SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ANTHONY KNIGHT,

Plaintiff,

-against-

STERLING NATIONAL BANK, STERLING NATIONAL MORTGAGE CO. INC., LUIS CAPPELLA, MICHAEL BIZENOV, ADAM DEJAK, AND JONATHAN GOLDBERG,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 18792/09
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendants' Motion to Dismiss the Verified Complaint	01
Plaintiff's Memorandum of Law	xx
Defendants' Memorandum of Law	xx
Defendants' Affidavit in Opposition	xx
Defendants' Reply Memorandum of Law	xx

The defendants move for an order pursuant to CPLR §3211(a)(7) dismissing the entire complaint for failure to state a cause of action or for an order granting summary judgment pursuant to CPLR §3212.

Plaintiff commenced this action seeking to recover monetary damages for, *inter alia*, breach of contract, breach of labor and overtime laws, fraud and misrepresentation, wrongful termination, intentional and negligent infliction of emotional distress and hostile work environment.

Plaintiff is a *pro se* litigant who attended and graduated from Thomas Jefferson School of Law, San Diego, CA in 2005 (see plaintiff's resume annexed as Exhibit C to motion).

On or about February 18, 2008, plaintiff and defendant Jonathan Goldberg allegedly entered into an agreement wherein plaintiff would work as a Senior Loan Officer for Sterling National Mortgage Company ("Sterling") and would secure a base salary of $30,000 a year plus commissions (¶ 7 of complaint). This position was advertised on Craig's List and stated, in pertinent part, as follows:

> "Currently, Sterling is seeking candidates who enjoy working in a team environment, are able to work flexible hours, like helping people, and are interested in achieving financial success.
>
> At Sterling we offer you:
> - A promising career
> - A friendly work environment
> - Extensive training
> - Salary plus commission
> - In-house staff to support and help you grow
> - The potential for high income and career growth
> - A company with a proven track record of professional advancement"

On or about March 31, 2008, after six weeks of employment, without notice to plaintiff, Sterling stopped paying plaintiff a salary and then switched to a commission-only weekly draw system where weekly paychecks were deducted entirely from plaintiff's commissions (¶ 8 of complaint). In effect, plaintiff was paid only a commission on the loans he closed.

Plaintiff further alleges that Sterling routinely required plaintiff and other employees to work from 9:30 a.m. to 8:30 p.m. and requested plaintiff to work on Saturdays (¶ 15 of complaint). Sterling did not pay any overtime wages to plaintiff or to any other loan officer employee (¶ 16 of complaint). Plaintiff allegedly worked many weeks putting in 50 to 75 hours of his time or more per week, without salary or overtime (¶ 18 of complaint).

Plaintiff further alleges as follows:

> "[d]uring the course of plaintiff's employment, plaintiff discovered that the defendants' were not following the proper state and federal banking and loan guidelines with respect to sending closing disclosures to consumers applying for home loans. (¶¶ 25-40) Plaintiff had to endure a work environment where misrepresentations to borrowers were routine causing plaintiff to suffer emotional distress; including a hostile work environment and abusive conduct so extreme and outrageous that it caused physical and psychological harm to plaintiff (¶¶ 65-69). Plaintiff attempted to remedy the problem by taking it up the chain of command, when he was fired the following day for being a whistleblower and refusing to engage in fraudulent and illegal activity by sending out disclosures when he was instructed not to by defendants' and

not misrepresenting Sterling National Mortgage as Sterling National Bank to consumers (¶¶ 70, 71, 76)" (Plaintiff's Memo of Law)

Plaintiff's complaint consists of 28 pages, 238 paragraphs, eight causes of action and "demands judgment of at least $1,000,000 against defendants for: (1) attorney's fees to be discussed; (2) salaries and commissions owed to plaintiff and severance pay; (3) emotional distress damages; (4) hostile work environment damages; (5) compensatory damages; (6) punitive damages; (7) expectation, unjust enrichment and detrimental reliance damages; (7) incidental and consequential damages; (8) penalties and interest and all other relief the court sees just and fit."

Defendants move to dismiss the complaint on the ground that plaintiff's assertion of a Labor Law § 740 claim, i.e., a New York State "whistleblower" statute, waives all other claims that are based upon facts of the alleged Labor Law § 740 claim. In turn, plaintiff's Labor Law § 740(2)(a) claim fails because he cannot allege an actual violation of a law, rule or regulation which presents a "substantial and specific danger to the public health or safety."

Additionally, defendants maintain that even if the court determines that plaintiff's remaining claims are not waived, plaintiff's breach of contract and wrongful termination claims must be dismissed because he was an at-will employee.

As to his negligent and intentional infliction of emotional distress causes of action, defendant contends that they fail the pleading test. Finally, plaintiff's causes of action for "a private *qui tam* action," "fraud and misrepresentation," and "hostile work environment" should be dismissed for legal insufficiency.

In opposition, plaintiff argues, *inter alia*, that plaintiff's Labor Law § 740 claim does not mandate dismissal of his complaint as the "complaint discusses a plethora of legal issues ranging from wages and overtime owed, to hostile workplace and intentional infliction of emotional distress which

began well before plaintiff's retaliatory discharge" and "the retaliatory type laws mentioned in the complaint were only given as examples and nowhere in the complaint does plaintiff allege that Labor Law § 740 is the exclusive claim he is seeking." (Memo of Law p. 12)

Overall, plaintiff submits that dismissal is not warranted as "[t]he complaint amply and in laborious detail sets forth a history of contractual breach, fraud, wrongful discharge, emotional distress and an extremely hostile." (Memo of Law p. 13) In other words, plaintiff asserts that the causes of action are sufficient to survive a dismissal motion pursuant to CPLR §3211(a)(7).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according plaintiff the benefit of every possible inference (*see Noonon v City ov New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon & Martinez*, 87 NY2d 83, 87 [1994]). The court's role on a motion to dismiss pursuant to CPLR §3211(a)(7) is to determine whether the factual allegations fit within any cognizable theory, without regard as to whether the allegations ultimately can be established (*see Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2nd Dept 2009]; *Union State Bank v Weiss,* 65 AD3d 584 [2nd Dept 2009]; *Sokol v Leader*, 64 AD3d 1180 [2nd Dept 2010]).

It is equally true that bare legal conclusions, "inherently incredible" assertions and/or claims "flatly contradicted by documentary evidence" are not entitled to favorable consideration and "should be dismissed" *(Daub v Future Tech Enterprise, Inc.*, 65 AD3d 1004 [2nd Dept 2009], quoting from *Well v Yeshiva Ramban*, 300 AD2d 580, 581 [2nd Dept 2002]; *see also, Maas v Cornell Univ.*, 94 NY2d 87, 91-92 [1999]).

Labor Law § 740

A cause of action premised upon Labor Law § 740 known as the "whistleblower statute," is

available "to an employee who disclosed or threatens to disclose an employer activity or practice which (1) is in violation of a law, rule or regulation, and (2) creates a substantial and specific danger to the public health." *(Deshponde v TJH Med. Serv. P.C.,* 52 AD3d 648 [2nd Dept 2008] quoting *Pipia v Nassau County*, 34 AD3d at 664, 665 [2nd Dept 2006], quoting *Lamagna v New York State Assn. for Help of Retarded Children*, 158 AD2d 588, 589 [2nd Dept 1990]; *see* Labor Law § 740[2][a]). Labor Law § 740 requires a plaintiff to allege an actual violation of law, rule or regulation. A good faith, reasonable belief that a violation occurred is insufficient (*see Nadkarni v North Shore-Long Is. Jewish Health* Sys., 21 AD3d 354, 355 [2nd Dept 2005]; *Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350 [2nd Dept 2001]).

At bar, the plaintiff has failed to allege a violation of any law, rule or regulation with the requisite particularity and specificity necessary to support a cause of action under Labor Law § 740 (*see Blumenreich v North Shore Health Sys.*, 287 AD2d 529, 530 [2nd Dept 2001]; *cf. Gay v Farella*, 5 AD3d 540, 541-542 [2nd Dept 2004]).

Further, Labor Law § 704(7) provides that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" (*see Pipia v Nassau County, supra* at p. 667*; Bordan v North Shore Univ. Hospt.*, 275 AD2d 335, 336 [2nd Dept 2001]; *Pipas v Syracuse Home Assn.*, 226 AD2d 1097 [4th Dept 1996]; *cf. Kraus v Brandstetter*, 185 AD2d 302, 302-303 [2nd Dept 1992]).

Since plaintiff asserted causes of action pursuant to Labor Law § 740, "he waived other causes of action related to the alleged retaliatory [action]" *Garner v China National Gas, Inc.*, 71 AD3d 825 [2nd Dept 2010]; *Deshponde v TJH Med. Serv., P.C., supra* at p. 651. Accordingly, those branches of the motion which seek to dismiss the causes of action alleging fraud and breach of contract should be

dismissed as they arise from the allegedly unlawful discharge. *Garner v China National Gas, Inc.*, *supra; Hayes v Staten Island University Hospital,* 39 AD3d 593 [2nd Dept 2007].

Notwithstanding the waiver imposed by Labor Law § 740, plaintiff's complaint should be dismissed for legal insufficiency.

It is well settled that "[a]bsent an agreement establishing fixed duration, employment relationship is presumed to be hiring at-will, terminable at any time by either party." *Goldman v White Plains Center for Nursing Care*, 11 NY3d 173 [2008]; *Sabetay v Sterling Drug*, Inc., 69 NY2d 329, 33 [1987]; *see e.g. Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983].

Since Mr. Knight was an at-will employee, Sterling had the unfettered right to terminate him at any time. *Id; Weiner v McGraw Hill, Inc.*, 57 NY2d 458.

The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of including the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. *Colosacco v Lawrence*, 68 AD3d 706 [2nd Dept 2009].

"A cause of action to recover damages for fraud will not arise where, as here, the only fraud charged relates to a breach of contract" *Dailey v Tofel, Berelson, Saxl & Partners*, 273 AD2d 341 [2nd Dept 2000].

Since plaintiff's fraud causes of action are duplicatory of his breach of contract causes, dismissal is warranted.

Turning to plaintiff's cause of action for infliction of emotional distress, it is well settled that in order to survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement (Second) of Torts § 46(1), which was adopted in *Fischer v Maloney*, 43 NY2d 553, 557 [1978]; that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional

distress to another is subject to liability for such emotional distress" (*Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. " *Murphy v American Home Products, supra.*

The facts alleged by plaintiff regarding the manner of his termination fall far short of this strict standard. Further, in light of our determination that there is no cause of action in tort in New York for abusive or wrongful discharge of an at-will employee, plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will employee, "plaintiff should not be allowed to evade that conclusion or to subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress" (*cf. Fischer v Maloney, supra*).

Finally, plaintiff's claim for a "private *qui tam* action" is legally insufficient. A private *qui tam* action is an antiquated legal phrase describing a lawsuit that can be brought solely pursuant to a statute awarding damages to citizens who sue on behalf of the government. (see Black's Law Dictionary).

In view of the foregoing, the complaint is hereby **dismissed**.

This constitutes the Decision and Order of the Court.

DATED: November 30, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - LABOR LAW 740\Knight v Sterling HBL.wpd