SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 160707/2019
EVANS, LAURIE
vs.
BLOOMBERG, L.P.
SEQUENCE NUMBER : 002
DISMISS CLAIMS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 22 to 51, were read on this motion to/for dismiss the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 22-40
Answering Affidavits — Exhibits _____ No(s). 44-46
Replying Affidavits _____ No(s). 48-51

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendants' motion to dismiss the complaint and for a declaratory judgment in part and denies their motion in part, pursuant to the accompanying decision. C.P.L.R. §§ 3001, 3211 (a)(1) and (5). The parties are to convene August 20, 2020, at 2:30 p.m., for a Preliminary Conference via telephone.

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

Dated: 7/31/20

LUCY BILLINGS, J.S.C.
LUCY BILLINGS J.S.C

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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LAURIE EVANS, Index No. 160707/2019

Plaintiff

- against - DECISION AND ORDER

BLOOMBERG L.P., KEITH GROSSMAN, and
JOHN DOES ##1-10,

Defendants

----------x

APPEARANCES:

For Plaintiff
Donna H. Clancy Esq.
Clancy Law Firm, P.C.
40 Wall Street, New York, NY 10005

For Defendants
Elise M. Bloom Esq., Pinchos N. Goldberg Esq., and
Rachel S. Philion Esq.
Proskauer Rose LLP
11 Times Square, New York, NY 10036

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

In this action for discrimination based on age, disability, and gender and for retaliation, defendants move to dismiss the amended complaint based on documentary evidence: a release that plaintiff signed November 28, 2016, barring her discrimination and retaliation claims. C.P.L.R. § 3211(a)(1) and (5). Defendants also seek a declaratory judgment that the release is valid and enforceable. C.P.L.R. § 3001. The court grants

defendants' motion to dismiss plaintiff's claims that the release is void and declares that it is not void due to her incapacity, duress, the release's ambiguity, its lack of consideration, and its violation of statutory requirements, without opposition. C.P.L.R. §§ 3001, 3211(a)(1) and (5); N.Y. Gen. Oblig. Law § 15-303; Allen v. Riese Org., Inc., 106 A.D.3d 514, 515 (1st Dep't 2013); Serbin v. Rodman Principal Invs., LLC, 87 A.D.3d 870, 870 (1st Dep't 2011). The court denies defendants' motion to dismiss plaintiff's claim that the release is void because it was fraudulently induced, however, as explained below. If it is void, then of course it does not bar her discrimination and retaliation claims. GoSmile, Inc. v. Levine, 81 A.D.3d 77, 82 (1st Dep't 2010); Federal Ins. Co. v. Kozlowski, 18 A.D.3d 33, 39 (1st Dep't 2005).

Plaintiff timely filed the amended complaint before defendants served any answer to her original complaint. C.P.L.R. § 3025(a). Although plaintiff's amended complaint repeatedly refers to "other similarly situated members of her protected class," Aff. of Elise M. Bloom Ex. 1 (Am. V. Compl.) ¶¶ 2, 4, 145, plaintiff has clarified that her amended complaint does not allege a class action. Therefore defendants' motion to dismiss plaintiff's class action allegations is academic.

II. THE ALLEGED FRAUDULENT INDUCEMENT

To void the release due to its fraudulent inducement, plaintiff must show that defendants misrepresented or concealed a material fact, knowing the misstatement or omission was false, to induce plaintiff to rely on it, and that plaintiff justifiably relied on the misrepresentation or omission and incurred damages from that reliance. Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011); Laduzinski v. Alvarez & Marsal Taxand LLC, 132 A.D.3d 164, 167 (1st Dep't 2015); Perrotti v. Becker, Glynn, Melamed & Muffy LLP, 82 A.D.3d 495, 498 (1st Dep't 2011). Plaintiff claims that she signed the agreement releasing her claims against defendants, her former employer and former supervisor, based on their misrepresentation that her position was eliminated as part of a reduction in force. An attachment to the release identifies six other employees in her media department whose employment was terminated simultaneously with hers as part of a reduction in force. Bloom Aff. Ex. 1 (Am. V. Compl.) ¶ 103. Defendants insist that this document refutes plaintiff's claim of fraudulent inducement, but the attachment only supports her claim that defendants gave her a reason for her termination, a reduction in force, that was false. Plaintiff claims that in 2019 she learned that she and those six other employees, all over age 40, id. ¶¶

104, 120, were replaced by younger employees. Id. ¶ 127. Defendants' further documentary evidence, plaintiff's email November 21, 2016, to a colleague at Bloomberg L.P., acknowledging that plaintiff's "division in the media group was dismantled," also supports her reliance on defendants' representation in her agreeing to the release. Aff. of Darron Smith Ex. A.

Defendants then inconsistently suggest that plaintiff's reliance on their own representations of a reduction in force was unjustified. Pointing to the amended complaint's allegations that plaintiff was a sophisticated, experienced employee in the media industry who produced significant revenue and managed business relationships critical to her employer's success, defendants criticize her for not giving more studied consideration to the terms of her severance and verifying defendants' representations. Again, viewing the evidence most favorably to plaintiff, this need for verification only supports her claim that defendants' offered reason for her termination was questionable. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d 815, 816 (1st Dep't 2015).

Plaintiff's allegations regarding defendants' conduct, in hindsight, reveal cause to question defendants' representations. On November 20, 2016, after plaintiff had been hospitalized for a nervous breakdown, Bloomberg L.P.'s Human Resources representative Alyson Zeitz telephoned plaintiff and inquired whether she would need leave for a mental disability. When plaintiff responded that she intended to return to work as soon as possible, Zeitz informed plaintiff that her division within her department was being eliminated. Bloom Aff. Ex. 1 (Am. V. Compl.) ¶ 99. If that fact were true, Zeitz had no reason to inquire whether plaintiff intended to take leave for a disability. In sum, plaintiff's allegations that defendants falsely represented that her position was eliminated as part of a reduction in force, on which plaintiff relied in agreeing to the release, when in fact she was replaced by a younger employee, and her position and division were not eliminated, demonstrate fraudulent inducement that damaged her. American Media, Inc. v. Bainbridge & Knight Labs., LLC, 135 A.D.3d 477, 477-78 (1st Dep't 2016); Laduzinski v. Alvarez & Marsal Taxand LLC, 132 A.D.3d at 168-69.

Plaintiff also alleges that defendants concealed their severance policies and that Zeitz misrepresented to plaintiff that payment of her accrued salary, bonus, and severance pay was contingent on her signing the release, when in fact the payment

was due her regardless of her signing the release. Bloom Aff. Ex. 1 (Am. V. Compl.) ¶¶ 100-101, 113. These allegations that defendants concealed their severance policies and falsely represented that she would receive the payments due her only if she signed the release, on which she also relied in agreeing to it, when in fact she was owed the payment under defendants' policies without signing the release, likewise demonstrate fraudulent inducement that damaged her. Id. ¶¶ 137-38.

While the release acknowledges that plaintiff has agreed to it knowingly and voluntarily, if fraudulent inducement voids the release, then this provision is void along with the release as a whole. Any knowing agreement by plaintiff is based on her knowledge upon entering the agreement. Johnson v. Lebanese Am. Univ., 84 A.D.3d 427, 430 (1st Dep't 2011). Defendants offer no reason why plaintiff would have known that the information defendant gave her, on which her knowledge was based, was false. Of course that information regarding the reduction in force may have been entirely true, but the complaint alleges to the contrary, which at this stage the court must accept as true. JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d at 764; Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d at 351; ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d at 227; Drug Policy Alliance v. New York City Tax Comm'n, 131 A.D.3d at 816.

III. DEFENDANTS' FURTHER DEFENSES

This posture of the action is one of the several factors distinguishing it from Skluth v. United Merchants & Mfrs., 163 A.D.2d 104 (1st Dep't 1990), on which defendants rely, and which granted the defendants there summary judgment after completion of disclosure because they established through admissible evidence that the plaintiff's position was terminated due to his employer ceasing operation of his division. The plaintiff contended that he was replaced by a younger employee, which he learned only after signing a release of all claims against his employer, but, critically, he did not contend that he had relied on his employer's representation regarding the liquidation of his division, nor did he claim fraudulent inducement. The court observed that:

> A release may, of course, be attacked for being the product of fraud, . . . but plaintiff's only challenge to the release . . . is that he did not have a lawyer advising him . . . and he did not learn until after he had approved the release that he had been replaced by a younger employee.

Id. at 106. Plaintiff here does claim that the release was the product of fraud.

In Skluth v. United Merchants & Mfrs., 163 A.D.2d at 105, moreover, the plaintiff had negotiated the release in exchange for severance benefits to which he would not have been entitled without the release. Again in contrast, plaintiff alleges that she simply assured her receipt of the standard severance benefits

and assumption of the standard noncompetition obligations applicable to all comparable employees. See Johnson v. Lebanese Am. Univ., 84 A.D.3d at 430-31.

Defendants also seek to rely on plaintiff's admission in medical records that she was aware of defendant Bloomberg L.P.'s layoffs before defendants represented to her the reason for her termination from her position. Defendants did not present these records in support of defendants' motion, however, nor are they in admissible form as required to support a motion under C.P.L.R. § 3211(a)(1). Bou v. Liamoza, 173 A.D.3d 575, 576 (1st Dep't 2019); Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc., 120 A.D.3d 431, 432-33 (1st Dep't 2014); Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007). While the second layer of hearsay, the record of plaintiff's admission, may qualify as an exception to the rule against hearsay, no business record foundation is laid for the first layer of hearsay, the records themselves. C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012). See Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 508 (2015); People v. Rodriguez, 153 A.D.3d 235, 244 (1st Dep't 2017); Barkley v. Plaza Realty Invs.

Inc., 149 A.D.3d 74, 79 (1st Dep't 2017); Weicht v. City of New York, 148 A.D.3d 551, 552 (1st Dep't 2017). Plaintiff's awareness of her employer's layoffs, moreover, does not necessarily correlate to her awareness that her position or her division within her department was being eliminated.

IV. THE ABSENCE OF CONCLUSIVE DOCUMENTARY EVIDENCE THAT PLAINTIFF RATIFIED THE RELEASE

To void an agreement due to its fraudulent inducement, plaintiff also must seek to rescind or repudiate the agreement promptly upon realizing the fraud. Scharf v. Idaho Farmers Mkt. Inc., 115 A.D.3d 500, 501-502 (1st Dep't 2014); VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d 49, 56 (1st Dep't 2013); Allen v. Riese Org., Inc., 106 A.D.3d at 517-18; Robinson v. Day, 103 A.D.3d 584, 585 (1st Dep't 2013). See Achache v. Och, 128 A.D.3d 563, 563 (1st Dep't 2015). Defendants insist that, since plaintiff's current attorney, representing plaintiff, wrote to Bloomberg L.P. in December 2017 claiming the same discrimination and retaliation as plaintiff claims in this action, she must have known then that she was replaced by a younger employee, that her position was not eliminated, and that there was no reduction in force in her department. Notably, the correspondence nowhere indicates knowledge of any such facts. In fact, plaintiff did not commence any legal action following that correspondence, raising the inference that, without knowledge of such facts, her attorney did not consider the release voidable.

Plaintiff attests that, when she learned such facts in 2019, she contacted her attorney again, who then considered the release voidable and plaintiff's discrimination claims viable based on defendants' misrepresentations about a reduction in force.

At that point plaintiff also offered to place the compensation she received as consideration for her release into a trust account. Defendants present no authority that placing the funds into a trust account would constitute continued retention of the funds and thus ratification of the release after plaintiff learned of defendants' misrepresentations that she now claims. See Reversible Destiny Found., Inc. v. Post, 173 A.D.3d 647, 647-48 (1st Dep't 2019); Allen v. Riese Org., Inc., 106 A.D.3d at 518; Khalid v. Scagnelli, 290 A.D.2d 352, 354 (1st Dep't 2002). Moreover, her amended complaint further alleges that she "remains willing to return any payment made to her" that was consideration for the release if the court voids the release. Bloom Aff. Ex. 1 (Am. V. Compl.) ¶ 129.

IV. CONCLUSION

For the foregoing reasons, the court denies defendants' motion to dismiss plaintiff's claim that the release is void because it was fraudulently induced and therefore does not bar her discrimination and retaliation claims. The court grants defendants' motion to dismiss plaintiff's claims that the release is void and declares that it is not void due to her incapacity,

duress, the release's ambiguity, its lack of consideration, and its violation of statutory requirements without opposition. C.P.L.R. §§ 3001, 3211(a)(1) and (5); N.Y. Gen. Oblig. Law § 15-303; Allen v. Riese Org., Inc., 106 A.D.3d at 515; Serbin v. Rodman Principal Invs., LLC, 87 A.D.3d at 870.

This decision constitutes the court's order and judgment. Defendants shall answer the amended complaint within 10 days after service of this order with notice of entry. C.P.L.R. § 3211(f). The parties shall convene for a Preliminary Conference August 20, 2020, at 2:30 p.m., via telephone to be arranged by the court.

DATED: July 31, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.