| **Zlatniski v Town of Riverhead** |
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| 2015 NY Slip Op 30434(U) |
| March 3, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 12-24684 |
| Judge: W. Gerard Asher |
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SHORT FORM ORDER

INDEX No. 12-24684

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT:***

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-14-14 (001 & 002)
MOTION DATE 6-11-14 (003)
ADJ. DATE 7-8-14
Mot. Seq. # 001 - MG; CASEDISP
# 002 - MG
# 003 - XMD

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DONNA M. ZLATNISKI and DAVID ZLATNISKI,

Plaintiffs,

- against -

THE TOWN OF RIVERHEAD, SEAN WALTER, Individually, GEORGE GABRIELSEN, Individually, JODI GIGLIO, Individually, and JAMES WOOTEN, Individually,

Defendants.

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Upon the following papers numbered 1 to 26 read on these motions and supporting papers 18-22 Answering Affidavits and supporting papers 22-24; Replying Affidavits and supporting papers 25-26; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions are consolidated for purposes of this determination; and it is further

***ORDERED*** that the motion by defendant Sean Walter ("Walter") for an order, pursuant to CPLR 3012, and 3211(a)(7) dismissing the complaint in its entirety and each claim therein is granted; and it is further

***ORDERED*** that the motion by defendants Town of Riverhead, George Gabrielsen, Jodi Giglio and

James Wooten ("Town defendants") for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint against them is granted ; and it is further

***ORDERED*** that the cross-motion by plaintiffs for an order, pursuant to CPLR 3025, granting them leave to amend the complaint to assert an additional cause of action against the defendants is denied.

In this action the plaintiffs seek damages from the defendants incurred as a result of plaintiff Donna M. Zlatniski's wrongful termination by the Town of Riverhead. The complaint herein contains three causes of action: (1) alleged breach of contract; (2) wrongful termination; and (3) intentional infliction of emotional distress. Plaintiffs also now seek to amend the complaint to add a cause of action for tortious interference with contract and/or employment.

The complaint alleges that plaintiff Donna M. Zlatniski was appointed by the Town of Riverhead Board to the position of town board coordinator in June of 2007. It is further alleged that on or about May 9, 2011, former Town Board member defendant James Wooten ordered and directed plaintiff to make phone calls on his behalf regarding a political fundraiser at the offices of the Town Board during business hours. It is alleged that despite her discomfort and initial refusal, she complied with the directive. Shortly thereafter Town Board member and defendant Jodi Giglio called her at home, threatening reprisals, including loss of her job, for making the telephone calls while at work. It is alleged that Town Board member and defendant George Gabrielsen and Town Supervisor and defendant Sean Walter threatened her job, accused her of violating ethics rules, and threatened her with criminal prosecution for following the orders of defendant Wooten. If plaintiff would not resign her job, she would be terminated or criminally prosecuted. Thereafter, it is alleged that plaintiff showed up for work every day but was refused entry and told to leave. She did not receive any correspondence indicating that she was suspended or terminated from her job. Plaintiff alleges that, under duress and coercion, she tendered her resignation on June 6, 2011.

Defendant Sean Walter now moves to dismiss the complaint in its entirety and each claim therein. In support of the motion he submits, *inter alia*, his attorney's affirmation, a copy of the complaint, a copy of his notice of appearance, and a copy of the decision and notice of decision before the Unemployment Insurance Appeal Board in the Matter of Donna M. Zlatniski, Case No. 011-30132. Defendants Town of Riverhead, George Gabrielsen, James Wooten, and Jodi Giglio also move to dismiss the complaint. In support of the motion they submit, *inter alia*, their attorney's affirmation, a copy of a notice of claim, and a copy of said defendants' notice of appearance. Plaintiffs oppose these motions and cross-move to amend the complaint to assert an additional cause of action against the defendants. In this regard the plaintiffs submit their attorney's affirmation, the affidavit of Donna M. Zlatniski, sworn to May 21, 2014 and a copy of the proposed amended complaint.

Initially, the defendants move to dismiss because the complaint was not served for more than a year after demand was made, rather than 20 days as required pursuant to CPLR 3012(b). To avoid dismissal of the action for failure to serve a complaint after a demand therefor has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint, a lack of prejudice to the opposing party and a potentially meritorious cause of action ***Mitrani Plasterers Co., Inc. v SCG Contracting Corp.***, 97 AD3d 552, 947 NYS2d 339 [2d Dept 2012]; ***Perez–Faringer v Heilman***, 79 AD3d 837, 838, 912 NYS2d 418 [2d Dept 2010]). The determination of

what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court" (**Pristavec v Galligan**, 32 AD3d 834, 834–835, 820 NYS2d 529). When exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action (*see* ***Grace v Follini***, 80 AD3d 560, 560–561, 914 NYS2d 302 [2d Dept 2011]; ***Aquilar v Nassau Health Care Corp.***, 40 AD3d 788, 789, 836 NYS2d 649 [2d Dept 2007]). Plaintiffs herein have established that they have never evinced an intent to abandon the action, a portion of the delay was caused by a change of attorneys, that negotiations to settle were to some extent made, that no prejudice to the defendants has been shown, and, that, on their face, plaintiffs' pleadings show a modicum of potential merit. The court, therefore will not dismiss the complaint on this ground.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action ***(Scoyni v Chabowski***, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Ofman v Katz***, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]. Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***AGS Marine Insurance Company v Scottsdale Insurance Company***, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; ***Chan Ming v Chui Pak Hoi et al***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799NYS2d 170 [2005]; *see* ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). However, conclusory allegations, which fail to adequately allege the material elements of a cause of action, will not withstand a motion to dismiss (***Peterec-Tolino v Harap***, 68 AD3d 1083, 1084 [2d Dept 2009] ). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (***Mark Hampton, Inc. v Bergreen***, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991], lv. denied 80 NY2d 788, 587 NYS2d 284, [1992]).

Plaintiffs' first cause of action in the complaint alleges breach of contract by reason of alleged oral promises from the defendants to the plaintiff Donna M. Zlatniski that in exchange for her resignation they would not contest her right to unemployment. The defendants allegedly breached that contract by contesting plaintiff's right to unemployment insurance. "In order to maintain a cause of action alleging breach of contract, the plaintiff must establish (1) the formation of a contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damages" ( ***Brualdi v IBERIA, Lineas Aereas de España, S.A.***, 79 AD3d 959, 960, 913 NYS2d 753 [2d Dept 2010]; *see* ***JP Morgan Chase v. J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). Town Law 64(6) demands that a formal resolution be passed by the Town Board and executed by the Town Supervisor in the name of the Town before a Town can be bound by any contract. Absent strict compliance with the formal requirements of this statute, no valid contract binding a Town may be found to exist (*see* ***Town of***

***Angelica v. Smith***, 89 AD3d 1547, 933 NYS2d 480 [4th Dept 2011]; ***Verifacts Group, Inc. v. Town of Babylon***, 267 AD2d 379, 700 NYS2d 75 [2d Dept1999]; ***New York Tel. Co. v Town of North Hempstead***, 41 N.Y.2d 691, 395 N.Y.S.2d 143, [1977]). Thus, no valid, binding contract was made between the plaintiff and the Town. Furthermore, a private mutual agreement between an employer and an unemployment compensation claimant does not circumvent the Industrial Commissioner's exclusive right to make an initial determination of whether employer–employee relationship exists, for purposes of determining unemployment compensation benefits (***Caruso v Professional Data Services, Inc.***, 78 AD2d 957, 433 NYS2d 273 [3d Dept 1980]). This also applies to the Unemployment Insurance Appeals Board's right to make its own determination regarding the factual basis for the claimant's discharge. (*see* ***Matter of Childs***, 69 AD3d 1070, 892 NYS2d 677 [3d Dept 2010]; ***Claim of Bernet***, 165 A.D.2d 957, 561 N.Y.S.2d 847 [3 Dept1990]). Thus, even if such contract existed, it would have had no effect. Based upon the foregoing, plaintiffs' alleged cause of action for breach of contract must be dismissed.

Plaintiffs' second cause of alleges wrongful termination. "New York adheres to the traditional common-law rule that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (***Monheit v Petrocelli Elec. Co., Inc.***, 73 AD3d 714, 715, 900 NYS2d 412 [2d Dept 2010]; *see* ***Minovici. Belkin BV***, 109 AD3d 520, 971 NYS2d 103 [2d Dept 2013]). New York does not recognize a cause of action for the ... abusive or wrongful discharge of an at-will employee, and this rule cannot be circumvented by casting the cause of action in terms of tortious interference with employment." However, an at-will employee nonetheless may assert such a cause of action "where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination" (***McHenry v. Lawrence***, 66 AD3d 650, 886 NYS2d 492 [2d Dept 2009]). Such "wrongful means," in turn, must amount to a crime or an independent tort, e.g., physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure, but persuasion alone will not suffice (***Nelson v Capital Cardiology Associates, P.C.***, 97 AD3d 1072, 949 NYS2d 530 [3 Dept2012]; ***Ullmannglass v. Oneida, Ltd.***, 86 AD3d 827, 830, 927 NYS2d 702 [3d Dept 2011]; *see, also,* ***Hobler v Hussain***,111 AD3d 1006, 975 NYS2d 212 [3 Dept 2013]). Even if the defendants, by barring her from her office, forced plaintiff to resign as alleged, it would not, by any means, rise to the level of wrongful conduct with regard to an at will employee, especially here, where they had ample grounds to fire plaintiff for cause. Thus, no cause of action for wrongful termination is set forth in the complaint and it must be dismissed.

Plaintiffs' third cause of action alleges intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 612, 596 NYS2d 350 [1993]; *see, also,* ***Gilewicz v Buffalo General Psychiatric Phyciatric (SIC) Unit***, 118 AD3d 1298, 988 NYS2d 334 [4th Dept 2014]). The facts alleged by plaintiffs are wholly inadequate to support such a cause of action. The anger of the majority of the Town Board over plaintiff Donna M. Zlatniski 's misconduct cannot not be considered extreme or outrageous. They had sufficient grounds, at the very least, to fire her for cause. Furthermore, her claim for unemployment was rejected by the administrative law judge (as set forth in her decision submitted by the

defendants) with a finding that she voluntarily left her employment. That decision further noted that a claimant who quits on the assumption that they will be fired for a rules violation does not establish good cause for their leaving. Based on the foregoing, plaintiff's failure to obtain unemployment benefits was a result of her own actions and no damages, if any, can be ascribed to the defendants. Therefore, no cause of action has been adequately pleaded and the cause of action must be dismissed.

Finally, plaintiffs' cross-motion to amend their complaint must be denied. Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]). A plaintiff asserting a claim for tortious interference with contract must demonstrate: (1) the existence of a valid contract; (2) the defendant's knowledge of the contract; (3) that the defendant intentionally and improperly procured a breach; and (4) damages (***White Plains Coat & Apron Co., Inc.*** v ***Cintas Corp.***, 8 NY3d 422, 835 NYS2d 530 [2007]; *see* ***AREP Fifty-Seventh, LLC . PMGP Associates, L.P.***, 115 AD3d 402, 981 NYS2d 406 [1st Dept 2014]. However, the cross-motion herein is devoid of merit because a party to a contract cannot be held liable in tort for breaching its own contract (***Ahead Realty LLC v India House, Inc.***, 92 AD3d 424, 938 NYS2d 17 [1st Dept 2012]; ***Manley v Pandick Press, Inc.***, 72 AD2d 452, 454, 424 NYS2d 902 [1st Dept [1980]). Therefore, the plaintiffs' cross-motion must be denied.

In light of the foregoing:

The motion by defendant Walter for an order, pursuant to CPLR 3012, and 3211(a)(7) dismissing the complaint in its entirety and each claim therein is granted;

The motion by defendants Town of Riverhead, George Gabrielsen, Jodi Giglio and James Wooten for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint against them is granted; and,

The cross-motion by plaintiffs for an order, pursuant to CPLR 3025, granting them leave to amend the complaint to assert an additional cause of action against the defendants is denied.

Dated: March 3, 2015

W. Gerard Asher
J.S.C.

**_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION**