Zhang v Alexander Primak Jewelry, Inc.

2020 NY Slip Op 35694(U)

February 14, 2020

Supreme Court, Queens County

Docket Number: Index No. 703841/18

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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NICOLE ZHANG,

Plaintiff,

-against-

Index No.: 703841/18
Motion Date: 12/10/19
Mot. Seq. 1

ALEXANDER PRIMAK JEWELRY, INC., ALEXANDER PRIMAK a/k/a SASHA PRIMAK, and VAIDA KAZLAUKAITE,

FILED
FEB 18 2020
COUNTY CLERK
QUEENS COUNTY

Defendants,

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The following were numbered papers were read on this motion by defendants seeking summary judgment dismissing the complaint, and on the cross-motion by plaintiff for summary judgment on liability, both pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits	E19-E34
Notice of Cross Motion - Affirmation - Exhibits	E35-E38
Reply Memorandum of Law - Affirmation - Exhibits.....	E39-E42

Upon the foregoing papers, it is ordered that this motion by defendants is granted in its entirety, and the cross-motion by plaintiff is denied.

Plaintiff worked for defendant company, from February 2007 through March 2009, first as a quality assurance inspector, and then in the diamond department. In March, 2009, the plaintiff was laid off, and collected unemployment insurance. She returned to work at defendant company, in February, 2014. In January, 2015, the company moved, and the plaintiff moved with it. Plaintiff alleges she was injured during the move and went on short-term disability. She returned to work in June, 2015. In July 2015, the plaintiff requested a raise and a new title, which was denied. Plaintiff resigned from the company, on or about July 17, 2015, intending to seek employment elsewhere. At her

request, was given a favorable letter of reference from defendant company.

In March, 2018, the plaintiff brought the instant action against the defendants, asserting causes of action for constructive discharge, breach of contract, intentional infliction of emotional distress, and unjust enrichment. Defendants appeared and answered, and discovery ensued. Defendants now move for summary judgment dismissing plaintiff's complaint. Plaintiff opposes, and cross-moves for summary judgment on her complaint.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving defendant
(*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2d 2015]; *Farrell v Herzog*, 123 AD3d 655 [2d Dept 2014]). Credibility issues regarding the circumstances of the subject transactions require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [[2d Dept 20] Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from

the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

To maintain a cause of action for constructive discharge, plaintiff-employee must demonstrate, to the satisfaction of the trier of fact, that the employer has intentionally created working conditions "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" (*Nelson v Vigorito*, 121 AD3d 872, 874 [2d Dept 2014], quoting *Pena v Brattleboro Retreat*, 702 F2d 322, 325 [2d Cir 1983]). Here, the defendants have shown their *prima facie* entitlement to judgment as a matter of law, by demonstrating that the plaintiff's stated "reasons" for resigning came woefully short of rising to the degree of intolerable working conditions necessary to prove a constructive discharge. The constructive discharge test is not met where the employee's promotion opportunities are reduced; where the pay grade or job title is not changed; or where the employee is merely dissatisfied with a change in job assignments (*see Morris v Schroder Capital Mgt., Intl.*, 7 NY3d 616 [2006]). Further, the defendants have evidenced "legitimate, nondiscriminatory reasons for its criticisms of the plaintiff's job performance" (*Ehmann v Good Samaritan Hosp. Med. Ctr.*, 90 AD3d 985, 985 [2d Dept 2011]).

In opposition, the plaintiff has failed to raise a triable issue of fact. Instead, the plaintiff's self-described "resign letter," dated July 17, 2015, signed almost three years prior to commencing this law suit, fails to even mention workplace conditions as a reason for any possible discomfort, stating only her desire for a pay raise and elevation in title within the company, as grounds for her willingness to remain employed. Based on such evidence, it appears that the plaintiff chose to resign from the company as the result of a free and voluntary choice on her part, and not because she was compelled to do so due to an intolerable workplace atmosphere (*see Morris v Schroder Capital Mgt., Intl.*, 7 NY3d

616). As such, this branch of defendants' motion is granted, and the First Cause of Action, for constructive discharge, is dismissed.

To maintain a cause of action for breach of contract, the plaintiff must establish the existence of a contract between plaintiff and defendant, performance by plaintiff, failure to perform by defendant, and resulting damages (*see Gawrych v Astoria Fed. Sav. & Loan, 148 AD3d 681* [2d Dept 2017]; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc., 137 AD3d 878* [2d Dept 2016]; *Bennett v St. Farm Fire & Cas. Co.*, 137 AD3d 727 [2d Dept 2016]). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Kelley v Bryan Ins. Agency, Inc.*, 176 AD3d 1042, 1045 [2d Dept 2019], quoting *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-590 [1999]; *see Premium Cornerstone Props., LLC v S & R Main Realty, LLC*, 173 AD3d 1230 [2d Dept 2019]; *Total Telecom Group Corp. v Kendal on Hudson*, 157 AD3d 746 [2d Dept 2018]).

Construing the pleadings liberally, and giving the nonmoving plaintiff the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Beirne v Ames' Strand View West Corp.*, 161 AD3d 1034 [2d Dept 2018]; *Chojnacki v Old Westbury Gardens, Inc.*, 152 AD3d 645 [2d Dept 2017]; *D'Esposito v Manetto Hill Auto Service, Inc.*, 150 AD3d 817 [2d Dept 2017]), and prior to any opposition thereto, defendants have established, prima facie, the lack of "a manifestation of mutual assent" that they and plaintiff were "in agreement with respect to all material terms," thereby failing to create an alleged binding contract between them (*Zheng v City of New York*, 19 NY3d 556, 577 [2d Dept 2012], quoting *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d at 589). Plaintiff's submissions, in the form of self-serving statements of partial negotiations, and less than conclusive emails between the parties, have failed to resolve all factual disputes and/or issues of credibility in plaintiff's favor with regard to the creation of a binding contract herein, and, thus, failed to raise an issue of fact sufficient to rebut defendants' entitlement to judgment. As such, the branch of defendants' motion seeking dismissal of the Second Cause of Action, for breach of contract, is granted.

Plaintiff's complaint contains a "Third Cause of Action: Intentionally Inflicted Emotional Distress." The elements of such cause of action are "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2d Dept 2012]; *see Brunache v MV Transp., Inc.*, 151 AD3d 1011 [2d Dept 2017]). Defendants have demonstrated that the conduct alleged by plaintiff, even if it had been proven to be true, which it was not, was insufficiently extreme and outrageous to support a finding of intentional infliction of emotional distress (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]; *Abruscato v Allstate Prop. & Cas. Ins. Co.*, 165 AD3d 1209 [2d Dept 2018]; *Petkewicz v Dutchess County Dept. Of Community & Family Services*, 137 AD3d 990, 991 [2d Dept 2016]). Further, the defendants have, *prima facie*, shown that the remaining three elements of this cause of action have not been evidenced. In opposition, the plaintiff has failed to raise any issue of fact in rebuttal. Therefore, the branch of defendants' motion seeking to dismiss plaintiff's Third Cause of Action, for intentional infliction of emotional distress, is granted.

"To prevail on a claim for unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit (the other party) to retain what is sought to be recovered" (*Reingold v Bowins*, – AD3d –, 2020 NY Slip Op. 00886 *2 [2d Dept 2020] quoting *Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]; *see Galasso, Langione & Botter, LLP v Galasso*, 176 AD3d 1176 [2d Dept 2019]). Defendants have shown that there was no unjust enrichment at the plaintiff's expense in this matter, *i.e.*, that plaintiff has conceded that she was paid everything she was entitled to up to her resignation. Plaintiff has failed to proffer any rebuttal to the defendants' *prima facie* entitlement on this ground, and this branch of defendants' motion to dismiss the Fourth Cause of Action, for unjust enrichment, is granted. Consequently, plaintiff's cross-motion, seeking summary judgment on her complaint, is denied.

Plaintiff's remaining contentions are either without merit or need not be addressed in light of the foregoing determinations.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, dismissing plaintiff's complaint, is granted in its entirety; and it is further

ORDERED that plaintiff's cross-motion, for summary judgment, is denied.

The forgoing constitutes the decision and order of the Court.

Dated: February 14, 2020

TIMOTHY J. DUFFICY, J.S.C.

FILED
FEB 18 2020
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QUEENS COUNTY