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

PRESENT: MARCY S. FRIEDMAN / MARCY S. FRIEDMAN, J.S.C. PART 57

Balk, Dennis

INDEX NO. 150030/2009

MOTION DATE

- v -

MOTION SEQ. NO. 002

New York Institute of Technology et al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for DISMISS

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + cross motion | 1, 2, 2A |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits | 4 |
| memos of law | MM 1-5 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are

FILED
SEP 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

Dated: 9-8-10

MARCY S. FRIEDMAN J.S.C.
MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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DENNIS BALK,

*Plaintiff,*

- against -

NEW YORK INSTITUTE OF TECHNOLOGY, NEW YORK INSTITUTE OF TECHNOLOGY – BAHRAIN, and DR. MOHAMED HUSSEIN

*Defendant.*

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Index No.: 150030/09

DECISION/ORDER



In this action, plaintiff seeks damages for defamation and breach of contract arising out of the termination of his employment with defendant New York Institute of Technology (NYIT). Defendants NYIT, New York Institute of Technology-Bahrain, and Dr. Mohamed Hussein move to dismiss the complaint pursuant to CPLR 3211. Plaintiff cross-moves to "strike" defendants' motion to dismiss and for sanctions. As a threshold matter, the court will deny the cross-motion, as defendants' motion substantially complies with court rules as to form.

Plaintiff was hired as an independent contractor under a written contract to teach courses at defendant NYIT's campus in Bahrain for one-year from June 1, 2007 through May 31, 2008. (Complaint, ¶ 6.) According to the complaint, in March 2008, after a controversy with students at the NYIT Bahrain campus, and publication of articles in Bahraini newspapers about the matter, defendants forced plaintiff to leave Bahrain and terminated his employment. (Complaint, ¶ 28.) NYIT claims that it did not terminate plaintiff's employment contract but, rather, that

plaintiff abandoned his duties and voluntarily left the country. (Aff. of Elan Raday [Ds.' Attorney] at 15.) It is undisputed that NYIT paid plaintiff the amount that would have been due for the full term of the contract.

Election of Remedies

Defendants seek dismissal of plaintiff's claims, pursuant to CPLR 3211(a)(4), on the ground that the claims are duplicative of a discrimination claim filed by plaintiff before the New York State Division of Human Rights (DHR). Defendants base this argument on Executive Law 297(9), which "precludes the plaintiff from commencing an action in court based on the same incident" as the incident that has been the subject of a discrimination complaint filed by the plaintiff with the DHR. (Emil v Dewey, 49 NY2d 968, 969 [1980].) "The question is whether a sufficient identity of issue exists between the complaint before the division and the instant claim." (Spoon v American Agriculturalist, Inc., 103 AD2d 929 [3d Dept 1984].)

The filing of a DHR claim will not bar a plaintiff from maintaining a court action for breach of contract where "a distinction can be made between the relief sought in a petition to the State Division of Human Rights and that claimed in court." (Goosley v Binghamton City School Dist. Bd. of Educ., 101 AD2d 942, 943 [3d Dept 1984]. Accord Matter of Baust v New York State Div. of Human Rights, 70 AD3d 1107 [3d Dept 2010]. See also Gondola v Center Moriches Union Free School Dist., 80 AD2d 600 [2d Dept 1981].) In contrast, where the DHR claim and the court action are based on the same facts and seek the same relief, the later court action will be dismissed as barred by the plaintiff's election of remedies. (See James v Coughlin, 124 AD2d 728 [2d Dept 1986], appeal denied 69 NY2d 609 [1987].)

Here, the breach of contract cause of action in the complaint and the discrimination action are based on the same incident and seek the same damages. While the DHR claim alleges that

plaintiff was discriminated against based on race and religion, it also alleges, as does the breach of contract claim in the instant action, that NYIT falsely accused plaintiff of behavior offensive to students, and terminated plaintiff from his teaching position, thus breaching plaintiff's written employment contract. The DHR complaint and breach of contract claims both seek the same damages, including "damage to my professional reputation and lost wages." (DHR Attachment, ¶ 5A; Complaint, ¶ 47.) The third cause of action for breach of contract against NYIT will accordingly be dismissed.

Alternative Bases for Dismissal

Defendants also seek dismissal of plaintiff's claims on the ground, among others, that they fail to state a cause of action. Plaintiff's first claim for defamation alleges that NYIT defamed plaintiff in a March 1, 2008 article that was published in Alayam, a Bahraini daily newspaper and in a March 6, 2008 article published in Gulf News. (See Complaint, ¶¶11, 18 [reprinting in full the English language versions of the articles].)

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, "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] [citations omitted]. See also 511 W. 232nd Owners Corp. v Jennifer Realty Corp., 98 NY2d 144 [2002].)

Defamation has long been defined as the making of a false statement which "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." (Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 379 [1977], cert denied 434

US 969, quoting Sydney v MacFadden Newspaper Pub. Corp., 242 NY 208, 211-212 [1926]; Foster v Churchill, 87 NY2d 744, 751 [1996].) "The elements are a false statement, published without privilege or authorization to a third party * * * and it must either cause special harm or constitute defamation per se." (Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999], citing Restatement [Second] of Torts § 558.) The statement complained of must be published by the defendant (Asensio v KPMG, LLP, 293 AD2d 426 [1st Dept 2002]), and clearly refer to the plaintiff (Allen v Gordon, 86 AD2d 514 [1st Dept 1982], affd 56 NY2d 780 [1982]). "The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." (Dillon, 261 AD2d at 38.)

Plaintiff's complaint fails to plead a cause of action for defamation. The Alayam article does not attribute any statement to defendants. The complaint claims that NYIT "ratifi[ed], endors[ed] and affirm[ed] the demonstrably false and defamatory statements in the March 1 [Alayam] News Article" by making statements to a Gulf News reporter, who then "republished" the statements from the March 1 Alayam article in the March 6 Gulf News article. (Complaint ¶¶ 16-17.)

While plaintiff seeks to attribute the entire Gulf News article to defendant NYIT, the article states: "The university has not commented." Three paragraphs later the article contains the sole sentence which plaintiff cites as showing that NYIT made and published a defamatory statement about plaintiff: "The university, which offers courses in business, accounting, finance and marketing, attributed its decision [to terminate the professor] to 'concerns about the safety of the professor, a desire to preserve its reputation and a move to ensure the stability of classes following an increase in calls to sack him.'" (Id., ¶ 18.)

Even giving plaintiff the benefit of every inference, this sentence does not on its face attribute the statement to any university official, spokesperson, or even employee, and does not provide any details as to the circumstances under which the statement was made. On the above authority, plaintiff's defamation claim is therefore not properly pleaded.

Moreover, it is well settled that "[t]he mere statement of discharge or termination from employment, even if untrue, does not constitute libel." (Chang v Fa-Yun, 265 AD2d 265 [1st Dept 1999] [internal quotation marks and citations omitted].) The statement in question does not attribute any comments to the university about the underlying controversy between plaintiff and various students, but merely addresses the university's concerns about the professor's safety and its own reputation. As the statement does not "imply any wrongdoing or incompetency on plaintiff's part," it does not allege actionable defamation. Plaintiff's first cause of action for defamation must accordingly be dismissed.

Plaintiff's second cause of action pleads disparagement against NYIT. Even assuming arguendo that this cause of action is maintainable outside a commercial context involving, for example, product disparagement (see Ruder & Finn, Inc. v Seaboard Sur. Co., 52 NY2d 663, 672 [1981], reh denied 54 NY2d 753 [1981]; Besicorp Ltd. v Kahn, 290 AD2d 147, 150 [3d Dept 2002], lv denied 98 NY2d 601), the disparagement claim pleaded here, like the defamation claim, alleges damage to plaintiff's reputation. (See id. at 150.) It will accordingly be dismissed as duplicative of the defamation claim.

As held above, plaintiff's third cause of action for breach of contract will be dismissed based on plaintiff's filing of the DHR claim. Plaintiff's fourth cause of action for breach of the covenant of good faith and fair dealing is duplicative of the breach of contract cause of action and

will therefore also be dismissed. (See Pier 59 Studios L.P. v Chelsea Piers L.P., 27 AD3d 217 [1st Dept 2006], lv denied 2007 NY App Div Lexis 2403 [1st Dept 2007].)

Plaintiff's fifth through eighth causes of action are pleaded only against defendants NYIT-Bahrain and Hussein. The fifth cause of action alleges tortious interference with contract based on the same acts alleged in support of the third cause of action for breach of contract. Both causes of action are based on the claim that plaintiff's employment contract was terminated, and he was prevented from fulfilling his duties under the contract. (Complaint, ¶¶ 45, 61.) The complaint alleges that defendant Hussein, "as the owner of NYIT Bahrain," was the university official who prevented plaintiff from fulfilling his duties, by demanding that plaintiff immediately leave the country due to the student controversy. (Id., ¶ 12.) Thus, defendant Hussein and defendant NYIT-Bahrain are the very actors alleged to have breached plaintiff's employment contract. The fifth cause of action will therefore be dismissed against these defendants as duplicative of the third cause of action.[1]

The sixth cause of action alleges tortious interference with prospective contract rights. The complaint alleges that defendant Hussein knew that NYIT intended to enter into a two year teaching agreement with plaintiff after the existing employment contract expired, and that he prevented plaintiff from performing under the existing contract and thereby from "receiv[ing] a new two year teaching agreement. (Complaint, ¶¶ 66, 67.)

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[1]In view of this holding, the court does not reach defendants' independent claim that NYIT-Bahrain is not a legal entity but a name used for marketing, and therefore may not be sued. (See Maldonado v Maryland Rail Commuter Serv. Admin., 91 NY2d 467 [1998]; Foster v Alfred S. Friedman Management Corp., 63 AD3d 446 [1st Dept. 2009].) Defendants support this claim with documentation showing the incorporation of NYIT, but also with the affidavit of Stephen Kloepfer, NYIT's General Counsel and Secretary, attesting that NYIT does not have a corporate affiliate which offers educational programs in Bahrain. This affidavit is not properly considered on a CPLR 3211(a)(1) motion to dismiss.

These allegations do not plead a cognizable claim for tortious interference with prospective contractual relations. Damages for interference with prospective relations may be awarded only "when the alleged means employed by the one interfering were wrongful." (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 194 [1980].) "'Wrongful means' include 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." (Id. at 191.) Wrongful means also include "conduct for the sole purpose of inflicting intentional harm" on the plaintiff. (Carvel Corp. v Noonan, 3 NY3d 182, 190 [2004] [internal quotation marks and citation omitted]; Hoesten v Best, 34 AD3d 143 [1st Dept 2006]; Miller v Mount Sinai Med. Ctr., 288 AD2d 72 [1st Dept 2001].) A threat not to renew a contract or to do business in the future with a contractor does not amount to wrongful means. (See Sumitomo Bank of New York Trust Co. v DiBenedetto, 256 AD2d 89 [1st Dept 1998], lv denied 93 NY2d 804 [1999]; 72 NY Jur 2d, Interference § 25.)

The seventh cause of action for prima facie tort and the eighth cause of action for intentional tort are both based on allegations that are duplicative of those alleged in the defamation, breach of contract, and tortious interference causes of action, and will also be dismissed.

It is accordingly hereby ORDERED that defendants' motion to dismiss is granted to the extent of dismissing the complaint in its entirety, with prejudice; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 8, 2010



MARCY FRIEDMAN, J.S.C.