Ashley v Westside Veterinary Ctr., P.C.
2016 NY Slip Op 30997(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 151500/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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NANCY ASHLEY,

Plaintiff,

Index No. 151500/13

-against-

DECISION/ORDER

WESTSIDE VETERINARY CENTER, P.C.,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for:_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Nancy Ashley commenced the instant action seeking to recover damages arising out of actions taken by her former employer, defendant Westside Veterinary Center, P.C. ("Westside"). Westside now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint. For the reasons set forth below, Westside's motion is granted.

The relevant facts and procedural history of this case are as follows. Westside is a veterinary practice located on the Upper West Side of Manhattan at 220 West 83rd Street, New York, New York and is owned by Dr. Stuart Brodsky ("Dr. Brodsky") and Dr. Karen Cantor ("Dr. Cantor"). Plaintiff, a licensed veterinarian, was first hired by Westside as an Associate Veterinarian in July 1998 but she quit in 2003 to work in upstate New York where she

maintained a second home. Thereafter, in or around the spring of 2004, plaintiff was re-hired by Westside and signed a Non-Compete Agreement as a condition of her employment. The Non-Compete Agreement provides, in pertinent part, as follows:

> Dr. Ashley covenants and agrees with WESTSIDE that during the term of her employment, and for a period of three (3) years after termination, that she will not establish, engage or in any manner whatsoever, be interested directly or indirectly, either as employee...or otherwise in any veterinary medical practice, trade or occupation similar to the practice of veterinary medicine within the area in Manhattan bounded by the northern side of West 125th Street, Central Park West, the southern side of West 53rd Street, and the Hudson River (the "Non-Compete Agreement").

Plaintiff was terminated from her employment at Westside on June 28, 2010.

In December 2010, plaintiff accepted a position with Animal General, a veterinary practice located approximately four blocks from Westside. Plaintiff's employment at Animal General was at-will and there was no employment contract between Animal General and plaintiff. After learning of plaintiff's employment at Animal General, Westside contacted an attorney, Katherine Parker ("Attorney Parker"), a partner at Proskauer Rose LLP, to advise Westside of its legal rights. On or about February 15, 2011, Westside sent Attorney Parker the Non-Compete Agreement and a fax cover sheet which notified Attorney Parker that Dr. Ashley was fired on Monday the 28th of June, 2010; that she is working at Animal General on Columbus Avenue and 86th Street; the name and phone number of the owner of Animal General; and that plaintiff was "fired for not following hospital rules, not getting along with co-workers, rudness [sic] to clients." After discussing the information with the owners of Westside and advising them that the Non-Compete Agreement was enforceable, on or about February 17, 2011, Attorney Parker sent two letters on Westside's behalf, one to Dr. Ashley and one to Animal General, in which Attorney Parker stated as follows:

> It has come to Westside's attention that Animal General recently

> hired Dr. Nancy Ashley. Please be advised that Dr. Ashley is bound by a non-compete agreement with Westside that restricts her ability to work for another veterinary medical practice located in the area of Manhattan bounded by the northern side of West 125th Street, Central Park West, the southern side of West 53rd Street, and the Hudson River for a three-year period after she left Westside. Given that Dr. Ashley left Westside in June 2010, her acceptance of employment with Animal General is a direct violation of her agreement with Westside. To the extent you and/or Animal General knew of Dr. Ashley's non-compete agreement prior to hiring her, Westside reserves its rights to seek damages and injunctive relief for tortious interference with contract. We also remind you that in the past, you have indicated your intent to enforce a non-compete agreement between Animal General and one of its former veterinarians, and Westside respected that agreement when it learned of it.
>
> We ask that you immediately contact the undersigned regarding the above. Please be advised that Westside has authorized us to take all steps necessary to enforce the Agreement and protect its rights.
>
> This letter is without prejudice to all of Westside's rights (the "February 17, 2011 Letter").

Thereafter, on or about February 21, 2011, after receiving the February 17, 2011 Letter, Animal General terminated Dr. Ashley prior to contacting Westside or Attorney Parker. Dr. Ashley also failed to respond to the letter she received or contact anyone at Westside regarding the Non-Compete Agreement. Defendant alleges that in December 2012, plaintiff was re-hired by Animal General on an hourly basis and performed house calls for Animal General. On or about June 5, 2012, plaintiff sent a letter to Westside requesting her job back, which Westside denied.

In or around February 2013, plaintiff commenced the instant action alleging causes of action for tortious interference with prospective economic advantage and intentional infliction of emotional distress. Westside then moved to dismiss plaintiff's complaint, which was resolved pursuant to an order by this court and a stipulation signed by the parties insofar as Westside

withdrew its motion to dismiss as to the cause of action for tortious interference with prospective economic advantage and plaintiff withdrew her cause of action for intentional infliction of emotional distress. Thus, the only claim that remains in this action is one for tortious interference with prospective economic advantage. Westside now moves for summary judgment dismissing the complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In order to establish a claim for tortious interference with prospective economic advantage, a party must demonstrate "that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." *Jacobs v. Continuum Health Partners, Inc.*, 7 A.D.3d 312, 313 (1st Dept 2004). A defendant's interference will not be considered undertaken for the sole purpose of harming plaintiff if it is established that the defendant's "motive in interfering with the [economic] relationship[]...was normal economic self-interest" and to "make [defendant] more profitable." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004). "The existence of competition [is] relevant, since it provides an obvious motive for defendant's interference other than a desire to injure the plaintiff;

competition, by definition, interferes with someone else's economic relations." *Id.* at 191. Additionally, the Court of Appeals has held that conduct that is "wrongful" or improper "include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure...." *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980). "[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference with prospective...economic relations." *Carvel Corp.*, 3 N.Y.3d at 190.

Courts have consistently held that where, as here, a defendant sends a letter to the plaintiff's employer to enforce rights it believes are legal and enforceable, such conduct does not rise to the level of wrongful means necessary to prove a claim for tortious interference with prospective economic advantage. In *Levy v. P&R Dental Strategies*, 302 A.D.3d 255 (1st Dept 2003), the First Department affirmed the trial court's dismissal of the plaintiff's tortious interference with prospective economic advantage claim on the ground that no triable issue of fact existed as to whether defendants employed wrongful means or acted solely to harm plaintiff when they notified plaintiff's potential employer, by letter, that there was a non-compete agreement in place and that employing plaintiff would be a violation thereof. Additionally, in *Thur v. IPCO Corp.*, 173 A.D.2d 344, 345 (1st Dept 1991), the First Department found that plaintiff's tortious interference claim was properly dismissed on the ground that defendant's sending of a letter informing the new employer of the non-compete agreement in place and threatening legal action did not constitute duress, malice or wrongful means. Further, in *Murray v. Sysco Corp.*, 273 A.D.2d 760, 761-62 (3d Dept 2000), the Third Department found that it did not constitute malice or wrongful means to send a letter to the plaintiff's new employer, which

discussed the violation of the non-compete agreement and potential legal action, especially since the letter contained no false statements. Indeed, it is well-settled that "it is not an actionable wrong for one in good faith to make plain to whomsoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are." *Thur*, 173 A.D.2d at 345, quoting *Kaplan v. Helenhart Novelty Corp.*, 182 F.2d 311, 314 (2d Cir 1950).

In the instant action, the court finds that Westside has established its *prima facie* right to summary judgment dismissing plaintiff's cause of action for tortious interference with prospective economic advantage. Initially, Westside has established, as a matter of law, that Attorney Parker's sending, on Westside's behalf, of the February 17, 2011 Letter to Animal General was not undertaken for the sole purpose of harming plaintiff. Dr. Brodsky and Dr. Cantor testified that their sole purpose in asking Attorney Parker to send the February 17, 2011 Letter to Animal General was to protect Westside's veterinary practice and their investments through the Non-Compete Agreement; that they worried about the continued existence of Westside, which has been in operation since 1985, as they had witnessed other veterinary practices suffer harm when employees subsequently worked at nearby practices; and that this worry was precisely why they required all full-time veterinarians to sign non-compete agreements.

Additionally, Westside has established, as a matter of law, that Attorney Parker's sending, on Westside's behalf, of the February 17, 2011 Letter to Animal General was not wrongful or improper based on its good faith belief that it was enforcing its legal rights under the Non-Compete Agreement. Dr. Brodsky and Dr. Cantor testified that upon learning of plaintiff's employment with Animal General, they retained Attorney Parker as counsel to advise them of

the enforceability of the Non-Compete Agreement; that Attorney Parker advised them that the Non-Compete Agreement was enforceable and that plaintiff's employment with Animal General was a violation of the Non-Compete Agreement; and that they only directed Attorney Parker to send the February 17, 2011 Letter to Animal General in good faith reliance on her advice. Further, Attorney Parker testified that she believed that the Non-Compete Agreement was legal and enforceable based on its scope and the fact that she had seen non-compete agreements similar to the one at issue in the past and that she believed Westside was acting in good faith in seeking to enforce the Non-Compete Agreement to protect its legitimate economic interests.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat Westside's motion for summary judgment. As an initial matter, to the extent plaintiff asserts that Westside's motion for summary judgment must be denied on the ground that there is an issue of fact as to whether the Non-Compete Agreement was enforceable against plaintiff and whether defendants should have known that the Non-Compete Agreement was not enforceable, such assertion is without merit. It is not relevant to the instant litigation whether the Non-Compete Agreement was actually enforceable against plaintiff or whether Westside should have known that the Non-Compete Agreement was not enforceable. As previously discussed, the First Department has made clear that it is not actionable when a party makes clear to another party that its purpose is "to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are." *Thur*, 173 A.D.2d at 345, quoting *Kaplan*, 182 F.2d at 314. In the present case, Westside has established, through the testimony of Dr. Brodsky and Dr. Cantor and the February 17, 2011 Letter, that it merely notified Animal General that its purpose was to insist upon its rights under the Non-Compete Agreement, an agreement which Westside believed to be enforceable based on the advice and counsel of Attorney Parker, a partner at

Proskauer Rose LLP.

Further, plaintiff's assertion that Westside's motion for summary judgment must be denied on the ground that there is an issue of fact as to whether Westside interfered with plaintiff's employment with Animal General solely to harm plaintiff based on the allegation that "the owners of Westside simply did not want Dr. Ashley to work at Animal General because they had strong dislike for her and resented her" is without merit. It is well-settled that a plaintiff can only establish a claim for tortious interference with prospective economic advantage if she can show that defendant's conduct was wrongful or that harming plaintiff was the *sole purpose* of defendant's interference. *See Jacobs*, 7 A.D.3d at 313. Here, there is no issue of fact as to whether defendant's dislike for plaintiff was the *sole purpose* of the sending of the February 17, 2011 Letter based on the objective evidence in the record that Westside sent the February 17, 2011 for economic reasons, including that there was a Non-Compete Agreement in place between plaintiff and Westside; that Westside retained a lawyer to advise it on whether the Non-Compete Agreement was enforceable; and that Westside maintained non-compete agreements identical to the one it maintained with plaintiff with all of its full-time employees.

Finally, plaintiff's assertion that Westside's motion for summary judgment should be denied on the ground that there is an issue of fact as to whether Westside's conduct in interfering with plaintiff's employment with Animal General was "wrongful" is without merit. Specifically, plaintiff asserts that a trier of fact could determine that Westside engaged in wrongful means by economically pressuring and threatening litigation against Animal General in the February 17, 2011 Letter. However, the court finds that such assertion is without merit as the First Department has consistently held that merely sending a letter to a third party which notifies that third party of a contractual violation and threatens possible legal action is not

probative evidence of malice or bad faith. *See Thur*, 173 A.D.2d at 344; *see also Murray*, 273 A.D.2d at 760.

Accordingly, Westside's motion for summary judgment is granted and the action is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 5/31/16

Enter: OK
CYNTHIA S. KERN
J.S.C