

**Lively v Wafra Inv. Advisory Group, Inc.**

2022 NY Slip Op 30159(U)

January 21, 2022

Supreme Court, New York County

Docket Number: Index No. 154121/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Francis P. Lively

INDEX NO. 154121/2021

- v -

Wafra Investment Advisory Group, Inc. et al

MOT. DATE

MOT. SEQ. NO. 001

The following papers were read on this motion to/for

- Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits
NYSCEF DOC No(s).
NYSCEF DOC No(s).
NYSCEF DOC No(s).

This is an action for employment discrimination on the basis of advanced age. Defendants now move to dismiss pursuant to CPLR 3211[a][4] and [7]. Plaintiff opposes the motion and cross-moves to disqualify plaintiff’s counsel pursuant to New York Rule of Professional Conduct 3.7. For the reasons that follow, the motion is granted and the cross-motion is denied as moot.

Since the motion to dismiss necessarily impacts the future of this action and its disposition may render the cross-motion moot, the court will consider it first. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (id. citing Morone v. Morone, 50 NY2d 481 [1980]; Rovello v. Orofino Realty Co., 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(4), the court may dismiss one or more causes of action on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires”.

Plaintiff Francis P. Lively alleges that he was a “stellar employee” for defendant Wafra Investment Advisory Group, Inc., a/k/a Wafra, Inc. (“Wafra”) for over two decades until in 2017 when defendant Fawaz Al-Mubarak became CEO. Plaintiff claims that Al-Mubarak “was possessed with a deep-seeded prejudice against employees of advancing age” and “[o]n this basis, Lively was terminated by Wafra on May 1, 2018.” Plaintiff claims that he was shocked when he received a letter from Wafra’s HR Director notifying that he was suspended without pay on April 30, 2018. The next day, plaintiff received another letter from Wafra’s Chief Administrative Officer “informing him that he was terminated for purportedly violating company policies and the code of ethics prohibiting sex discrimination and harassment in the workplace.” Plaintiff claims that the sexual harassment complaint against him was a “manufactured basis for Lively’s termination” and “nothing more than a pretext to fire him for being an order worker.” As

Dated: 1/21/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

for the complainant, plaintiff claims that she “regularly and voluntarily solicited Lively’s involvement in her personal and professional life. Lively had no reason to believe that their interactions were anything but welcomed by the Alleged Complainant, who purposely pursued the friendship and the business mentoring relationship, including actively lobbying in 2016 and being vetted by Wafra human resources for a new position reporting directly to Lively.”

As proof of defendants’ discriminatory animus, plaintiff alleges that beginning with Al-Mubarak’s appointment as CEO in June 2017, Al-Mubarak “began making negative comments about Lively’s age” and “[i]n meetings with Wafra executives and others, Al-Mubarak stated that Lively (and other senior executives) was too old and that he would seek to replace Lively (and them) with younger counterparts.” Plaintiff further alleges that on November 13, 2017, at an after-hours gathering at Wafra’s offices, Al-Mubarak “casually stated to Lively’s son that Wafra needed to replace older employees like his father with younger employees like Lively’s son.”

Plaintiff asserts causes of action for age discrimination and retaliation under the New York State Human Rights Law, Executive Law § 296, *et seq.* (the “State HRL”) New York City Human Rights Law, N.Y.C. Admin Code § 8-101, *et seq.*, (the “City HRL”) (the first through fourth COAs) as well as for tortious interference with prospective business or contractual relations (fifth COA), defamation *per se* (sixth COA), negligence (seventh COA), unjust enrichment (eighth COA) and quantum meruit (ninth COA).

Defendants dispute plaintiffs’ allegations and claim that plaintiff was terminated following complaints from plaintiff’s direct report of sexual harassment and discrimination by plaintiff.

Although plaintiff fails to mention it in his complaint, he previously commenced a federal action for discrimination against the defendants in the United States District Court, Southern District of New York (19-CV-3257). In an opinion and order dated July 17, 2020 (this action was commenced April 28, 2021), Judge Paul Oetken granted defendants’ motion to dismiss plaintiff’s federal claims and declined supplemental jurisdiction over plaintiff’s remaining state and city claims. Judge Oetken found that plaintiff had failed to state a claim, specifically stating:

Furthermore, the nearly six months that passed between Lively’s reporting Al-Mubarak’s age-related comment in November 2017 and Lively’s termination in May 2018 — especially in light of Al-Mubarak’s intervening praise for “Lively’s substantial contributions and exceptional work” (Compl. ¶ 11) — undermines any plausible inference of causation arising from the “temporal proximity to the protected activity.” ...

Once again, the only plausible conclusion to be drawn from the facts in the complaint, as supplemented with facts from the answer, is that Lively was terminated as a result of his violation of WAFRA’s policies prohibiting sexual harassment and discrimination. Because Lively has not plausibly alleged that his having engaged in a protected activity was a “but-for” cause of his termination, Defendants’ motion for judgment on the pleadings on Lively’s ADEA retaliation claim is granted.

Thus, Judge Oetken granted defendants judgment on the pleadings and denied plaintiff’s motion for leave to amend. Defense counsel has since advised the court that the Second Circuit recently affirmed Judge Oetken’s decision, finding that his age discrimination claims were properly dismissed (Docket No. 20-2709, July 23, 2021). A copy of that decision has been provided to the court, which held in relevant part that plaintiff had failed to plausibly prove that he would not have been terminated but for his age.

The court agrees with defendants that plaintiff has failed to state any *prima facie* claim. The court will consider each cause of action in turn.

### Discrimination

Assuming *arguendo* that the Second Circuit decision which constitutes a final disposition on the merits of plaintiff's age discrimination claims does not collaterally estop him from bring such claims under the State and City HRLs, plaintiff has nonetheless failed to state a *prima facie* cause of action.

A *prima facie* case of discrimination requires a showing by the plaintiff that: [1] he is a member of a protected class; [2] he was qualified to hold the position; [3] he was terminated from employment or suffered another adverse employment action; and [4] the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). A plaintiff claiming retaliation under either the State or City HRL "must allege that . . . there was a causal connection between the protected activity and the adverse action" (*Fletcher v. Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]).

As in the federal action, plaintiff has again failed to allege sufficient facts to support his discrimination and retaliation claims. While "an employer need not engage in a consistent pattern of discrimination in order to discriminate against someone based upon their protected status" (*Melman v. Montefiore Medical Center*, 98 AD3d 107 [1st Dept 2012]) mere comments without any causal relationship to the adverse action does not give rise to the inference of discrimination (*Forrest v. Jewish Guild for the Blind*, 3 NY3d at 308; see also *Mete v. New York State Office of Mental Retardation and Developmental Disabilities*, 21 A.D.3d 288, 294 [1st Dept. 2005]). Indeed, like in the now-dismissed federal action, plaintiff again alleges that that "Al-Mubaraki[] recognized Lively's substantial contributions and exceptional work by email in 2017, and again in 2018, during Lively's annual formal evaluation", which undercuts the claims of discriminatory animus al-Mubaraki allegedly manifested at unspecified meetings with unspecified individuals and in a casual comment to plaintiff's son. Plaintiff's failure to allege sufficient facts which would give rise to an inference of discrimination warrants dismissal of his first through fourth causes of action (see *i.e. Askin v. Dep't of Educ. of the City of N.Y.*, 110 AD3d 621, 621-22 [1st Dept 2013]). Accordingly, defendants' motion to dismiss these claims is granted.

### Tortious interference with prospective business or contractual relations

To state a claim for tortious interference with prospective business relations, the plaintiff must allege that (1) he had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009]; see also *Carvel Corp. v. Noonan*, 3 NY3d 182 [2004]). The potential business and contractual relationships with which Lively alleges defendants interfered with are conclusory. Plaintiff simply lists a number of entities and claims that he "had a reasonable expectation to enter into contracts with these potential investors and acquire properties for investment and management, with the probability of substantial future economic benefit to Lively." Plaintiff has failed to allege sufficient facts which would establish his business relationships with any of the entities he listed or that the defendant knew of these particular relationships. Further, plaintiff has wholly failed to allege that the defendants acted solely out of malice or used improper or illegal means. Accordingly, the fourth cause of action is severed and dismissed.

### Defamation *per se*

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] cert denied 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation per se (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon, supra* at 38).

Here, plaintiff has failed to allege his defamation claim with particularity. Instead, he only asserts that “Wafra, acting by and through its employees and its counsel, made defamatory statements that directly impugned the integrity and reputation of Lively. Waka knew or should have known that these statements were false, and it was not privileged to make them.” Such allegations are insufficient and therefore the sixth cause of action is also severed and dismissed.

#### Negligence

Plaintiff cannot sue his employer for negligence because the New York Workers’ Compensation Law, provides “the exclusive remedy to an employee . . . when such employee is injured . . . by the negligence or wrong of another in the same employ” (Workers’ Comp. Law §§ 29[6], 11; see *i.e. Jean-Louis v. Hilton Hotels Corp.*, 68 AD3d 406 [1st Dept. 2009]). Nor has plaintiff demonstrated an exception to the exclusive remedy provisions of the Workers’ Compensation Law (*Jean-Louis, supra*). Accordingly, the seventh cause of action is severed and dismissed.

#### Unjust enrichment and *quantum meruit*

An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff’s expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]).

A cause of action for quantum meruit has four elements: “[1] the performance of services in good faith, [2] the acceptance of the services by the person to whom they are rendered, [3] an expectation of compensation therefor, and [4] the reasonable value of the services” (*Fulbright & Jaworski, LLP v. Carucci*, 63 AD3d 487 [1st Dept 2009]).

Plaintiff’s allegations are woefully insufficient to demonstrate either cause of action. As an employee, he has failed to allege what he would be entitled from his former employer to that defendant should not be permitted to keep and/or he was expected to be compensated for. Accordingly, the eighth and ninth causes of action are dismissed.

#### Remaining issues

In light of the court’s dismissal of the complaint, the cross-motion to disqualify is denied as moot.

### CONCLUSION

Accordingly, it is hereby

**ORDERED** that defendants’ motion to dismiss is granted in its entirety, plaintiff’s complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the cross-motion is denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 1/21/22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.