SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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NATASHA SCHWARTZ,

Plaintiff,

-against-

Index No.

INTEGRATED DENTAL SYSTEMS, LLC, MEGAGEN USA, INC. and STEVEN PFEFER,

157816/17

Motion Seq. No.: 001

Defendants.

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DORIS LING-COHAN, J. :

Defendant Megagen USA Inc. (Megagen) moves for dismissal of the complaint, or summary judgment.

This is an action based on allegations of age and gender discrimination, sexual harassment and retaliatory termination. Beginning in 2007, plaintiff was a dental implant sales representative for Megagen, a dental implant manufacturer. In September 2013, defendant Integrated Dental Systems, LLC (IDS) bought the assets of Megagen and took over as plaintiff's employer. In the complaint, plaintiff alleges that she was regularly subjected to harassment by her supervisor, defendant Steven Pfefer (Pfefer). She also alleges that she was subjected to disparate treatment such as being given different pay when compared to similarly-situated male employees. Plaintiff alleges that her termination at IDS on May 16, 2015 was in retaliation for her complaints of discrimination there. Plaintiff is suing defendants for allegedly creating a hostile work environment in violation of section 8-101 of the New York City Administrative Code, and is seeking damages for back pay, lost benefits and emotional distress, plus attorneys' fees.

Megagen moves for dismissal of the complaint, or summary judgment. Megagen contends that the duration of plaintiff's alleged harassment occurred during IDS's time as her employer. According to Megagen, plaintiff's complaint clearly alleges that specific examples of sexual harassment or discrimination occurred at the time of IDS's employment, and IDS is the

defendant potentially liable for plaintiff's termination. Thus, Megagen argues that it should be dismissed as a defendant in this suit.

Megagen also seeks dismissal on the ground that plaintiff brought an untimely action. Megagen states that the statute of limitations for claims brought under the Administrative Code is three years. The complaint alleges that IDS bought the assets of Megagen in September 2013. Megagen avers that after a three year period, plaintiff failed to take action against it and is now barred from suing it.

In opposition, plaintiff argues that her claims of harassment occurred during the period when Megagen was her employer. According to her, the continuity of Megagen's business after IDS's purchase of its assets was clear, despite her new employer. Plaintiff discusses successor liability, contending that although a new employer usually does not assume the torts of its predecessor, under a substantial continuity test, liability can attach to a successor employer in the context of civil rights cases such as this one. Plaintiff argues that under such a test, Megagen can be held liable for her claims.

With respect to timeliness, plaintiff argues that she filed a "Charge of Discrimination" with the United States Equal Opportunity Commission on May 19, 2015. Thereafter, said Commission issued to her a "Determination of Liability," dated April 20, 2017, and a "Right to Sue" letter on June 1, 2017. The complaint was filed on August 31, 2017. Plaintiff contends that her civil rights claims were filed in a timely manner.

In reply, Megagen argues that the successor liability arguments are not appropriate, because Megagen is the predecessor and not the successor in this case. Megagen also argues that since plaintiff did not file a federal charge against Megagen, only IDS, the statute of limitations was not tolled as against Megagen. Therefore, Megagen contends that plaintiff's claims against it are untimely.

Megagen is apparently moving for dismissal based on documentary evidence, namely the complaint. Megagen argues that it is not the appropriate defendant, since its successor, IDS, is the defendant allegedly liable for the claimed civil rights violations. If documentary evidence conclusively establishes a defense to a claim, it will be dismissed as a matter of law pursuant to CPLR 3211 (a) (1) (*see Leon v Martinez,* 84 NY2d 83, 88 [1994]).

Alternatively, Megagen seeks summary judgment, since issue has already been joined. "It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374,375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o] nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'" (*People v Grasso,* 50 AD3d 535,545 [1st Dept 2008]). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of facts in dispute and thus that it is entitled to judgment as a matter of law." (*Flores v City of New York,* 29 AD3d 356,358 [1st Dept 2006]). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." (*Id).*

Megagen's main argument is that it is not the proper defendant in this action. While part of plaintiff's duration as an employee occurred under Megagen, after its assets were sold to IDS, IDS became her employer. There is no dispute that such a sale occurred. For all practical purposes, it would be futile to seek damages from a party lacking assets such as Megagen. Moreover, the successor liability issue is not applicable here, as Megagen is not a successor. In addition, the three-year statute of limitations was not tolled as against Megagen regarding the federal complaint filed by plaintiff, which was only brought against IDS. Therefore, dismissal is warranted as to defendant Megagen.

Accordingly, it is

ORDERED that defendant Megagen USA Inc.'s motion to dismiss is granted and the complaint is dismissed in its entirety as against said defendant with all costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended to reflect the dismissal and that all future papers

filed with the court bear the amended caption, which shall read as follows:

Natasha Schwartz

-v-

Integrated Dental Systems, LLC and

Steven Pfefer

and it is further

ORDERED that within 30 days of entry of this order, defendant Megagen USA Inc. shall serve a copy upon all parties, with notice of entry.

Dated: 10/9/18

Hon. Doris Ling-Cohan, J.S.C.

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