Reitman v Ronell
2019 NY Slip Op 31578(U)
May 31, 2019
Supreme Court, New York County
Docket Number: 157658/2018
Judge: III, Francis A. Kahn

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Acting Justice

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NIMROD REITMAN,

Plaintiff,

- v -

AVITAL RONELL, NEW YORK UNIVERSITY

Defendants.

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INDEX NO. 157658/2018

MOTION DATE 02/05/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 6, 8, 11, 19- 24, 39-43, 59-63, 79

were read on this motion to/for DISMISS DEFENDANT'S COUNTERCLAIM.

In this action for sexual harassment, Plaintiff Nimrod Reitman moves pursuant to CPLR §3211(a)(7) to dismiss Defendant Avital Ronell's counterclaim. In response, Ronell filed a cross-motion in opposition to Plaintiff's motion and in the alternative for leave to amend the counterclaim.

BACKGROUND

As set forth in the amended complaint, between 2012 to 2015, Plaintiff attended as a doctoral student and worked as a language instructor at Defendant New York University ("NYU"). At that time, Defendant Avital Ronell ("Ronell") was a Professor in the Humanities Department and in the Germanic Languages and Literature and Comparative Literature Departments at New York University. During Plaintiff's tenure at New York University, Ronell supervised Plaintiff's doctoral work. According to Plaintiff, Ronell allegedly made unwanted sexual advances toward Reitman and he objected to Ronell about these advances. Plaintiff further claims he complained about Ronell's conduct to a Vice-Provost and Administrative Director at NYU, but no action was taken in response by NYU.

After Plaintiff completed his doctorate degree in 2017 he filed a Title IX complaint with the Office of Equal Opportunity at NYU. This prompted New York University to conduct an eleven-month investigation. In order for NYU to complete its investigation, on March 23, 2018, the parties, through their counsel, entered into a tolling agreement that prohibited any party from commencing a lawsuit and tolled the statute of limitations for all claims and defenses until the agreement terminated (*see* NYSCEF Document ##12, 22; Plaintiff's motion, Exhibit A). During the pendency of the agreement, it further set forth that neither Plaintiff nor Ronell would make any public statement or speak to the press regarding any potential claims (*id.*). On May 4, 2018, this agreement was amended to extend the termination date of the tolling agreement to 120 days after the original effective date [120 days after March 23, 2018 was Saturday, July 21, 2018] (*see* NYSCEF Document ##13, 23; Plaintiff's motion, Exhibit B).

Plaintiff commenced this action by filing his summons and complaint on August 16, 2018. Before either Defendant answered, on September 14, 2018, Plaintiff filed an amended summons and complaint which alleged four causes of action against both Defendants for gender discrimination, q*uid pro quo* sexual harassment, hostile educational environment and retaliation all in violation of the Human Rights Law of the City of New York codified in section 8-107 of the Administrative Code of the City of New York. Additionally, Plaintiff asserted separate causes of action against NYU only for gender discrimination as it pertains to its eleven-month Title IX investigation and common-law negligence for its alleged training, supervision and retention of its employees. Further, Plaintiff asserts a cause of action against Ronell only for negligent infliction of emotional distress (*see* NYSCEF Document #6).

In her answer to the amended complaint, Ronell asserted a breach of contract counterclaim based upon the tolling agreement. Specifically, Ronell accuses Plaintiff of violating the tolling agreement by speaking to a New York Times reporter and providing portions of the written findings of the Title IX investigation conducted by New York University before the tolling agreement expired. According to Ronell, on August 11, 2018, the same New York Times reporter contacted Ronell's attorney and on August 14, 2018, the New York Times published an article regarding Plaintiff's claims. Based upon these allegations, Ronell claims that "the tolling agreement and amendment are void *ab initio* and that the statute of limitations for the claims made by Plaintiff in this lawsuit were not tolled between March 23, 2018 and July 23, 2018" (*see* NYSCEF Document # 11).

MOTIONS

Plaintiff moved to dismiss Ronell's counterclaim for failure to state a cause of action. Plaintiff asserts that Ronell's pleading does not state the elements necessary to sustain the breach of contract counterclaim and that it is not sufficiently supported by factual allegations. In the alternative, Plaintiff argues that if this counterclaim is interpreted as a rescission claim, that Ronell has failed to properly plead and factually support that as well (*see* NYSCEF Document ##19-20).

Defendant Ronell opposed Plaintiff's motion and cross-moved for permission to amend her counterclaim. Ronell argued that the tolling agreement was a bargained-for exchange that Plaintiff violated and therefore he should not benefit from the tolling provision. Moreover, Defendant avers that the statute of limitations defense is critical to her defense, especially since the causes of actions brought under New York City Administrative Code §8-107 (that have a three-year statute of limitations) cannot apply to any activity after Plaintiff graduated from NYU, in either May or September of 2015. In the alternative, Ronell argues that in the event the Court finds the counterclaim fails to state a cause of action, that she be allowed to amend the counterclaim with the additional language set forth in Exhibit 2 of her cross-motion (*see* NYSCEF Document #42) to her cross-motion (*see* NYSCEF Document ##39-40).

In reply, Plaintiff maintained the proposed amendments to the counterclaim are legally insufficient and that Ronell also violated the "no press" provision of the tolling agreement. Additionally, Plaintiff claims that Ronell failed to establish the absence of an adequate remedy at law and that Plaintiff would be restored to his prior position before the agreement, necessary to

support a rescission claim. Further, Plaintiff contends that his alleged breach in speaking to the New York Times does not constitute a material breach of the tolling agreement and does not "substantially defeat the purpose of the contract" (*see* NYSCEF Document #59).

DISCUSSION

On a motion to dismiss a counterclaim for failing to state a cause of action, the Court must take the allegations in the pleading as true and resolve all inferences in favor of the proponent (*Island ADC, Inc. v Baldassano Architectural Group, P.C.,* 49 AD3d 815, 816 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]["On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord Plaintiffs the benefit of every possible inference…" [internal citation omitted]]; *see also* CPLR §3026 ["Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced"]). As well, the pleader's opposition to a CPLR §3211 motion "must be given [its] most favorable intendment" (*Arrington v New York Times Co.,* 55 NY2d 433, 442 [1982]). When considering whether a pleading states a cause of action, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law…" (*Weiner v Lenox Hill Hosp.*, 193 AD2d 380 [1st Dept 1993], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In her counterclaim, Ronell asserts that on March 23, 2018, Plaintiff and Defendants entered into a tolling agreement that in total remained in effect for 120 days (*see* NYSCEF Document #11). As per the express language of that agreement, its purpose was "to provide NYU's Office of Equal Opportunity with to complete its ongoing investigation of a complaint filed by Reitman against Ronell, and further to provide the parties an opportunity to consider and conduct negotiations with respect to claims at law and equity among them" (NYSCEF Document ##12, 13, 22, 23; Exhibits A and B to Defendant Ronell's answer, NYSCEF Document #11). As part of this contract, a condition was imposed upon Plaintiff and Ronell only, not NYU, that no public statement to the press or media occur during the pendency of the agreement. After the agreement expired, a New York Times reporter contacted Ronell's attorney about Plaintiff's claims. As claimed by Ronell, this establishes that Plaintiff breached the tolling agreement and as a result, the agreement is now void *ab initio*.

The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see eg Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed" (*see, Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992] *citing* Restatement [Second] of Contracts § 347, comment *a;* § 344). To avoid a motion to dismiss a breach of contract action, Defendant needed to plead definite, measurable and out-of-pocket damages (*see Universal Inv. Advisory SA v Bakrie Telecom PTE, Ltd.*, 154 AD3d 171, 181 [1st Dept 2017]). Here, Ronell pleads no comprehensible damages, but instead, seeks to have the contract declared null and void from its

inception. Because Defendant has not properly pleaded damages, she has failed to state a breach of contract cause of action.

While equitable relief can be granted on a breach of contract claim, that may only occur when a remedy in damages is inadequate (*see* Farnsworth, Contracts 2nd ed. §12.4, page 852 [1990] [Adequacy test: "Equity would stay its hand if the remedy of an award of damages at law was 'adequate'"]). In her cross-motion, Defendant Ronell concedes that rescission is the only remedy she seeks. Rescission is an equitable remedy that a party to a contract may seek whereby a written instrument is disaffirmed and the party is returned to the status that existed before the transaction was executed. However, the equitable remedy of rescission is only to be invoked where the plaintiff has no adequate remedy at law and where the parties can be substantially restored to their status *quo ante* positions (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]). In her counterclaim, Defendant Ronell does not address the lack of a remedy at law nor does she establish that all parties can be restored to the status that existed before the tolling agreement. Specifically, in the case of Plaintiff, as the tolling provision restrained Plaintiff from filing this lawsuit, she cannot establish that Plaintiff will be substantially restored to his pre-contract status if the contract was voided.

Ronell's proposed amendments to her counterclaim do not remedy the defect in pleading. The proposed amended counterclaim neither addresses a lack of adequate remedies in damages nor addresses returning all parties to their pre-contract stage. Moreover, the facts alleged in the amended counterclaim do not support Ronell's claim of breach of the agreement. All of the conduct Ronell alleges constitute breaches of the agreement are after July 21, 2018, when the tolling agreement had already expired. While Ronell proposes to amend the counterclaim to allege that part of the purpose of the agreement was to avoid releasing information to the media, the agreement itself set forth its sole purpose which was to allow Defendant New York University to complete its Title IX investigation before any lawsuits were filed. Contrary to Ronell's claims otherwise, allowing the investigation to conclude first benefitted both Plaintiff and Defendant.

Accordingly, Plaintiff's motion to dismiss Defendant Ronell's counterclaim is granted and Defendant Ronell's cross-motion is denied in its entirety.

All parties are reminded that a compliance conference for this matter is scheduled for **July 16, 2019 at 9:30 a.m.** in IAS Part 14, in Courtroom 1045, located at 111 Centre Street.

5/31/2019
DATE

FRANCIS A. KAHN III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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