SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 159306/2012
KENNINGTON, KRISTOPHER
vs
226 REALTY LLC D/B/A HOTEL
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Scanned to New York EF on 10/24/13

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/24/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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KRISTOPHER KENNINGTON, LIRIDONA KASTRAT, THOMAS AHEARN and DAVID ORTIZ,

Plaintiffs,

INDEX NO. 159306/12

-against-

226 REALTY LLC d/b/A HOTEL EDISON, 228 HOTEL CORP. d/b/a HOTEL EDISON, JOHN CANAVAN and MALGORZATA "MARGARET" SOWA,

Defendants.

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HON. ANIL C. SINGH, J.:

Defendants move pursuant to CPLR 3211(a)[7] to dismiss: the sexually hostile work environment claims of plaintiffs Kristopher Kennington ("Kennington"), Thomas Ahearn ("Ahearn") and David Ortiz ("Ortiz"); the sexually hostile work environment claim of plaintiff Liridona Kastrat ("Kastrat") against defendant Malgorzata Sowa ("Sowa"); the age discrimination claims of Ahearn and Ortiz; and, all of plaintiffs' retaliation claims.

Plaintiffs cross-move pursuant to CPLR 2215 and 3025 for leave to amend their complaint.

Plaintiffs are former employees of the Hotel Edison (s/h/a 226 Realty LLC and 228 Hotel Corp.) who were fired. Kennington and Kastrat were assistant front desk managers. Ahearn was Assistant Head of Security, and Ortiz was a security agent. Ahearn and Ortiz were over 50 years old when they were fired. Defendant John Canavan ("Canavan") is the General Manager of the

Hotel Edison. Defendant Sowa is an assistant front desk manager at the Hotel Edison.

Plaintiff's complaint contains two causes of action, the first comprising the various claims asserted by Kennington and Kastrat, and the second the claims asserted by Ahearn and Ortiz. According to the complaint, defendants Canavan and Sowa had a sexual relationship. Kastrat was fired in retaliation for rebuffing Canavan's repeated and unwelcome sexual advances. Kennington was fired in retaliation for rebuffing Sowa's repeated sexual advances and harassment. Ahearn and Ortiz, both of whom were replaced with younger people, were fired because of their age and in retaliation for reporting that Sowa had left the Hotel while she was working a night shift in order to have sexual relations with a male employee not party to this action. Based on these allegations, plaintiffs brought this action pursuant to the New York City Human Rights Law ("NYCHRL," Title 8 of the NYC Administrative Code) asserting claims of sexual harassment and sexually hostile environment, retaliation, and age discrimination.

In support of their motion, defendants argue that even reading the complaint liberally and deeming all the allegations contained therein to be true, the claims at bar are untenable and must be dismissed as a matter of law.

With respect to the claims asserted by Ahearn and Ortiz, defendants argue that there are insufficient allegations to support a cause of action for age discrimination and no allegations at all that they were subjected to a sexually hostile work environment. Similarly, defendants argue that Kastrat's hostile environment claim against Sowa must be dismissed because the complaint does not allege any conduct that would support that claim. Defendants also argue that Kennington's sexual harassment claim against Hotel Edison must be dismissed "as a matter of law" because "he has failed to establish that the Hotel should be imputed with any liability for his

co-worker's alleged conduct, which he never reported." Defendants further argue that if the Hotel is not liable, "Canavan and Sowa cannot be held liable as a matter of law." Finally, defendants argue that all of plaintiffs' retaliation claims must fail because the complaint does not allege that plaintiffs engaged in any protected activity, an essential element of a cause of action for retaliation.

In their cross-motion, plaintiffs seek leave to file a first amended complaint to cure the infirmities of their original complaint. The proposed amended complaint (attached to N. Frank's supporting affirmation) drops Kastrat's hostile environment claim against Sowa, all hostile environment claims by Ahearn and Ortiz, and the retaliation claims of all plaintiffs. The proposed amended complaint also augments the factual allegations supporting the remaining claims: hostile environment by Kennington against all defendants, hostile environment by Kastrat against Hotel Edison and Canavan, and age discrimination by Ahearn and Ortiz against Hotel Edison and Canavan, all pursuant to Admin Code § 8-107, *et seq.*, and all still contained in two causes of action, one for Kennington and Kastrat and the other for Ahearn and Ortiz.

Plaintiffs' motion to amend the complaint is granted. Leave to amend should be freely given (see CPLR 3025[b]), and the decision whether to grant or deny leave is in the court's discretion (see *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]). The court will treat defendants' motion as addressed to plaintiffs' first amended complaint.

"In evaluating a motion to dismiss pursuant to CPLR 3211(a)[7], the court is required to accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*CBS Corporation v Dumsday*, 268 AD2d 350, 352 [1st Dept 2000]).

At the outset, the court notes that NYCHRL is different from the comparable federal and state laws, which resemble each other. "In the [NYCHRL] formulation, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences" (*Bennett v Health Management Systems, Inc.*, 92 AD3d 29, 38 fn 9 [1st Dept 2011], lv den 18 NY3d 811 [2012], citations omitted). Enacted to be "the most progressive [anti-discrimination law] in the nation" (*Farrugia v North Shore University Hospital*, 13 Misc 3d 740, 745 [Sup Ct, NY Co, Acosta, J, 2006]), NYCHRL is to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]).

To state a claim for sexual harassment, a "plaintiff must show that (1) he belongs to a protected group, (2) he was subjected to unwelcome sexual harassment and, (3) the harassment complained of was based upon his sex" (*Farrugia v North Shore Univ. Hosp.*, *supra*, 13 Misc 3d at 745). Deeming the allegations in the complaint to be true, these elements have been met with respect to the claims asserted by Kennington and Kastrat, who also state a claim for hostile work environment. Under state and federal law, a "hostile work environment exists when 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" (*Tomka v Seiler Corporation,* 66 F3d 1295, 1304 [2d Cir1995], citations omitted). The City's law, more liberal than the federal or state laws, does not require the alleged sexual harassment to be "severe or pervasive" to be actionable (see *Williams v NYCHA*, 61 AD3d 62, 73–74 [1st Dept 2009], lv den 13 NY3d 702 [2009]). The harassment must just be "more than non-actionable petty slights

and minor inconveniences" (*Short v Deutsche Bank Securities Inc.*, 79 AD3d 503, 506 [1st Dept 2010]. A few comments would suffice (see *Santos v Brookdale Hospital Medical Center*, 29 Misc 3d 1207(A) [Sup Ct, Kings Co, 2010]). In fact, under the liberal standards applicable to NYCHRL, all that is needed to state a claim of sexual harassment is for the plaintiff to have "been treated less well than other employees because of her gender" (*Short v Deutsche Bank supra.*, 79 AD3d at 505-506). The allegations that Kennington and Kastrat were fired because they rebuffed unwelcome sexual advances satisfies this minimal standard.

Defendants' reply argument is that even if Kennington and Kastrat can state the elements of a hostile environment claim, they cannot assert a basis of liability against Hotel Edison because the complaint does not allege that the Hotel knew, or should have known, of the unwelcome sexual advances, and if the Hotel is not liable, then Canavan and Sowa cannot be liable as a matter of law. Defendants further argue that plaintiffs' "cat's paw" theory (Sowa influenced her superiors) has never been applied to a hostile environment claim under NYCHRL.

"NYCHRL imposes liability on the employer in three instances: (1) where the offending employee 'exercised managerial or supervisory responsibility'...; (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take "immediate and appropriate corrective action"; and (3) where the employer "should have known" of the offending employee's unlawful discriminatory conduct yet "failed to exercise reasonable diligence to prevent [it]" (*Zakrzewska v New School*, 14 NY3d 469, 479 [2010], citing Admin Code § 8–107[13][b][1]-[3]). NYCHR's "section 8-107(13) [further provides] for strict liability in employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where employer knew of act and failed to take prompt and effective

remedial action or should have known and had not exercised reasonable diligence to prevent" (*id.*, 14 NY3d at 480). "[C]ases under the State Human Rights Law imposing liability only where the employer encourages, condones or approves the unlawful discriminatory acts" cannot be applied to a claim under NYCHRL.... By the plain language of § 8–107(13)(b), these are not factors to be considered so long as the offending employee exercised managerial or supervisory control" (*Zakrzewska v New School*, *supra*, 4 NY3d at 481).

"For the same reasons, each of the individual defendants may also be held liable under [NYCHRL]" (*McRedmond v Sutton Place Restaurant and Bar, Inc.*, 95 AD3d 671, 673 [1st Dept 2012]). In the case at bar, Canavan was Hotel Edison's general manager, with total authority to hire and fire. Clearly, he was the offending employee with respect to Kastrat, so under the standards set forth above, she has asserted a valid claim against both Canavan and Hotel Edison. The ownership interest required for personal liability under the state's Human Rights Law (see *Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]) is not required by NYCHRL. Kennington's claim based on Sowa's conduct is less clear-cut. The first amended complaint alleges that Sowa used her personal relationships with Canavan and with the Front Desk Manager to get Kennington fired in retaliation for being spurned by him (¶¶ 24-28). While, as defendants suggest, this 'cat's paw' theory is too farfetched even for a claim under NYCHRL, the complaint also alleges that "Hotel Edison and Canavan acquiesced in, encouraged, condoned and ratified Sowa's sexual harassment of Kennington (¶ 31). Given this allegation, which must be deemed true and meets the traditional standard, the court will not dismiss Kennington's claims at this stage. With respect to Sowa's personal liability, her status at Hotel Edison is more dubious, but since she has the title of "Assistant Front Desk Manager," the court will allow plaintiffs to explore her managerial responsibilities at trial.

In the second cause of action in plaintiffs' first amended complaint, Ahearn and Ortiz assert claims of age discrimination against Hotel Edison and Canavan. To state a cause of action for employment discrimination under both the state law (Executive Law § 296, *et seq.*) and NYCHRL, "plaintiff must show that (1) [he] is a member of a protected class; (2) [he] was qualified to hold the position; (3) [he] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Melman v Montefiore Medical Center*, 98 AD3d 107, 113 [1st Dept 2012]).

The first amended complaint contains sufficient allegations to support these elements for both Ahearn and Ortiz. In their reply, defendants do not challenge this repleaded cause of action – they merely evoke section I(a) of their supporting memorandum of law, which essentially argues that plaintiffs have not alleged all the elements of the cause of action. Both complaints allege that defendants were qualified for their respective positions and were fired when they were over 50 years of age, which would satisfy the first three elements. However, as defendants correctly argued, the original complaint did not contain any allegations suggesting that the circumstances of their termination gave rise to an inference of discrimination. In the first amended complaint, however, plaintiffs have remedied that defect by alleging that: Ahearn and Ortiz were fired without cause and replaced with younger, less qualified employees (¶¶ 48-51, 55-56); prior to their termination Canavan told his management staff that "he wanted to hire 'high energy' and 'young and attractive' staff, and subsequently hired a disproportionate number of younger staff members to replace older employees, who were disciplined and terminated far more often than the younger ones (¶¶ 57-59); defendants "condoned and encouraged" staff to

discriminate against the older workers, taunting them and making age-related jokes (¶ 60); and, management "frequently bad mouth[ed] its older employees, referring to them as stupid, and indicated the hotel needed to hire younger staff" (¶ 61).

Based on the foregoing, the court finds that none of plaintiffs' claims can be dismissed for failure to state a cause of action at this juncture.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)[7] is denied; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within twenty (20) days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on January 8, 2014, at 9:30 AM.

This decision constitutes the order of the court.

DATED: 12/26, 2013

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE