At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of June, 2013

PRESENT:

HON. MARK I. PARTNOW,

Justice.

----------X

RITA HAHN,

Plaintiff,

- against -

Index No.: 500608/2012

CONGREGATION MECHINA MIKDASH MELECH, INC., TALMUD TORAH MEKOW CHAIM and CHAIM BUXBAUM, in his individual and official capacities,

Defendants.

----------X

The following papers number 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Affidavits (Affirmations)	
Other Papers Memoranda of Law	4, 5, 6

Upon the foregoing papers, defendants Congregation Mechina Mikdash Melech, Inc., Talmud Torah Mekor Chaim and Chaim Buxbaum, in his individual and official capacities move for an order: (1) pursuant to CPLR 3211 (a) (7), dismissing the second cause of action, alleging that Buxbaum aided and abetted a discriminatory employment practice; (2) pursuant to CPLR 3211 (a) (7), dismissing the third cause of action, alleging a violation of the New York City Human Rights Law, against Buxbaum individually; and (3) pursuant to CPLR 3024 (b), striking paragraphs 17 through 23 of the complaint.

Background

Plaintiff Rita Hahn commenced the instant action by filing a summons and complaint on March 23, 2012. The complaint asserts, in essence, that defendants terminated her from her employment based on her age, in violation of both the New York State Human Rights Law (Executive Law §§ 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of the City of New York §§ 8-101 *et seq.*).

Specifically, the complaint asserts that plaintiff, 68 years old when this action was commenced, was employed by defendants[1] as a schoolteacher from September of 2009 until March 2, 2011. On that date, plaintiff suffered an accident and injury while in a dark restroom. Consequently, she asked Buxbaum for permission to leave for the day and tend to her injuries, but Buxbaum, "visibly amused at the mental image of [plaintiff] having fallen in the dark" did not allow plaintiff leave from work. Later that day, Buxbaum terminated her employment, stating that plaintiff's ways were "old fashion" and that the subject school needed "young blood"—indeed, plaintiff alleges that she was replaced with a teacher forty years younger than she is.

Plaintiff seeks damages, as well as declaratory and injunctive relief for the alleged age discrimination in her employment. As relevant to the instant motion, plaintiff alleges in her second cause of action that Buxbaum is subject to liability under the New York State Human Rights Law for aiding and abetting the subject age discrimination. In her third cause of action, plaintiff alleges a violation of the New York City Human Rights Law against all three defendants. Lastly, in paragraphs 17 to 23 of her complaint, plaintiff describes the accident she suffered while in the restroom, the immediate aftermath, and her subsequent interaction

---

[1] Plaintiff asserts that defendants Congregation Mechina Mikdash Melech, Inc., and Talmud Torah Mekow Chaim are a single enterprise; it appears that Talmud Torah Mekow Chaim refers simply to the subject school. Defendant Chaim Buxbaum is the executive director of the school.

with Buxbaum. In response to the complaint, and in lieu of an answer, defendants filed and served the instant motion.

Arguments Advanced by Movant

Defendants first assert that plaintiff has no viable cause of action against Buxbaum for aiding and abetting a violation of the New York State Human Rights Law. Defendants contend that, in order for an employee to be subject to such "aiding and abetting" liability, the subject employee must have had authority to make decisions about termination, salary and benefits. Here, claim defendants, there is no indication that Buxbaum had authority to terminate plaintiff. Indeed, note defendants, plaintiff's complaint asserts that Buxbaum told her that he was "just carrying the news" of her termination.

Defendants have submitted copies of documents in support of their argument. First, defendants submit a memorandum containing Buxbaum's job description, which ostensibly lacks the power to make any personnel decisions, including whether to fire plaintiff. Next, defendants submit copies of checks representing plaintiff's wages, and note that someone other than Buxbaum signed the same. Lastly, Buxbaum submits his affidavit, in which he avers both that he does not possess an ownership interest in either corporate defendant, and that he has no power greater than to carry out personnel decisions made by others. In sum, defendants reason that since Buxbaum was plaintiff's co-employee, plaintiff has no viable claim against him for allegedly aiding an abetting a violation of the New York State Human Rights Law.

Similarly, defendants argue that plaintiff does not have a viable cause of action against Buxbaum for an alleged violation of the New York City Human Rights Law. Defendants reiterate that Buxbaum both does not have an ownership interest in the corporate defendants, and did not make the allegedly discriminatory personnel decision (terminating plaintiff).

Thus, reason defendants, Buxbaum is plaintiff's co-employee, and there is appellate authority suggesting that one employee cannot maintain a cause of action alleging a violation of the New York City Human Rights Law against another employee. For this reason, defendants conclude that this court should dismiss the New York City Human Rights Law claim as against Buxbaum individually.

Lastly, defendants note paragraphs 17 to 23 of the complaint, which describe plaintiff's accident and injury in the subject restroom, the immediate aftermath, and certain interactions between her and Buxbaum. Defendants allege that the complaint describes excessive details of plaintiff's attempts to recover from a fall in a dark bathroom. Also, defendants take issue with the both the statement that plaintiff requested to leave work from Buxbaum to go home and tend to her injuries, and the statement, allegedly made by Buxbaum, that no one else was available to teach plaintiff's class. Defendants insinuate that these statements are designed to instill undue prejudice in the jury. Also, defendants contend that these statements have nothing to do with the claimed age discrimination in an employment practice. For these reasons, defendants conclude that the subject paragraphs are scandalous or prejudicial, as well as irrelevant to plaintiff's claims, and should therefore be stricken pursuant to CPLR 3024 (b).

Arguments Advanced by Plaintiff

In opposition to defendants' arguments, plaintiff first notes that it is undisputed that Buxbaum personally terminated plaintiff. Therefore, reasons plaintiff, there is no serious dispute that (assuming the facts alleged in her complaint as true) Buxbaum actually participated in the School's termination of her employment based on age discrimination. Moreover, states plaintiff, since her pleading contains the allegation that Buxbaum actually participated in the alleged age discrimination, there is thus no merit to defendants' suggestion

that she has not adequately pleaded a cause of action against Buxbaum for aiding and abetting the alleged violations of both the New York State and New York City Human Rights Laws. Put differently, plaintiff argues that the fact (the truth of which is not disputed) that Buxbaum actually participated in her termination—coupled with the allegation that defendants terminated her in violation of both the New York State and New York City Human Rights Laws—suffices to sustain her pleadings against defendants' motion.

Also, plaintiff argues that defendants have not met the standard contained in CPLR 3024 (b) for entitlement to an order striking paragraphs contained in the complaint. Plaintiff contends that defendants seeking such an order must demonstrate that the allegations are irrelevant, scandalous and prejudicial. Assuming arguendo that defendants have demonstrated that the subject allegations are irrelevant to her age discrimination claims, plaintiff maintains that defendants have not met the high burden of showing that the allegations are either scandalous or prejudicial. Moreover, claims plaintiff, the facts in the subject paragraphs relate the events that she experienced in the workplace on the day she was terminated. More specifically, plaintiff states that "not only did Ms. Hahn's injuries set in motion the series of interactions with Buxbaum that culminated in her termination later that day, but Buxbaum's reaction to her injuries also suggests that his conduct was motivated by age-based animus for Ms. Hahn, as reflected by his evident amusement at Ms. Hahn's injuries, his denial of her request to leave work to tend to her injuries, and his termination of her employment in favor of 'young blood' later that same day." Plaintiff reasons that, even if this court finds that the subject paragraphs are scandalous and prejudicial, they are nevertheless relevant to her causes of action. Accordingly, plaintiff concludes that the subject paragraphs were not "unnecessarily inserted" in her pleading, and CPLR 3024 (b) is thus inapplicable.

Discussion

The court denies the instant motion. "On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, the court will accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*QK Healthcare, Inc. v InSource, Inc.*, 2013 NY Slip Op 03312 [2d Dept 2013] [internal quotations omitted], citing *Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*id.*, citing CPLR 3026; *Leon*, 84 NY2d at 87; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]).

First, defendants correctly note that "[a] corporate employee is not individually subject to an employment discrimination suit under the [New York State] Human Rights Law unless he or she has an ownership interest in the corporate employer or has the authority 'to do more than carry out personnel decisions made by others'" (*Trovato v Air Express Intl.*, 238 AD2d 333, 334 [2d Dept 1997], quoting *Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]). It is uncontested that Buxbaum did not have an ownership interest in the corporate employer that terminated the plaintiff. However, the record shows that Buxbaum exercised authority over plaintiff, and Buxbaum cannot claim that he only acted under the direction of others. The complaint asserts that plaintiff went to Buxbaum and requested a leave from work, and this claim suggests that Buxbaum functioned as a supervisor and not just a co-employee. Also, this court must give plaintiff the favorable inference that her corporate employer terminated her based on Buxbaum's observations of plaintiff when she asked for leave from work.

Therefore, and notwithstanding defendants' contentions, "the plaintiff alleged facts sufficient to state a cause of action against her coworkers and supervisors pursuant to Executive Law § 296 (6), which imposes liability upon individuals who aid and abet an employer that commits employment discrimination in violation of Executive Law § 296 (1) (a)" (*Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 707 [2d Dept 2006]; *see also Murphy v ERA United Realty*, 251 AD2d 469, 472 [2d Dept 1998] ["the broad language in *Trovato v Air Express Intl.* (238 AD2d 333) should not be read to rule out a cause of action pursuant to Executive Law § 296 (6) against a coemployee who is alleged to have actively aided and abetted the employer in acts prohibited under Executive Law article 15."]). For these reasons, plaintiff has sufficiently pleaded a cause of action alleging a violation of the New York State Human Rights Law against Buxbaum.

Similarly, plaintiff's cause of action against Buxbaum for an alleged violation of the New York City Human Rights Law must be sustained. "In contrast to Executive Law § 296 (1) (a), which in defining those who may be held liable for unlawful discriminatory practices speaks of an 'employer' without mention of employees or agents, Administrative Code § 8-107 (1) (a) expressly provides that it is unlawful for 'an employer *or an employee* or an agent thereof' to engage in discriminatory employment practices (emphasis added). Accordingly, the plaintiff has a cause of action under this provision against the employer as well as her coemployees" (*Murphy*, 251 AD2d at 471). Thus, despite defendants' contentions, for the purposes of the New York City Human Rights Law, it is irrelevant whether Buxbaum was plaintiff's co-employee or not; plaintiff's claim should be sustained nevertheless.[2]

---

[2] To the extent that *Priore v New York Yankees* (307 AD2d 67 [1 Dept 2003]) conflicts with *Murphy*, this court must follow *Murphy*; "this court is required to follow Second Department authority unless and until the Court of Appeals decides otherwise" (*Shenkerman v Goycoechea*, 34 Misc 3d 496, 502 [Sup Ct, Kings County 2011], citing (*Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 [2d Dept 1984]).

Lastly, this court denies the motion insofar as it seeks portions of the complaint stricken pursuant to CPLR 3024 (b). "[T]o warrant striking, such allegations must be, unnecessarily inserted, as well as, scandalous or prejudicial" (84 NY Jur 2d Pleading § 335 ["Test of unnecessary matter in pleadings"]). Here, this court cannot find that the subject paragraphs, which describe both plaintiff's accident and her subsequent interactions with Buxbaum, are not "unnecessarily inserted" in her pleading; therefore, the court exercises its discretion (*Bristol Harbour Assoc. v Home Ins. Co.*, 244 AD2d 885 [4th Dept 1997]) and denies the branch of defendant's motion to strike the subject paragraphs from plaintiff's complaint.

Conclusion

In sum, the motion of defendants Congregation Mechina Mikdash Melech, Inc., Talmud Torah Mekow Chaim and Chaim Buxbaum is denied in its entirety.

The foregoing constitutes the decision and order of the court.

E N T E R,

HON. MARK I. PARTNOW
J. S. C.