Stoica v Phipps
2018 NY Slip Op 31592(U)
March 7, 2018
Supreme Court, New York County
Docket Number: 153834/2017
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

RONIT STOICA,

Plaintiff,

-against-

JAKE PHIPPS and MAYA PHIPPS,

Defendants.

Index No.: 153834/2017
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss.

Papers	**NYSCEF Documents Numbered**
Defendants' Notice of Motion	4-7
Defendants' Memorandum of Law in Support	8
Plaintiff's Memorandum of Law in Opposition	10
Plaintiff's Affirmation in Opposition	11-12
Defendants' Memorandum of Law in Reply	13

Levine & Blit, P.L.C.C., New York (Russell Moriarty of counsel), for plaintiff.
Studin Young, P.C., New York (Tamir Young of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff, Ronit Stoica, brings eight causes of action against defendants Jake Phipps and Maya Phipps. Plaintiff's causes of action are as follows: (1) unpaid minimum wages in violation of New York Labor Law; (2) unpaid overtime wages in violation of New York Labor Law; (3) failure to provide one day of rest per seven days in violation of the Domestic Workers Bill of Rights; (4) failure to provide three days of rest per year in violation of the Domestic Workers Bill of Rights; (5) failure to provide wage notice in violation of Labor Law § 195 (1); (6) failure to provide wage statements in violation of Labor Law § 195(3); (7) discrimination and hostile work environment in violation of Executive Law § 296; and (8) discrimination and hostile work environment in violation of the Administrative Code of the City of New York § 8-107.

In a pre-answer motion to dismiss, defendants move under (1) CPLR 3211 (a) (1) to dismiss plaintiff's first, second, third, fourth, fifth, and sixth causes of action on the grounds that documentary evidence contradicts the allegations that plaintiff was a full-time nanny working the hours alleged in the amended complaint; (2) CPLR 3211 (a) (7) to dismiss plaintiff's first, second, third, fourth, fifth, and sixth causes of action because they are so inherently incredible that they must not be presumed true on legal insufficiency; (3) CPLR 3211 (a) (7) to dismiss plaintiff's first, second, third, fourth, fifth, and sixth causes of action because plaintiff was never

an employee of defendants and cannot allege violation of New York Labor Law; (4) CPLR 3211 (a) (7) to dismiss plaintiff's seventh and eighth causes of action on the ground that they are so inherently incredible that they must not be presumed to be true on legal insufficiency; (5) CPLR 3211 (a) (7) to dismiss plaintiff's seventh and eighth causes of action because the complaint lacks the requisite detail to state a cause of action; and (6) CPLR 3211 (a) (5) to dismiss plaintiff's seventh and eighth causes of action on the ground that they are time-barred.

I. Defendants' Motion to Dismiss Plaintiff's First, Second, Third, Fourth, Fifth, and Sixth Causes of Action Under CPLR 3211 (a) (1) On the Ground That Documentary Evidence Contradicts Facts Alleged in Complaint.

Defendants' motion to dismiss plaintiff's first through sixth causes of action under CPLR 3211 (a) (1) is denied. Documentary evidence provided by defendants does not support their assertion that defendants did not employ plaintiff full-time.

"A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fontanetta v Doe*, 73 AD3d 78, 83 [2d Dept 2010], quoting *Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002].) To be considered documentary, the evidence must unambiguous and of undisputed authenticity. (*Fontanetta*, 73 AD3d at 86). Affidavits are not documentary evidence. (*Id.*)

In support of the motion to dismiss, defendants have submitted (1) an affidavit from defendant, Maya Phipps; (2) a domestic incident report from April 25, 2017, alleging that plaintiff told defendant that she was "going to come after [defendant] and her family and her kids if she didn't get her money"; and (3) a temporary order of protection filed by defendant against plaintiff. Defendants argue that the documentary evidence provided establishes that (1) plaintiff was a full-time college student; (2) defendant did not want or need a full-time nanny; (3) plaintiff was fully compensated by defendants; and (4) plaintiff is not recognized as an employee under New York law.

The domestic incident report and temporary order of protection fail to resolve the factual issues raised by plaintiff's claims, and the affidavit is not admissible as documentary evidence. Therefore, defendants' motion to dismiss plaintiff's first through sixth causes of action is denied.

II. Defendants' Motion to Dismiss Plaintiff's First, Second, Third, Fourth, Fifth, and Sixth Causes of Action Under CPLR 3211 (a) (7) On the Ground that the Claims are Inherently Incredible.

Defendants' motion to dismiss plaintiff's first through sixth causes of action under CPLR 3211 (a) (7) on the grounds that the claims are inherently incredible is denied.

Defendants allege that plaintiff could not have been working for defendants full-time because plaintiff was a full-time college student. In a motion to dismiss under CPLR 3211, pleadings are construed liberally, the alleged facts stated in the complaint are presumed true, and plaintiffs are given the benefit of favorable inferences where the facts fit within any recognizable

legal theory. (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) A motion to dismiss under CPLR 3211 (a) (7) should be denied unless evidence demonstrates that a material fact asserted by the pleader is not a fact and unless there is no significant dispute regarding that fact. (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010].) Plaintiff's complaint does not allege that she was a full-time student while she worked for defendants. And even if plaintiff had alleged enrollment as a full-time student, that would not preclude the possibility that plaintiff was concurrently a full-time employee of defendants.

For these reasons, plaintiff's first through sixth causes of action survive, and defendants' motion to dismiss is denied.

III. Defendants' Motion to Dismiss Plaintiff's First, Second, Third, Fourth, Fifth, and Sixth Causes of Action Under CPLR 3211 (a) (7) On the Grounds of Legal Insufficiency.

Defendants' CPLR 3211 (a) (7) motion to dismiss is denied. Plaintiff's pleading states several causes of action recognized under New York law.

"When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." (*Sokol*, 74 AD3d at 1180–1181). Defendants fail to show that plaintiff does not have a legal claim under the first through sixth causes of action listed in plaintiff's complaint.

(1) Causes of Action One and Two: Unpaid Minimum Wages and Overtime Wages Under the Labor Law

In a CPLR 3211 (a) (7) motion to dismiss for unpaid overtime wages, the plaintiff must allege that plaintiff was (1) an employee, (2) that plaintiff's wages were determined on the basis of time (*see* Labor Law § 190 [1]), and (3) that portions of the earned wages and overtime compensation were improperly held by defendant in violation of the Labor Law (*Ackerman v New York Hospital Medical Center of Queens*, 127 AD3d 794, 795 [2d Dept 2015], citing Labor Law § 193 [1].) Additionally, compensation for domestic workers who reside in the home of their employer is at least one and one-half times the worker's normal wage rate when the employer works more than 44 hours in a week. (Labor Law § 170.)

Plaintiff's complaint alleges that plaintiff was employed as a "live-in nanny" and that throughout the majority of plaintiff's employment, her work hours were between six and seven days a week and up to 114 hours a week. Plaintiff alleges that wages varied from $300–$700 per week. Finally, plaintiff alleges that defendants failed to pay plaintiff minimum wages and overtime wages for the hours worked. Plaintiff's complaint has adequately stated the cause of action to recover withheld unpaid wages and overtime compensation. (*See Ackerman*, 127 AD3d at 795). Therefore, plaintiff's first and second causes of action are adequately pleaded.

(2) Causes of Action Three and Four: Failure to Provide One Day of Rest Every Seven Days and Three Paid Rest Days Per Year in Violation of the Domestic Workers Bill of Rights

In plaintiff's amended complaint, plaintiff is described within the statutory definition of "domestic worker" as "a person employed in a home or residence for the purpose of caring for a child, . . . [but] does not include any individual (a) working on a casual basis" (Labor Law § 2 [16.) Persons defined as domestic workers under New York Labor Law are entitled to at least 24consecutive hours of rest each calendar week and three days of rest each year after one year of work with the same employer. (Labor Law § 161 [1].)[1]

Plaintiff's complaint alleges that defendants hired her as a "live-in-nanny." Plaintiff also alleges that for no less than 80 to 100work weeks during her employment by defendants, plaintiff worked a full seven days per week. Additionally, the complaint alleges that defendants failed to give plaintiff at least three paid rest days each year after plaintiff's first year of work. Therefore, plaintiff has adequately pleaded causes of action three and four as violations of Labor Law § 161 (1).

(3) Violation of Labor Law § 195 (1)

New York Labor Law requires employers to provide employees a written statement containing the rate and measure of pay, allowances, designated regular pay day, and the name, address, and phone number of employer at the time of hire. (Labor Law § 195 [1] [a].) Plaintiff alleges that defendants failed to furnish the above listed information at the time plaintiff was hired by defendants. Therefore, plaintiff has adequately pleaded the fifth cause of action.

(4) Violation of Labor Law § 195 (3)

Labor Law § 195 (3) requires employers to provide statements with each payment of wages, listing the dates covered by payment, the rate and measure of pay, address and phone number of employer, gross wages, deductions, allowances, and net wages. (Labor Law § 195 [3].) Plaintiff alleges that defendants failed to furnish the above listed information each time defendants paid plaintiff wages. Therefore, plaintiff has adequately pleaded the sixth cause of action.

IV. Defendants' Motion to Dismiss Plaintiff's Seventh and Eighth Causes of Action Under CPLR 3211 (a) (7) On the Ground that the Claims are Inherently Incredible

Defendants' CPLR 3211 (a) (7) motion to dismiss plaintiff's seventh and eighth causes of action on the grounds that they are inherently incredible is denied.

"Generally, isolated remarks or occasional episodes of harassment will not merit relief under New York State Executive Law or the New York City Administrative Code." (*San Juan v Leach*, 278 AD2d 299, 300 [2d Dept 2000].) To state a cause of action sufficiently, the alleged conduct must be both objectively and subjectively offensive, hostile, or abusive to a reasonable person. (*San Juan*, 278 AD2d at 300 [finding that plaintiff's immediate supervisor entering her

[1] The Domestic Workers Bill of Rights was a legislative bill enacted on August 31, 2010 and codified in the New York Labor Law. (*See* 2009-2010 NY Assembly Bill A1470B, available at https://www.nysenate.gov/legislation/bills/2009/A1470/amendment/B).

bed and attempting to kiss and touch her, exposing and fondling his genitals in front of her, and occasional inappropriate comments at work poisoned the work relationship and environment so that plaintiff could not properly focus on the job duties].) If the plaintiff's "complaint alleges specific serious and offensive acts by an immediate supervisor, the plaintiff has sufficiently stated a cause of action alleging hostile work environment sexual harassment." (*Id.*)

Plaintiff's complaint alleges defendant J. Phipps would make comments about plaintiff's body in a sexually explicit manner almost daily. Plaintiff also alleges that defendant would sneak into plaintiff's bedroom at night to sleep next to plaintiff to convince plaintiff to engage in sexual activity with her. Plaintiff alleges that when this behavior was objected to, defendant would threaten to fire plaintiff, kick her out of the home, and have her deported. Plaintiff's complaint alleges that because of this behavior, plaintiff suffered "extreme mental anguish, emotional distress, anxiety, depression and humiliation."

Plaintiff's complaint alleges several objectively offensive acts by one of plaintiff's immediate supervisors. Moreover, plaintiff's complaint states that these acts were ongoing and negatively impacted the work environment. Defendants claim that these allegations are too outrageous and incredible to be believed[2] but facts alleged in plaintiff's complaint are accepted as true and given the benefit of every favorable inference. (*Id.*)

The facts alleged in the complaint are not inherently incredible, and defendants' motion to dismiss plaintiff's seventh and eighth causes of action under CPLR 3211 (a) (7) is denied.

V. Defendants' Motion to Dismiss Plaintiff's Seventh and Eighth Causes of Action Under CPLR 3211 (a) (7) On the Ground of Legal Insufficiency.

Defendants' CPLR 3211 (a) (7) motion to dismiss plaintiff's seventh and eighth causes of action is denied.

Plaintiff's seventh and eighth claims of employment discrimination and hostile work environment are assessed under a relaxed "notice pleading" standard, which does not require the plaintiff to plead specific facts, but only requires that the defendant receive "fair notice" of the nature and grounds of the claims. (*Vig v New York Hairspray Co.*, 67 AD3d 140, 145 [1st Dept 2009].) Plaintiff has provided a general framework of the nature and grounds of the claims. Plaintiff's complaint has alleged sexually explicit comments, inappropriate behavior, and threats to deport plaintiff, made by defendant "J. Phipps" during plaintiff's employment. Therefore,

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[2] Defendants claim that the alleged facts in plaintiff's complaint are untrue because plaintiff slept in a bed with defendant Maya Phipps' brother (plaintiff's current husband) and that defendant J. Phipps would not "risk his marriage and children 'numerous times' in such a brazen act." Cases defendants cite in support of this motion are not factually similar. (*See Pacifico v Playwrights Horizons Theatre Sch.*, 163 Misc 2d 1084, 1086 [Sup Ct, NY County 1994] [finding plaintiff's complaint inherently incredible because plaintiff alleged that defendant sexually abused plaintiff, Matthew Broderick, and Christopher Walken; placed listening devices and miniature cameras in Broderick and Walken's apartments; and arranged to drug their food but that Broderick and Walken no longer remembered these events because they were brainwashed].)

even if plaintiff does not cite specific facts regarding these instances, the facts alleged in the complaint give defendants fair notice of these claims.

For these reasons, plaintiff's seventh and eighth causes of action as alleged in plaintiff's amended complaint are legally sufficient.

VI. Defendants' Motion to Dismiss Plaintiff's Seventh and Eighth Causes of Action Under CPLR 3211 (a) (5)

Defendants' CPLR 3211 (a) (5) motion to dismiss plaintiff's seventh and eighth causes of action is denied in part and granted in part. Plaintiff timely filed its claim within the applicable three-year statute of limitations for a discrimination and hostile work environment claim starting April 27, 2014.

Plaintiff filed discrimination and hostile work environment claims under Executive Law section 296 and N.Y.C. Administrative Code § 8-107. The statute of limitations for claims under New York State Human Rights Law (NY Exec Law § 296) and New York City Human Rights Law (NYC Admin Code § 8-107) is three years. (*Soloviev v Goldstein*, 104 F Supp 3d 232, 246 [ED NY 2015].) Plaintiff's amended complaint, which was filed on April 27, 2017, alleges that defendants employed plaintiff beginning approximately March 2013 until February 2017 and was subjected to sexual harassment by defendants "[f]rom beginning of plaintiff's employment tenure until its conclusion." Therefore, any allegations that occurred prior to April 27, 2014, are time-barred.

For these reasons, plaintiff's seventh and eighth causes of action are timely for discrimination and hostile work environment, those allegations after April 27, 2014, and defendants' CPLR 3211 (a) (5) motion to dismiss is denied in part. Plaintiff's seventh and eighth causes of actions are untimely for discrimination and hostile work environment allegations before April 27, 2014, and, thus, defendants' CPLR 3211 (a) (5) motion to dismiss is granted in part.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint for causes of action one, two, three, four, five, and six is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiff's complaint for causes of action seven and eight is denied in part for those claims occurring after April 24, 2014, and granted in part for those claims occurring before April 24, 2014; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on plaintiff; and it is further

ORDERED that defendants have 20 days to file their answer; and it is further

ORDERED that defendants serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that the parties appear for a preliminary conference at 60 Centre Street, Room 345, Part 7, on May 30, 2018, at 11:00 a.m.

Dated: March 7, 2018

J.S.C.
HON. GERALD LEBOVITS
J.S.C.