Mata v Omnivere
2021 NY Slip Op 30535(U)
February 11, 2021
Supreme Court, New York County
Docket Number: 156238/2019
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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LEYDAH F. MATA,

Plaintiff,

v.

OMNIVERE, MEDLEY CAPITAL CORPORATION; TOWER LEGAL SOLUTIONS, DRIVEN INC., OLD OMV, CO., THOMAS TEPER, GEORGES SABONGUI, and ANTHONY CAPUTO,

Defendants.

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Index No. 156238/2019

Motion Seq. Nos. 001, 003 and 004

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Recitation pursuant to CPLR 2219 (a) of the papers considered in these motions to dismiss and leave to amend: documents numbered 6-10, 24-27, 33-35, 39-42, 44, 55-59, 67-73, 75-78 and 82 listed in the New York State Courts Electronic Filing System (NYSCEF).

Motion Seq. Nos. 001, 003 and 004 are consolidated for disposition.

In this action, plaintiff Leydah F. Mata alleges that she was assaulted and raped as part of a conspiracy between two senior executives of two companies that were pursuing a business merger. In Motion Seq. 001 (Dkt. 6)[1], defendant Tower Legal Solutions moves to dismiss for failure to state a claim (CPLR 3211[a][7]), as does defendant Medley Capital Corporation (Motion Seq. 003 [Dkt. 24]). Defendants Georges Sabongui and Anthony Caputo (Motion Seq. 004 [Dkt. 55]) move to dismiss pursuant to CPLR 3211[a][1] and [7] based on documentary evidence and for failure to state a claim, or in the alternative pursuant to 3211[a][5] as to defendant Georges Sabongui based on the applicable statute of limitations. Plaintiff cross moves

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

to amend the complaint (Dkt. 67) under Motion Seq. 004.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that she began her employment with the Legal Services Segment of defendant Omnivere (Omnivere) on May 2, 2016 (Amended Complaint [Dkt. 70] ¶ 25).[2] As Senior Vice President and Director of Operations, plaintiff oversaw the entire Legal Services Segment and all its staff, reporting to its then-President, Craig Brown (*id.*, ¶ 22). Medley Capital Corporation (Medley) was the parent corporation of Omnivere and had day-to-day involvement with its business, financial and personnel affairs (*id.*, ¶ 5).

During the first two months of her tenure, plaintiff was enlisted by Omnivere's senior leadership, under Medley's direction, to facilitate the terminations of the Legal Services Segments' two most senior employees, Brown and Nichole Weber. Plaintiff played a key role in the terminations, speaking frequently with Omnivere's president, outside counsel and human resources department (*id.*, ¶¶ 25-26). Plaintiff was then required to perform the responsibilities of those two former employees, in addition to supporting the already understaffed recruitment and operations teams (*id.*, ¶ 28).

The entire full-time permanent staff of the Legal Services Segment team, which was all male except for plaintiff, received generous retention/incentive bonuses for the following several payroll periods in appreciation for remaining with Omnivere at the time of the terminations and for taking on additional work. Plaintiff however did not receive any such bonus (*id.*, ¶ 27). For the next two and a half years, plaintiff played an integral role in several areas at Omnivere and

2 The Court will deem the Amended Complaint as the operative pleading. The Amended Complaint is substantially similar to the Complaint, as it appears to only add three new paragraphs while the causes of action remain the same.

the quality of her work was universally recognized within the organization. However, her compensation did not reflect her performance and she was treated differently and worse than her male peers (*id.*, ¶ 29).

In the spring of 2018, defendant Tower Legal Solutions (Tower) was engaged in business discussions to acquire Omnivere's Legal Services Segment (*id.*, ¶ 4). At approximately 5:30 p.m. on May 22, 2018, plaintiff was escorted by defendant Georges Sabongui (Sabongui), Omnivere's Chief Business Officer, to a hotel bar in midtown Manhattan to meet with the Chief Financial Officer of Tower Legal Solutions, Thomas Teper (Teper). The meeting had been arranged by Sabongui at the request of Teper, who specifically solicited a one-on-one meeting with plaintiff (*id.*, ¶¶ 30-31).

Sabongui insisted on meeting with plaintiff beforehand to "prep her," and told her to "do whatever is necessary" to close the deal (*id.*, ¶¶ 32, 34). He had also told her this on prior occasions, as had defendant Anthony Caputo (Caputo), then-CEO of Omnivere (*id.*, ¶ 34). Sabongui chose the bar and selected a hard alcohol drink from the menu in advance to serve to Teper and plaintiff. Sabongui joined them for one drink and then left for a seat in close proximity to monitor their meeting (*id.*, ¶¶ 33, 35-36).

Plaintiff does not recall much about the meeting except that very little business, if any, was discussed. She recalls Teper showing her underwater photographs on a smartphone and that he told her not to upset Tower's CEO, Leslie Firtell (Firtell), by telling her they had discussed personal matters rather than business (*id.*, ¶ 37). The next thing she remembers clearly was being naked in a shower with Teper, which she later determined was in an apartment he maintained in Hoboken, New Jersey (*id.*, ¶ 42). She was very disoriented and believed that she may have been

drugged, as she had no recollection of what had transpired in the several hours since the meeting (*id.*, ¶ 38).

Plaintiff's legs were in pain, her right knee was bleeding and she was terrified. Plaintiff said nothing to Teper, immediately left the shower, and tried to locate her clothing and her belongings, which were strewn all over the floor in the bedroom. While getting up, plaintiff saw her legs were covered in bruises and bloody scrapes. Plaintiff felt dizzy and sick and wished to escape and get home. Plaintiff asserts that she was brutally sexually assaulted by Teper and never consented to any sexual activity with him (*id.*, ¶¶ 39-42, 44-45). Sabongui's conduct was consistent with an agreement with Teper to drug plaintiff and subject her to an assault (*id.*, ¶ 46).

Sometime during the night of the assault, an individual from Tower's human resources department left plaintiff a voicemail outlining her job offer from Tower and saying she would be receiving an official letter regarding the position the following day once it was "blessed" by Firtell and Teper. The next day, plaintiff attended all-day meetings at Tower's offices as well as meetings with her Omnivere New York team the following day. Plaintiff saw Teper briefly while at Tower's office, but he said nothing to her other than pleasantries and introduced some company team members from finance to her (*id.*, ¶¶ 51-52).

Prior to the assault, plaintiff had received an offer from Tower for full-time employment in a senior leadership role with a salary commensurate with her then-current salary from Omnivere. After the assault, plaintiff received a substantially inferior offer of a three-month consulting opportunity, which she rejected. Teper reached out to plaintiff to claim that it was not his decision to rescind the more favorable offer. (*id.*, ¶¶ 53-55).

After the deal to sell the Legal Services Segment was "aborted," Caputo told plaintiff that

she would be kept on for several months as that business was being wound down. Caputo said that she was essential to the business and that he needed her but none of the other Legal Services Segment team members. He made it very clear that plaintiff was central to the plans not just for Legal Services, but for Omnivere in general (*id.*, ¶ 61).

In early June 2018, plaintiff told a close colleague at Omnivere about the assault after he questioned her about a change in her demeanor. He immediately reported the conversation to Omnivere's senior management. Consequently, plaintiff received a call from Omnivere's outside counsel, who told her that the company would support her in whatever she chose to do (*id.*, ¶¶ 56-59).

On June 12, 2018, plaintiff initiated a call to Omnivere's controller and human resources representative to formally discuss the assault. She sent a follow-up email thanking the representative the next day. However, plaintiff is not aware of any actions taken by Omnivere or Medley to investigate the allegations or impose disciplinary measures (*id.*, ¶¶ 62-63).

During her last week of employment with Omnivere, plaintiff was the only remaining staff member in the Legal Services Segment. Plaintiff's termination letter did not mention any severance pay and the human resources department told her that she would not be receiving any. However, her male colleagues in the Legal Services Segment received severance pay, as did other senior level employees who, along with plaintiff, were let go as part of a workforce reduction decision made by Medley in the summer of 2018. Additionally, the most senior employee in the Legal Services Segment other than plaintiff was a male colleague who received unsolicited job placement assistance from Caputo. Plaintiff further alleges that Omnivere failed to pay her earned commissions for June and July 2018 and that she was not paid earned bonuses,

earned incentive compensation or reimbursement for business expenses (*id.*, ¶¶ 64-66).

This action was filed on June 24, 2019. The complaint asserts four causes of action: (1) gender discrimination and retaliation in violation of the New York State Human Rights Law (NYSHRL), Executive Law ¶ 296 (as against all defendants except Teper); (2) gender discrimination and retaliation in violation of the New York City Human Rights Law (NYCHRL), New York City Administrative Code §8-502(a) (as against all defendants except Teper); and (3) sexual assault and battery and conspiracy to commit those torts (as against Teper, Sabongui and Tower).

At oral argument on November 25, 2019, plaintiff abandoned her claims against Tower under the NYSHRL and the NYCHRL (Transcript [Dkt. 78] 3:8-18). Similarly, at oral argument on August 4, 2020, the fourth cause of action for intentional infliction of emotional distress was dismissed upon consent as against all defendants (Transcript [Dkt. 82] 26:17-24). Accordingly, those claims are dismissed.

DISCUSSION

Motion to Dismiss under CPLR 3211

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st

Dept 1994]).

Tower's Motion to Dismiss

Tower moves to dismiss plaintiff's cause of action for assault and battery on grounds that plaintiff has failed to plead facts sufficient to support a theory of respondeat superior.[3] Plaintiff alleges that "[s]ince Mr. Teper purposefully utilized his executive employment relationship with Tower Legal Solutions to accomplish the sexual assault of Ms. Mata and further, since Mr. Teper utilized the opportunity of the sexual assault to further the business opportunity with Omnivere, Tower Legal Solution is liable for the sexual assault" (Amended Compl. ¶ 85). This argument is foreclosed insofar as the Court of Appeals has consistently held that a rape or sexual assault committed by an employee may not be the predicate for respondeat superior liability (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]; *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999], *Cornell v State of New York*, 46 NY2d 1032 [1979]; *see also Dia CC. v Ithaca City School Dist.*, 304 AD2d 955, 956 [3d Dept 2003]).

In *Judith M.*, a patient sued a hospital after an orderly assigned to bathe her, sexually abused her. In upholding the lower courts' grant of summary judgment, the court explained that

> [t]he doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment. Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. If, however, an employee for purposes of his own departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, the master is not liable. Assuming plaintiff's allegations of sexual abuse are true, it is clear that the employee here departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business. Accordingly, the courts below properly dismissed plaintiff's respondeat superior cause of action.

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3 Tower also argues that plaintiff's complaint fails to plead facts sufficient to support a theory of negligent supervision.

Judith M., 93 NY2d 932, 933.

In *Cabrini*, the court similarly found that a hospital could not be found liable for the actions of a surgical resident who sexually abused a patient while purporting to perform a pelvic examination, reiterating that "[a]sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives" (*Cabrini*, 97 NY2d 247, 251. The court found that the grounds for dismissal were even more compelling than in *Judith M.*, because unlike the orderly in that case, the resident in *Cabrini* was not assigned to her care (*id.* at 252). The court further noted that the pelvic examination was contraindicated by the nature of the plaintiff's surgery, and "refuse[d] to transmogrify [the resident's] egregious conduct into a medical procedure within the physician's scope of employment . . . [t]his was a sexual assault that in no way advanced the business of the hospital" (*id.*).

As in *Judith M.* and *Cabrini*, Teper's alleged egregious assault upon plaintiff was committed for wholly personal motives. Plaintiff's claim that Teper utilized his employment with Tower to facilitate the assault on plaintiff is unavailing. The mere fact that a sexual assault occurs within an employment context or even on the employer's premises is insufficient (*see Osvaldo D. v Rector Church Wardens & Vestrymen of the Parish of Trinity Church of N.Y.*, 38 AD3d 480, 480 [1st Dept 2007] ["Whether or not providing food from his own apartment was part of the employee's duties, the alleged sexual assault was clearly not in furtherance of the business of Trinity Church and was outside the scope of his employment "]; *McKay v Healthcare Underwriters Mut. Ins. Co.*, 295 AD2d 686, 687 [3d Dept 2002] ["Although [the therapist's] relationship with plaintiff certainly arose in the course of [the therapist's] employment with the

County, nonetheless, his abuse of plaintiff's trust for the purpose of engaging in a sexual relationship with her constituted a clear departure from the normal duties of his employment and was solely for the purpose of self-gratification"]; *Mary KK. v Jack LL.*, 203 AD2d 840, 841 [3d Dept 1994] ["Although these acts occurred on school property during school hours, they were clearly outside the scope of the teacher's employment as they were wholly personal in nature and certainly not done in the furtherance of the District's business"].

Even if the business meeting was originally intended to further the interests of Tower, the assault clearly departed from that objective. Moreover, plaintiff asserts that little or no business was discussed, and that the assault took place in Teper's apartment. The respondeat superior claim rests on Teper's bare status as an employee of Tower and is thus patently insufficient.

Whether an assault falls within or outside of the scope of employment may, as plaintiff contends, sometimes give rise to a question of fact. However, as the Court of Appeals recently observed in *Rivera v State of New York*, 34 NY3d 383 [2019], the close questions arise in cases involving "occupations for which some physical contact with others is permissible or even expected" and an inquiry is required to determine "whether the employee was authorized to use force to effectuate the goals and duties of the employment" (*Rivera*, 34 NY3d 383, 390). Although in *Rivera* the assault was committed by corrections officers who were ordinarily permitted to employ physical force, the court found the attack to be so excessive and brutal as to be outside the scope of employment as a matter of law. The same conclusion must be reached here as well, as there is no conceivable circumstance under which physical contact, much less a sexual assault, would be required to further the purposes of merger negotiations.

Medley's Motion to Dismiss

Medley moves to dismiss on the ground that it is not a joint or integrated employer with Ominvere. In *Griffin v Sirva, Inc.*, 29 NY3d 174 (2017), the Court of Appeals held that common law principles should determine whether a defendant is an employer, with the relevant factors being the entity's "(1) selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct" (*Griffin*, 29 NY3d 174, 186) (internal quotations and citations omitted). The court further held that the "greatest emphasis [should be] placed on the alleged employer's power 'to order and control' the employee in his or her performance of work (*id.*).

In examining whether a defendant is a joint employer, "for purposes of employment discrimination under the State and City Human Rights Laws", courts apply an "immediate control" test, which considers whether the defendant "had immediate control over the other company's employees," specifically as to "setting the terms and conditions of the employee's work" (*Brankov v Hazzard*, 142 AD3d 445, 445-46 [1st Dept 2016]) (internal quotations and citations omitted). Relevant factors include common authority over hiring, firing, discipline, pay, insurance, supervision and employee records (*Brankov*, 142 AD3d 445, 446). However the "right to control the means and manner of the worker's performance is the most important factor. If such control is established, other factors are then of marginal importance" (*id.*) (internal quotations and citations omitted).

Although the complaint alleges that Medley "shared power and exercised influence" over employment decisions at Ominvere, the specific allegations of the pleading do not support this claim. The complaint fails to allege that Medley had "immediate control" over the terms and

conditions of plaintiff's employment. Rather, all the interactions regarding plaintiff's recruitment, hiring, compensation and termination were with Omnivere employees and agents (*see* Compl. ¶ 18-23, 25, 57-59, 61, 63-66). Medley's motion to dismiss the Complaint is therefore granted unless plaintiff repleads within thirty (30) days in accordance with the above.

Sabongui's and Caputo's Motion to Dismiss

Conspiracy

Sabongui moves to dismiss the conspiracy claim on the ground that the complaint fails to allege that he agreed to facilitate or participate in the assault, or that he knew that Teper was planning one. He also argues that the one-year statute of limitation for assault bars the claim.

In arguing that the claim is time-barred in the first instance, Sabongui invokes the one-year statute of limitation for assault under CPLR 215(3). However, CPLR 213-c provides for a five-year limitations period for claims based upon various sexual offenses defined by the Penal Law, including rape.[4] In disputing the applicability of that statute, Sabongui argues that only the person who actually commits the assault is subject to the longer limitations period. This contention is without merit. The statute defines the term "defendant" to mean *either* (1) "a person who commits the acts" *or* (2) [one] who, in a criminal proceeding, could be charged with criminal liability for the commission of such acts pursuant to section 20.00 of the penal law."

[4] As amended in September 2019, CPLR 213-c now provides for a twenty-year limitations period, and specifically applies to "any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the said conduct." However, the assault is alleged to have occurred prior to the effective date of the amendment, and "ordinarily, statutes of limitation are given a prospective construction unless the contrary is clearly indicated" (*Matter of Pauletti v Freeport Union Free School Dist. No. 9*, 59 AD2d 556, 556, (2d Dept 1977), *aff'd sub nom Beary v City of Rye*, 44 NY2d 398 [1978]). The statute provides no indication that it is to apply retroactively.

"The language of CPLR 213-c is broad, encompassing claims against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the said conduct and not merely the perpetrator" (*Gutierrez v Mount Sinai Health Sys., Inc.*, 188 AD3d 418, 418 [1st Dept 2020] (internal quotations omitted). Penal Law ¶ 20.00, in turn, provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."[5]

Turning to the merits of plaintiff's allegations that Sabongui conspired with Teper to commit the sexual assault, "[a]lthough New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted 'to connect the actions of separate defendants with an otherwise actionable tort'" (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020], *quoting Alexander & Alexander of N.Y. v Fritzen,* 68 NY2d 968, 969 [1986]). To state a claim under that theory, "the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*Cohen Bros. Realty*, 181 AD2d 401, 404).

This court has however found no authority to support a claim for a conspiracy to commit a rape or sexual assault. Such allegations in essence may constitute claims for aiding and abetting an assault or battery which plaintiff has however failed to plead. "To be liable for an

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5 Given this determination, this court need not decide whether New Jersey's two year statute of limitations for assault applies.

assault under an aiding and abetting theory, a defendant must have committed some overt act, either by words or conduct, in furtherance of the assault" (*McKiernan v Vaccaro*, 168 AD3d 827, 830 [2d Dept 2019]; *see also Offenhartz v Cohen*, 168 AD2d 268, 268 [1st Dept 1990]. Plaintiff alleges that Sabongui escorted her to the bar, arranged the subject meeting at the request of Teper, selected an alcohol beverage for plaintiff and told her to "do whatever is necessary" to close the deal between Tower and Omnivere (*see* Amended Compl. ¶¶ 30-34). Moreover, plaintiff alleges that "while of course Ms. Mata was not privy to private communications between Mr. Sabangui and Mr. Teper, Mr. Sabangui's conduct is only consistent with an agreement he entered into with Teper to drug Ms. Mata and subject her to an assault" (Amended Compl. ¶ 46).

On the basis of the foregoing, Sabongui's motion to dismiss plaintiff's cause of action for assault and battery as against Sabongui is granted unless plaintiff repleads the Amended Complaint in light of the above.

NYSHRL and NYCHRL Claims

With respect to her claims under the NYSHRL and the NYCHRL, plaintiff's opposition papers indicate that she is pursuing, under a theory of retaliation, only those relating to her termination and unpaid commissions. The termination claim must fail because the complaint itself concedes that the entire Legal Services Segment was eliminated, and she does not assert that this workforce reduction was implemented specifically to target her (*see, e.g.*, *Suri v Grey Global Group, Inc.*, 164 AD3d 108 [1st Dept 2018]). Indeed, she alleges that she was the last employee in that department to be terminated.

As to the retaliation claim relating to unpaid commissions, the court cannot resolve it at

this pre-discovery stage. To plead a claim for retaliation under the NYSHRL, the plaintiff must establish that "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *see Franco v Hyatt Corp.*, 189 AD3d 569, 571 [1st Dept 2020]; Exec. Law 296[7]). Under the NYCHRL, the retaliatory act complained of need only be "reasonably likely to deter a person from engaging in protected activity" (Administrative Code of City of NY § 8–107[7]; *Franco*, 189 AD3d at 571, *2). However, an employee is not protected against retaliatory action for exposing wrongdoing or filing a grievance, unless the conduct complained of relates to opposing discriminatory practices under the state or city Human Rights Laws (*see Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]; Executive Law § 296[7]).

Individual defendants may be held liable as "employers" under the human rights statutes if they participated in, aided and abetted, encouraged, approved or condoned the discriminatory conduct (*see Ramos v Metro N. Commuter R.R.*, __AD3d __, 2021 WL 189279, at *2 [1st Dept 2021]; *McRedmond v Sutton Place Rest. & Bar, Inc.*, 95 AD3d 671, 673 [1st Dept 2012]); *cf Doe v Bloomberg L.P.*, 178 AD3d 44, 51 [1st Dept 2019]; Moreover, "[A] co-worker who actually participates in the conduct giving rise to a discrimination claim [can] be held liable under the NYSHRL [or NYCHRL] even though that co-worker lacked the authority to either hire or fire the plaintiff" (*McHenry v Fox News Network, LLC*, 2020 WL 7480622,*8 [SDNY 2020]) (internal quotation and citation omitted). Although the relevant allegations are somewhat skeletal, plaintiff has adequately pled that Sabongui and Caputo participated, influenced or

condoned the decision to withhold the commissions in retaliation for her complaint about the assault. The court rejects defendants' argument that plaintiff has not alleged that she was engaged in a protected activity when she complained about the assault. While the particulars of that conversation are not clear, it may be assumed that she objected to being exploited on the basis of her gender by an Ominvere officer at the purported business meeting at the bar. The amended complaint was thus not necessarily limited to the particulars of the assault by a third-party Tower employee.

The *Doe* case, *supra*, is distinguishable. In *Doe*, the court upheld the dismissal of a retaliation claim where plaintiff failed to allege that the individual defendant, who owned the corporation, knew or should have known that the supervisor who harassed and assaulted plaintiff behaved in a discriminatory manner toward women other than the plaintiff, or that he had any involvement or interactions with the supervisor at any point (*Doe*, 178 AD3d 44, 51). Here, in contrast, defendants Sabongui and Caputo had interactions with plaintiff and each other and were aware of the meeting and presumably the assault. Defendants' contention that the commissions were withheld only because the parties were in the midst of failed negotiations over her severance again merely raises an issue of fact.

Plaintiff's Cross Motion to Amend

Plaintiff's cross motion to amend is granted. "Leave to amend pleadings should be freely granted in the absence of prejudice or surprise so long as the proposed amendment is not palpably insufficient as a matter of law" (*Mashinsky v Drescher*, 188 AD3d 465, 465 [1st Dept 2020]). There is no prejudice here because the motions to dismiss extended defendants' time to answer (*see* CPLR 3211[f]) and plaintiff could have simply filed the amended pleading as of

right during the pendency of this motion (*see* 3025[a]; *Estate of Feenin v Bombace Wine & Spirits, Inc.*, 188 AD3d 1001 [1st Dept 2020]). Furthermore, the proposed new pleading adds only three new allegations (*see* Proposed Amended Complaint [Dkt. 70] ¶¶ 46, 70-71), one of which clarifies plaintiffs' claim that Caputo and Sabongui both participated in the decision to withhold her commissions. For the sake of economy, the court has deemed the proposed complaint to be the operative pleading and direct the remaining defendants to serve answers to it, subject to the determinations made by this decision.

Accordingly, it is

ORDERED, that the motions of defendants Tower Legal Solutions to dismiss the claims against it is granted, and those claims are severed and dismissed, with costs and disbursements as taxed by the Clerk of the Court, and it is further

ORDERED, that the motion by Medley Capital Corporation to dismiss the claims against it is granted unless plaintiff repleads within thirty (30) days in accordance with this decision; and it is further

ORDERED, that the motion of defendant Georges Sabongui to dismiss the third cause of action for assault and battery is granted unless plaintiff repleads within thirty (30) days in accordance with this decision; and it is further

ORDERED, that the motion of defendants Georges Sabongui and Anthony Caputo to dismiss the first and second causes of action is granted, except as to the claims under the NYSHRL and NYCHRL for retaliation in withholding plaintiff's commissions; and it further

ORDERED, that the fourth cause of action for intentional infliction of emotional distress is dismissed on consent as against all of the moving defendants (Dkt. Nos. 75-77); and it is

further

ORDERED that plaintiff's cross motion for leave to amend the complaint is granted, and the proposed amended complaint in the proposed form annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED, that defendants shall interpose an answer to the amended complaint within thirty (30) days of service of this decision/order with notice of entry; and it is further

ORDERED, that the clerk shall enter a judgment accordingly.

Dated: February 11, 2021

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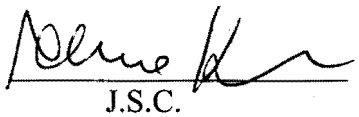

J.S.C.