

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

SONIA CANDELLA,
Plaintiff,

- v -

BANCO INDUSTRIAL DE VENEZUELA, C.A.,
Defendant.

Index No.: 603199/08
Motion Date: 07/14/09
Motion Seq. No.: 02
Motion Cal. No.: 24

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2, 3	_____
4	_____

FILED
DEC 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Defendant moves for dismissal of the complaint in this breach of contract action.

Plaintiff, a former Treasurer Assistant of defendant alleges that on April 30, 2007, her employment was terminated by defendant, and that she was asked to sign a letter that stated that the reason for her termination was her violation of bank privacy rules, insubordination and circumvention of the bank hierarchy. Plaintiff refused to sign the letter.

Plaintiff began employment at defendant bank on March 22, 2006. She reported to Gabriela Arzola, the Treasurer. On April

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

27, 2007, plaintiff alleges that she received trade confirmations for three transactions which were improperly backdated to April 26, 2007. According to the complaint the three transactions were to take place with the broker-dealer Pali Capital Inc., which was unapproved by defendant's Board of Directors as of April 27, 2007. Plaintiff contacted Ms. Arzola, who told her to submit an e-mail to Jose Garcia Araque, the Executive Vice President of Finance and Investments; Oscar Recinos, Operations Manager; Robert Farrell, Controller; Ernesto Herrero, a financial officer based in Venezuela and Hilario Aellos, Vice President of Risk, advising each about the Pali Capital transactions.

In the complaint, plaintiff alleges that in the Personnel Policies and Practices Manual (Manual), defendant promised to protect her from adverse action in connection with reporting suspicious activities and that this promise gave rise to a contractual obligation to protect her from retaliatory termination.

Defendant moves for dismissal of the complaint based on failure to state a cause of action and based on documentary evidence. First, defendant submits a copy of the letter of employment signed by plaintiff, said letter specifically stating that defendant "adheres to a policy of employment-at-will, which allows either party to terminate the employment relationship at any time for any reason." Second, defendant submits a copy of a

document entitled Employment at Will Acknowledgment, signed by plaintiff, which provides, in part:

I understand that the employment relationship between Banco Industrial Venezuela, C.A.(defendant) - U.S. Agencies and me, is one that can be dissolved at any time by either Banco Industrial de Venezuela, C.A.- U.S. Agencies or me. I do not have nor have been offered a contract, neither of employment or any assurances, written or verbal, that my employment is neither a permanent nature nor for any specific period of time at Banco Industrial de Venezuela, C.A.- U.S. Agencies.[sic]

Defendant argues that the Manual itself contains several disclaimers that disavow any intent on defendant's part to accept contract limitations on its rights as an at-will employer. One section of the Manual, Separation Policies and Procedures: Employment, states its policy of at-will employment: "Employment at the Agencies, therefore, has always been considered 'at will,' permitting either party to end the relationship at each own discretion." The main section concerning at-will employment is entitled "General Statement of Policy: Employment at Will", which states in pertinent part

This policy may not be modified by any statements contained in this Manual or any other staff member handbook, employment applications, the Agencies' recruiting materials, Agencies memoranda, or other materials provided to applicants and staff members in connection with their employment. None of these documents, whether singly or combined, create an express or implied contract of employment for a definite period, or an express or implied contract concerning any terms or conditions of employment. Similarly, the Agencies' policies and practices with respect to any matter are not to be considered as creating any contractual obligation on the Agencies' part or as stating in any way that termination will occur only for "just cause."

Statements of specific grounds for termination set forth in this manual or in any other Agencies documents are examples only, not all-inclusive lists, and are not intended to restrict the Agencies' right to terminate at-will.

Defendant contends that the aforementioned documentary evidence supports its position that plaintiff had no contractual right with respect to the termination of her employment, and that she was subject to an at-will termination.

Defendant also contends that the complaint fails to allege, in non-conclusory fashion, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated. Defendant asserts that plaintiff has failed to identify any alleged contractual language that supports her claim.

In opposition to the motion, plaintiff states that the Manual contains a specific section that she relied upon prior to the termination. This section is entitled Code of Ethics-Reporting of Illegal or Questionable Activities and provides in part

In the event that a staff member suspects a theft, embezzlement, defalcation or any other irregularity, including violations of law or regulation and that he/she believe might require the submission of a Suspicious Activities Report (SAR), he/she should bring such violation to the attention of Agencies' Internal Auditor. However, staff members might choose to submit a Suspicious Activities Report (SAR) directly to regulatory authorities. Although it is preferable that suspicious activities first be brought to the attention of the Agencies' Internal Auditor, no director, officer or staff member of Banco Industrial de Venezuela, C.A., or its

U.S. Agencies shall take any adverse action against the staff member or in any other way place the staff member in jeopardy for his/her action in filing a Suspicious Activities Report (SAR).

Plaintiff argues that this section of the Manual is the equivalent of a contractual obligation, and that violation of the section constitutes a breach of contract. Plaintiff asserts that she had knowledge of improper financial transactions, and that before she could file a SAR, she was terminated from her position.

In a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and accorded every favorable inference. Nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration. Sud v Sud, 211 AD2d 423, 424 (1st Dept 1995).

The documentary evidence supports defendant's argument that plaintiff is an at-will employee and neither party denies that conclusion. Where the term for employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason. Lobosco v New York Telephone Co./NYNEX, 96 NY2d 312, 316 (2001). Furthermore, there is no exception for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities. Id.

New York does recognize a narrow exception to its at-will employment doctrine. Specifically, an employer may not terminate an employee when the employee made its employer aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment. See Weiner v McGraw Hill, Inc., 57 NY2d 458 (1982). Plaintiff alleges in her complaint that she relied upon a section of the Manual holding that defendant could not make an adverse action against her if she reported on questionable or suspicious activities.

"[A] limitation on the employer's right to terminate an employment of infinite duration might be imparted from an express provision found in the employer's handbook or personnel policies and procedures." Mulder v. Donaldson, Lufkin and Jenrette, 208 AD2d 301, 307 (1st Dept 1995), citing Murphy v American Home Products Corp., 58 NY2d 293, 305 (1983). However, where a handbook contains an explicit disclaimer, the handbook does not constitute an employee contract, and does not place an express contractual limitation upon the employer's right to terminate the employee at will. See Gomariz v Foote, Cone and Belding Communications, Inc., 228 AD2d 316, 317 (1st Dept 1996).

The Manual at bar does contain explicit disclaimers that allow the employer to terminate an employment at will. The sole limitation upon this action is in the event that an employee

files a SAR. In this case, plaintiff admits that she did not file a SAR. Therefore, plaintiff does not gain the benefit of this limitation.

Accordingly, it is

ORDERED that the motion to dismiss the complaint for failure to state a cause of action is GRANTED and the Clerk is directed to enter judgment for the defendant dismissing this action.

This is the decision and order of the court.

Dated: November 19, 2009

ENTER:

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J.S.C.
DEBRA A. JAMES

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