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

PRESENT: HON. SALIANN SCARPULLA PART 19
Justice

JOAN BANACH,

Plaintiff,

- v -

THE DEDALUS FOUNDATION, INC.,

Defendant.

INDEX NO. 600918/2009

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 7 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3,4
Answering Affidavits — Exhibits	5,6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is

ORDERED that the motion is determined in accordance with the accompanying decision/order dated May 27, 2010 [redacted]

This constitutes the Decision and Order of the Court.

Dated: May 27, 2010

Saliann Scarpulla, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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JOAN BANACH,

Plaintiff,

Index No.:600918/2009

- against-

THE DEDALUS FOUNDATION, INC.,

DECISION AND ORDER

Defendant.

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HON. SALIANN SCARPULLA, J.:

Defendant The Dedalus Foundation, Inc. ("Dedalus") moves, pursuant to CPLR 2201 and 3211 (a) (4), to stay, or dismiss, the instant proceeding pending a determination by the federal court as to whether it will exercise supplemental jurisdiction over Dedalus' state law claims in Dedalus' first-filed federal action against plaintiff Joan Banach ("Banach"). Alternatively, Dedalus moves, pursuant to CPLR 3211(a)(1) and/or (a)(7), to dismiss the first, second, third, fourth, fifth and sixth causes of action of the amended complaint with prejudice based on documentary evidence and failure to state a cognizable claim.[1]

[1] Initially, Dedalus also sought dismissal of the suit, pursuant to CPLR 3211(a)(8), based on lack of personal jurisdiction, but that claim has been withdrawn, pursuant to a

Since this motion was filed, the federal court has declined to entertain jurisdiction over the state law claims. *See The Dedalus Foundation v. Joan Banach,* Index No. 09 Civ 2842 (S.D.N.Y. October 15, 2009). Accordingly that portion of the instant motion requesting a stay, pursuant to CPLR 2201 and 3211(a)(4) is now moot.

Dedalus is a non-profit corporation formed under the laws of the States of Connecticut and New York, originally incorporated as The Motherwell Foundation in 1981, for the purpose of fostering public understanding of modern art. The corporation was formed by renowned artist Robert Motherwell (Motherwell). Banach was employed by and had worked closely with Motherwell since 1981. After Motherwell's death in 1991, Banach continued to be employed by Dedalus. Banach was also made a member of Dedalus' board of directors.

In August of 2008, Banach was removed from her position at Dedalus, both as an employee and as a member of the board, pursuant to a vote of the board at a special meeting called for this purpose. Although Banach was not specifically removed for cause, the reasons surrounding her removal form the genesis of the federal action filed by Dedalus against Banach. The complaint in the federal action, filed on March 25, 2009, alleges breaches of fiduciary duties, conversion, misappropriation, and replevin of stolen property.

Also on March 25, 2009, sometime after the federal action was filed, Banach filed this action. In her amended complaint, filed on or around April 10, 2009, Banach alleges seven causes of action: (1) breach of contract; (2) promissory estoppel; (3) breach of contract as a

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stipulation between the parties.

third-party beneficiary; (4) breach of a right of notice and opportunity to be heard; (5) wrongful removal; and (6) anticipatory defamation against Dedalus' president, Jack Flam ("Flam"), a nonparty to either action; and (7) employment discrimination.

Both actions arise out of the termination of Banach's employment with Dedalus. Dedalus asserts that Banach was an at-will employee who could be terminated without cause but, nevertheless, such cause did exist. Dedalus further asserts that Banach allegedly sold Motherwell art believed to be owned by Dedalus, and destroyed evidence of her alleged misconduct by erasing memories of two Dedalus computers.

Dedalus states that on August 22, 2008 it noticed a August 29, 2008 Special Meeting by telephone of its board of directors, indicating that the purpose of the meeting was to vote on Banach's removal. Dedalus sent a reminder notice of the meeting on August 28, 2008. According to Dedalus, both notices were sent to Banach. At that Special Meeting, on August 29, 2008, Banach was removed as a director and as an employee.

Banach alleges that on January 31, 1991, Motherwell wrote a letter to Richard Rubin ("Rubin"), then president of the Motherwell Foundation, stating that Rubin, Banach and another person, Mel Paskell, would be employed by the Motherwell Foundation, with minimum salaries based on their then-current salaries, so long as each so chose to be employed. The letter was not signed by Rubin, Banach or the Motherwell Foundation.

More than five months after he wrote the above-referenced letter, Motherwell executed his will, in which he stated, "In order to ensure continuity in the handling of my

affairs, I hereby authorize my Executors and Trustees to employ my valued assistants and friends, MEL PASKELL, and JOAN BANACH, for as long a period of time as my Executors and Trustees shall believe necessary and appropriate."

There is no evidence of any other writing that supercedes this will.

Banach maintains that Rubin orally promised her that he, and the Motherwell Foundation, would honor Motherwell's letter, and that she would be employed by the Motherwell Foundation for life. According to Banach, she accepted employment with the foundation based on these representations of lifetime employment.

Banach maintains that Flam, the current president of Dedalus, began manufacturing reasons to fire her in the beginning of August, 2008, in order to quell Banach's challenge to his authority. Banach further asserts that the board had already voted to remove her by the time she and another director were able to telephone into the meeting. According to Banach, in order to preserve procedures, a second vote was then taken at which the board again voted to remove her. Banach avers that she was never given a reason for her removal, despite her requests for an explanation of the directors' actions. Banach maintains that she was contractually employed by Dedalus, and was terminated for no lawfully justifiable reason.

Discussion

CPLR 3211 (a) states that: "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; . . . (7) the pleading fails to state a cause of action . . . ." On such

a motion, "the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory. Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 A.D.2d 243, 246 (1st Dep't 2000)(citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188,189 (1st Dep't 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v. Doyle*, 231 A.D.2d 475, 476 (1st Dep't 1996).

Banach asserts that, pursuant to New York choice of law rules, the laws of Connecticut should apply to the instant matter. *Equis Corp. v. Mack-Cali Realty Corp.*, 6 A.D.3d 264 (1st Dep't 2004). Accordingly, Banach has primarily cited to Connecticut cases. Dedalus opposes this conclusion, but argues that such distinction is irrelevant, because under both New York and Connecticut law its motion would prevail.

Whether applying Connecticut or New York law, Banach's first, second and third causes of action, alleging, respectively, breach of contract, promissory estoppel, and breach of contract as a third-party beneficiary, are dismissed.

In opposition to the motion to dismiss, Banach asserts that pursuant to the Motherwell letter, she had a life-time employment contract which Dedalus breached when it terminated her employment without cause. "Under the law in Connecticut, an employment contract for an indefinite time period is terminable at the will of the employer. Evidence presented by the plaintiff establishes nothing more than [s]he had a contract of employment for life, which is necessarily of an indefinite duration and, therefore, terminable at the will of the employer." *Grieco v. The Hartford Courant Company*, 1993 Conn Super Lexis 298, *6-7 (Superior Ct., Hartford 1993) (internal citations omitted). Moreover, under Connecticut law, corporate directors have "no power to hire an employee on a lifetime basis." *Solomon v. Hall-Brooke Foundation, Inc.*, 1992 Conn Super Lexis 297, *75 (Superior Ct. Fairfield 1992).

With respect to Banach's trusteeship, "Connecticut statutes limit any trustee's term to five years per term, and as with officers, authorize the directors of a non-profit corporation to remove any other directors with or without cause." *Solomon,* at *78. Consequently, under applicable Connecticut law, Banach's alleged employment contract for life is terminable at will.

Further, the letter written by Motherwell is not a binding contract, because there is no supporting consideration. *D'Ulisse-Cupo v. Board of Directors of Notre Dame High School,*

202 Conn 206 (1987) ("Under the law of contract, a promise is generally not enforceable unless it is supported by consideration"). In any event, the letter was superceded by Motherwell's will, which, as indicated above, withdrew any presumptive limitation on the foundation's ability to terminate Banach's employment.

Banach has also failed to provide any legally sufficient allegation that would warrant the finding of promissory estoppel. To find that Banach detrimentally relied on the alleged representations of an oral employment contract for life, Banach would have to at least make "the representation in one or more of the following ways: (a) plaintiff rejected other substantial employment offers in favor of accepting the subject employment; (b) plaintiff relocated at considerable inconvenience and expense to this area; (c) plaintiff purchased a house and became obligated to make substantial mortgage payments thereon." *Coelho v. Posi-Seal International, Inc.*, 208 Conn. 106, 114-115 (1988). This she has failed to do, only making conclusory assertions that she detrimentally relied on the alleged promise of permanent employment.

The same result occurs when applying New York law. "In New York, absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party. The at-will presumption may be triggered when an employment agreement fails to state a definite period of employment, fix employment of a definite duration, establish a fixed duration or is otherwise indefinite." *Rooney v. Tyson,* 91 N.Y.2d 685, 689 (1998) (internal citations omitted).

Contracts for employment for life are unenforceable in New York. *Lowinger v. Lowinger*, 287 A.D.2d 39 (1st Dept 2001). Consequently, Banach cannot prevail on a claim based on such an agreement.

Because the alleged agreement is one that is terminable at will in both Connecticut and New York, and unenforceable as a contract for lifetime employment in New York, there exists no basis for Banach to assert a claim as the third-party beneficiary of a such a contract. Where, as here, there is no enforceable contract, there can be no basis to assert a claim as a third-party beneficiary. *See, e.g., Dow & Condon, Inc. v. Brookfield Development Corp.*, 266 Conn 572 (2003) (the test to determine whether a person has a right of action as a third party beneficiary "is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party [beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties"); *Matter of Liquidation of Union Indemnity Insurance Company of New York,* 200 A.D.2d 99, 108 (1st Dept 1994) ("the essential foundation of any right of action a third-party beneficiary may have is a valid and binding contract"), *affd* 89 N.Y.2d 94 (1996).

Dedalus also argues that Banach's fourth cause of action, alleging a breach of a common-law right of notice and opportunity to be heard before being removed should also be dismissed.

Pursuant to Dedalus' by-laws, directors may be removed without cause. According to Connecticut law, a director may be removed only at a meeting called for the purpose of removing the director, and the notice must state that the purpose of the meeting is the removal of that director. Conn Gen Stat Ann § 33-1088(d). The documentary evidence supplied with the moving papers indicates that such notice was given.

In her opposition, Banach argues that under New York law, she must be afforded an opportunity to defend against charges brought against her before the board of directors may remove her. This argument regarding the applicability of New York law is disingenuous at best.

Banach initially argues that under the New York choice of law rules, Connecticut law must be applied in interpreting her amended complaint. However, for this issue, Banach now argues that it is New York law that is most appropriate, because Dedalus is incorporated in New York as well as Connecticut, and operates primarily out of New York offices. However, since Banach may be removed without cause, the cases cited by her are inapposite. These cases all involve situations in which the subject director was removed for cause, such cause being articulated by the board. Here, Dedalus has maintained that, although cause does exist, it had the right to remove Banach without cause, and so exercised that right. As a consequence, Banach's fourth cause of action is dismissed.

Banach's fifth cause of action, alleging wrongful removal, is dismissed. Banach incorrectly cites to section 706 (a) and (b) of New York's Not-for-Profit Law for the

conclusion that, under New York law, a director may only be removed for cause. However, sections 706(a) and (b) provide as follows:

> (a) Except as limited in paragraph (c)[not here relevant], any or all of the directors **may** be removed for cause by vote of the members, or by vote of the directors provided there is a quorum of not less than a majority present at the meeting of directors at which such action is taken.
> (b) Except as limited in paragraph (c)[not here relevant], if the certificate of incorporation **or the by-laws so provide, any or all of the directors may be removed without cause** by vote of the members." (emphases added)

As previously stated, Dedalus' by-laws provide for removal of directors without cause, as does Connecticut law. Consequently, this cause of action is dismissed.[2]

Banach's sixth cause of action for defamation is similarly dismissed. The amended complaint itself states that it fails to meet the particularity requirements of CPLR 3016 to assert such a cause of action, but hopes that discovery will provide Banach with evidence of Flam's defamatory statements. In her opposition, Banach asserts that she never alleged a cause of action for defamation, and argues that this portion of Dedalus' motion should be deemed moot. However it is styled, the court does not recognize as actionable Banach's cause of action alleging "Anticipatory Sixth Cause of Action: Defamation."

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[2] Banach's reliance on *LaPointe v. Board of Education of Town of Winchester*, 274 Conn 806 (2005) is misplaced, because Dedalus never noticed that the meeting was being called to remove Banach for cause. Dedalus only maintains that, if cause were needed, such cause did exist. Dedalus' position has always been that Banach served at-will, and could be removed at any time for any reason, or for no reason at all.

The court notes that Dedalus has not argued for the dismissal of Banach's seventh cause of action, alleging employment discrimination, and neither side has provided any argument for or against this cause of action. Therefore, this cause of action remains.

In accordance with the foregoing, it is

ORDERED that defendant the Dedalus Foundation, Inc.'s motion to dismiss is granted and the first through sixth causes of action of the amended complaint are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry.

Dated: New York, New York
May 27, 2010

ENTER:

Saliann Scarpulla, J.S.C.