Epstein v Feldman
2019 NY Slip Op 31124(U)
April 17, 2019
Supreme Court, New York County
Docket Number: 153088/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** ***Justice*** **PART** **IAS MOTION 2EFM**

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MICHELINE EPSTEIN,

Plaintiff,

- v -

YAN FELDMAN,

Defendant.

---X

INDEX NO. 153088/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to DISMISS.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this breach of contract action, defendant Yan Feldman ("Feldman") moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint of plaintiff Micheline Epstein ("Epstein"). Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 1, 2017, plaintiff Epstein was hired as a primary care physician by 14th Street Medical, P.C. ("14th Street Medical"), a multi-special medical practice located in Manhattan. (Doc. 25 at 3.) 14th Street Medical entered into identical employment agreements with each of its salaried physicians. (Doc. 17 at 7.) Under the terms of each contract, physicians were bound by certain confidentiality and non-competition provisions. (*Id.*) The employment agreement also governed how an employee could be terminated. (*Id.* at 7–8.) The agreement between 14th Street

Medical and Epstein provided that either 14th Street Medical or the physician could terminate the agreement "at any time and for any reason," provided that the party delivered a "written notice of such intention to terminate not less than ninety (90) days prior to the date on which termination is desired." (*Id.* at 8.) The agreement further provided that, for a "period of two years" after leaving 14th Street Medical, the physician would not induce or in any other way encourage other employees to leave the practice. (*Id.*) These provisions were included in Epstein's contract. (Doc. 8 at 9–10.)

The parties offer two versions of their ensuing employment relationship: In her complaint, plaintiff alleged that, throughout her employment, Feldman, who was the administrator of the medical practice (Doc. 6 at 1), repeatedly pressured and ordered her to conduct unnecessary tests for patients (Doc. 23 at 5). Plaintiff continuously objected to those demands. (*Id.* at 6.) On February 9, 2018, Feldman purportedly terminated her employment over the telephone in retaliation for pushing back against his behavior. (*Id.*)

In contrast, defendant claims in his motion papers that Epstein voluntarily resigned from her employment without any prior written notice. (Doc. 6 at 3.) In support of this allegation, defendant submitted several text messages that were exchanged between Epstein and Feldman. (*See id.* at 3–4; Doc. 15.) These text messages suggest that, rather than being fired, Epstein decided to quit her job. Among the messages that she sent to defendant are the following: "Yan, don't give me any grief. This place is a mess. I'm done with it" (Doc. 6 at 4); "You did it, I'm walking out!" (Doc. 15 at 2); "I'm not afraid of u" (*id.*); "I also have lawyers Yan, bring it on" (*id.*); "Do u wanna tango Yan?" (*id.*); "You're Batman huh?" (*id.*); and "Bye bye Stan" (*id.*). Plaintiff did not appear for work on February 9, 2018 or anytime thereafter. (Doc. 6 at 3.) On February 10, 2018, plaintiff

sent an e-mail to Feldman informing him that her "resignation date [was] effective on 02/07/18." (Doc. 16 at 2.) She also allegedly induced four other employees to leave. (Doc. 6 at 2.)

On March 14, 2018, 14th Street Medical commenced an action against Epstein styled *14th Street Medical, P.C. v Epstein M.D.*, Supreme Court, New York County Index Number 651211/2018 ("the related action"), alleging two causes of action for breach of contract. In her answer in the related action, Epstein asserted a counterclaim for tortious interference with contract as well as a counterclaim for violation of New York Labor Law § 741.

Epstein commenced the instant action against Feldman on April 5, 2018 by filing a summons and complaint. (Doc. 7.) In her complaint, she alleged one cause of action for tortious interference with contract. (*Id.* at 7–8.) Feldman now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint.

In support of the motion, Feldman argues that plaintiff's claim for tortious interference with contract is subject to dismissal based on the documentary evidence. He submits various corporate documents of 14th Street Medical—including its certificate of incorporation, the corporate bylaws, and a stock certificate—to show, contrary to plaintiff's assertions, that he is not the owner of the corporation. (Docs. 17 at 9–11; 11; 13–14.) Thus, Feldman asserts that "[t]here can be no question that [he] is not the owner of 14th Street Medical" and that he "could not have tortiously interfered with an agreement" that plaintiff herself breached. (Doc. 17 at 11.) Moreover, he claims that the complaint fails to state a cause of action because plaintiff cannot show an essential element of tortious interference with contract. (*Id.* at 12–13.) Specifically, because the test messages suggest that plaintiff quit her job, Feldman argues that plaintiff cannot establish that his activities caused a breach of contract. (*Id.*)

On May 22, 2018, after defendant served his motion, plaintiff filed an amended complaint as of right pursuant to CPLR 3025(a). (Doc. 25.) In the amended complaint, instead of asserting that Feldman is the owner of 14th Street Medical, she asserted that he has a financial interest in the company. (*See* Docs. 7 at 3; 25 at 2; 26 at 2.) She therefore argues, in opposition, that "the ownership issue has been mooted" by the amended complaint. (Doc. 23 at 4.) She also added an allegation that Feldman acted outside the scope of his authority by firing her. (Doc. 25 at 7.) With respect to the text messages, Epstein maintains that they do not "utterly refute" her allegation that she was terminated from employment; instead, she claims that she used poor word choices in her text messages because she is not a native English speaker. (*Id.* at 9.)

In reply, defendant asserts that the issue of ownership has not been mooted by the amendment, and that, even though English is not Epstein's native language, she knows the difference in meaning between "resignation" and "termination." Defendant further submits his employment agreement with 14th Street Medical, as well as Epstein's medical credentials, into evidence, which reflects that she speaks three languages. (Docs. 28–29.)

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].) Nonetheless, CPLR 3211 (a)(1) provides for dismissal should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) Therefore, if the complaint's "allegations are contradicted by documentary evidence, they are not presumed to be

true or granted every favorable inference . . . ." (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Further, a motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*) "The standard is not whether the plaintiff has stated a cause of action, but whether the plaintiff has a cause of action." (*McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [2d Dept 2005].)

To establish a claim for tortious interference with contract, a plaintiff must establish the following: (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract; and (4) damages. (*See Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006].) An "essential element" of a claim for tortious interference with contract "is that the breach of contract would not have occurred but for the activities of the defendant." (*Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204, 204 [1st Dept 2002].) Because the complaint pleads all the material allegations necessary for this cause of action (*see* Doc. 25 at 7–8), dismissal is not warranted under CPLR 3211(a)(7).

Nevertheless, this Court finds that dismissal is appropriate pursuant to CPLR 3211(a)(1). The documentary evidence that Feldman submitted with the motion papers—in particular, text messages from Epstein that she was "done with it" (Doc. 6 at 4) and that she was "walking out!"

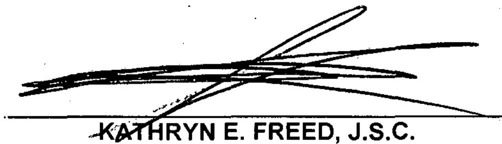
(Doc. 15 at 2) on February 9, 2018—demonstrate that plaintiff was not terminated from her job, but rather resigned due to deep disagreements between herself and Feldman. Indeed, in opposition, plaintiff did not even submit any evidence supporting her claim that she was fired. Moreover, her credentials also establish that she speaks three languages and should know the difference between "terminated" and "resigned." (Doc. 29.) Although her credentials were submitted into evidence for the first time in reply, the allegation that she is a non-native English speaker was first introduced in plaintiff's opposition to the motion, and thus was not an issue that had existed when defendant initially served his motion. Feldman therefore had the right to submit this evidence in his reply papers. (*See Anderson v Beth Israel Med. Ctr.*, 31 AD3d 284, 288 [1st Dept 2006] (a movant may properly submit new evidence that "merely responds" to arguments made in opposition).)

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant Yan Feldman's motion to dismiss the complaint of plaintiff Micheline Epstein is granted; and it is further

ORDERED that, within 30 days of the uploading of this order to NYSCEF, defendant's counsel is directed to serve a copy of this order with notice of entry on plaintiff's counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of this Court



4/17/2019	KATHRYN E. FREED, J.S.C.
DATE	

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐ REFERENCE