SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

---X

GLENN JUDSON,

Plaintiff,

- v -

ELLIOTT MANAGEMENT CORPORATION, ZION SHOHERT, OLEG OLOVYANNIKOV

Defendant.

---X

INDEX NO. 652185/2021

MOTION DATE 09/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS

Upon the foregoing documents, and after oral argument, which took place on December 15, 2021 before the Honorable Alexander Tisch, Defendants Elliott Management Corporation ("EMC"), Zion Shohert ("Shohert"), and Oleg Olovyannikov's ("Olovyannikov") (collectively "Defendants") motion for partial dismissal pursuant to CPLR §§ 3211(a)(1) and (7) is granted in part and denied in part[1].

I. Factual and Procedural Background

On April 1, 2021, Plaintiff Glenn Judson ("Plaintiff") initiated this action by filing a Summons and Complaint alleging age discrimination, hostile work environment, and retaliation pursuant to the New York City Human Rights Law ("NYCHRL") (NYSCEF Doc. 1). Defendants filed their Answer on April 8, 2021 (NYSCEF Doc. 2). Plaintiff filed an Amended Complaint on April 28, 2021 which contained the same causes of action (NYSCEF Doc. 4). In response, on

[1] While this motion was submitted and heard in another part, the case has been transferred to Part 33. The motion was not transferred to Part 33 but given the age of the motion and in the interest of judicial economy and expediency, this Court issues a decision on the instant motion.

August 19, 2021, Defendants sought dismissal of the first cause of action alleging age discrimination and the second cause of action alleging hostile work environment (NYSCEF Doc. 12). Defendants also seek dismissal of the third cause of action against Defendants Shohet and Olovyannikov (*id.*).

This action arises out of Plaintiff's employment at EMC. Plaintiff worked at EMC from 2007 until August 10, 2018 (NYSCEF Doc. 15 at ¶ 11). Defendant Olovyannikov has been the Chief Technology Officer of EMC since August 15, 2016 (*id.* at ¶ 13). Shohert is the Chief Operating Officer of EMC (*id.* at ¶ 7). Plaintiff's record at EMC was "spotless" (*id.* at ¶ 12). Shortly after Olovyannikov began working at EMC, Plaintiff was promoted (*id.* at ¶ 14). Initially, Plaintiff reported to Olovyannikov in his new position (*id.*). Olovyannikov gave plaintiff a positive performance review in November 2017 (*id.* at ¶ 16). The following month, Plaintiff began reporting to a different individual named Basu (*id.* at ¶ 17). Basu reported to Olovyannikov (*id.*).

Allegedly, once Olovyannikov arrived at EMC, there was "a significant shift in the culture of the technology group" (*id.* at ¶ 18). Olovyannikov allegedly negatively commented on employees' ethnicity, national origin, gender, and disability (*id.* at ¶ 21). Allegedly, he wanted to fire the Indian employees and replace them with Russian employees (*id.* at ¶ 22). He allegedly referred to two Indian employees as "retards" (*id.* at ¶ 24) and allegedly asked another if he was going to a jihadist training camp (*id.*at ¶ 25). After a colleague allegedly died as a result of alcoholism, Olovyannikov hung a banner in his office which said, "Suicide Squad" (*id.* at ¶ 27). He allegedly made demeaning statements about women and allegedly commented that he wanted stripper poles in the office and to hire prostitutes (*id.* at ¶ 23). Allegedly, he frequently mentioned that he "wanted to get rid of the older employees in the office and replace them with 'younger' and more 'energetic' employees (*id.* at ¶ 19). Plaintiff alleges many of his colleagues voiced

concern about Olovyannikov's behavior and those that supported and enabled his behavior, including Shohert (*id.* at ¶ 28).

On May 11, 2018, Plaintiff allegedly learned from one of his subordinates that one of Olovyannikov's subordinates sent a derogatory text message allegedly referring to one of Plaintiff's employees as a "silly menstrual fish" (*id.* at ¶ 29). Plaintiff alleges that he complained about the text message to EMC's human resources managers on May 11, 2018, as required by EMC's discrimination and harassment policy (*id.* at ¶¶ 29-30). Plaintiff alleges he also complained about the culture of discrimination Olovyannikov created and the numerous discriminatory comments he made (*id.* at ¶ 32). Plaintiff asked if the legal department should be involved but was told that human resources would discuss the complaints with Shohert (*id.* at ¶ 32) Although human resources discussed the matter with Shohert there was allegedly no follow up (*id.* at ¶ 33).

After this complaint, the allegedly discriminatory ageist comments escalated (*id.* at ¶ 20). The ageist comments made, including the ones made at a company party in July of 2018, were reported to the global head of human resources by one of Plaintiff's colleagues (*id.*). However, Plaintiff alleges that instead of correcting Olovyannikov's behavior, Plaintiff was fired without warning less than three months after reporting the discriminatory acts and only one month after the purportedly ageist comments were made at a holiday party (*id.* at ¶ 36). Plaintiff alleges the retaliation continued at a company town hall meeting shortly after Plaintiff's termination, where Olovyannikov allegedly "denounced [him] by name and attributed his termination to poor performance" to the firm's global technology department, thereby substantially injuring Plaintiff's professional reputation (*id.* at ¶ 44). Defendants move for partial dismissal because they allege that Plaintiff recites bare legal conclusions that are flatly contradicted by documentary evidence.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give a plaintiff the benefit of all favorable inferences which may be drawn from the pleadings (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

B. Age Discrimination

To state a viable cause of action, plaintiff must show that he is part of a protected class, that he was qualified for his job, that he was treated differently or worse than his colleagues, and

that the facts surrounding his termination support an inference of discrimination (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

As of the date of the Complaint, Paintiff was 50 years old (NYSCEF Doc. 15 at ¶ 1). Defendants submit a copy of Olovyannikov's passport, which shows that he was 54 or 55 years old on the date of the Complaint (NYSCEF Doc. 18). Prathana Gowda, who replaced Plaintiff was born in 1976. Though Gowda is younger than plaintiff, she is also in the protected age group. Defendants argue Plaintiff's intermediate supervisor, Basu, is a year older than Olovyannikov.

In addition, Defendants allege that dismissal is proper because in 2016 Olovyannikov promoted Plaintiff (*id.*, ¶¶ 13-14). Also, Olovyannikov gave Plaintiff "a strong performance review" (*id.* at ¶ 16). Defendants argue that "it is difficult to impute a discriminatory motive . . . in connection with the adverse action that is inconsistent with the initial decision to treat plaintiff favorably". Defendants contend the stray ageist comments Plaintiff alleges are insufficient.

In opposition, Plaintiff asserts that his age discrimination claim is sufficient (NYSCEF Doc. 20). He emphasizes that notice pleading standards do not require a plaintiff to plead specific facts, but only to provide fair notice of the basis for the claim. Plaintiff asserts that Courts interpret the NYCHRL "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (quoting *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). Plaintiff rejects Defendants' position that the cause of action is foreclosed because of Olovyannikov's age or the ages of other employees. Further, Plaintiff notes that paragraphs 19-20 of the Complaint allege facts that provide evidence of age discrimination. He contends that even stray remarks may be enough to set forth a prima facie case (citing *Chiara v Town of New Castle*, 126 AD3d 111, 124 [2d Dept 2015]). Plaintiff also asserts that it is not dispositive at the pleading stage that Olovyannikov promoted him in 2016.

In reply, Defendants argue that Plaintiff overstates the liberality of the standard of review. Although notice pleading is applicable, Plaintiff still must allege that Defendants discriminated against him based on age. They reiterate that although Plaintiff's duties subsequently were assumed by a younger individual, she also was over 40 and thus in the same protected category. They note that conclusory claims of discrimination have been dismissed in the State courts (citing *Massaro v The Dept. of Educ. of the City of New York*, 2013 NY Slip Op 31011 [U], *4 [Sup Ct, NY County 2013], *affd* 121 AD3d 569 [1st Dept 2014]). They argue Plaintiff's Complaint is conclusory because he cites only one ageist comment made about Plaintiff to a third party.

After careful consideration, the Court denies this prong of the motion to dismiss. A claim under the NYCHRL "is intended to provide 'uniquely broad and remedial' protections 'for the civil rights of all persons' within the statute's geographic scope; and it is to be 'construed liberally' to fulfill this purpose" (*Pustilnik v Battery Park City Auth.*, 71 Misc 3d 1058 [Sup Ct, NY County 2021] [quoting *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009)]). Therefore, the Complaint's allegations must simply give Defendants "fair notice of the nature of plaintiff's claims and their grounds" (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019]).

The NYCHRL is broad in scope (*Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 [1st Dept 2016]). "Thus, courts must play a highly active role in the development of the City HRL by interpreting all cases in a manner consistent with the goal of providing unparalleled strength in deterring and remedying discrimination" (*Morse v Fidessa Corp.*, 165 AD3d 61, 67 [1st Dept 2018]). Allegations that are dismissed as insufficient under the State and Federal laws often survive dismissal motions as they relate to the NYCHRL (*see, e.g., Pelepelin v City of New York*, 189 AD3d 450, 452 [1st Dept 2020] [claim sustained where the complaint adequately asserted "a

disadvantageous action"). Accordingly, Defendants' citations to decisions under the State Human Rights Law are not persuasive (*see also Pustilnik*, 71 Misc 3d 1058 at 1069).

The fact that Olovyannikov and Prowda are in the same protected age category as Plaintiff does not require dismissal. In *Rollins v Fencers Club, Inc.* (128 AD3d 401, 402 [1st Dept 2015]), the First Department refused to grant summary judgment on an age discrimination claim merely because "several of the persons involved in the decision to fire plaintiff were close to her in age, and thereby in the same protected class." The court found that an issue of fact existed because a board member in the protected class made comments suggesting that the plaintiff was too old or infirm to do her job effectively. In the context of this CPLR § 3211 motion to dismiss, where plaintiff bears a lesser burden, these allegations are sufficient (*see also Mirro*, 159 AD3d at 966).

Further, although, many of Olovyannikov's purported ageist statements were not made directly to Plaintiff, this is not a basis for dismissal (*see Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016]). Instead, it raises "a potential rebuttal argument...which is misplaced at this early procedural juncture" (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 404 [1st Dept 2019]). Moreover, while Plaintiff was promoted after Olovyannikov began working at EMC, this does not dispose of his claim on a motion to dismiss. Defendants' reliance on *Anderson* is misplaced because that case involved consideration of a summary judgment motion. *Buon v Spindler* (2021 WL 1056010 [SDNY 2021]) is not persuasive because it was decided under Title VII of the Civil Rights Act of 1964 rather than under the NYCHRL and because the court evaluated the claim under Federal Rule of Civil Procedure § 12 (b)(6). Thus, this branch of Defendants' motion is denied.

C. Hostile Work Environment

Defendants also argue that Plaintiff's second cause of action should be dismissed. First, they argue that many of the alleged hostile acts target women and other groups of which he is not a member. Second, Defendants state that Plaintiff merely references insensitive comments related to his protected class which were not pervasive enough to create a hostile environment.

In opposition, Plaintiff notes that the First Department has rejected the position that "the 'severe or pervasive' restriction be applied to NYCHRL claims just as the restriction is applied to Title VII and State HRL claims" (*Williams*, 61 AD3d at 78). Instead, it is only necessary to allege that the plaintiff suffered more than a mere slight or inconvenience. Plaintiff argues he satisfied the standard because he alleged that Olovyannikov taunted him and indicated that he should be fired because of his age. Although not all the statements were made in Plaintiff's presence, he argues "[t]he mere fact that [a plaintiff] was not present when a . . . derogatory comment was made will not render that comment irrelevant to his hostile work environment claim" (quoting *Schwapp v Town of Avon*, 118 F3d 106, 111 [2d Cir 1997]). In reply, Defendants argue that Plaintiff has not challenged their contention that he cannot include alleged misconduct against members of protected groups if he is not a member. They contend that the only allegation of ageism was the comment Olovyannikov made to another person at a party, and this is insufficient.

While Plaintiff cannot state a claim for hostile work environment related to comments made about a protected class he is not a member of, Plaintiff has stated a claim for hostile work environment under the NYCHRL based on age discrimination. Since *Williams*, the courts in this State have analyzed NYSHRL and NYCHRL claims differently (*see Hernandez v Kaisman*, 103 AD3d 106, 112-114 [1st Dept 2012] [considering summary judgment motion]). As Plaintiff argues, "[t]he NYCHRL sets a lower standard for maintaining a cause of action for hostile work

environment" (*Palmer*, 65 Misc 3d at 393). Instead, a plaintiff must allege that he or she "was treated less well than other employees because of the relevant characteristic" (*Oluwo v Sutton*, 206 AD3d 750, 753 [2d Dept 2022]). Under the NYCHRL, moreover, "'questions of "severity" and "pervasiveness" are applicable to the scope of permissible damages, but not to the question of underlying liability'" (*Hernandez*, 103 AD3d at 113-114 [quoting *Williams*, 61 AD3d at 76]).

Given the facts alleged, dismissal is premature. Contrary to Defendants' assertion, the Complaint does not simply state that Defendants made a single ageist comment to a third party. In addition, the Complaint states that Olovyannikov "*frequently* mentioned that he wanted to get rid of the older employees in the office," replacing them with younger employees, and that he wanted to replace Plaintiff for this reason (NYSCEF Doc. 15 at ¶ 19 [emphasis added]). Although Defendants suggest that none of the comments were made to Plaintiff, the Complaint asserts otherwise, stating that he "directly referred to Plaintiff as 'old' *on a number of occasions*" (*id.* [emphasis added]). The extent to which the statements were made in Plaintiff's presence, and whether the statements were "severe or pervasive or just petty offenses" are issues of fact which cannot be resolved on a motion to dismiss.

D. Retaliation Claims as to Individual Defendants

Initially, Defendants argue that the causes of action fail against Shohert and Olovyannikov, because Plaintiff has not set forth valid age discrimination and hostile work environment claims. The Court rejects this argument as these causes of action are not dismissed. Defendants also argue that the allegations against Shohert, are insufficient to support liability. The Complaint alleges that Shohert "supported and enabled [Olovyannikov's] behavior" (NYSCEF Doc. 15 at ¶ 28). Allegedly, the human resources manager told Shohert about Plaintiff's complaints and Shohert concluded the legal department did not have to get involved (*id.* at ¶ 33). It states that Shohert

"approved of Plaintiff's retaliatory termination" (*id.* at ¶ 39). The Complaint alleges Shohert was "aware of the discriminatory acts done by other EMC employees, acquiesced in such conduct, failed to take the appropriate remedial action in response to such conduct, and personally retaliated against Plaintiff by terminating his employment and otherwise aided and abetted the discriminatory and retaliatory conduct herein" (*id.*) Defendants claim these allegations fail to allege Shohert was involved in the challenged conduct.

Plaintiff contends that the Complaint's allegations state a claim for aiding and abetting. He alleges that Shohert did not take action following Plaintiff's complaint about the text message or reports regarding ageist comments made about Plaintiff. Shohert's failure to thoroughly investigate, intervene, and take remedial action can be the basis of an aiding and abetting claim (*Feingold v New York*, 366 F3d 138 [2d Cit. 2004]; *Black v ESPN, Inc.*, 70 Misc.3d 1217[A] [Sup Ct. New York County 2021]; *Pellegrini v Sovereign Hotels, Inc.*, 740 F. Supp.2d 344 [NDNY 2010]). Further, Plaintiff alleges that Shohert knew about the discrimination Plaintiff was facing, knew about the discrimination Plaintiff had complained about, and knew that others had reported the discrimination Plaintiff was facing (NYSCEF Doc. 15 at ¶¶ 20, 28, 33 and 39). Yet, it is alleged that rather than intervene to put an end to the behavior, he allegedly approved of Plaintiff's termination (*id.*). Based on these allegations and the procedural posture of this motion, the aiding and abetting claim against Shohert survives.

However, dismissal of the aiding and abetting claim against Olovyannikov is appropriate. As he was the individual who fired Plaintiff, he cannot be liable for aiding and abetting his own conduct (citing, *Hardwick v Auriemma*, 116 AD3d 465, 468 [1st Dept 2014]). Plaintiff does not challenge this position. Therefore, the Court dismisses the claim for aiding and abetting as it applies to Olovyannikov (*see Park v Kurtosys Sys., Inc.*, 206 AD3d 570, 571 [1st Dept 2022]).

Defendants also contend that dismissal of the retaliation claim against Olovyannikov is appropriate. According to Defendants, the Complaint does not allege that Olovyannikov knew Plaintiff engaged in a protected activity, and thus does not show a causal connection between the protected activity and termination (citing *Fletcher v Dakota, Inc.*, 99 AD3d 43, 54 [1st Dept 2012]) Plaintiff responds that the allegation that Olovyannikov fired Plaintiff in retaliation for complaining about his discriminatory acts is sufficient to raise an inference of retaliation.

The Court concludes that the Complaint states a claim for retaliation. To state a cause of action for retaliation under the NYCHRL, a plaintiff must show he participated in protected activity known to defendant, the defendant took an action that disadvantaged plaintiff, and a causal connection exists between the protected activity and the adverse action (*Harrington v City of New York*, 157 AD3d 582 [1st Dept 2018]).Protective activity includes complaining about unlawful discrimination (*Albunio v City of New York*, 67 AD3d 407 [1st Dept 2009].

The Complaint alleges Plaintiff was fired 90 days after he complained about numerous discriminatory acts to human resources, and that Shohert was not only aware of Plaintiff's complaints but decided nothing had to be done in response. Further, after Plaintiff complained about the discriminatory acts, Olovyannikov began spreading ageist comments about Plaintiff around the office, both to Plaintiff directly and to Plaintiff's coworkers. These alleged discriminatory remarks and Plaintiff's ultimate termination, which allegedly occurred in a matter of weeks after Plaintiff's complaint, give rise to an inference of retaliation. Indeed, as this is a motion to dismiss, and little to no discovery has taken place yet, Plaintiff is entitled to the benefit of all favorable inferences which may be drawn from his allegations (*Leon v Martinez*, 84 NY2d 83 [1994]). Given the alleged dynamic between Shohert and Olovyannikov, where Shohert defended and brushed off reports of Olovyannikov's discriminatory acts, the Court can infer, for

purposes of a motion to dismiss, that Olovyannikov was aware of Plaintiff's complaint. Thus, Plaintiff's third cause of action survives this motion to dismiss.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent of severing and dismissing any aiding and abetting claims in the third cause of action as against Defendant Olvyannikov; and it is further

ORDERED that the Defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that within twenty (20) days of entry of this decision and order, Defendants shall serve an Answer to the Amended Complaint; and it is further

ORDERED that the parties shall submit a proposed preliminary conference order via e-mail to SFC-Part33-Clerk@nycourts.gov on or before March 8, 2023. If the parties are unable to agree to a proposed preliminary conference order, the parties shall appear for a preliminary conference on March 15, 2023 at 9:30 a.m., at 60 Centre Street, Room 442; and it is further

ORDERED that within ten (10) days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on Defendants and the Court of the Clerk; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/6/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION	
		GRANTED	DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE

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