

Collins v Circa, Inc.

2015 NY Slip Op 30135(U)

January 26, 2015

Supreme Court, New York County

Docket Number: 651758/2014

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS Part 8

-----X
 Kara Collins,

Plaintiff,

-against-

Circa, Inc.,

Defendant.
 -----X

DECISION AND ORDER
 Index Number.: 651758/2014
 Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions to dismiss.

Papers	Numbered
Notice of Motion, Affirmations, Exhibits	1-4
Opposition Papers, Affirmations, Exhibits	5-10
Reply Papers	11-14

In this action, defendant Circa, Inc., (Circa), seeks an Order, pursuant to CPLR 3211(a)(7), dismissing the second and third causes of action of plaintiff's amended complaint for failure to state a claim.

FACTUAL BACKGROUND

Plaintiff Kara Collins (Collins) was employed by Circa from on or about March 28, 2012 until her voluntary resignation in or around October 2013. Circa is a New York based buyer engaged in the business of evaluating, purchasing, consigning and selling jewelry products and other related items. Collins was hired by Circa under an at-will employment agreement, subject to certain restrictive covenants, including a two-year prohibition on buying jewelry in the United States and Canada.

After voluntarily resigning from Circa, Collins began employment as Vice President of Trading with Borro, Inc. (Borro), a company that makes secured loans using jewelry and related items as collateral. Plaintiff does not allege that she had an employment agreement with Borro, Inc.

On or about February 21, 2014, defendant's counsel sent a letter informing Borro of plaintiff's Non-Compete and Confidentiality Agreement (Agreement) with Circa, and that Borro could be exposed to potential liability if plaintiff was in violation of such restrictive covenants. Under the Agreement, plaintiff was restricted from buying jewelry in the United States and Canada for a period of two years from the expiration or termination of employment, as well as from disclosing any of Circa's confidential information, including "information disclosed in discussions between the parties in connection with technical information, data, proposals and other documents of Employer pertaining to its business, products, services, buying and selling processes, pricing policy, finances, product designs, plans, vendor lists, customer and client lists, public relations and other marketing information and other unpublished information." (Plaintiff's Exhibit B). On or about March 31, 2014, Borro terminated plaintiff's employment.

Plaintiff's Amended Complaint alleges that defendant "knowing the relationship with Plaintiff and Borro Inc. and acting in bad faith with malice and intent, sent Borro Inc. a letter threatening to bring a lawsuit" and that "as a direct result of the Defendant's letter, Plaintiff was terminated from her position with Borrow, Inc." (Verified Amended Complaint ¶¶ 32, 35). The Amended Complaint also includes allegations that defendant "without justification and with intent to harm Plaintiff sent a letter to Borro Inc. threatening to sue Burro Inc. if it continued to aid Plaintiff in violating the Restrictive Covenant contained in the Defendant's Employment Agreement by employing him in his position as Vice President of Trading" and that "by falsely informing Borro Inc. that Plaintiff was in violation of the Restrictive Covenants, without proof, and by threatening a lawsuit, Defendant acted with malice" and that "as a direct result of Defendant's actions, Plaintiff was terminated from her position at Borro Inc." (*Id.* ¶¶ 39, 40, 41).

ARGUMENTS

Defendant Circa contends that the claim for tortious interference with prospective business relations¹ must be dismissed in that plaintiff failed to make any nonconclusory, factual allegations that Circa used wrongful means in contacting Borro. Defendant also contends that the claim for prima facie tort must be dismissed in that plaintiff failed to make any nonconclusory, factual allegations that Circa's letter to Borro was motivated solely by disinterested malevolence, and further that plaintiff failed to allege special damages.

Plaintiff contends that the within motion to dismiss plaintiff's tortious interference with prospective business relations and prima facie tort claims must be denied because plaintiff's complaint sufficiently states facts to apprise movants of the causes of action alleged against them.

DISCUSSION

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc.*, et al., 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which

¹Circa also argued at length for the dismissal of tortious interference with contractual claims because plaintiff's amended complaint only vaguely identified its second cause of action as "Tortious Interference." In the amended complaint, plaintiff refers to an agreement with Borro; however, in its opposition papers, plaintiff specifically states that she did not have an employment agreement with Borro. Thus, only a claim for tortious interference with prospective business relations will be discussed.

reasonably flow therefrom, in favor of the plaintiff (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).

A motion to dismiss is made pursuant to CPLR 3211(a)(7), which allows such a motion on the ground that the pleading fails to state a cause of action. The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon the one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced. The test of prejudice is to be given primary emphasis. Thereby, the court disregards pleading irregularities, defects, or omissions that are not such as to reasonably mislead one as to the identity of the transactions or occurrences sought to be litigated or as to the nature and elements of the alleged cause or defense.

Plaintiff's second cause of action is based on tortious interference with prospective business/contractual relations. The required elements of a cause of action for tortious interference with prospective business relations are as follows: "(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for the sole purpose of harming the plaintiff or by using wrongful (or unlawful) means, and (4) there was resulting injury to the business relationship (*Thome v. Alexander & Louisa Calder Foundation*, 70 AD3d 88 [1st Dept 2009], *lv denied*, 15 NY3d 703 [2010]).

To state a legally cognizable claim for tortious interference with prospective contract rights, the plaintiff must allege with specific factual support that the defendant directly interfered with a third party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff (see *Carvel Corp. v. Noonan*, 3 NY3d 182, 189-192, 785 NYS2d 359, 818 NE2d 1100 [2004]).

In this case, this Court deems that the complaint sufficiently states facts to support a cause of action for tortious interference with prospective business relations. It is noted that plaintiff does not have an existing, enforceable contract with Borro. Thus, because plaintiff does not have a contract for a definite term, the relationship with Borro is considered at-will. A contract that is terminable at-will can support a claim only for tortious interference with prospective contractual relations and not for tortious interference with an existing contract. (See *Guard-Life Corp. v. Parker Hardward Mfg. Corp.*, 50 NY2d 183, 192-193 [1980]). The complaint alleges that plaintiff had an employment relationship with Borro and that defendant, acting in bad faith with malice and intent, sent a letter to Borro threatening a potential lawsuit, which thereby caused plaintiff's termination. Thus, the elements of tortious interference with prospective business relations has been fulfilled.

Plaintiff's third cause of action is for prima facie tort. "The requisite elements for prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." (*Freihofer v. Hearst Corp.*, 65 NY2d 135, 142, 490 NYS2d 735, 480 NE2d 349 [1985]). Prima facie tort is not a "catch-all alternative for every cause of action which cannot stand on its own legs." (*Id.* at 142-143). Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a conventional tort cause of action (*Id.*).

Further, “there is no recovery in prima facie tort unless malevolence is the sole motive for defendant’s otherwise lawful act or unless defendant acts from disinterested malevolence.” (*Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 333, 64 NYS2d 712, 451 NE2d 459 [1983]). In addition, a critical element of the cause of action is an allegation that plaintiff suffered specific, measurable loss, which requires an allegation of special damages (*Freihofer*, 65 NY2d at 143).

Here, the pleading is legally deficient respecting the third cause of action in that plaintiff has not alleged special damages, which is an essential element of the cause of action for prima facie tort. Plaintiff simply alleges that she suffered “damages in the amount to be determined at trial, but no less than \$500,000.00.” Thus, the third cause of action for prima facie tort must be dismissed. Accordingly, it is

ORDERED, that defendant Circa’s motion to dismiss plaintiff’s second cause of action for tortious interference, is denied; and it is further

ORDERED, that defendant Circa’s motion to dismiss plaintiff’s third cause of action for prima facie tort, is granted; and it is further

ORDERED, that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that counsel are directed to appear for a preliminary status conference on April 2, 2015 in Room 304 located at 71 Thomas Street, New York, NY 10013.

Dated: January 26, 2015

ENTER:



Joan M. Kenney, J.S.C.