UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BRAIN JOHNSTON & NILE CHARLES

Plaintiff,

11 CV 3321 (JSR)

- against-

APPLE INC. & OMNISCIENT INVESTIGATION CORP.,

Defendants.
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REPLY MEMORANDUM OF LAW IN SUPPORT OF OMINISCIENT'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendant
OMNISCIENT INVESTIGATION CORP.
61 Broadway, Suite 2000
New York, New York 10006
212.233.7195

Of Counsel:
David L. Metzger, Esq.

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PRELIMINARY STATEMENT

The plaintiffs' Second Amended Complaint, which is now their third pleading in this matter, fails to adequately plead the causes of action alleged. With respect to the 42 U.S.C. §1982 claim, the plaintiffs in the opposition brief inappropriately refer to facts neither alleged nor plead, in an effort to overcome that the pleading does not make the requisite allegation that the plaintiffs were deprived of any interest in property. With respect to the causes of action under both the New York State and New York City Human Rights Laws, as well as the cause of action seeking punitive damages, the plaintiffs' reliance on the alleged involvement of a purported "Head of Security" is insufficient to impute liability to the named corporate defendant, Omniscient.

POINT I
PLAINTIFFS DO NOT ADEQUATELY PLEAD A CLAIM UNDER 42 U.S.C.§1982

a. The Alleged Discrimination Did Not Concern the Purchase of Personal Property

Although, citing *Olzman v. Lake Hills Swim Club*, 495 F.2d 1333 (2d Cir. 1974) plaintiffs aver that 42 U.S.C. §1982 has been interpreted to include a somewhat broad definition of property, the allegations, or lack thereof, contained in the Second Amended Complaint fall outside even the broadest of definitions. Though there may be instances where the statute has been interpreted broadly, a plaintiff, to state a claim, must [nevertheless] allege interference with some right involving real or personal property. *Bishop v. Toys "R" US-NY, LLC.,* 414 F.Supp.2d 385, 395 (S.D.N.Y. 2006)(citations omitted). Yet, the Second Amended Complaint specifically pleads that the plaintiffs had already completed their respective purchases at the moment of the alleged discriminatory remarks. The Second Amended Complaint fails to plead that the plaintiffs were engaging in a further purchase or perusal of merchandise or did anything other than

proceed upstairs to the entry level of the store after making their purchases (Second Amended Complaint ¶¶23, 24, Exhibit "C" to original motion).

In a clear effort to circumvent this fatal flaw in the pleadings, plaintiffs' counsel conveniently adds in the opposing papers that the clients "*were still looking around the store and had no intention of leaving at that point*". At the outset, it is submitted that this still would not afford the plaintiffs a viable §1982 claim as "it is doubtful that [a] plaintiff could claim any interest in the 'property' of the store". *Bishop, supra* at 395. However, of paramount significance is that nowhere in the Second Amended Complaint is the above-referenced purported fact plead or alleged.

"In analyzing a motion to dismiss pursuant to Rule 12(b)(6), consideration is generally limited to the factual allegations in the complaint…A court generally may not consider affidavits and exhibits submitted by the parties or rely on factual allegations contained in legal briefs or memoranda." *Lawrence v. City Cadillac*, 2010 WL 5174209 *2 (S.D.N.Y. 2010)(emphasis added)(citations omitted). Plaintiffs have had three opportunities to plead this alleged fact in support of the §1982 claim, but failed to do so each time. As such, it is respectfully submitted that the §1982 claim should be dismissed.

POINT II
PLAINTIFFS DO NOT ADEQUATELY PLEAD A CLAIM FOR DISCRIMINATION UNDER NEW YORK STATE EXECUTIVE LAW §296(2)(a) OR NEW YORK CITY ADMINISTRATIVE CODE §8-107

a. The Allegations Against a Purported "Head of Security" are Insufficient to State a Claim

Even after the enactment of New York City's 2005 Local Civil Rights Restoration Act (Local Law No.85 of City of New York [2005]), the courts have maintained under both the State and City's Human Rights Laws that an employer is liable for the conduct of its non-managerial

employee if it knew or should have known of the conduct and failed to prevent it. *See Farrugia v. North Shore University Hospital*, 13 Misc.3d 740, 749, 820 N.Y.S.2d 718, 725 (S.Ct. NY Cty. 2006). Plaintiffs' counsel affirmatively concedes that "it is true" that an employer is not liable for an employee's discriminatory acts under the New York State Human Right Law, but seeks to impute liability upon Omniscient through a purported "Head of Security's"[1] alleged condonation and participation in the discrimination (Plaintiffs' Opposition p.13). However, once again, although that it what is argued, that is not what is plead.

The plaintiffs plead that the first security guard, identified as "John Doe", acted with racial animus and intentionally discriminated against them (Second Amended Complaint ¶58). Nowhere is it plead or alleged that the separate individual identified, a purported "Head of Security", acted with racial animus or intentional discrimination. Further, although plaintiffs are deliberate to specifically plead and allege in their Material Facts that the Apple Manager condoned "John Doe's" acts (Second Amended Complaint ¶59), nowhere do the plaintiffs plead that the purported "Head of Security" condoned "John Doe's" acts, or that he exercised any managerial control. To the contrary, it is specifically alleged and plead that the security personnel, including the "Head of Security" were "subordinate to defendant, Apple, Inc.'s management." (Second Amended Complaint ¶¶49, 50).[2] Further, the specific Third Cause of Action for Discrimination under the New York City Human Rights Law only pleads discrimination based upon "John Doe's illegal actions" and only pleads that the Apple defendant had knowledge of and acquiesced to those actions through its manager. (Second Amended Complaint ¶73).[3]

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[1] Defendant, Omniscient does not concede that there is such a position.
[2] For this same reason the plaintiffs' argument of *respondeat superior* liability under the §1982 would fail.
[3] By citing these allegations in the Second Amended Complaint the defendant, Omnisicient, is not arguing that the claims against Apple were properly plead.

Additionally, the plaintiffs fail to adequately plead that this purported "Head of Security" maintains the necessary role which would impose liability beyond the individual and upon Omniscient as a corporation. In interpreting who is deemed an "employer" under the New York State Human Rights Law, the courts have limited the term to owners and decision makers in the business. *McIlwain v. Korbean Int'l, Inv. Corp.* 896 F.Supp. 1373, 1382 (S.D.N.Y. 1995)(citations omitted). The Second Amended Complaint does not allege that the purported "Head of Security" has any ownership interest or exercises and decision making authority over the corporate affairs of Omniscient.

POINT III
PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES

The imposition of punitive damages for intentional discrimination under both federal and local law is governed by the federal standard. *Hill v. Airborne Freight Corporation*, 212 F.Supp.2d 59, 75 (E.D.N.Y.2002)(*citing Farias v. Instructional Systems, Inc.*, 259 F.3d 91 (S.D.N.Y. 2001)). The Administrative Code [of New York] does not provide a standard to use in assessing whether punitive damages are warranted [and therefore] discrimination claims brought under the Administrative Code are generally analyzed within the same framework as Title VII claims. *Farias* at 101 *(citation omitted)*. "Punitive damages...are limited to cases in which the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Farias at 101 (citations omitted)(emphasis added).* "Malice and reckless indifference refer to the 'employer's knowledge..." *Farias at 101 (citations omitted)(emphasis added).*

For the same reasons as stated above, the allegations in the Second Amended Complaint do not anywhere plead that Omniscient, as employer, engaged in any intentional discrimination.

The two individuals claimed in the Amended Complaint to have made remarks to the plaintiff are specifically plead in the Second Amended Complaint to be "employees" (Second Amended Complaint ¶¶27, 30) and the plaintiffs do not allege any policy or practice by Omniscient regarding discrimination. Moreover, there is no claim that either individual referenced in the Complaint held a high level of managerial authority in relation to the nature and operation of the employee's entire business so as to demonstrate corporate culture. *see Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 42, 877 N.Y.S. 300 (1st Dept. 2009). As there is no willful, malicious, or discriminatory conduct alleged against Omniscient, there is no basis to allow for punitive damages against the corporation.

CONCLUSION

For the foregoing reasons, the defendant, Omniscient, respectfully requests that this Honorable Court dismiss the Plaintiffs' Second Amended Complaint, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: August 25, 2011

Respectfully submitted,

DAVID L. METZGER, ESQ. (DLM 9380)
dlmetzger@lewisjohs.com
LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendant
OMNISCIENT INVESTIGATION CORP.
61 Broadway, Suite 2000
New York, New York 10006
212.233.7195

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2011 the following parties were served via electronic mail and via Electronic Court Filing a true copy of the defendant, Omniscient Investigation Corp.'s, Reply Memorandum of Law in Support of Ominiscent's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)

WHITE ROSE GROUP, LLC
Attorneys for Plaintiffs
86-12 37th Avenue, 2nd Floor
Jackson Heights, NY 11374
347.709.2584
Jesse Rose, Esq.
jrose@tpglaws.com

DEREK T. SMITH LAW GROUP, P.C.
Attorneys for Plaintiffs
30 Broad Street, 35th Floor
New York, New York 10004
212.587.0760
William Phillips, Esq.
wkphillips@tpglaws.com

SCHIFF HARDIN, LLP
Attorneys for Defendant
APPLE INC.
666 Fifth Avenue, 17th Floor
New York, New York 10103
212.753.5000
Thomas Crispi, Esq.
tcrispi@schiffhardin.com

Dated: New York, New York
August 26, 2011

DAVID L. METZGER, ESQ.
LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendant
OMNISCIENT INVESTIGATION CORP.
61 Broadway, Suite 2000
New York, New York 10006
212.233.7195