

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GERALD CHRISTIAN,

PLAINTIFF,

v.

BILL REYNOLDS, ANTHONY
MCDANIEL, AND STX RX, INC. D/B/A/
GOLDEN ROCK PHARMACY,

DEFENDANTS.

CIVIL NO: SX-06-CV-035

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

STX RX, INC.,

COUNTERCLAIMANT,

v.

GERALD CHRISTIAN,

COUNTERDEFENDANT.

ROSS, EDGAR D., Senior Sitting Judge

MEMORANDUM OPINION

(Filed: October 7, 2009)

I. INTRODUCTION

THIS MATTER is before the Court on Defendants', Bill Reynolds ("Reynolds"), Anthony McDaniel ("McDaniel"), and STX RX, Inc. ("Golden Rock Pharmacy"), Motion for Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Plaintiff filed a Rule 56 (f) motion in response and Defendants filed an opposition thereto. Plaintiff

further filed a reply. The Court will treat the Plaintiff's response as an opposition to Summary Judgment. Upon review of the briefs submitted by the parties, and after careful consideration, the Court issues the following ruling.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges the following counts against Defendant: (1) constructive discharge in violation of the Wrongful Discharge Act, V.I. Code Ann. tit. 24, § 76(a); (2) slander, libel, defamation, defamation per se; (3) violation of the Whistleblower Protection Act, 10 V.I.C. §122 et seq.; (4) breach of contract (5) misrepresentation; (6) intentional infliction of emotional distress; (7) violation of the Virgin Islands Civil Rights statute 10 V.I.C. §§ 1-10; and 64 et seq.; (8) punitive damages.

Plaintiff was employed by Golden Rock Pharmacy as a Staff Pharmacist on May 7, 2000. Plaintiff alleges that defendants have a pattern and practice of misrepresenting to staff pharmacists that if they work for depressed wages and make other considerations to the business that they will sell the business to them. Plaintiff claims that he began negotiations with McDaniel to purchase Golden Rock Pharmacy sometime prior to 2002. In July 2002, McDaniel sold fifty (50%) percent of the pharmacy to Reynolds.

In 2004, Plaintiff again began negotiations to purchase the pharmacy. This time negotiations were for the purchase of one hundred (100%) percent of the pharmacy. Shortly thereafter the parties agreed that Plaintiff would purchase the pharmacy for two-million two hundred thousand (\$2,200,000.00) dollars, with a down payment of twenty thousand (\$20,000.00) dollars. In August 2005, the agreement was reduced to writing in the form of the Asset Purchase Agreement. See Defs.' Mot. at Exhibit B. Plaintiff alleges that Defendants

repeatedly promised he would be provided the financial records of the pharmacy which never transpired.

In April 2005 Advanced Caremark PCS ("Caremark") conducted an audit of the prescriptions of the pharmacy, which determined that two hundred and eighty-thousand (\$280,000.00) dollars worth of prescriptions were improperly filled and issued. Caremark completed its audit on October 24, 2005. On or about October 31, 2005 McDaniel called Plaintiff and informed him that he was being suspended. Plaintiff alleges that McDaniel told him that he would be blamed for all problems arising out of the audit. Also on October 31, 2005, Plaintiff received a letter from Edward Barry, Esq., on behalf of the Pharmacy, advising him of an indefinite suspension.

Plaintiff filed the instant matter on January 19, 2006 against defendants after he had not heard from them for over two months. Defendants filed a Motion for Summary Judgment on November 8, 2008 seeking to dismiss all of Plaintiff's counts contained in the allegations pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Plaintiff filed his Rule 56(f) motion in response on July 15, 2009 arguing that defendants' motion for summary judgment is premature. Defendants filed their opposition shortly thereafter, and Plaintiff filed this response thereto.

III. SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ." FED. R. CIV. P. 56(c). The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a

genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once this showing has been made, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must “do more than simply show that there is some metaphysical doubt as to the material facts.” *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

A factual dispute is deemed genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Id.* at 247-48. The Court may not make credibility determinations or weigh evidence. *Id.* at 252. If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

In analyzing this motion for summary judgment, this Court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 680 (3d Cir.2003); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir.2000).

IV. DISCUSSION

A. Wrongful Discharge

Plaintiff's Complaint contends that defendants' actions constitute violation of the Wrongful Discharge Act (“WDA”).¹ Plaintiff was advised of his suspension pending further

¹ Section 76 of the WDA, enacted by the Virgin Islands Legislature in 1986, provides as follows:

investigation by letter dated October 31, 2005 from Attorney Barry. Plaintiff avers that he filed the instant action when more than two (2) months had passed without hearing anything further from defendants. In essence, Plaintiff believes that he was the victim of a constructive discharge.

Defendants argue that Plaintiff cannot maintain a wrongful discharge claim because the Wrongful Discharge Act (hereafter "WDA" or "Act") excludes professionals from the Act's purview. From its inception, the WDA afforded protection from wrongful discharge for "employees²," including "any individual whose work has ceased as a consequence of, or in

(a) Unless modified by union contract, an employer may dismiss any employee:

(1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;

(2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;

(3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;

(4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;

(5) who performs his work assignments in a negligent manner;

(6) whose continuous absences from his place of employment affect the interests of his employer;

(7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;

(8) who is dishonest; or

(9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

24 V.I.C. § 76.

² Section 62 defines employee as:

any employee or any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but does not include any individual employed as an agricultural laborer or as a seaman or engaged in the catching, taking or selling of any fresh fish, shellfish or crustacea, or in domestic service of any family or person at his home, or any individual employed by his parent or spouse, or an individual engaged in the

connection with, any current labor dispute because of any unfair labor practice" 24 V.I.C. § 62. On February 1, 2001, the definition of "employee" was amended to exclude "any individual employed in a bonafide position in an executive or professional capacity." *Id.*

Plaintiff was employed as a Pharmacist with Golden Rock Pharmacy. The practice of pharmacy is a recognized profession in the United States Virgin Islands. 27 V.I.C. § 141. As such, Plaintiff's action for wrongful discharge and cannot be brought under the WDA. The Court need not explore whether a constructive discharge can be read into the WDA. Since plaintiff is not subject to the protection of the WDA, plaintiff's action for wrongful discharge must be dismissed.

B. Slander, Libel, Defamation, Defamation per Se

A statement is defamatory if it tends to do harm to the reputation of another, his standing in the community is lowered and it deters third persons from associating or dealing with that person. *Cohen v. Raedler*, 17 V.I. 46 (Terr.Ct.1980). In order to recover on a claim of defamation, the plaintiff must prove (1) that defendants made a false and defamatory statement concerning another; (2) that said communication was an unprivileged publication to a third party;

activities of an educational, charitable, religious or non-profit organization where the employer-employee relationship does not, in fact, exist or where the services rendered to such organization are on a voluntary basis or any individual employed in a bonafide position in an executive or professional capacity; or any alien temporarily admitted to the Virgin Islands, except one who has a currently valid authorization to work for his employer, but does not include any person who has been employed by an employer for less than six (6) calendar months or is a 'public employee' as defined in chapter 14 of this title; 'employer' includes any person acting in the interest of an employer directly or indirectly that has employed five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in the two (2) year period preceding a discharge, but not a 'public employer' as defined in chapter 14 of this title.

(3) that the defendants were at fault amounting to at least an act of negligence; and (4) that the publication caused harm to the plaintiff. See RESTATEMENT (Second) OF TORTS § 558 (1977).³

To succeed on a defamation *per se* claim, a plaintiff must show that the defendant's defamatory statement imputes to the plaintiff: (1) a criminal offense; (2) a loathsome disease; (3) matter incompatible with his business, trade, profession, or office; or (4) serious sexual misconduct. Restatement (Second) of Torts § 570 (1977). A plaintiff need not prove special damages such as monetary loss. *Id.*

Defendants argue that this claim should be dismissed because Plaintiff has admitted that he has "no knowledge that any of [the] Defendants made false allegations about [plaintiff] to law enforcement personnel." See Defs' Mot. For Summ. J. at 20. In fact, Defendants themselves have admitted that they have complained of Plaintiff's alleged criminal action to persons other than law enforcement personnel.⁴ The Defendants have submitted no notice of a completed investigation, nor provided any notice to the Court of criminal charges filed against Plaintiff. Defendants admit that the investigation is ongoing, while their counsel accuses Plaintiff of criminal activity throughout their motion. Plaintiff's claim for defamation against Defendant will stand.

C. Whistleblower's Protection Act

Plaintiff alleges Defendants are in violation of the Virgin Islands Whistleblower's Protection Act ("the Act"), V.I.Code Ann. tit. 10, §§ 122 & 123. The Act provides in pertinent part:

³ Plaintiff also asserts a claim for slander. The elements for defamation and slander claims are identical. See *Carino v. Golden*, Civ. No. 807-82, 1983 V.I. LEXIS 51, at *4 (V.I.Terr.Ct. Mar. 17, 1983). "Slander consists of the publication of defamatory matter by spoken words...." Restatement (Second) of Torts, § 568 (1977).

⁴ McDaniel has admitted that he made statements to others concerning plaintiff's alleged illegal activities, namely Suzana Brin and Lydia Scott. See Pl.'s Motion at Exhibit D at No. 16.

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, *reports or is about to report*, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this territory or the United States to a public body unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. (Emphasis added)

Id. at § 122. A person alleging a violation of § 122 “may bring a civil action for appropriate injunctive relief, or actual damages, or both, within ninety days after the occurrence of the alleged violation.” *Id.* at § 123.

Plaintiff claims that he was terminated because defendants feared that he would report their illegal actions. Defendants contend that Plaintiff's claim must be dismissed because Plaintiff did not report anything that would implicate the Act. Defendants further claim that Plaintiff has admitted, through deemed admissions, that he has no knowledge of illegal actions on the part of the Defendants. See Defs.' Mot. at Exhibit I..

The fact the Plaintiff has admitted that he had no knowledge of any actions does not negate his right to the claim. Because Plaintiff has admitted that he has no knowledge of illegal actions on the part of the Defendants, does not mean that the Defendants did not believe that he would not report any such actions. Nor does it preclude that fact that someone else could have acted on Plaintiff's behalf. The law clearly states that another can act on the Plaintiff's behalf. As such, the Court finds that a reasonable jury could find that he was fired for such reason. The Court will therefore deny the defendants' motion for judgment on the pleadings as to Count III of Plaintiff's complaint.

D. Breach of Contract

To establish a breach of contract claim under Virgin Islands law, a plaintiff is required to prove that there was (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages. *Galt Capital, LLP v. Seykota*, Civ. Nos.2002-63 and 2002-134, 2007 U.S. Dist. LEXIS 92955, at *10 (D.V.I. Dec. 14, 2007) (citing *Stallworth Timber Co. v. Triad Bldg. Supply*, 968 F.Supp. 279, 282 (D.V.I.App.Div.1997)).

Plaintiff contends that he relied on Defendants' promise to sell Golden Rock Pharmacy to him. Plaintiff further claims that he has suffered damages as well as a loss of business opportunity and profits from said business. Defendants argue that Plaintiff has admitted that his hope of purchasing the business was a pipedream. They further argue that because Plaintiff could not have honored his part of the contract no breach occurred. Defendants are misguided. Plaintiff clearly states that the Defendants have reneged on their promise to sell him Golden Rock Pharmacy.⁵ As such a reasonable jury could find for plaintiff under the theory of promissory estoppel.⁶ Accordingly, Plaintiff's claim for beach of contract will stand.

E. Misrepresentation

To successfully allege an act of fraud or intentional misrepresentation, a complainant must demonstrate: (1) a knowing misrepresentation of a material fact; (2) intent by the defendant that the plaintiff would rely on the false statement; (3) actual reliance; and (4) detriment as a result of that reliance Restatement (Second) of Torts, § 530; see *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir.1992). The Federal Rules of Civil Procedure also require

⁵ It is important to note that the business has since been sold to a corporation owned by a local physician.

⁶ Under virgin Islands law, promissory estoppel is "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." Restatement (Second) of Contracts § 90.

that allegations of misrepresentation be pled with specificity. Fed.R.Civ.P. 9(b) . Allegations of misrepresentation must also describe why or how the representations were false when they were made. See Pourzal, 2006 U.S. Dist. LEXIS 60231, at * 13, 2006 WL 2471695; Charleswell v. Chase Manhattan Bank, N.A., 308 F.Supp.2d 545, 569-70 (D.Vi.2004).

Specifically, Plaintiff claims that Defendants represented that if he worked at depressed wages, he would be given the opportunity to buy Golden Rock Pharmacy. Plaintiff alleges that he relied on the representations of the Defendants in continuing his employment at the depressed wages. However, Plaintiff alleges that Defendants had no intention to sell Golden Rock Pharmacy to him.

In viewing the evidence in light more favorable to the Plaintiff the Court concludes that a jury could find that: (1) Defendants promised to sell Plaintiff Golden Rock Pharmacy (2) the Defendants made the statement to Plaintiff in order to get him to work for depressed wages (3) Plaintiff accepted the depressed wages; and (4) Plaintiff allegedly suffered monetary losses, including lost wages, when the promised sale did not result. Therefore, the Court finds that Plaintiff has sufficiently alleged an act of intentional misrepresentation. See D.P. Enterprises, Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir.1984) (“[T]he factual allegations of the complaint must be viewed as true”). As such, Count Five of the Plaintiff’s complaint will survive summary judgment.

E. Intentional or Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

An action for intentional infliction of emotional distress requires four elements: “(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.” Chuy v. Philadelphia

Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir.1979); Restatement (Second) of Torts § 46 (1965). The conduct in question must have been done with the intention both to do the act and to produce emotional distress, or it must have been done recklessly in deliberate disregard for the high probability that emotional distress would follow. Minerva Marine, Inc. v. Spiliotes, 2006 U.S. Dist. LEXIS 13922, at *119, 2006 WL 680988 (D .N.J. Mar. 13, 2006)

Defendant argues that if Plaintiff suffered any emotional distress, it was a result of his own poor choices. See Defs.' Mot. For Summ. J. at 23, Defendants' further argue that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). The defendants' conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Restatement (Second) of Torts § 46 cmt. d; see Moolenaar v. atlas Motor Inns, Inc., 616 F.2d 87, 89 (3D Cir. 1980).

It is plaintiff's claim that all illegal acts alleged that gave rise to this complaint were committed by the Defendants and imputed to him. Defendants have admitted to telling others outside of law enforcement of these acts. Defendants have further admitted that the matter is still under investigation. Drawing all reasonable inferences in favor of the Plaintiff, the Court finds that Plaintiff has provided sufficient evidence such that a jury could find that Defendants accusatory and potentially defamatory conduct so outrageous and utterly intolerable as to render Defendants liable for intentional infliction of emotional distress. Therefore, the Court denies Defendants' Motion for Summary Judgment as to Plaintiff's claim for intentional infliction of emotional distress.

2. Negligent Infliction of emotional Distress

Plaintiff also makes a claim for negligent infliction of emotional distress in Count 6 of his Complaint. In the Virgin Islands, there are two required elements of a claim for negligent infliction of emotional distress: (1) physical harm and (2) foreseeability. See Anderson v. V.I., 180 F.R.D. 284, 287 (D.Vi. 1998). A physical manifestation of emotional distress is a necessary element to recover on a claim for negligent infliction of emotional distress. Restatements (Second) of Torts § 313.

Plaintiff has not made the necessary showing of physical harm. He alleges only that if Defendants did not commit the tort of intentional infliction of emotional distress, then they negligently inflicted it. (Compl. ¶ 55.) This allegation is not enough to rise to the level of showing physical injury for purposes of negligent infliction of emotional distress in the Virgin Islands. Therefore the Court will grant Defendants' motion on the negligent infliction of emotional distress claim contained in Count Six of the complaint.

G. Civil Rights Violation

Count Three of Plaintiff's Complaint contends that Defendant's actions violate the Virgin Islands civil rights statute 10 V.I.C. § 64. Defendant argues that Plaintiff cannot prove a viable claim for discrimination under 10 V.I.C. § 64 because it is judicially admitted fact that Defendants did not engage in unlawful discrimination against blacks or other minorities.

The power to enforce 10 V.I.C. § 64 is vested in the Virgin Islands Civil Rights Commission which may, if appropriate, file a civil action, in which case the person aggrieved may recover damages as provided in this title; however, nowhere in this section is it established that an aggrieved individual may directly bring an action for violation of this section. Codrington v.

Virgin Islands Port Authority, 33 V.I. 215, 911F. Supp. 907, 33 V.I. 245, 1996 U.S. Dist. LEXIS 580 (D.C.V.I. 1996). See Miller v. Virgin Island Housing Authority, 2005 WL 1353395, at *5 (D.Vi. June 3, 2005) (holding that a civil action cannot be brought directly in court for violation of 10 V.I.C. § 64). Accordingly, the Court grants Defendant's Motion for Summary Judgment as to Plaintiff's claim for violation of 10 V.I.C. § 64.

Additionally, Plaintiff brings this claim pursuant to Chapter 1 of Title 10 of the Virgin Islands Code. (See also 10 V.I.C. § 2, "Discrimination' includes refusal of sale or service, employment, or of setting up different standards in any of these, or segregation, based on race, creed, color, or national origin.") Plaintiff has admitted that the Defendants have not "engaged in unlawful discrimination against blacks or other minorities." See Defs'. Mot. for Summ. J. at Exhibit I p. 13. Again, drawing all reasonable inferences in favor of Plaintiff, the Court finds that Plaintiff has not provided sufficient evidence such that a jury could find that the Defendants discriminated against the Plaintiff based on race. Plaintiff's civil rights claims will be dismissed.

H. Punitive Damages

Defendants contend that Plaintiff's claim for punitive damages in Count Eight of his Complaint must be dismissed because such a claim is not independently actionable. See Defs.' Mot. for Summ. J. at 24. Punitive damages are awarded at the jury's discretion to "punish defendant[s] for [their] outrageous conduct and to deter [them] and others like [them] for similar conduct in the future." Restatement (Second) of Torts § 908(1). Reckless disregard for the plaintiff's rights or intentional violations of law are sufficient to trigger a jury's consideration of the appropriate level of punitive damages. Smith v. Wade, 461 U.S. 30, 51, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). Although punitive damages do not constitute a distinct

cause of action, a jury may find that Plaintiff is entitled to such damages with respect to his claims in Counts Two, Three, Four, Five, and Six of his Complaint. Therefore, the Court will not dismiss Plaintiff's claim for punitive damages at this juncture.

V. CONCLUSION

Considering the facts in the light most favorable to the Plaintiff, the Court finds that there are genuine issues of material fact in dispute with regards to Counts Two, Three, Four, Five, Six, and Eight, but not as to Counts One and Seven. Accordingly, summary judgment is granted with regards to Counts One and Seven. An appropriate order will follow.

CERTIFIED TO BE A TRUE COPY
This 19th day of Oct 2009
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT

By  Court Clerk