SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Ada Damla Demir,

Index No.
150954/2015

Plaintiff,

DECISION and ORDER

- against -

Sandoz Inc., and Fougera Pharmaceuticals Inc.,

Mot. Seq. 2

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Ada Damla Demir ("Plaintiff"), brings this action against defendants Sandoz Inc. ("Sandoz"), and Fougera Pharmaceuticals ("Fougera") (collectively, "Defendants"), her former employers, for wrongful termination. Plaintiff alleges that she was terminated in retaliation for her reporting to Defendants' management that an ingredient for one of their products was being manufactured in a non-compliant facility in violation of FDA regulations.

Plaintiff's Second Amended Complaint ("SAC") asserts the following six causes of action against Defendants: retaliatory discharge under New York Labor Law § 740, retaliatory discharge under the federal, New York State, and New York City False Claims Act ("FCA"), breach of contract/implied covenant of good faith and fair dealing, and discrimination in violation of the New York State Human Rights Law ("NYSHRL").

Presently before the Court is Defendants' motion to dismiss the SAC, pursuant to CPLR §§ 3211(a)(1) and (a)(7). In support of their motion, Defendants submit the attorney affirmation of Barry I. Levy; pleadings; the affidavit of Sarina Tomel, a Senior Human Resources Generalist of Fougera; a copy of the Relocation Policy, Tier 1; a copy of a July 23, 2012 letter addressed to Plaintiff setting forth the

terms of the retention bonus plan; and a copy of the Annual Incentive Plan, effective January 1, 2013. Plaintiff opposes. Oral argument was held on Defendants' motion.

The following facts are alleged in the SAC and assumed to be true for the purposes of this motion.

Plaintiff is a female of Turkish origin and a practicing Muslim. Plaintiff began her employment with Fougera on January 13, 2012 as the Director of Procurement, and was provided a "relocation package" as an incentive to employment. In spring 2012, Plaintiff learned that Fougera was being acquired by and merged with Sandoz, and was asked to continue her employment as Director of Procurement and to also lead the Procurement Division's "Merger Group" during the merger. Plaintiff's "duties and responsibilities included identifying and curing some of the Fougera/Sandoz violations of FDA regulations and requirements, including cGMP (current Good Manufacturing Practices) in particular those found during FDA Observations of Fougera."

In July 2012, Sandoz asked Plaintiff to continue to work for the company after the merger was completed, and Plaintiff accepted the offer. Sandoz "assumed Fougera's obligation to plaintiff under her Employment Agreement and Relocation Package" and gave Plaintiff "a retention bonus award ... of 1570 stock units in Sandoz" which was scheduled to vest in January 2015 as a "further incentive" for her continued employment. The SAC alleges that Plaintiff's work "was exemplary, as evidenced by the fact that numerous managers at Fougera/Sandoz, including Wilfredo Mateo, Sandoz's Director of Manufacturing, Science and Technology, Alan Rankin, Sandoz's Chief Procurement Officer, and Thomas Dunleavy, Global Transportation Manager at Sandoz, endorsed plaintiff for the Linkedin 'Supply Chain Management' group." The pleading also alleges Plaintiff's "work was also recognized as exemplary due to her handling of the numerous FDA violations that had been identified during the Fougera 483 Observations, which as of October 2012, plaintiff had efficiently identified, addressed and cured in a timely, efficient and cost effective manner."

Plaintiff alleges that beginning in October 2012, Plaintiff "informed Sandoz management about certain practices relating to Sandoz's manufacture and procurement of chemical supplies for Solaraze, an actinic kerotoses product, that were non-compliant with of FDA regulatory requirements, including but not limited to cGMPs governing the drug's safety and efficacy." At the time, Solaraze was "Sandoz' proprietary and highest grossing product that was in transition to a generic

drug, Sodium Hyaluronate, which is known as an Active Pharmaceutical Ingredient ('API') due to the nature of the drug's 'acting' formula and manufacturing process." According to the SAC, "Every API must have a Type 2 DMF clearance to ensure that the manufacturing facility and methods are consistent with cGMP."

Plaintiff alleges that "Sandoz' Japanese manufacturer of Sodium Hyaluronate told plaintiff that its sole source (i.e. only) manufacturing facility was not Type 2 DMF compliant." Plaintiff, in turn, "informed Sandoz management that failure to properly source Solaraze' API from a Type 2 DMF compliant manufacturer substantially increased the health and safety risk that a 'non-compliant' Solaraze would have on a large number of consumers" and "could potentially result in fraud upon the government because Sandoz received a large portion of Solaraze revenues through Federal, New York State and City administered medicaid and medicare reimbursement claims which were also premised upon Sandoz compliance with of FDA regulatory requirements, including but not limited to cGMPs governing the drug's safety and efficacy."

Plaintiff alleges that her complaints concerning "the use of this non-compliant supplier and the related health and safety and potential efficacy/false claims concerns" were initially ignored and when she continued to voice her concerns, she was transferred to another department and demoted to a position that was outside her procurement and supply expertise. On February 3, 2014, Plaintiff filed a complaint with Sandoz' Business Practices Office. On February 4, 2014, Plaintiff's employment was terminated.

In addition to being improperly terminated, Plaintiff alleges that Defendants failed to pay her certain compensation that she was entitled to, including a performance bonus of $20,000, 2013 bonus of $29,000, her retention bonus, and a merit award. Plaintiff also alleges that she was discriminated based on her gender as a woman, Turkish national origin, and religion while employed by Defendants.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence; or

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003] [internal citations omitted]; CPLR § 3211[a][7]).

A. Plaintiff's New York Labor Law §740 Cause of Action

The first cause of action of the SAC is for retaliatory discharge New York Labor Law §740. Plaintiff alleges that Defendants unlawfully terminated her in retaliation for her reporting to management that the manufacturer of the purported active pharmaceutical ingredient in Solaraze was not in compliance with certain FDA rules and regulations that ensure public health and safety. Defendants move to dismiss Plaintiff's Section 740 cause of action on the grounds that it is insufficiently plead and is time barred under the governing one-year statute of limitations.

Section 740 of the New York Labor Law makes it unlawful for an employer to take a retaliatory personnel action against an employee because such employee does any of the following "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety . . . [or] objects to, or refuses to participate in any such activity, policy or practice in violation of law, rule or regulation."

Section 740 "requires a plaintiff to allege an actual violation of a law, rule, or regulation." (*Nadkarni v. N. Shore-Long Island Jewish Health Sys*, 21 A.D.3d 354, 355 [N.Y. 2005]). "An employee's good faith, reasonable belief that a violation occurred is insufficient." (*Nadkarni*, 21 A.D.3d at 355). Allegations of a violation

that amount to "no more than speculation" are insufficient to set forth a "'good ground' to support [a Section 740] cause of action" and thus render such a claim "totally devoid of merit ..." (*Id.* at 355).

Defendants argue that Plaintiff's Section 740 cause of action is insufficiently plead because the allegation that "Sandoz' Japanese manufacturer of Sodium Hyaluronate told plaintiff that its sole source (i.e. only) manufacturing facility was not Type 2 DMF compliant . . . falls far short of pleading a requisite actual violation of a law, rule, or regulation to sustain a Section 740 claim" and "amount[s] to nothing more than her purported belief that a violation existed."

Accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of the SAC adequately plead a cause of action under Section §740 against Defendants.

Turning to the timeliness of Plaintiff's Section 740 cause of action, Defendants argue that the claim is barred by the applicable one-year statute of limitations and should be dismissed as time barred. Plaintiff, in turn, argues that her Section 740 claim relates back to the factual allegations in her initial Complaint and First Amended Complaint and is therefore timely under the relation back provisions of CPLR §203(f). Plaintiff further argues that Defendants cannot claim undue surprise or prejudice by her Section 740 claim because Defendants were aware of the specific regulatory health and safety violations underlying the claim since the date of Plaintiff filed her internal complaint with Defendants' Business Practices Office.

Claims brought pursuant to Section 740 are subject to a one-year statute of limitations. See N.Y. Labor Law §740(4)(a) ("An employee who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision of this section within one year after the alleged retaliatory personnel action was taken."). CPLR §203(f) provides that a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the * * * series of transactions or occurrences, to be proved pursuant to the amended pleading." "The salient inquiry is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences

... to be proved pursuant to the amended pleading.'" (*Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 548, 961 N.Y.S.2d 157, 159 [1st Dept 2013]).

Plaintiff asserted her Section 740 cause of action for the first time in her SAC, which was filed and served on October 19, 2015. The SAC alleges that Plaintiff was improperly terminated on February 4, 2014. Defendants argue that since Plaintiff first asserted a cause of action under Section 740 more than one year after the alleged retaliatory discharge, the claim is untimely. However, in Plaintiff's initial Complaint, filed on January 31, 2015, Plaintiff alleges that on February 3, 2014, she complained to the Sandoz Business Practices Office regarding improper practices relating to Sandoz's procurement of chemical supplies for the manufacturing of Solarize that were non-compliant with FDA regulations and that on the following day, February 4, 2014, she was terminated in retaliation for that complaint. Accordingly, the Complaint provides "notice of the transactions, occurrences . . . to be proved pursuant to the [SAC]" concerning Plaintiff's claim for retaliatory discharge pursuant to Section 740, and the claim is therefore timely under the relation back provisions of CPLR §203(f).

B. Waiver under Section 740(7)

Defendants contend that Plaintiff's Section 740 cause of action operates as a waiver of all other claims relating to Plaintiff's allegedly unlawful discharge. Defendants rely on the recent First Department decisions of *Reddington v Staten Is. Univ. Hosp.*, 11 N.Y.3d 80, 87 [1st Dept 2008]), and *Bones v Prudential Fin., Inc.*, 54 A.D.3d 589, 589 [1st Dep't 2008]. Plaintiff, in turn, argues that the Court is not bound by these decisions, and should adopt the narrower interpretation of Section 740's waiver provision advanced in the federal court decision of *Collette v. St. Luke's Roosevelt Hosp.*, 132 F. Supp. 2d 256, 274 [S.D.N.Y. 2001]. Plaintiff argues that under *Collette*, her "additional claims are factually and legally distinguishable from her Section 740 claim because none of those other claims asserts retaliation precisely related to her complaints regarding Defendants' violation of FDA regulatory requirements and the resulting danger to the public health or safety."

Section 740 of the New York Labor Law states that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." N.Y. Labor Law § 740(7). Section 740(7) is "an election-of-remedies provision, thus contemplating that a plaintiff will

choose whether to file a section 740 whistleblower claim or some other claim." *(Reddington*, 11 N.Y.3d at 87). The "plain text of this provision indicates that institute[ing] an action -- without anything more -- triggers waiver." *(Id.)*

The First Department has held that waiver under Section 740(7) applies to any asserted other cause of action "which arises from the allegedly unlawful discharge." (*Bones*, 54 A.D.3d at 589). "Such a waiver may not be avoided by a plaintiff by amending the complaint, to withdraw the Labor Law § 740 claim." (*Id.* at 589) (finding plaintiff's promissory estoppel claim arising from allegedly unlawful discharge waived under Section 740). Section 740's waiver provision applies where the underlying claim under the statute is time barred or inadequately pled. (*See Maccagno v. Prior*, 78 A.D.3d 549, 549-50 [1st Dept 2010]).

However, waiver under Section 740(7) does not apply "when redress is sought for injury under a claim that is distinct from a statutory cause of action predicated on wrongful termination." (*Seung Won Lee v. Woori Bank*, 131 A.D.3d 273, 277 [1st Dept 2015])(citations omitted)("The statute specifically addresses the termination of an employee who witnesses and reports misconduct. It is not so broad as to encompass the circumstances at bar, in which plaintiffs were not only terminated for revealing abuse by senior managers but were also targeted and victimized by that abuse."). *See also Knighton v. Mun. Credit Union*, 71 A.D.3d 604, 605 [1st Dept 2010] (holding that "plaintiff's assertion of a claim for retaliatory termination pursuant to Labor Law § 740 (7) did not require the dismissal of her causes of action based on disability discrimination" because "Plaintiff's claims that defendants failed to reasonably accommodate her disabilities stated separate causes of action from her claim of retaliatory termination under the whistleblower statute.")

The Court will consider Section § 740's waiver provision with respect to the additional causes of actions of the SAC.

C. Plaintiff's causes of action for retaliatory discharge under federal, New York State, and New York City FCA (second, third, and fourth causes of action)

Plaintiff's second, third and fourth causes of action sound in retaliatory discharge under the federal, New York State, and New York City FCA, respectively. Plaintiff alleges that she was terminated from her employment in retaliation for voicing complaints to Defendants that Sandoz was "not in compliance with FDA rules and/or regulations relating to the safety and efficacy of manufacturing facilities

for chemicals used in the manufacture of pharmaceutical products," and "that such non-compliance could potentially constitute fraud upon the government and a violation" of the federal, New York State, and New York City False Claims Act. Plaintiff alleges that "[t]his complaint to the Sandoz Business Practices Office, as well as plaintiff's prior complaints to various Sandoz/Fougera managers regarding these health and safety issues, was the kind of complaint that is specifically protected by the by the anti-retaliation provisions of" the respective false claims acts.

The second cause of action of the SAC alleges that Plaintiff faced retaliatory action in violation of the anti-retaliation provision of the FCA, 31 U.S.C. 3730(h). That section, provides in part:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

To state a claim for retaliatory discharge under the FCA, a plaintiff must show: "(1) that he engaged in conduct protected under the statute, (2) that defendants were aware of his conduct, and (3) that he was terminated in retaliation for his conduct." (*Faldetta v. Lockheed Martin Corp.*, No. 98-cv-2614(RCC), 2000 U.S. Dist. LEXIS 16216, at *38 [S.D.N.Y. 2000]).

The third cause of action of the SAC alleges that Plaintiff faced retaliatory action in violation of the anti-retaliation provision of the New York FCA. N.Y. State Fin. Law 191 states in part:

> Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more

> violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole.

Similar to a federal FCA claim, to state a claim for retaliatory discharge under the New York FCA, a plaintiff must show that "(1) the employee engaged in conduct protected under the [statute]; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discharged, discriminated against or otherwise retaliated against the employee because of the protected conduct." (*Landfield v. Tamares Real Estate Holdings, Inc.*, 112 A.D.3d 487, 487-88 [1st Dep't 2012]).

The fourth cause of action of the SAC alleges that Plaintiff faced retaliatory action in violation of the anti-retaliation provision of the New York City FCA. Analysis of a retaliatory discharge claim under the New York City FCA tracks that of such a claim under the federal and New York State FCAs. (*See Chen ex rel. United States*, 966 F. Supp. 2d at 305).

Plaintiff's causes of action under the federal, New York State, and New York City FCA are based upon the factual allegations that Plaintiff was unlawfully discharged after she "learn[ed] that defendant was not in compliance with FDA rules and/or regulations relating to the safety and efficacy of manufacturing facilities for chemicals used in the manufacture of pharmaceutical products," and "complained to and advised other Sandoz/Fougera managers about this important issue and the fact that such non-compliance could potentially constitute fraud upon the government and a violation of the Federal False Claims Act." Since these causes of action arise from the same wrongful discharge that underlies Plaintiff's Section 740, Plaintiff has waived her right to pursue these causes of action under N.Y. Labor Law § 740(7) by advancing a claim alleging a substantive violation of Section 740. [1]

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[1] Plaintiff argues that waiver of her federal FCA cause of action by virtue of her assertion of a Section 740 claim "would run afoul of the Supremacy Clause of the United States Constitution." Plaintiff, citing to *Colette*, states, "An effort by New York to condition a state law right on the waiver of arguably unrelated federal rights would raise serious constitutional questions." (*Collette,* 132 F. Supp. 2d at 265). Defendants contend that Plaintiff's argument concerning the Supremacy Clause and Plaintiff's federal FCA cause of action "is inconsistent with the Eastern District's decision in *Nadkarni v. North Shore-Long Island Jewish Health System*, which found that the invocation of Section 740 constituted a waiver of that plaintiff's

Furthermore, "Although internal complaints alone may constitute efforts to stop the violation of a false claims statute and thus rise to the level of protected conduct ..., [the] plaintiff is required to show that his complaints of noncompliance ... went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligation." (*Landfield*, 112 A.D.3d at 488). Here, the SAC alleges that Plaintiff's job duties and responsibilities included "identifying and curing some of the Fougera/Sandoz violations of FDA regulations and requirements, including cGMP (current Good Manufacturing Practices)." As such, the SAC fails to show that Plaintiff's complaints of noncompliance with FDA regulations and rules "went beyond the performance of his normal job responsibilities so as to overcome the presumption that he was merely acting in accordance with his employment obligations" (*Lanfield,* 112 A.D. 2d 488).[2] Accordingly, even if Section 740(7) did not operate as a waiver of Plaintiff's separate claims under the federal, New York State, and New York City FCA, the four corners of the SAC fail to state a claim for relief for these claims.

Americans with Disabilities Act claim." (*See Nadkarni*, 02-CV-05872-JS, 2003 WL 24243918 [E.D.N.Y. July 31, 2003]).

[2] Defendants also argue that even assuming, arguendo, that Plaintiff's conduct constitutes protected activity, her federal, New York State, and New York City FCA retaliatory discharge claims would be subject to dismissal because Plaintiff has failed to allege the existence of a viable FCA claim. Defendants argue that in order to state a FCA claim, a plaintiff must allege the existence of a false claim or statement by the defendant. Defendants allege that the SAC fails to allege the existence of a false statement because "the only courts to analyze the question of whether alleged non-compliance with cGMPs could constitute a 'false claim or statement' under the FCA have unequivocally held that circumstances such as those alleged by Plaintiff do not constitute a violation of the statute." Since the Court has found that Plaintiff has failed to plead the requisite "protected activity" to substantiate a FCA claim, the Court need not also consider whether the SAC has alleged the existence of a false claim or statement under the respective acts.

D. Plaintiff's breach of complaint/implied covenant of good faith and fair dealing cause of action

Plaintiff's fifth cause of action for breach of contract/breach of good faith and fair dealing claim is based on allegations that Defendants prevented Plaintiff from performing her obligations in order to prevent Plaintiff from obtaining certain benefits.

More specifically, the SAC alleges that Defendants' demotion and subsequent termination of Plaintiff after she made a formal complaint concerning Defendants' failure to procure Sodium Hyaluronate from a Type 2 DMF compliant manufacturer, were "calculated in bad faith to prevent Plaintiff from performing her duties under her Employment Agreement and to also withhold her benefits due under her Employment Agreement. Defendants thus breached their covenant of good faith and fair dealing under their Employment Agreement, Relocation Package and Retention Bonus by, among other things, failing to pay her the $29,000 due her for the 2013 bonus to which she was entitled; failing to pay her the $20,000 project bonus to which she was entitled as part of the transition team; failing to pay her all of the Relocation Package Payments that had been promised to her; failing to pay her all of the Merit Award Payments to which she was entitled; and failing to pay her the Retention Bonus Award to which she would have been entitled after three years of service, but for the bad faith wrongful termination of her by defendants."

Defendants argue that Section 740's waiver provision encompasses Plaintiff's breach of contract/breach of good faith and fair dealing cause of action because it based upon Plaintiff's discharge as a result of her reporting the alleged FDA non-compliance to management. Alternatively, Defendants further argue that the SAC fails to state a cause of action for breach of contract and documentary evidence contradicts Plaintiff's claims. Defendants argue that the SAC fails to state a cause of action for breach of contract because Plaintiff has failed to allege the specific contractual provisions upon which her breach of contract is claimed and her performance of those terms. Defendants further argue that Plaintiff's allegations of breach of contract are refuted by terms of the Retention Bonus Plan ("RBP") and Annual Incentive Plan ("AIP").

Defendants provide copies of the RBP, AIP, and the Relocation Package. The RBP provides that the retention bonus would "vest in 100% cliff fashion following the 3rd anniversary ("Vesting Date")," only if "employment with the Company . . . has not been terminated prior to the Vesting Date for any reason" and the employee

has been terminated "with or without cause prior to the vesting date of the Award, all unvested share units will be forfeited and cancelled as of the date of your termination." Defendants argue that, "The RBP therefore summarily refutes Plaintiff's allegation that she "was given a retention bonus award" that granted "her the 1570 stock units in the form of restricted stock units under the Novartis Corporation 2012 Stock Inventive Plan for North American Employees." Defendants argue that since Plaintiff does not dispute that she was not employed through her vesting period and that her employment ended before the retention bonus was scheduled to vest, her breach of contract claim seeking payment of her retention bonus should be dismissed.

The AIP provides "[t]o be eligible for an incentive award, an employee must . . . remain active through the payout following the Plan Year." The AIP further provides that "[g]enerally, awards are based on the target percentage, individual performance, and business performance for the Plan Year" and "[i]ndividual performance takes into account Company management's view of the employee's performance against both individual objective and Novartis values and behaviors." Defendants argue, "The AIP therefore summarily refutes Plaintiff's conclusory allegation that "she was entitled" to her '2013 bonus.'" Defendants argue that since Plaintiff does not dispute that she was not employed through the payout following plan year 2103 which would have been March 2014, her breach of contract claim seeking payment of her 2013 annual bonus should be dismissed.

Regarding Plaintiff's claim that Defendants "failed to pay her all of the Relocation Payments that had been promised to her," Defendants argue that the express language of the relocation package which provides for a "declining scale" payment over the course of three years refutes such a claim. Defendants further argue that her failure to identify the specific contractual provision upon which her breach of relocation claim is based also warrants dismissal. In opposition, Plaintiff claims that Defendants have failed to address her claim that they breached their covenant of good faith and fair dealing under their Employment Agreement or to address the terms of the Employment Agreement.

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]). "[I]mplied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party

of the right to receive the benefits under their agreement." (*Jaffe v. Paramount Communs.*, 222 A.D.2d 17, 22-23 [1st Dep't 1996]). The implied obligation "is in aid and furtherance of other terms of the agreement of the parties", and "an obligation that would be inconsistent with other terms of the contractual relationship cannot be implied." (*Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 73 [1st Dep't 2000]). "A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." (*Skillgames v. Brody*, 1 A.D.3d 247, 252 [1st Dept 2003]).

Here, as plead, Plaintiff's breach of contract/implied covenant of good faith cause of action is based on the allegation that Plaintiff filed a formal complaint concerning the manufacturing of one of Sandoz's products, and as a result she was terminated and could no longer collect the compensation that would have come due to Plaintiff if she had continued to be employed. As such, Plaintiff's breach of contract/implied covenant of good faith claim arises from the same allegedly unlawful discharge that forms the basis of her Section 740 claim and is waived by her assertion of that claim.

E. Plaintiff's discrimination cause of action

The sixth cause of action of the SAC alleges that Defendants engaged in unlawful discrimination of Plaintiff because she was female, Muslim, and of Turkish national origin in violation of NYSHRL § 296.

Defendants argue that Plaintiff's NYSHRL claims have been waived "because of her assertion that her allegedly unlawful discharge was a consequence of the discrimination to which she was allegedly subjected." Defendants also allege that Plaintiff has failed to set a forth a viable cause of action under the NYSHRL.

Contrary to Defendants' contention, the waiver provision of Labor Law § 740(7) does not bar the Plaintiff's discrimination claim in this action. (*See Knighton v. Mun. Credit Union*, 71 A.D.3d 604, 605 [1st Dept 2010]).

Turning to Defendants' argument that Plaintiff failed to set forth a viable cause of action under NYSHRL, NYSHRL § 296(1)(a) provides, in relevant part:

> It shall be an unlawful' discriminatory practice for an employer...because of an individual's...race...to discharge from

> employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

The standards for recovery under the NYSHRL are similar to the standards under Title VII, and employment discrimination claims under both are analyzed pursuant to the burden-shifting framework established in *McDonnell Douglas Corp. v. Green* (411 U.S. 792 [1973]). (*Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629, [1997]). To state a claim for discrimination, a plaintiff must first allege that: "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she ... suffered [an] adverse employment action; and (4) the ... adverse action occurred under circumstances giving rise to an inference of discrimination." (*Forrest* v. *Jewish Guild for the Blind*, 3 N.Y. 3d 295 [2004]) (citations omitted).

With respect to the first three elements necessary to state a claim of discrimination against Plaintiff, the SAC alleges that (1) Plaintiff, as a female Muslim of Turkish origin is a member of a protected class; (ii) Plaintiff was hired by Defendants as Director of Procurement, a position for which she was qualified; and (iii) Plaintiff was terminated by Defendants on February 4, 2014. Defendants do not challenge that Plaintiff has adequately plead these elements. Rather, Defendants allege that Plaintiff has failed to plead the fourth prong: that Plaintiff's termination occurred under circumstances supporting an inference of discrimination.

"A person alleging racial or other discrimination does not have to prove discrimination by direct evidence. It is sufficient if he or she proves the case by circumstantial evidence." (*Forrest,* 3 N.Y.3d at 326). In order to make out a discrimination claim based on disparate treatment, a plaintiff must first set forth a prima facie case of discrimination, i.e., that he is a member of a protected class and that he was treated differently than similarly situated non-members of the class. (*Shah v. Wilco Sys., Inc.*, 27 A.D. 3d 169, 176 [1st Dep't 2005]). "The individuals being compared must be similarly situated in all material respects." (*Shah*, 27 A.D.3d at 177). "Stray remarks ... even if made by a decision maker, do not, without more, constitute evidence of discrimination." *Melman*, 98 A.D. 3d at 125. *See also Mete v. New York State Office of Mental Retardation & Developmental Disabilities*, 21 A.D.3d 288, 294 [1st Dept 2005].

Under NYSHRL, 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." (*Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 310 [N.Y. 2004]). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Forrest*, 3 N.Y.3d at 310-11) (citations omitted). Additionally, "[t]he effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." (*Id.* at 311). The alleged "conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. (*Id.*). "A hostile work environment requires 'more than a few isolated incidents of racial enmity,'" and "[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." (*Id.*).

Defendants also allege that the SAC fails to state a claim for hostile work environment under the NYSHRL because Plaintiff's "allegations fall far short of establishing that the workplace was permeated with sufficiently severe or pervasive discriminatory intimidation, ridicule and insult that altered the conditions of her employment."

In the SAC, Plaintiff alleges that she and other woman were subjected to a "double standard" because she was a woman. As alleged in the SAC, Plaintiff, as well as other woman, dealt with a "male dominated management at Sandoz/Fougera [which] acted as if they were in a 'boy's club' where, in addition to the 'locker room' jokes designed to demean women in general, and plaintiff in particular, it was considered improper for woman to speak up during meetings or to assert themselves in any meaningful way." The "male defendant managers" "made it clear that they felt threatened by plaintiff's assertive approach to the management and professional issues that inevitably arise in this complex industry" and "in doing so ... applied a double standard, since they asserted themselves on a daily basis, which was considered 'normal" and acceptable when done by a male manager." The SAC alleges, "This double standard, based on gender discrimination, was ingrained in defendants' 'corporate culture.'"

Plaintiff further alleges, "As a Muslim woman of Turkish origin, plaintiff was exposed to constant discrimination while employed at Sandoz/Fougera." As one

example, Plaintiff alleges, "[W]hen she first met with Sandoz managers from the Sandoz New Jersey offices, one of the manufacturing vice presidents, Michael Altman, told plaintiff that 'we're going to need a translator for you.'" Plaintiff alleges that "[h]e was obviously referring to the fact that plaintiff speaks English with a fairly strong Turkish accent." Plaintiff alleges that she "was also frequently subjected to sarcastic and inappropriate comments about her religion, often under the pretext that such comments were being made 'out of curiosity' [and] subjected to such discriminatory comments on a fairly regular basis, in particular once she began raising the FDA non-compliance issues detailed above." Plaintiff alleges, "Sandoz/Fougera managers continued to make off-color and grossly inappropriate jokes about 'Indian women' with foreign accents, plainly designed to ridicule foreign woman such as plaintiff of the Islamic faith, particularly because they did not fit in with 'boy's club.'"

Plaintiff alleges she was confronted with Defendants' "boy's club" environment when she attended a March 2013 business convention at the Waldorf Astoria. She alleges when at the convention, Jack Loghery, a Sandoz manager, "shouted at plaintiff in the presence of other members of the Sandoz procurement team and other DCAT members from other companies, sharply asking her: 'What are you doing here?" and proceeded to state, "'We don't need you here. We can handle it.'" Plaintiff also alleges "although [she] was next in line for promotion to the position of senior Director of Procurement & Planning upon Ms. Alexander's [another employee's] resignation, [she] was passed over for such promotion and the position was filled from outside the organization by a male."

As other examples of Defendants' alleged discriminatory conduct toward other employees, Plaintiff alleges that Rahima Chawaudry, a Muslim woman from Bangladesh, "was fired for praying four times per day during the work day, despite the fact that she was an excellent employee;" "female 'contract' workers were terminated on the basis that company policy did not permit them to exceed twelve (12) months without being employed as a permanent employee while male 'contract' workers were allowed to exceed this twelve (12) limitation with impunity;" "Lucy Alexander, who had been the senior Director of Procurement & Planning at Sandoz/Fougera, was forced to resign after being similarly subjected to harassment and discrimination for speaking her mind at management meetings and otherwise acting as an assertive female manager, which was repugnant to the corporate culture at Sandoz/Fougera;" and "Melody Gulcan, a female engineer of Turkish descent and a practicing Muslim, was never promoted or given a raise despite exemplary

performance" and "was wrongfully demoted to the position of associate engineer ... [b]ecause [she] was also perceived as being overly assertive with respect to compliance issues." Plaintiff alleges, "On the other hand, women who carried themselves in a sexualized, flirtatious manner were rewarded with perks and bonuses despite their lack of qualifications."

Accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of the SAC adequately plead a cause of action for discrimination and hostile environment under NYSHRL.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss the SAC is granted only to the extent that the second, third, fourth, and fifth causes of action of the SAC are dismissed; and it is further

ORDERED that Defendants' motion to dismiss the first and sixth cause of actions of the SAC is denied; and it is further

ORDERED that Defendants are directed to answer the SAC within 20 days of the date of this Order.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 16, 2017

FEB 16 2017

Eileen A. Rakower, J.S.C.