Rivera v Arias
2020 NY Slip Op 33109(U)
September 15, 2020
Supreme Court, Kings County
Docket Number: 524765/2019
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of September, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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GLENDALIZ RIVERA,

Plaintiff,

-against-

Index No.: 524765/2019
Decision and Order

ADRIAN ARIAS, KATHY FERNANDEZ, SHIFAT BAKHT, HEALTHFIRST, INC., HEALTHFIRST HEALTH PLAN INC., HEALTHFIRST PHSP, INC., AND HF MANAFEMENT SERVICES LLC,

Defendants,

---X

The following *papers NYSCEF* Doc #'s 14 to 28 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	14-18
Opposing Affidavits (Affirmations)	21-26
Reply Affidavits	28

After having heard Oral Argument on JULY 15, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendants move pursuant to 3211(a)(7) for an order dismissing the plaintiff's complaint. (MS#1). Plaintiff opposes the same.

BACKGROUD/FACTS

Plaintiffs commenced this action alleging claims pursuant to State and City Law

for Discrimination based on Gender, and Sexual Harassment, quid pro quo, and disability, and retaliation.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 N.E.2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 NY2d at 635, 389 NYS2d 314, 357 N.E.2d 970) and **"the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 N.E.2d 970). Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects (*see Quinones v. Schaap,* 91 AD3d 739, 740, 937 NYS2d 262; *Daub v. Future Tech Enter., Inc.,* 65 AD3d at 1005, 885 NYS2d 115). *Minovici v. Belkin BV*, 109 AD3d 520, 521, 971 NYS2d 103, 106 (2013) "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could

withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). **"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss"** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 AD3d 34, 38; *see EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3d 11, 19).

In provisions of its Administrative Code known as the New York City Human Rights Law, the City has specifically prohibited discrimination on the basis of actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, or alienage or citizenship status, in connection with employment, apprentice training programs, the operation of places of public accommodation, the sale or rental of housing accommodations, land, or commercial space, and lending practices, and the granting of licenses and permits. It has also declared such practices as blockbusting and solicitation to be unlawful real estate practices. It is an unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden by the enactment, or to attempt to do so, and for any person engaged in any activity covered thereby to retaliate or discriminate against any person for opposing or complaining about the doing of such acts. Moreover, it is an unlawful discriminatory practice for any person to coerce, intimidate, threaten, or interfere with, or attempt to coerce, intimidate, threaten, or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right

granted or protected by the New York City Human Rights Law. The provisions of the Law defining and proscribing discriminatory practices likewise prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, or alienage or citizenship status of a person with whom such person has a known relationship or association. Claims under New York City Human Rights Law must be evaluated separately from those brought under New York State Human Rights Law. 18 N.Y. Jur. 2d Civil Rights § 12.

I. Requirements and Purposes of the Restoration Act

As New York's federal and State trial courts are recognizing the need to take account of the Restoration Act, the application of the City HRL as amended by the Restoration Act must become the rule and not the exception. *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 66–69, 872 N.Y.S.2d 27, 31–33 (2009)

While the Restoration Act amended the City HRL in a variety of respects, the core of the measure was its revision of Administrative Code § 8–130, the construction provision of the City HRL (Local Law 85, § 7, deleted language, new language italicized): The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.* ***Id.***

As a result of this revision, the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to

understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws. Section 1 of the Restoration Act amplifies this message. It states that the measure was needed because the provisions of the City HRL had been "construed too narrowly to ensure protection of the civil rights of all persons covered by the law." *Id.*

It goes on to mandate that provisions of the City HRL be interpreted "independently from similar or identical provisions of New York state or federal statutes." The City Council's debate on the legislation made plain the Restoration Act's intent and consequences: Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy. *Id.* The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL: "discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation" (Committee Report, 2005 N.Y. City Legis. Ann., at 537).

II. City Human Rights Law

Defendants' burden with respect to plaintiff's claims under the City's Human Rights Law is more onerous than under the state law. "The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation" (*Farrugia v. North Shore University Hospital,* 13 Misc.3d 740, 745, 820 N.Y.S.2d 718 [Sup Ct, N.Y. Co, Acosta, J, 2006]). In 2005, unsatisfied with how courts

were applying the same principles to both the state and city laws, the City Council enacted the Local Civil Rights Restoration Act ("Local Law 85"), which calls for every provision of the City's Human Rights Law to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v. City of New York,* 16 NY3d 472, 477–478 [2011]). "As a result of this revision, the City [Human Rights Law] now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language" (*Williams v. NYC Housing Authority,* 61 AD3d 62, 66, 872 NYS2d 27 [1st Dept 2009, Acosta, J], lv den 13 NY3d 702 [2009]). Judicial interpretation of similarly worded state or federal "provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (*id.* at 66–67, 872 N.Y.S.2d 27, citing section 1 of Local Law 85. That intentional divergence from analogous federal and state laws created some legal confusion. Most of the significant, oft-cited decisions clearly stated that the same principles and analyses applicable to federal and state laws also governed the City's Human Rights Law (see, *e.g., Forrest v. Jewish Guild for the Blind, supra,* 3 NY3d 295, 786 NYS2d 382, 819 NE2d 998). Trial courts, navigating City waters, suddenly left rudderless by Local Law 85, either continued to apply established precedent (still good law with respect to federal and state statutes), perhaps tweaked a little (see, *e.g., Santos v. Brookdale Hospital Medical Center,* n.o.r., 29 Misc.3d 1207(A) [Sup Ct, Kings Co, 2010] [applied state test, but held harassment need not be "severe and pervasive"]), or devised their own creative interpretation (see, *e.g., Artis v. Random House, Inc.,* 34

Misc.3d 858, 936 N.Y.S.2d 479 [Sup Ct, N.Y. Co, Billings, J, 2011]).

In *Bennett v. Health Management Systems, Inc.* (92 A.D.3d 29, 936 N.Y.S.2d 112 [1st Dept 2011, Acosta, J], lv den 18 N.Y.3d 811 [2012]), the First Department articulated the standards applicable to summary judgment motions to dismiss sex discrimination and harassment claims under the City's Human Rights Law. The court must hold the plaintiff to a much lower standard than the minimal standard usually applied in similar discrimination cases under federal and state law (*id.* at 35–36, 936 NYS2d 112, citing *McDonnell Douglas Corp. v. Green,* 411 US 792 [1973]). All aspects of the City's Human Rights Law "must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law" (*Bennett, supra,* at 34–35, 936 NYS2d 112, citing Admin Code § 8–130). The court is to consider plaintiff's ability to make out a *prima facie* case only in exceptional situations. "Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party" (*Bennett* at 38–40, 45, 936 NYS2d 112). Poolt v. Brooks, 38 Misc 3d 1216(A), 967 NYS2d 869 (Sup. Ct. 2013). Although the case at bar is not a summary judgment case it is clear that the defendants have offered no admissible evidence to support their motion to dismiss as the plaintiffs have stated a cause of action, they are under no obligation to prove that there is one but only to state one as mentioned within. Therefore, based upon the Bennett standard the instant motion to dismiss would be denied.

Moreover, the "level of proof a plaintiff is required to present in order to establish a *prima facie* case of discrimination is low" (*Hill v. Douglas Elliman–Gibbons & Ives,* n.o.r., 1999 WL 34855568 [Sup Ct, NY Co, EJ Goodman, J, 1999], affd 269 AD2d 117, 702 NYS2d 70 [1st Dept 2000], citing *de la Cruz v. NYC Human Resources*

Administration, Dept. of Social Services, 82 F3d 16, 20 [2d Cir1996], mot den 519 US 805 [1996]). Additionally, "the rationality of plaintiff's belief, being a question of fact rather than law, must be determined by the jury. It is the court's role at this stage to determine if there is enough evidence for the jury to find plaintiff's belief was rational." *Quoting, Poolt v. Brooks*, 38 Misc 3d 1216(A), 967 NYS2d 869 (Sup. Ct. 2013). As discussed above, for purposes of defendants' motion to dismiss the court must accept plaintiff's version of the facts as true.

I. State Human Rights Law

The Equal Protection Clause of the New York State Constitution explicitly prohibits both public and private discrimination (see N.Y. Const., art. I, § 11). Legislation implementing this provision states "[t]he opportunity to obtain education ... without discrimination ... is ... recognized as and declared to be a civil right" (Executive Law § 291[2]). N. Syracuse Cent. Sch. Dist. v. N.Y. State Div. of Human Rights, 19 N.Y.3d 481, 496, 973 N.E.2d 162, 169 (2012) (quoting the dissent).

"It is declared policy of the State to afford every individual within this State an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity ... because of discrimination ... not only threatens the rights and proper privilege of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants' " (*City of Schenectady v. State Division of Human Rights,* 37 NY2d 421, 428 [1975], rearg den 38 NY2d 856 [1976], citations omitted). The abuse of the anti-discrimination laws enacted in furtherance of this policy, by unscrupulous plaintiffs who take advantage of laws affording vital protection to society by filing

frivolous—sometimes even mendacious—claims thereunder for personal financial gain, is just as much of a threat. *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 N.Y.S.2d 869 (Sup. Ct. 2013)

At a discrimination trial, it is the job of the jury to decide whether a plaintiff's claim is meritorious or frivolous. *Poolt v. Brooks*, 38 Misc. 3d 1216(A), 967 NYS2d 869 (Sup. Ct. 2013) When a party, usually the defendant, moves for a motion to dismiss, it is asking the court to make that determination instead. "Courts are not infallible. In undertaking such a task, a court should be mindful to prevent errors which could result in the dismissal of a worthy claim, even if it means risking an unworthy claim proceeding to trial. In other words, it must err on the side of the plaintiff. Toward this aim, many rules and standards have evolved for the court to follow."*Poolt v. Brooks*, 38 Misc 3d 1216(A), 967 NYS2d 869 (Sup. Ct. 2013)

In the present case, Plaintiff's sworn complaint, coupled with the sworn affidavits from alleged witnesses, constitutes evidence that defendants, sexually harassed and/or discriminated against plaintiff. How credible that evidence is irrelevant at this juncture. Plaintiff must still make out a *prima facie* case against them at trial through competent evidence, but when it comes to "he said, she said," merely raises a question of credibility for the jury to decide (see *Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc., supra,* 202 AD2d 191, 608 NYS2d 214). Additionally, pursuant to CPLR § 3211 (d), "should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to

permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." *See also Peterson v. Spartan Industries, Inc.* 33 NY2d 463, 467 (1974) ["Plaintiffs have demonstrated that facts 'may exist' in opposition to the motion to dismiss and are therefore entitled to the disclosure expressly sanctioned by CPLR 3211 (subd. (d))."]. As there has been no discovery in the present case, it is inappropriate to dismiss such claims before any discovery has been conducted and the defendants can renew their request upon the completion of discovery.

Therefore, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiffs the benefit of every possible inference, it is the opinion of this Court that the complaint sufficiently states a cause of action for all causes of action at this pre-discovery stage of the proceedings (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra* at 38). Although facts sufficient to justify opposition may exist, they currently reside almost exclusively within the knowledge of the officers or employees of defendant (*see* CPLR 3211[d]). See also *Iommarini v. Mortg. Elec. Registration Sys., Inc.,* 54 Misc. 3d 1225(A) (N.Y. Sup. Ct. 2017) Moreover, the defendants have failed to submit any admissible evidence to the contrary. As such, the plaintiffs have plead facts sufficient to state a cause of action for violation of New York State Human Rights Law for Sex discrimination; for violation of New York City Human Rights Law for Gender Discrimination/Disparate Treatment; for violation of New York State Human Rights Law for Quid Pro Quo Sexual harassment and discrimination; for violation of New York City Human Rights Law for Quid Pro Quo sexual harassment and discrimination; for violation of New York State Human Rights Law for Discrimination based on plaintiffs disability and disability leave; for violation of

New York City Huma Rights Law for Discrimination based on plaintiffs disability and disability leave; and for violation of New York State Human Rights Law for Hostile Work Environment/Sexual harassment; and for violation of New York City Human Rights Law for Hostile Work Environment/Sexual Harassment; for violation of New York State Human Rights Law retaliation for opposing sexual harassment and discrimination based on sex, taking disability leave, and reasonable accommodation; for violation of the New York City Human Rights Law retaliation for opposing sexual harassment and discrimination based on sex, taking disability leave, and reasonable accommodation; for violation of New York State Human Rights Law for Aiding, Abetting, Inciting, compelling and or coercing forbidden acts; and for violation of the New York City Human rights law for Aiding, Abetting, Inciting, compelling and or coercing forbidden acts.

Accordingly, Defendants request to dismiss the plaintiff's complaint is hereby denied in its entirety, for the reasons stated above. (MS#1).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
September 15, 2020

HON. RICHARD VELASQUEZ

SEP 15 2020

SO ORDERED

Hon. Richard Velasquez

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