SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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INDEX NO. 652707/2020

ALONZO WILLIAMS,

MOTION DATE 12/02/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

RHYTHM OF LIFE CORP., doing business as BROADWAY DANCE CENTER,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16 (Motion 001)

were read on this motion to/for DISMISS COMPLAINT/3211(a)(7).

In this action to recover damages, inter alia, for breach of contract, defamation, discrimination in the terms and conditions of employment on the basis of race and sex in violation of Executive Law 296 and the New York City Human Rights Law (Admin. Code of City of N.Y. § 8-101, *et seq*.; hereinafter NYC HRL), and negligence, the defendant moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. The plaintiff opposes the motion, claiming that the defendant wrongfully terminated his employment as a dance instructor based on false accusations that he sexually harassed female coworkers at one of his prior jobs, and failed fully to investigate the claims of misconduct made against him, but nonetheless published a statement on an internet web page that it was fully investigating the charges of sexual harassment.

The motion is granted in part and denied in part. Although the claim set forth in the first cause of action to recover unpaid wages in accordance with an employment agreement states a cause of action sounding in breach of contract, the claims set forth in the first cause of action to recover for mental anguish, emotional distress, injury to reputation, and consequential damages do not state a cause of action, and are dismissed. In addition, the second cause of action,

which seeks to recover for defamation, is dismissed, the third cause of action, which seeks to recover for race and sex discrimination, is dismissed, and the fourth cause of action, which seeks to recover for negligence, is dismissed.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A*., 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners 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 at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). Where, as here, the court considers evidentiary material beyond the complaint, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.).

The elements of a cause of action to recover for breach of contract are the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ*., 71 AD3d 80, 91 [1st Dept 2009]). In the first cause of action, the plaintiff adequately alleged that he entered into an oral contract with

the defendant to teach dance classes for a period of five months, that the defendant failed to perform its obligations under the agreement by terminating his employment after less than five months, that it lacked cause to terminate his employment because the allegations of sexual harassment against him were false, and that he lost income when the defendant failed to pay him for the entire five-month term of the agreement.

General Obligations Law § 5-701(a)(1) provides that, if an agreement by its terms is not to be performed within one year, it is void unless it is evidenced by a writing or writings. Here, the complaint alleges that the oral agreement was to be performed within five months and, thus, less than one year. Consequently, to state a cause of action to recover for breach of contract, the complaint in this action need not allege that the employment agreement was in writing (*see Caeners v Huntington Crescent Club*, 223 AD2d 570, 571 [2d Dept 1996]). Moreover, since the plaintiff asserts that the employment agreement was meant to cover a defined period of time, he has alleged facts sufficient to establish that he was not an at-will employee whose employment could be terminated for any reason or no reason at all (*see Nausch v AON Corp*., 2 AD3d 101, 101-102 [1st Dept 2003]).

Nonetheless, the law does not recognize the right to recover for mental anguish or emotional distress in connection with a breach of contract cause of action. "[A]bsent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty" (*Wehringer v Standard Sec. Life Ins. Co. of N.Y*., 57 NY2d 757, 759 [1982]; *accord Johnson v Jamaica Hosp*., 62 NY2d 523, 528-529 [1984]; *see Riffat v Continental Ins. Co.*, 104 AD2d 301, 303 [1st Dept 1984]). Moreover, consequential damages, also referred to as indirect damages, are defined as "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act" (Black's Law Dictionary [9th ed 2009]). Such damages are "the natural and probable consequence of the breach" (*Reads Co., LLC v Katz*, 72 AD3d 1054, 1056 [2d Dept 2010]; *see Monteforte v Newport Designs Corp*., 2020 NY Slip Op 30615[U] [Sup Ct, N.Y. County Feb. 27, 2020] [Kelley, J.]).

Inasmuch as the plaintiff's expectation of remuneration was for a limited period of time, the complaint fails to state a cause of action to recover consequential damages, such as future lost wages, based on the defendant's alleged breach of the employment contract. Nor are damages to reputation recoverable pursuant to a breach of contract cause of action *(see generally Miller v Building Serv. Maint. & Misc. Empls.*, 16 AD2d 211, 212 [1st Dept 1962]).

The court rejects the defendant's contention that the plaintiff concedes, in his complaint, that his employment was terminated for cause, as the plaintiff expressly denied that he engaged in sexual harassment or other proscribed behavior.

"The elements of a cause of action [to recover] 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" (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]; *see Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). "To establish actionable defamation, it must be shown that the facts are false and," depending on whether the plaintiff is or is not a public figure, "that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982] [internal quotation marks and citations omitted]).

To impose liability in a defamation action commenced by a person who is not a public figure, "the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch, Inc*. 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v Jefferys*, 103 AD3d 514 [1st Dept 2013]). A person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it (*see Matovcik v Times Beacon Record Newspapers*, 108 AD3d 511 [2d Dept

2013]), or evinces an inability or unwillingness to take any steps to obtain such a verification (*see Fraser v Park Newspapers of St. Lawrence, Inc*., 246 AD2d 894 [3d Dept 1998]).

The plaintiff must allege "the precise words allegedly giving rise to defamation [as well as the] time, place and manner of publication" (*Khan v Duane Reade*, 7 AD3d 311, 312 [1st Dept 2004]). In the First Department, a claim based upon an allegedly libelous statement that does not constitute libel per se must plead special damages (*see Rall v Hellman*, 284 AD2d 113 [1st Dept 2001]; *cf*. *Matherson v Marchello*, 100 AD2d 233, 236 [2d Dept 1984] [cause of action asserting slander must plead special damages, but cause of action asserting libel need not]).

Only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue (*see Thomas H. v Paul B*., 18 NY3d 580, 584 [2012]; *Martin v Daily News L.P*., 121 AD3d 90, 100 [1st Dept 2014]). Consequently, "a general accusation of 'unprofessional conduct' [is] a protected statement of opinion [and] not sufficiently factual to be actionable" (*Chiavarelli v Williams*, 256 AD2d 111, 114 [1st Dept 1998]).

Here, the plaintiff alleges in his complaint that an anonymous complainant falsely posted on the Instagram page of an organization known as Protect NY Dancers that he had raped, sexually assaulted, and sexually harassed female co-employees or subordinates. He further asserts that the defendant, in response to that anonymous post, posted on the same Instagram page that

> "[t]hese allegations are extremely serious and we are investigating. We are currently working with all parties involved. We cannot go into further detail on social media. We do not tolerate harassment of any type."

The plaintiff contends that the defendant's statement is not true because the defendant was not "working" with him by interviewing him or getting his side of the story and, hence, was not "working with all parties involved." The statement, however, does not rise to the level of defamation, inasmuch as the defendant was, in fact, investigating the matter; even if there were no truth to the defendant's representation that it was "currently working" with all parties involved, as the plaintiff defined that term, that statement caused no injury to the plaintiff. Crucially, the

defendant's statement does not accuse the plaintiff of committing any of the acts alleged by the anonymous complainant, and any misstatement as to the extent of its investigation did not falsely accuse the plaintiff of committing any particular act. Inasmuch as the defendant did not accuse the plaintiff of committing a crime, the plaintiff does not state a cause of action for defamation per se, and thus his failure to allege special damages, that is, direct pecuniary loss, arising from the alleged defamatory statements, is fatal to the defamation cause of action. Moreover, the defamation cause of action cannot be solely based on complaints made by his coworkers or former coworkers to third parties (*see Traviglia v Fleet Bank, N.A.*, 219 AD2d 644, 644 [2d Dept 1995]). Consequently, the complaint fails to state a cause of action to recover for defamation. In light of that determination, the court need not determine whether the plaintiff "has" a cause of action to recover for defamation, as the documentary evidence that the defendant submitted beyond the complaint is irrelevant to the court's analysis.

Executive Law § 296(1)(a) provides that

> "It shall be an unlawful discriminatory practice:
>
> "[f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence , to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Similarly, the NYC HRL provides, in relevant part, that

> "It shall be an unlawful discriminatory practice:
>
> "[f]or an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person:
>
> "[t]o refuse to hire or employ or to bar or to discharge from employment such person; or
>
> "[t]o discriminate against such person in compensation or in terms, conditions or privileges of employment"

(Admin. Code of City of N.Y. § 107[1][a][2], [3]). In 2005, the New York City Council amended the NYC HRL to add Admin. Code § 8-130(a) as part of the New York City Civil Rights Restoration Act. That section states that:

> "[t]he provisions of [the NYC HRL] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights law, including those laws with provisions worded comparably to the provisions of this title, have been so construed."

The standard for recovery under the Executive Law is analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]; *see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 270 [2006]; *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 305 [2004]). Under *McDonnell Douglas*, the plaintiff has the initial burden to establish a prima facie case of discrimination. To meet that burden, plaintiff must show that he or she is a member of a protected class, was qualified for the position held, was terminated from employment or suffered another adverse employment action, and the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*see Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d at 270, citing *Ferrante v American Lung Assn*, 90 NY2d 623, 629 [1997]; *Forrest v Jewish Guild for the Blind*, 3 NY3d at 305; *Baldwin v Cablevision Sys. Corp*., 65 AD3d 961, 965 [1st Dept 2009]).

Notwithstanding the enactment of the 2005 Civil Rights Restoration Act, as the Appellate Division, First Department, has explained in connection with claims of violation of the NYC HRL,

> "[u]nder the *McDonnell Douglas* framework, a plaintiff asserting a claim of employment discrimination bears the initial burden of establishing a prima facie case, by showing that [he or] she is a member of a protected class, [he or] she was qualified to hold the position, and that [he or] she suffered adverse employment action under circumstances giving rise to an inference of discrimination. If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision. If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination"

(*Hudson v Merrill Lynch & Co., Inc*., 138 AD3d 511, 514 [1st Dept 2016] [citations omitted]).

> "But the explanatory second set of facts, such as the absence of such misconduct by the plaintiff's colleagues, should not be relied on to negate the plaintiff's prima facie case in the first instance, but rather, seen as either: (a) the defendant's articulation through competent evidence of nondiscriminatory reasons for its action (stage two in the *McDonnell Douglas* framework); or (b) part of the defendant's ultimate effort to undercut the weight assigned to the plaintiff's evidence and thus disprove the plaintiff's claim that it was more likely than not that discrimination played a role in defendant's actions"

(*Bennett v Health Mgt. Sys., Inc*., 92 AD3d 29, 37 [1st Dept 2011]).

The plaintiff concedes that the defendant provided him with the following reason for terminating his employment

> "[o]n January 1, 2020, we received an official complaint of sexual harassment from two of your former students/company members. After a careful review of these reports we have made a decision to terminate your employment, effective immediately."

The plaintiff contends that the defendant discriminated against him on the basis of race and sex because the complainants were white women, while he is an African-American male. It is unclear from the complaint whether he believes that two complainants identified by the defendant included the anonymous person who posted on Instagram. The plaintiff alleges no other fact from which a finder of fact could draw a reasonable inference that the basis for the termination of his employment was anything other than complaints of sexual harassment made against him, which would be sufficient cause for an employer to terminate an employment contract for a term of months, regardless of the race or sex of the employee (*see Traviglia v Fleet Bank, N.A*., 219 AD2d at 644; *see generally Oncale v Sundowner Offshore Services, Inc*., 523 US 75, 78-80 [1998] [Title VII of Civil Rights Act of 1964 recognizes right to recover for same-sex harassment]; *Sanderson-Burgess v City of New York,* 173 AD3d 1233, 1234 [2d Dept 2019] [NYC HRL recognizes right to recover for same-sex harassment]). In other words, the complaint fails to allege facts sufficient to make out a claim that the termination of the plaintiff's employment was effectuated, at least in part, because he is male and African-American. In light

of the foregoing, the plaintiff has failed to state a cause of action to recover for violation of the Executive Law or the NYC HRL.

"In order to establish a claim for negligence, a plaintiff must show that the defendant owed the plaintiff a duty and breached that duty, and that the breach proximately caused the plaintiff harm" (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]; *see Kenney v City of New York*, 30 AD3d 261, 262, 817 NYS2d 264 [1st Dept 2006]). "The existence of a duty depends on the circumstances, and the issue is one of law for the court; 'the court is to apply a broad range of societal and policy factors'" (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d at 459, quoting *Hayes v Riverbend Hous. Co., Inc*., 40 AD3d 500, 500 [1st Dept 2007]).

The plaintiff alleges that the defendant not only had a duty to investigate the allegations of sexual harassment made against him (*see generally Herlihy v Metro. Museum of Art*, 214 AD2d 250, 256 [2d Dept 1995]), but also a duty to conduct the investigation in a particular manner before terminating his employment. He thus alleges that the defendant's failure to interview him and hear his side of the story before terminating his employment constituted a breach of that duty proximately causing him injury. The plaintiff has cited, and research has revealed, no authority for the proposition that a private employer must interview a person accused of sexual harassment if the employer finds the allegations against the employee credible, or must accept the employee's denials even where an interview is conducted. Moreover, the substance of the claim actually implicates only whether the defendant breached the plaintiff's employment contract, not whether the defendant is liable to him in tort for the manner in which it concluded that termination was warranted. Consequently, the negligence cause of action must be dismissed for failure to state a cause of action.

The court notes that the defendant submitted, with its motion papers, copies of complaints in four other actions commenced by the plaintiff against four other dance studios at which he worked, in which he made allegations against those former employers virtually

identical to those that he makes in this action. Inasmuch as the defendant does not provide any evidence as to how these other actions were resolved, if at all, the submission is of no precedential value and has no preclusive effect. The submission is of no evidentiary value either, inasmuch as the complaints do not contain judicial admissions, and seem relevant only to the characterization of the plaintiff as a "serial litigator" who is unworthy of belief; the court declines to draw any inference from the pendency of any of those actions, and premises its determination solely on the allegations set forth in the instant complaint.

The plaintiff's remaining contentions are without merit.

Accordingly, it is,

ORDERED that the defendant's motion to dismiss the complaint is granted to the extent that the plaintiff's claims to recover for mental anguish, emotional distress, injury to reputation, and consequential damages, as set forth in the first cause of action, are dismissed, the second, third, and fourth causes of action are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/14/2021
DATE

JOHN J. KELLEY, 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**