

Devlin v Mendes & Mount, LLP
2011 NY Slip Op 33823(U)
July 1, 2011
Sup Ct, Queens County
Docket Number: 31433/10
Judge: Denis J. Butler
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the Fifth Cause of Action, alleging a violation by defendants of the Family & Medical Leave Act ("FMLA"), 29 U.S.C. §2601, et seq., the Seventh Cause of Action, alleging negligent infliction of emotional distress, and Eleventh Cause of Action, alleging that "defendant willfully failed to pay wages, benefits or supplements" to plaintiff.

Plaintiff commenced this action to "obtain relief arising from the ... termination of plaintiff's employment ... disability discrimination and violation of the Family Medical Leave Act" (Amended Complaint, Ex. C).

Defendants contend that the Fifth, Seventh and Eleventh Causes of Action should be dismissed, pursuant to CPLR §3211(a)(7), for failure of plaintiff to state a cause of action and upon documentary evidence. With regard to the Fifth Cause of Action, alleging a violation by defendants of the FMLA, movants contend that plaintiff's termination took place after the FMLA-covered period of leave of absence expired, and, therefore, no violation of FMLA occurred. With regard to the Seventh Cause of Action, alleging negligent infliction of emotional distress, movants contend that plaintiff has failed to demonstrate the special duty and unique circumstances necessary to permit such a claim. With regard to the Eleventh Cause of Action, alleging a violation of New York Labor Law in that "defendant willfully failed to pay wages, benefits or supplements" to plaintiff, movants contend that plaintiff has failed to demonstrate that she "had any accrued time that was unused as of her termination", and, as a result, such cause of action must fall.

Plaintiff opposes the motion to dismiss as to the Fifth, Seventh and Eleventh Causes of Action, contending that the evidence submitted by defendants does not qualify as "documentary evidence", pursuant to CPLR §3211(a)(1), and that the complaint sufficiently states proper causes of action for a violation of FMLA, for the infliction of emotional distress, and for failure to pay for accrued wages.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and the plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). In determining whether plaintiff's complaint states a valid cause of action, the Court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (see, 219 Broadway Corp. v. Alexanders, Inc., 46 N.Y.2d 506 [1979]; Tougher

Industries, Inc. v. Northern Westchester Joint Water Works, 304 A.D.2d 822 [2 Dept. 2003]).

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The Court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]).

A motion made pursuant to CPLR §3211(a)(1) warrants dismissal only if the evidence submitted utterly refutes, conclusively establishes a defense to, the asserted claims as a matter of law (see, Goshen v. Mutual Life Ins. Co., 98 N.Y.2d 314 [2002]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (see, Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793 [2 Dept. 2011]). Defendants' evidence submitted herein does not constitute "documentary" evidence for the purposes of this motion.

The branch of defendants' motion seeking to dismiss the Fifth Cause of Action in the amended complaint, based upon an alleged violation of FMLA, for failure to state a cause of action pursuant to CPLR §3211(a)(7), is denied. The Fifth Cause of Action (Ex. C) and plaintiff's affidavit in opposition, dated February 21, 2011, contain sufficiently particular factual details to demonstrate the material elements of the cause of action for violation of FMLA herein (see, Staskowski v. Nassau Community College, 53 A.D.3d 611 [2 Dept. 2008]).

The branch of defendants' motion seeking to dismiss the Seventh Cause of Action in the amended complaint, based upon negligent infliction of emotional distress, for failure to state a cause of action pursuant to CPLR §3211(a)(7), is granted. The alleged acts of the defendants do not rise to the level of extreme and outrageous conduct which is necessary to sustain this cause of action (see, Howell v. New York Post, Inc., 81 N.Y.2d 115 [1993]; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293 [1983]; Curry v. Dollard, 52 A.D.3d 642 [2 Dept. 2008]; Schwegel v. Chiaromonte, 4 A.D.3d 519 [2 Dept 2004]). As such, plaintiff has failed to sustain a proper cause of action for negligent infliction of emotional distress against defendants, and the Seventh Cause of Action of plaintiff's amended complaint is hereby dismissed.

The branch of defendants motion seeking to dismiss the Eleventh Cause of Action in the amended complaint, based upon an alleged failure of defendants to pay plaintiff for accrued time off or vacation time, for failure to state a cause of action pursuant to CPLR §3211(a)(7), is denied. The Eleventh Cause of Action (Ex. C), the allegations contained in the amended complaint, and plaintiff's affidavit in opposition, dated February 21, 2011, contain sufficiently particular factual details to reasonably demonstrate the material elements of a cause of action herein (see, Staskowski v. Nassau Community College, supra.).

The branch of defendants' motion seeking costs and sanctions for frivolous litigation, pursuant to 22 NYCRR §130-1.1, is hereby denied. Defendants have failed to demonstrate that plaintiff's conduct herein was intended to harass defendants or that the instant litigation is completely without merit, as required by that statute (see, Mascia v. Maresco, 39 A.D.3d 504 [2 Dept. 2007]; Yan v. Klein, 35 A.D.3d 729 [2 Dept. 2006]).

Accordingly, the branch of defendants' motion seeking to dismiss the Seventh Cause of Action in plaintiff's amended complaint, pursuant to CPLR §3211(a)(1) and (7), for failure to state a cause of action for negligent infliction of emotional distress, is hereby granted, and the Seventh Cause of Action in plaintiff's amended complaint is hereby dismissed.

The branches of defendants' motion seeking to dismiss the Fifth and Eleventh Causes of Action in plaintiff's amended complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action for violation of FMLA and for failure to pay accrued benefits, are hereby denied.

The branch of defendants' motion seeking costs and sanctions for frivolous conduct, pursuant to 22 NYCRR §130-1.1, is hereby denied.

This Constitutes the Decision and Order of the Court.

July , 2011

Denis J. Butler, J.S.C,