Amaducci v. Metropolitan Opera

33 A.D.2d 542
Supreme Court of New York, Appellate Division, First Department
October 16, 1969

BRUNO AMADUCCI, Respondent, v. METROPOLITAN OPERA ASSOCIATION, INC., Appellant, et al., Defendant. Stevens, P.J., Eager, Markewich, Nunez and Macken, JJ. concurring.

Per Curiam.

Plaintiff seeks damages for breach of an employment contract by which defendant engaged him as a conductor of the orchestra of the Metropolitan Opera for a period of 12 weeks from September 19, 1968 to December 11, 1968, inclusive, at a salary of $700 per week plus an additional $1,000 for travel and rehearsal expenses. Sometime in December, 1967, defendant notified plaintiff that he would not be employed during the 1968-69 season. Based upon this breach of the employment agreement – which calls for a total payment of less than $10,000 – the amended complaint seeks damages of one million dollars. Paragraphs Tenth, Eleventh, Twelfth and Thirteenth of the amended complaint contain allegations which, in effect, allege that defendant's breach of the agreement to employ plaintiff as an orchestra conductor caused plaintiff "mental anguish, humiliation, grief and distress" and caused, and will in the future result in, "great and irreparable harm and damage to his name, career and reputation as an orchestra conductor". Essentially, Special Term denied the motion to dismiss upon the ground that since the amended complaint did state a cause of action for breach of a contract of employment, the sufficiency of the pleading is not affected by the inclusion of other claims which may not be actionable. This formalistic approach cannot be approved in the light of the purposes and objectives of the provisions of the CPLR (CPLR 104). It is well settled that the optimum measure of damages for wrongful discharge under a contract of employment is the salary fixed by the contract for the unexpired period of employment, and that damages to the good name, character and reputation of the plaintiff are not recoverable in an action for wrongful discharge.~ Consequently, defendant's motion will be considered as one for partial summary judgment dismissing that part of plaintiff's claim represented by plaintiff's allegations in paragraphs Tenth, Eleventh, Twelfth and Thirteenth of the amended complaint, and defendant's motion will be granted to the extent of dismissing those claims. A further amended complaint, in accordance herewith, is to be served within 20 days after service of a copy of the order to be entered hereon with notice of entry.

Quinn v. Straus Broadcasting

309 F.Supp. 1208
United States District Court for the Southern District of New York
March 5, 1970

BRUNODominic QUINN, Plaintiff, v. STRAUS BROADCASTING GROUP, INC., Defendant. No. 69 Civ. 4781. Counsel: Boal, Doti, Fitzpatrick & Hart, New York City, for plaintiff; William D. Greene, New York City, of counsel. Robinson, Silverman, Pearce, Aronsohn & Sand, New York City, for defendant; Leonard B. Sand, Barry I. Fredericks, New York City, of counsel.

BONSAL, District Judge.

Defendant Straus Broadcasting Group, Inc. moves (1) pursuant to F.R.Civ.P. 12(f) to strike the ad damnum clause in the first cause of action alleged in plaintiff's complaint, and (2) pursuant to F.R.Civ.P. 12(b)(6) to dismiss the second and third causes of action on the ground that they fail to state claims upon which relief can be granted.

This is a diversity action for breach of an employment contract. The complaint alleges in the first cause of action that plaintiff Dominic Quinn entered into a written agreement on April 29, 1969 (attached as exhibit 'A' to the complaint) with defendant to perform as moderator of a radio 'talk show' called 'WMCA Power Line with Dominic Quinn,' which was to be broadcast on defendant's New York City radio station, WMCA, from 6:00 a.m. to 10:00 a.m. Monday through Friday, that plaintiff began performing pursuant to the agreement, and that on August 1, 1969, defendant discharged plaintiff without just cause by notifying him that it would not broadcast him show after August 29th, and would have no future need for his services after that date. (Defendant states that it offered to pay plaintiff the balance of the $50,000 provided in the contract.) Plaintiff claims $500,000 in damages in the first cause of action.~

The second cause of action incorporates the allegations of the first cause of action, alleges the unique nature of Quinn's services and his need to appear before the public to advance his professional reputation, that defendant knew that plaintiff's reputation would be damaged by cancellation of his show, and that defendant's cancellation deprived him of the opportunity to appear before the public. Plaintiff claims an additional $500,000 in damages in the second cause of action.

The third cause of action incorporates the allegations of the first and second causes of action and alleges in paragraph 13 that defendant's cancellation 'held the plaintiff up to public ridicule and caused his reputation as a performer to be seriously and permanently impaired.' Plaintiff claims an additional $500,000 in damages in the third cause of action, making a total of $1,500,000 claimed in damages.

The contract provided that plaintiff was employed as a 'staff announcer' for the year April 1, 1969 to March 31, 1970 at a salary of $50,000, and that WMCA

had an option to renew for a second year at $57,500, and for a third year at $65,000.

The parties agree that the substantive law of the State of New York applies.

With respect to the first cause of action alleging breach of plaintiff's employment contract, defendant moves to strike the ad damnum clause of $500,000 on the ground that plaintiff's damages cannot exceed the stipulated salary of $50,000. The New York rule is that damages for breach of an employment contract are limited to the unpaid salary to which the employee would be entitled under the contract less the amount by which he should have mitigated his damages, *Cornell v. T.V. Development Corp.*, 17 N.Y.2d 69 (1966). This rule was recently applied with respect to the conductor of the orchestra of the *Metropolitan Opera in Amaducci v. Metropolitan Opera Association,* 33 A.D.2d 542 (1st Dept. 1969), where plaintiff sought damages for mental anguish and defamation resulting from his discharge~. While Amaducci does not directly answer plaintiff's contention that he is entitled to damages for the loss of opportunity to practice his profession before the public, there is no reason to believe that the State courts would adopt a different rule in this context. Moreover, it is clear that by signing a $30,000 contract with radio station WCAU in Philadelphia in September 1969, plaintiff has not lost his opportunity to practice his profession.~

Since, under the New York rule, plaintiff's damages are limited to a maximum of $50,000, his ad damnum clause of $500,000 in the first cause of action is clearly excessive and will be stricken.

The second and third causes of action are not recognized in the New York rule as laid down in *Cornell* and *Amaducci*. The second alleges that plaintiff's services were unique and that by reason of the breach of contract plaintiff was deprived of an opportunity to perform before large audiences; and the third alleges that his reputation as a performer had been impaired. No authority has been suggested for the proposition that loss of opportunity to perform entitles the employee to a separate cause of action. *Amaducci* holds that no separate cause of action can be stated for loss of reputation. Divested of these allegations, the second and third causes of action merely repeat the first cause of action. Accordingly, they will be stricken.

Plaintiff may file an amended complaint within 20 days from the date of the order to be entered herein.

Parker v. Twentieth Century-Fox Film

3 Cal.3d 176
Supreme Court of California
September 30, 1970

SHIRLEY MACLAINE PARKER, Plaintiff and Respondent, v. TWENTIETH CENTURY-FOX FILM CORPORATION, Defendant and Appellant. L.A. No. 29705. Counsel: Musick, Peeler & Garrett and Bruce A. Bevan, Jr., for Defendant and Appellant. Benjamin Neuman for Plaintiff and Respondent. McComb, J., Peters, J., Tobriner, J., Kaus, J., and Roth, J., concurred. Appellant's petition for a rehearing was denied October 28, 1970. Mosk, J., did not participate therein. Sullivan, J., was of the opinion that the petition should be granted.

BURKE, J.

Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress, and in the contract between plaintiff and defendant is sometimes referred to as the "Artist." Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled "Bloomer Girl." The contract provided that defendant would pay plaintiff a minimum "guaranteed compensation" of $53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of $750,000. Prior to May 1966 defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not "comply with our obligations to you under" the written contract.

By the same letter and with the professed purpose "to avoid any damage to you," defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled "Big Country, Big Man" (hereinafter, "Big Country"). The compensation offered was identical, as were 31 of the 34 numbered provisions or articles of the original contract.

Among the identical provisions was the following found in the last paragraph of Article 2 of the original contract: "We [defendant] shall not be obligated to utilize your [plaintiff's] services in or in connection with the Photoplay hereunder, our sole obligation, subject to the terms and conditions of this Agreement, being to pay you the guaranteed compensation herein provided for."

Unlike "Bloomer Girl," however, which was to have been a musical production, "Big Country" was a dramatic "western type" movie. "Bloomer Girl" was to have been filmed in California; "Big Country" was to be produced in Australia. Also, certain terms in the proffered contract varied from those of the original.

Article 29 of the original contract specified that plaintiff approved the director already chosen for "Bloomer Girl" and that in case he failed to act as director

plaintiff was to have approval rights of any substitute director. Article 31 provided that plaintiff was to have the right of approval of the "Bloomer Girl" dance director, and Article 32 gave her the right of approval of the screenplay.

Defendant's letter of April 4 to plaintiff, which contained both defendant's notice of breach of the "Bloomer Girl" contract and offer of the lead in "Big Country," eliminated or impaired each of those rights. It read in part as follows:

> The terms and conditions of our offer of employment are identical to those set forth in the 'BLOOMER GIRL' Agreement, Articles 1 through 34 and Exhibit A to the Agreement, except as follows:
>
> 1. Article 31 of said Agreement will not be included in any contract of employment regarding 'BIG COUNTRY, BIG MAN' as it is not a musical and it thus will not need a dance director.
>
> 2. In the 'BLOOMER GIRL' agreement, in Articles 29 and 32, you were given certain director and screenplay approvals and you had preapproved certain matters. Since there simply is insufficient time to negotiate with you regarding your choice of director and regarding the screenplay and since you already expressed an interest in performing the role in 'BIG COUNTRY, BIG MAN,' we must exclude from our offer of employment in 'BIG COUNTRY, BIG MAN' any approval rights as are contained in said Articles 29 and 32; however, we shall consult with you respecting the director to be selected to direct the photoplay and will further consult with you with respect to the screenplay and any revisions or changes therein, provided, however, that if we fail to agree ... the decision of ... [defendant] with respect to the selection of a director and to revisions and changes in the said screenplay shall be binding upon the parties to said agreement.

Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant's breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and "anticipatorily repudiated" the

contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and pleads as an affirmative defense to both causes of action plaintiff's allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in "Big Country."

Plaintiff moved for summary judgment under Code of Civil Procedure section 437c, the motion was granted, and summary judgment for $750,000 plus interest was entered in plaintiff's favor. This appeal by defendant followed.

As stated, defendant's sole defense to this action which resulted from its deliberate breach of contract is that in rejecting defendant's substitute offer of employment plaintiff unreasonably refused to mitigate damages.

The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment.~

However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.^

In the present case defendant has raised no issue of reasonableness of efforts by plaintiffs to obtain other employment; the sole issue is whether plaintiff's refusal of defendant's substitute offer of "Big Country" may be used in mitigation.~

Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion-here, defendant – it is clear that the trial court correctly ruled that plaintiff's failure to accept defendant's tendered substitute employment could not be applied in mitigation of damages because the offer of the "Big Country" lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that "Bloomer Girl" was to be a musical review calling upon plaintiff's talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas "Big Country" was a straight dramatic role in a "Western Type" story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute "Big Country" offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original "Bloomer Girl" contract (see fn. 2, ante), and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available "other employment" relied

upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept.^

Statements found in affidavits submitted by defendant in opposition to plaintiff's summary judgment motion, to the effect that the "Big County" offer was not of employment different from or inferior to that under the "Bloomer Girl" contract, merely repeat the allegations of defendant's answer to the complaint in this action, constitute only conclusionary assertions with respect to undisputed facts, and do not give rise to a triable factual issue so as to defeat the motion for summary judgment.~

The judgment is affirmed.

SULLIVAN, Acting C.J., dissenting.

The basic question in this case is whether or not plaintiff acted reasonably in rejecting defendant's offer of alternate employment. The answer depends upon whether that offer (starring in "Big Country, Big Man") was an offer of work that was substantially similar to her former employment (starring in "Bloomer Girl") or of work that was of a different or inferior kind. To my mind this is a factual issue, which the trial court should not have determined on a motion for summary judgment. The majority have not only repeated this error but have compounded it by applying the rules governing mitigation of damages in the employer-employee context in a misleading fashion. Accordingly, I respectfully dissent.

The familiar rule requiring a plaintiff in a tort or contract action to mitigate damages embodies notions of fairness and socially responsible behavior which are fundamental to our jurisprudence. Most broadly stated, it precludes the recovery of damages which, through the exercise of due diligence, could have been avoided. Thus, in essence, it is a rule requiring reasonable conduct in commercial affairs. This general principle governs the obligations of an employee after his employer has wrongfully repudiated or terminated the employment contract. Rather than permitting the employee simply to remain idle during the balance of the contract period, the law requires him to make a reasonable effort to secure other employment.~ He is not obliged, however, to seek or accept any and all types of work which may be available. Only work which is in the same field and which is of the same quality need be accepted.~

For reasons which are unexplained, the majority cite several of these cases yet select from among the various judicial formulations which they contain one particular phrase, "Not of a different or inferior kind," with which to analyze this case. I have discovered no historical or theoretical reason to adopt this phrase, which is simply a negative restatement of the affirmative standards set out in the above cases, as the exclusive standard. Indeed, its emergence is an example of the dubious phenomenon of the law responding not to rational judicial choice or changing social conditions, but to unrecognized changes in the language of opinions or legal treatises.~ However, the phrase is a serviceable one and my concern is not with its use as the standard but rather with what I consider its distortion.

The relevant language excuses acceptance only of employment which is of a different kind.^ It has never been the law that the mere existence of differences

between two jobs in the same field is sufficient, as a matter of law, to excuse an employee wrongfully discharged from one from accepting the other in order to mitigate damages. Such an approach would effectively eliminate any obligation of an employee to attempt to minimize damage arising from a wrongful discharge. The only alternative job offer an employee would be required to accept would be an offer of his former job by his former employer.

Although the majority appear to hold that there was a difference "in kind" between the employment offered plaintiff in "Bloomer Girl" and that offered in "Big Country"^, an examination of the opinion makes crystal clear that the majority merely point out differences between the two films (an obvious circumstance) and then apodically assert that these constitute a difference in the kind of employment. The entire rationale of the majority boils down to this; that the "mere circumstances" that "Bloomer Girl" was to be a musical review while "Big Country" was a straight drama "demonstrates the difference in kind" since a female lead in a western is not "the equivalent of or substantially similar to" a lead in a musical. This is merely attempting to prove the proposition by repeating it. It shows that the vehicles for the display of the star's talents are different but it does not prove that her employment as a star in such vehicles is of necessity different in kind and either inferior or superior.

I believe that the approach taken by the majority (a superficial listing of differences with no attempt to assess their significance) may subvert a valuable legal doctrine.~ The inquiry in cases such as this should not be whether differences between the two jobs exist (there will always be differences) but whether the differences which are present are substantial enough to constitute differences in the kind of employment or, alternatively, whether they render the substitute work employment of an inferior kind.

It is not intuitively obvious, to me at least, that the leading female role in a dramatic motion picture is a radically different endeavor from the leading female role in a musical comedy film. Nor is it plain to me that the rather qualified rights of director and screenplay approval contained in the first contract are highly significant matters either in the entertainment industry in general or to this plaintiff in particular. Certainly, none of the declarations introduced by plaintiff in support of her motion shed any light on these issues.~

The declaration of Herman Citron, plaintiff's theatrical agent, alleges that prior to the formation of the "Bloomer Girl" contract he discussed with Richard Zanuck, defendant's vice president, the conditions under which plaintiff might be interested in doing "Big Country"; that it was Zanuck who informed him of Fox's decision to cancel production of "Bloomer Girl" and queried him as to plaintiff's continued interest in "Big Country"; that he informed Zanuck that plaintiff was shocked by the decision, had turned down other offers because of her commitment to defendant for "Bloomer Girl" and was not interested in "Big Country." It further alleges that "Bloomer Girl" was to have been a musical review which would have given plaintiff an opportunity to exhibit her talent as a dancer as well as an actress and that "Big Country" was a straight dramatic role; the former to have been produced in California, the latter in Australia. Citron's

declaration concludes by stating that he has not received any payment from defendant for plaintiff under the "Bloomer Girl" contract.

Benjamin Neuman's declaration states that he is plaintiff's attorney; that after receiving notice of defendant's breach he requested Citron to make every effort to obtain other suitable employment for plaintiff; that he (Neuman) rejected defendant's offer to settle for $400,000 and that he has not received any payment from defendant for plaintiff under the "Bloomer Girl" contract. It also sets forth correspondence between Neuman and Fox which culminated in Fox's final rejection of plaintiff's demand for full payment.~

Fox filed two declarations in opposition to the motion; the first is that of Frank Ferguson, Fox's chief resident counsel. It alleges, in substance, that he has handled the negotiations surrounding the "Bloomer Girl" contract and its breach; that the offer to employ plaintiff in "Big Country" was made in good faith and that Fox would have produced the film if plaintiff had accepted; that by accepting the second offer plaintiff was not required to surrender any rights under the first (breached) contract nor would such acceptance have resulted in a modification of the first contract; that the compensation under the second contract was identical; that the terms and conditions of the employment were substantially the same and not inferior to the first; that the employment was in the same general line of work and comparable to that under the first contract; that plaintiff often makes pictures on location in various parts of the world; that article 2 of the original contract which provides that Fox is not required to use the artist's services is a standard provision in artists' contracts designed to negate any implied covenant that the film producer promises to play the artist in or produce the film; that it is not intended to be an advance waiver by the producer of the doctrine of mitigation of damages.

The second declaration is that of Richard Zanuck. It avers that he is Fox's vice president in charge of production; that he has final responsibility for casting decisions, that he is familiar with plaintiff's ability and previous artistic history; that the offer of employment for "Big Country" was in the same general line and comparable to that of "Bloomer Girl"; that plaintiff would not have suffered any detriment to her image or reputation by appearing in it; that elimination of director and script approval rights would not injure plaintiff; that plaintiff has appeared in dramatic and western roles previously and has not limited herself to musicals; and that Fox would have complied with the terms of its offer if plaintiff had accepted it.

I cannot accept the proposition that an offer which eliminates any contract right, regardless of its significance, is, as a matter of law, an offer of employment of an inferior kind. Such an absolute rule seems no more sensible than the majority's earlier suggestion that the mere existence of differences between two jobs is sufficient to render them employment of different kinds. Application of such per se rules will severely undermine the principle of mitigation of damages in the employer-employee context.

[The declarations do not] attempt to explain why [Plaintiff] declined the offer of starring in "Big Country, Big Man." Nevertheless, the trial court granted the

motion, declaring that these approval rights were "critical" and that their elimination altered "the essential nature of the employment."~

I believe that the judgment should be reversed so that the issue of whether or not the offer of the lead role in "Big Country, Big Man" was of employment comparable to that of the lead role in "Bloomer Girl" may be determined at trial.