Rodrigues v Watershed Ventures LLC
2018 NY Slip Op 30322(U)
February 22, 2018
Supreme Court, New York County
Docket Number: 150644/17
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12
Justice

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NAPOLEON RODRIGUES and KHYRI M. NATH,

Plaintiffs,

- v -

WATERSHED VENTURES LLC, et al.,

Defendants.

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INDEX NO. 150644/17

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

By notice of motion, defendants move to dismiss the complaint on various grounds. Plaintiffs oppose.

I. BACKGROUND

In an action filed in federal court, plaintiffs sued defendants for violations of the Fair Labor and Standards Act (FLSA) and the New York Labor Law (NYLL), related to their employment with defendants. The action settled and plaintiffs signed a release which provides, as pertinent here:

> 1.14. Released Rule 23 Class Claims. "Released Rule 23 Class Claims" means all claims, rights, liens, demands, penalties, fines, wages, liquidated damages, restitutionary amounts, attorneys' fees and costs, punitive damages, controversies, and liabilities . . . related to any wage and hour claims that have been or could have been asserted under New York State Law . . . "Released Rule 23 Class Claims" shall be interpreted as broadly as possible in accordance with the terms set forth herein and shall include but not be limited to the allegations in the Litigation.

The term "Released FLSA Claims" is defined as is "Released Rule 23 Class Claims," and provision 4.1, entitled Release of Claims, provides that each and every releasor forever and fully releases the defendants from all Released Rule 23 Class Claims, all Released FLSA Claims, and "any and all claims for damages that were prayed for or could have been recovered in the Litigation, including but not limited to claims for wages, credits, liquidated damages, penalties, fines, punitive damages, interest, attorneys' fees, costs, and restitutionary amounts." (NYSCEF 8).

The opt-in notice sent to proposed plaintiffs in the federal action advised that the defendants were being sued for failing "to pay employees all of the applicable wages and premiums due under federal and New York state law," and alleged that defendants paid less than the required minimum wage by taking an unlawful tip credit, required workers to work off the clock, failed to make certain payments, and failed to provide required wage statements and notices. (*Id.*).

In the complaint here, plaintiffs allege that defendants engaged in race discrimination in violation of the New York State and City Human Rights Laws (HRL), and seek as damages an award of back pay, compensatory and punitive damages, and attorney fees and costs. They assert that defendants Burke and Cintron are equity interest holders in defendants Watershed Ventures LLC and Fishlegs, LLC d/b/a Fishtail, who manage and control all operational aspects of restaurants owned or managed by Watershed, and exercise control over the terms and conditions of plaintiffs' employment with authority to supervise and control plaintiffs' supervisors, including managers at David Burke Group restaurants. (NYSCEF 2).

II. ANALYSIS

A. Effect of release in prior action

"A release is a provision that intends a present abandonment of a known right or claim." (*McMahan & Co. v Bass*, 250 AD2d 460, 461 [1st Dept 1998], *lv denied*, 92 NY2d 1013). Where a release is clearly expressed, "effect must be given to the intent of the parties as indicated by the language employed." (*Goode v Drew Bldg. Supply, Inc.*, 266 AD2d 925 [4th Dept 1999]). The party seeking enforcement of a release must establish that it is valid and enforceable. (*Lincoln Trust v Spaziano*, 118 AD3d 1399 [4th Dept 2014]; *Litvinov v Hodson*, 74 AD3d 1884 [4th Dept 2010], *lv denied* 77 AD3d 1457).

Here, the release, read broadly according to its terms, precludes all claims related to any wage and hour claim that had been or could have been asserted under New York State law. Defendants cite no authority for the proposition that a claim of discrimination relates to a "wage and hour" claim.

While defendants urge that the release is broad enough to preclude plaintiffs from bringing any claim against them related to their employment, such a broad release is routinely disapproved by the federal district courts in the Second Circuit in FLSA. (*See Lopez v Nights of Cabiria, LLC*, 96 F Supp 3d 170, 181 [SD NY 2015] [rejecting proposed settlement of FLSA claim where release contained provision for waiver of any possible claim including those unrelated to wage-and-hour issues; disapproving use of FLSA settlements "to erase all liability whatsoever in exchange for partial payment of wages allegedly required by statute."]).

Indeed, it is common practice in the Second Circuit for parties to enter into two settlement agreements, one addressing FLSA claims and the other addressing non-FLSA claims, such as discrimination claims, thereby warranting the inference that wage-and-hour claims and

discrimination claims are mutually exclusive. (*See e.g., Santos v Yellowstone Props., Inc.*, 2016 WL 2757427 [SD NY 2016] [where parties agreed to two releases, one for wage-and-hour claims and one for discrimination claims, general release governing discrimination claim appropriate in resolving non-wage-and-hour claims, but not appropriate in wage-and-hour release]; *see also Rodriguez v 3551 Realty Co.*, 2017 WL 5054728 [SD NY 2017] [proposed FLSA settlement agreement contained invalid provisions, including release of claims arising from National Labor Relations Act, Title VII, and Americans with Disabilities Act]).

As the release in issue here limits its impact to those related to wage-and-hour claims, and absent any authority for the proposition that a discrimination claim is related to a wage-and-hour claim, and in view of the policy against permitting such a release to preclude a discrimination action, defendants fail to establish that plaintiffs' discrimination claims are barred by it.

B. Sufficiency of pleading

In employment discrimination actions brought pursuant to the state and city HRLs, the plaintiff need not plead specific facts establishing a *prima facie* case of discrimination, but must instead give fair notice of the nature of the claim and its grounds. (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]).

To state a cause of action for discrimination, a plaintiff must "plead facts that would tend to show (1) membership in a protected class, (2) an actual or constructive discharge or adverse employment action, (3) qualification to hold the position for which he or she was terminated or suffered an adverse employment action, and (4) that the discharge or adverse employment action occurred under circumstances giving rise to an inference of age discrimination." (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *O'Halloran*

v Metro. Transp. Auth., 154 AD3d 83, 100–01 [1st Dept 2017]; *James v City of New York*, 144 AD3d 466, 466–67 [1st Dept 2016]).

Here, plaintiffs allege that they are South Asian, that they are or were qualified for promotion to waitstaff as they speak fluent English, are familiar with the restaurants' food and wine menus, and have been praised for their work ethic, and that defendants engaged in an adverse employment action by repeatedly refusing to promote them to waitstaff, claiming that no positions were available while subsequently hiring non-minorities in their stead. Plaintiffs also allege that the entire waitstaff consists of non-minorities or those with light complexions. (*See Emengo v State of New York*, 143 AD3d 508 [1st Dept 2016] [plaintiff sufficiently alleged that he was minority, well-qualified for employment positions, was refused promotions, and was adversely treated because of race and national origin]; *Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012] [claim sufficient under city HRL as plaintiffs alleged membership in protected class, and that they were qualified for positions and suffered adverse employment action, which gave rise to inference of discrimination as all disabled workers were fired, while non-disabled not fired]). They have thus sufficiently pleaded a claim for discrimination.

C. Documentary evidence

A motion to dismiss on the ground that a claim is barred by documentary evidence is appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Residential Bd. of Mgrs. v 46th St. Dev., LLC*, 154 AD3d 422 [1st Dept 2017]). While affidavits, deposition testimony, and letters do not constitute documentary evidence within the meaning of CPLR 3211 (*Granada Condo. III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]), "documents reflecting out-of-court transactions

such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable'" may suffice (*Sands Point Partners Private Client Group v Fid. Nat. Title Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012]). The alleged documentary evidence "must be unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

Defendants offer, as documentary evidence in support of their motion, a payroll report which they claim proves that they hire members of minority groups. The list is not probative on its face and its contents are ambiguous and not essentially undeniable. Thus, it does not constitute documentary evidence. (*See Trask v Tremper Prop. Assn., Inc.*, 122 AD3d 1206 [3d Dept 2014] [minutes of membership meetings and unsigned amended bylaws not unambiguous and of undisputed authenticity and thus not documentary evidence]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010] [letters, summaries, opinions, and/or conclusions not documentary evidence at they did not reflect out-of-court transaction and were not essentially undeniable]).

In any event, the report contains no indication of the race of each employee, and thus does not establish that defendants hired waitstaff of varied racial backgrounds. Consequently, the list does not utterly refute plaintiffs' allegations or conclusively establish a defense as a matter of law. (*Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC*, 154 AD3d 422 [1st Dept 2017] [survey showing that problems with floors were caused by water infiltration and not by defects in defendants' work, even if documentary evidence, did not conclusively establish defendant to claims as matter of law]).

That defendants offer an affidavit to elucidate the report, moreover, establishes that the list itself is not documentary evidence; if the document was unambiguous, no explanation would be required. (*See e.g., Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] [affidavits, letters, and spreadsheets offered in support of motion to dismiss not documentary evidence]).

D. Individual liability

> [A] corporate employee, though he has a title as an officer and is the manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on age or sex under New York's Human Rights Law...if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others.

(*Patrowich v Chem. Bank*, 63 NY2d 541, 542 [1984]). "[C]ourts have interpreted *Paltrowich* broadly and allowed individuals to be sued for discrimination." (*Poolt v Brooks*, 38 Misc 3d 1216[A], 2013 NY Slip Op 50116[U] [Sup Ct, New York County 2013], referencing *Kaiser v Raoul's Rest. Corp.*, 72 AD3d 539, 540 [1st Dept 2010]). In *Kaiser*, the Court held that to impose individual liability on a corporate employee under the state or city HRL, the plaintiff must allege that the employee has an ownership interest in the company or the power to do more than carry out personnel decisions made by others. (72 AD3d at 540; *see also Ananiadis v Mediterranean Gyros Prod., Inc.*, 151 AD3d 915, 920 [2d Dept 2017] [on summary judgment, issue of fact existed as to whether defendant had "power to do more than carry out personnel decisions made by others" in order to be held individually liable]; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50 [1st Dept 2005] [individual properly held liable under state HRL as "employer" as he was cofounder, president, and 10 percent shareholder in defendant with significant managerial responsibilities]).

Other examples of conduct which may subject an employee to individual liability under the state HRL include: (1) the power to hire and fire employees; (2) supervision and control of employee work schedules or conditions of employment; (3) determination of the rate and method of payment; and (4) maintenance of employment records. (*Griffin v Sirva Inc.*, 835 F3d 283 [2d Cir 2016]).

Here, plaintiffs allege in their complaint that the individual defendants have an ownership interest in the corporate defendants, that they manage and control all of the restaurants' operations, including supervision and control of managers, and that they exercised control over the terms and conditions of plaintiffs' employment. They thus sufficiently plead a basis for holding the individual defendants liable under the state and city HRL. (*See Emengo*, 143 AD3d at 509 [plaintiff's allegations that each individual defendant was "employer" based on broad assertions that defendants were high-ranking managers with supervisory powers, even if inferentially, including power to promote, discipline, and terminate employees, held sufficient to withstand motion to dismiss]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006] [motion to dismiss should have been denied as complaint adequately stated claim against individual defendant based on allegations that he was co-founder and managing member of company with power to hire and fire plaintiff]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is denied in its entirety; it is further

ORDERED, that defendants are directed to serve and file an answer within 20 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on April 4, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York 10007.

2/22/18

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE