Romanello v Intesa Sanpaolo, S.p.A.
2010 NY Slip Op 31341(U)
May 17, 2010
Sup Ct, NY County
Docket Number: 109314/09
Judge: Louis B. York
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SCANNED ON 5/24/2010

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 109314/2009

ROMANELLO, GIUSEPPE

vs.

INTESA SANPAOLO S.P.A.

SEQUENCE NUMBER : 001

DISMISS

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

FILED
MAY 24 2010
NEW YORK
COUNTY CLERKS OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/17/10

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2
---X
GUISEPPE ROMANELLO,

Plaintiff,

-against-

Index No. 109314/09

INTESA SANPAOLO, S.p.A and ANN STEFAN,

Defendants.
---X

LOUIS B. YORK, J.:

Plaintiff, Mr. Guiseppe Romanello, is an individual residing in Lynbrook, New York, and a former executive of defendant, Intesa Sanpaolo, S.p.A. (Intesa). Romanello allegedly worked for Intesa and its predecessor for some 25 years before his termination. This action concerns the conditions under which the working relationship between the parties was ended. More specifically, Romanello claims that Intesa discriminated against him when he became disabled, breached the contract of employment, and violated his human rights by terminating him.

Intesa has several hundred employees based in New York, where it maintains offices at One William Street in New York City. Defendant Ms. Ann Stefan (Stefan) is First Vice President and Head of Personnel for Intesa, and she allegedly makes and carries out Intesa's personnel decisions. Romanello claims that Stefan, individually, and as an officer of Intesa, engineered and carried out a campaign of unlawful conduct toward Romanello.

Background

According to the complaint, on or about January 9, 2008, Romanello became ill at work.

He attempted to return to work on January 22, 2008, but upon arrival, Romanello could not function, as he had overwhelming feelings of passing out and panic. Romanello was eventually diagnosed with major depression, syncope and collapse, neurasthenia and anxiety. He remained unable to return to work for the ensuing months.

From January to March 2008, Intesa gathered information on Romanello's condition for submission to its insurer, Prudential Insurance Company (Prudential). Prudential allegedly offered short-term and long-term disability insurance through a group plan offered by the New York State Bankers' Association (NYSBA). According to the complaint, as of April 21, 2008, Stefan provided the information on Romanello's condition to Prudential with the admonition that "I hope someone will review this case very carefully." In addition, without offering any specifics, the complaint alleges that Stefan and Intesa violated Romanello's medical privacy by: (i) gathering his confidential medical information and records; (ii) reviewing, misunderstanding, misconstruing and contorting the content of such records; and (iii) intentionally and maliciously using and disclosing such records for the purposes of harming him.

In a determination made as of May 29, 2008, Prudential denied Romanello's claims for short-term and long-term disability benefits. In that same time period, Intesa informed Romanello that his short-term disability payments ended as of April 3, 2008, and that his Family and Medical Leave Act (FMLA) benefits would expire on June 3, 2008. Intesa also inquired as to whether "he intends to return to work or to abandon his position." *See* Josephson Aff., Exh. 5. Although Romanello indicated that he did not wish to abandon his job, as of June 3, 2008, Intesa terminated his benefits, including his salary continuance. Prudential evidently later reversed its determination of May 29, 2008, and found Romanello to have been disabled from January 9,

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2008 through October 27, 2008.

The complaint alleges that Intesa refused to make the reasonable accommodation for Romanello's disability, as required under New York State and New York City Human Rights Laws (NYSHRL & NYCHRL, respectively), by keeping his job open, providing him with proper severance pay, and continued medical benefits. The complaint also states that these very same actions also constituted unlawful retaliation for his seeking reasonable accommodation for his disability.

Thereafter, Intesa purportedly raised the interest rate on, and accelerated, a mortgage on his home that had been taken out under a program offered by Intesa to employees (the Note). Contrarily, the documentary evidence seems to suggest that Intesa decided to forbear full acceleration of the Note, but rather offered an opportunity for Romanello to pay interest only until such time as refinancing could be arranged. Nonetheless, there is nothing in the Note that indicates that continued employment with Intesa is a condition of continuing the Note.

Romanello apparently did not make some of the arranged payments, and Intesa sought to take legal action to close its position in the Note. Romanello views these actions as discriminatory, and cites an e-mail sent to his counsel as of November 13, 2008 as a demonstration of bad faith on the part of Intesa. The e-mail, from Intesa legal counsel, states that "I have not heard from you since last week when I asked to close this out. At the bank's instruction I am opening a litigation file for Romanelli's [sic] account and its [sic] going to get expensive fast. This really is your client's last chance to avoid litigation." *See* Josephson Aff., Exh. 9.

In addition to these adverse actions, Romanello complains that Intesa failed to pay his

bonus for 2007, divested him of his accrued sick days, and failed to provide him with the proper severance and benefits package commensurate with other comparably-situated non-disabled employees, including medical benefits until age 65.

Finally, the complaint states that Stefan defamed Romanello by stating that "we had to terminate Mr. Romanello's employment because I spoke with his doctors and they said he was not disabled and was falsifying his claim for disability benefits," he was "faking" the symptoms of his disability, and he was "malingering" "or other words synonymous therewith." Stefan allegedly made these statements "to numerous persons during the weeks and months following termination ... and continues to make such statements to the present time." Complaint ¶¶ 34, 77-79.

Romanello now brings this action for: (i) discrimination on the basis of disability and retaliation in violation of NYSHRL (first and third causes of action): (ii) discrimination on the basis of disability and retaliation in violation of NYCHRL (second and fourth causes of action); (iii) tortious interference with his contract of insurance with Prudential through the NYSBA (fifth cause of action); (iv) breach of contract (sixth cause of action, as against Intesa only); (v) unlawful withholding of wages (seventh cause of action, as against Intesa only); (vi) defamation (eighth cause of action); and (vii) violation of his medical privacy (ninth cause of action). Upon this motion, defendants move, pursuant to CPLR 3211 (a) (1) & (7), to dismiss all causes of action except the sixth.

Discrimination and Retaliation Claims (First through Fourth Causes of Action)

Both the New York State and New York City Human Rights Laws prohibit employment

discrimination on the basis of disability, which includes improper discharge on that basis. *See* Administrative Code of the City of New York (Admin. Code) § 8-107 (1) (a) ("[i]t shall be an unlawful discriminatory practice ... [f]or an employer ... because of the actual or perceived ... disability ... to discharge from employment [any] person or to discriminate against such person in compensation or in terms, conditions or privileges of employment"); *compare* Executive Law § 296 (1) (a).

However, where, as here, the claim of discrimination relates to the failure of the employer to provide reasonable accommodation for the employee/complainant, both State and City Human Rights Law make an exception for where the employee could not, even with such accommodation, satisfy the essential requisites of the job. *See* Admin. Code § 8-107 (15) (b) ("[i]n any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job ...); *compare* Executive Law § 292 (21) ("in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held").

In communicating about the possibility of his return to work, Romenello, through counsel, stated that: (i) "since on or about January 9, 2008, [he] has been suffering from severe and disabling illnesses that have prevented him, and continue to prevent him, from working in any capacity, let alone in the capacity in which he had been serving Intesa until that time;" (ii) he "remains unable to return to work in any capacity because of his disabling condition, which have

been amply documented;" and (iii) he "has been sick and unable to work, with an uncertain prognosis and a return to work date that is indeterminate at this time." Josephson Aff., Exh. 6.

As such, Romanello has overtly and repeatedly stated that there is no accommodation under which he can continue to work. It is beyond cavil that such statements obviate protection under NYSHRA and NYCHRA. *See Pimentel v Citibank, N.A.*, 29 AD3d 141, 146 (1st Dept), *lv denied* 7 NY3d 707 (2006) ("plaintiff's admission that she could not perform in any job that required customer contact was tantamount to an admission that she could not perform the essential functions of the job she held, even with reasonable accommodation"); *Fama v American Intl. Group*, 306 AD2d 310, 312 (2nd Dept 2003), *lv denied* 1 NY3d 508 (2004) (employee's deposition testimony that she suffered from a disability which prevented her from performing the duties of her former job in a reasonable manner "was fatal to her claim under Executive Law § 296"); *Giaquinto v New York Tel. Co.*, 135 AD2d 928, 929 (3rd Dept 1987), *lv denied* 73 NY2d 701 (1988) (employer's decision to terminate employee where employee's condition prevented her from reasonably performing her tasks was not unlawful discrimination under Human Rights Law). Further, Romanello never proposed, and was never refused, any particular accommodation that could have allowed him to continue at Intesa. *See Pimentel*, 29 AD3d at 146; *Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185 (1st Dept 2003); *Evans v City of New York*, 64 AD3d 468 (1st Dept 2009). Moreover, his communication of an "uncertain prognosis and a return to work date that is indeterminate at this time," obviated Intesa's obligation to offer further accommodation in the way of continued leave. *See e.g. Phillips v City of New York*, 66 AD3d 170, 178-180 (1st Dept 2009) (employer must consider request for extended leave where it appears such accommodation will allow employee to return

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to work).

As such, the first and third causes of action for discrimination are dismissed. With regard to Romanello's allegations under the second and fourth causes of action, that his termination constituted retaliation under NYSHRA and NYCHRA, those claims are also dismissed. Intesa has demonstrated that Romanello's termination did not implicate either of the Human Rights Acts, and, as a result, could not be the basis of a retaliation claim under either.[1]

Tortious Interference with Contract (Fifth Cause of Action)

Romanello also seeks to recover for Intesa's alleged tortious interference with his contract of disability insurance with Prudential. More specifically, the complaint alleges that Intesa withheld Romanello's application for coverage for an unreasonably long period, and communicated false information and innuendo to Prudential with the specific purpose of causing Prudential to breach the contract. This cause of action is clearly without merit.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996), citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 (1956).

Here, Prudential never breached the contract in question. Indeed, Romanello acknowledges in the complaint that

[1]The court makes no finding as to the allegations, raised under the retaliation causes of action, that Intesa improperly raised the interest rate on, called, and accelerated the Note, as the Note seems to have no provision allowing Intesa to take such actions.

> following much discussion and correspondence with Mr. Romanello's counsel to, among other things, correct the false impressions and innuendos that [Intesa] had supplied to it, and after the gathering and review of a comprehensive set of Mr. Romanello's medical records, [Prudential] reversed its determination of May 29, 2008 and determined Mr. Romanello to have been disabled as defined in the NYSBA short term and long term disability insurance policies from January 9, 2008 through October 27, 2008.

Romanello maintains, nonetheless, that there was a period for which Prudential was in breach, because it denied him coverage, and only through expenditure of substantial time and resources, including the engagement of legal counsel, was the breach remedied. Relying on cases such as *Central Trust Co., Rochester v Goldman* (70 AD2d 767, 768 [4th Dept 1979], *appeal dismissed* 48 NY2d 654), Romanelllo asserts that he is entitled to recover for such expenditure.

This argument is unavailing because: (i) it relies upon the inherently contradictory assertion that the initial denial of coverage by Prudential automatically constitutes a breach of contract; and (ii) it seeks to recover on the basis of that non-existent breach, (iii) when the Prudential has never been subject to any alleged proceeding establishing or curing such breach.

It is an unreasonable proposition that the initial denial of coverage by Prudential constitutes a breach of contract per se (*see Sukup v State of New York*, 19 NY2d 519 [1967] [good faith denial of coverage is not a breach of contract]) because coverage did not improperly end with such denial, and, in any event, Prudential did eventually cover Romanello.

Romanello's reliance on *Central Trust Co., Rochester* is misguided. That case allowed for recovery of plaintiff's attorney's fees in defending itself in a third-party lawsuit where the defendant's tortious conduct was the proximate cause of such expense, and then only if "plaintiff proves its case of fraud against defendants." *Central Trust Co., Rochester*, 70 AD2d at 768. Here, there was never any lawsuit against Prudential and no explicit breach of contract.

Moreover, even casting the cause of action as interference with prospective contract rights, Romanello would still have to show highly culpable conduct (*i.e.* wrongful means) on the part of Intesa. *See NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 (1996); *see also Guard-Life Corp v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 (1980). The complaint alleges, at best that Intesa attempted to persuade Prudential to deny coverage, which does not constitute wrongful means. *See id.* at 191 ("'wrongful means' [includes] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; *they do not, however, include persuasion alone although it is knowingly directed at interference with the contract*") (emphasis added).

The fifth cause of action for tortious interference with contract is dismissed.

Unlawful Withholding of Wages: Labor Law § 198-c (Seventh Cause of Action)

Under the seventh cause of action, Romanello seeks to recover for benefits and wage supplements that he did not receive, including his bonus for 2007, his accrued sick days, salary continuation benefits, a proper severance and benefits package commensurate with other comparably-situated non-disabled employees, and medical benefits until age 65. Romanello claims that failure to provide these benefits is a violation of Labor Law § 198-c, and brings the seventh cause of action to recover thereunder. Defendants argue that Labor Law § 198-c does not give rise to a private cause of action, and the claim must, therefore, be dismissed. The motion to dismiss is denied.

Defendants cite *Stoganovic v Dinolfo* (92 AD2d 729 [4th Dept 1983], *affd* 61 NY2d 812 [1984]) to support the proposition that there is no private right of action for violation of section

198-c. The court disagrees. *Stoganovic* applied to the question of whether *officers and agents of the corporation* may be liable for recovery of wages. *See Stoganovic* (92 AD2d at 730) ("the Legislature did not intend that a civil action against officers and agents of corporations for the recovery of wages should be implied under section 198-a of the Labor Law"). The seventh cause of action is not against any officer of Intesa, but specifically against Intesa only.

In addition, it has been specifically held that

> *Stoganovic* does not affect the issue whether *employers* may be sued for violations of Article VI. In the instant case, plaintiffs bring suit against defendants, not as corporate officers or shareholders, but as employers. The difference is dispositive. Plaintiffs, in order to bring an action under § 196-d or § 198-b of Article VI, must show that the defendant being sued is not merely a corporate officer or shareholder, but an employer.

Chu Chung v New Silver Palace Rests., 272 F Supp 2d 314, 318 (SD NY 2003) (emphasis added); *accord Vysovsky v Glassman*, 2007 WL 3130562 (SD NY 2007).

Thus, defendants' assertion that the pronouncement of *Excavators Union Local 731 Welfare Fund v Zurmuhlen* (68 AD2d 816 [1st Dept 1979]), that civil liability may exist under Labor Law 198-c has been overturned is without support. Indeed, as recently as 2009, New York courts have suggested that as long as defendants are also employers within the definition of N.Y. Labor Law § 190, they can be sued. *Lauria v Heffernan*, 607 F Supp 2d 403, 409 (ED NY 2009), citing *Vysovsky*, 2007 WL 3130562 at *17; *see also Wong v Yee*, 262 AD2d 254 (1st Dept 1999). The motion to dismiss the seventh cause of action for violation of Labor Law § 198-c is denied.

Defamation (Eighth Cause of Action)

The complaint states that Stefan and Intesa, through Stefan, defamed Romanello by

stating that "we had to terminate Mr. Romanello's employment because I spoke with his doctors and they said he was not disabled and was falsifying his claim for disability benefits," he was "faking" the symptoms of his disability, and he was "malingering" "or other words synonymous therewith." Stefan allegedly made these statements "to numerous persons during the weeks and months following termination ... and continues to make such statements to the present time." Complaint ¶¶ 34, 77-79. These statements and actions, giving the plaintiff every favorable inference (*Negri v Stop & Shop*, 65 NY2d 625 [1985]), do not constitute defamation.

A claim for defamation requires no less than a statement, in *haec verba*, of the particular defamatory words claimed to have been uttered by defendants. *See* CPLR 3016 (a); *Manas v VMS Assoc.*, 53 AD3d 451, 454-455 (1st Dept); *Gardner v Alexander Rent-A-Car*, 28 AD2d 667 (1st Dept 1967). Here, the complaint patently attempts to paraphrase the statements of Stefan, by noting that she uttered certain words, or "other words synonymous therewith." Such imprecision not only opens the complaint to the question of whether the words were ever published, but also renders the complaint defective as a matter of law. *See Ramos v Madison Sq. Garden Corp.*, 257 AD2d 492, 493 (1st Dept 1999); *Murganti v Weber*, 248 AD2d 208, 208-209 (1st Dept 1998); *Gardner*, 28 AD2d at 667.

Further, Romanello does not specify any time or manner of communication of the alleged defamatory material. *See Seltzer v Fields*, 20 AD2d 60, 64 (1st Dept 1963), *affd* 14 NY2d 624 (1964) ("present practice requires that plaintiff allege the time, manner, and the persons to whom the publication was made"). Here, the complaint fails to state when the defamatory words were either said or documented, or to whom. Thus, neither the time, nor the manner has been pled with any particularly. "Courts will not strain to find defamation where none exists." *Dillon v*

City of New York, 261 AD2d 34, 38 (1st Dept 1999) (citations and internal quotation marks omitted).

Moreover, the argument that the statements are defamatory per se is also without merit. The words alleged do not, as would be required: (i) impute a crime or injure Romanello in his trade, business or profession (*Moore v Francis,* 121 NY 199, 203 [1890]; *Harris v Hirsh*, 228 AD2d 206, 208 [1st Dept], *lv denied* 89 NY2d 805 [1996]); or (ii) rise to the level of slander per se (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992] ["only statements regarding (serious, as opposed to minor, offenses) are actionable as defamation per se"] [citation omitted]). The motion to dismiss the eighth cause of action for defamation is granted.

Violation of Medical Privacy (Ninth Cause of Action)

The complaint states that the defendants violated Romanello's medical privacy by: (i) gathering his confidential medical information and records; (ii) reviewing, misunderstanding, misconstruing and contorting the content of such records; and (iii) intentionally and maliciously using and disclosing such records for the purposes of harming him. This cause of action is without gravitas.

First, as noted by defendants, the Health Insurance Portability and Accountability Act (HIPAA), to which the complaint obliquely refers, "does not create any private right of action. Instead, patients who perceive themselves aggrieved by non-compliance with HIPAA are relegated to filing a complaint pursuing an administrative process under HIPAA, thereby allowing the Secretary of HHS to pursue any rights or remedies on behalf of the patient." *Holzle v Healthcare Servs. Group*, 7 Misc 3d 1027(A), Ny Slip Op. 50770 (U) (Sup Ct, Niagara County

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2005) (citations omitted).

Second, the theory upon which Romanello apparently also relies, from *Doe v Community Health Plan-Kaiser Corp.* (268 AD2d 183 [3rd Dept 2000]), that "the duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, the breach of which is actionable as a tort" (*id.* at 187), is also misplaced. Intesa is not in a physician-patient type of relationship with Romanello. *See e.g. id.; Harley v Druzba*, 169 AD2d 1001, 1002 (3rd Dept 1991) (actionable tort was based upon confidential relationship between social worker and client); *Tighe v Ginsberg*, 146 AD2d 268, 271 (4th Dept 1989) (action based on physician's disclosure of records); *MacDonald v Clinger*, 84 AD2d 482 (4th Dept 1982) (action based on psychiatrist disclosure of patient information).

Finally, the complaint does not indicate any specific medical information, disclosed to any specific person, at any specific time. Mere conclusions, unsubstantiated allegations, or expressions of hope, which are far more that the complaint offers on this cause of action, are insufficient to defeat a summary judgment motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The motion to dismiss the ninth cause of action for violation of medical privacy is granted.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is partially granted to the extent that the complaint is hereby severed and dismissed as against defendant Ann Stefan, and the Clerk is directed to enter judgment in favor of said defendant, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is

further

ORDERED that the remaining portion of the motion for summary judgment is partially granted to the extent that the first, second, third, fourth, fifth, eighth, and ninth causes of action are severed and dismissed; and it is further

ORDERED that the action shall continue as to the sixth and seventh causes of action.

Dated: 5/17/10

ENTER: [signature]
J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAY 24 2010
NEW YORK
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