

**DeMarzo v Urban Dove, Inc.**

2013 NY Slip Op 33651(U)

October 3, 2013

Sup Ct, Kings County

Docket Number: 500466/13

Judge: David I. Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of October, 2013.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

-----X

JENINE M. DEMARZO,

Plaintiff,

- against -

Index No. 500466/13

THE URBAN DOVE, INC., URBAN DOVE TEAM CHARTER SCHOOL, JAI NANDA and MARIANNE ROSSANT,

Defendants.

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The following papers numbered 1 to 5 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers Memoranda of Law \_\_\_\_\_

Papers Numbered

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1-3 4-5  
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Upon the foregoing papers, defendant Urban Dove, Inc. (the Urban Dove) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint of Jenine M. DeMarzo (plaintiff) as against it. Plaintiff cross-moves to amend her complaint.

**Background**

(1)

Defendant Jai Nanda (Nanda) hired plaintiff, in March 2012, to act as the director of sports-based youth development at defendant Urban Dove Team Charter School (UD Team).

UD Team was, at that time, engaged in a planning year prior to opening for the 2012-2013 school year. Plaintiff worked for UD Team part time at first, and she commenced full-time work for the school on July 1, 2012. UD Team terminated plaintiff's employment on January 1, 2013.

(2)

Plaintiff commenced this action on January 30, 2013, and alleged causes of action for disability discrimination and retaliation in the terms, conditions and privileges of employment, under both the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), against the Urban Dove, UD Team, Nanda and Marianne Rossant (Rossant). Plaintiff's charges stemmed primarily from purported harassment and discrimination by Rossant, UD Team's principal. Plaintiff further brought a false-imprisonment claim against Rossant. Plaintiff alleged that she was hired as an employee of the Urban Dove and UD Team by Nanda, who was the executive director of the Urban Dove and a member of UD Team's board of directors.<sup>1</sup> Plaintiff also asserted that the "Urban Dove launched [UD Team], manages [UD Team] and serves as its corporate partner." Accordingly, plaintiff alleged that the Urban Dove and UD Team each fostered a "pervasively hostile work environment by failing to take action to remedy the situation."

Plaintiff additionally alleged that neither the Urban Dove nor UD Team had a policy prohibiting harassment and discrimination or a procedure for complaining of harassment and discrimination in the workplace. Plaintiff claimed that her written complaint to UD Team's board of directors regarding Rossant's actions resulted in no investigation and that, shortly after she filed that complaint, "Defendants commenced with preparing to terminate Plaintiff's

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<sup>1</sup> Nanda explains that she was, in fact, the chair of UD Team's board of trustees.

employment.” Plaintiff asserts that the reason given for her termination, that she had become “disengaged,” represented mere pretext for a discriminatory and retaliatory firing.

(3)

The Urban Dove now moves, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the action as against it. The Urban Dove argues that it was never plaintiff’s employer and that an action for employment discrimination pursuant to NYSHRL or NYCHRL is thus barred. It contends that only UD Team employed plaintiff, and urges that plaintiff’s letter of hire was sent on UD Team letterhead, makes no reference to the Urban Dove, and was signed by Nanda only in her capacity as chair of UD Team’s board of trustees. The Urban Dove further urges that only UD Team paid plaintiff and gave her an employee handbook. It asserts that “[p]laintiff was never assigned work by an Urban Dove employee in his or her capacity of an Urban Dove employee,” and further explains that the Urban Dove has no ownership interest in UD Team.

The Urban Dove additionally argues that the Charter Schools Act of 1984 (Education Law § 2850 *et seq.*) grants final authority on charter school policy and operational decisions to each school’s board of trustees, and it thus concludes that the Urban Dove legally could not have exercised control over UD Team. The Urban Dove supports its motion with an affidavit by Nanda, who reiterates the factual allegations outlined above.

(4)

Plaintiff cross-moves, pursuant to CPLR 3025 (b), to amend her complaint such as to “amplify the claims concerning the employer-employee relationship between Urban Dove and Plaintiff.” She urges that the proposed amendment will cause defendants no surprise or prejudice as they are aware of plaintiff’s claim that the Urban Dove employed her and because discovery commenced only recently. Plaintiff’s proposed amendments include

allegations that the Urban Dove and UD Team shared centralized labor control, common hiring practices, common management and joint control over working conditions.

Plaintiff contends, in opposition to the Urban Dove's dismissal motion, that her complaint properly pleaded the necessary elements of a cause of action and that dismissal must, therefore, be denied. Plaintiff alleges that the Urban Dove employed her, as it and UD Team constituted either a single integrated employer or joint employers. She asserts that the determination of whether the Urban Dove employed her is a factual question that cannot be resolved on this motion and that she has sufficiently alleged that the Urban Dove acted as her employer. Plaintiff further argues that the Urban Dove's documentary evidence fails to conclusively establish that it did not function as plaintiff's employer as it does not address the Urban Dove's control over labor relations and employment conditions, its control over UD Team's work or working conditions, or whether it could contribute to UD Team's disciplinary or termination decisions. Plaintiff urges that the Urban Dove's posting of online advertisements for UD Team jobs in 2012 and its website shared with UD Team betray its assertions of independence. Finally, plaintiff contends that, although the New York Charter Schools Act may legally preclude the Urban Dove from controlling UD Team, this cannot dispositively establish that the Urban Dove *in fact* exercised no control over that school.

(5)

The Urban Dove argues, in opposition to plaintiff's cross motion, that her proposed amendments must be rejected as plainly lacking in merit. It urges that plaintiff's additional allegations concerning the Urban Dove's purported control of UD Team must fail because the New York Charter Schools Act precluded it from exercising any such power. The Urban Dove reiterates its arguments that only UD Team's board of trustees hired and terminated

plaintiff, that the Urban Dove made no payments to plaintiff, and that the Urban Dove was legally barred from controlling UD Team employees' conduct.

The Urban Dove characterizes plaintiff's proposed complaint amendments as conclusory and emphasizes that each new allegation is "upon information and belief." It concludes by asserting that "[a]ccepting the requirements of the [New York Charter Schools] Act as true, which Plaintiff must, Plaintiff could only be granted a reasonable accommodation, demoted, or fired by a member of [UD Team's] board of trustees or a [UD Team] officer or employee who was given that authority."

### ***Discussion***

#### *The Urban Dove's Dismissal Motion*

##### *(1)*

A movant seeking dismissal under CPLR 3211 (a) (1) must show that "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012] [internal quotation marks omitted]; *see also Galvan v 9519 Third Ave. Rest. Corp.*, 74 AD3d 743, 743-44 [2010]). To be "documentary," evidence "must be unambiguous and of undisputed authenticity" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2012] [internal quotation marks omitted]; *see also Fontanetta v John Doe I*, 73 AD3d 78, 86 [2010]).

A defendant's dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has *stated* a cause of action, but, "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading *has* a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-82 [2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant

demonstrates conclusively that the plaintiff has no cause of action, or that “a material fact as claimed by the pleader to be one is not a fact at all” (*Sokol*, 74 AD3d at 1182, quoting *Guggenheimer*, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a dismissal motion on the basis of failing to state a claim generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181), even when such allegations are “upon information and belief” (*see Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]).

(2)

The NYSHRL and NYCHRL render it unlawful discrimination for an employer to terminate or discriminate in terms, conditions or privileges, because of an employee’s disability (*see Executive Law § 296 [1] [a]*; *Administrative Code of City of NY § 8-107 [1] [a]*) or to retaliate against a person who opposes or complains of discriminatory treatment (*see Executive Law § 296 [1] [e]*; *Administrative Code § 8-107 [7]*). Standards for recovery under the NYSHRL and NYCHRL generally mirror those under Title VII of the Civil Rights Act of 1964 (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 [2004]).

A plaintiff may maintain an employment discrimination action against an entity related to, but legally distinct from, the direct employer if the two entities operated as a single, integrated employer or as joint employers (*see Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 70 [2005]; *Gulino v New York State Educ. Dept.*, 460 F3d 361, 378 [2d Cir 2006], *cert denied sub nom. Board of Educ. of the City Sch. Dist. of the City of New York v Gulino*, 554 US 917 [2008]; *Cook v Arrowsmith Shelburne, Inc.*, 69 F3d 1235, 1240-41 [2d Cir 1995]; *but cf. Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 708 [2006] [examining simply whether parent corporation “exercised complete dominion and control over (a) subsidiary” in deciding NYSHRL discrimination and retaliation liability (internal quotation

marks omitted))). Determining whether a single, integrated employer or joint employer relationship exists requires examining whether any of four factors are present: “(1) interrelation of operations[;] (2) centralized control of labor[;] (3) common management[;] and (4) common ownership or financial control” (*Gulino*, 460 F3d at 378, quoting *Cook*, 69 F3d at 1240; *see also Strauss*, 26 AD3d at 70).

(3)

Here, plaintiff’s complaint sufficiently pleads a cause of action for employment discrimination against the Urban Dove, including allegations that the Urban Dove acted as plaintiff’s employer. The Urban Dove’s proffered evidence, though showing that UD Team paid plaintiff, fails to conclusively establish that the Urban Dove exercised no control over UD Team’s operations or employment decisions. Furthermore, on this motion, plaintiff’s allegations must be accepted as true, and the Urban Dove does not conclusively demonstrate that plaintiff has no cause of action or that it could not be found to have acted as plaintiff’s employer. The Urban Dove correctly asserts that the Charter Schools Act of 1984 vests ultimate control over UD Team’s policy and operations in its board of trustees (*see* Education Law § 2853 [f]), but this broad legal requirement would present no obstacle to a factual finding that the Urban Dove exercised, albeit improperly, such power. The Urban Dove’s dismissal motion must, therefore, be denied.

*Plaintiff’s Cross Motion To Amend*

CPLR 3025 (b) states that leave to amend a pleading “shall be freely given upon such terms as may be just.” Leave shall be withheld, however, when the proposed amendment would cause prejudice or surprise to the opposing party or is insufficient or devoid of merit (*Seidman v Industrial Recycling Proprs., Inc.*, 83 AD3d 1040, 1040-41 [2011]). Nevertheless, “a court should not examine the merits or legal sufficiency of the proposed amendment



unless it is palpably insufficient or patently devoid of merit on its face” (*Giunta’s Meat Farms, Inc. v Pina Cosntr. Corp.*, 80 AD3d 558, 559 [2011]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 514 [2009]).

Here, plaintiff’s proposed amendment, which consists primarily of additional allegations pertaining to the Urban Dove’s control over UD Team, cannot be considered palpably insufficient. The Appellate Division, Second Department, has explicitly rejected the Urban Dove’s contention that the proponent of a proposed amendment must establish its merit with an evidentiary showing (*see Lucido v Mancuso*, 49 AD3d 220, 227-29 [2008] [“(c)ases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed(;) (n)o evidentiary showing of merit is required”], *appeal withdrawn* 12 NY3d 804 [2009], *appeal withdrawn & discontinued* 12 NY3d 813 [2009]). The Urban Dove does not contend that it would suffer any surprise or prejudice resulting from the amendment. Plaintiff’s cross motion to amend her complaint will, therefore, be granted. Accordingly, it is

ORDERED that the Urban Dove’s motion, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss plaintiff’s action as against it is denied in its entirety; and it is further

ORDERED that plaintiff’s motion, pursuant to CPLR 3025 (b), to amend her complaint is granted in its entirety.

This constitutes the decision and order of the court.

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