SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK P. NERVO** **PART** **04**

Justice

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JENNA DE VITO

Plaintiff,

- v -

JIMMY YEH,

Defendant.

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INDEX NO. 152393/2023

MOTION DATE 06/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for DISMISS.

Defendant moves to dismiss the complaint pursuant to CPLR § 3211(a)(7) and for attorney's fees associated in defending this action as sanctions. Plaintiff opposes.

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v. Martinez*, 84 NY2d 83 [1994]; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action

exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

As relevant to this action, the parties' paths crossed during two periods. First, plaintiff and defendant were co-workers at Chanel until plaintiff's employment was terminated. Following her termination, plaintiff brought suit against a subordinate employee at Chanel alleging defamation, tortious interference with her employment contract, and intentional infliction of emotional distress. The Court dismissed all claims finding them duplicative, time-barred, and that they otherwise failed to state cause of action. The interested reader is referred to the decision of the Hon. Lori S. Sattler, J.S.C. for a full recitation of those claims and their disposition (*De Vito v. Carter*, NY Index No. 154689/2022 Decision and Order [Sattler, J.] [NY Sup. Ct. Jan. 6, 2023]). Plaintiff also brought an arbitration proceeding against, inter alia, Chanel and defendant Yeh; the parties have not advised of the outcome of this arbitration.

After her termination at Chanel, plaintiff became employed at Dolce & Gabbana. It was during her employment at Dolce & Gabbana that plaintiff's and defendant's path would cross a second time. Plaintiff alleges, in this lawsuit, that defendant ignored her when he was picking up a suit in the Dolce & Gabbana store where plaintiff was working on January 11, 2023. Two days

later, on January 13, 2023, defendant became employed with Dolce & Gabbana as a Vice President of Retail. Plaintiff alleges that over the next 13 days, defendant visited the retail store where she was working and ignored her. Plaintiff then resigned from her employment at Dolce & Gabbana.

Plaintiff, by way of this lawsuit, alleges defendant retaliated against her for bringing an arbitration proceeding against defendant and their former employer Chanel, tortious interference with a prospective business advantage, and intentional infliction of emotional distress.

It is undisputed that plaintiff voluntarily resigned from her employment with Dolce & Gabbana before any hiring decision had been made regarding the role she alleges she had been promised. This is fatal to plaintiff's retaliation claims that she was denied the role (*see generally, Forrest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004] a plaintiff is required to establish, inter alia, an adverse employment action to make out of prima facie showing of retaliation; *see also Bilitch v. New York City Health & Hosp. Corp*, 194 AD3d 999 [2d Dept 2021] NYCHRL requires employer engage in conduct reasonably likely to deter plaintiff from engaging in protected activity). Plaintiff's allegations that anyone retaliated against her, slighted her, or interfered with her ability to secure a new role within Dolce & Gabbana amount to mere speculation, as it is undisputed that plaintiff resigned before Dolce & Gabbana had even begun the hiring process for that role.

Assuming, *arguendo*, that plaintiff's voluntary resignation did not preclude her retaliation claims, and assuming as true plaintiff's claims that

defendant ignored her during a few occasions over an approximately two-week period, the alleged behavior can only be described as a petty slight or trivial inconvenience, not an adverse employment action for the purposes of the state or city human rights laws (*Balsamo v. Savin Corp.*, 64 AD3d 622 [2d Dept 2009]; *Minckler v. United Parcel Service, Inc.*, 132 AD3d 1186 [3d Dept 2015]; *Golston-Green v. City of New York*, 184 AD3d 24 [2d Dept 2020]).

Turning to plaintiff's claims for tortious interference with a prospective economic advantage, assuming the allegations in support of same to be true, the claim must nevertheless fail. To maintain such a cause of action, the alleged conduct must be directed at the party the plaintiff seeks to have a relationship with, not the plaintiff themself (*Carvel Corp. v. Noonan*, 3 NY3d 182 [2004]). As relevant here, plaintiff's complaint alleges defendant's conduct, namely ignoring plaintiff, was directed at her person. Furthermore, at-will employees cannot assert tortious interference with a prospective business advantage within their employment (*Barcellos v. Robbins*, 50 AD3d 934 [2d Dept 2008]).

Plaintiff's final claim, intentional infliction of emotional distress must also fail. Again, assuming plaintiff's allegations that defendant ignored her to be true, this is not extreme and outrageous conduct as required to maintain a claim for intentional infliction of emotional distress. To be extreme and outrageous, the conduct must be "utterly intolerable in a civilized community" (*Murphy v. American Home Products Corp.*, 58 NY293 [1983]; *164 Mulberry Street Corp. v. Columbia University*, 4 AD3d 49 [1st Dept 2004]). Ignoring someone is not utterly intolerable in our civilized society.

Finally, the Court turns to that portion of the motion seeking attorney's fees as a sanction for frivolous conduct. It is easy work to conclude that the entirety of this lawsuit is frivolous. Being ignored is not a cause of action. Being ignored does not create an intolerable work environment sufficient to constitute constructive discharge. Voluntarily resigning because one was ignored by a co-worker or supervisor is neither rational nor an adverse employment action. Given the foregoing, it is inescapable that the purpose of this lawsuit is to harass defendant. Accordingly, pursuant to 22 NYCRR § 130 1.1(a) et seq. the Court finds that plaintiff has engaged in frivolous behavior and that sanctions should be imposed. The Court further finds that plaintiff and plaintiff's counsel's conduct in bringing this frivolous lawsuit has substantially wasted judicial resources, in addition to wasting the resources of defendant and defense counsel. Accordingly, while this Court is empowered to impose sanctions up to $10,000.00 upon counsel for frivolous conduct, plaintiff's counsel, Milman Labuda Law Group PLLC, is sanctioned in the amount of $750.00, payable to the Client Protection Fund. Plaintiff's sanction shall comprise the reasonable attorney's fees defendant expended in defending this action, as determined by this Court at inquest.

Therefore, it is

ORDERED that the motion is granted in its entirety, and the complaint is dismissed; and it is further

ORDERED that plaintiff and plaintiff's counsel shall affix a copy of this order to any complaint, summons, or other pleading filed on plaintiff's behalf; and it is further

ORDERED that the inquest on defendant's reasonable attorney's fees shall proceed on papers, absent a timely request for cross-examination on same by plaintiff, as below

ORDERED that no later than October 25, 2023, defense counsel shall file, via NYSCEF with courtesy copy to chambers via first class mail or hand delivery, a detailed affidavit/affirmation reciting the reasonable attorney's fees expended in defense of this matter including: the number of hours expended, the hourly rate charged for such services by defense counsel, and the rate charged by attorneys of similar skill and experience in the community; and it is further

ORDERED that papers in opposition, including a request for cross-examination of defense counsel, if any, shall be filed by plaintiff's counsel no later than November 03, 2023, via NYSCEF with courtesy copy to chambers via first class mail or hand delivery; and it is further

ORDERED that failure to timely file papers in support of attorney's fees shall constitute waiver of such relief; and it is further

ORDERED that failure to timely file papers in opposition to attorney's fees sought by defendant shall constitute waiver as to the amount of attorney's fees; failure to timely request cross-examination shall constitute waiver of cross-examination of defense counsel; and it is further

ORDERED that plaintiff's counsel, Milman Labuda Law Group PLLC, is sanctioned in the amount of $750.00, without any charge to its client, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part IV and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that payment of the above sanction shall not be stayed pending appeal of same, subject only to a stay application in the Appellate Division, as provided by the CPLR; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the Court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, in accordance with Section 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

10/5/2023
DATE

HON. FRANK P. NERVO
J.S.C.

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