SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES **PART** 59

Justice

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ALONZO WILLIAMS,

Plaintiff,

- v -

GENMILL LLC d/b/a BRICKHOUSE NYC,

Defendant.

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INDEX NO. 652706/2020

MOTION DATE 01/05/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 21

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

Plaintiff alleges that he had an oral employment agreement with defendant to teach dance for a one year term under which his compensation was a function of the number of students he taught per dance class. Plaintiff alleges that defendant breached such agreement when it wrongfully terminated him six

months before the expiration of such one year term (NYSCEF Document Number 8, Complaint, First Cause of Action-Breach of Contract).

Plaintiff also alleges that defendant libeled and defamed him by publishing false accusations of sexual conduct made against him by anonymous female instructors employed by plaintiff (NYSCEF Document Number 8, Complaint, Second Cause of Action-Libel and Defamation).

In addition, plaintiff claims that defendant also violated his rights under the Executive Law (Human Rights Law) § 296, in that defendant terminated his employment, based on false accusations of sexual misconduct that were motivated by gender animus (NYSCEF Document Number 8, Complaint, Third Cause of Action, Gender Discrimination).

Finally, plaintiff asserts that defendant should be cast in damages for defendant's negligence in investigating the accusations of sexual misconduct, which were false (NYSCEF Document Number 8, Complaint, Fourth Cause of Action-Negligence.)

With respect to his first cause of action for breach of contract, plaintiff does not allege any "meeting of the minds" between the parties as to compensation or a minimum guarantee thereof, let alone a minimum amount of instruction that he promised to render thereunder. Plaintiff claims that he is

entitled to compensation in an amount that is derived from the average renumeration he received for students per classes that he actually taught during the first six months of his employment.[1] However, he does not allege that there was any agreement that he would be paid the average of his monthly earnings for the duration of the contract or that he performed any services during the six months period that remained under that agreement, thereby earning the reasonable value of his services for that six months period. Therefore, such allegations insufficiently plead a cause of action for either breach of an oral employment agreement, plaintiff having failed to allege a meeting of the minds on all essential terms of such contract (see Marraccini v Bertelsmann Music Group Inc, 221 AD2d 95, 97 [3d Dept 1996]), or for quantum meruit.

As to his second cause of action seeking damages against defendant for libel and slander, plaintiff alleges in his complaint that on January 9, 2020, defendant defamed him in transmitting a mass email to customers of defendant, which stated:

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[1] In his complaint, plaintiff alleges that he earned an average of $1,000 per month from defendant for the period of September 2019 through January 2020. Such assertion is belied by the IRS Form 1099 showing total earnings of $3,233.00 during calendar year 2019 (NYSCEF Document Number 9), which reflects an average monthly payment of $250, which Form 1099 was generated by defendant.

> We are writing to address recent accusations against one of the open class teachers at Brickhouse NYC. We take allegations like these very seriously. After much thought and many conversations, we have decided to remove Alonzo from our teaching calendar. Please know that our X Factory family and our dance community at large are our number one priority. Please let us know if you have any questions or concerns regarding this matter.

Defendant is correct that under New York law, truth is a complete defense to libel and defamation claims. See Dillon v City of New York, 261 AD2d 34, 39 (1st Dept 1999). Defendant attaches to its moving papers, the court records of the arrests of plaintiff on criminal complaints that accuse him of, on May 1, 2018 and September 25 2019, committing sexual abuse, in the second degree, and forcible touching of intimate parts in the first degree (NYSCEF Documents Nos. 10 and 11). Such records irrefutably establish the truth that at the time that defendant transmitted the subject e-mail message, "accusations", to be taken seriously, had been made against plaintiff.

Defendant is also correct that it had a common interest privilege, which extends to a "'communication made by one person to another person upon a subject in which both have an interest'", Liberman v Gelstein, 80 NY2d 429, 437 (1992). See also Present v Avon Products, 253 AD2d 183, 187-188 (1st Dept 1999). It cannot be gainsaid that defendant communicated the accusations about plaintiff to its customers, who had a corresponding interest with respect to such subject matter. Nor

has plaintiff pled sufficient facts to establish that defendant acted with malice, which is necessary to overcome the qualified common interest privilege because:

> Even a negligent investigation, without more, does not create an inference that defendant suspected the falsity of the information and purposefully avoided seeking out facts that would confirm its falsity.

Present, ibid, 253 AD2d at 188.

As to his third cause of action, plaintiff seeks damages based on his claim that defendant wrongfully terminated him in violation of Executive (Human Rights) Law § 296.

This court concurs with defendant that, as an independent contractor, plaintiff was "not eligible for protection under Executive Law § 296(1)(a)", Scott v Massachusetts Life Ins Co, 86 NY2d 429, 433 (1995). In its supporting papers, defendant submits a copy of Tax Form 1099, for calendar year 2019. Such form, as opposed to a Tax Form W2, is evidence that plaintiff was an independent contractor, not an employee of defendant. Moreover, in the complaint at bar, plaintiff alleges that defendant paid him as a function of the number of students per class that he taught, rather than an hourly, weekly or monthly salary and that his accusers were employed by him. Moreover, in the complaints in the actions entitled Williams v Star Struck Dance Inc, Index No. 150967/2020 (Supreme Court, New York County 2020) and Williams v Protect NYC Dancers, 20 CV 02684 (US Court,

SDNY 2020), plaintiff alleges that from November 2018 through January 2020, while he worked for defendant, he also worked for Broadway Dance Centers, Dance Expression and Star Struck Dance. Such judicial admissions establish that he was free to engage in other employment, thus having an unfixed schedule with defendant, contradicting any implication that he was a teacher, employed "full-time" by defendant. Assuming the truth of the material allegations of plaintiff's complaint, as this court must on defendant's motion to dismiss (Leder v Spiegel, 31 Ad3d 266, 267 [1st Dept 2006]), such claims allege only "incidental control over the results produced [by plaintiff] without further indicia of control over the means employed to achieve the results" by defendant. Plaintiff's insufficient assertions of an employer/employee relationship, as a matter of law and fact, allege that plaintiff was an independent contractor, Bynog v Cipriani Group, 1 NY3d 193, 198 [2003]). Therefore, as on the face of his complaint, plaintiff fails to allege an employee-employee relationship between the parties, his gender discrimination cause of action fails to state a claim under New York State Executive Law § 296(1)(a).

This court notes that the absence of allegations of an employer/employer relationship is fatal to plaintiff's claim pursuant to Executive Law § 296(1)(a). Had plaintiff alleged such a relationship, the remaining allegations of the complaint

as to gender discrimination would have been sufficient to allege a cognizable claim pursuant to Executive Law § 296. See Sandiford v City of New York Dept of Educ, 94 AD3d 593 (1st Dept 2012).

Finally, even assuming arguendo, that plaintiff was an employee of defendant, and that the accusers were likewise employed, there is no theory of liability, tort or otherwise, that would impose a duty, respondeat superior on defendant, as employer, to plaintiff, as an employee falsely accused of sexual misconduct. See Rausman v Baugh, 248 AD2d 8 (2d Dept 1998). A priori, since there is no such duty on the part of the employer, with respect to accusations by plaintiff's co-workers that were ultimately determined to be false, there is no duty, in tort or otherwise, that defendant employer owed to plaintiff, its alleged employee, to investigate whether the sexual misconduct accusations against plaintiff made by his alleged co-workers were falsehoods.

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3/27/2023
DATE

DEBRA A. JAMES, 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