

**Archie Comic Publ. v Silberkleit**

2011 NY Slip Op 34151(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 651859/11

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY

Index Number : 651859/2011  
ARCHIE COMIC PUBLICATIONS, INC.  
vs.  
SILBERKEIT, NANCY  
SEQUENCE NUMBER : 001  
PRELIMINARY INJUNCTION

PART 54

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

No(s) 3, 4, 6, 7, 8  
No(s) 8, 9  
No(s) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 29

Upon the foregoing papers, it is ordered that this motion is denied  
in accordance with the  
unreversed decision and order.

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

Dated: 11/28/11

JUSTICE STEPHEN W. COHEN  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER

DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE  
 CROSS-MOTION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

ARCHIE COMIC PUBLICATIONS,

Plaintiff,

-against-

Index No. 651859/11  
Decision & Order

NANCY SILBERKLEIT,

Defendant.

-----X

SHIRLEY WERNER KORNREICH, J.:

Plaintiff Archie Comic Publications (ACP) moved, by order to show cause, for an order granting a preliminary injunction enjoining and restraining defendant Nancy Silberkleit (Nancy): from working at the company’s offices located at 325 Fayette Avenue, Mamaroneck, NY 10543; from attending the industry “Comic-Con” trade show in San Diego, California, scheduled for July 20 to 24, 2011, on behalf of the company; and from contacting or otherwise communicating with the company’s employees, other than Jonathan Goldwater (Jon), or vendors for any purpose.

Nancy cross-moved, pursuant to CPLR 3211, for an order dismissing the complaint.

*Facts*

ACP is in the business of publishing comic books, in particular, those involving the characters Archie, Veronica, Betty, and Jughead. The company has two co-CEOs and two directors, Nancy and Jon. Nancy was employed as co-CEO pursuant to an employment agreement dated March 26, 2009, following the death of her husband, Michael Silberkleit (Michael) in August 2008. Michael had run the company together with Jon’s father, Richard

Goldwater, before the latter's death.<sup>1</sup>

The employment contract provides that Nancy has the final decision with respect to live theatrical plays or productions and in connection with any scholastic book or similar academic resource materials, referred to in the contract as the "Specified Matters." With respect to anything other than the Specified Matters, Jon has final responsibility and authority. Ex. A, ¶ 1. Nancy's term of employment under the agreement is through December 31, 2013, unless sooner terminated. The office location was specified as being at the company's "principal office in the metropolitan New York, New York vicinity. Executive shall not be required to render Executive's employment services at any other locations without Executive's prior consent." *Id.*, ¶ 3.

The agreement permits the company to terminate Nancy's employment for "Cause." Cause is defined to include, *inter alia*, "intentional and gross incompetence, gross neglect, or gross misconduct in the performance of the Executive's duties... ." If the company determines that there has been such incompetence, neglect or misconduct, it must provide the "executive with written notice of the alleged wrongful conduct." The executive must be given the opportunity to cure within 30 days. *Id.*, ¶ 5 (b).

In March 2011, Jon received a letter complaining of Nancy's behavior. He had received similar complaints from other employees previously. Then, in May 2011, the same employee alleged that Nancy was using inappropriate and offensive language and behavior, amounting to sexual harassment in violation of the company's employee handbook. The employee stated that

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<sup>1</sup> The company was founded in 1942 by Louis Silberkleit and John L. Goldwater. It subsequently was run by Michael Silberkeit, Louis' son, and Richard Goldwater, John's son. Nancy Silberkleit is Michael Silberkleit's second wife and, allegedly, a former educator.

the employee believed that the only option was to file a formal complaint with the Equal Employment Opportunity Commission.

In response to the letter and upon advice of counsel, Jon engaged the company's human resource consulting firm, HR Innovations, LLC (HR Innovations), to conduct a thorough and impartial investigation of the matter, and instructed all of the employees to cooperate with the investigation. The principal of HR Innovations, Myrna I. Sessa (Sessa), interviewed employees and completed a report on June 24, 2011. Ex. C. Nancy declined to participate in the investigation on the advice of counsel. *Id.* at 1.

Sessa reported that the employees felt that the atmosphere at work was generally amiable, cheerful and creative, with the exception of the nervousness and disruption caused by Nancy. Most employees said that they felt uneasy around Nancy, and they all reported hearing yelling and screaming between Nancy and Jon, with Nancy raising her voice most of the time. Nancy's screaming could be heard throughout the ACP offices. A number of employees stated that Nancy accused them of doing things that they did not do and loudly criticized Jon about a work product in front of photographers and a team from a national magazine. Employees also reported that they have received complaints from outside vendors concerning how Nancy treats them. *Id.* at 1.

When Sessa asked employees whether anyone at ACP used sexually-explicit or inappropriate language in the workplace, Nancy was the only person mentioned. Seven employees said they heard Nancy use the word "penis" in referring to men. This occurred on a number of occasions. Nancy also was said to have remarked that a particular employee was liked by others only "because she has big boobies." Additionally, Nancy was said to have told employees that they should pull their pants down, on one occasion while on a conference call

with a vendor, who heard the remark. *Id.* at 2.

Employees asserted that Nancy had threatened many of their jobs and periodically threatened legal action when she did not like something that was going on. *Id.* at 3. Employees complained about Nancy eavesdropping, often at Jon's door, and interrupting meetings and telephone calls, thereby interfering with their ability to do their jobs. *Id.* at 4. A number of employees expressed concern about personal safety and refused to be in the building alone with Nancy. *Id.* at 5.

Sessa concluded her report with the following:

It is my recommendation, based on my investigation, that there is clearly a serious problem in the company and prompt action should be taken to correct the situation. This conduct cannot be tolerated and in my opinion, Nancy should no longer work at the ACP offices and should have no further direct conduct with ACP employees and vendors.

*Id.* at 6.

Nancy's attorney was provided with a copy of the report on July 5, 2011. When he did not accept the company's attorney's invitation to discuss the matter, the instant action was filed on July 7, 2011. In the order to show cause, ACP sought a temporary restraining order and a preliminary injunction pending the determination of the action enjoining Nancy from working at the company's offices, attending the Comic-Con trade show in San Diego, California scheduled for July 20-24, 2011, and from contacting or otherwise communicating with company employees, other than Jon, or with vendors. In the complaint, ACP seeks a permanent injunction for the same relief, as well as costs, disbursements and attorney's fees.

Nancy opposed the motion and cross-moved, pursuant to CPLR 3211 (7), to dismiss the complaint. In her affidavit in opposition, Nancy denied ever making threatening or demeaning

comments that would jeopardize ACP's operations, making any comments regarding an employee's physical attributes, or telling any off-color jokes. Silberkleit Aff., ¶ 11. In response, ACP included affidavits from seven employees, including both recent hires and longtime employees, which attested to Nancy's improper and inappropriate comments and behavior. ACP also submitted a decision in a pending proceeding in the Surrogate's Court in Westchester County regarding Nancy's husband's estate. In it, the Surrogate expressed concern about Nancy's credibility based upon her alleged inability to recall whether she was present for the preparation or execution of the will, which attorneys she met with, and her assertion that she did not see decedent's will or the codicil until after her husband died. The Surrogate further pointed out that Nancy professed not to have known that decedent had life insurance until after he died, but she participated in the transfer of that multimillion dollar asset before his death.<sup>2</sup>

A TRO was granted by this court, pending hearing of the motion. The TRO enjoined Nancy from harassing, yelling at or abusing anyone at the company's office, from attending the Comic-Con trade show in San Diego in any manner other than for educational panels and issues, and from contacting or otherwise communicating with the company's vendors.

At oral argument, the court extended the TRO prohibiting Nancy from harassing, yelling at or abusing anyone. It further directed that Nancy was permitted as co-CEO to deal with the Specified Matters in the employment contract only and that she is not to contact or otherwise communicate with the company's employees or with the vendors in regard to anything but the Specified Matters.

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<sup>2</sup> Michael Silberkleit's children from his first marriage are contesting his last will, written while he was dying of cancer. As a result, it is unclear who owns the shares of ACP which are held in the Silberkleit estate.

## *Discussion*

### *Cross-Motion to Dismiss*

ACP contends that it is seeking only to implement the recommendations contained in HR Innovations' report, dated June 24, 2011. It denies that it is trying to improperly terminate Nancy's employment contract or seeking monetary damages. ACP claims it is seeking to have Nancy continue to work on the Specified Matters arrogated to her by her employment agreement, but to do so in separate offices where she would no longer have contact with ACP employees and vendors who work on other aspects of ACP's business.

Nancy opposes the motion, and seeks to dismiss the action. She contends that this action is a corporate power grab by Jon, masquerading as a breach of contract action. She further contends that the parties' relationship is governed by a contract, ACP has only those remedies provided for in the contract, and ACP cannot seek injunctive relief where the contract does not provide for such a remedy. Nancy maintains that this action is tantamount to seeking a judicial termination of the contract, arguing that ACP is seeking to have the court inject itself into the operating affairs of ACP. Nancy objects to using "rank hearsay" to support ACP's position.

It is well established that on a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello* at 636. Here, Nancy has failed to demonstrate that there is no cause of action.

Contrary to defendant's position, plaintiff is not seeking to terminate defendant's employment. While there is no question that the action concerns her employment, it revolves around alleged misconduct and possible actionable misbehavior on her part. Plaintiff is seeking to protect itself, a company in which defendant represents 50% ownership, from potential lawsuits and investigation by the Equal Employment Opportunity Commission. While the same allegations might be used to seek defendant's termination for cause, such termination is not the subject of this action. Plaintiff has stated, and reiterated, that it is prepared to continue to employ defendant with respect to the Specified Matters, but that it seeks to protect its employees from her allegedly erratic and abusive behavior. Defendant has failed to demonstrate how plaintiff falls short of stating a claim. Therefore, the cross motion is denied.

*Motion for Preliminary Injunction*

In order to obtain a preliminary injunction, a party must establish a likelihood of success on the merits; danger of irreparable injury in the absence of a preliminary injunction; and a balance of equities in its favor. *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005).

Nancy maintains that ACP cannot establish a likelihood of success on the merits because her employment contract does not provide for any equitable remedy and plaintiff, in effect, is asking for her employment to be terminated. In order to terminate her employment, she argues, ACP would be required to provide her with written notice of her incompetence, neglect or misconduct, and give her 30 days to cure. No such written notice has been provided, and, therefore, the employment contract cannot be terminated.

As discussed above, ACP is not seeking to terminate the employment agreement at this

time. While the actions that it complains of may serve to support a termination for cause, it now seeks only to shield itself and its employees and vendors from Nancy's alleged inappropriate behavior. If that can be accomplished without terminating Nancy's employment, ACP would have the right to pursue its remedy.

There is no question that Nancy's behavior, as alleged, is highly inappropriate and unacceptable in the workplace. ACP has provided affidavits from people who have seen and heard such behavior. In opposition, Nancy supplies only her own affidavit denying such action. She does not submit a single affidavit from any employee or vendor disputing her alleged inappropriate behavior or offering a different version of the occurrences outlined in the affidavits submitted. Therefore, insofar as demonstrating Nancy's inappropriate behavior at the workplace, ACP has demonstrated a likelihood of success.

With respect to the relief that ACP seeks, the matter is somewhat more complex. The employment agreement provides that Nancy must agree to any change in her work location from the principal place of business of ACP. Nancy has not so agreed. Consequently, unless Nancy agrees to work out of a different venue, that aspect of the relief sought is unavailable to ACP as long as the employment agreement remains in effect.

With respect to the Comic-Con trade show, the issue is moot. The trade show was held, and the parties complied with the TRO, apparently without any negative effects. With respect to prohibiting Nancy from contacting or communicating with the company's employees, there is a problem insofar as Nancy has her role to play with respect to Specified Matters under the employment agreement. However, there is no reason that Nancy must contact the employees that are working on other matters. In view of the division of responsibilities, it is entirely feasible for

Nancy to have her own staff for Specified Matters projects. She need have no contact with employees or vendors working on projects other than Specified Matters.

In sum, ACP has shown that there is merit to its position, and while not all of the relief it seeks is available, that does not preclude it from making a showing of a likelihood of success on the merits with respect to much of the relief it seeks.

Nancy next argues that monetary damages would be available to ACP on its complaints. Since the damages are compensable by monetary payment, Nancy maintains that injunctive relief is improper. *Credit Index. v RiskWise Intl.*, 282 AD2d 246, 247 (1<sup>st</sup> Dept 2001). Then too, Nancy suggests that ACP can seek to terminate Nancy's employment, if so advised, thereby avoiding any irreparable harm.

This position is not compelling. First, there is no reason that ACP must wait for 30 days after giving written notice to Nancy to try to alleviate the uncomfortable working conditions for its workforce. Nancy's alleged behavior is such that any of the employees harmed thereby can seek legal redress, which would harm ACP not only monetarily, but in terms of its reputation and the productive atmosphere of the workplace. Further, many of the employees, including some who have been with the company for a long time, could choose to leave rather than put up with Nancy's aberrant behavior. Such departures could not be compensated by money damages and would undoubtedly injure the company in many ways. Therefore, ACP has demonstrated a danger of irreparable injury.

Finally, when balancing the equities, it is hard to see how preventing Nancy from abusing her fellow employees, in any way, would be unfair. Since her work and her area of control do not require her to interact with most other employees (other than Jon), there is no reason to

subject them to continued abuse, and there is no harm to Nancy if she is prevented from doing so. Hence, the balance tips in favor of granting a preliminary injunction.

Such injunction, as mentioned early, cannot strip Nancy of any rights that she has under the employment agreement, so long as her employment continues. She cannot be barred from working at the company's office so long as she is employed under the employment agreement. That does not mean, however, that she must be afforded free access to all of the employees who work there. Nor does it mean she can abuse or harass anyone working at the ACP offices. Nancy can continue to work at the company's office, but may not interact with employees or vendors other than Jon or anyone she specifically hires to work with her on her Specified Matters. Those employees working on matters that fall under Jon's authority are not to be approached or contacted by her in any way.

Accordingly, due deliberation having been had, and it appearing to this court that a cause of action exists in favor of the plaintiff, Archie Comic Publications, and against the defendant, Nancy Silberkleit, and that the plaintiff is entitled to a preliminary injunction on the ground that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff, as set forth in the aforesaid decision, it is

ORDERED that defendant, her agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

harassing, yelling at or abusing anyone at the Archie Comic Publications' offices;  
engaging in any matters for the company other than the Specified Matters required  
by the contract of employment; and/or contacting or otherwise communicating  
with the company's employees or vendors, other than Jon Goldwater, in regard to  
anything but the Specified Matters;

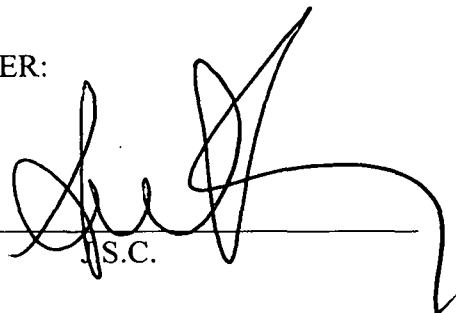
and it is further

ORDERED that defendant's cross motion to dismiss the complaint is denied; and it is  
further

ORDERED that counsel are directed to appear for a <sup>preliminary</sup> status conference in Room 228, 60  
Centre Street, on December 13, 2012, at 10:00 a.m.

Dated: November 28, 2011

ENTER:



J.S.C.