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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART _____
Justice

Index Number : 104287/2011
KING, LAURA
vs.
KLINE, DANA
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

Dated: 1/18/13 _____, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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LAURA KING,

Plaintiff,

-against-

DANA KLINE, JUSTIN WELCH and FUSION BRANDS, INC.,

Defendants.

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Index No. 104287/11

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action against defendants Dana Kline ("Ms. Kline"), Justin Welch ("Mr. Welch") and Fusion Brands, Inc. ("Fusion") alleging fraud, defamation, conspiracy, hostile work environment and deceptive business practices. After plaintiff failed to appear at two scheduled compliance conferences, this case was marked off the calendar pursuant to the Uniform Rules for New York State Trial Courts § 202.27(b). Plaintiff now moves for an Order pursuant to CPLR § 5015(a) restoring this action to the calendar. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts are as follows. Plaintiff and Ms. Kline worked together at Icon Beauty ("Icon"). Ms. Kline then resigned from Icon to work for Fusion instead. Plaintiff alleges that Ms. Kline actively recruited her to leave Icon and work at Fusion. Plaintiff resigned from Icon in

April 2010 and began working at Fusion in or around June 2010. However, plaintiff alleges that Ms. Kline and defendant Justin Welch ("Mr. Welch") conspired "to get rid of" her from her employ at Fusion and that she was eventually fired from Fusion on September 28, 2010.

This case was set for a compliance conference on July 17, 2012. Plaintiff's counsel alleges that during the week of July 8, 2012, he received a telephone call from Robert Kaplan, counsel for defendants, who mentioned that he would be taking vacation the following week and asked if plaintiff would agree to adjourn the compliance conference for two weeks. Plaintiff's counsel agreed to the adjournment but thought that the new conference date was set for July 31, 2012. However, the new conference date was actually set for July 24, 2012 and plaintiff's counsel failed to show up to the conference.

Another compliance conference was scheduled for September 11, 2012. Plaintiff's counsel alleges that he was en route to the conference that morning but that he started to feel faint and went home, thus, failing to appear for the conference. As plaintiff failed to appear for two scheduled compliance conferences, on September 11, 2012, this court dismissed the instant action pursuant to the Uniform Rules for New York State Trial Courts § 202.27(b). This court then received a motion from defendants for an Order pursuant to CPLR § 3211 (a)(7) and (a)(1) dismissing the complaint. However, this court denied the motion as the case had already been disposed. Plaintiff then brought the instant motion to vacate the default judgment entered against her and restore the action to the calendar.

A case that has been dismissed due to the plaintiff's failure to appear for two or more scheduled court conferences may be restored if the plaintiff establishes "a reasonable excuse for the failure to attend the conference and a meritorious cause of action." *Biton v. Turco*, 88 A.D.3d 519 (1st Dept 2011). In the instant case, plaintiff's motion to restore the case to the calendar is

denied. As an initial matter, plaintiff's counsel has demonstrated a reasonable excuse for failing to appear for the two scheduled compliance conferences. Plaintiff's counsel has established that there was some confusion about the date of the July 24, 2012 conference as he thought that it was scheduled for July 31, 2012. Further, plaintiff alleges that he suddenly became ill en route to the second conference, thereby making his appearance on that date impossible. The court finds that these excuses are reasonable. *See Donnelly v. Treeline Companies*, 66 A.D.3d 563 (1st Dept 2009)("plaintiff's default was reasonable and likely attributable to the court's failure to notify everyone about the conference, whose date is not found in any prior conference order"); *see also Acciarito v. Homedco, Inc.*, 237 A.D.2d 236 (2d Dept 1997)(finding that plaintiff established reasonable excuse by reason of counsel's illness).

However, plaintiff has failed to establish a meritorious cause of action. As an initial matter, plaintiff's first cause of action alleging fraud in the inducement fails to state a cause of action. To state a claim for fraud in the inducement, "a plaintiff must assert the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury." *Braddock v. Braddock*, 60 A.D.3d 84, 86 (1st Dept 2009). Furthermore, elements of a fraud claim must be pled with specificity. *See* CPLR § 3016(b). In the instant action, plaintiff has failed to state a claim for fraud in the inducement as plaintiff has not asserted that defendants misrepresented a material fact which was known by defendants to be false and intended to be relied on when made. While plaintiff asserts that she was coerced into resigning from her job at Icon in reliance upon the representation by Ms. Kline that she would be hired by Fusion, this allegation is insufficient to establish a claim for fraud in the inducement as such representation was true. Plaintiff has alleged in her complaint that after resigning from Icon, she was offered a

job at Fusion and started working at Fusion on June 3, 2010. That plaintiff was terminated from her position a few months later does not establish that defendants made any misrepresentations to her. Plaintiff's assertion that she relied on defendants' promise that she could have a career at Fusion is without merit as plaintiff was an at-will employee who could be terminated for any reason or no reason at all and thus, reliance on a statement promising plaintiff a career was without basis. Moreover, plaintiff did not have an employment contract with Fusion which could have specified the terms of her employment. Therefore, as plaintiff has failed to allege any misrepresentations made by defendants, her claim for fraud in the inducement fails to state a meritorious cause of action.

Additionally, plaintiff's second cause of action for defamation fails to state a cause of action. To state a claim for defamation, a plaintiff must plead "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." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). Further, the allegation must set forth the exact words uttered or communicated by the defendant or the cause of action will be dismissed. *See Manas v. VMS Associations, LLC*, 53 A.D.3d 451 (1st Dept 2008); *see also* CPLR § 3016(a) ("In an action for libel or slander, the particular words complained of shall be set forth in the complaint...") Finally, a cause of action for defamation must set forth with particularity how and when the allegedly offending words were communicated and must specifically identify any third-party to whom those words were communicated. *See Dillon*, 261 A.D.2d at 38.

In the instant action, plaintiff has failed to state a claim for defamation as she has failed to plead such cause of action with the requisite specificity. In her complaint, plaintiff merely alleges that defendants defamed her work ethic and ability by stating that she was disorganized

and incompetent. However, plaintiff's complaint does not (a) set forth the exact words uttered or communicated by the defendant; (b) allege whether the defamatory words were communicated by defendant orally or in writing; (c) allege when the defamatory words were communicated by defendant; and (d) specifically identify a single third-party to whom the defamatory words were communicated. Moreover, plaintiff has not alleged that the defamatory words are false. An essential element of a cause of action for defamation is an allegation that the words at issue are false. *See Christopher Lisa Matthew Policano, Inc. v. North American Precis Syndicate, Inc.*, 129 A.D.2d 488 (1st Dept 1987). Therefore, plaintiff's claim for defamation fails to state a meritorious cause of action.

Further, plaintiff's third cause of action for conspiracy fails to state a cause of action. It is well-settled that New York does not recognize a cause of action for civil conspiracy. *See Legion Lighting Co., Inc. v. Switzer Group, Inc.*, 171 A.D.2d 472 (1st Dept 1991); *see also Cunningham v Hagedorn*, 72 A.D.2d 702 (1st Dept 1979). Allegations of conspiracy are "permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968 (1986). In the instant action, plaintiff alleges that defendants "did conspire among themselves and others to damage the reputation of the Plaintiff with her current employer and with the beauty/fragrance industry itself." The only underlying tort that plaintiff attempts to allege is injury to her reputation. However, it is well-settled that New York does not recognize a cause of action for damage to reputation as such a claim must be asserted through a "specific cause of action like libel, slander or malicious prosecution." *See State v. General Electric Co.*, 199 A.D.2d 595, 604 (2d Dept 1993). This court has already found that plaintiff's claim of defamation fails to state a cause of action. Therefore, as plaintiff has not alleged an underlying actionable tort, plaintiff's claim of

conspiracy fails to state a meritorious cause of action.

Moreover, plaintiff's fourth and fifth causes of action, both of which allege that defendants created a hostile work environment, fail to state a cause of action. "[A] hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Hernandez v. Kaisman*, 2012 WL 6699394 *3 (1st Dept Dec. 27, 2012), citing *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 23. In addition, "the conduct must both have...[been]...subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment - one that a reasonable person would find to be so." *Id.* at 21. Moreover, "there can be no claim for sexual discrimination, including that based on a hostile work environment, unless the plaintiff was treated differently *because* of her sex [or gender]." *Hernandez*, 2012 WL 6699394 *3. A plaintiff who is alleging that he or she has been discriminated against because of his or her protected status must allege facts warranting the inference that he or she has been discriminated against because of that protected status. *See Quintas v. Pace University*, 23 A.D.3d 246 (1st Dept 2005). While the "severe and pervasive" standard is used to analyze hostile work environment claims brought pursuant to the New York State Human Rights Law (" New York State HRL"), "[f]or [City Human Rights Law] liability...the primary issue...is whether the plaintiff has been treated less well than other employees because of her gender." *Williams v. New York Hous. Auth.*, 61 A.D.3d

62, 78 (1st Dept 2009).

In the instant action, plaintiff's fourth and fifth causes of action alleging a hostile work environment fail to state a claim. As an initial matter, plaintiff's fourth cause of action, which alleges a hostile work environment pursuant to the New York State HRL, fails to state a cause of action as plaintiff has failed to allege incidents which would constitute severe and pervasive discriminatory, intimidation, ridicule or insult while she was employed at Fusion. Plaintiff's complaint merely alleges that defendants "regularly subjected [her] to a degrading work environment by subjecting [her] to misinformation, unattainable working demands, shouting, demeaning comments, intentional sabotage, intentional misdirection, snide comments." Plaintiff has not alleged conduct that was physically threatening and she has not alleged that it interfered with her work performance. Moreover, plaintiff's complaint does not allege specifically how such conduct was severe and pervasive. Additionally, plaintiff's fifth cause of action, which alleges a hostile work environment pursuant to the New York City Human Rights Law (the "New York City HRL"), fails to state a claim as plaintiff has not shown how she was treated less well than other employees because of her gender. Plaintiff alleges in her complaint that defendants' conduct "was prompted by the Plaintiff [sic] gender and...sexual orientation." However, plaintiff has not alleged that any comments made to her by defendants were about her gender or sexual preference or that she was treated any differently on account of her gender or sexual preference than other employees. Thus, plaintiff's claim of a hostile work environment fails to state a meritorious cause of action.

Finally, plaintiff's sixth cause of action alleging deceptive business practices pursuant to General Business Law ("GBL") § 349 fails to state a cause of action. GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the

furnishing of any service in this state..." GBL § 349. "To state a cause of action under [§ 349], a plaintiff 'must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; [p]rivate contract disputes unique to the parties...would not fall within the ambit of [GBL § 349]'". *Gomez-Jiminez v. New York Law School*, 2012 WL 6620602 (1st Dept, Dec. 20, 2012), citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995). A mere employment dispute is not a valid predicate for a claim under § 349. *See LoGerto v. Trustees of Columbia Univ.*, 35 A.D.3d 395 (2d Dept 2006).

In the instant action, plaintiff has failed to state a claim for deceptive business practices pursuant to GBL § 349 as the complaint fails to allege that defendant's conduct was consumer-oriented. Plaintiff alleges that defendants engaged in deceptive business practices including, but not limited to, fraudulently inducing her to leave her employment, conspiring to embarrass, humiliate and damage her reputation in the beauty/fragrance industry. However, plaintiff has not alleged that any of this conduct was aimed at the public at large or at consumers in general. Rather, the allegations involve a private employment dispute between plaintiff and defendants which is precisely the type of dispute that does not fall within the ambit of § 349. Thus, plaintiff's claim for deceptive business practices fails to state a meritorious cause of action.

Accordingly, plaintiff's motion to restore this action to the calendar is denied. This constitutes the decision and order of the court.

Dated: 1/18/13

Enter: _____

J.S.C.