SHORT FORM ORDER

INDEX No. 13-3813

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

***PRESENT:***

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 5-14-13
ADJ. DATE 7-3-13
Mot. Seq. # 001 - MotD
# 002 - XMD

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LEONA REYNOLDS,

Plaintiff,

- against -

ALL ISLAND MEDIA, INC.,

Defendant.

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Upon the following papers numbered 1 to 29 read on this motion for dismissal and cross motion for leave to amend the complaint : Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 20 ; Answering Affidavits and supporting papers 21 - 27 ; Replying Affidavits and supporting papers 28 - 29; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that defendant's motion pursuant to CPLR 3211 for an order dismissing the complaint is granted to the extent set forth herein, and is otherwise denied; and it is further

***ORDERED*** that plaintiff's cross motion for leave to serve an amended complaint is denied.

By letter dated August 29, 2011, plaintiff Leona Reynolds was offered the position of display sales representative by defendant All Island Media, an advertising company which publishes the Long Island Pennysaver and various other local publications. In addition to explaining her job responsibilities and her compensation, the letter advises that "employment and compensation are 'at will' and can be terminated with or without cause, and with or without notice, at any time," and that the terms of the offer of employment "are not intended to express an implied contract." Plaintiff accepted the job offer and entered into a written employment agreement with All Island Media on September 12, 2011. The agreement, like the offer of employment, states that plaintiff is an "at will employee." It provides, in part, that during the term of her employment, and for the nine-month period after her resignation or termination, plaintiff will not solicit any of All Island Media's customers or "[c]ompete in the business of publishing, marketing, selling, advertising,

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distributing or managing a freely distributed advertising publication or related publication, freely distributed direct-mail advertising product . . . or other publication or product containing local advertising, where [plaintiff] will be involved in the sale of advertising to businesses, distributed within five (5) miles of an area assigned to [plaintiff] as a geographical sales territory."

Plaintiff's supervisor during her employment with All Island Media was Angelo Donofrio, Vice President of Sales. Joanne Lloyd and Mary Locasio allegedly worked in the company's Human Resources Department, and were responsible for investigating and assessing any complaints related to employee conduct. Ronald Rudolph, President of All Island Media, allegedly oversaw all administrative matters, and was authorized to remove Donofrio, Lloyd and Locasio from their positions. After accepting her position with All Island Media, plaintiff executed a document in October 2011 stating that she was aware of and would comply with All Island Media's policy that no harassment of its employees by managers, supervisors, co-workers, customers or vendors would be tolerated, and that she had watched a video regarding sexual harassment. In addition to setting forth behavior that constitutes sexual harassment, the document directs that employees immediately notify the Human Resources Department and their supervisor if they believe they have been subjected to or witnessed harassment.

On October 14, 2012, just over a year after she was hired by All Island Media, plaintiff submitted her resignation via an e-mail message to Donofrio. Shortly thereafter, by letter dated October 24, 2012, All Island Media sent a letter to Anton Community Newspapers stating that it had been informed plaintiff was working in the sales department of such company, and that, if true, such employment would violate the September 2011 agreement it had entered into with plaintiff.

Subsequently, on February 5, 2013, plaintiff commenced this action against All Island Media seeking compensatory and punitive damages. The amended complaint alleges, among other things, that plaintiff was sexually harassed by Donofrio throughout the term of her employment with All Island Media; that Donofrio ignored her requests to stop making offensive comments and lewd gestures; that she complained to Locasio and Lloyd about such behavior; and that Locasio was dismissive of her complaints of sexual harassment, telling plaintiff that Donofrio just being friendly and that she "should not take his conduct personally." It also alleges that certain actions by Donofrio led plaintiff to believe he would advance her career in exchange for sexual favors, and that Lloyd and Locasio engaged in offensive and abusive conduct towards plaintiff. The first cause of action, which alleges All Island Media knew about yet failed to protect plaintiff from the sexual harassment committed by Donofrio, seeks damages for sexual discrimination that allegedly created a hostile workplace in violation of New York State's Human Rights Law. The second cause of action seeks to impose vicarious liability on All Island Media for "abusive and harassing conduct" against plaintiff by Donofrio and Lloyd, and the third cause of action seeks damages for intentional infliction of emotional distress. The fourth cause of action seeks damages for breach of employment contract, and the fifth cause of action seeks damages for negligent supervision and retention of Donofrio. In addition, the sixth cause of action seeks damages for disability discrimination, and the seventh cause of action seeks punitive damages.

All Island Media now moves for an order dismissing the complaint based on documentary evidence and failure to state a cause of action (*see* CPLR 3211 [a][1],[7]). As to the first cause of action, All Island Media argues plaintiff's allegations are insufficient to state a cause of action for sexual discrimination

creating a hostile work environment, as no claim has been made that it encouraged, condoned or approved of the alleged offensive conduct by Donofrio. It argues documentary evidence disproves allegations, raised for the first time in the amended complaint, that Donofrio had "sexual harassment issues prior to his employment" and that he had "a long history of abusive conduct that predated plaintiff's appointment" to her job. As to the second and sixth causes of action, All Island Media argues independent causes of action may not be maintained for vicarious liability or punitive damages. It further alleges the allegations in the complaint are insufficient to make out a claim against it for intentional infliction of emotion distress based on the conduct of Donofrio or Lloyd, that documentary evidence disproves the allegation that it breached the employment agreement with plaintiff, and that the claim for negligent supervision and retention is barred by the Workers' Compensation Law. All Island Media also alleges there are no allegations in the complaint supporting the cause of action for disability discrimination.

Plaintiff opposes the motion and cross-moves for leave to serve an amended complaint. In opposition to the dismissal motion, plaintiff submits an affidavit stating that "[o]n numerous occasions I tried to rectify the situation with management and complained about the sexual harassment that was taking place in the office, but to no avail," and that "the Human Resources person never acted on [her complaints] and Angelo still continued his actions." She also states that she "complained numerous times and Mary Locasio the Human Resources Director refused to act or notate any file." The amended complaint included with plaintiff's motion papers sets forth the same seven causes of action, but includes additional allegations concerning Donofrio, Locasio and Lloyd.

The cross motion for leave to serve the amended complaint is denied. Here, defendant's pre-answer motion under CPLR 3211 (a)(7) for an order dismissing the complaint for failure to state a cause of action extended both defendant's time to serve an answer (CPLR 3211 [f]) and plaintiff's time to serve an amended complaint as of right (CPLR 3025 [a]; *see* ***Poly Mfg. Corp. v Dragonides***, 109 AD3d 532, 970 NYS2d 589 [2d Dept 2013]; ***STS Mgt. Dev. v New York State Dept. of Taxation & Fin.***, 254 AD2d 409, 678 NYS2d 772 [2d Dept 1998]). The cross motion for leave to serve the amended complaint, therefore, is unnecessary (*see* ***Terrano v Fine***, 17 AD3d 449, 793 NYS2d 451 [2d Dept 2005]).

As to defendant's motion, when a party moves under CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (***Rovello v Orofino Realty Co.***, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (***Muka v Greene County***, 101 AD2d 965, 965, 477 NYS2d 444 [4 th Dept 1984]; *see* ***DiMauro v Metropolitan Suburban Bus Auth.***, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; ***Melito v Interboro Mut. Indem. Ins. Co.***, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; ***Greschler v Greschler***, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). Thus, "factual allegations which are flatly contradicted by the record are not presumed to be true, and '[i]f the documentary

proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action'" (***Deutshe Bank Natl. Trust Co. v Sinclair***, 68 AD3d 914, 915, 891 NYS2d 445 [2d Dept 2009], *quoting* ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]). Furthermore, dismissal under CPLR 3211(a)(1) may be granted only if the documentary evidence "utterly refutes plaintiff's factual allegations" and conclusively establishes a defense to the asserted claim as a matter of law (***Goshen v Mutual Life Ins. Co.***, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *see* ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Initially, the Court notes that as the amended complaint supersedes the original complaint (*see* ***Poly Mfg. Corp. v Dragonides***, 109 AD3d 532, 970 NYS2d 589; ***Elegante Leasing, Ltd. v Cross Trans Svc, Inc.***, 11 AD3d 650, 782 NYS2d 919 [2d Dept 2004]), and defendant's reply papers address the new allegations contained therein, the Court will consider the dismissal motion as addressed to the amended complaint (*see* ***Sobel v Ansanelli***, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; ***Union State Bank v Weiss***, 65 AD3d 584, 884 NYS2d 136 [2d Dept 2009]; ***Sage Realty Corp. v Proskauer Rose***, 251 AD2d 35, 675 NYS2d 14 [1st Dept 1998]). Article 15 of the Executive Law, comprised of sections 290 through 301, is known as the Human Rights Law. Executive Law § 296 (1)(a) makes it an unlawful "for an employer . . . because of an individual's age, race, creed, color . . . sex, disability . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." As relevant to the first cause of action, a claim of sexual harassment in the work place may proceed on the theory that the discriminatory conduct created a hostile work environment (*see* ***Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights***, 71 AD3d 890, 897 NYS2d 177 [2d Dept 2010]; ***Vitale v Rosina Food Prods.***, 283 AD2d 141, 727 NYS2d 215 [4th Dept 2001]), or on the theory that submission to or rejection of unwelcome sexual advances or other sexual conduct was used as the basis for a decision relating to the plaintiff's employment, such as compensation, promotion, or benefits (*see* ***Ortega v Bisogno & Meyerson***, 2 AD3d 607, 769 NYS2d 279 [2d Dept 2003]; ***Matter of Fella v County of Rockland***, 297 AD2d 813, 747 NYS2d 588 [2d Dept 2002]).

The application for an order dismissing the first cause of action is denied. For purposes of the Human Rights Law, a hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (***Harris v Forklift Sys.***, 510 US 17, 21, 114 S Ct 367 [1993] [citation omitted]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Matter of New State Div. of Human Rights v ABS Elecs., Inc.***, 102 AD3d 967, 958 NYS2d 502 [2d Dept 2013]; ***Vitale v Rosina Food Prods.***, 283 AD2d 141, 727 NYS2d 215). Even a single incident of sexual harassment can create a hostile work environment if the alleged conduct is sufficiently severe (*see* ***San Juan v Leach***, 278 AD2d 299, 717 NYS2d 334 [2d Dept 2000]). However, to hold an employer liable for a hostile work place caused by an employee's discriminatory behavior, a plaintiff must establish that the employer became a party to such behavior by encouraging, condoning or approving it (*see* ***Matter of Totem Taxi, Inc. v New York State Human Rights Appeal Bd.***, 65 NY3d 300, 491 NYS2d 293 [1985]; ***Matter of State Div. of Human Rights v St. Elizabeth's Hosp.***, 66 NY2d 684, 496 NYS2d 411 [1985]; ***Doe v State of New York***, 89 AD3d 787, 933 NYS2d 688 [2d Dept 2011]). Although calculated inaction to discriminatory conduct may indicate condonation, "only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake action which may be construed as

condoning the improper conduct" (***Matter of Medical Express Ambulance Corp. v Kirkland***, 79 AD3d 886, 887-888, 913 NYS2d 296 [2d Dept 2010], *lv denied* 17 NY3d 716, 934 NYS2d 374 [2011]; *see* ***Bianco v Flushing Hosp. Med. Ctr.***, 54 AD3d 304, 863 NYS2d 453 [2d Dept 2008]). Here, the complaint contains allegations of repeated instances of improper sexual behavior and sexual comments directed at plaintiff by Donofrio. It further alleges plaintiff repeatedly advised Locasio, who works in the Human Resources Department, as well as Donofrio and Lloyd, who are supervisors at All Island Media, that Donofrio's conduct was unwelcome, and that no action was taken in response to her complaints (*see* ***Matter of Father Belle Community Ctr. v New York State Div. of Human Rights***, 221 AD2d 44, 642 NYS2d 739 [4th Dept 1996], *lv denied* 89 NY2d 809, 655 NYS2d 889 [1997]).

The second cause of action seeking damages based on vicarious liability is dismissed. Although the Workers' Compensation Law is intended to be the exclusive remedy for injuries sustained by an employee during the course of employment (Workers' Compensation Law §§ 11, 29 [6]; *see* ***Macchirole v Giamboi***, 97 NY2d 147, 736 NYS2d 660 [2001]; ***Burlew v American Mut. Ins. Co.***, 63 NY2d 412, 416, 482 NYS2d 720 [1984]; ***Doe v State of New York***, 89 AD3d 787, 933 NYS2d 688; ***Kruger v EMFT, Inc.***, 87 AD3d 717, 930 NYS2d 11 [2d Dept 2011]; ***Hyman v Agtuca Realty Corp.***, 79 AD3d 1100, 913 NYS2d 579 [2d Dept 2010], *lv denied* 16 NY3d 711, 923 NYS2d 415 [2011]; ***Pereira v St. Joseph's Cemetery***, 54 AD3d 835, 864 NYS2d 491 [2d Dept 2008]), it does not bar an injured employee from seeking damages from his or her employer for injuries resulting from a tort intended to cause harm to such employee "perpetrated by the employer or at the employer's direction" (***Acevedo v Consolidated Edison Co. of N.Y.***, 189 AD2d 497, 500, 596 NYS2d 68 [1st Dept 1993], *quoting* ***Finch v Swingly***, 42 AD2d 1035, 1036, 348 NYS2d 266 [4th Dept 1973]; *see* ***Orzechowski v Warner-Lambert Co.***, 92 AD3d 110, 460 NYS2d 64 [2d Dept 1983]; ***Thompson v Maimonides Med. Ctr.***, 86 AD2d 867, 447 NYS2d 308 [2d Dept 1982]; ***Mylroie v GAF Corp.***, 81 AD2d 994, 440 NYS2d 67 [3d Dept 1981], *affd* 55 NY2d 893, 449 NYS2d 21 [1982]; ***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88 [2d Dept 2005]; ***Fucile v Grand Union Co.***, 270 AD2d 227, 705 NYS2d 377 [2d Dept 2000]). To constitute an intentional tort, the employer's conduct "must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as an intent to cause injury . . . A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" (***Finch v Swingly***, 42 AD2d 1035, 1036, 348 NYS2d 266; *see* ***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88). The amended complaint does not allege an intentional, deliberate act by All Island Media directed at causing harm to plaintiff, thereby placing her claim outside the ambit of the Workers' Compensation Law (*see* ***Oben v Charmer Indus., Inc.***, 37 AD3d 791, 831 NYS2d 461 [2d Dept 2007]; ***McNally v Posterloid Corp.***, 15 AD3d 456, 789 NYS2d 445 [2d Dept], *lv denied* 6 NY3d 701, 810 NYS2d 415 [2005]; ***Hart v Sullivan***, 84 AD3d 865, 445 NYS2d 40 [3d Dept 1981], *affd* 55 NY2d 1011, 449 NYS2d 481 [1982]; ***Gagliardi v Trapp***, 221 AD2d 315, 633 NYS2d 387 [2d Dept 1995]). Moreover, the doctrine of respondeat superior based on an agency relationship is not available in cases involving discrimination, including sexual discrimination and its sexual harassment component (***Matter of Father Belle Community Ctr. v New York State Div. of Human Rights***, 221 AD2d 44, 53, 642 NYS2d 739; ***Matter of State Univ. of N.Y. at Albany v State Human Rights Appeal Bd.***, 81 AD2d 688, 438 NYS2d 643 [2d Dept 1981], *affd* 55 NY2d 896, 449 NYS2d 29 [1982]).

Dismissal of the third cause of action for intentional infliction of emotional distress also is granted. To set forth a claim of liability for intentional infliction of emotional distress, a plaintiff's allegations must

show the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society" (***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 303, 461 NYS2d 232 [1983]). The tort involves four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal relationship between the conduct and the injury; and (4) severe emotional distress (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). Accepting the allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the Court finds that the alleged facts are insufficient to show extreme or outrageous conduct on the part of All Island Media, that such conduct was intended to cause plaintiff severe emotional distress, or that plaintiff suffered grievous mental distress due to such conduct (*see* ***Klein v Metropolitan Child Servs., Inc.***, 100 AD3d 708, 954 NYS2d 559 [2d Dept 2012]; ***Shelia C. v Povich***, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]; ***Geller v Harris***, 258 AD2d 421, 685 NYS2d 734 [1st Dept 1999]).

However, dismissal of the fourth cause of action, which alleges All Island Media breached its contractual obligation of good faith and fair dealing is denied. In every contract there is an implied obligation of good faith and fair dealing (***Dalton v Educational Testing Serv.***, 87 NY2d 384, 389, 639 NYS2d 977 [1995]; ***Rowe v Great Atl. & Pac. Tea Co.***, 46 NY2d 62, 68, 412 NYS2d 827 [1978]; ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141 [2d Dept 2012]; ***Jaffe v Paramount Communications***, 222 AD2d 17, 644 NYS2d 43 [1st Dept 1996]). As part of such duty, each party to the contract pledges not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (***Kirke La Shelle Co. v Paul Armstrong Co.***, 263 NY 79, 87, 188 NE 163 [1933]). Thus, the obligation of good faith is breached when a party to a contract acts in manner that, while not expressly forbidden under the terms of the contract, would deprive the other party of the right to receive the benefits of the agreement (*see* ***Legend Autorama, Ltd. v Audi of Am., Inc.***, 100 AD3d 714, 954 NYS2d 141; ***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [2d Dept 1999]). Viewing all of the allegations in the complaint in the light most favorable to plaintiff, the Court finds the allegations that, among other things, plaintiff repeatedly advised Locasio about alleged acts of sexual harassment committed by Donofrio, that Locasio was dismissive of such complaints and failed to act on them, and that she consequently felt constrained to leave her job with All Island Media are sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing (*see* ***Samide v Roman Catholic Diocese of Brooklyn***, 194 Misc 2d 561, 754 NYS2d 164 [Sup Ct., Queens County 2003]).

The fifth and sixth causes of action are dismissed. A necessary element of a cause of action for negligent hiring or negligent retention is that the employer knew or should have known of the offending employee's propensity to commit the conduct that caused the plaintiff's injury (*see* ***Evans v City of Mount Vernon***, 92 AD3d 829, 939 NYS2d 130 [2d Dept], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]; ***Kenneth R. v Roman Catholic Diocese of Brooklyn***, 229 AD2d 159, 654 NYS2d 791 [2d Dept 1997]; ***Mataxas v North Shore Univ. Hosp.***, 211 AD2d 762, 621 NYS2d 683 [2d Dept 1995]). While there is no statutory requirement that negligent supervision or negligent retention action be pleaded with specificity (*see* ***Kenneth R. v Roman Catholic Diocese of Brooklyn***, 229 AD2d 159, 162, 654 NYS2d 791), the bare, conclusory allegations in the amended complaint that All Island Media "knew of defendant Donofrio's abusive and harassing conduct toward plaintiff," and that it "ignor[ed] plaintiff's complaints and the many complaints of others" about Donofrio, are insufficient to state such a cause of action (*cf.* ***Bumpus v New***

***York City Tr. Auth.***, 47 AD3d 653, 851 NYS2d 591 [2d Dept 2008]). Furthermore, documentary evidence submitted by All Island Media in opposition to plaintiff's cross motion disproves the allegation that Donofrio had been fired from previous positions for committing sexual harassment. As to the sixth cause of action, no allegations were made in the complaint that plaintiff was disabled during her employment and that she was discriminated against by All Island Media due to such disability.

Finally, dismissal of the seventh cause of action is granted, as New York does not recognize an independent cause of action for punitive damages (*see* ***Nocella v Fort Dearborn Life Ins. Co. of N.Y.***, 99 AD3d 872, 955 NYS2d 66 [2d Dept 2012]; ***99 Cents Concepts, Inc. v Queens Broadway, LLC***, 70 AD3d 656, 893 NYS2d 627 [2d Dept 2010]; ***Tartaro v Allstate Indem. Co.***, 56 AD3d 758, 868 NYS2d 281 [2d Dept 2008]).

The foregoing constitutes the Order of this Court.

**Dated: October 15, 2013**
**Riverhead, NY**

Hector D. LaSalle
**HON. HECTOR D. LASALLE, J.S.C.**

**____ FINAL DISPOSITION** **__X__ NON-FINAL DISPOSITION**