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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 105530/2011
GIRVIN, EMILY
vs.
BIRNBAUM, MARK
SEQUENCE NUMBER : 001
DISM ACTION/~~INCONVENIENT FORUM~~

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

The following papers, numbered 1 to _____, were read on this motion to/for dismiss, cross motion to amend.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
APR 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 19, 2012

_____, 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
NEW YORK COUNTY, PART 11

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EMILY GIRVIN, KAYCI ROTHWEILER, ELLIOT SAILORS and RENEE FURINI,

Plaintiffs,

-against-

MARK BIRNBAUM, EMM GROUP HOLDINGS, LLC, ONE GROUP LLC, BASEMENT MANAGER, LLC, WILL MALNATI, ERIC MARX, EUGENE REMM, SUTOL OPERATING COMPANY LLC, SUTOL ASSOCIATES MANAGEMENT LLC, and SUTOL ASSOCIATES LLC,

Defendants.

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**JOAN A. MADDEN, J.:**

In this action arising from allegedly discriminatory and/or wrongful conduct by defendants against the plaintiff employees, defendants move pursuant to CPLR 3211(a)(5) and (7) to dismiss the seventh, eighth and ninth causes of actions against all the defendants, and the causes of action asserted against defendants Will Malnati, Eric Marx and Eugene Remm. Plaintiffs oppose the motion in part and cross move to amend the first amended complaint pursuant to CPLR 3025(b), and to commence discovery.

**BACKGROUND**

Plaintiffs Emily Girvin ("Girvin"), Kayci Rothweiler ("Rothweiler"), Elliot Sailors ("Sailors"), and Renee Furini ("Furini"), are women residing in New York County, New York. Defendant EMM Group Holdings LLC ("EMM Group") is a hospitality and management company specializing, *inter alia*, in restaurants and nightlife operations, and owns the Simyone Lounge, which is a restaurant, lounge and nightclub located at 409 West 14th Street, NY, NY. EMM Group also partially owns Tenjune, which is a restaurant, lounge and nightclub located at 26 Little West 12th Street, NY, NY.

Defendant One Group LLC ("One Group") is a hospitality company that manages and operates a portfolio of luxury restaurants, lounges and bars. One Group partially owns Tenjune. Defendant Basement Manager, LLC ("Basement Manager") employs the Plaintiffs working at Tenjune. Sutol Management Company LLC ("Sutol Management") employs the plaintiffs working at Simyone Lounge.

Mark Birnbaum ("Birnbaum") is a partner in EMM Group and an owner of Simyone Lounge and Tenjune. Eugene Remm ("Remm") is a partner in EMM Group and an owner of Simyone Lounge and Tenjune. Will Malnati ("Malnati") and Eric Marx ("Marx") are managers employed by EMM Group and/or One Group.

This action alleges that plaintiffs Girvin, Rothweiler, Sailors and Furini, all of whom were employees of the defendants Simyone Lounge and Tenjune Lounge (collectively, "the Lounges"), were subject to unwelcome sexual advances and inappropriate physical and verbal conduct of a sexual nature by Birnbaum. The first amended verified complaint also names as defendants EMM Holdings, One Group, Basement Manager, Sutol Operating Company, Sutol Associates Management and Sutol Associates (collectively, "the Corporate Defendants"). The first amended verified complaint also names Remm, Malnati and Marx as defendants (collectively, "the Individual Defendants").

The first amended verified complaint contains causes of action for: (1) sexual harassment and hostile work environment against Birnbaum and the Corporate Defendants, under New York Human Rights Law § 296.1(a), Executive Law § 290, and Title 8 of the New York City Administrative Code, § 8-107; (2) gender discrimination against Birnbaum and the Corporate Defendants, under New York Human Rights Law § 296.1(a), Executive Law § 290, and Title 8 of the New York City Administrative Code, § 8-107; (3) retaliation, on behalf of Plaintiff Sailors only, against all defendants, under

New York City Human Rights Law § 296.1(a), Executive Law § 290, and Title 8 of the New York City Administrative Code, § 8-107; (4) sexual harassment and hostile work environment against Birnbaum and the Corporate Defendants, under New York Human Rights Law § 296.1(a), Executive Law § 290, and Title 8 of the New York City Administrative Code, § 8-107[1]; (5) assault, on behalf of Girvin and Rothweiler only, against Birnbaum; (6) battery, on behalf of Girvin only, against Birnbaum; (7) intentional infliction of emotional distress against Birnbaum; (8) negligent infliction of emotional distress against Birnbaum; and (9) negligent hiring and supervision against the Corporate Defendants.

Defendants move to dismiss the claims in the first amended verified complaint as against the Individual Defendants, on the grounds that there are no allegations against these defendants, beyond identifying their employer and alleged residence. Defendants also seek to dismiss the claims for intentional infliction of emotional distress, negligent infliction of emotional distress and negligent hiring and supervision, the seventh, eighth and ninth causes of action, respectively, as barred by New York Workers' Compensation Law, asserting that the Workers' Compensation Law is the exclusive means for an employee injured in the course of employment to obtain relief. Defendants further assert that while there is an intentional tort exception to the exclusivity of workers' compensation, plaintiffs have not alleged conduct giving rise to a claim for the intentional infliction of emotional distress, and that, in any event, with respect to Sailors and Furini, this claim is barred by the one-year statute of limitations.

Plaintiffs oppose the motion in part and cross move to amend the first amended verified complaint and to commence discovery. Plaintiffs consent to the dismissal

[1] This cause of action is redundant of the first cause of action and plaintiffs have acknowledged that it should be deleted.

without prejudice of the eighth and ninth causes of action, for negligent infliction of emotional distress and negligent hiring and supervision, and to the dismissal without prejudice of the seventh cause of action, for the intentional infliction of emotional distress, as to plaintiff Furini only.

Plaintiffs seek to amend the first amended complaint so as to revise Paragraph 28 to include specific allegations relating to the third cause of action for retaliation on behalf of Sailors against all the defendants, including the Individual Defendants. Plaintiffs also seek to amend the claim for intentional infliction of emotional distress to include additional allegations on behalf of all the plaintiffs, except for Furini.[2]

In reply, defendants assert that the seventh, eighth and ninth causes of action should be dismissed with prejudice since the plaintiffs have acknowledged the legal deficiencies in these claims, offering no arguments in opposition to their dismissal, and as these causes of action are barred by the statute of limitations and/or exclusivity provisions of New York Workers' Compensation Law. Defendants also argue that the new allegations regarding the Individual Defendants are insufficient to provide a basis for their liability for retaliation. Finally, the defendants contend that the proposed intentional infliction of emotional distress claim is duplicative of the claims under New York State and New York City's discrimination statutes and therefore should not be permitted.

**DISCUSSION**

Leave to amend a pleading should be 'freely given' (CPLR 3025(b)) as a matter of discretion in the absence of prejudice and surprise. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355-56 (1st Dep't 2005) (internal citation and quotations omitted).

[2] In the proposed second amended verified complaint, the seventh cause of action becomes the sixth cause of action after the fourth cause of action is deleted as redundant.

That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed cause of action is warranted." Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 60 A.D.3d 404, 405 (1st Dep't), lv dismissed, 12 N.Y.3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that the proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. v. Greystone & Co. Inc., 74 A.D.3d 499 (3rd Dep't 2010) (citation omitted). In addition, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a sufficient basis for a motion for summary judgment." Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 365 (1st Dep't 2007).[3] Here, as the defendants do not argue that they were prejudiced or surprised by the proposed amended complaint, the only issue this court will consider is whether the proposed pleading is of sufficient merit.

Plaintiffs consent to the dismissal of the eighth and ninth causes of action, for the negligent infliction of emotional distress and negligent hiring and supervision and of the seventh cause of action, for the intentional infliction of emotional distress as to plaintiff Furini, and, in fact, do not include these claims in their proposed second amended complaint. However, plaintiffs argue that the dismissal of these claims should be without prejudice. Plaintiffs' position is without merit. As the claims for negligent infliction of emotional distress and negligent hiring and supervision are barred by New York's Workers' Compensation Law (Thompson v. Maimonides Med. Ctr., 86 A.D.2d 867 (2d Dept 1982)), and the cause of action by plaintiff Furini for the intentional infliction of emotional distress is barred by the one-year statute of limitations, such dismissal is with

[3] Since the plaintiffs responded to the motion to dismiss by seeking to amend and commence discovery, the court will consider the proposed pleading under the standard for a motion to amend.

prejudice. See D'Amico v. Arnold Chevrolet, LLC, 31 Misc.3d 1201(A), at 8-9 (Sup. Ct., Suffolk Cty. March 21, 2011) (dismissing with prejudice a negligent hiring claim as barred by the exclusivity provision of Workers' Compensation Law and an intentional infliction of emotional distress claim as time-barred by one-year statute of limitations); Schlotthauer v. Sanders, 153 A.D.2d 731, 732 (2d Dept 1989), appeal denied, 75 N.Y.2d 709 (1990)(dismissal with prejudice is warranted when claims are barred by applicable statute of limitations).

That being said, however, the dismissal with prejudice of the negligence claims and untimely claim by plaintiff Furini for the intentional infliction of emotional dismiss, does not preclude plaintiffs from pursuing timely claims based on employee harassment and/or other deliberate or intentional conduct by defendants or others, as the Workers' Compensation Law does not provide an exclusive remedy for such intentional torts. Jaffe v. National League of Nursing, 222 A.D.2d 233, 233 (1st Dept 1995); Kruger v. EMFT, LLC, 87 A.D.3d 717 (2d Dept 2011).

**Liability of the Individual Defendants for Retaliation**

Plaintiffs seek to amend the first amended complaint to impose individual liability upon defendants Will Malnati, Eric Marx and Eugene Remm, in connection with their third cause of action which seeks to recovery against all defendants, including the Individual Defendants, based on allegations that defendants violated New York State and New York City Human Rights Laws in retaliating against plaintiff Elliot Sailors by terminating her employment after she asserted her rights to be free of gender discrimination in employment.[4] Specifically, the proposed second amended verified

[4]While the motion seeks to dismiss the entire complaint against the Individual Defendants, a review of the first amended complaint and the proposed second amended complaint indicates that the only causes of action asserted against the Individual Defendants in both pleadings are the third cause of action on behalf of Sailors for retaliation, and the seventh cause of action against all the defendants for the intentional

complaint alleges that "[o]n June 28, 2011, Elliot [Sailors] was terminated from employment at Tenjune Lounge by Defendants Malnati and Marx, at the direct order of Defendants Birnbaum and Remm." Proposed Second Amended Verified Complaint ¶ 28. It furthers allege that "[a]fter being terminated, in a further act of retaliation, Elliot [Sailors] received an e-mail from Defendant Malnati forwarding, upon information and belief at the order of Defendants Birnbaum and Remm, the employee work schedule, with her name deleted." Id., at ¶ 28.

At issue is whether these allegations are sufficient to hold the various Individual Defendants personally liable to Sailors for purported acts of discrimination through retaliation. The courts have interpreted the New York State Human Rights Law, which provides for liability of "an employer" for discriminatory practices, to mean that "a corporate employee, even with a title of manager or supervisor, cannot be held individually liable for an employer's discriminatory practice if he does not have any ownership interest or power to do more than carry out personnel decisions made by others." Patrowich v. Chemical Bank, 63 N.Y.2d 541, 543 (1984). In contrast, under the New York City Human Rights Law, an "employee" can be held liable "where they act with or on behalf of the employer in hiring, firing, paying or in administrating the 'terms and conditions of employment.'" Priore v. New York Yankees, 307 A.D.2d 67, 74 (1st Dept.), lv denied, 1 N.Y.3d 504 (2003).

Under this standard, the allegations in the proposed second amended complaint are insufficient to hold defendants Malnati and Marx individually liable to Sailors under the New York State Human Rights Law as these defendants, who have no purported ownership interest in the Corporate Defendants, are alleged to have acted "*at the direct*

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infliction of emotional distress, which is renamed the sixth cause of action in the proposed second amended complaint.

*order of* Defendants Birnbaum and Remm" (emphasis added) and such allegations are insufficient to show that they had any authority beyond carrying out personnel decisions made by defendants Birnbaum and Remm. Patrowich v. Chemical Bank, 63 N.Y.2d at 541. However, under the New York City Human Rights Law, the allegations are sufficient to hold Malnati and Marx liable to Sailors as "employees" based on their purported action in terminating Sailors on behalf of Birnbaum and Remm. Priore v. New York Yankees, 307 A.D.2d at 74; Miloscia v. B.R. Guest Holdings, LLC, 33 Misc.3d 466 (Sup Ct NY Co. 2011). Next, the allegations against Remm, including that he had an ownership interest in EMM Group, Simyone Lounge, and Tenjune Lounge, and that he directed Sailors' termination, are sufficient to provide a basis for his individual liability under both the New York State and New York City Human Rights Laws.

The issue remains whether the allegations in the proposed pleading have prima facie merit as to Malnati and Marx based on the theory that they aided and abetted in discriminatory conduct. Under New York City and New York State Human Rights laws, an employee may be held individually liable for aiding and abetting an employer's discriminatory conduct even when the employee lacks the authority to hire or fire the plaintiff. D'Amico v. Commodities Exch., Inc., 235 A.D.2d 313, 315 (1997); Murphy v. ERA United Realty, 251 A.D.2d 469 (2003); Feingold v. New York, 366 F.3d 138, 158 (2d Cir. 2004). However, courts that have recognized aider and abettor liability for co-employees require the plaintiff to show that the defendant "actually participated" in the conduct giving rise to the discrimination claim. See Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995) (finding a basis for aider and abettor liability as co-employees allegedly assaulted plaintiff, causing a hostile work environment); see also Miloscia v. B.R. Guest Holdings LLC, 33 Misc.3d at 468 (finding an issue of fact regarding co-

employees' active involvement in hiring, firing, and refusal to provide disability accommodation).

Here, this court finds the second amended verified complaint sufficient to establish a prima facie case of aider and abettor liability against Malnati and Marx, based on allegations that they terminated Sailors on behalf of Birnbaum and Remm.

Therefore, the cross motion to amend is granted to the extent plaintiffs seek to amend the first amended complaint to provide a basis for the third cause of action for retaliation on behalf of Sailors against Individual Defendants, except insofar as it seeks to assert a claim against Malnati and Marx as "employers" under the New York State Human Rights Law.

**Proposed Cause of Action for Intentional Infliction of Emotional Distress**

Plaintiffs Girvin, Rothweiler and Sailors base their proposed amended claim of intentional infliction of emotional distress against Birnbaum on the allegation that Birnbaum knew that Plaintiffs were "psychologically and financially vulnerable, and solely for his own personal satisfaction, intentionally inflicted egregious emotional trauma upon Plaintiffs[5]." Proposed Second Amended Verified Complaint ¶ 55. Plaintiffs claim that his actions demonstrated a purpose and/or intent to injure and harm Plaintiffs and that "Birnbaum physically assaulted Plaintiffs Girvin and Rothweiler in furtherance of this intention". Id., at 55. With regards to the Corporate and Individual Defendants, Plaintiffs allege that "all Defendants acted to harass and attack all three Plaintiffs by encouraging and facilitating Birnbaum's actions, and they acted together to terminate Plaintiff Elliot [Sailors'] employment in a manner designed to cause severe emotional trauma." Id., at 55.

[5]As indicated above, the claim asserted by Furini for the intentional infliction of emotional distress is untimely.

For the reasons below, this court finds that the proposed claim for intentional infliction of emotional distress has prima facie merit as to Birnbaum only.

It is well settled law that four elements must be present for a prima facie case of intentional infliction of emotional distress: "(i) extreme and outrageous conduct, (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and injury, and (iv) severe emotional distress." See Howell v. NY Post Co., 81 N.Y.2d 115, 121 (1993); see also Murphy v. American Home Products Corp., 58 N.Y.2d 293, 303 (1983) (quoting Restatement of Torts, Second, Section 46[1], comment [d]). However, a defendant need not intend to cause emotional distress if it can be shown that a defendant knows that the circumstances are such that emotional distress is substantially likely to result from the conduct. Howell, 81 N.Y.2d at 121. For a cause of action, conduct must be "'so outrageous in character and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'"McRedmond v. Sutton Place Restaurant and Bar, Inc., 48 A.D.3d 258 (1st Dept 2008), quoting, Murphy v. American Home Products Corp., 58 N.Y.2d at 303.

Here, the court finds that Birnbaum's conduct of continual sexual harassment of plaintiffs, including making unwelcome sexual advances, requesting sexual favors and engaging in inappropriate verbal and physical conduct, such as taking the women into a room and demanding that they undress and perform sexual acts and grabbing them when they attempted to leave, is sufficiently outrageous in character and extreme in degree as to provide a prima facie basis for Birnbaum's liability. See Stallings v. U.S. Electronics Inc., 270 A.D.2d 188 (1st Dep't 2000) (holding that former employee's allegations of harassment by her same-sex supervisor because of non-work-related intimate relationship stated cause of action against supervisor for intentional infliction of emotional distress).

Moreover, contrary to defendants' position, a plaintiff may plead a claim for discriminatory conduct and for the intentional infliction of emotional distress based on sexual harassment. See Murphy v. ERA United Realty, 251 A.D.2d 469 (2d Dept 1998)(in action alleging discrimination based on sex and origin court properly denied motion to dismiss claim for the intentional infliction of emotional distress); Reilly v. Executone of Albany, Inc., 121 A.D.2d 772 (3d Dep't 1986) (holding that complaint alleging sexual harassment on job by superiors and coworkers stated cause of action for intentional infliction of emotional distress); Collins v. Wilcox, Inc., 158 Misc.2d 54, 57 (Sup Ct NY Co. 1992)(complaint stated cause of action for intentional infliction of emotional distress based on allegations of sexual harassment).

On the other hand, this court holds that the plaintiffs have insufficiently pled that the other defendants engaged in conduct extreme and outrageous conduct so as to make a out a prima facie a cause of action of intentional infliction of emotional distress as to them. Plaintiffs base the claim against these defendants wholly on the allegations that the plaintiffs encouraged and facilitated Birnbaum's behavior, and acted together to terminate Sailors' in a manner designed to cause her emotional trauma.

These allegations regarding their actions related to termination of Plaintiff's employment do not provide a basis for a prima facie claim of intentional infliction of emotional distress. Fama v. Am. Int'l Group, Inc., 306 A.D.2d 310, 311-12 (2d Dep't 2003), lv denied, 1 N.Y.3d 508 (2004); see also Doyle v. Doyle–Koch Agency, Inc., 249 A.D.2d 357 (2d Dep't 1998) (holding that the plaintiff's wrongful discharge did not amount to extreme and outrageous conduct and could not be used to circumvent termination of traditional at-will employment). In this connection, while Plaintiffs allege that Sailors' termination was "ordered immediately before Elliot [Sailors] was to go on vacation in order to be married and was carried out willfully and intentionally to

maximize the emotional trauma inflicted upon Elliot", this does not amount to conduct "so outrageous in conduct and extreme in degree" as to form a basis for intentional infliction of emotional distress.

Accordingly, the cross motion to amend is denied to the extent it seeks to assert the proposed claim for the intentional infliction of emotional distress claim against the Individual Defendants.

**CONCLUSION**

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of (i) dismissing with prejudice the eighth and ninth causes of action in the first amended complaint for negligent infliction of emotional distress and negligent hiring and supervision as barred by the exclusivity of the Workers' Compensation Laws; (ii) dismissing with prejudice the seventh cause of action for the intentional infliction of emotional distress on behalf of plaintiff Renee Firini against all defendants as untimely, and (iii) dismissing the seventh cause of action for the intentional infliction of emotional distress on behalf of the remaining plaintiffs, i.e. Emily Girvin, Kayci Rothweiler and Elliot Sailors against all the defendants except for Mark Birnbaum, for failure to state a cause of action; and it is further

ORDERED that the cross motion to amend is granted to the extent of permitting plaintiffs to amend the complaint to include additional allegations against the Individual Defendants providing a basis for the proposed third cause of action for retaliation on behalf of plaintiff Elliott Sailors, but is denied insofar as plaintiffs seeks to base such a claim against defendants Will Malnati and Eric Marx as "employers" under the New York State Human Rights Law; and it is further

ORDERED that the cross motion to amend is denied to the extent it seeks to include additional allegations supporting a claim for intentional infliction of emotional distress against the Individual Defendants and, as indicated above, the first amended complaint and the proposed second amended complaint fail to assert this claim against any defendant other than Mark Birnbaum; and it is further

ORDERED that within 30 days of the date of this decision and order a copy of which is being mailed by my chambers to counsel for the parties, plaintiffs shall file and serve a second amended verified complaint consistent with this decision and order, and defendants shall serve an amended answer within 20 days of such service; and it is further

ORDERED that the cross motion to commenced discovery is denied as moot; and it is further

ORDERED that the preliminary conference scheduled for March 29, 2012 is adjourned to May 31, 2012, at 9:30 a.m. in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: April 19, 2012

J.S.C.