

**Lacognata v Service by Air, Inc.**

2014 NY Slip Op 33933(U)

September 8, 2014

Supreme Court, Nassau County

Docket Number: 601089/14

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

\_\_\_\_\_  
FRANK LACOGNATA,  
  
Plaintiff,  
  
- against -

TRIAL/IAS PART 34  
NASSAU COUNTY

Index No.: 601089/14  
Motion Seq. No.: 01  
Motion Date: 05/23/14

SERVICE BY AIR, INC. and STUART STOCKELBERG  
a/k/a STUART STOCKLEBERG,  
  
Defendants.

**The following papers have been read on this motion:**

|  | Papers Numbered |
|--|-----------------|
| <u>Notice of Motion, Affirmation and Exhibit and Memorandum of Law</u> | <b>1</b>        |
| <u>Affirmation in Opposition and Exhibits</u>                          | <b>2</b>        |
| <u>Memorandum of Law in Reply</u>                                      | <b>3</b>        |

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff's Verified Complaint; and move, pursuant to CPLR § 3024, for an order striking the scandalous and prejudicial allegations in the Verified Complaint. Plaintiff opposes the motion.

Plaintiff and defendant Stuart Stockelberg a/k/a Stuart Stockleberg ("Stockelberg") were co-workers employed by defendant Security By Air, Inc. ("SBA"). In December of 2013, plaintiff's employment was terminated. In March of 2014, plaintiff commenced this action.

In the Verified Complaint, plaintiff alleges three causes of action, namely, breach of the

covenant of good faith and fair dealing, tortious interference with contract and intentional infliction of emotional distress. *See* Defendants' Affirmation in Support Exhibit A. At this time, defendants seek dismissal of all three causes of action pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

On a pre-answer motion pursuant to CPLR § 3211, the pleadings are to be afforded a liberal construction and the plaintiff's allegations are to be accepted as true and accorded the benefit of every possible favorable inference. *See ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d (1994). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). The criterion on a motion pursuant to CPLR § 3211(a)(7) is whether the pleader has a cause of action. *See Leon v. Martinez, supra* at 88.

#### Breach of the Covenant of Good Faith and Fair Dealing

The rule in New York is that, where employment is for an indefinite period, it is presumed to be a hiring at-will which may be terminated by either party at any time for any reason or even for no reason. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983). A claim by an at-will employee that his employer violated the duty to terminate him only in good faith and fair dealing fails to state a cognizable cause of action. *See Murphy v. American Home Prods. Corp., supra* at 304; *McGimpsey v. J. Robert Folchetti & Assoc., LLC*, 19 A.D.3d 658, 798 N.Y.S.2d 498 (2d Dept. 2005). No such duty exists because it would be inconsistent with the employer's unfettered right to terminate the employment at any

time. See *Murphy v. American Home Prods. Corp.*, *supra* at 304-305. Furthermore, vague and conclusory allegations of a breach of the covenant of good faith and fair dealing during a period of at will employment are insufficient to state a cause of action. See *Cirillo v Muss Dev. Co.*, 278 A.D.2d 353, 717 N.Y.S.2d 638 (2d Dept. 2000).

Here, plaintiff's allegations in support of his claim for breach of the duty of good faith and fair dealing are: "(a) conspiring with each other to breach the contractual relationship Plaintiff had with the Defendants, (b) by not crediting Plaintiff for the work he performed for SBA, and (c) by usurping business opportunities from Plaintiff for Defendants own benefit, among other things." See Defendants' Affirmation in Support Exhibit A ¶ 64.

Plaintiff has no cause of action against defendant Stockelberg for breach of the covenant of good faith and fair dealing because plaintiff had no employment agreement with defendant Stockelberg. As to defendant SBA, the first allegation fails to state a cause of action; the second and third allegations are too vague and conclusory to withstand dismissal. Based on the foregoing, the branch of defendants' motion, pursuant to CPLR § 3211(a)(7), for dismissal of the First Cause of Action against both defendants is hereby **GRANTED**.

#### Tortious Interference with Contract

An at-will employee asserting a cause of action for tortious interference with employment is required to allege (1) the existence of a business relationship between the plaintiff and a third-party; (2) the defendant's interference with that business relationship; (3) that defendant acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amount to a crime or an independent tort; and (4) such conduct resulted in the injury to the plaintiff's relationship with the third party. See *McHenry v. Lawrence*, 66 A.D.3d 650, 886

N.Y.S.2d 492 (2d Dept. 2009) *lv. app. den.* 15 N.Y.3d 703, 906 N.Y.S.2d 817 (2010). It is well established that only a stranger to the contract, such as a third party, can be liable for tortious interference with contract. *See Ashby v. ALM Media, LLC*, 110 A.D.3d 459, 973 N.Y.S.2d 109 (1<sup>st</sup> Dept. 2013) *lv. app. den.* 22 N.Y. 3d 860, 981 N.Y.S.2d 670 (2014); *Ahead Realty LLC v. India House, Inc.*, 92 A.D.3d 424, 938 N.Y.S.2d 17 (1<sup>st</sup> Dept. 2012).

As defendant SBA cannot be liable for tortiously interfering with its own contract, plaintiff fails to state a cause of action for tortious interference with contract against defendant SBA. Consequently, the branch of defendants' motion, pursuant to CPLR 3211(a)(7), for an order dismissing the Second Cause of Action against defendant SBA is hereby **GRANTED**.

Although plaintiff additionally alleges a contract between himself and defendant Stockelberg, the contract that is the subject of the tortious interference claim can only be the business relationship between plaintiff and defendant SBA. Viewing the allegations of the Verified Complaint in the light most favorable to plaintiff, including the allegation that defendant Stockelberg's intent was to "steal Lacognata's book of business" (*see* Defendants' Affirmation in Support Exhibit A ¶ 37), the Court concludes that plaintiff has stated a cause of action against defendant Stockelberg for tortious interference with that business relationship. For this reason, the branch of defendants' motion, pursuant to CPLR 3211(a)(7), for an order dismissing the Second Cause of Action against defendant Stockelberg is hereby **DENIED**.

#### Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or disregard of a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress. *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350

(1993). The conduct at issue must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Murphy v. American Home Prods. Corp.*, *supra* at 303 quoting *Fischer v. Maloney*, 43 N.Y.2d 553, 402 N.Y.S.2d 991 (1978).

Accepting as true the allegations of the Verified Complaint, the conduct alleged by plaintiff herein is not “so outrageous in character, and so extreme in degree” as to support a cause of action for intentional infliction of emotional distress. See *Borawski v. Abulafia*, 117 A.D.3d 662, 985 N.Y.S.2d 284 (2d Dept. 2014); *Phillip v. Sterling Home Care, Inc.*, 103 A.D.3d 786, 959 N.Y.S.2d 546 (2d Dept. 2013) *lv. app. den.* 21 N.Y.3d 854, 2013 WL 1831653 (2013); *Baumann v. Hanover Community Bank*, 100 A.D.3d 814, 957 N.Y.S.2d 111 (2d Dept. 2012). Accordingly, the branch of defendants’ motion, pursuant to CPLR 3211(a)(7), for an order dismissing the Third Cause of Action against both defendants is hereby **GRANTED**.

#### Motion to Strike

A motion to strike scandalous and prejudicial language from a Complaint should be granted where the subject language is irrelevant to the viability of the cause of action at issue and prejudicial to defendants. See *Kinzer v. Bederman*, 59 A.D.3d 496, 873 N.Y.S.2d 692 (2d Dept. 2009); *Matter of Plaza at Patterson, LLC v. Clover Lake Holdings, Inc.*, 51 A.D.3d 931, 856 N.Y.S.2d 877 (2d Dept. 2008).

The Court finds that the allegations in paragraphs 44 and 45 of the instant Verified Complaint, describing a sexual encounter and a “girlfriend,” are irrelevant to plaintiff’s claim of tortious interference and prejudicial to defendant Stockelberg. For this reason, the branch of defendants’ motion, pursuant to CPLR 3024, for an order striking the scandalous and prejudicial allegations in the Verified Complaint is hereby **GRANTED**. Plaintiff is directed to serve an

Amended Complaint without these allegations.

Therefore, in conclusion, the branch of plaintiff's motion, pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint is hereby **GRANTED as to all causes of action against defendant SBA and as to the First and Third causes of action against defendant Stockelberg**. Plaintiff's Second Cause of Action against defendant Stockelberg is severed and continued.

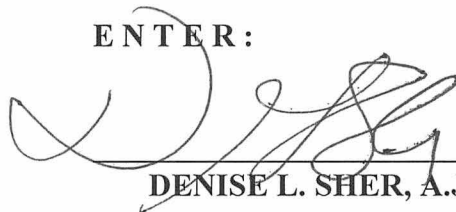
Furthermore, the branch of defendants' motion, pursuant to CPLR 3024, for an order striking the scandalous and prejudicial allegations in paragraphs 44 and 45 of the Verified Complaint is hereby **GRANTED**. Plaintiff is directed to serve an Amended Complaint without these allegations.

Defendants' further informal request for sanctions is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on October 23, 2014, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

**ENTER:**

  
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
September 8, 2014

**ENTERED**

SEP 09 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE