S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X **PART 9**

GREG CURRY,

INDEX NO. 23218/09

Plaintiff, **X X X**

-against- **MOTION DATE: 1/20/10**
SEQUENCE NO. 002

AHMUTY, DEMERS & McMANUS, ESQS., PHILIP J. McMANUS, FRANK A. CECERE, JR., ROBERT J. HINDMAN and RICHARD J. DaVOLIO,

Defendants.

----------X

Notice of Motion, Affs. & Exs.....1
Affirmation In Opposition & Exs.....2
Reply Affirmation & Exs.....3

Upon the foregoing papers, it is ordered that the motion by defendants pursuant defendants pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss plaintiff's complaint is granted and the Complaint is hereby dismissed.

Plaintiff commenced this action to recover damages arising from his termination from employment as an associate attorney at defendant law firm. Plaintiff asserts that he was fired in retaliation for his threat to report the firm's alleged fraudulent and unethical billing practices to the Disciplinary Committee of the Appellate Division. Plaintiff contends that, in an effort to cover up its billing improprieties, the defendant firm fired him, and through unspecified malicious

threats, coercion and blackmail, exacted a promise from him not to report the alleged misconduct to the appropriate authority.

Defendants seek dismissal of the complaint pursuant to CPLR 3211(a)(1), (5) and (7) predicated on the grounds that plaintiff was not wrongfully terminated from employment but, as evidenced by a letter dated October 17, 2008, resigned his position in accordance with the terms therein.

The fundamental issue before the court is whether plaintiff's claim that defendant breached of an implied in-law duty inherent in his at-will employment contract with the Ahmuty law firm is viable under the circumstances extant.

In evaluating a motion to dismiss under CPLR 3211(a)(7) the court must accept the allegations of the complaint as true, accord plaintiff the benefit of every possible influence and determine only whether the facts alleged fit within a cognizable legal theory (*Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc.*, 5 AD3d 352, 353 [2nd Dept. 2004]). Allegations consisting of bare legal conclusions, as well as factual claims contradicted by documentary evidence, are not entitled to any such consideration (*Salvatore v Kumar,* 45AD3d 560, 563 [2nd Dept. 2007], leave to appeal denied 10 NY3d 703 [2008]). Factual allegations presumed to be true, may properly be negated by affidavits and documentary evidence (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept. 2005]). Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes a defense (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Montes Corp. v Charles Freihofer Baking Co., Inc.*, 17 AD3d 330 [2nd Dept. 2005]).

With respect to plaintiff's wrongful discharge claim, analysis begins with the long standing and well established rule that, absent a constitutionally impermissible purpose, a statutory proscription or an agreement establishing a fixed duration, an

employment relationship is presumed to be a hiring at-will, terminable at any time by either party (*Lobosco v New York Telephone Company/NYNEX,* 96 NY 312, 316 [2007]; *Daub v Future Tech Enterprise, Inc.*, 65 AD3d 1004, 1005 [2nd Dept. 2009]). Thus, generally either the employer or employee may terminate the at-will employment for any reason - or for no reason (*Smalley v Dreyfus Corp.,* 10 NY3d 55, 58 [2008]; *Epifani v Johnson*, 65 AD3d 224, 230 [2nd Dept. 2009] (citations and internal quotation marks omitted)).

In response to defendants' dismissal motion, plaintiff argues that, even though he was an at-will employee at defendant law firm, his breach of contract claim is viable since he was terminated in retaliation for his threat to report the law firm's purported misconduct to the Disciplinary Committee in compliance with his ethical obligation as an attorney. To buttress his position, plaintiff relies on the exception to the employment at-will doctrine enunciated by the Court of Appeals in *Wieder v Skala*, 80 NY2d 628 [1992], a case involving an associate attorney terminated by his employer for insisting that the firm comply with DR1-103(A)[1] and report another associate's unethical conduct.

In *Wieder,* the Court recognized a cause of action for breach of an implied in-law obligation, inherent in the relationship between the law firm and an associate attorney, that both the firm and the associate would comply with the governing rules of conduct and ethical standards of the legal profession. Writing for the court, Judge Hancock distinguished *Murphy v American Home Products Corp.,* 58 NY2d 293

---

[1]At the time of the events at issue, DR1-103(A) provided that "A lawyer possessing [unprivileged] knowledge of .... a violation of DR-103 .... shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such knowledge."

[1983] and *Sabetay v Sterling Drug, Inc.*, 69 NY2d 329 [1987], wherein the Court of Appeals refused to find an implied in-law obligation of good faith and fair dealing that would have provided relief to corporate whistleblowers, premised on the distinctive relationship between a law firm and a lawyer hired as an associate.

Defendants counter that plaintiff's case falls outside the narrow exception created by *Wieder*. Moreover, they maintain that plaintiff was not fired to keep him from reporting any alleged misconduct but rather because he was an unproductive employee who had an inappropriate heated verbal altercation with one of the partners of the firm in the presence of other office personnel.

It is beyond dispute, as quoted in *Connolly v Napoli, Kaiser & Bern, LLP,* 12 Misc.3d 530, 535 [N.Y. Sup. 2006] that

> "in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession." *Wieder v Skala, supra* at p. 635-635.

Even accepting the allegations of the complaint as true, and affording them the benefit of every favorable inference (*International Shoppes, Inc., v Spencer* 34 AD3d 429, 430 [2nd Dept. 2006]), the complaint fails to state a claim within the narrow exception to the employment at-will doctrine set forth in *Wieder* v *Sicala*. Significantly in *Wieder,* where the plaintiff alleged he was terminated for his refusal to allow himself to be drawn into the cover up of a fellow associate's wrongful acts, two of the firm's partners conceded that the firm was aware that the associate in question was a pathological liar who had lied to members of the firm regarding the status of pending legal matters. The associate himself admitted in writing that he had

committed several acts of legal malpractice, fraud and deceit upon plaintiff and several clients of the firm. In the instant matter, defendants vigorously deny the veracity of plaintiff's allegations regarding the firm's billing practices. Moreover, the issue apparently was never broached until the time of his resignation/firing.

Plaintiff was not expected to choose between continued employment and reporting alleged billing improprieties. Rather, he executed a letter of resignation dated October 17, 2008 wherein he, *inter alia*, thanked defendant law firm for having employed him for four years; agreed to accept four months salary following his resignation as well as health insurance coverage until February 28, 2009, irrespective of his gaining employment during that period; and agreed not to disparage the firm in any way or do anything that would harm its reputation among current, past or potential customers or clients.

It bears noting that in the four years prior to his execution of the resignation letter, plaintiff never reported any purported misconduct by the defendant law firm to the Disciplinary Committee nor did he do so in the period post execution of the letter until commencement of the lawsuit in or about November, 2009.

Plaintiff's conclusory assertions, bereft of supporting factual averments that the resignation letter was the product of blackmail, extortion, coercion, duress by the individual defendants, and fear of physical and professional reprisals, are untenable under the circumstances extant, regardless of whether or not the letter constitutes a release as defendants contend. Notably, the terms of the agreement were carried out. Plaintiff collected his severance pay, was not precluded from reporting the purported ethical violations and did not seek to "rescind" or "revoke" the non-disparagement letter until eleven months after it was executed. A party who signs an agreement and

accepts the benefit thereof, is presumed to know its terms and to consent to them *(Guerra v Astoria Generating Co., L.P.*, 8 AD3d 617, 618 [2nd Dept. 2004]).

As an attorney, plaintiff was clearly aware of the ramifications of the resignation letter he knowingly signed and affirmed by fully accepting the benefits thereunder without complaint for almost one year. For him now to complain that the agreement was the product of duress/coercion strains credibility.

Given that plaintiff's alleged retaliatory firing, a resignation in fact, does not factually fall within the ambit of *Wieder*, he was an employee at-will whom defendants were free to terminate at any time for any reason (*Harbas v Gilmore*, 193 AD2d 553 [1st Dept. 1993]).

While plaintiff's claim for punitive damages fails with the substantive cause of action to which it is appended, it bears noting that punitive damages are not recoverable for breach of the implied covenant of good faith (*Bainton v Baran*, 287 AD2d 317, 318 [1st Dept. 2001]).

Dated: March 16, 2010.

Anthony L. Parga, J.S.C.