Cancel v East Coast Fertility, P.C.

2012 NY Slip Op 30239(U)

January 19, 2012

Sup Ct, Nassau County

Docket Number: 14668/11

Judge: Denise L. Sher

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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ALEXIS CANCEL,

Plaintiff,

- against -

EAST COAST FERTILITY, P.C., CHARLES TODARO, DANIEL KREINER and DAVID KREINER,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 14668/11
Motion Seq. No.: 01
Motion Date: 11/30/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibit	1
Affirmation in Opposition and Exhibit and Memorandum of Law	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3211(a)(7), for an order: (1) dismissing the first, fourth through sixth and seventh through twelfth causes of action and (2) striking paragraphs "G" and "H" of the Verified Complaint's prayer for relief. Plaintiff opposes the motion.

Commencing in March of 2010, plaintiff was employed as an Assistant Practice Administrator by defendant East Coast Fertility, P.C. ("ECF"), where she served in defendant ECF's Brooklyn offices. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 6-10, 15. During the course of her employment, plaintiff – then defendant ECF's only Hispanic female employee – claims that she performed a broad range of duties, among them the handling of loan financing for

the entire firm and human resource-related duties, which included staffing matters, office management, and overseeing the scheduling of doctors and patients. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 12-13.

However, despite her "stellar work ethic," plaintiff contends that defendant ECF's manager – defendant Charles Todaro ("Todaro") – and later defendant ECF's principals, defendants Daniel Kreiner and Dr. David Kreiner, subjected her to racial and gender-based discrimination before illegally terminating her in October of 2010. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 14, 17, 19, 20-27.

More specifically, plaintiff has alleged that defendant Todaro – her immediate supervisor– responded to her job place suggestions and requests for guidance and/or support in a hostile and condescending manner, that he undermined her authority by refusing to communicate with her and ignoring her recommendations with respect to staff and other relevant job concerns and that defendant Todaro increased her job responsibilities by requiring that she divide her time between defendant ECF's Brooklyn and Plainedge offices, but then refused to provide her with a functioning work station at the Plainedge location. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 15-19.

Additionally, plaintiff alleges that defendant Dr. David Kreiner ignored her oral and written complaints about defendant Todaro and instead "coddled" and declined to discipline him, that defendant Daniel Kreiner demeaned and humiliated her (either when conversing with her directly and/or through e-mails sent to co-employees), that defendant Daniel Kreiner utilized derogatory language and had an "overall misogynistic attitude" towards all female employees and that, at one point, defendant Daniel Kreiner falsely accused plaintiff (in an email exchange), of infecting the firm's computers with a virus and then threatened to fire her. *See* Defendants'

Affirmation in Support Exhibit A ¶¶ 21-27.

Plaintiff contends that defendant ECF finally made good on its threat and discharged her in October of 2010. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 26-27.

Thereafter, by Summons and Verified Complaint dated October 2011, plaintiff commenced the within action, alleging in sum that the defendants illegally discriminated against her based upon her race and gender and then retaliated when she objected to their misconduct by terminating her employment. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 8, 27. The Verified Complaint further alleges that, after defendants discharged her in October of 2010, plaintiff suffered mental anguish and emotional distress, as well as substantial monetary injury and damage to her personal and professional reputation. *See* Defendants' Affirmation in Support Exhibit A ¶¶ 28-30.

Based on these claims, and others, plaintiff has interposed twelve, separately pleaded causes of action, including claims grounded upon race and gender discrimination in violation of the New York State and Nassau County Human Rights Laws (*see* Executive Law § 296; Nassau County Administrative Code § 21-9.8(1), (2), (4)(a)); retaliatory discharge; aiding and abetting statutory violations of the New York State and Nassau County Human Rights Law and intentional infliction of emotional distress. Among other things, the Verified Complaint's "Wherefore" clause also demands counsel fees and punitive damages. *See* Defendants' Affirmation in Support Exhibit A ¶¶ "G", "H".

Defendants now move, pre-Answer, for an order, pursuant to CPLR § 3211(a)(7), dismissing ten of the twelve causes of action, *i.e.*, the first; fourth through sixth causes of action (to the extent based on racial discrimination) and the seventh through twelfth causes of action and also for an order striking paragraphs "G" and "H" of the Verified Complaint's "Wherefore"

clause. Notably, the second and third causes of action, as to which dismissal has not been sought, allege gender-based discrimination.

Defendants' motion to dismiss should be granted to the extent indicated below.

"The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under Title VII of the Civil Rights Act of 1964." *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108 (W.D.N.Y.1996). A plaintiff alleging discrimination in employment has the initial burden of establishing a *prima facie* case of discrimination. *See Lambert v. Macy's E., Inc.*, 84 A.D.3d 744, 922 N.Y.S.2d 210 (2d Dept. 2011); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004); *Ferrante v. American Lung Assn., supra* at 629. To do so, a plaintiff must carry the "initial burden of showing 'that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination'" *Suriel v. Dominican Republic Educ. & Mentoring Project, Inc.*, 85 A.D.3d 1464, 926 N.Y.S.2d 198 (3d Dept. 2011) *quoting Forrest v. Jewish Guild for the Blind, supra* at 305; *Lambert v. Macy's E., Inc., supra.*

Significantly, although Title VII and the Executive Law prohibit discrimination, nevertheless they are "'not a shield against harsh treatment at the work place.'" *Gibson v. Brown*, ___F.Supp.2d ___, 1999 WL 1129052 (E.D.N.Y. 1999), *aff'd*, 242 F.3d 365 (2d Cir. 2000) *quoting Neratko v. Frank*, 31 F.Supp.2d 270, 284 (W.D.N.Y. 1998). *See also McCollum v. Bolger*, 794 F.2d 602, 609–10 (11th Cir. 1986). *Accord Forrest v. Jewish Guild for the Blind, supra* at 309-310. Nor can a plaintiff "'turn a personal feud into a * * * discrimination case by accusation'" since "'[p]ersonal animosity is not the equivalent of * * * discrimination* * *'" *Gibson v. Brown, supra. See also Forrest v. Jewish Guild for the Blind, supra* at 309-310; *Gorley*

v. Metro-North Commuter R.R., ___ F.Supp.2d.___, 2000 WL 1876909 (S.D.N.Y. 2000), *aff'd*, 29 Fed.Appx. 764 (2d Cir. 2002).

"In order to survive a motion to dismiss, the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent." *Yusuf v. Vassar College*, 35 F.3d 709, 713 (2d Cir.1994). *See also Smith v. United Federation of Teachers*, 162 F.3d 1148 (2d Cir. 1998); *Forrest v. Jewish Guild for the Blind, supra.*

Preliminarily, plaintiff has agreed to voluntarily withdraw her claims based upon the Nassau County Code and those branches of the "Wherefore" clause which demand counsel fees and punitive damages. *See* Plaintiff's Affirmation in Opposition ¶ 8; Plaintiff's Memorandum of Law in Opposition pp. 1 fn.1, 8. Accordingly, the **seventh through eleventh causes of action are dismissed upon consent** and **paragraphs "G" and "H" are stricken from the "Wherefore" clause in the Verified Complaint.**

With respect to the remaining claims as to which dismissal has been sought – the first, and fourth through sixth causes of action – the Court agrees that even when most favorably viewed (*see Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994)), they do not state viable claims for racial discrimination under the New York State Human Rights Law.

Notably, to succeed on a discrimination claim, a plaintiff must properly allege that a complained-of discharge or other adverse action "occurred under circumstances giving rise to an inference of discrimination." *Forrest v. Jewish Guild for the Blind, supra* at 304-305. *See also Smith v. United Federation of Teachers, supra.* Moreover, "bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion pursuant to CPLR § 3211(a)(7). *See Maas v. Cornell University*, 94 N.Y.2d 87, 699 N.Y.S.2d 716 (1999). *See also Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009); *Peter F. Gaito*

Architecture, LLC v. Simone Dev. Corp., 46 A.D.3d 530, 846 N.Y.S.2d 386 (2d Dept. 2007).

Here, while the Verified Complaint alleges, *inter alia*, that plaintiff was the only Hispanic female in the involved work environment – and that she was treated in an allegedly discriminatory fashion (*see* Defendants' Affirmation in Support Exhibit A ¶¶ 6, 17; 12-26) – said Verified Complaint never identifies conduct from which an inference of unlawful and/or discriminatory racial misconduct can be plausibly derived, *i.e.*, the Verified Complaint does not contain discretely pleaded factual averments which causally link the defendants' allegedly objectionable conduct to plaintiff's race. Rather, the Verified Complaint relies upon assertions to the effect that, among other things, defendant Todaro allegedly mistreated plaintiff by undermining her authority, by "setting her up to fail" and by humiliating and/or demeaning her – and that since this misconduct occurred – defendant Todaro (and the other defendants) must therefore have been "treating her harshly" based on her race. *See* Defendants' Affirmation in Support Exhibit A ¶ 19.

Upon these largely circular allegations, however, it is just as likely that the objectionable conduct was attributable to another, entirely distinct and non-racial rationale. *See Forrest v. Jewish Guild for the Blind, supra* at 309-310. *See also Padob v. Entex Information Service*, 960 F.Supp. 806, 813 (S.D.N.Y. 1997). *See generally Yusuf v. Vassar College, supra* at 713; *Wilson v. Reuben H. Donnelley, Corp.*,___ F.Supp.2d .___,1998 WL 770555 (S.D.N.Y. 1998) The few incidents actually depicted with any degree of specificity in the Verified Complaint, by themselves generate no particular inference of discriminatory motive or intent based on race. Nor has plaintiff buttressed or enhanced her claims by alleging that she was, *inter alia,* subjected to racial comments (*cf., Forrest v. Jewish Guild for the Blind, supra* at 324-325), treated disparately from other, similarly situated employees or exposed to any other misconduct in which race can be implicated as a motivating or underlying factor.

Instead, the Verified Complaint appears to rely on the inconclusive assumption that because plaintiff is Hispanic – and that since the ensuing misconduct allegedly occurred – defendants' actions must necessarily have been motivated by racial discrimination. *See generally Smith v. United Federation of Teachers, supra*; *Peters v. Mount Sinai, Hosp.*,___ F.Supp.2d. ___, 2010 WL 1372686 (S. D. N.Y. 2010); *Jimenez v. City of New York*, 605 F.Supp.2d 485, 522 (S.D.N.Y. 2009); *Padob v. Entex Information Service*, *supra* at 813. *See also Forrest v. Jewish Guild for the Blind, supra*. Courts have held, however, that this sort of conjectural reasoning will not suffice to generate a plausible inference of prohibited discrimination. *See Smith v. United Federation of Teachers, supra*; *Peters v. Mount Sinai, Hosp.*, *supra*; *Jimenez v. City of New York*, *supra*. *Cf. Foss v. Coca Cola Enterprises,* ___F.Supp2d.___, 2011 WL 1303346 (E.D.N.Y. 2011); *Padob v. Entex Information Service*, *supra*; *Wilson v. Reuben H. Donnelley, Corp.*, *supra* at 4.

Additionally, and to the extent plaintiff is advancing a hostile work environment theory (*cf.* Defendants' Affirmation in Support Exhibit A ¶¶ 22-23), that claim is also subject to dismissal since there are absent allegations depicting conduct so "severe or pervasive to alter the conditions of the plaintiff's employment and create an objectively hostile or abusive work environment." *Sigh v. Fire*, 88 A.D.3d 981, 931 N.Y.S.2d 884 (2d Dept. 2011); *Lambert v. Macy's East, Inc.*, *supra* at 745; *Grovesteen v. New York State Public Employees Federation, AFL-CIO*, 83 A.D.3d 1332, 921 N.Y.S.2d 700 (3d Dept. 2011); *Thompson v. Lamprecht Transp.*, 39 A.D.3d 846, 834 N.Y.S.2d 312 (2d Dept. 2007). *See also Forrest v. Jewish Guild for the Blind*, *supra* at 310-311.

Further, and even upon most favorably construing the Verified Complaint's non-conclusory averments (*see Reilly v. Garden City Union Free School Dist.*, 89 A.D.3d 1075, 934 N.Y.S.2d 204 (2d Dept. 2011)), the twelfth cause of action sounding in intentional infliction of

emotional distress must be dismissed since it does not identify conduct "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983) *quoting* RESTATEMENT (SECOND) OF TORTS § 46(1). *See Howell v. New York Post Co.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993); *Fama v. American Intl. Group*, 306 A.D.2d 310, 760 N.Y.S.2d 534 (2d Dept. 2003). *See also Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community*, 11 N.Y.3d 15, 862 N.Y.S.2d 311 (2008); *Reilly v. Garden City Union Free School Dist., supra*; *Stangel v. Zhi Dan Chen*, 74 A.D.3d 1050, 903 N.Y.S.2d 110 (2d Dept. 2010). Notably, "the 'requirements of the rule are rigorous, and difficult to satisfy.'" *Howell v. New York Post*, *supra* at 122 *quoting* PROSSER AND KEETON, TORTS § 12, at 60–61 (5th ed.); *Bernat v. Williams*, 81 A.D.3d 679, 916 N.Y.S.2d 614 (2d Dept. 2011); *Cunningham v. Mertz*, 265 A.D.2d 370, 696 N.Y.S.2d 839 (2d Dept. 1999).

Finally, while the last sentence of plaintiff's Memorandum of Law cryptically requests leave to file an Amended Complaint, "as necessary" (*see* Plaintiff's Memorandum of Law in Opposition p.8), there is no Cross-Motion before the Court requesting affirmative relief (*e.g.*, CPLR § 2215; *Khaolaead v. Leisure Video*, 18 A.D.3d 820, 796 N.Y.S.2d 637 (2d Dept. 2005); *Thomas v. Drifters*, 219 A.D.2d 639, 631 N.Y.S.2d 419 (2d Dept. 1995)) and plaintiff has not attached a proposed, Amended Complaint to her papers. *See Pollak v. Moore,* 85 A.D.3d 578, 926 N.Y.S.2d 434 (1st Dept. 2011); *Kilkenny v. Law Office of Cushner & Garvey, LLP*, 76 A.D.3d 512, 905 N.Y.S.2d 661 (2d Dept. 2010). Nor has it been shown that whatever amendments plaintiff is referring to would possess the requisite degree of merit. *See Pollak v. Moore, supra.*

The Court has considered plaintiff's remaining contentions and concludes that they are

insufficient to defeat defendants' motion to dismiss stated portions of the Verified Complaint.

Accordingly, it is,

ORDERED the defendants' motion pursuant to CPLR § 3211(a)(7) is hereby **GRANTED to the extent** that: (1) the first cause of action, (2) those portions of the fourth through sixth causes of action which are predicated on racial discrimination and (3) the seventh through twelfth causes of action, are **dismissed**. And it is further

ORDERED that paragraphs "G" and "H" of the prayer for relief, shall be **stricken** from the Verified Complaint's "Wherefore" clause.

It is further ordered that the parties shall appear for a Preliminary Conference on March 5, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of the Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 19, 2012

ENTERED
JAN 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE