

Pecile v Titan Capital Group, LLC

2018 NY Slip Op 30831(U)

May 3, 2018

Supreme Court, New York County

Docket Number: 110490/2010

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**
----- X
DANIELLE PECILE and CRISTINA CULICEA,

**Index No. 110490/2010
Motion Seq: 018 & 019**

Plaintiffs,

- against-

**TITAN CAPITAL GROUP, LLC; MARC ABRAMS in
his professional and personal capacity; RUSSELL
ABRAMS in his professional and personal capacity;
and SANDRA ABRAMS**

Defendants.
----- X

**DECISION & ORDER
ARLENE P. BLUTH, JSC**

Motion Sequence Numbers 018 and 019 are consolidated for disposition. The motion by defendants (Mot Seq 018) for summary judgment dismissing plaintiffs' complaint is granted in part and denied in part. The motion by plaintiff Culicea (Mot Seq 019) for summary judgment on her claim for retaliation against defendant Sandra Abrams is denied.

Background

This action arises out of plaintiffs' employment for Titan Capital Group, LLC (Titan). Pecile worked as an executive assistant to defendants Marc and Russell Abrams (the Abrams brothers ran Titan) from March 2008 through April 2009. Culicea also worked at Titan, first as a receptionist beginning in March 2006 and then became an executive assistant for Russell and Marc. Culicea left Titan in September 2008.

After both Pecile and Culicea left Titan, they filed complaints with the Equal Employment Opportunity Commission ("EEOC"). Culicea claimed she was subjected to

discrimination and sexual harassment by Marc and Russell. Pecile lodged similar complaints against Marc and Russell.

Defendants offer a different version of events. Defendants contend that soon after Pecile started working at Titan, she became romantically involved with Marc and the instant litigation is the result of their bad breakup. Defendants theorize that Pecile recruited her friend, Culicea, to file complaints against Marc and Russell. Defendants acknowledge that Marc sent a “series of heated emails” to Pecile and also left an angry voicemail to Culicea as a result of Marc’s breakup with Pecile.

Defendants move for summary judgment on plaintiffs’ claims for a hostile work environment, retaliation, intentional infliction of emotional distress (“IIED”), loss of reputation and to bar plaintiffs from recovering for emotional distress damages.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City*

of New York, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec. Ltee.*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Hostile Work Environment Claims

"A hostile work environment exists where 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. Various factors, such as frequency and severity of the discrimination, whether the alleged discriminatory actions were threatening or humiliating or a mere offensive utterance, and whether the alleged actions unreasonably interfere with an employee's work are to be considered in determining whether a hostile work environment exists. The allegedly abusive conduct must not only have altered the conditions of the employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an objectively hostile or abusive environment—one that a reasonable person would find to be so" (*Chiara v Town of New Castle*, 126 AD3d 111, 125, 2 NYS3d 132 [2d Dept 2015] [internal quotations and citations omitted]).

Plaintiffs bring hostile work environment claims under both state and city Human Rights Laws ("HRL"). Under the State HRL, a court must dismiss a hostile work environment claim

“where the environment was not objectively hostile because the behavior complained of amounted to no more than mild or isolated incidents that could not be said to permeate the workplace . . . courts would uphold sexual discrimination claims . . . where women were subjected to sexual ridicule day after day over the course of several years without supervisory intervention” (*Hernandez v Kaisman*, 103 AD3d 106, 113, 957 NYS2d 53 [1st Dept 2012] [observing how the City and State HRLs used to be treated under the same “severe and pervasive” standard]).

City HRL claims are treated more liberally. “For HRL liability, therefore, the primary issue for a trier of fact in harassment cases . . . is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred” (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80, 872 NYS2d 27 [1st Dept 2009]).

Defendants claim that summary judgment should be granted on both plaintiffs’ hostile work environment claims.

As an initial matter, the hostile work environment claims alleged against defendant Sandra Abrams are severed and dismissed. It is undisputed that Sandra (Russell’s wife) never worked at Titan or had any supervisory role over Pecile and Culicea at Titan.

Culicea’s Hostile Work Environment Claims

Defendants claim that there is no evidence of wrongdoing by Russell and insist that the inappropriate voicemail message left by Marc occurred while Marc was no longer an employee of Titan.

The Court finds that there are issues of fact with respect to Culicea's claims for a hostile work environment against both Russell and Marc. With respect to Russell, Culicea testified that "Well he was making me feel very uncomfortable because of the sexual harassment. For example, any time that I would speak with him, he would just stare at my breasts as he spoke to me. He would stare at my behind as I walked away, even if he had to turn his head and do it the whole way that he was walking down the hallway" (Culicea's tr at 117).

She also testified that Russell "would ask me once investors came into the office to set them up in the conference room and to entertain them using my womanly powers. He said this numerous times in a variety of different ways" (*id.* at 118). Culicea alleged that Russell "told me to use my woman's advances, my sexual nature, to entertain clients" (*id.* at 121).

It is for a jury to decide whether this conduct (assuming the jury credits Culicea's account) created an abusive work environment. Defendants reliance on an email from Culicea in which she says the job was "comfortable" and that she left Titan because her job was crazy is not dispositive. Culicea testified that it was "very embarrassing to tell people that you work somewhere where you're being sexually harassed" (*id.* at 106). The fact is that Culicea worked as an executive assistant for Russell— this type of job required personal interaction with Russell on a daily basis. Unsurprisingly, she testified that she would not feel comfortable complaining to Russell because he was the source of the problem (*id.* at 116).

With respect to Marc, Culicea also raises an issue of fact. Culicea testified that Marc sent aggressive emails and phone calls "right after he asked me out for drinks and I told him that I didn't think that was a good idea" (Culicea tr at 323). Culicea testified that Marc's behavior was so bad that she had her first panic attack at Titan (*id.* at 322). She claimed that Marc "sexually

harassed me by starting to treat me differently after I declined his advance” (*id.* at 323). Culicea also recounted an incident where she was asked to join in company dinners and “Marc told me that I was invited because of my appearance and the former secretary was not invited because she was a fat ass” (Culicea tr at 329).

Defendants’ claim that Marc had limited contact with Culicea in the months leading up to her resignation does not compel this Court to grant defendants’ motion. The fact that Marc may have only been physically present in the building nine times from March 2008 to August 2008 does not foreclose a hostile work environment claim. It is undisputed that Marc had supervisory powers over Culicea and had the ability to give her direction in 2008. And, of course, Culicea began working at Titan in 2006.

Despite defendants’ efforts to characterize Culicea’s complaints as self-serving, on a motion for summary judgment this Court can only consider whether Culicea has raised an issue of fact. This is not a case where Culicea complains about a single incident or petty slights—instead she references a series of repeated events that a jury might find constituted a hostile environment.

The fact that Culicea tried to leave Titan on good terms does not make her claims meritless. What employee, especially a junior employee going through law school, wants to burn bridges on the way out? Should that employee be forced to choose between maintaining work relationships and pursuing a legal claim? The Court cannot hold that the failure to lodge complaints until after the employment is over prohibits an employee from raising hostile work environment claims.

The reference to the EEOC’s findings against plaintiffs is also not dispositive—this Court

must decide whether defendants have demonstrated, as a matter of law, that Marc and Russell did not create a hostile work environment. The Court cannot do that on this record. Under either the state HRL's "severe and pervasive" standard or under the "treated less well" standard under the city HRL, Culicea has raised issues of fact with respect to all defendants except for Sandra.

Pecile's Hostile Work Environment Claim

The Court finds that there are issues of fact with respect to Pecile's claims against both Marc and Russell. With respect to Russell, Pecile maintains that there was a pervasive hostile work environment. Pecile testified that Russell hit on her and looked down her shirt (Pecile tr at 193). Pecile also claimed that while hanging out after work one evening, Russell started caressing her leg (*id.* at 292, 296-7). Pecile further testified that on one occasion, Russell and Sandra (Russell's wife) came into her office "and [Sandra] and Russell were kissing by my desk close to the IT room, which is right by my desk, and as they were kissing Russell was staring at me" (*id.* at 429).

Pecile also testified that Russell "asked me to print CDs which revealed his wife topless and in a thong and asked me how I liked the pictures, how I liked them. He has asked me to entertain his clients and made further comments about dating them or them liking me or me liking them on numerous occasions . . . He has asked me repeatedly to go out out with his brother Marc" (*id.* at 195). "[Russell] also suggested to give me time off and go away with Marc on vacation, and when I requested off he had said, as long as you take Marc with you. He has implied that I should work out with Marc on my off hours" (*id.* at 196).

This account creates an issue of fact and the Court denies defendants' motion to the extent it sought to dismiss the hostile work environment claim against Russell. Defendants'

assertion that Pecile only complained about one incident is meritless. And while defendants' allegations about Pecile's inappropriate conduct in the workplace might undercut Pecile's credibility, it does not compel this Court to grant this branch of defendants' motion. A jury must decide whether this conduct establishes a hostile work environment.

Russell's claim that he never intended for Pecile to see the photos is just an allegation-- the jury must decide whether they believe his claim or Pecile's version (that Russell gave it to her knowing she would see the photos and then asked her if she liked them).

With respect to Marc, Pecile has clearly stated a cause of action for hostile work environment. Although Pecile admits that she had a consensual relationship with Marc, that does not foreclose her claim against him. An employer is not immunized from hostile work environment claims simply because there is a consensual romantic relationship.

Pecile claims that after going out after with work colleagues one evening in May 2008, Marc tried to kiss her and she pushed him away (*id.* at 859-60). Pecile testified that Marc "hired her based on my looks. He had repeatedly asked me out. I would continuously try to break up with him, and he would continuously not accept that" (*id.* at 205). "He had treated me better when we were dating and would give me more work and humiliate me when we weren't dating" (*id.*). Marc allegedly pressured Pecile into sexual activity in the workplace, called her names and threatened to fire her based on their relationship (*id.* at 206). Pecile further testified that Marc "brought me into the office after work hours and had pressured me into having sex with him and then went out to the trading floor with his shirt open to show all the other workers that he had just -- was putting back on his clothes after being in the office with me" (*id.* at 208).

On April 8, 2009, the same day that Pecile left her job at Titan, Pecile says that she

refused to continue her romantic relationship with Marc. Marc sent an email to Pecile with the subject line: “if you don’t return the 5k and the check I’m having you arrested. You and your little scum boyfriend will see the inside of a jail cell” and the message stated “You are a disgusting gold digger piece of trash. You deserve david, and you deserve the life you will have with him, you dirty pig thief” (*see* NYSCEF Doc. No. 329).

Later that afternoon, Marc sent another email which read in part:

“You think you and your little scumbag boyfriend are going to play me??? You are an idiot if you think that and he’s completely fucked. I am going to teach your piece of shit who he should not try to cheat. You are too pathetic for me to care about—your jealous of your own sister and can’t even pass a test. Give up and be a hooker—but you probably need to learn to fuck first. You little dirtbag, you are not walking away with my money after you conned me about your piece of shit boyfriend” (*id.*).

In fact, Pecile sent an email to Russell that evening stating “As you know I have resigned from Titan Capital Group today because your brother Marc was harassing me while I was working. Since I have left Titan this afternoon, Marc has threatened me, Cristina, my ex boyfriend and my brother in law. I can not [sic] come tomorrow or the next day as I am afraid of what your brother might [sic] to me or my family and friends” (*see* NYSCEF Doc. No. 334).

Pecile later got a temporary restraining order (*see* NYSCEF Doc. No. 333).

Clearly, plaintiffs have raised an issue of fact with respect to the hostile work environment claim against Marc. Defendants can certainly raise the fact that Marc had a consensual relationship with Pecile at trial, but that fact did not give Marc a license to do or say whatever he wanted.

Retaliation

“The State HRL provides in, pertinent part, that it shall be unlawful to retaliate against

any person because he or she has opposed any practice forbidden under this article. To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [plaintiff] engaged in a protected activity by opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) [plaintiff] was subject to adverse action; and (4) there was a causal connection between the protected activity and the adverse action” (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51, 948 NYS2d 263 [1st Dept 2012] [internal quotations and citations omitted]).

“[T]o make out a retaliation claim under the City HRL, the complaint must alleged that (1) [plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [plaintiff]; and (3) a causal connection exists between the protected activity and the adverse action” (*id.* at 51-52).

Plaintiffs’ retaliation claim alleges that defendants retaliated by filing another lawsuit (hereinafter, “Sandra’s Action”) in which Sandra commenced a case to get back the topless’ photos. Plaintiffs claim that their protected activity, filing EEOC complaints, was only six months prior to the filing of Sandra’s Action.

Defendants move for summary judgment on this claim because Sandra is not an employee of Titan and the remaining defendants were not parties to Sandra’s Action.

Plaintiffs raise issues of fact in opposition. The fact that Sandra was not plaintiffs’ employer does not foreclose these claims (*see Griffin v Sirva, Inc.*, 29 NY3d 174, 187-88, 54 NYS3d 360 [2017][finding that Executive Law § 296[6], a provision prohibiting aiding or abetting the violation of discrimination laws, applies to any person]). Of course, Sandra cannot face direct liability for retaliation because she was not plaintiffs’ employer— but she might be found liable for helping the Abrams brothers commit a retaliatory act.

When asked when she first considered suing Pecile, Sandra testified that “When it was— when I decided I will do it, after filed the EEOC complaint” (Sandra tr at 174). Sandra also testified that she sued Cristina because “she also claimed she saw pictures of me and made the complaint in the EEOC” (*id.* at 178). The fact that Sandra’s Action may have had other motivations— to get the photos back— does not remove the possibility that the lawsuit was brought because Pecile and Culicea filed an EEOC complaint against her husband.

This claim also remains as to the other defendants. When considering a motion to dismiss in Sandra’ Action in 2009, Justice Tolub noted that Sandra “has not submitted any pleading or affidavit to the effect that she is even aware of this proceeding. The real parties of interest in this proceeding are Russell [sic] run a hedge fund known as Titan Capital, LLC” (*Abrams v Pecile*, 2009 NY Slip Op 32567(U) (Trial Order) [Sup Ct, NY County 2009]). Clearly, Sandra’s husband Russell (and therefore his company Titan) played a role in bringing Sandra’s Action against Pecile and Culicea. Whether that role is sufficient to constitute retaliation is for a jury to decide. But this Court is unable to find, as a matter of law, that Marc, Russell or Titan had no role in bringing Sandra’s Action and a jury might find that was retaliation for bringing an EEOC complaint.

Given the undisputed facts in this case, the fact that a lawsuit was commenced a few months after plaintiffs filed EEOC complaints against Russell, Marc and Titan raises an issue of fact as to the other defendants’ involvement. Clearly, these defendants had a reason to encourage the commencement of Sandra’s Action in response to the EEOC complaint. A jury must decide whether they credit defendants’ denials or whether they believe plaintiffs’ theory that Marc and Russell used Sandra to bring the other action to punish plaintiffs.

Pecile also raised an issue of fact with respect to Marc and Russell’s alleged retaliation—she claims she was treated worse by Russell when she was not dating Marc and that Marc retaliated against her when she threatened to end their romantic involvement.

Whether Sandra’s Action was baseless is besides the point. It does not matter if Sandra is ultimately successful in her case if the basis for bringing that lawsuit was retaliation against plaintiffs for the EEOC complaints (*see Spencer v International Shoppes, Inc.*, 902 FSupp2d 287, 299-300 [ED NY 2012] [finding issues of fact regarding whether a state defamation case was brought with retaliatory intent even though employer successfully prosecuted one of the claims]).

IIED Claims

Plaintiffs do not oppose the branch of defendants’ motion seeking to dismiss their IIED claims. Therefore, these causes of action are severed and dismissed.

Emotional Distress Damages

Defendants claim that plaintiffs cannot recover for emotional distress damages because they have not presented medical evidence supporting that claim. Defendants also submit the report of Dr. Hammer, who met with both plaintiffs and concludes that neither suffered any psychological damages. Plaintiffs dispute the fact that medical evidence is required to recover emotional distress damages in discrimination claims.

Under the “NYSHRL and NYCHRL, a plaintiff’s recovery of damages for mental anguish is limited to compensation for actual and proven injury. Damages for emotional distress . . . cannot be assumed simply because discrimination has occurred. However, a compensatory award for emotional distress in a discrimination action may be based on testimonial evidence alone and is not preconditioned on whether the plaintiff underwent treatment, psychiatric or

otherwise” (*Makinen v City of New York*, 167 FSupp3d 472, 489 [SD NY 2016] *revd on other grounds* 2018 WL 546409 [2d Cir 2018]).

Clearly, a plaintiff can seek emotional distress damages in the discrimination context. Defendants’ submission of an expert’s affidavit does not change the standard. Of course, at trial the jury will be able to evaluate Dr. Hammer’s testimony and whether they agree with his conclusions.

Reputational Damages

Defendants claim that Culicea cannot seek damages for reputational harm because she was arrested in 2010 for stealing. Defendants also claim that any harm to plaintiffs’ reputations was caused by plaintiffs’ decision to speak to the press about this matter.

Plaintiffs raised an issue of fact with respect to this issue as well. The fact that Culicea has a criminal history might *lessen* the amount of reputational damages to which she may be entitled. And the fact that plaintiffs spoke to the media might also factor into the jury’s decision regarding harm to plaintiffs’ reputations. But it does not foreclose plaintiffs’ ability to seek those damages.

The fact is that plaintiffs brought EEOC complaints and then Sandra commenced a lawsuit against both Pecile and Culicea. The filing of that complaint made it public that plaintiffs were allegedly involved in retaining topless photos of their boss’ wife. It is for a jury to decide whether plaintiffs deserve compensation (assuming, of course, that defendants are found liable) for damage to their reputation. As Culicea noted, any Internet search about her reveals the instant litigation (Culicea tr at 495-497). The jury must decide if that damages plaintiffs’ reputation.

Marc Abrams' Employment

As a general matter, the Court finds that there is an issue of fact regarding when Marc left his employment with Titan (*see e.g.*, NYSCEF Doc. No. 355 [payroll records for Quarter 4, 2009]; NYSCEF Doc. No. 356 [Marc's W-2 from 2009]). From these records, a jury could conclude that Marc worked for Titan into 2009. Therefore, the Court rejects defendants' claim that Marc cannot be held liable under plaintiffs' hostile work environment and retaliation claims because he was no longer a Titan employee as of late 2008. This is another issue to be determined by the jury.

Motion Sequence 019

Culicea also moves for summary judgment on her retaliation claim under the City HRL. Culicea claims that Sandra had no reason to include her in Sandra's Action because Culicea had nothing to do with Sandra's topless photos—Pecile was asked to develop those photos by Russell. The First Department dismissed Culicea from Sandra's Action.

In opposition, defendants claim that Sandra cannot be held liable under the City HRL because she was not an employer and because Culicea claims that Sandra is liable under an "aiding and abetting" theory of retaliation. Defendants point out that Culicea has not moved for summary judgment as to the other defendants.

As an initial matter, this Court has already held that Sandra can face liability under the City HRL for retaliation claims under *Griffin v Sirva, Inc.* If the Court were to embrace defendants' theory, employers could simply have their spouses bring lawsuits against employees who raise discrimination claims and completely avoid retaliation claims. That is clearly not the

purpose of the City HRL.

However, defendants correctly point out that “an individual cannot aid and abet his or her own violation of the Human Rights Law” (*Hardwick v Auriemma*, 116 AD3d 465, 468, 983 NYS2d 509 [1st Dept 2014]). Here, that is plaintiffs’ theory— that Sandra aided and abetted retaliatory conduct by bringing her lawsuit at the behest of Russell, Marc and Titan.

To the extent that plaintiffs characterize their theory of liability as against Sandra directly, they are not entitled to summary judgment on that point. The fact is that plaintiffs filed EEOC complaints detailing allegations against Marc and Russell. That is the protected activity that is the basis of plaintiffs’ retaliation claims. Integral to that cause of action is the interplay between Sandra, Russell and Marc. While the Court has found that Sandra can face liability for aiding and abetting retaliation claims, she cannot face retaliation liability on her own because she was not Culicea’s employer. The whole purpose of retaliation is to regulate conduct in the workplace. It makes no sense to allow liability solely against a non-employer.

As stated above, a jury must decide whether they believe plaintiffs’ theory that Sandra’s lawsuit was an effort by the Abrams brothers to retaliate against plaintiffs.

Summary

This litigation is a primer on inappropriate behavior in the workplace. The emails attached to the instant motion provide countless examples of communications that should never be sent between colleagues, even those who are romantically involved. That type of office culture helped facilitate the inexcusable interactions between Marc, Russell, Pecile and Culicea.

Of course, that does not mean that defendants are liable. A jury must decide if they believe defendants’ version of events— that plaintiffs are not credible and this action is simply

Pecile's attempt to punish Marc after a bad breakup- or plaintiffs' theory that defendants cultivated a miserable work environment rife with sexual harassment.

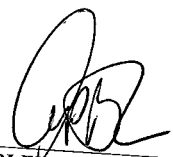
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss (Mot Seq 018) is granted only to the extent that plaintiffs' IIED claim and hostile work environment claim against Sandra Abrams are severed and dismissed and the remaining branches of the motion are denied; and it is further

ORDERED that plaintiff Cristina Culicea's motion (Mot Seq 019) for summary judgment is denied.

This is the Decision and Order of the Court.

**Dated: May 3, 2018
New York, New York**



HON. ARLENE P. BLUTH, JSC

**HON. ARLENE P. BLUTH
J.S.C.**