

Montrevil v Avon DSTC #2388
2011 NY Slip Op 33751(U)
February 16, 2011
Sup Ct, Queens County
Docket Number: 24675/2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA Part 14

MARISA MONTREVIL,
Plaintiff,

Index
No. 24675 2010

- against -

Motion
Date December 21, 2010

AVON DSTC # 2388,
Defendant.

Motion
Cal. No. 22

Motion
Seq. No. 1

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Upon the foregoing papers the motion is determined as follows:

Plaintiff commenced this action to recover damages for “breach of contract, racism and conscience [sic] emotional distress” in connection with her position as an Independent Sales Representative for Avon Products, Inc. (Avon), s/h/a Avon DSTC # 2388. Although the allegations as written in the complaint are somewhat unclear, plaintiff alleges, in pertinent part, the following:

On August 23, 2010, plaintiff entered into a contract with Avon, wherein plaintiff would act as an Independent Sales Representative for the company so as to promote the sale of its products. On August 30, 2010, plaintiff was in Queens distributing Avon brochures and collecting contact information from potential customers when she “experienced verbal

abuse, just for being able to speak Spanish.”¹ Plaintiff alleges to have complained numerous times about same to a manager, but was ignored. Specifically, on October 3, 2010, plaintiff visited an Avon “shop” (presumably District Office # 2388) to address a manager regarding the verbal abuse and profanity she had experienced. Further, plaintiff inquired about “the rest of [her] training,” at which time Avon responded that they were under no obligation to provide additional training. Further, on October 9, 2010,² plaintiff telephoned the District Office in order to arrange a meeting with a client who was interested in becoming a Sales Representative, but persons at Avon (who are not identified in plaintiff’s complaint) would not take her calls. As a result, plaintiff asked a third-party to call the District Office on her behalf to speak with a manager, and just before the call ended, plaintiff heard the person to whom she was speaking state that plaintiff was a “dumb immigrant.”

Avon now moves for an order dismissing plaintiff’s complaint pursuant to CPLR 3013 and 3211 (a) (7). Pursuant to CPLR 3013, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Further, it is well-settled that, when determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleadings must be liberally construed (CPLR 3026; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Uzzle v Nunzie Court Homeowners Assn., Inc.*, 70 AD3d 928 [2010]), and “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 274 [1977]). Further, the facts pleaded are presumed to be true and are afforded every favorable inference (*see Leon*, 84 NY2d at 87; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2008]).

Turning first to plaintiff’s cause of action for breach of contract, in order to plead same, the complaint “must allege the provisions of the contract upon which the claim is based” (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719 [1994]; *see Maldonado v Olympia Mech. Piping & Heating Corp.*, 8 AD3d 348 [2004]).

Here, plaintiff’s complaint fails to point to a specific provision (or provisions) of the contract entered into with Avon, which would necessarily form the basis of her claim. Not

¹ It is noted that plaintiff does not allege who verbally abused her, nor, more importantly, that such abuse was committed by Avon.

² Though the complaint refers to the date as September 9, 2010, the court presumes that plaintiff intended to refer to the date as October 9, 2010, as plaintiff’s complaint appears to be written in chronological order.

only does this omission fail to apprise defendant – as well as the court – of the alleged breach which plaintiff intends to prove, but it is also fatal to her breach of contract claim, thereby warranting dismissal (CPLR 3013; *see Peters v Accurate Bldg. Inspectors Div. of Ubell Enters., Inc.*, 29 AD3d 972 [2006] [setting forth contract provisions that were allegedly breached is a “necessary element” for a breach of contract claim]; *Atkinson*, 205 AD2d at 720). To the extent that the breach of contract claim rests on plaintiff’s contentions that Avon failed to provide additional training, or that it failed to take action after plaintiff’s complaints of “verbal abuse,” there is nothing in the contract which affirmatively requires Avon to address these issues with plaintiff. Plaintiff’s Reply, which contains, among other things, a document entitled “Avon Training Center” that sets forth a schedule of sales meetings – without any context for its submission whatsoever – is insufficient to demonstrate that her claim for breach of contract can be sustained.

Turning to plaintiff’s claim for “racism,” it must first be noted that there is no common-law claim for discrimination; such a claim, rather, derives from statute (*see Monsanto v Electronic Data Sys. Corp.*, 141 AD2d 514 [1988]). There are federal, state, and local laws that prohibit discrimination in employment on the basis of race (*e.g.*, Title VII of the Civil Rights Act of 1964, 42 USCA § 2000e; Age Discrimination in Employment Act of 1967, 29 USCA § 623(a) to (d); New York State Human Rights Law, Exec Law §§ 290 to 301; Commission on Human Rights, NY City Administrative Code, Chap. I, tit. 8, §§ 801 et seq.). However, since there is no employer-employee relationship,³ as plaintiff was an “Independent Sales Representative,” her claim must fail for that reason alone (*see Scott v Massachusetts Mut. Life Ins. Co.*, 86 NY2d 429 [1995]; *Murphy v ERA United Realty*, 251 AD2d 469 [1998]).

Even affording plaintiff every possible inference, the complaint still fails to state a cause of action for unlawful discrimination. To prove a prima facie case of discrimination, plaintiff must show: (1) that she is a member of the class protected by the statute; (2) that she was actively or constructively discharged; (3) that she was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Other than asserting that she was a victim of racism, and other than the allegation of a reprehensible comment by an unknown individual who answered the telephone at the District Office, plaintiff does not satisfactorily plead the elements of discrimination.

³ Neither was an employer-employee relationship alleged in the complaint. In fact, it is noted that plaintiff admits that she desired to become a representative for Avon, in part, due to the “advantages of training commissions and freedom of the business.”

Turning now to plaintiff's final cause of action, purportedly sounding in intentional infliction of emotional distress, dismissal is also warranted, inasmuch as the acts alleged to have been committed by Avon were not "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" (Restatement [Second] of Torts § 46, Comment d; see e.g. *McGovern v Nassau County Dept. of Social Servs.*, 60 AD3d 1016 [2009]; *Hering v Lighthouse 2001, LLC*, 21 AD3d 449 [2005]).

Accordingly, Avon's motion to dismiss is granted. Plaintiff's complaint is dismissed.

Dated: February 16, 2011

J.S.C.