

Brock v Covenant House
2012 NY Slip Op 31511(U)
June 4, 2012
Sup Ct, NY County
Docket Number: 400112/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 400112/2012
BROCK, MANDEL T.
vs.
COVENANT HOUSE
SEQUENCE NUMBER : 001
DISMISS

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 _____ No(s). 1, 2
Answering Affidavits — Exhibits _____ No(s). 3
Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

JUN 07 2012

Dated: 6/4/12

NEW YORK
COUNTY CLERK'S OFFICE, J.S.C.
HON. EILEEN A. RAKOWER

- 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

SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MANDEL T. BROCK,

Plaintiffs,

Index No.
400112/2012

**DECISION
and ORDER**

-against-

COVENANT HOUSE, KEVIN RYAN,
EMERSON SIMON, LENORE HAAS, KIM
PAGE, YVONNE HUDSON AND JERRY DILLON,

Defendants.

Mot. Seq. 001

FILED

-----X
HON. EILEEN A. RAKOWER:

JUN 07 2012

Cross-Motion: **Yes** **No**

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff brings this action alleging improper termination from his job as a telefundraiser at Covenant House, a privately funded non-profit organization. The instant motion is brought by Defendants to dismiss Plaintiff's pro se Amended Complaint, pursuant to CPLR §3211(a)(1) and (a)(7). Plaintiff opposes the motion.

Plaintiff was hired on August 15, 2011 as a per diem employee for Defendant Covenant House. As a telefundraiser, he was tasked with calling prospective donors and securing pledges for donations. Each telefundraiser is given a telefundraising department training manual that includes specific "scripts" to use on calls with prospective donors. After beginning at Covenant House, each telefundraiser is given a three-month evaluation period in which their phone calls and adherence to policies and procedures are closely monitored by the telefundraising department's supervisory personnel. At the end of the first three months of employment, a "telefundraiser evaluation form" is completed by the telefundraiser's supervisor.

Some time between October 13, 2011 and October 27, 2011 Defendant's payroll manager, received an order from a North Carolina Child Support Enforcement Agency instructing Defendant to deduct a certain amount of Plaintiff's wages for child support. The child support order was then reflected in Plaintiff's October 27, 2011 paycheck. When Plaintiff received his paycheck reflecting the child support garnishment, he immediately complained to one of his supervisors, asserting that the child support garnishment was not lawful and that the North Carolina court had no authority to enforce a child support order in New York. Defendant states that it investigated Plaintiff's grievance and sought to determine the validity of the North Carolina child support order. Defendant determined that the correct course of action was to stop garnishing Plaintiff's wages. Defendant also wrote a letter to Plaintiff informing him that it had been directed to stop garnishing his paycheck and that it would not be garnishing his paycheck going forward. Plaintiff claims that he was never paid his final paycheck. Defendant contends that the final paychecks were paid, and attaches evidence of payment. Defendant does admit that due to a clerical error, child support deductions were mistakenly taken out of Plaintiff's final two paychecks.

Plaintiff's First Cause of Action alleges retaliation. The Second and Third Causes of Action assert denial of access to the human resources department. Plaintiff's Fourth Cause of Action alleges wrongful termination. The Fifth, Sixth, Seventh, and Eighth causes of action are for defamation. The Ninth Cause of Action sounds in breach of contract, and the Tenth Cause of Action asserts failure to issue a final paycheck in accordance with N.Y. Labor Law §191. Finally, the Eleventh Cause of Action asserts theft of wages and conspiring to steal wages, theft of services and conspiring to steal services, bearing false witness, and violation of due process.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence;
- (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply

whether the facts alleged fit within any ;7801;7801cognizable ;7802;7802legal ;7803;7803theory.” (See, *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 [1st Dept. 2003]) (internal citations omitted) (See CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (See, *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (See, *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (See, *Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Dismissal of plaintiffs’ Amended Complaint is unwarranted at this early stage, and without the benefit of discovery. In assessing the four corners of the Complaint, Plaintiff states cognizable claims for retaliation, denial of access to human resources, wrongful termination, defamation, failure to issue a final paycheck, and theft of wages/conspiring to steal wages.

With regard to the First Cause of Action for retaliation, Plaintiff sufficiently alleges that, “defendant’s conduct was motivated by and in retaliation for plaintiff’s spoken assertion of the unlawfulness of the garnishment of his wages.” However, Plaintiff’s claim that Defendant violated N.Y. Labor Law §740(2)(a) is insufficient. N.Y. Labor Law §740(2)(a) states, “[a]n employer shall not take any retaliatory personnel action against an employee because such employee... 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, or which constitutes health care fraud.” Nowhere does Plaintiff assert that he disclosed, or threatened to disclose to anyone such violation. Inasmuch as Plaintiff has failed to adequately lay out a claim under N.Y. Labor Law §740(2)(a), all such claims must be dismissed.

Regarding Plaintiff’s Second and Third Causes of Action for denial of access to human resources, Plaintiff has adequately laid out evidence that Defendant refused him access to human resources. Specifically, Plaintiff states that members of human resources were made unavailable to him, and failed to return his calls.

Plaintiff's Fourth Cause of Action for wrongful termination is sufficient, in that the complaint alleges that he was terminated "in retaliation for plaintiff complaining about the garnishment of his wages." Although Defendants produce documents indicating his unsatisfactory performance evaluation as the reason for his termination, there remains a question of fact as to why Plaintiff was ultimately fired.

In order to plead a prima facie claim of defamation, a party must allege a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." (*See, Dillon v. City of New York*, 261 A.D.3d 34, 704 N.Y.S.2d 1, [1st Dept 2006]). Special harm consists of "the loss of something having economic or pecuniary value." (*See, Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 [2nd Dept 1984]). Plaintiff's Fourth, Fifth, Sixth, and Seventh Cause of Action for defamation, is sufficient, in that the complaint states that defendants made materially false statements, in writing, to multiple others, and caused Plaintiff to suffer emotional and mental anguish, loss of financial security and sustain personal injuries.

Plaintiff's Ninth Cause of Action for breach of contract must be dismissed as Plaintiff fails to assert the existence of any contract, written or oral, between the parties (*See, Sud v. Sud*, 211 A.D.2d 423, NYS2d 37 [1st Dept 1995]).

Plaintiff's Tenth Cause of Action, which alleges a violation of N.Y. Labor Law §191, for failure to issue a final paycheck, may not be dismissed pursuant to the instant motion. Although Defendant provides documentary evidence that Plaintiff's final check was issued on December 8, 2011, check number 55834988, the net amount was only \$33.35, and Defendant has admitted to a clerical error in wages provided in the final two paychecks.

Finally, many of Plaintiff's Eleventh Cause of Action claims are duplicative of prior claims. Specifically, Plaintiff's claims of unlawful employment practices, wrongful termination, intentionally creating a hostile work environment, slander, defamation, libel, breach of contract, caused loss of employment and detrimental damage to plaintiff's future employment opportunities, are all claims which have been brought through prior Causes of Action and must be dismissed. Plaintiff's claims of "theft of services/conspiring to steal services," "due process" and

“bearing false witness” claims are inapplicable to the present facts, and must be dismissed at this time as well. Theft of services/conspiring to steal services prohibits (i) using stolen credit or debit cards to pay for services rendered; (ii) failing to pay a restaurant or hotel bill after services have been provided; (iii) failing to pay the proper fare for a train, subway, air, taxi or other transportation service once such service has been provided; or (iv) stealing or diverting cable television, gas, steam, sewer, water, electrical or telephone service from a neighbor or some other third party (*See*, New York Penal Code §165.15). Plaintiff does not assert any facts in his complaint, which would apply to a theft of services claim. With regard to Plaintiff’s due process claim, as a non-governmental organization, Defendants do not owe Plaintiff due process rights. (*See, San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 [1996]). Plaintiff’s “bearing false witness” claim fails to identify how Defendants bore “false witness” against him. The only claim under the Eleventh Cause of Action which is sufficiently pleaded is that of “theft of wages or conspiring to steal wages,” as there is still an issue as to proper payment of Plaintiff’s final paychecks.

Wherefore, it is hereby,

ORDERED that Defendants Covenant House, Kevin Ryan, Emerson Simon, Lenore Haas, Kim Page, Yvonne Hudson and Jerry Dillon, motion to dismiss Plaintiff’s claims regarding N.Y. Labor Law §740(2)(a), breach of contract, theft of services/conspiring to steal services, violations of due process, and bearing false witness is granted.

ORDERED that Defendants Covenant House, Kevin Ryan, Emerson Simon, Lenore Haas, Kim Page, Yvonne Hudson and Jerry Dillon, motion to dismiss Plaintiff’s claims for retaliation, denial of access to human resources, wrongful termination, defamation, failure to issue a final paycheck, and theft of wages/conspiring to steal wages is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 4, 2012

FILED


EILEEN A. RAKOWER, J.S.C.

JUN 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

FILED

JUN 07 2012