

Burhans v Assembly of the State of N.Y.

2014 NY Slip Op 30587(U)

March 7, 2014

Supreme Court, New York County

Docket Number: 155232/13

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X
VICTORIA BURHANS and CHLOË RIVERA,

Index #155232/13

Plaintiffs,

-against-

DECISION & ORDER

THE ASSEMBLY OF THE STATE OF NEW YORK,

Defendant.

-----X
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Papers considered in review of this motion seeking an Order dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits and Memorandum of Law	1-7
Affidavit in Opposition with Exhibits and Memorandum of Law	8-13
Reply Memorandum of Law	14

Defendant, the New York State Assembly (the Assembly), moves for a pre-answer Order dismissing plaintiffs' complaint, pursuant to, *inter alia*, CPLR 3211(a)(7).

Factual & Procedural Background

Plaintiffs, are two young women, who were 27 and 25 years old at the time this action was commenced (see, amended verified complaint ¶3) (the amended complaint). The 27 page amended verified complaint sets forth one cause of action under the "New York State Human Rights Law" (id. ¶2), and the Exec. Law §292(5) et seq. (id. ¶¶79-82) (collectively the NYSHRL).

Plaintiffs' sole cause of action is entitled "Sex

Discrimination and Sexual Harassment." The facts described in the amended complaint are alarming and include a voluminous account of, *inter alia*, prior sexual harassment complaints brought against Vito Lopez (Lopez). Lopez is a former New York State Assemblymember from Brooklyn, New York. Lopez retained his seat in the Assembly (the Assembly) for almost 30 years.

The pleading states that the Assembly discriminated against plaintiffs, and as a result, this "action is brought to remedy discrimination on the basis of gender in employment, including hostile work environment sexual harassment . . ." (see, amended verified complaint ¶2). The complaint further alleges that "[t]he New York State Assembly is part of the New York State Legislature, and that the Assembly is an 'employer' within the meaning of N.Y. Executive Law §292[5]." (Id. ¶5).

ARGUMENTS

The movant argues in support of its application as follows: (1) the Assembly did not acquiesce in or condone Lopez's conduct because the Assembly investigated and took action in response to plaintiffs' complaints; (2) any allegations of the Assembly's failure to respond adequately to prior complaints made against Lopez, fail to state a cause of action under the NYSHRL; (3) plaintiffs have not stated a cause of action of disparate treatment sex discrimination under the NYSHRL; and (4) the Assembly is not plaintiffs' employer for the purpose of imputing liability under

the NYSHRL.

Plaintiffs contend in opposition that: (1) defendant's motion fails to comply with CPLR 3211(a)(7); (2) the Assembly knew, or should have known, that Lopez would continue to harass female staff members in his office, after the first set of complaints against Lopez were settled without discipline; (3) the Assembly's response to plaintiffs' complaints does not relieve it of vicarious liability for Lopez's harassment; (4) employers are routinely held liable for failing to take appropriate action against recidivist harassers; and (5) Lopez's conduct is attributable to the Assembly because he was a "high ranking manager."

DISCUSSION

Plaintiffs' amended verified complaint alleges that "[t]he New York State Assembly is part of the New York State Legislature [and] [t]he Assembly is an 'employer' within the meaning of N.Y. Exec. Law §292[5]." (See, amended complaint ¶5). Whether a person seeking relief of a proper party by requesting an adjudication, is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation (*Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975]). The threshold question to be decided in this case is whether or not the Assembly, as a body, is an "employer," as that term is defined by both statute and common law.

The legion of law applicable to CPLR 3211(a)(7) is clear: in

considering a CPLR 3211 motion to dismiss, the court is required to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994).

Moreover, "[w]hen the moving party [seeks dismissal], the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2d Dept 2005) (citation omitted).

Exec. Law §292(5) states that "the term 'employer' does not include any employer with fewer than four persons in his or her employ." In order to determine whether or not the Assembly is an employer, pursuant to the Exec. Law, it would seem that the answer to this question would naturally flow from a plain reading, but it does not.

The Court of Appeals in *Patrowich v. Chemical Bank*, 63 NY2d 541 (1984), held that the "economic reality" test for determining

who may be sued as "employer" pursuant to the NYSHRL, requires a plaintiff to put forth evidence that shows that the putative employer, has an ownership interest in the enterprise or the power to do more than just carry out personnel decisions made by others.

The Court stated, in pertinent part, as follows:

"The 'economic reality' test ... has been refined and ... is understood to include inquiries into: 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" (Id.).

The multi-factor test stated in *State Div. of Human Rights v GTE Corporation*, 109 AD2d 1082 (4th Dept 1985) appears to use a similar approach, though not identical. In *Kaiser v Raoul's Restaurant Corp.*, 72 AD3d 539 (1st Dept 2010)¹, the First Department analyzed *Patrowich, supra*, in detail. *Kaiser, supra*, reiterated the "economic reality" test for determining who may be sued as putative "employer" under the NYSHRL. In fact, the "economic reality" test, has been broadly read by all four Appellate

¹Former employee filed action against owners and officers of corporate employer alleging age discrimination in violation of Human Rights Law. The Supreme Court, New York County, Louis B. York, J., 2008 WL 2328937, denied owners' motion to dismiss. Owners appealed.

Divisions which have adopted the same theory for determining who may be sued as an "employer" under the NYSHRL. Even though the cases following *Patrowich* do not use the phrase "economic reality" (see e.g., *Barbato v Bowden*, 63 AD3d 1580 [4th Dept 2009]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006]; *Strauss v New York State Dept. of Educ.*, 26 AD3d 67 [3rd Dept 2005]; *Brotherson v Modern Yachts*, 272 AD2d 493 [2nd Dept 2000], the outcomes have been the same.

The Court in *Kaiser, supra*, found that the *Patrowich, supra*, holding is in fact narrower, by stating that the Court of Appeals decided that the definition of "employer" under the NYSHRL is not, in any event, broader than the definition of that term under the relevant federal statutes. The Court in *Kaiser* stated in pertinent part as follows:

"The broad reading of *Patrowich* is not easily reconciled with the second paragraph of the opinion. The Court [of Appeals] observed that the definition of employer under the Human Rights Law [Executive Law §292[5]] 'relates only to the number of persons employed and provides no clue to whether individual employees of a corporate employer may be sued under its provisions' (63 NY2d at 543). 'The contrary is, however, suggested by subdivision 3-b of section 296 [of the Exec. Law], which makes it a discriminatory practice for 'any real estate broker, real estate salesman or employee or agent thereof' to make certain representations, for it indicates that the Legislature differentiated that provision from the general definition of 'employer'"

(id.). If the broad reading of *Patrowich* is correct, the Court took pains to note the textual support for concluding that an individual employee cannot be sued as an employer and then dismissed that support without explanation.

Although *Patrowich* holds that a necessary condition for an employee to be classified as an employer for purposes of the Human Rights Law is that the employee have an ownership interest in the company or the power to do more than carry out personnel decisions made by others, the Court did not hold that either condition was a sufficient condition.

In the more than 25 years since *Patrowich*, the Court of Appeals has not again had occasion to construe the definition of 'employer' under the Human Rights Law. Until the Court does, we think it appropriate to follow our precedents that adopt the broad reading of the holding of *Patrowich* (see e.g., *Pepler v Coyne*, 33 AD3 434 [1st Dept 2006]; *Dorvil v Hilton Hotels Corp.*, 25 AD3d 442 [1st Dept 2006]; *Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 60 [1st Dept 2005]).

Plaintiffs' claim that the Assembly functioned as their "employer." Plaintiffs do not allege that the individual Assemblymembers have any ownership interest in the body which they serve. However, the complaint does contain allegations that because the Assembly, as a whole, did not properly address prior sexual harassment complaints made against Lopez, the Assembly aided and abetted Lopez, by permitting him to retain his power to hire and fire plaintiffs.

Plaintiffs have not presented a single claim that the individual Assemblymembers aided and abetted Lopez's discriminatory conduct (see Exec. Law §296[6]). Nor are there any allegations in the pleading that plaintiffs will be able to identify evidence supporting the contention that any of the individual Assemblymembers "actually participate[d]" in the discriminatory acts. Such allegations could possibly support an alternative theory of individual liability, on the grounds of aiding and abetting the alleged acts (*Asabor v Archdiocese of New York*, 102 AD3d 524 [1st Dept 2013]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 328 [2004]).

It is uncontested that Assemblymembers do not have any ownership interest in the Assembly itself because they are all public officers.² Moreover, plaintiffs have not alleged that anyone other than Lopez had the power to hire or fire them from their employment with the State of New York.

Assuming arguendo, that the Assembly could be considered

²Public Officers Law §2 defines a public officer as an officer as is required by law to be elected or appointed, and/or who has a designation or title given him or her by law, and who exercises functions concerning the public, assigned to him or her by law.

Indicia of the status of a public officer are the authority to exercise a portion of the sovereign powers of government and vested discretion as to how to perform duties; other indicia of public office are statutory designation of the position as an "office," a requirement to take an oath of office or file bonds, appointment for a definite term, and receipt of a Commission of Office or Official Seal. 1990 N.Y. Op. Atty. Gen. 190-29.

plaintiffs' employer, this Court could impose liability on the body as a whole or the individual Assemblymembers, only where the "employer" encourages, condones or approves the unlawful discriminatory acts (*Zakrzewska v New School*, 14 NY3d 469, 481 [2010] and Exec. Law §296).

Plaintiffs' complaint refers to Lopez as a "high ranking manager." Given the nature of the Assembly's seniority system and Lopez's nearly 30 year tenure in his position, it is obvious that he had supervisory control over plaintiffs' worksite. Lopez was presumably able to review and comment on plaintiffs' job performance. Unfortunately, the lack of factual support in the amended complaint, and the lack of any testimony in the form of an affidavit in opposition, to support the contention that any of the other 149 Assemblymembers had the authority to hire or fire plaintiffs; or anyone else hired by the other Assemblymembers. Plaintiffs do not set forth any allegations that any other Assemblymember had the power to make personnel decisions on behalf of Lopez.

The NYSHRL states that it shall be an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." Exec. Law §296(6). As a general rule, one who counsels, advises, abets, or assists in the commission of an actionable wrong by another is responsible to the injured person for the entire loss

or damage (Exec. Law §296[6]).

To make a prima facie case for civil aiding and abetting under New York law, plaintiffs must show "the existence of [a] violation by the primary party; (2) knowledge of this violation on the part of the aider and abetter; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation. *Evans v Rosen*, 111 AD3d 459 (1st Dept 2013). In order for plaintiffs' claims of aiding and abetting to survive a motion to dismiss, they must be pled with some level of specificity in order to invoke personal liability on the individual Assemblymembers (*id.*).

Plaintiffs' amended verified complaint does not allege the requisite elements of civil aiding and abetting, and does not set forth any specific allegations of fact against any individual Assemblymember. Without particular allegations that a defendant actually participated in the conduct giving rise to a discrimination claim, he or she cannot be held personally liable under the NYSHRL. See also, Exec. Law §296.

Consequently, and for the foregoing reasons, the case is dismissed without prejudice to commence a timely action against the proper parties, e.g., The State of New York and/or Vito Lopez and/or any other individual, plaintiffs can proffer evidence against to support a claim of aiding and abetting. In view of the determination that plaintiffs did not meet their burden on the

motion to dismiss in the first instance, the Court need not reach the additional arguments raised by the parties.

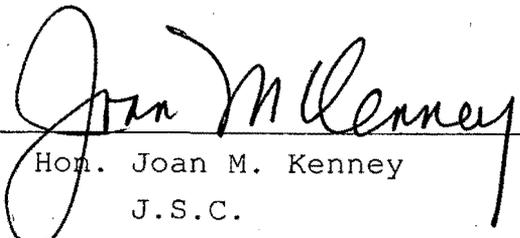
Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: March 7, 2014

E N T E R:


Hon. Joan M. Kenney
J.S.C.