SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

SETH RATNER,

Plaintiff(s),

-against-

INDEX No. 11704/04
XXX

MOTION DATE: 11/1/04

BRIAN ROBINSON, STUART LITMAN, NANCY LITMAN, ZIRH INTERNATIONAL SHISEIDO INC., et al.,

Defendant(s).

MOTION SEQ. No. 1-MG
2-MD

The following papers read on this motion:

Notice of Motion/Affidavit/Memorandum/Exhibits
Affirmation in Opposition/Memorandum/Exhibits
Reply Affidavit in Support/Reply Memorandum /Exhibits
Reply Affidavits of Brian Robinson in Support/Exhibits
Further Reply Affidavit of Brian Robinson in Support
Motion for Default Judgment/Affirmation/Exhibits
Affidavit of Theodore C. Max/Exhibits

In this action arising out of an alleged wrongful termination, defendants seek an Order dismissing the Complaint pursuant to CPLR § 3211(a)(1). Plaintiff opposes and seeks an Order granting him a Default Judgment pursuant to CPLR § 3215.

Plaintiff's motion for a Default Judgment is Denied. Plaintiff fails to provide the Court with proper proof of service of the original Complaint on which he seeks the Default. In addition, the proof presented demonstrates that the plaintiff served a Supplemental Verified Complaint after the defendants made their motion to dismiss. Thus any default on the original Complaint is mooted. In addition, there has been no

prejudice to plaintiff, and any delay in serving the Answer is minor and excusable, as there is a strong policy in favor of disposing of cases on the merits, which, in fact, not only is a consideration prior to granting judgment pursuant to CPLR § 3215, but favors vacating otherwise valid default judgments.

To prevent default, a defendant must show an adequate excuse, an absence of wilfulness and a meritorious defense to the claims alleged. *New York Business Development Corp. v. Gilbert's Hotel, Inc.,* 26 AD2d 791 (1966); *Nomako v. Ashton,* 22 AD2d 683 (1964). In light of the proof that the plaintiff was served with the motion to dismiss, and served, although not properly, a Supplemental Complaint, the court agrees with the defendants that there was no default, and if there was, the short delay is excusable. The Court also finds that the defendants have set forth a potentially meritorious defense.

In his Supplemental Verified Complaint, plaintiff alleges seven causes of action arising out of a claimed wrongful termination and breach of contract. Plaintiff claims that the defendants breached his employment contract, conspired to defraud him of future earnings, interfered with his relationship with a potential future employer, SHISEIDO, and that the individual defendants ROBINSON and LITMAN forced him to sign a general release of these claims under extreme and economic duress. The plaintiff also claims that the individual defendants defrauded the plaintiff out of stock and dividend options. (Defendants Reply, Exh A).

This action arises out of an alleged wrongful termination. Plaintiff was hired by defendants ROBINSON, LITMAN and ZIRH in 1999, and was employed by ZIRH until his termination in 2000. Apparently in the Spring of 2000 it became apparent to all that ZIRH was to acquired by SHISEIDO, and that the individual defendants were to be kept on as employees, and plaintiff and these defendants were in the process of renegotiating a contract for RATNER to become an employee of SHISEIDO upon its acquisition of ZIRH. The negotiations and relationship between RATNER, ROBINSON and LITMAN apparently broke down in May and June of 2000.

This action was commenced in August 2004. In this Complaint plaintiff alleges tortious interference against defendants for his potential employment relationship with SHISEIDO, that claim is without merit. In his current Verified Complaint plaintiff claims that the defendants tortiously interfered with his employment with SHISEIDO with the wilful intent to cause harm to plaintiff's career. (Motion, Exh.)

The defendants seek a dismissal arguing that these claims must be dismissed as it is undisputed that plaintiff was an employee at will with ZIRH and potentially SHISEIDO, as evidenced and acknowledged by plaintiff in his signed employment agreement. (Motion, Exh. C).

Plaintiff opposes dismissal, contending that an employee at will may have a claim for tortious interference if it involves fraud, threats or other wrongful conduct. *Guard Life Corp v. S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 (1989). Plaintiff argues that representatives of a corporation are immune from liability only if the defendants acted in good faith and did not engage in "independent torts or predatory acts directed at another." *Murtha v. Yonkers Child Care Assoc.*, 45 NY2d 913 (1978); *Buckley v. 112 Central South Park Inc.*, 285 App Div 331 (1954).

The defendants motion to dismiss these claims pursuant to CPLR § 3211 is Granted.

As to the employment agreement between plaintiff and defendant ZIRH and SHISEIDO, dated May 3, 2000, the document, executed by plaintiff, clearly states that he is an employee at will. (Cross Motion, Exh. G) In addition, by its own clear and unequivocal terms it represents what the parties hoped for in the future upon defendant SHISEIDO purchasing defendant ZIRH. It is merely a prediction of something hoped for in the future. *Leszczynski v. Kelli & McGlynn*, 281 AD2d 519 (2nd Dept 2001); *Chase Investments, Ltd v. Kent*, 256 AD2d 298 (2nd Dept. 1998). There is no factual allegation of an actual intent to defraud or of a misrepresentation of fact involving this contract. *Edelman v. Buchanan*, 234 AD2d 675 (3rd Dept. 1996).

As to the General Release dated June 30, 2004, the document is again clear and unequivocal that RATNER was giving up any claims against the defendants. (Motion, Exh. B) Further, the undisputed evidence provided demonstrates that RATNER cashed the check for monies given to him in exchange for the release. His claims that, in essence, LITMAN and ROBINSON were unpleasant and yelled at him prior to his executing the release, do not constitute extreme duress.

As to the claims of alleged fraud, plaintiff fails to meet the pleading requirements set forth in CPLR § 3016. A review of the proof provided by the plaintiff include only his unsubstantiated allegations of vague threats by LITMAN uttered to induce him to sign the release.

Plaintiff also offers a photocopy of a transcript of an alleged conversation between plaintiff and defendant ROBINSON. This proof is not in proper form and is not properly considered by the Court.

Plaintiff claims that this transcribed conversation took place on August 17, 2004. The uncontested proof demonstrates that ROBINSON had no knowledge of being recorded by plaintiff on any occasion. The purported transcript is largely unintelligible and does not reveal any proof of specific actions or wrongful acts used to somehow convince the plaintiff to execute a general release in exchange for payments of sums certain, which can support plaintiff's claims of duress and/or fraud. In addition, the purported transcript is not certified, as the last page has only a stamped signature of the reporter. More disturbingly, the certification page containing the stamped signature of the transcriber is dated July 12, 2004, one month prior to the date plaintiff affirms the alleged conversation took place. (Reply, Exh. B)

Thus, this document is not considered as part of this application.

Plaintiff fails to set forth with requisite specificity actions of the defendants to sustain any such claims based in fraud. He merely states that in the days immediately prior to his General Release, he had a series of arguments with the individual defendants, which, he claims culminated in LITMAN throwing plaintiff's briefcase and yelling at him to force him to sign the release.

Plaintiff also argues that all of the complained of treatment constituted fraudulent misrepresentations and or predatory acts. He concludes that these acts resulted in his wrongful termination and therefore constituted tortious interference.

The Court disagrees.

As noted by the defendants, ZIRH and SHISEIDO are not proper defendants to those causes of action. SHISEIDO and ZIRH were parties to the employment contract which plaintiff claims was interfered with by the individual defendants. Therefore it cannot have tortiously interfered with that contract. *Kosson v. Algaze*, 203 AD2d 112 (1st Dept. 1994). Under New York law, there is no cause of action for wrongful discharge of an employee at will. Thus the motion of SHISEIDO and ZIRH for a dismissal of the claims against it is Granted pursuant to CPLR § 3211(a)(7).

As to the individual defendants, their motion for dismissal of the claims against them is also Granted. Plaintiff has failed to allege with any specificity, that the actions of these individuals were taken through wrongful means or with the sole purpose of harming plaintiff. Further he has failed to demonstrate any conduct by the individuals which was the proximate cause of his termination by ZIRH and/or SHISEIDO.

The elements of a claim for tortious interference with a contractual relation are; (1) a valid contract exists; (2) that a third-party has knowledge of that contract; (3) that the third-party intentionally and improperly procure the breach of that contract; and (4) that the breach resulted in damage of the plaintiff. *Albert v. Loksen*, 239 F.3d 256 (2nd Cir. 2000).

In order to state a cause of action for tortious interference with contractual relations plaintiff must show the defendants intentionally and through improper means induced the breach of contract between plaintiff and a third-party. *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 NY2d 183 (1980). The related tort of interference with business relations applied to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant. *Ivan Mogull Music Corp. v. Madison-59th St. Corp.*, 162 AD2d 336 (1st Dept. 1990); *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 AD2d 257 lv den 81 NY2d 709 (1993). As noted, there can be no such claim of interference with prospective business relations in this instance because plaintiff was already employed by ZIRH .

In this instance the plaintiff has failed to identify culpable conduct on the part of any of the named individual defendants to establish a claim for tortious interference. He has failed to demonstrate that any of these persons exceeded the bounds of their authority with ZIRH or SHISEIDO. *A.S. Rampell, Inc. v. Hyster,* 3 NY2d 369 (1957). Further, he has failed to demonstrate that their alleged interference was accomplished by wrongful means including violence, fraud, misrepresentation, civil suits, criminal prosecution or economic pressure. *Kosson, supra; Snyder v. Sony Music Entm't Inc.*, 252AD2d 294 (1st Dept. 1999). His conclusory allegations and speculation regarding individual vendettas is not evidence and is not supported by any specific factual allegations sufficient enough to defeat the application for dismissal.

In New York, an at-will employee cannot maintain a claim for tortious interference with existing contractual relations based upon an employment relationship. A plaintiff may not evade the status of an employee at will by recasting his cause of action in terms of tortious interference. *Thawley v. Turtell*, 289 AD2d 169 (1st Dept. 2001); *Ingle v. Glamore Motor Sales Inc.*, 538 NYS2d 771 (1989).

The Court notes that while the plaintiff claims his termination was wrongful, he asserts no factual claim other than his own opinion that it was unfounded or beyond the scope of the employment or that it was

accomplished by wrongful means with the sole purpose of harming him. *Miller v. Richman*, 184 AD2d 191 (4th Dept. 1992); *Ott v. Automatic Connector*, 193 AD2d 657 (2nd Dept. 1993). Plaintiff has failed to provide more than conclusory speculation that any act of an individual defendant was the proximate cause of his termination in June 2000. *Am. Preferred Prescription Inc v. Health Mgmt. Inc.*, 252 AD2d 414 (1st Dept. 1998).

Finally, the Court agrees with the defendants that the executed General Release and the plaintiff's cashing of the checks given to him in exchange for his signing the release, bar the claims set forth in the Complaint. *Leggio v. Cantor Fitzgerald*, 182 AD2d 611 (2nd Dept 1992); *Edison Stone Corp. v. 42nd Street Dev. Corp.*, 145 AD2d 249 (1st Dept 1989); *Powell v. Oman Constr. Co.*, 25 AD2d 566 (1st Dept. 1966). Plaintiff's claims stating that the defendants coerced him or otherwise placed him under duress to execute the general release are equally unsustainable in light of the proof presented.

Plaintiff's claim of duress due to the threats and actions of the defendants is insufficient in light of the fact he took the monies given to him in exchange for the execution of the release. Emotional and economic pressures as described by plaintiff in his Supplemental Complaint and affidavits do not give rise, as a matter of law, to state a legal defense of duress in order to set aside the contracts. *Silver v. Starrett*, 176 Misc2d 511 (1998). The Court finds that the plaintiff's conduct in taking the exchanged for payment the next day demonstrated his ratification of the contract and is deemed to have waived this claim. *Nisi v. Nisi*, 226 AD2d 510 (2nd Dept. 1996); *Wasserman v. Wasserman*, 217 AD2d 544 (2nd Dept. 1995).

Defendants seeks a dismissal of all wrongful termination and breach of employment contract claims in the Complaint, alleging that the plaintiff was an employee at will, as he acknowledged in his employment contract. The defendants contend that as such, plaintiff could be terminated without cause. Further, they contend that plaintiff's execution of a general release bars these and any other claims arising out of his termination.

Based on the proof presented, the defendant's motion to dismiss pursuant to CPLR § 3211 is Granted in its entirety. CPLR §§ 3211(a)(1)(5) and (7).

It is, SO ORDERED.

Dated: Jan 6, 2005

ENTERED
JAN 07 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. JEOFFREY J. O'CONNELL, J.S.C.