UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPHINE ROBINSON,

Plaintiff,

-against-

GUCCI AMERICA, STAN SHERWOOD, MATTEO MASCAZZINI, and CHRISTY LELECK

Defendants.

ECF CASE

Index No. 11-CV-3742 (JPO)

DEFENDANT MASCAZZINI'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

Defendant Matteo Mascazzini ("Mascazzini") respectfully submits this Reply Memorandum in further support of his motion to dismiss the Complaint ("Compl.") pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion") for failure to state a claim upon which relief can be granted.

As set forth in Mascazzini's opening brief, the entirety of Plaintiff's allegations against Mascazzini, who is the Associate President of Gucci America, Inc., are the following:

> When [Plaintiff] reported to work on September 14, Mascazzini and [defendant Christy Leleck] ordered [Plaintiff] to report to work in the New Jersey office. [Plaintiff] objected and explained that the commute was too burdensome and she cannot lawfully practice in New Jersey because she is not licensed to do so. Nonetheless, Leleck and Mascazzini ordered [Plaintiff] to report to work in New Jersey.
>
> [Plaintiff] complained to Mascazzini and Leleck that she was being subjected to retaliation. Despite this Leleck repeated multiple times "You are to be at the New Jersey office September 15th at 8:30 in the morning."

(Compl. ¶ 42-43.)

In Plaintiff's Memorandum of Law in Opposition to Defendant Mascazzini's Motion to Dismiss ("Opposition" or "Opp."), Plaintiff relies on rank

speculation, including referencing entirely new allegations in her Opposition that are not contained in her Complaint. Plaintiff's efforts to save her claims against Mascazzini from dismissal are unavailing. The Court should not consider these new "allegations," all of which are clearly speculation, in ruling on the motion to dismiss; the Complaint must be sufficient on its face to survive a Rule 12(b)(6) motion, and here it is not. Even were the Court to consider these new allegations, Plaintiff has only adduced a "mere possibility" of misconduct by Mascazzini, which is insufficient under the applicable pleading standards. Finally, despite Plaintiff's contention, she is not entitled to discovery merely to conduct a fishing expedition to determine whether she had any basis to sue Mascazzini in the first instance. Because Plaintiff has failed to state a claim against Mascazzini, his Motion should be granted.

ARGUMENT

As described in Mascazzini's opening brief, Plaintiff's claim that Mascazzini "aided and abetted" the discrimination and retaliation she allegedly suffered must be dismissed as she has failed to identify any facts suggesting that Mascazzini participated in discriminatory conduct or had any knowledge of her alleged protected activity.

New York recognizes individual liability for conduct prohibited by § 296 under an aiding and abetting theory – the theory advanced in the Complaint – for discriminatory conduct only where a plaintiff alleges actual participation by the individual defendant in the conduct giving rise to the claim. N.Y. Exec. Law § 296(6); *Fried v. LVI Services. Inc.*, No. 10-9308, 2011 WL 2119748, at *7 (S.D.N.Y. May 23,

2011). Aiding and abetting liability requires that the aider and abettor share the intent or purpose of the principal actor. *Fried*, 2011 WL 2119748, at *7. In the absence of any facts suggesting that an individual defendant displayed any intent to discriminate, the individual defendant may not be held liable. *See Robles v. Goddard Riverside Comm. Ctr.*, No. 08 Civ. 4856, 2009 WL 1704627 at *3 (S.D.N.Y. June 17, 2009).

Likewise, to state a claim for aiding and abetting retaliation, the defendant must be alleged to have had actual knowledge of the protected activity. *Little v. National Broadcasting Co.*, Inc., 210 F. Supp. 2d 330, 384 (S.D.N.Y. 2002); *see also Brice v. Security Operations Systems, Inc.*, No. 00 Civ. 2438, 2001 WL 185136, at *4-8 (S.D.N.Y. Feb. 26, 2001) (granting summary judgment where there was no evidence that alleged aider and abettor was actually involved in any retaliatory conduct and rejecting plaintiff's proposed "inference" of involvement).

The Complaint lacks the factual content to suggest even a "possibility" of Mascazzini's discriminatory intent or knowledge of Plaintiff's protected activity, let alone its "plausibility" as required by the standard enunciated in *Iqbal*. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Plaintiff has merely alleged that Mascazzini was present in the room and joined in instructing Plaintiff to report to work in New Jersey and this is not sufficient to state a claim.[1]

Apparently recognizing her failure to state a claim against Mascazzini, Plaintiff spends much of her Opposition imagining possible ways in which Mascazzini might have been involved in other conduct alleged in the Complaint. In her Opposition,

[1] While Plaintiff argues that the transfer was an adverse action, Mascazzini has not contested that point, solely for purposes of this Motion.

Plaintiff has added the following new theories, all of which are absent from the Complaint:

- Mascazzini, the Associate President of Gucci America and one of its most senior executives, was her supervisor, despite the fact that she admits that Sherwood was her immediate supervisor. *Compare* Complaint ¶¶ 9, 12 *with* Opp. p. 1.

- Mascazzini might have made the termination decision, and Leleck may have merely drafted and signed the termination letter. *Compare* Complaint ¶ 58 *with* Opp. p. 6.

- Leleck might have informed Mascazzini of Plaintiff's alleged complaints, either before or after the decision was made to require her to work in New Jersey. Opp. p. 7.

Plaintiff's new theories are not properly before the Court for purposes of the motion to dismiss and should not be considered. *See Fonte v. Bd. Of Mgrs. Of Continental Towers Condominium*, 848 F.2d 24, 26 (2d Cir. 1988) ("[f]actual allegations contained in legal briefs or memoranda are also treated as matters outside the pleading for purposes of Rule 12(b)" and thus should not be considered unless the motion is converted to one for summary judgment); *see also Friedl v. City of New York*, 210 F.3d 79 (2d Cir. 2000). "In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration 'to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.'" *Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 107 (2d Cir. 1999) (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)) (finding district court erred in considering information outside of the complaint).[2] It is indisputable that the Complaint does not contain any of

[2] Mascazzini's Motion should not be converted to one for summary judgment. *See Giant Group, Ltd. v. Sands*, 142 F. Supp. 2d 503, 506 (S.D.N.Y. May 16, 2001) ("[e]ven where additional materials are submitted by one party, a trial court should not transform a 12(b)(6) motion into a summary judgment

these allegations and Plaintiff should not be permitted to speculate about additional facts that are not contained in her pleading in order to defeat Mascazzini's Motion.

Even were Plaintiff's new suspicions to be considered, they miss the mark. Plaintiff failed to plead that Mascazzini displayed any intent to discriminate against her in connection with the one decision he is alleged to have participated in – the decision to assign her to New Jersey – or that he had any knowledge of her alleged protected activity prior to that decision. Spinning theories as to what later actions Mascazzini might have taken or what Leleck might have told him does nothing to indicate that Mascazzini acted with discriminatory or retaliatory intent at that time.

Furthermore, Plaintiff's claim that an inference of discrimination could be drawn because there was allegedly no logical reason to assign her to New Jersey fails on its face. While Plaintiff has alleged that she found the New Jersey transfer undesirable, she must still allege that it was done for a discriminatory purpose. Where, as here, "there are no facts alleged concerning the circumstances surrounding" the adverse action which would suggest a discriminatory intent, the complaint should be dismissed. *Foster v. Humane Soc'y of Rochester and Monroe Co.*, 724 F.Supp.2d 382, 390 (W.D.N.Y. 2010); *see also Tappe v. Alliance Capital Mgmt. L.P.*, 177 F. Supp. 2d 176, 184-85 (S.D.N.Y. 2001). Here Plaintiff has only alleged that Mascazzini was in the room when she was instructed to report to the New Jersey office, that Mascazzini jointly gave the instruction, and that Plaintiff took issue with the instruction in Mascazzini's

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motion where, as here, the motion has been filed in lieu of an answer, and the parties have neither completed discovery nor formally requested that the motion be converted").

presence. These facts fall well short of stating circumstances giving rise to an inference of discrimination or retaliation.[3]

Moreover, contrary to Plaintiff's claims, she is not entitled to discovery on the new, speculative theories first espoused in her opposition. A plaintiff "is not entitled to discovery that would support a viable claim prior to the Court's ruling on the motion to dismiss. In order to survive the motion, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. If the complaint is deficient under this standard, the plaintiff is not entitled to discovery, however limited." *Mayes v. New York City Police Dept.*, No. 10 Civ. 1690, 2011 WL 2206739, at *2 n.2 (S.D.N.Y. June 6, 2011) (Report & Recommendation) (internal citations omitted); *see also Iqbal*, 129 S.Ct. at 1954 (holding that plaintiff "is not entitled to discovery, cabined or otherwise," where complaint failed to meet pleading requirements). Plaintiff should not be permitted to conduct discovery merely to ascertain whether there was any basis to sue Mascazzini in the first place. Because her request for discovery serves only to highlight the absence of sufficient allegations against Mascazzini, her claims against him should be dismissed.

CONCLUSION

For the reasons set forth herein and in Defendant Mascazzini's Memorandum of Law in Support of His Motion to Dismiss, Plaintiff has failed to plead sufficient facts to state a discrimination or retaliation claim against Mascazzini and the

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[3] Plaintiff proffers *Stratton v. Dep't. for the Aging for the City of New York*, 132 F.3d 869, 880 n.6 (2d Cir. 1997), for the proposition that "[a]ctions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of discrimination." However, *Stratton* is inapplicable here because the *Stratton* court was not evaluating the legal sufficiency of a complaint in response to a 12(b)(6) motion, but rather reviewing the appeal of a jury verdict.

Court should therefore dismiss the claims against Mascazzini in their entirety. Mascazzini further requests that he be awarded his attorneys' fees, costs, expenses and such further relief as the court deems just and proper.

Dated: New York, New York.
October 28, 2011

Respectfully submitted,

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