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

PRESENT: HON. JOAN A. MADDEN PART 11

Justice

Index Number : 105224/2005

CONNOLLY, GERARD A.

VS.

NAPOLI KAISER BERN

SEQUENCE NUMBER : 014

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

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

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion sequence number 015 for determination and the consolidated motions are determined in accordance with the annexed decision and order.

FILED
JUN 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: June 16, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GERARD A. CONNOLLY,

Plaintiff,

INDEX NO. 105224/05

-against-

NAPOLI KAISER & BERN, LLP, PAUL J. NAPOLI, MARC J. BERN, GERALD KAISER, and NAPOLI BERN, LLC and NAPOLI, KAISER, BERN & ASSOCIATES, LLP,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages, plaintiff is an attorney who is suing his former employer, a law firm, claiming he was wrongfully discharged in April 2002 for refusing to participate in an alleged "cover-up" regarding the propriety of a settlement of one of the firm's personal injury cases. Defendants move for an order pursuant to CPLR 3211(a)(5) and (7) dismissing the Second Amended Complaint in whole or in part, and for an order pursuant to CPLR 3024(b) striking certain factual allegations in the Second Amended Complaint.[1] Plaintiff opposes the motions.

On December 11, 2008, plaintiff made a motion for leave to amend his complaint to add new factual and legal allegations, to assert several new causes of action and to expand previously asserted causes of action. Plaintiff also moved to add Napoli, Kaiser, Bern & Associates, LLP as a "necessary party." By a decision and order dated July 16, 2009, this court granted plaintiff's motion to amend to the extent of two of the six causes of action in the proposed amended

[1]Motion Sequence Nos. 014 and 015 are consolidated for determination.

complaint, the Second Count for breach of implied-in-law obligation pursuant to Wieder v. Skala, 80 NY2d 628 (1992), and the Sixth Count for breach of contract. Plaintiff was also permitted to add Napoli, Kaiser, Bern & Associates, LLP as a party defendant. The motion was denied to the extent of the proposed claims for violation of Judiciary Law §487 (First Count), fraud (Third Count), promissory estoppel (Fourth Count) and retaliation (Fifth Count). The court's order directed "that within 20 days of the date of this decision and order plaintiff shall serve and file an amended complaint that complies with the determination herein above" and that "within 20 days of such service, defendants shall serve and file answers to the amended complaint."

On August 13, 2009, plaintiff served a Verified Amended Complaint dated August 12, 2009, which complies with the court's July 16, 2009 order, by asserting two causes of action for breach of implied-in-law obligation (First Count) and breach of contract (Second Count). Shortly thereafter, on August 21, 1009, plaintiff served a Verified Second Amended Complaint dated August 20, 2009, which adds two new causes of action for tortious interference with prospective business advantage (Third Count) and tortious interference with contract (Fourth Count). When plaintiff's counsel served the Second Amended Complaint on defendants' counsel, he enclosed a letter advising that the Second Amended Complaint "is being served and filed pursuant to CPLR 3025(a), which permits a party to 'amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires.'"

Defendants are now moving to dismiss the Second Amended Complaint, on the grounds that plaintiff never requested leave to amend to add the new causes of action for tortious

interference with prospective business advantage and tortious interference with contract. Defendants assert that plaintiff is "attempting to make an obvious and impermissible end [run] around the provisions of New York law governing the amendment of complaints, by attempting to amend his Complaint without permission of the Court and in direct contravention of this Court's order of July 16, 2009 governing the amendment of Plaintiff's Complaint." Defendants also assert that the Third and Fourth Counts fail to state a cause of action, and are time-barred.

The case law plaintiff cites arguably supports his position that since the second amended complaint was served before defendants interposed an answer with respect to the amended complaint, the second amended complaint was properly served as of right. See Merkos L'Inyonei Chinuch, Inc. v. Sharf, 59 AD3d 403 (2nd Dept 2009); Parkway Windows, Inc. v. River Tower Assocs, 108 AD2d 660 (1st Dept 1985). For the purposes of the instant motions, the court will assume without deciding that the Second Amended Complaint was properly served, since the new claims added to that pleading must be dismissed as plainly lacking in merit.

The Third Count for tortious interference with prospective business advantage alleges that based on his employment as an associate attorney, plaintiff had a "Business Relationship" with defendant law firm(s), and that individual defendants Napoli, Bern and Kaiser, who plaintiff alleges were not parties to the business relationship and were not his employer, "[i]n making the decision to terminate plaintiff in or about April 2002 for refusing to execute an affirmation with false information . . . utilized wrongful means to interfere with the Business Relationship." The Fourth Court for tortious interference with contract, alleges that individual defendants Napoli, Bern and Kaiser, who were not "individually" parties to his employment agreement with the firm, "utilized wrongful means to intentionally procure a breach the Employment Agreement,

and in so doing, acted outside the scope of their authority as agents of NKB [defendant Napoli, Kaiser, & Bern, LLP], NB [defendant Napoli Bern LLP] and NKB & Associates [defendant Napoli, Kaiser, Bern & Associates, LLP]."

Plaintiff's allegations are legally insufficient to support a claim for tortious interference with plaintiff's at-will employment contract or plaintiff's so-called "business relationship" with defendant law firm, as against the three individual partners of defendant law firm(s). See Wieder v. Skala, 168 AD2d 355 (1st Dept 1990). It cannot be disputed that individual defendants Napoli, Kaiser and Bern are individual partners of defendant law firm(s). As the Appellate Division First Department held in Wieder v. Skala, "the individual partners in the defendant law firm cannot . . . be held liable for interference with the at-will employment contract between the defendant law firm and the plaintiff since, as a matter of law, each of the individual partners, as parties to any contract that may have existed between the plaintiff and the firm, may not be held liable for interfering with or inducing the breach of their own contract." Id at 355-356.

Moreover, just as in Wieder v. Skala, plaintiff has not alleged "independent tortious conduct by the individual partners outside the scope of their employment, so as to satisfy the narrowly-limited exceptions to well-settled New York law that, in the absence of an agreement establishing a fixed duration of employment, an employment relationship is presumed to be freely terminable by either party, at any time, for any reason, or even for no reason at all." Id at 356. Plaintiff's attempt to mischaracterize his at-will employment relationship with the defendant law firm as a "business relationship" does not alter the foregoing conclusions. Notably, more than four years ago, the Honorable Rolando T. Acosta denied defendants' pre-answer motion to dismiss the original complaint, by holding that even though plaintiff does not

have a valid cause of action for wrongful discharge, the narrow exception to the employment at-will doctrine articulated in Wieder v. Skala, 80 NY2d 628 (1992), is applicable to the facts in this action, so as to permit plaintiff to maintain a breach of contract claim based on the implied-in-fact obligation in plaintiff's relationship as an associate attorney with defendant law firm. Connolly v. Napoli, Kaiser & Bern, LLP, 12 Misc3d 530 (Sup Ct, NY Co 2006). This is plaintiff's second unsuccessful attempt at recasting his breach of contract claim as different theories of independent tortious conduct, presumably to impose personal liability on the individual defendants. Thus, the Third and Fourth Counts in the Second Amended Complaint are dismissed as without merit. See Wieder v. Skala, 168 AD2d 355 (1st Dept 1990). In light of this determination, the court need not consider defendants' statute of limitations argument.

The portion of defendants' motions to strike certain factual allegations in the Second Amended Complaint is granted. Contrary to plaintiff's argument, the motions to strike are timely pursuant to CPLR 3024(c), which provides that a CPLR 3024(b) motion to strike "scandalous or prejudicial matter" in a pleading "shall be served within twenty days after service of the challenged pleading." Here, plaintiff served the Second Amended Complaint on August 21, 2009, and defendants served their motions to strike by mail within 20 days thereafter on September 10, 2009.

Defendants have sufficiently established that the allegations in paragraphs 9 to 12, 16, and 20-27 of the Second Amended Complaint, which detail the substance of several alleged "pre-employment discussions," are prejudicial. Those allegations first appeared in the proposed amended complaint, in support of plaintiff's proposed new claims for fraud and promissory estoppel. Since this court's July 16, 2009 order denied amendment as to those claims, those

allegations are no longer necessary and are prejudicial to defendants. See Plaza at Patterson LLC v. Clover Lake Holdings, Inc., 51 AD3d 931 (2nd Dept 2008); Soumayah v. Minnelli, 41 AD3d 390 (1st Dept), app withdrawn 9 NY3d 989 (2007). The striking of such allegations, however, is not intended as a determination as to the relevancy of any evidentiary matter at trial. See Schachter v. Massachusetts Protective Ass'n, 30 AD2d 540 (2nd Dept 1968) (quoted in Soumayah v. Minnelli, supra).

Finally, individual defendants Napoli, Bern and Kaiser seek dismissal of the First Count for breach of contract based on an implied-in-law obligation, as asserted against them. Citing to plaintiff's allegation in the Second Amended Complaint that "[n]either Napoli nor Bern nor Kaiser was individually a party to the Employment Agreement," defendants argue that absent such an agreement, they cannot be subject to a claim for breach of contract based on an implied-in-law obligation. In opposition, plaintiff stands by his allegation that the individual defendants were not parties to the "Employment Agreement," but asserts that they can still be "personally liable for those *torts* they personally commit" (emphasis added). Plaintiff's assertion is without merit, as the First Count sounds in contract, and not in tort. See Weider v. Skala, 80 NY2d 628 (1992); Connolly v. Napoli, Kaiser & Bern, LLP, 12 Misc3d 530 (Sup Ct, NY Co 2006). Thus, since plaintiff maintains his position that the individual defendants were not parties to his employment agreement, the First Count is dismissed as against those defendants.

In view the number of motions that have been made in this action, especially with respect to the pleadings, the court is now directing that all future motions by any party, shall be made by order to show cause.

Accordingly, it hereby

ORDERED that defendants' motions to dismiss the Third and Fourth Counts in the Second Amended Complaint are granted, and such counts are dismissed in their entirety; and it is further

ORDERED that defendants' motions to strike are granted, and paragraphs 9 to 12, 16 and 20 to 27 in the Second Amended Complaint are stricken in their entirety; and it is further

ORDERED that the First Count in the Second Amended Complaint is dismissed as against defendants Paul J. Napoli, Marc J. Bern and Gerald Kaiser; and it is further

ORDERED that within 20 days of the date of this decision and order, defendants shall serve and file answers to the Second Amended Complaint; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for June 24, 2010 at 9:30 a.m., Part 11, Room 351, 60 Centre Street; and it is further

ORDERED all future motions in this action by any party shall be made by order to show cause.

The court is notifying the parties by mailing copies of this decision and order to counsel.

DATED: June 16, 2010 ENTER:

J.S.C.

FILED
JUN 25 2010
COUNTY CLERK'S OFFICE
NEW YORK