

Silva v Children's Rescue Fund
2015 NY Slip Op 30820(U)
April 24, 2015
Supreme Court, Bronx County
Docket Number: 303377/2014
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 303377/2014**

Tanekqua C. Silva,

Plaintiff,

-against-

DECISION and ORDER

Children's Rescue Fund,

Present:

Defendant.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(7).

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Memorandum of Law & Exhibits	1
Pl's. Reply to Defendant's Motion to Dismiss	2
Def.'s Reply Memorandum of Law	3

Plaintiff is a former employee of Children's Rescue Fund ("CRF"), a not-for-profit agency which provides transitional housing for the homeless population with special temporary needs in Bronx County. Plaintiff worked as a security guard at CRF's facilities. Plaintiff alleges she was terminated without just cause and brings this action against her employer. The complaint names the following causes of action: (1) implied limitation of employer's right of termination pursuant to CRF's manual, (2) good faith and fair dealings, (3) infliction of emotional distress, (4) negligent infliction of emotional distress and (5) libel/slander.

CRF now moves to dismiss the complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action. CRF contends that: (1) plaintiff cannot sustain either of her contract claims because she was an "at-will" employee and there was no limitation on CRF's right to terminate, (2) plaintiff's claims of intentional and negligent infliction of emotional distress are barred by the exclusivity provisions of the workers' compensation law, (3) the facts alleged in the complaint fail to state viable claims for intentional and negligent infliction of emotional

distress, and (4) plaintiff fails to state a claim for libel or slander because the alleged defamatory statements were made in the course of a contested unemployment insurance proceeding.

In the Statement of Facts section of her complaint, plaintiff alleges: Prior to working for CRF, plaintiff had six months' experience working as a security guard at a housing premises for "those who have been victimized, abused, and beaten by their significant others, spouses, or family member, and who sought shelter and protection." CRF hired plaintiff based on that experience. When she applied for employment with CRF, plaintiff informed CRF that she was working as a home attendant and would have to give her then employer two weeks' notice if she were hired by CRF. CRF provided plaintiff with a one-day training session where she was specifically instructed to strictly adhere to CRF's Employee Manual ("Manual"). Plaintiff attached a copy of the Manual to the complaint. The complaint includes excerpts from the Manual including the following:

As a result of the special circumstances confronted by [CRF] employees, strict adherence to [CRF] policies and procedures is required as a condition of employment. This Handbook has been provided to familiarize you with some of [CRF's] most important policies and procedures. . . Only visitors authorized by the President or other appropriate management personnel are permitted on the premise of [CRF]. Because of safety and security reasons . . . Security should be notified immediately of the presence of unauthorized visitors.

.....

[CRF] expressly reserves the right to discipline its employees as it deems appropriate in its sole discretion. Reasons for termination may include, but are not limited to, failing to meet performance, punctuality or attendance standards, engaging in misconduct, violating a company policy, or any other circumstances which, in management's discretion, require separation of employment. Any single violation of [CRF] rules, policies or procedures may result in any degree of discipline, up to and including immediate termination of employment. At the discretion of the Director of Human Resources, appropriate discipline may be administered without reference to the four-step procedure outlined below, particularly where the offense or infraction is a serious one. Ordinarily, however, employees will be subject to the following policy. . . .

The complaint alleges that the four-step grievance procedure includes a verbal warning upon an employee's first offense, a written warning upon a second offense, disciplinary suspension/final warning upon a third offense, and termination/final warning upon a fourth offense. Management has the discretion to issue a five-day suspension without pay instead of termination.

The complaint further alleges: On June 20, 2013 at 12:51 a.m., Ms. Alarcon, a resident of the facility, arrived with her two children and the children's father, Mr. Otero. Otero is not a resident of the facility and was not authorized to be at the facility after its normal operating hours. Otero greeted the security staff, which included plaintiff, another safety officer and their supervisor, Blackman. Although plaintiff "acknowledged" Otero, "in a state of hysteria and shock," he stated:

Wow what a hostile group. I come in here and say hello and no one answers back! When I come in from somewhere, I want to feel welcomed. I want good customer service! I don't want to feel as if I am some kind of criminal walking into a correctional facility.

Otero specifically stated to plaintiff in front of the other staff:

You didn't say hello because if you did I would have heard you. Were you trained to be rude? You are very rude and you are a customer service representative, you must really have your job mistaken.

Plaintiff informed Otero that her job was to make sure residents of the facility are safe and to monitor all visitors. Raising his voice directly at plaintiff, "in a belittling way," Otero "yelled" at plaintiff: "Yeah you are a security guard who is taking her job too seriously." Plaintiff acted in a professional manner and in accordance with the Manual. Plaintiff explained to Otero that she was not taking her job too seriously, was doing what she was instructed to do by her employer in not allowing anyone in the facility after visiting hours. Plaintiff further explained that as a one-time courtesy because Otero's son was "today in the emergency room" and he was carrying his son, she allowed him to enter the facility. Plaintiff instructed Otero that

“for safety reasons of all the residents at the facility you are not supposed to allowed [sic] at the facility and asked him to please leave the facility since his family is now safe in their unit.” Then, Otero, in front of the staff, became “belligerent, upset, and hostile” and “antagonized” plaintiff. Otero told plaintiff that “she was making things difficult for him and all he wanted was to make sure his family was safe.” Otero replied: “I never hit my wife so you better watch your mouth. What do you think I never had a job? I know about following rules.” Plaintiff responded that if Otero hit her she would have him arrested and again informed Otero that he had to leave the facility as his family was safe in their unit. At this point, Otero “lunged at [plaintiff] in an attempt to make good on his threat to slap her in the face.” Supervisor Blackman then escorted Otero out of the facility. Prior to escorting Otero outside, Supervisor Blackman did not “take any action to resolve the situation between Otero and [plaintiff].” After Blackman escorted Otero outside, plaintiff asked Blackman “why he did not intervene and provided [sic] backup support since Mr. Otero became hostile, violent, and attempted to attack her.” Blackman told plaintiff “that was not his job!” As a supervisor, Blackman “should have defused the situation being more experienced and in a higher rank in accordance with CRF’s manual and training.” On Thursday, June 27, 2013, plaintiff received a phone call from Trish McElroy, the Director of Human Resources, and “was informed after further investigation [plaintiff] was terminated.” Plaintiff was asked to “surrender her CRF credentials and was immediately removed from the facility.” According to CRF records, plaintiff was terminated for the following reason: “Harassment and unappropriated [sic] conduct guideline 9 page 9 policy and practice - verbally threatening, harassing, or abusing other agency employees, agency resident, improper conduct.” Plaintiff demanded a disciplinary hearing but “was terminated without being afforded a disciplinary hearing in violation of CRF’s manual.” CRF opposed plaintiff’s application for unemployment benefits “on grounds of misconduct” and plaintiff was denied benefits. However, an administrative law judge subsequently overruled that determination finding, *inter alia*, that:

. . . claimant did not engage in a verbal confrontation, she was merely carrying out her job duties by trying to prevent a family member who was not permitted on the premises to gain entry and

explaining the rules to this person. Significantly, the supervisor was present and did not intervene until the family member became physically threatening towards the claimant . . . Under the circumstances, the claimant's actions did not rise to the level of misconduct.

.....

On a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *See Maas v. Cornell*, 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999).

I. Implied Limitation of Employer's Right of Termination Pursuant to CRF's Manual

With respect to this cause of action the complaint alleges: CRF failed to follow its policies and procedures. CRF "specifically, intentionally, wantonly, and negligently" failed to follow its Manual's disciplinary procedures. Plaintiff strictly complied and followed the Manual. Plaintiff strictly relied to her detriment upon CRF's "promises to give every employee a disciplinary hearing." CRF "unjustly and without cause" terminated plaintiff as per the ALJ's decision.

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. *See Sabetay v. Sterling Drug*, 69 N.Y.2d 329, 333, 514 N.Y.S.2d 209 (1987); *Martin v. New York Life Insurance Co.*, 148 N.Y. 117, 121 (1895). However, an action to recover damages for breach of an employment contract may be maintained, notwithstanding the indefinite term, where the existence of a limitation by express agreement is demonstrated by such circumstances as: (1) the employee was induced to leave her prior employment by the assurance that her employer would not discharge her without cause, (2) that assurance is incorporated into the employment application,

and (3) the employment is subject to the provisions of a personnel handbook or manual which provides that dismissal will be for just and sufficient cause only. *See Wiener v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982). Here, plaintiff does not dispute that she was an “at-will” employee of CRF, but rather, she argues that the exception set forth in *Wiener* applies under the circumstances of her case. However, plaintiff makes no allegations in the complaint or elsewhere that CRF assured her that she would not be discharged without cause or that any such assurance was incorporated into the employment application. Nor does the complaint allege that plaintiff was induced to leave her prior employment with the assurance that CRF would not discharge her without cause. Further, the Manual does not state that she could or would be terminated for just and sufficient cause only. Indeed, the complaint includes the following language from the Manual:

[CRF] expressly reserves the right to discipline its employees as it deems appropriate in its sole discretion. Reasons for termination may include, but are not limited to, failing to meet performance, punctuality or attendance standards, engaging in misconduct, violating a company policy, or any other circumstances which, in management’s discretion, require separation of employment [emphasis added].

Further, plaintiff’s allegation that CRF failed to follow its own disciplinary policies and procedures as stated in the Manual is inconsistent with the following Manual language included in the complaint: “At the discretion of the Director of Human Resources, appropriate discipline may be administered without reference to the four-step procedure.”

For the foregoing reasons, plaintiff’s cause of action titled “Implied Limitation of Employer’s Right of Termination Pursuant to CRF’s Manual” is dismissed.

II. Good Faith and Fair Dealings

With respect to this cause of action the complaint alleges: CRF had an implied obligation to act in good faith and fairly with plaintiff whose job performance was rated by CRF at 89.3 prior to the incident. CRF acted in bad faith and unfairly to her in terminating her without providing her with a disciplinary hearing as specifically stated in the Manual. CRF actions were intentional and wantonly in bad faith and unfair to the plaintiff.

Contrary to plaintiff's allegation, the Court of Appeals has concluded that "there is no implied obligation of good faith and fair dealing in an employment at will, as that would be incongruous to the legally recognized jural relationship in that kind of employment relationship." See *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183,188, 535 N.E.2d 1311 (1989) citing *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304-305, 448 N.E.2d 86 (1983). Nor does the Manual include any provision for a disciplinary hearing. As such, plaintiff's cause of action titled "Good Faith and Fair Dealings" is dismissed.

III. Infliction of Emotional Distress¹

With respect to this cause of action the complaint alleges: CRF's actions in intentionally failing to comply with its Manual caused plaintiff "financial and undue hardship, constant worry about her finances, and detrimentally obtaining employment as a security guard." It is expected that CRF, dealing with New York City's homeless population, "would have compassion for their dedicated employee . . . and provided [sic] her with notice and an opportunity to be heard." CRF's violation of "its very own promulgated rules, policies, and procedures, it [sic] itself an act of extreme and outrageous conduct."

While defendant asserts that this claim is barred by the New York Workers' Compensation Law, for purposes of the instant motion, the Court will assume that plaintiff's allegations are sufficient to overcome the exclusivity provisions of the New York Workers' Compensation Law.

To survive a motion to dismiss a cause of action for intentional infliction of emotional distress, plaintiff must allege "extreme and outrageous conduct intentionally or recklessly [which] causes severe emotional distress to another." See *Murphy, supra* at 303; *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991 (1978). The Court of Appeals has noted that liability has been found "only where the conduct has been so outrageous of character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

¹While plaintiff's claim is not titled "intentional" infliction of emotional distress, her allegations in this regard involve intentional conduct on the part of CRF. The court also notes that plaintiff alleges a separate cause of action for negligent infliction of emotional distress.

atrocious, and utterly intolerable in a civilized community.” *See id.* Here, plaintiff alleges that CRF’s “intentional” failure to comply with the Manual caused her financial hardship and worries, and difficulty in obtaining another job as a security guard. Plaintiff also alleges that CRF’s violation of its own promulgated rules, policies and procedures is in itself “an act of extreme and outrageous conduct.” Clearly, plaintiff’s allegations regarding the manner of her termination fall far short of the “strict standard” set forth in *Fischer*. *See id.* As such, plaintiff’s cause of action titled “Intentional Infliction of Emotional Distress” is dismissed.

IV. Negligent Infliction of Emotional Distress

With respect to this cause of action the complaint alleges: CRF’s actions in intentionally failing to comply with its Manual were “also negligent causing [plaintiff] financial and undue hardship, constant worry about her finances, and detrimentally effecting [her] ability to be gainfully employed as a security guard.” A “responsible not-for-profit organization receiving Government contracts from the City of New York, would not act in a gross and negligent manner.”

These conclusory allegations are insufficient to state a cause of action. Further, the factual allegations and excerpted language from the Manual in the complaint do not establish, if true, that CRF did not comply with its Manual. As such, plaintiff’s cause of action titled “Negligent Infliction of Emotional Distress” is dismissed.

V. Libel/Slander


With respect to this cause of action the complaint alleges: CRF informed the New York State Unemployment Insurance Office (“Unemployment Office”) in a letter that plaintiff should not receive unemployment benefits as a result of her misconduct. The Unemployment Office agreed and plaintiff was barred from receiving unemployment benefits. CRF’s letter to the Unemployment Office was a publication of a false statement. Given the opportunity, CRF failed to send a representative to appear in person or by telephone at the hearing. Plaintiff appealed the hearing and won.

In his affirmation in opposition to the motion, plaintiff’s counsel asserts that “plaintiff’s claim of defamation cannot be argued absent the opportunity for discovery to determine any

malice for her termination.” However, since statements made by CRF to the Unemployment Office in connection with plaintiff’s application for unemployment benefits were absolutely privileged, whether CRF acted with malice is immaterial. *See Phillip v. Sterling Home Care, Inc.*, 103 A.D.3d 786, 959 N.Y.S.2d 546 (2nd Dept. 2013); *see also Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 464 N.Y.S.2d 424 (1983); *Wiener v. Weintraub*, 22 N.Y.2d 330, 239 N.E.2d 540 (1968); *Kitchner v. State of New York*, 82 Misc.2d 858, 371 N.Y.S.2d 91 (Ct. Cl. 1975). Therefore, discovery on this issue would serve no purpose. As such, plaintiff’s cause of action titled “Libel/Slander” is dismissed.

Based on the foregoing, defendant’s motion is granted in its entirety and the complaint is hereby dismissed.

Dated: Bronx, New York
 April 27, 2015



 Hon. Julia I. Rodriguez, J.S.C.