Pakniat v Moor
2020 NY Slip Op 31372(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 157923/2019
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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PARINAZ PAKNIAT

Plaintiff,

- v -

VICTORIA MOOR,

Defendant.

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INDEX NO. 157923/2019

MOTION DATE 03/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM.

In this action sounding in defamation, defendant Victoria Moor ("Moor" or "defendant") moves, pursuant to CPLR 327 (ii), to dismiss the complaint by plaintiff Parinaz Pakniat ("Pakniat" or "plaintiff") based on forum non conveniens or, in the alternative, to dismiss plaintiff's defamation claim, pursuant to CPLR 215(3), 3016(a) and 3211(a)(7), for failure to state a cause of action and, pursuant to CPLR 3211(a)(2) and (7), the tortious/intentional interference with contract claim (Doc. 4). Pakniat opposes the motion (Doc. 11-13). After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

From January 22 through October 23, 2018, Pakniat, a resident of Montreal, Canada, was employed as "Area Manager of the Canadian Market" with Mageba International, LLC ("Mageba"), a civil engineering service provider and manufacturer for the construction industry (Doc. 1 ¶ 2, 6). She reported directly to Gianni Moor, a chief executive officer ("CEO") and

employee of Mageba (Doc. 1 ¶ 4, 7). Plaintiff alleged, *inter alia*, that defendant Gianni Moor's wife, a non-employee of Mageba, accused plaintiff of sleeping with her husband, made false statements about an extramarital affair between plaintiff and Gianni Moor to other employees in Mageba and, ultimately, induced Gianni Moor to terminate plaintiff's employment (Doc. 1 ¶ 8, 11, 12, 14, 19).

On August 13, 2019, plaintiff commenced this action against Moor by filing a summons and verified complaint (Doc. 1). In the complaint, plaintiff asserted two causes of action: (1) a claim for defamation per se; and (2) a claim for tortious/intentional interference with contract (Doc. 1 ¶ 21-34).[1] On November 22, 2019, Moor filed the instant motion to dismiss in lieu of an answer (Doc. 4).

Moor argues that this action should be dismissed on the ground of forum non conveniens because, *inter alia*, (1) plaintiff is a resident of Canada; (2) the defamatory statements were allegedly made to Mageba employees, none of whom are alleged to reside in New York; (3) potential witnesses, including coworkers, will likely reside in Canada; (4) Gianni Moor has ties to Canada and, thus, the hardship of testifying there would be less severe; and (5) the situs of the action is based in Canada because, although the complaint alleges that the defamatory statements were made in New York, she was terminated in Canada (Doc. 8 at 7-8).

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[1] Plaintiff initiated a related action (*Pakniat v Gianni Moor et al.*, Index No. 160019/2019, Sup Ct, NY County 2019) in this Court (D'Auguste, J.S.C.) against Gianni Moor and Mageba for claims based on sexual discrimination in violation of the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"); vicarious liability against Mageba; retaliatory discharge pursuant to both the NYSHRL and NYCHRL; and breach of contract (Doc. 16). By decision and order entered May 7, 2020, the complaint was dismissed on the grounds that the Court lacked subject matter jurisdiction over the NYSHRL/NYCHRL claims and that plaintiff failed to state a cause of action with respect to its breach of contract claim (Doc. 16).

Defendant further asserts that the complaint fails to state a cause of action for defamation because, *inter alia*, plaintiff does not allege the time, place, manner, audience, words, and speakers of the communication and, further, that the Court has no way of ascertaining from the complaint whether all statements were made within the statute of limitations proscribed by CPLR 215(3) (Doc. 8 at 10-13). Moor maintains that the alleged defamatory statements, even if assumed to be true, are non-actionable opinions, and that any statements allegedly made by defendant to Gianni Moor are protected by spousal privilege (Doc. 8 at 13-16, 18-19). Moreover, she asserts that said statements are also protected by the common-interest privilege because she "shares a common interest with other Mageba employees, officials and stockholders vis-à-vis her husband" and "[a]s his wife, . . . is entitled to all property acquired by him during the course of the marriage" (Doc. 8 at 17). Thus, claims Moor, the alleged statements concern the management of the company and were made to other Mageba employees in the interest of protecting the well-being of the company from the scandal of an extra-marital affair between an official and an employee (Doc. 8 at 16-18). Lastly, defendant contends that the complaint fails to state a cause of action for tortious/intentional interference with contract because plaintiff's status as an at-will employee precludes her from making such a claim (Doc. 8 at 19). [2]

In opposition to the motion, plaintiff contends that New York is a proper forum in which to litigate this action because, *inter alia*, (1) this Court routinely adjudicates complex commercial cases involving domestic and international parties; (2) Moor is a resident of New York; (3) the alleged defamatory statements and tortious acts that resulted in plaintiff's termination were

[2] Although the notice of motion reflects that defendant is also moving to dismiss the tortious interference claim pursuant to CPLR 3211(a)(2), no arguments are made pertaining to subject matter jurisdiction in her moving papers.

committed within the state; and (5) that defendant has failed to demonstrate that Canada is an appropriate forum (Doc. 11 ¶ 6-16).

Additionally, plaintiff argues, *inter alia*, that the complaint adequately states a cause of action for defamation because it complies with the pleading specificity requirements set forth in CPLR 3016(a), including that the remarks were made by Moor (Doc. 11 ¶ 22-27). Moreover, she argues that Moor's defamatory statements are not non-actionable opinions because, *inter alia*, they can be proven to be true or false; that common-interest privilege does not apply to these statements which were made with malice; and that defendant's argument regarding spousal privilege is premature and is nevertheless without merit because it applies to confidential communications between spouses and does not extend to statements revealed to third parties (Doc. 11 ¶ 28-33).

Plaintiff further asserts that her at-will employment does not bar the tortious/intentional interference with contract claim because a viable claim exists when an employee's relationship with her employer is attacked by a third party (Doc. 11 ¶ 17-21).

LEGAL CONCLUSIONS:

Forum Non Conveniens

"The doctrine of forum non conveniens permits a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum" (*JG & CG v Goldfinger*, 2019 NY Slip Op 32407[U], 2019 NY Misc LEXIS 4486, *4 [Sup Ct, NY County 2019] [internal quotation marks and citations omitted]). The Court must consider and balance various factors, including the "existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority

of the witnesses; and the burden on New York courts" *(Tax Club, Inc. v Precision Corporate Servs.*, 2011 NY Slip Op 32852[U], 2011 NY Misc LEXIS 5171 *21 [Sup Ct, NY County 2011]; *see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). Moreover, even where, as here, the plaintiff is a nonresident, the heavy burden of establishing that New York is an inconvenient forum rests on the party challenging that forum (*see Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.P.A.*, 26 AD3d 286, 287 [1st Dept 2006]; *Brodherson v V. Ponte & Sons*, 209 AD2d 276, 277 [1st Dept 1994]) and, "[g]enerally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks [USA] Inc.*, 131 AD3d 431, 431 [1st Dept 2015] [internal quotation marks and citations omitted]).

Defendant has failed to establish the heavy burden necessary to dismiss the complaint on forum non conveniens grounds. While it is undisputed that plaintiff is a non-resident of New York who was employed and terminated in Canada, she alleges in the complaint that defendant's defamatory statements, which form the crux of her claims, were made in New York (Doc. 1 ¶ 14). Moreover, the fact that plaintiff is a resident of this state (*see OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 702-703 [1st Dept 2011]; *Anagnostou v Stifel*, 204 AD2d 61, 62 [1st Dept 1994]), and Canada's lack of personal jurisdiction over defendant (*see Reid v Ernst & Young Global Ltd.*, 13 Misc 3d 1242[A], 2006 NY Misc LEXIS 3603, *8-9 [Sup Ct, NY County 2006]), weigh against dismissal of the complaint based on this doctrine. In her papers in opposition to the motion, plaintiff also asserts that all Mageba employees named in the complaint were employed in the New York office (Doc. 11 ¶ 14). Although plaintiff was employed in Canada, her contract with Mageba included a New York choice of law provision, which further supports this Court's

finding that New York is not an inconvenient forum. Thus, this Court, in its discretion, declines to grant such relief.

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs 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 NY2d 83, 87-88 [1994] [internal citations omitted]). Moreover, a pleading may be dismissed if it fails to state a cause of action (*see* CPLR 3211 [a] [7]).

Defamation

That branch of the motion seeking dismissal of the defamation cause of action is also denied. "The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'" (*Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009] [internal quotation marks, brackets and citations omitted]). Additionally, the complaint must also set forth the particular words constituting defamation, the time, place, and manner of the false statement and specify to whom it was made (*see* CPLR 3016 [a]; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

Contrary to defendant's contention, the complaint conforms to the requirements set forth in CPLR 3016(a) and does not fail to state a cause of action for defamation pursuant to CPLR 3211(a)(7). Plaintiff alleges, *inter alia*, that, "at the end of June and beginning of July 2018" and, while in New York County, defendant called the former CFO of Mageba USA, Paul Deonarine,

and told him that "the new girl in the Canadian office [was] sleeping with Gianni Moor" (Doc. 1 ¶ 26). She also claimed that, on September 24, 2018, defendant called Borja Bailles, Deputy General Manager of Mageba, claiming that plaintiff and Gianni Moor were "together" (Doc. 1 ¶ 26) (*see Flomenhaft v Jacoby & Meyers, LLP*, 122 AD3d 422, 422-423 [1st Dept 2014]; *Herlihy v Metro. Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995]). Contrary to defendant's contention, while plaintiff does not identify by name all of the Mageba employees to whom the defamatory statements about the affair were allegedly made, this omission is not fatal to her claim (*see Herlihy v Metro. Museum of Art*, 214 AD2d at 260-261).

Further, after considering defendant's arguments that the alleged statements constitute nonactionable opinions and/or are protected by common-interest privilege or spousal privilege, as well as the case law submitted in support of this argument, this Court finds them lacking in merit (*compare Gaccione v Scarpinato*, 137 AD3d 857, 858-859 [2d Dept 2016]; *L.Y.E. Diamonds Ltd. v Gemological Inst. of Am., Inc.*, 2017 NY Slip Op 32576[U], 2017 NY Misc LEXIS 4747, *5-6 [Sup Ct, NY County 2017]; *Rojas v Debevoise & Plimpton*, 167 Misc 2d 451, 457 [Sup Ct, NY County 1995]). Thus, viewing the pleadings in the light most favorable to the nonmoving party, that branch of the motion seeking dismissal of the defamation claim must be dismissed.

Tortious Inference with Contract

To sustain an action based on tortious/intentional interference with contract, the plaintiff must establish (1) the existence of a valid contract (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of that contract; and (4) damages (*see Carlyle, LLC v Quick Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Contrary to defendant's contention, although "the Court of

Appeals has declined to allow a plaintiff 'to evade the employment at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment'" (*Thawley v Turtell*, 289 AD2d 169, 169 [1st Dept 2001], *quoting Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 201 [1989]), an at-will employee may sustain a tortious interference claim when a "'third party used wrongful means to effect the termination such as fraud, misrepresentation, or threats, that the means used violated a duty owed by the defendant to the plaintiff, or that the defendant acted with malice'" (*Albert v Loksen*, 239 F3d 256, 274 [2d Cir 2001]), *quoting Cohen v Davis*, 926 F Supp 399, 403 [SDNY 1996]).

Plaintiff sufficiently pleads in the complaint that her termination was as a result of malice or improper means. Plaintiff claims, *inter alia*, that, prior to her termination, defendant accused plaintiff of having an affair with Gianni Moor via telephone and text messages; that defendant inadvertently sent a text message to her stating "I need to get her out as soon as possible" and that Gianni Moor informed plaintiff, at defendant's request, that she would start reporting to another executive so as to avoid further contact with him (Docs. 1 ¶ 8, 11, 12, 15). Additionally, Gianni Moor allegedly made plaintiff provide him with her marriage certificate to show defendant, asked plaintiff to apologize to defendant and then, at his wife's bequest, terminated plaintiff's employment (Docs. 1 ¶ 8, 11, 12, 15). Thus, that branch of the motion seeking dismissal of this claim is denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

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

ORDERED that Victoria Moor's motion is denied in its entirety; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order, with notice of entry, upon defendant within 30 days of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 80 Centre Street, Room 280, on July 28, 2020, at 2:30 p.m.; and it is further

ORDERED that this constitutes the decision of the Court.

5/14/2020
DATE

KATHRYN E. FREED, J.S.C.

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