SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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CHERYL OVERTON,

Plaintiff,

- v -

EGAMI GROUP INC.,EGAMI CONSULTING INCORPORATED, THE CUSP INFLUENCER NETWORK LLC,DREAM VENTURES INC, TENESHIA JACKSON-WARNER, MICHAEL

Defendant.

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INDEX NO. 657185/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL.

The motion to dismiss the fourth, fifth and sixth causes of action and for sanctions is granted in part and denied in part.

Background

Plaintiff contends that she is a public relations expert who was hired by defendant Egami in April 2018 as President. She insists that the terms of the employment agreement included a 12-month non-competition clause and a 6-month severance payment in the event that plaintiff was fired. Plaintiff argues that the agreement also provided that she would earn equity in Egami (a public relations firm).

Plaintiff alleges that she was told verbally on December 20, 2019 that she was terminated and the parties began to discuss the terms of her separation. She maintains that defendants never compensated her in accordance with the employment agreement, including both the equity and

the severance payment. Plaintiff also complains that her likeness was used from December 2019 through March 2020 despite the fact that she was no longer with the company. She contends that the only written agreement that ever went into effect was the original employment agreement.

Defendants move to dismiss the Labor Law claims against her as well as plaintiff's claim for legal fees under the Labor Law. They argue that section 191 of the Labor Law excludes executive employees and that section 193 only applies to deduction from wages, which is not alleged here. Defendants also argue that Labor Law §§ 195 and 217 fail because plaintiff allegedly received timely notice about the date of her termination and the date on which her benefits ended.

Defendants also argue that sanctions are appropriate because these Labor Law claims are fundamentally flawed and no reasonable attorney would ever allege them under these circumstances.

In opposition,[1] plaintiff insists that defendant Jackson-Warner is the founder of Egami and that she was the CEO as well as majority shareholder. Plaintiff argues that despite her title as president, she did not have the power to hire and fire employees, and if she wanted to terminate an employee, it would have to be evaluated by a five-member committee. Plaintiff disputes that any employee actually reported to her and claims that defendant Jackson-Warner and her husband, Michael Warner, exerted control over the company.

Plaintiff points out that a determination as to whether she was an executive cannot be determined as a matter of law on this motion. She maintains that she did not receive an exact

[1] The Court observes that plaintiff's memo of law in opposition appears to exceed the permitted word limit and does not contain a certificate of compliance as required under 22 NYCRR 202.8-b. The Court will overlook this error in this instance but reminds both parties that compliance with this rule is expected for future motions.

date for her termination and the date suggested was only proposed. Similarly, plaintiff claims that she was provided with options for her health insurance coverage rather than exact language.

In reply defendants insist that Egami is not a small or obscure business and disputes plaintiff's characterization of her position as a mere employee instead of an executive.

Background

"It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Street Realty Corp.*, 104 AD3d 401, 403, 960 NYS2d 404 [1st Dept 2013] [internal quotations and citations omitted]).

On a "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Labor Law §§ 191, 193- Sixth Cause of Action

The Court dismisses this cause of action. Plaintiff is correct that the Court of Appeals has held "that executives are employees for purposes of Labor Law article 6, except where expressly excluded" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616, 861 NYS2d 246 [2008]). However, the Court of Appeals also stressed "that employees serving in an executive, managerial or administrative capacity do not fall under section 191 of the Labor Law" (*id.*).

The language of Labor Law § 191 makes that clear—it mentions specific types of jobs and the only applicable category that would apply to plaintiff (clerical or other worker) expressly excludes "any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week" (Labor Law § 190[7]).

Although plaintiff contends that she was not an executive, the complaint suggests that her salary was $300,000 per year and that she was hired to be Egami's president (NYSCEF Doc. Nos. 1, ¶¶ 15, 35). The employment agreement attached by plaintiff states "all business functions of the company will report to the President including Sales, Marketing, Client Services, Business Operations, Innovation and Finance" (NYSCEF Doc. No. 2). These documents demonstrate that plaintiff has failed to state a cause of action under Labor Law §191 because she was a bona fide executive or, at the very least, working in an administrative capacity by serving as president of the company, having multiple departments report to her and she made significantly more than $900 per week.

Plaintiff's attempt, in her affidavit in opposition, to characterize her role as merely an "integrator" is not sufficient to compel a different conclusion. She admits that she led, managed and held the leadership team accountable and, if there was "a stalemate in decision making, the Integrator would serve as tie breaker" (NYSCEF Doc. No. 14, ¶¶ 4-5). Plaintiff's attempt to minimize her role in the *leadership team* does not raise an issue of fact with respect to whether she was an executive.

That the employment agreement noted that the president would report to a board, which included the CEO, does not save this claim. Executives, even CEOs, often report to a board of directors or shareholders (at least in publicly traded companies). But that does not mean they are no longer executives. In order to find that plaintiff was a mere employee, it would require the

Court to ignore her title, her stated job responsibilities and high salary. The Court cannot suspend disbelief in that manner. If the president of a company is not an executive, then that term (as far as the Labor Law is concerned) would cease to have any meaning.

The Court also dismisses the Labor Law § 193 portion of the claim because that section relates to deductions from wages rather than a employers' failure to pay certain compensation. As defendants point out, plaintiff did not cite a case that held that a plaintiff could rely on this section based on the failure to pay a severance or grant an equity stake. Simply put, the Court finds that this provision is inapplicable to the circumstances described by plaintiff. This section of the Labor Law prohibits deductions, except for certain permissible deductions such as those for health insurance premiums or pensions. Clearly, the purpose of this provision is to ensure that an employer only takes out money from paychecks for certain purposes. It was not intended to allow a plaintiff to cite this section when severance payments were allegedly not paid.

Labor Law Sections 195(6) and 217- Fourth Cause of Action

The Labor Law requires that an employer "notify any employee terminated from employment, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination. In no case shall notice of such termination be provided more than five working days after the date of such termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty pursuant to section two hundred seventeen of this chapter" (Labor Law § 195[6]). Labor Law § 217 requires that an employee whose job has been terminated shall provided the exact date of the cancellation of their health insurance.

Defendants point to a letter dated December 18, 2019 that states that plaintiff's employment with Egami would end on December 20, 2019. However, plaintiff denies receiving

this letter and, instead, claims that she was told at a meeting on December 20, 2019 that she was being fired. Plaintiff admits she received "an unmarked piece of paper with bullet points summarizing the proposed terms of separation" (NYSCEF Doc. No. 14, ¶ 10). Plaintiff also says that she was told on that same day, December 20, 2019, that her health benefits would expire on December 31, 2019.

The Court grants this branch of the motion. Plaintiff admits that she received the December 23, 2019 letter from defendant's agent TriNet (a third party hired to handle employment matters such as termination) (NYSCEF Doc. No. 9, exh B). This letter states that plaintiff's employment benefits were due to expire on December 31, 2019 due to the end of plaintiff's employment (*id*.). Although she claims she got it on December 30, 2019, this means she knew that she was losing her benefits on a date certain and that she had lost her job.

Plaintiff's claim that she did not receive the December 18, 2019 letter stating that she was being fired does not save this cause of action. The facts here suggest that plaintiff knew she was fired on December 20, 2019, she admits she cleaned out her office on December 23, 2019 and received a check for her unused vacation time on that same day. Plaintiff's complaints appear to be that neither she nor anyone at defendants engaged in a discussion about her benefits or the terms of the separation. But that dissatisfaction does not support a Labor Law claim.

On the facts as alleged by plaintiff, the Court is unable to conclude that there was any confusion about the fact that plaintiff was fired on December 20, 2019. The instant dispute centers on the terms of that separation and whether she is entitled to receive certain payments and benefits described in her employment agreement.

As the Court has dismissed the Labor Law claim, plaintiff is not entitled to legal fees pursuant to the Labor Law.

Sanctions

The Court denies the branch of defendants' motion that seeks sanctions. Simply because the Court agrees with defendants' arguments does not render plaintiff's claims as worthy of sanctions. Plaintiff described a company which she believed was controlled by others despite her title as president. Although the Court finds that plaintiff was a bona fide executive under the Labor Law, plaintiff was entitled to allege claims under the Labor Law based on her view of the company's structure. In other words, sanctions are not warranted because defendants fervently believe that their arguments were correct. In this Court's view, sanctions are only appropriate where the behavior is outrageous and the claims alleged are so frivolous that no one could justify asserting them. That is not the case here.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is granted to the extent that it sought to dismiss the fourth, fifth and sixth causes of action and denied as to the remaining relief requested and defendants are directed to answer pursuant to the CPLR.

Remote Conference: June 17, 2021.

4/5/2021
DATE

ARLENE P. BLUTH, 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