Max v Moseson
2013 NY Slip Op 32771(U)
January 10, 2013
Sup Ct, Westchester County
Docket Number: 59620/2012
Judge: Lester B. Adler

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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DEBORAH MAX,

Plaintiff,

-against-

DECISION & ORDER

Index No.: 59620/12

SHARON MOSESON Individually, and as a Member of the Board of CHOICE of New Rochelle, Inc., a not-for-profit agency, BARBARA NAPOLI, Individually and as a Member of the Board of CHOICE of New Rochelle, Inc., a not-for-profit agency, MARY GRACE FERONE, Individually and as a Member of the Board of CHOICE of New Rochelle, Inc., a not-for-profit agency, and DEMETRIUS MOYSTON, Individually,

Defendants.
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ADLER, J.

The following papers numbered 1 to 4 were read on defendant defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(5) and (7):

	Papers Numbered
Notice of Motion; Memorandum of Law in Support	1-2
Memorandum of Law in Opposition	3
Reply Memorandum of Law	4

On June 18, 2012, plaintiff commenced this action in which she has asserted a claim for tortious interference against all of the defendants (first cause of action), a claim for intentional infliction of emotional distress against defendants Sharon Moseson ("Moseson") and defendant Demetrius Moyston ("Moyston") (second cause of action), and a claim for prima facie tort against defendants Moseson and Moyston (third cause

of action). Defendants now move to dismiss the second and third causes of action pursuant to CPLR §3211(a)(5) on the ground that these causes of action are barred by the applicable statute of limitations, and to dismiss the entire complaint pursuant to CPLR §3211(a)(7) on the ground that plaintiff has failed to state a cause of action.

First, the Court will address defendants' motion insofar as they move to dismiss the causes of action for intentional infliction of emotion distress and prima facie tort as barred by the applicable one-year statute of limitations (see CPLR §215[3]).

In moving to dismiss a cause of action pursuant to CPLR §3211(a)(5), "a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*A.F. Rockland Plumbing Supply Corp. v. Hudson Shore Associated Ltd. Partnership*, 96 A.D.3d 885, 886, 948 N.Y.S.2d 79; *Fleetwood Agency, Inc. v. Verde Elec. Corp.*, 85 A.D.3d 850, 851, 925 N.Y.S.2d 576). The complaint alleges, *inter alia*, that on or about March 16, 2011, plaintiff received notice from defendant Moseson that she was being demoted from her position of Deputy Director to Program Director, that her salary was being reduced from $65,000.00 to $40,000.00 and that her agency vehicle, as well as her allowances for gas and tolls, were being taken away (Complaint, ¶55). It is further alleged that CHOICE knew that plaintiff could not afford a cut in salary and that she would be unable to accept the position of Program Director (Complaint, ¶56). As a result, the demotion amounted to a constructive discharge of her employment (Complaint, ¶57).

Defendants have met their initial burden by demonstrating that, pursuant to the allegations in the complaint, the constructive discharge occurred on March 16, 2011.

Since the complaint was not filed until June 18, 2012, the action was commenced outside of the applicable statute of limitations.

Thus, the burden shifts to plaintiff "to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether they actually commenced the action within the applicable limitations period" (*Jalayer v. Stigliano*, 94 A.D.3d 702, 703, 941 N.Y.S.2d 243; *Rakusin v. Miano*, 84 A.D.3d 1051, 1052, 923 N.Y.S.2d 334). Contrary to the allegations contained in the complaint, plaintiff now argues that "it is unclear the exact date plaintiff was terminated." While the sufficiency of this argument is questionable, in the name of judicial economy, plaintiff concedes her inability to meet the "incredibly high burden imposed on plaintiffs by New York courts to substantiate a claim" for intentional infliction of emotional distress. Plaintiff does not address the motion insofar as asserted against the cause of action for prima facie tort and, therefore, has failed to meet her burden.

Defendants further argue that plaintiff has failed to state a claim for tortious interference in the first cause of action.

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; *Pacific Carlton Dev. Corp. v. 752 Carlton*, 62 A.D.3d 677, 679, 878 N.Y.S.2d 421). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"

(*Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274, quoting *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [internal quotations omitted]; *513 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496).

The Court begins its analysis with the well-settled law in New York that "[a]n employee who does not work under an agreement for a definite term of employment is an at-will employee who may be discharged at any time with or without cause" (*Barcellos v. Robbins*, 50 A.D.3d 934, 935, 858 N.Y.S.2d 658, *lv. denied* 11 N.Y.3d 705, 866 N.Y.S.2d 609, 896 N.E.2d 95, citing *Robertazzi v. Cunningham*, 294 A.D.2d 418, 742 N.Y.S.2d 115; *Thawley v. Turell*, 289 A.D.2d 169, 736 N.Y.S.2d 2; *Michnick v. Parkell Prods.*, 215 A.D.2d 462, 626 N.Y.S.2d 265). New York does not recognize a cause of action for the tort of abusive or wrongful discharge of an at-will employee (*Barcellos v. Robbins*, 50 A.D.3d at 935, citing *Lobosco v. New York Tel. Co./NYNESX*, 96 N.Y.2d 312, 727 N.Y.S.2d 383, 751 N.E.2d 462; *Negron v. JP Morgan Chase/Chase Manhattan Bank*, 14 A.D.3d 673, 674, 789 N.Y.S.2d 257), and "this rule cannot be circumvented by casting the cause of action in terms of tortious interference with employment" (*Barcellos v. Robbins*, 50 A.D.3d at 935; *Negron v. JP Morgan Chase/Chase Manhattan Bank*, 14 A.D.3d 673 at 674).

However, an at-will employee may assert a cause of action alleging tortious interference with employment where she can demonstrate that defendant utilized wrongful means to effect her termination (*McHenry v. Lawrence*, 66 A.D.3d 650, 651, 886 N.Y.S.2d 452, *lv. denied* 15 N.Y.3d 703, 906 N.Y.S.2d 817, 933 N.E.2d 216). "As

a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of physical violence, fraud or misrepresentation, civil suits and criminal prosecutions" (*Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 1013, 950 N.Y.S.2d 762, quoting *Smith v. Meridian Tech., Inc.*, 86 A.D.3d 557, 560, 927 N.y.S.2d 141 [internal quotations omitted]; *Nelson v. Capital Cardiology Assocs., P.C.*, 97 A.D.3d 1072, 949 N.Y.S.2d 530; *Anesthesia Assocs. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 A.D.3d 473, 477, 873 N.Y.S.2d 679; *Murray v. SYSCO Corp.*, 273 A.D.2d 760, 761, 710 N.Y.S.2d 179). "Moreover, where, as here, the individual defendants are co-employees of plaintiff, in order for a claim of tortious interference with an employment relationship to lie, it must be alleged that defendant co-employees acted outside the scope of their authority" (*Marino v. Vunk*, 39 A.D.3d 339, 340, 835 N.Y.S.2d 47).

It is alleged that defendants were aware of plaintiff's contractual relationship with CHOICE and that they employed "wrongful means" to effect her demotion and constructive discharge from her employment with CHOICE (Complaint, ¶¶'63, 64). It is further alleged that defendants actions were based on "malice and self-interest and outside the scope of their employment," and that as a result thereof, plaintiff suffered both loss of employment and "significant psychological harm" (Complaint, ¶¶65, 66). Specifically, it is alleged, among other things, that defendant Moyston filed false charges of discrimination against plaintiff with the New York State Division of Human Rights, that defendant Moseson encouraged him to file the complaint, and that the sole purpose therefor was to interfere with plaintiff's employment.

Here, the allegations in the complaint are not conclusory (cf. *Barcellos v. Robbins*, 50 A.D.3d at 935), and accepting the allegations therein as true as the Court must on a motion to dismiss, the complaint adequately pleads a cause of action for tortious interference.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss the second and third causes of action pursuant to CPLR §3211(a)(5) is GRANTED; and it is further

ORDERED, that defendants' motion to dismiss the first cause of action pursuant to CPLR §3211(a)(7) is DENIED; and it is further

ORDERED, that the parties appear in the Preliminary Conference Part on February 4, 2013 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 10, 2013

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

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