is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference, including a settlement conference, in Part 57 of this court on Thursday, October 15, 2009 at 2:30 p.m. The parties shall appear on that date with counsel, or be available by telephone, and counsel shall be authorized and prepared to discuss settlement of the instant action pursuant to New York Rules of Court 22 NYCRR § 202.12(c)(5) and Local Rule 1 of the Rules of the Justices of New York County Supreme Court.

This constitutes the decision and order of the court.

Dated: New York, New York
September 8, 2009



MARCY FRIEDMAN, J.S.C.

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK