

selected as a Decision of Interest

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Fields v. Sbarro, 115592-05 Decided: July 7, 2006

NEW YORK COUNTY
Supreme Court

Justice DeGrasse

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Defendants move for an order dismissing the first, second and third causes of action of the amended complaint pursuant to CPLR 3211 (a)(1)(5) and (7) and granting costs pursuant to Rules of the Chief Administrator (22 NYCRR) 130-1.1. Plaintiff cross-moves for summary judgment on the fourth cause of action. Defendants are restauranters. Plaintiff is the principal and founder of Svelte Events LLC. The complaint describes plaintiff as a "publicist and consultant whose career has included . . . representation of major clients." By two agreements dated March 24, 2005, defendant Salute Restaurant engaged Svelte to provide staffing and project management. By another agreement dated May 19, 2005, Salute engaged Svelte to provide public relations services and consulting on marketing and business needs. The agreements provided for the payment of specified fees and were terminable by either party upon 30 days' written notice. Plaintiff signed each agreement in her capacity as Svelte's founder. By email dated July 29, 2005, defendant Gennaro Sbarro, the president of Salute, informed plaintiff that he was suspending her services to evaluate her performance "in the areas of PR, marketing and advertising." By summons and endorsed complaint dated September 21, 2005, Svelte sued the defendants in the Civil Court of the City of New York for breach of the public relations and marketing agreement. That action was settled with the execution of a mutual release.

Under the original complaint filed in this court on November 9, 2005, plaintiff alleged discrimination in employment in violation of the State Human Rights Law (Executive Law §296). Five days later, plaintiff amended the complaint so as to add a libel cause of action. Defendants seek a dismissal of the employment discrimination claims on the disputed ground that they are not plaintiff's employers. Plaintiff does not allege that she performed any services or worked under any conditions which are not set forth in the agreements. Plaintiff even states in her affidavit that the parties "determined that the Defendants would retain my company Svelte Events, LLC to do Public Relations and Marketing work for the Defendants. In turn, I would be compensated through Svelte Events, LLC."

A motion to dismiss on the ground that a claim is barred by documentary evidence may be granted where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law (see Goshen v. Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]). Accordingly, the Salute-Svelte agreements categorically refute plaintiff's pivotal assertion that she was defendants' employee. Plaintiff's vague assertions that defendants exercised control over her hours and had the power to hire or fire her do not lend viability to her claim of an employment relationship in the face of the agreements.

Summary judgment cannot be granted. It does not appear that issue has been joined (see CPLR 3212 [a]). If so, plaintiff has not submitted a copy of the answer as required by CPLR 3212 (b). Defendants assert that plaintiff engaged in frivolous conduct by bringing this action. At this time, defendants do not seek a dismissal of the libel cause of action which was extant when the instant motion was made. The action cannot be characterized as "frivolous" in view of the fact that the libel cause of action remains pending (cf. Bailey v. 800 Grand Concourse Owners, 199 AD2d 1, 3 [1993]). The court also considers the fact that defendants have not been put to the task of drafting an answer in response to the employment discrimination claims.

For the foregoing reasons, defendants' motion is granted to the extent that the first, second and third causes of action set forth in the amended complaint dated November 8, 2005 are dismissed pursuant to CPLR 3211 (a) (1) and (7). The branch of the motion by which defendants seek sanctions is denied. In any event, defendants shall recover costs in the amount of \$100 pursuant to CPLR 8106. Plaintiff's cross motion for summary judgment is denied.