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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

CATHERINE GILIBERTI,
Plaintiff,

-against-

SILVERSTEIN PROPERTIES, INC. and
LARRY SILVERSTEIN,
Defendants.

INDEX NO. 112138/11
MOTION DATE 04-04-2012
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ____ cross motion ____	4 - 5
Replying Affidavits ____	6, 7

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that defendants' motion to dismiss the plaintiff's first, third, fifth, six, seventh and eight causes of action pursuant to CPLR § 3211[a][1],[5] & [7], is granted but only to the extent that the third cause of action is severed and dismissed, the remainder of the motion is denied.

Defendants make this motion seeking to dismiss the plaintiff's first, third, fifth, six, seventh and eight causes of action pursuant to CPLR § 3211[a][1], [5] & [7]. The plaintiff has asserted causes of action for discrimination, retaliation and interference based on her age and gender under the human rights provisions of the New York City Administrative Code ("NYCHRL") §§ 8-101 et. seq. [Mot. Exh. A]. Defendants also seek to seal and restrict the use of documents annexed to the motion papers.

To support a claim of discrimination under the NYCHRL, the plaintiff must establish membership in a protected class, that she was qualified to hold the position, that she was actively or constructively discharged or suffered other adverse employment action, and that the discharge gives rise to the inference of discrimination. Defendant can have plaintiff's claims dismissed by demonstrating that the plaintiff cannot establish every element of intentional discrimination or by introducing evidence of nondiscriminatory, legitimate reasons to support its employment decisions. If the defendant produces evidence sufficient to raise a triable issue of fact rebutting the claims of discrimination, the plaintiff can still prevail upon providing proof that the legitimate reasons were merely a pretext for discrimination (Mittl v. New York State Division of Human Rights, 100 N.Y. 2d 326, 794 N.E.2d 660, 763 N.Y.S. 2d 518 [2003] and Forrest v. Jewish Guild for the Blind, 3 N.Y. 3d 295, 819 N.E. 2d 998, 786 N.Y.S. 2d 382 [2004]). The evidence presented by plaintiff can be circumstantial. The NYCHRL has a broader standard and only requires the plaintiff provide proof that age was a "motivating factor" for adverse employment actions (Bennett v. Health Management Systems, Inc., 92 A.D. 3d 29, 936 N.Y.S. 2d 112 [N.Y.A.D. 1st Dept., 2011]).

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

To prevail on claims of retaliation, the defendants are required to provide proof that the plaintiff has not established every element of her claims of discrimination. Alternatively, the defendants can prove their case by introducing evidence in the form of affidavit or documentary evidence of nondiscriminatory, legitimate reasons to support their employment decisions and establish the lack of material issues of fact as to pretext. A plaintiff's prima facie case of retaliation requires evidence of a subjective retaliatory motive and that the conduct was reasonably likely to deter an individual from engaging in protected activity (Bendeck v. NYU Hospitals Center, 77 A.D. 3d 552, 909 N.Y.S. 2d 439 [N.Y.A.D. 1st Dept., 2010], Williams v. City of New York, 38 A.D. 3d 238, 831 N.Y.S. 2d 156 [N.Y.A.D. 1st Dept., 2007] and Williams v. New York City Housing Authority, 61 A.D. 3d 62, supra).

A claim of interference requires the plaintiff to allege that individuals on behalf of the entity took action to prevent the claimant from obtaining a protected right (Montanez v. New York City Housing Authority, 5 A.D. 3d 314, 773 N.Y.S. 2d 549 [N.Y.A..D. 1st Dept., 2004]).

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the Court construe every fact the plaintiff has alleged as true. The party seeking dismissal must produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (See, Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994] and AG Captial Funding Partners and L.P. v. State Street Bank and Trust Co., 5 N.Y. 3d 582, 842 N.E. 2d 471, 808 N.Y.S. 2d 573 [2005]. The documents relied on by the movant must, "definitively dispose of plaintiff's claim" Blonder & Co., Inc. v. Citibank, N.A., 28 A.D. 3d 180, 808 N.Y.S. 2d 214 [N.Y.A.D. 1st Dept., 2006]).

Plaintiff's third cause of action for gender based discrimination asserts that plaintiff's equity interests were forfeited resulting in a loss of approximately $1.6 million dollars, and that her male peers were not subjected to loss of their equity interests without compensation. Defendants seek to dismiss plaintiff's third cause of action relying on documentation in the form of Incentive Compensation Agreements ("ICA") (Mot. Exhs. H - K) issued to plaintiff's five other male colleagues in 2002. They refer to separate participation agreements issued to Michael Levy, SPI's chief financial officer (Supp. Aff. Of Brian Noonan, Exhs. M & N), which they claim had nothing to do with forfeiture but involved capital contribution to SPI. Defendants claim that plaintiff's causes of action pertain only to the 2002 ICU agreements and that Michael Levy was not a colleague.

Plaintiff claims the participation agreements had the ultimate result of preventing the full amount forfeiture and were only offered to male colleagues. She also claims that separate participation agreements were potentially offered to other males during periods other than 2002. She states that the defendants have refused to provide additional documentary evidence requested per discovery demands concerning other agreements, and restricting the agreements to specific individuals. Plaintiff has established that the documentation provided by the defendants as evidence does not utterly refute plaintiff's allegations of discrimination based on separate participation agreements offered to male employees.

Pursuant to CPLR §3211[a][5], an action may be dismissed based on a specific claim that, "the cause of action may not be maintained because of ... statute of

limitations...." Pursuant to CPLR § 214 [2], the statute of limitations for an employment discrimination claim is three years. A cause of action for discrimination accrues from the date the adverse determination was made and communicated to the plaintiff (Cordone v. Wilens & Baker, 286 A.D. 2d 597, 730 N.Y.S. 2d 89 [N.Y.A.D. 1st Dept., 2001] and Peterec-Tolino v. Harap, 93 A.D. 3d 577, 941 N.Y.S. 2d 92 [N.Y.A.D. 1st Dept., 2012]). A discrimination claim may be extended beyond the statute of limitations based on the paycheck rule, which provides that each check is treated as a series of individual wrongs that can extend beyond the three years. The paycheck rule is applied by looking to whether the individual was paid less within the limitation period than was paid to other individuals outside the limitations period (Kent v. Papert Cos., 309 A.D. 2d 234, 764 N.Y.S. 2d 675 [N.Y.A.D. 1st Dept., 2003]).

Defendants seek to dismiss the plaintiff's third cause of action for discrimination based on the ICA agreements, claiming the action cannot be maintained because the statute of limitations has run. They also claim plaintiff's discrimination claim began to accrue in December of 2002, when she entered into four ICA agreements that were a condition of employment. Defendants state the statute of limitations does not run from the date of forfeiture or resulting consequences from the agreement. Defendants also state that the complaint does not allege disparity in disbursements paid under the ICAs were disproportionate to amounts paid to males, only that different agreements were offered to male employees. Defendants have asserted a basis to dismiss the third cause of action because the statute of limitations period has run.

Plaintiff claims that based on the Federal Ledbetter Act of 2009, and the Equal Employment Opportunity Commission (EEOC) Compliance Manual, application of the "paycheck rule" can be applied to benefits or other non-base items like stock options, profit sharing or bonus plans, and should be extended in this action. Plaintiff provides no state or federal case law or actual application of the paycheck rule to compensation agreements and does not establish extraordinary circumstances for equitable relief.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim. Allegations are generally deemed true (Leon v. Martinez, 84 N.Y. 2d 83, 614 N.Y.S. 2d 972, 638 N.E. 2d 511 [1994] and Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17, [1977]). A plaintiff alleging employment discrimination under NYCHRL need not plead specific facts but shall give, "fair notice of the nature of the claim and its grounds" (Vig v. New York Hairspray Co., 67 A.D. 3d 140, 885 N.Y.S. 2d 74 [N.Y.A.D. 1st Dept. 2009]). Documentary evidence that contradicts the allegations, or pleadings that are conclusory, will not be presumed to be true and are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept. ,2003]).

Defendants seek to dismiss plaintiff's first cause of action for age discrimination, for failure to state a cause of action. Plaintiff was employed by Silverstein Properties Inc. ("SPI") from 1987 to 1991 when she left the company to work at Bank of New York's IDCNY facility. She was re-hired in 1996 and remained with SPI until October 30, 2008, when her employment was terminated. Defendant's claim that when plaintiff was rehired in 1996 she was already a member of the protected class. Roger Silverstein worked with

the plaintiff for a combined total of ten years, defendants claim plaintiff did not allege that he ever uttered any derogatory comments or otherwise made statements concerning her age. At the time her employment was terminated in 2008, plaintiff had just turned 55 years old. Roger Silverstein, defendant Larry Silverstein's son was 44 years old in 2008, and plaintiff's replacement was approximately 35 years old. Defendants state that plaintiff's claims that Roger Silverstein preferred to work with a younger male and asked his father to terminate her, or that the defendants acted with discriminatory animus based on age is conclusory, speculative and untrue. They also state that plaintiffs claims concerning Roger Silverstein were solely based on her subjective beliefs and are unsupported by any evidence.

Plaintiff does not attempt to refute defendants' claims as pretext, or provide any evidence that her claims of age discrimination are based in fact. Instead she claims that pursuant to NYCHRL she has adequately stated a legally recognizable cause of action that will be established during discovery. Defendants do not provide an affidavit from Roger Silverstein or anyone with personal knowledge attesting to the lack of age based discrimination. Plaintiff has sufficiently established a basis to maintain the first cause of action.

Defendants claim that plaintiff cannot maintain the fifth and six causes of action based on retaliation, after she filed a complaint with the EEOC. Defendants state that because COBRA reimbursement was only delayed for approximately three months based on when the American Recovery and Reinvestment Act of 2009 (ARRA), went into effect and the plaintiff was reimbursed in full for the COBRA afterwards there is no basis for retaliation. They also state that the insurance benefits were cancelled in error and fully reinstated therefore, plaintiff cannot establish retaliation. Defendants claim that the temporal proximity of plaintiff's complaint to the EEOC as the causation for retaliation alleged in both causes of action are distant and three months is too long.

Plaintiff claims that under NYCHRL, retaliatory acts do not need to be materially adverse, only reasonably likely to deter a person from engaging in protected activity. She also claims the delay and termination, even if temporary, at four months and seven days respectively, are sufficient to state a cause of action.

Defendants have not established a basis to dismiss the fifth and sixth causes of action, which have been stated with sufficient notice of the claim. Defendants have not provided affidavits or other documentary proof to dismiss the causes of action based on retaliation.

Defendants seek to dismiss the seventh and eighth causes of action for interference claiming that plaintiff has not provided a basis for the allegations that defendant Larry Silverstein interfered with Ms. Hudnell, the defendant's Human Resource person, in providing both the COBRA and insurance benefits. Defendant claims that plaintiff has overlooked the possibility that rather than interference the delays were caused by innocent oversight or error.

Plaintiff has stated a basis for her claims of interference based on retaliatory actions by Larry Silverstein concerning other employees and Ms. Hudnell's knowledge before the three months delay of the law and her payments. Defendants have not provided proof including affidavits that the delays were caused by oversight or errror.

The sealing of records is generally not permitted by the court, even when both parties to the proceeding make the request (Matter of Hoffman, 284 A.D. 2d 92, 727 N.Y.S. 2d 84 [N.Y.A.D. 1st Dept. 2001] and Liapakis v. Sullivan,, 290 A.D. 2d 393, 736 N.Y.S. 2d 675 [N.Y.A.D. 1st Dept. 2002]). The right of the public to access court proceedings takes precedence and the confidentiality obtained by sealing of records requires a narrowly tailored yet compelling objective that outweighs public interest (Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd., 274 A.D. 2d 1, 711 N.Y.S. 2d 419 [N.Y.A.D, 1st Dept., 2000]). There is no specific definition of "good cause," it is based on the Court's discretion (Applehead Pictures L.L.C. v. Perelman, 80 A.D. 3d 181, 913 N.Y.S. 2d 165 [N.Y.A.D. 1st Dept. 2010]). A motion to seal records, "accompanied solely by the affirmation of an attorney who did not purport to have any personal knowledge of the documents," with no affidavits produced by any of the authors of the documents, or participants in their events was found to not present evidence on the record as to why the records were "so confidential or sensitive" that they should be sealed. Failure to address specific documents sought to be sealed is fatal to the request (Mosallen v. Berenson, 76 A.D. 3d 345, 905 N.Y.S. 2d 575 [N.Y.A.D. 1st Dept. 2010]).

The determination of whether discovery should be provided lies within the Court's discretion (Town of Southampton v. Salten, 186 A.D. 2d 796, 589 N.Y.S. 2d 355 [N.Y.A.D. 2nd Dept., 1992]). The court has broad discretion in supervising disclosure and to grant a protective order pursuant to CPLR §3103 (148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co., 62 A.D. 3d 486, 878 N.Y.S. 2d 727 [N.Y.A.D. 1st Dept., 2009]).

Defendants have not provided an affidavit of the defendant or an individual with knowledge on behalf of the defendants or any of the participants involved in the ICA's they claim are confidential. Defendants rely solely on the affirmation of their attorney. Although defendants claim that the ICAs are business records, not all business records are confidential. Defendants have not established a compelling objective that outweighs public interest. Defendant application for sealing of the records alternatively for a protective order is denied.

Accordingly, it is ORDERED that defendants' motion to dismiss plaintiff's first, third, fifth, six, seventh and eight causes of action pursuant to CPLR § 3211[a][1],[5] & [7], is granted, but only to the extent that the third cause of action is severed and dismissed, and it is further,

ORDERED that the remainder of the motion is denied.

This constitutes the decision and order of this court.

FILED

MAY 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: May 23, 2012

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE