Winiarski v Butler
2021 NY Slip Op 31009(U)
March 31, 2021
Supreme Court, New York County
Docket Number: 151858/2020
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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STEPHEN WINIARSKI,

Plaintiff,

- v -

JOHN BUTLER, MATTHEW SCHIMENTI, SCHIMENTI CONSTRUCTION COMPANY, LLC

Defendant.

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INDEX NO. 151858/2020

MOTION DATE 09/21/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for DISMISS.

This is an action for defamation and tortious interference with business relations. The plaintiff, Steven Winiarski, was employed as a project manager for defendant Schimenti Construction Company, LLC ("Schimenti") for approximately four years. Defendant Matthew Schimenti is the President and Chief Executive Officer of Schimenti and defendant John Butler is a senior project manager.

The plaintiff claims he was fired by Schimenti as the result of a dispute between Schimenti and its largest retail client, Target. According to the complaint, Schimenti would regularly engage in the practice of renegotiating the price charged by its subcontractors after the subcontractor's bids had already been approved by Schimenti's client. Schimenti would pocket the difference between the price paid by the client and the renegotiated and reduced price paid to the subcontractor. This practice was referred to as a Buyout. According to the plaintiff, Schimenti's contracts with Target did not permit Buyouts. Yet, the defendants engaged in Buyout practices on Target projects for many years. The plaintiff alleges that had this practice

been discovered, Target could have clawed back millions of dollars of overpayments to Schimenti.

At some point, Target was alerted by one of its subcontractors that had been approached about a Buyout on one of Schimenti's projects for Target. The complaint alleges that when Target confronted Schimenti about this, the defendants lied and made the plaintiff a scapegoat for their own misconduct. Specifically, the complaint alleges that the defendants falsely informed Target that Mr. Winiarski's communications with subcontractors regarding Buyouts were "not authorized" and that Mr. Winiarski was acting as a "rogue project manager." These allegations were repeated both inside and outside the company by defendant Butler. Defendants also allegedly falsely informed Target that Schimenti had already terminated the plaintiff's employment because of his actions. In fact, the plaintiff remained an employee and was not fired until over a month later.

The complaint also alleges numerous specific allegations concerning the defendants directing the plaintiff and other employees to engage in Buyouts on Target projects. The plaintiff claims that all Buyouts were initiated at the direction of defendant Butler and the plaintiff had no knowledge of or basis to believe that the Buyouts were prohibited by the defendants' contracts with Target. The complaint alleges that because of the defendants' false and defamatory statements to Target, the plaintiff is effectively blacklisted from the retail construction industry and cannot find employment. The plaintiff brings this action alleging defamation and tortious interference with business relations. The defendants now move to dismiss the complaint pursuant to CPLR §3211(a)(7) on the ground that it fails to state a valid cause of action.

Pursuant to CPLR § 3211(a)(7), a party may move to dismiss one or more causes of action asserted in a complaint on the ground that they fail to state a valid cause of action. In determining whether a cause of action is sufficiently pled so as to withstand a motion to dismiss, the court must accept the complaint's factual allegations as true, according to the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Amsterdam Hospitality Grp., LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]). However, allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible are not presumed true (*see Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Defendants argue that the complaint is really a disguised claim for wrongful termination or abusive discharge of an at-will employee, which is impermissible under New York law. Absent a constitutionally or statutorily impermissible purpose or a limiting contractual provision, New York law does not permit courts to impair the right of an employer to terminate an at-will employee (*see Smally v Dreyfus* Corp., 10 NY3d 55, 58 [2008]; *Horn v N.Y. Times,* 100 NY2d 95, 92 [2003]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305 [1988]). This principle has consistently been applied by the courts in an extremely strict manner to the point of refusing to recognize any exceptions from or alternatives to this policy, absent further legislative recognition of such claims (*see Smally*, 10 NY3d at 58, *Murphy*, 58 NY2d at 300). As a result, courts have prohibited the use of other causes of action such as defamation or tortious interference as a means to bootstrap or bypass an otherwise invalid wrongful termination or abusive discharge claim (*see Murphy,* 58 NY2d at 300). *Murphy* held that because at-will employees "may be freely terminated ... at any time for any reason or even for no reason," they

can neither challenge their termination in a contract action nor "bootstrap" themselves around this bar by alleging that the firing was in some way tortious. (*Id.*).

As exemplified by the cases cited in the defendants' brief, New York courts have consistently applied the at-will employment doctrine in dismissing tort claims, including claims for defamation and/or tortious interference with business relations, by finding that such claims were actually impermissible surrogates for claims for wrongful termination (*see e,g,*, *Ranieri v Lawlor*, 211 AD2d 601, 601 [1st Dept 1995] ["[P]laintiff's claims for defamation [was] properly dismissed because such [cause] of action may not be interposed as a means of circumventing this jurisdiction's continuing refusal to recognize a cause of action for wrongful discharge"]; *Ullman v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994] ["[T]he [cause] of action for ... defamation ... merely constitute[s] an improper attempt by the plaintiff to circumvent the traditional at-will employee rule"]; *Brooks v Blue Cross of Ne. N.Y., Inc.*, 190 AD2d 894, 895 [3d Dept 1993] [complaint dismissed as the alleged acts of the employer were too closely related to the termination of the plaintiff to stand as a distinct cause of action in tort]; *McEntee v Van Cleef & Arpels, Inc.,* 166 AD2d 359 [1st Dept 1990] ["[P]laintiff's first cause of action [for defamation] was properly dismissed as merely a common law cause of action in tort for abusive or wrongful discharge based upon the termination of an at-will employment. Such an action may not be maintained under New York law"]).

The allegations in the complaint describe how the plaintiff was made a scapegoat with Target for the allegedly prohibited Buyout and was ultimately terminated because of it. Given that the plaintiff is seeking damages for lost compensation and lost career and employment prospects, the defendants maintain that all his claims flow from his wrongful termination and not

from any other claim. Based on the above referenced caselaw and the specific allegations in the complaint, the Court is constrained to agree.

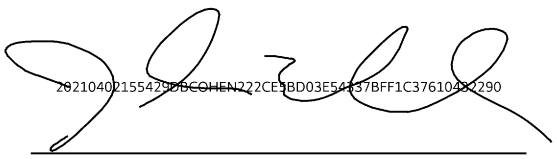
The complaint clearly alleges that the plaintiff was terminated not as a result of any misdeed or impropriety on his part but because he was made a scapegoat. The plaintiff's employer did this by first falsely stating that he had engaged in unauthorized Buyouts and then terminating him based on that very same alleged fabricated charge. The very statements that the plaintiff claims were defamatory and/or tortious are the same statements citied in justification of the plaintiff's termination and the plaintiff's causes of action, stripped of all artifice, are inextricably intertwined with his termination (*see Brooks* 190 AD2d at 895; *see also Baker v Guardian Life Ins. Co. of Am.*, 12 AD3d 285 [1st Dept 2004]; *Larson v Albany Med. Ctr.,* 252 AD2d 936, 937-938 [3d Dept 1998]). Plaintiff's claims, taken as true, cannot be maintained without vitiating the termination at-will rule and modifying the employee-employer balance of power in a manner the Court of Appeals has determined is best left to the Legislature (*see Murphy*, 58 NY2d at 302 ["If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants."]).

In opposition to the motion, the plaintiff attempts to distinguish the above-cited cases. The only arguably distinguishing factor cited by the plaintiff is the fact that some of the cited cases involve allegedly defamatory comments made about the at-will employee after he was terminated and/or as a justification for terminating him, whereas here the plaintiff was not terminated until over a month after the defendants allegedly told Target that he was a rouge project manager who had engaged in unauthorized Buyouts. This is a distinction without a

difference, particularly given the short period of time between the statements and the plaintiff's termination. In *McEntee,* the plaintiff alleged he was terminated because of defamatory statements made by his employer to unidentified persons (*see McEntee,* 166 AD3d at 359-360). The court dismissed the defamation and tortious interference claims, finding them to be an "outgrowth" of a wrongful discharge claim (*see id.*). Similarly, the plaintiff attempts to distinguish this case by highlighting the allegations that he was deliberately made a scapegoat to cover up wrongdoing by the defendants. This argument only serves to further demonstrate the fact that the alleged acts of the defendants are too closely related to the alleged wrongful termination to stand as any distinct causes of action or claims (*see Brooks*, 190 AD2d at 895). Indeed, stripped of all labels, these claims are virtually identical to claims for wrongful termination and unlawful discharge and cannot be sustained (*see Larson*, 252 AD2d at 937-938)

Given the above finding, the Court need not consider the defendants' other arguments for dismissal. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and the complaint is hereby dismissed, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs.



3/31/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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