Akkurt v Cemusa, Inc.
2011 NY Slip Op 33783(U)
April 25, 2011
Sup Ct, NY County
Docket Number: 102202/2009
Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10
Justice

Index Number : 102202/2009
AKKURT, VOLKAN
VS.
CEMUSA, INC.
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

PC set for June 9, 2011 @ 9:30 a.m.

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

Dated: 4/25

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS 10

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VOLKAN AKKURT,

Plaintiff,

- against -

CEMUSA, INC., DAVID YAGNESAK, AND PETER PIECHOCNISKI,

Defendants.

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DECISION AND ORDER
Index No.: 102202/2009
Seq No.: 001

Present:
HON. JUDITH J. GISCHE
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3211) w/BJH affirm, exhs	1
Pltf's opp w/AJ affirm, exhs	2
Defs' reply	3

Gische J.:

This is an action for, among other things, breach of employment contract and retaliatory conduct based upon allegations that plaintiff Volcan Akkurt was fired because he was a "whistleblower," a violation of Labor Law § 740. Akkurt served an amended complaint (hereinafter "complaint") with defendants' consent and a reservation of their right to later seek dismissal thereof. Defendants Cemusa, Inc. ("Cemusa"), David Yagnesak ("Yagnesak") and Piechocniski ("Piechocniski") (collectively "defendants") now move for the pre-answer dismissal of the complaint and this action. The motion is opposed by plaintiff.

Since defendants seek to dismiss the complaint on the basis that plaintiff has not stated a cause of action, the pleading is afforded a liberal construction, the facts as alleged in the complaint are accepted by the court as true, and will be accorded every

favorable inference (Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept. 1997]).

The following facts are taken from the complaint:

Plaintiff is a design engineer who was hired by plaintiff Cemusa, a street furniture company that has a franchise with the City of New York to install, operate and maintain such things as newsstands, bus stop shelters and outdoor automated paid toilets. He began working at Cemusa in December 2006. During his career with Cemusa, plaintiff received exemplary performance reviews and he was elevated to Senior Engineer in December 2007. In late 2007, plaintiff learned that the newsstands installed by Cemusa were not code compliant because of certain electrical hazards and because their roofs were too thin. He also learned that the bus stop shelters were being improperly installed with bolts that were too short and that there was a risk that a shelter – consisting of 900 pounds of glass– could collapse unto passengers waiting for the bus. Plaintiff also learned that Cemusa was improperly disposing of hazardous materials. In the complaint, plaintiff makes references to the New York City electrical code, NEC (the National Electrical Code), ANSI (the American National Standards Institute), the New York City Buildings Code, the American Disabilities Act ("ADA") and the Code of Federal Rules ("CFR"). Once plaintiff learned of these defects, violations and dangerous practices, he notified his Cemusa supervisor. Shortly after he spoke to his supervisor, that person was terminated from employment. Defendant Piechocniski was then made plaintiff's immediate supervisor and Yagnesak was the overall supervisor for both plaintiff and Piechocniski (collectively defendant's "supervisors").

At a meeting in January 2008, plaintiff again raised his concerns about the

practices he was observing and that he was concerned about the public's safety. After the meeting, he was warned by his supervisors that he should never raise these issues again. On January 16, 2008, defendant Yagnesak terminated plaintiff's Project Management Professional training program, which had been approved by his previous supervisor. A few days later, plaintiff met with Piechocniski and Cemusa's Human Resources manager ("Valensi"). They provided him with a "final written warning" letter[1] which, according to plaintiff, "contained groundless and inaccurate allegations." Plaintiff was fired, re-hired, fired and re-hired by Valensi – all within several hours. Although he kept his job, plaintiff was demoted and subjected to invective emails, telling him he was "theatrical" and "useless."

Plaintiff filed a complaint with Human Resources and the CEO of Cemusa, Susan Baron, detailing the various problems he had observed with the street furniture being installed, describing the failure by his supervisors to address the problems he had identified, and explaining the possible danger to the public. After plaintiff made these complaints on March 3, 2008, the retaliatory acts against him increased in frequency and severity. One example is that Piechocniski commented on plaintiff being a homosexual. The comment was made at a meeting and overheard by "Ana." Plaintiff states he was defamed because he is a heterosexual male, faithful to his wife and that as an Islamic man, these statements are defamatory because they accuse him of infidelity and of a practice frowned upon in his culture. Other statements by Piechocniski about plaintiff were that he invited male Cemusa staffers to Turkish baths with him, presumably for

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[1]Neither side has provided the court with a copy of that letter.

sexual trysts. On another occasion Piechocniski said that plaintiff was blackmailing Cemusa; this comment was overheard by "Marlon."

On May 23, 2008, plaintiff was terminated from employment and thereafter, in June when he submitted for reimbursement of expenses, his application was denied. Plaintiff sued Cemusa in small claims court and prevailed. He also filed for unemployment insurance and Cemusa opposed his application. He prevailed in that action as well.

Plaintiff contends that Cemusa's employment manual requires its employees to be ethical and report any matters of concern, without fear of reprisals. However, once he reported matters he believed posed a serious danger to the public's health and safety, he was retaliated against, defamed by his supervisors and then terminated without cause. He contends all these actions were in violation of his rights as an employee of Cemusa, as set forth in its employee handbook.

Based upon these facts, plaintiff has asserted four (4) causes of action ("COA") against Cemusa: 1st COA - breach of implied contract, 2nd COA - breach of good faith and fair dealing, 3rd COA - lost wages and benefits for his termination without cause and; 4th COA - violation of New York State Labor Law § 740 [2][a] (i.e. the "whistleblower" act). Plaintiff's 5th COA is against Piechocniski for defamation; his 6th COA is against Piechocniski and Yaganesak for workplace harassment and his 7th COA is against Yagnesak for conspiracy to defame because he was Piechocniski's supervisor, he knew of and impliedly condoned Piechocniski's conduct and in doing so, conspired with Piechocniski in his mistreatment of plaintiff.

In support of its motion to dismiss, defendants contend plaintiff's amended

complaint still does not meet the strict pleading requirements of Labor Law § 740 because he does not sufficiently alleged any actual violation of a law, rule or regulation impacting public health or safety. Defendants argue that plaintiff has not stated in what way the newsstands fail to comply with applicable codes or how the public has been or could be, harmed. According to defendants, his generalized claim that he believed the street furniture posed a danger, is insufficient to support his whistleblower claim. Defendants also state that plaintiff's reference to violations of the ADA is unavailing because its preamble clearly states that it is not a public health and safety statute, but an act to curtail discriminatory acts.

Defendants allege that by filing a claim under Labor Law § 740 [7], plaintiff has waived all his other employment related claims. In relevant part, the whistleblower act provides that "[nothing] in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract, except that institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract." Thus, defendants urge the court to dismiss plaintiff's claims for wrongful termination, breach of implied contract, breach of good faith and fair dealing and torts claims for that reason.

Alternatively, defendants argue that even his wrongful termination and other employment based claims were not waived by election of remedies, then they fail in any event because he was an at-will, not contract, employee. and, therefore, his contract based claims are without any basis in fact.

Defendant argue that no cognizable action for "workplace harassment" exists and

that plaintiff's defamation claims are not pleaded with the specificity required under CPLR § 3016. They also claim plaintiff has not pleaded special damages and, in any event, the comments (if made) were made to like-minded persons who also worked at Cemusa and, therefore, privileged.

In defense of the complaint, plaintiff maintains the amended complaint sufficiently pleads the material elements of each cause of action asserted and that defendants should be directed to answer the complaint.

Discussion

Labor Law § 740 [2] forbids an employer from taking "any retaliatory personnel action against an employee because such employee ... (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety ... (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation." To properly plead a cause of action under the whistleblower stature, the plaintiff must provide facts tending to show that his complaints or refusals to participate in certain activity were in response to "an actual violation of a relevant law, rule, or regulation" (Bordell v. General Electric Co., 88 N.Y.2d 869 [1996]). Even if the employee had a good faith and reasonable basis for his belief that such a violation has occurred, to prevail on a whistleblower claim, there must be an actual violation of a law, rule or regulation (Desphande v. TJH Medical Services, 52 AD3d 648 [2nd Dept 2008]).

Plaintiff has alleged a number of safety concerns, including that: half the city bus stop shelters erected on City sidewalks were installed with bolts that are too short to

support the 900 pounds of glass at each stop. The bolts used are non-compliant with section 16 of the New York City Building Code (structural design). The weight of the glass could cause a shelter to collapse, injuring passengers waiting for the bus. He has alleged that all 110 newspaper stands have thinner roofs than approved by City engineers and loose, live wires, in violation of New York City's electrical code which could cause electric shocks to the operators, users and inspectors of such stands. The complaint states that the automated paid toilets are a danger to the public because the units were modified in violation of the National Electric Code and UL rules and regulations. Plaintiff also cites a provision of the New York Environmental Conservation Law that he contends was violated in the manner certain hazardous waste was discarded.

Although the phrase "substantial and specific danger to the public health or safety," is not defined in Labor Law § 740, courts have interpreted the whistleblower law narrowly (Connolly v. Harry Macklowe Real Estate Co., Inc., 161 A.D.2d 520 [1st Dept. 1990]) as requiring a "certain quantum of dangerous activity before its remedies are implicated" (Cotrone v. Consolidated Edison Co of New York, 50 A.D.3d 354 [1st Dept. 2008] *citing* 161 AFPeace v KRNH, Inc., 12 AD3d 914, 915 [3rd Dept. 2004] *lv den* 4 NY3d 705 [2005]).

Countless New Yorkers use mass transit on a daily basis. The bus stop shelters that were allegedly installed in a defective manner are located throughout the City at 300 locations. There are two pending lawsuits against Cemusa and other defendants at this time (Brito v. City of New York, et al. Sup Ct, New York, Index No. 107310/10 and Huggins v. City of New York et al., Sup Ct, New York, Index No. 910353/10). In each of

those cases, it is alleged that the bus stop shelter collapsed, shattered and injured the plaintiff. It is also alleged in each of those cases that the shelter negligently installed, maintained and operated. Plaintiff has sufficiently identified the laws, rules, and regulations he alleges were violated by the defendants (16 NYCRR 370 et seq). These violations, if proved, would adversely affect the general public's health and safety. He has also alleged adverse work actions taken against him immediately after he made these reports. Such adverse work actions including being fired (twice), a demotion, and the repeal of permission to engage in a program previously approved by his former supervisor. Given these circumstances, affording the complaint a liberal construction, accepting the facts as alleged in the complaint as true, and according it every favorable inference, plaintiff has stated a claim under the whistleblower law. Defendants' motion for the dismissal of the 4th COA as to the bus stop shelters is denied

For similar reasons, defendants' motion to dismiss the Labor Law § 740 claims insofar as they pertain to the safety of the news stands is denied. Plaintiff has alleged certain codes, rules and laws were violated in how these structures were installed. The electrical conditions, problems, etc., alleged could pose a threat to the general public's health and safety. In stating these facts and alleging these code (etc.) violations, plaintiff has defeated defendants' motion for the dismissal of this prong of the 4th COA. Whether the plaintiff can ultimately establish his allegations is not part of the calculus" (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 [2005]).

Insofar, however, as plaintiff has alleged various violations affecting the public's safe usage of the outdoor automatic pay toilets and that some of the street furniture is not ADA compliant, defendants' motion to have those claims dismissed must be

granted. Plaintiff has not presented any facts that he disclosed a practice or activity by Cemusa which presented a substantial danger to the public health or safety (Kahn v. State Univ of New York Health Science Ctr., 288 AD2d 350 [2nd Dept. 2001]). Furthermore, as correctly argued by defendants, the ADA is anti-discriminatory statute. Thus, while the ADA may set forth standards to be followed to insure equal opportunities for persons with disabilities, it cannot be said that failure to adhere to those standards poses a "substantial danger to the public health or safety" (42 USC 12112 et seq). Therefore, defendants' motion to dismiss the ADA based claims is granted as well.

Also severed and dismissed are any claims based upon violations of Cemusa's contract with the City for installation of any of the street furniture. At oral argument plaintiff elaborated that since Cemusa has a contract with the City, a breach of the contract is proof the certain laws, codes, regulations, have been violated. This argument, however, presumes that the contractual requirements dovetail with legal requirements. Referral to the Cemusa contract does not relieve plaintiff from his obligation to plead actual violations of laws, codes, regulations etc. Therefore, it is immaterial whether any of the materials, methods and practices employed by Cemusa deviated from what Cemusa and the City contractually agreed to because a deviation therefrom is not a predicate bases for a Labor Law § 740 claim.

Having brought an action against his former employer, defendant Cemusa, this constitutes plaintiff's "waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" (Labor Law § 740 [7]; Bones v. Prudential Financial, Inc., 54 A.D.3d 589, 589 [1st Dept 2008]). Thus, plaintiff's causes of action, premised on the same facts as his Labor

Law §740 claims, for breach of implied contract, breach of good faith and fair dealing and for lost wages and employment benefits due to his termination without cause, are dismissed for that reason.

These causes of action (1st, 2nd and 3rd) are also dismissed because plaintiff was not a contract employee, but employed by Cemusa as an at will employee, who could be fired at any time. Nor does petitioner have a viable claim against defendant for wrongful termination in violation of the standards set forth in the Cemusa employee handbook. The employee handbook is not a guarantee or contract of employment and did not create any implied promises or guarantees of fixed terms of employment (Thomas v. MasterCard Advisors, LLC, 74 A.D.3d 464 [1st Dept 2010]).

Plaintiff's 6th COA is for "workplace harassment" based upon his supervisors' actions, which included verbal harassment and discriminatory acts. Assuming that this is actually a claim under the New York City and/or New York State Human Rights Laws, plaintiff has not identified himself as a member of a protected class. This is not a situation where, for example, it is alleged that the discriminatory conduct was so pervasive as to alter the conditions of the plaintiff's employment (a hostile work environment), or he was the victim of unwelcome sexual advances, or that certain sexual conduct was the *quid pro quo* for promotions and other employment conditions (Ortega v. Bisogno & Meyerson, 2 A.D.3d 607 [2nd Dept 2003]). Nor is it alleged that plaintiff received disparate treatment because Piechocniski thought he was gay (see, Berner v. Gay Men's Health Crisis, 295 A.D.2d 119 [1st Dept.,2002]), only that these comments were made to denigrate and humiliate him. In any event, isolated or stray remarks, even if offensive, are generally not enough to make out a claim for discrimination (Forrest v.

Jewish Guild for the Blind, 3 N.Y.3d 295 [2004]; Baliva v. State Farm Mutual Ins. Co., 286 AD2d 953 [4th Dept 2001]; Therefore, the 6th COA against Yagnesak and Piechockniski fails to state a cause of action and it is hereby severed and dismissed.

The 5th and 7th COAs arise from statements reportedly made about plaintiff's sexuality to others and that he was "blackmailing" Cemusa. Defamation is the making of a false statement about a person that tends to expose the person to public contempt, ridicule, aversion or disgrace, or induces an evil opinion of him or her in the minds of right-thinking persons, deprives him or her of their "friendly intercourse in society" (Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369 [1977] *cert. denied* 434 U.S. 969 [1977]). It can either be spoken ("slander") or written ("libel"). Slander, as a rule, is not actionable unless the plaintiff suffers special damages which are the loss of something having economic or pecuniary value (*see* Golub v. Enquirer/Star Group, 89 N.Y.2d 1074 [1997]). An exception to this rule are statements that are slander per se. Words constitute slander per se if they impute the commission of a serious crime, a loathsome disease, unchaste behavior in a woman, or if they affect the plaintiff in his or her trade, occupation or profession (Liberman v. Gelstein, 80 N.Y.2d 429 [1992]). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (Liberman v. Gelstein, *supra*).

CPLR § 3016 (a) requires that the particular words complained of as being defamatory be set forth in a complaint alleging defamation. Consequently, plaintiff is specifically bound by the alleged defamatory words contained in the four corners of his complaint (See, Sassower v. Finnerty, 96 AD2d 585 [2nd Dept. 1983] *app dismd* 61 NY2d 756 [1984]). The complaint contains the following statements:

> "Piechocniski accused plaintiff, a married man, of engaging in homosexual acts knowing of plaintiff's national origin and marital status . . ."
>
> "Piechocniski had conversations with other Cemusa employees during which defendant erroneously and inappropriately informed said employees that plaintiff was 'gay.' On May 14, 2008, plaintiff also learned from an employee named "Marlon" that Piechocniski, in a conversation with Marlon that took place the week prior, in person, falsely accused plaintiff of "blackmailing" Cemusa...."
>
> "Piechocniski accused plaintiff of inappropriately inviting other employees of Cemusa to join him in a "Turkish bath" with the additional accusation that plaintiff desired to engage in homosexual acts at the Turkish bath. . ."
>
> "Piechocniski falsely accused plaintiff of being a homosexual, spread rumors amongst the employees of Cemusa that plaintiff was "gay," and falsely accused plaintiff of enticing others to participate with plaintiff in illicit, sexual, adulterous acts."

What is defamatory largely depends upon the "temper of the times, the current of contemporary [and] public opinion...with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place" (Mencher v Chesley, 297 NY 94, 100 [1947]). Although a Federal district court Judge recently decided that in this day and age calling a straight heterosexual male a homosexual or "gay" is not defamatory, and therefore, not actionable (Stern v. Cosby, 645 F.Supp.2d 258 [SDNY 2009]), in reaching such conclusion the court expressly rejected direct State appellate authority to the contrary, holding that such statements are still defamatory per se, notwithstanding New York's tolerant attitudes towards same sex relationships (Klepetko v. Reisman, 41 A.D.3d 551 [2nd Dept 2007]; Nacinovich v. Tullet & Tokyo Forex, Inc., 257 A.D.2d 523 [1st Dept 1999]). The court in Stern also disagreed

with other decisions by judges of coordinate jurisdiction in the same district (Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni, 585 F.Supp.2d 520 [S.D.N.Y. 2008]). Thus, contrary to defendants' arguments, plaintiff's defamation claim based upon homosexual "slurs" does not have to be dismissed because they are not defamatory as a matter of law (see, Rosen v. Robinson, 28 Misc.3d 1221(A), Slip Copy, 2010 WL 3210002 [Sup Ct N.Y. Co. 2010]). The defamation claims do, however, have to be dismissed for the reasons that follow.

Plaintiff's has not satisfied the pleading requirements of CPLR §3016. He has not set forth the actual words that were uttered or sufficiently identified the time, manner and place they were uttered (Dillon v. City of New York, 261 A.D.2d 34 [1st Dept. 1999]). Plaintiff has only stated that he was called "gay" and it was in a public setting. This is insufficient to support a defamation claim. Therefore, the 5th COA based upon Piechocniski calling him a homosexual or "gay" must be severed and dismissed.

The statements allegedly made by Piechocniski, that plaintiff was "blackmailing" the Cemusa are not set forth with any kind of specificity. "Loose language" and "colloquial" terms are not actionable as defamatory (600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130 [1992] *cert den* 508 US 910 [1993]). Here, plaintiff has provided no facts about the circumstances (time, manner, place) this statement was made, or what was said. All he can muster is that this was a statement made by Piechocniski to a fellow worker. These facts are wholly insufficient to satisfy the pleading requirements of CPLR §3016.

The 7th COA against Yagnesak for conspiracy to defame is severed and dismissed as it is dependant on the 5th COA the court has dismissed.

Recapitulation and Conclusion

The Labor Law § 740 (whistleblower) claims (4th COA) survive this pre-answer motion to dismiss only as they pertain to the bus stop shelters and news stands and then only to the extent those claims are based upon violations of the codes and regulations asserted. Otherwise, the whistleblower claims are severed and dismissed.

The other employment law based claims (i.e. 1st, 2nd, 3rd COAs) are each severed and dismissed.

The defamation based claims (i.e. 5th and 7th COAs) are severed and dismissed as is the 6th COA for workplace harassment.

Although at oral argument plaintiff asked for permission to re-plead any claim dismissed, he has not provided any facts tending to show that he can shore up his claims. In any event, there is no proposed amended complaint before the court for it consider. The request is, therefore, denied.

Defendants shall answer the complaint pursuant to CPLR§ 3211 [f]. In anticipation of issue being joined, the Preliminary Conference is hereby scheduled for **June 9, 2011 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232. No further notices will be sent.

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
April 25, 2011

So Ordered:

Hon. Judith J. Gische, JSC