

Delever v One Taste Inc.
2019 NY Slip Op 32311(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 161172/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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TAMMY DELEVER,

Plaintiff,

- v -

ONE TASTE INC.,

Defendant.

INDEX NO. 161172/2018

MOTION DATE _____

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14-24
were read on this motion to _____ dismiss _____.

By notice of motion, defendant moves pursuant to CPLR 3211(a)(5) and (7) and 3016(b)
for an order dismissing plaintiff’s amended complaint.

I. AMENDED VERIFIED COMPLAINT (NYSCEF 17, Exh. C)

In February 2013, defendant’s sales director promised plaintiff that she “could move to
New York and live [in defendant’s] housing and that [defendant] would provide employment as
well.” Relying on that promise, plaintiff paid defendant a deposit of \$500. In June 2013, plaintiff
moved to New York to participate in defendant’s “Coaching Program.”

Upon arriving in New York, plaintiff “was forced to live in communal housing and share
a bed with different male staff and fellow students who were strangers to her.” The men “would
make repeated requests for sex, make outs and [orgasmic meditation] a thinly veiled partnered
meditation practice that in fact was public sexual stimulation of women disrobed from the waist
down by fully clothed men.”

Plaintiff was not provided with the promised employment. “Rather [defendant] made

[her] participate in [its] courses and activities as a ‘volunteer,’ sometimes for over 12 hours a day,” and she “was forced to go to Union Square with a fellow member of [defendant] and hold a sign saying ‘Turned On’ to speak to strangers about the practices and lure them to [defendant’s] events or encourage them to sign up for [its] Classes.”

Defendant “leveraged its position as a ‘wellness organization’ to emotionally and psychologically manipulate [plaintiff] and demand that she “take out credit cards to pay for course fees” for “more and more expensive courses.” She witnessed other of defendant’s members being “ordered to have sex to increase sales,” and she was “forced to watch [them] have sex in front of an audience in her own sleeping area,” was “humiliated and berated in front of other [of defendant’s members],” and was told that she was “so backed up, it must be torture.” She was also “coerced into an ‘unconditional sex practice’ wherein she was supposed to have sex with a different man each night for 10 days,” and recounts that “[t]he first night, a . . . staff member came to her bedroom and ‘offered’ to assist and had sex with her . . .” Defendant continually pressure[d her] to take a ‘mastery class’ for \$7,500.00 and [told her] that she would need to get STD tested before taking the class as sexual techniques would be ‘taught’ there.”

Defendant’s sales director “repeatedly berate[d] and humiliate[d plaintiff] in an effort to get her to engage in an ‘unconditional sex practice’ calling her an ‘isolation addict’ for locking herself in her room so that strange men couldn’t enter.” Plaintiff describes the sexual harassment by defendant’s staff as “ongoing,” and that she was “continually harassed via text message to check on the frequency of her participation in group sexual activities.”

In August 2013, plaintiff sought emergency medical care as a result of defendant’s “continual and reckless treatment of [her],” and in May 2014, she started therapy “to deal with the psychological trauma caused by [defendant].”

In May 2016, [defendant] made unauthorized withdrawals and charges on plaintiff's debit card" and defendant's "employees followed [her] to her bank and to her work to make sure she made withdrawals and paid them to [defendant]." She "was induced and paid to [defendant] over \$55,000 for 'classes' and 'workshops' wherein she was alternately encouraged and berated to participate in sexual practices, including switching partners and anonymous sex with strangers."

As a result of defendant's acts, plaintiff "has suffered the adverse effects of sexual harassment; sexual battery; intentional and negligent infliction of emotional distress," including "harm to [her] self-esteem and self-respect, and ongoing humiliation from her treatment while employed at defendant, which caused [her] great psychological harm." She alleges having had, and continuing to have, "panic attacks as a result of her abusive treatment during her participation in 'classes' and other activities at [defendant]" and that she "continues to suffer from PTSD caused by the regular and consistent hostile housing environment created by defendants that included sexual harassment and sexual battery by coerced participation or witness to sexual activities."

Based on the foregoing, plaintiff advances causes of action for breach of contract, fraud, sexual harassment, intentional infliction of emotional distress, and negligent infliction of emotional distress. In setting forth her cause of action for breach of contract, plaintiff additionally alleges that defendant intentionally and fraudulently promised to provide her with educational courses in exchange for payment and willfully "would 'bait and switch' classes, teachers, times and length of the classes causing [her] to be defrauded of her payment." She seeks compensatory as well as punitive damages.

II. PERTINENT PROCEDURAL HISTORY

On November 29, 2018, plaintiff filed a summons and complaint in this matter. As a

result of defense counsel's advice to plaintiff's counsel that the complaint would likely be dismissed, on March 4, 2019, plaintiff filed the amended verified complaint. (NYSCEF 21).

III. CONTENTIONS

A. Defendant (NYSCEF 14-17)

Defendant argues that plaintiff fails to allege a contract between the parties, observing that the complaint contains no mention of the words "contract" or "agreement" within the factual portion of the amended complaint. Rather, she alleges at most a periodic teacher-student relationship without an agreement as to any particular class, subject, time or length, instructor or location. Nor is a breach of a specified term alleged.

According to defendant, plaintiff fails to state a cause of action for fraud absent allegations of a misrepresentation or factual omission which was false and known by defendant to be false and fails to plead it with particularity. It also maintains that the cause of action is duplicative of the cause of action for breach of contract, as it is premised on the same allegations on which the breach claim is premised. Nor, it posits, does the allegation of a "bait and switch" create an independent claim of fraud.

As plaintiff brings her causes of action for sexual harassment, intentional infliction of emotional distress, and negligent infliction of emotional distress more than four years after May 2014, when the last of the alleged events in issue occurred, defendant argues that each is time-barred. It asks that the reference in the complaint to the unauthorized withdrawal of plaintiff's funds and following of her by defendant's employees as occurring in May 2016 be disregarded as a typographical error, observing that plaintiff alleged in her first complaint that defendant's alleged conduct in that regard occurred in May 2014, and it was more likely to have occurred then. In any event, defendant asserts, the allegations form no factual basis for her causes of

action for sexual harassment, fraud or negligent infliction of emotional distress. Thus, defendant contends, the May 2016 date it does not extend the statutory period.

Defendant argues that the cause of action for sexual harassment is time-barred by virtue of a three-year statute of limitations and that the last event thereof is alleged to have occurred some time in 2014. In any event, having failed to set forth a statutory basis for this cause of action, having conceded that she was not employed by defendant, and absent an allegation that she was treated differently due to her gender or that her gender played a role or motivated the alleged conduct, plaintiff fails to state a cause of action for it.

Observing that the statute of limitations for intentional infliction of emotional distress is one year from the injury, defendant argues that as the last instance of such infliction occurred some time in 2014, it too is time-barred. Moreover, absent any allegation rising to the level of outrageous or extreme conduct, the claim otherwise fails to state a cause of action for it. Nor has plaintiff alleged, maintains defendant, that it intended to cause her emotional harm or that it could have reasonably anticipated that her participation in its courses or in its community would harm her. Rather, as plaintiff was a “consenting adult who voluntarily enrolled in [its] courses, there would be no reason for [defendant] to anticipate that [plaintiff] would react in the manner [in which] she purportedly reacted, much less a substantial likelihood of such a response.”

Defendant asserts that as plaintiff fails to allege a duty of care owed her by it, or a basis on which such a duty could be inferred, she does not state a cause of action for negligent infliction of emotional distress, and otherwise claims that plaintiff’s cause of action is a restatement of her causes of action for breach of contract and fraud. It also observes that there is nothing in the complaint to guarantee the genuineness of her claim or that the purported breach of a duty endangered her physical safety or caused her to fear for her physical safety. And as the

limitations period for negligent infliction of emotional distress is three years from the injury, and again, as the last instance of such infliction was sometime in 2014, it too is time-barred.

Should plaintiff's causes of action for fraud and negligent infliction survive, defendant asks that the demand for punitive damages be stricken, given the insufficiency of the allegations and absence of conduct evincing a "high degree of moral turpitude" or "wanton dishonesty" implying "criminal indifference to civil obligations." Defendant argues that to demonstrate moral turpitude, plaintiff must, but fails to, allege deliberate wrongdoing that has "the character of outrage frequently associated with crime," that the wrongdoing is "exceptional," "malicious," "wanton," or was reckless to such a degree as to indicate "an improper motive or vindictiveness."

B. Plaintiff (NYSCEF 19-22)

In opposition to defendant's motion to dismiss her cause of action for breach of contract, plaintiff argues that when she accepted defendant's offer to come to New York and participate in the Coaching Program, which its sales director induced by offering housing and employment, a contract was formed and then breached by defendant's failure to provide employment and by providing "dangerous and substandard housing."

Plaintiff argues that the practices taught, encouraged, and demanded by defendant are "explicitly sexual in nature," "that its practice of orgasmic meditation is purely fraudulent" and is sexual and "not science-based," defendant "continues to position itself and sell its products (i.e. classes, seminars and memberships) as science based."

In denying that her claims are time-barred, plaintiff argues, relying on what counsel variously describes in his memorandum of law as plaintiff's affirmation or affidavit, that her participation in defendant's program lasted until late in 2017, and otherwise maintains that

defendant possesses her “purchase records, receipts and communications” demonstrating same. The affirmation, while entitled “affidavit,” is dated March 25, 2019, although on a separate page is the indication that it was sworn to by plaintiff in the presence of her attorney a month earlier on “February 22,” although there is no notary stamp or registration number. In it, plaintiff affirms under penalty of perjury new facts and a cause of action for battery. (NYSCEF 19).

In support of her cause of action for intentional infliction of emotional distress, plaintiff maintains that having alleged to have been “repeatedly and publicly asked about - and shamed for - her private sex life,” and demanded that she participate in sexual activity and other sexual practice with strange men, she offers evidence of outrageousness that “clearly shock[s] the conscious” thereby withstanding defendant’s motion.

Plaintiff argues that defendant “took on a duty of care” by advertising, bargaining for, and selling her “coaching programs” and “classes,” thereby engaging her participation in psycho-sexual games, and negligently causing her direct harm.

Arguing that she sufficiently states a cause of action for battery in her affirmation, plaintiff maintains that in her complaint, she alleges that defendant’s employees and members repeatedly pestered, coerced, and attempted to force her to have sex against her will by compelling her to participate in the required sex practice and by regularly placing strange men in her bed, resulting in unwanted touching, some of which occurred during orgasmic meditation practice.

C. Defendant’s reply (NYSCEF 23)

Defendant argues that the new facts, theories of liability, and cause of action for battery advanced in her opposition to its motion should be disregarded for her failure to seek leave to do so and for the additional reason that plaintiff is not authorized to submit an affirmation in lieu of

an affidavit.

Defendant otherwise alleges that in a departure from her claim that defendant breached its contract with her via the alleged “bait and switch,” plaintiff now improperly advances the new theory that it breached its promise to provide her with employment and housing, claiming that she cannot defeat its motion by presenting a new theory of liability in her responsive papers without seeking leave to amend her pleading.

In any event, it maintains, her new theory is palpably insufficient and devoid of merit absent an alleged agreement beyond an unenforceable and nonspecific oral agreement to agree to provide plaintiff with at will employment. The promise to provide housing, defendant argues, is also unenforceable absent specific terms, and in any event, defendant maintains, plaintiff admits that defendant provided her with housing, albeit substandard.

According to defendant, plaintiff also advances a new theory of fraud relating to the sexual practices that defendant is alleged to falsely claim are scientifically based, again circumventing the requirement that she move to amend her pleadings. In any event, it argues, plaintiff’s new facts do not state a cause of action for fraud, are insufficiently particular, and any statements attributed to it are inherently ambiguous and thus not actionable.

Absent any claim of having been employed by defendant and having failed to respond to defendant’s argument, defendant contends, plaintiff’s cause of action for sexual harassment concededly is legally insufficient.

As plaintiff interposed in her responsive papers a cause of action for battery which does not appear in the amended verified complaint, it should be dismissed, asserts defendant, and in any event, it is time-barred given plaintiff’s allegation in her affirmation that she was a member of defendant until May 2017, more than a year before she filed her complaint. Thus, her

attorney's affirmation that her participation ended at the end of 2017 should be disregarded.

Defendant relies on the same argument as to plaintiff's cause of action for intentional infliction of emotional distress, absent any conduct alleged to have occurred after 2014, and relies on its opening brief for its argument that plaintiff does not state a cause of action for it.

Nor does plaintiff reference an instance of conduct within the three-year limitation period for negligent infliction of emotional distress, and thus, defendant argues, it is time-barred and in any event, plaintiff alleges no direct and specific duty owed her by defendant, a breach thereof, that she suffered a direct emotional injury or any "guarantee of genuineness" to ensure that the alleged breach of the duty directly owed at least endangered plaintiff's physical safety or caused her to fear for her physical safety.

Having offered no response to its argument that her demand for punitive damages must be dismissed, defendant argues that she has abandoned it.

D. Oral argument (NYSCEF 24)

At oral argument, plaintiff's counsel maintained that plaintiff moved to New York "to participate in this training where she was going to be given employment and housing." He alleged that defendant has been aware that no time limit had been placed on plaintiff's involvement with the organization and that it knew that she was "still paying," "still being charged," "still participating," and that all of the conduct complained of continues "all the way up to the end of her involvement . . ." Thus, he asserted, there is an issue of fact as to the timeliness of her cause of action for intentional infliction of emotional distress.

In light of the procedural posture of defendant's motion being interposed before it filed an answer, counsel asked that if any of plaintiff's causes of action were to be dismissed, that she be given an opportunity to replead.

IV. ANALYSIS

A. CPLR 3211(a)(5)

“To dismiss a cause of action . . . on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired.” (*Campane v Panos*, 142 AD3d 1126, 1127 [2d Dept 2016]). “If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period” (*Id.*).

Here, although plaintiff’s affirmation is inadmissible (CPLR 2106[a]) and thus disregarded, the allegation contained therein that she had ended her association with defendant in May 2017 constitutes an admission. It also renders immaterial her attorney’s assertion that her participation in defendant’s program ended in late 2017, which in any event is not alleged to have been based on personal knowledge. Thus, defendant demonstrates, *prima facie*, that having filed her complaint on November 29, 2018, her cause of action for intentional infliction of emotional distress, which has a one-year statute of limitations, is time-barred even if defendant had committed that tort on the last day of May 2017. Plaintiff raises no issue of fact in response and has not sought leave to replace her inadmissible affirmation with a sworn affidavit in response to defendant’s reply or at oral argument. Had she effectively advanced a cause of action for battery, that too would be time-barred.

Defendant’s contention that the May 2016 date should be disregarded as a typographical error lacks sufficient foundation. In any event, defendant’s alleged conduct in withdrawing plaintiff’s funds without authorization and following her to ensure payment in May 2016 does

not extend the limitations period absent any relationship between that conduct and a cause of action. (*See Henry v Bank of Am.*, 147 AD3d 599, 600 [1st Dept 2017] [continuing wrong tolls running of period of limitations to date of commission of last wrongful act]). Moreover, continuing damages does not extend the statutes of limitations (*Demian v Calmenson*, 156 AD3d 422, 423 [1st 2017], *lv denied*, 31 NY3d 902 [2018]), and the alleged conduct is otherwise insufficiently specific to state a claim for any cause of action.

B. CPLR 3211(a)(7)

In considering a motion to dismiss for a failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged as true, and afford the plaintiff “the benefit of every possible favorable inference.” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Nonetheless, allegations asserting bare legal conclusions are not entitled to such consideration. (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

In accepting all of the plaintiff’s allegations as true, the court may not express “any opinion as to the plaintiff’s ability to ultimately establish the truth of these averments before the trier of the facts.” (*Cooper v 620 Properties Assocs.*, 242 AD2d 359, 360 [2d Dept 1997], quoting *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). “The motion must be denied if from the four corners of the pleadings ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

1. Breach of contract

Absent any allegation that defendant had promised plaintiff particular a housing accommodation, job description, or topic for study, defendant demonstrates *prima facie*, that plaintiff fails to state a cause of action for breach of contract. (*See Reznick v Bluegreen Resorts Mgt., Inc.*, 154 AD3d 891 [2d Dept 2017] [in asserting breach of contract, party must plead pertinent terms and conditions allegedly breached; vague allegations of agreement insufficient]; *Canzona v Atanasio*, 118 AD3d 637 [2d Dept 2014] [plaintiff failed to plead material terms of alleged oral agreement, and allegations too vague and indefinite to plead breach of contract]; *Sud v Sud*, 211 AD2d 423 [1st Dept 1995] [breach of contract claim properly dismissed as plaintiff failed to allege nonconclusorily essential terms of contract, including specific provisions allegedly breached]). As plaintiff does not dispute that defendant housed her, employed her as a volunteer, and provided her with courses, the cause of action fails in that regard as well, notwithstanding her allegations as to the quality of the housing, employment, and coursework. Her contention of a “bait and switch” is apparently abandoned as it is not referenced in her memorandum of law.

2. Fraud

To establish, *prima facie*, a cause of action for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). There is no fraud arising from statements that are, in fact, true. (*Gomez–Jimenez v New York Law School*, 103 AD3d 13, 18 [1st Dept 2012] *lv denied*, 20 NY3d 1093 [2013]).

Here, while plaintiff alleges, with particularity, that she was subject to a plethora of objectionable conduct said to have been set in motion by defendant, the facts she alleges indicate

that she took an immense and ill-educated risk in paying the deposit and moving to New York based on nothing more than vague and nonspecific promises of housing, employment, and education. Thus, even if credited, plaintiff's allegations do not, on their face, demonstrate justifiable reliance.

That plaintiff alleges that defendant misrepresents its practices as non-sexual and scientifically based is legally insignificant absent an allegation in her complaint that she was specifically told that as an inducement to move to New York. Rather, she alleges no specific statements and offers no indication as to when they were made, who made them, or that she was justified in relying on them.

3. Sexual harassment

In light of plaintiff's assertion that defendant failed to employ her, she states no cause of action for sexual harassment, even if she was a volunteer. (*O'Connor v Davis*, 126 F3d 112 [2d Cir 1997], *cert denied* 522 US 1114 [1998] [as unpaid intern not "employee," discrimination claim properly dismissed]; *Doe v Anonymous Inc.*, 2019 WL 2616904 [SD NY 2019] [plaintiff's claims for, among others, sexual harassment and hostile work environment dismissed as she was not defendant's employee]; *Strauss v New York State Dept. of Educ.*, 26 AD3d 67 [3d Dept 2005] [to recover under Title VII or New York Human Rights Law, plaintiff must demonstrate she had employment relationship with defendant]; *see also Doe v Hall*, 64 Misc3d 1211[A], *2 [Sup Ct, New York County 2019] [there is no independent tort for sexual assault in New York, citing *Freihofer v Hearst Pub.*, 65 NY2d 135, 140 [1985]]).

4. Intentional infliction of emotional distress

As plaintiff's cause of action for intentional infliction of emotional distress is time-barred, whether she states a cause of action for it need not be addressed.

5. Negligent infliction of emotional distress

A claim of negligent infliction of emotional distress presupposes a duty of care owed by a defendant to the plaintiff. (*Ornstein v New York Health & Hosp. Corp.*, 10 NY3d 1, 6 [2008]). Where a plaintiff is owed such a duty and it is breached, the plaintiff “may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations” (*Id.* [citation omitted]). The claim must, however, possess “some guarantee of genuineness” (*Id.* [citation omitted]). Genuineness may be guaranteed where, *inter alia*, “the breach of the duty owed directly to the injured party must have at least endangered the plaintiff’s physical safety or caused the plaintiff to fear for his or her own physical safety.” (*Taggart v Costabile*, 131 AD3d 243, 253 [2d Dept 2015] [citations omitted]).

Here, there is neither a factual basis alleged nor legal argument advanced for plaintiff’s conclusory assertion that defendant owed her a duty of care or that defendant negligently caused her direct harm by engaging her participation in psycho-sexual games. Rather, plaintiff alleges that defendant intended to engage her participation. (*Offor v Mercy Med. Ctr.*, 171 AD3d 502 [1st Dept 2019] [negligent infliction claim properly dismissed as intentional, not negligent, conduct alleged]). Absent these essential elements, the others need not be addressed.

V. CONCLUSION

Given this result, there is no basis for plaintiff’s prayer for punitive damages. (*See Weir Metro Ambu-Svce., Inc. v Turner*, 57 NY2d 911 [1982] [punitive damages may not be maintained as separate cause of action]).

Accordingly, and for all of the foregoing reasons, it is hereby

ORDERED, that defendant’s motion to dismiss is granted in its entirety, and the

complaint is dismissed, and the clerk is directed to enter judgment accordingly.

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7/31/2019

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: