

Overton v Egami Group Inc.

2023 NY Slip Op 30704(U)

March 7, 2023

Supreme Court, New York County

Docket Number: Index No. 657185/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

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, N/A

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for RENEWAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 109, 110

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Motion Sequence Number 004 and 005 are consolidated for disposition.

Plaintiff’s motion to renew (MS004) is denied and plaintiff’s motion (MS005) to amend is denied.

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.

Plaintiff seeks to renew a decision issued by this Court on April 5, 2021 in which it found that plaintiff had no cause of action under Labor Law § 193. She insists that the legislature changed the law regarding the “no deduction from wages” theory via legislation that took effect on August 19, 2021. Plaintiff maintains that this change in the law constitutes a valid basis for renewal and that plaintiff should now be able to pursue a Labor Law § 193 claim.

In motion sequence 005, plaintiff seeks to amend her complaint to add a cause of action under Labor Law § 193 under the theory that the new legislation (the No Wage Theft Loophole Act) permits her a cognizable theory of recovery against defendants.

In opposition to both motions, defendants point out that plaintiff perfected an appeal to the First Department after the new legislation was effective and that she has lost every effort to appeal. They point out that the First Department denied her appeal for reasons unrelated to the amended statute and her attempt to reargue before the First Department and to seek leave to appeal to the Court of Appeals were all denied. Defendants stress that this issue only pertains to the fifth cause of action as the other Labor Law claims related to different provisions.

Defendants observe that plaintiff failed to mention any of the appellate history of this issue despite the fact that the amendment of Labor Law § 193 was part of the appeal. They complain that plaintiff cannot seek to amend based upon a legal theory that has already been

rejected. Defendants also observe that the first amended complaint seeks to add an additional defendant despite the fact that the moving papers do not address the justification for this request at all. They also maintain that plaintiff changed the substance of two other paragraphs as part of an apparent effort to reconfigure her claims.

Defendants also contend that to the extent plaintiff seeks to add a claim for conversion, that request should be rejected and plaintiff did not include a claim for conversion in the proposed first amended complaint (it is only in the motion papers). They also contend that the entire motion should be denied because plaintiff is seeking this relief only after defendants deposed plaintiff.

In reply, plaintiff insists the new claims in the amended pleading do not constitute unfair surprise. She insists that defendants failed to show any unfair prejudice from the motion for leave to amend. Plaintiff emphasizes that she chose to appeal various orders but that the change in the law should compel the Court to grant renewal.

Discussion

The Court denies the motion that seeks renewal. As defendants point out, plaintiff pursued an appeal of this Court's decision. The First Department denied her appeal and found that "The Labor Law § 193 claim fails to allege an unlawful deduction from wages. The complaint fails to state a cause of action under Labor Law § 193. Defendants' alleged failure to compensate plaintiff for keeping her likeness on their website until March 2020 to attract business does not give rise to a wage claim for labor or services rendered. Plaintiff's claim that defendants failed to grant her equity depends on defendants' overall financial success and thus 'lacks the direct relationship between [her] own performance and the compensation to which

[she] is entitled contemplated by Labor Law article 6” (*Overton v Egami Group, Inc.*, 201 AD3d 455, 455 [1st Dept 2022], *lv to appeal dismissed*, 38 NY3d 1177 [2022]).

The First Department and the Court of Appeals have already rejected plaintiff’s efforts to revive her Labor Law § 193 claim and these denials occurred long after the effective date of the new legislation upon which the motion to renew is based. This Court sees no reason to modify its decision under these circumstances.

The Court also denies the motion for leave to amend. The Court observes that, for some reason, plaintiff decided to upload two different versions of the proposed amended complaint (compare NYSCEF Doc. No. 90 with NYSCEF Doc. No. 110). As part of their opposition, defendants pointed out that the proposed amended complaint (NYSCEF Doc. No. 90) did not contain an additional cause of action for conversion, although plaintiff mentioned this cause of action in her moving papers. A review of that document confirms that observation. However, plaintiff decided to upload in reply for the first time another proposed amended pleading that now has a conversion cause of action (NYSCEF Doc. No. 110). And plaintiff’s reply does not appear to mention that she was uploading a completely different amended pleading. Instead, she alleges that she can submit an amended complaint in reply “to remedy any defect” before insisting that she attached “again” the “entire amended complaint.” But there is no dispute that the amended complaint attached to the moving papers does not contain a conversion claim and the one included with the reply has such a cause of action.

This Court cannot grant a motion for leave to amend where the movant has uploaded two different versions of the proposed amended pleading – the first version which was criticized by the defendant and the second version which was submitted in reply (where defendant could not respond). Of course, defendants should have an opportunity to address the actual amended

pleading proposed by plaintiff. And while the Court noticed at least one glaring difference, it is not this Court’s role to review two nearly 30-page documents to assess what other differences were included between these two proposed amended pleadings.

The Court recognizes defendants’ frustration with plaintiff’s motion, which doesn’t even include what the Court noticed – that plaintiff attached a different proposed amended complaint in reply. But defendant did not make a cross-motion for sanctions and there has been no hearing where plaintiff would have a chance to explain her behavior; therefore, the request for sanctions is denied.

Accordingly, it is hereby

ORDERED that plaintiff’s motions to renew and to amend are both denied.

Next Conference April 27, 2023 (*see* NYSCEF Doc. No. 93).

<u>3/7/2023</u> DATE			<hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED		<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE