

Dominguez v Gruber
2014 NY Slip Op 31323(U)
May 20, 2014
Supreme Court, New York County
Docket Number: 150944/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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MILOCYS DOMINGUEZ,

Plaintiff,

Index No. 150944/14

-against-

DECISION/ORDER

SHAI GRUBER, individually and CALIBER
ASSOCIATES II, INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Milocys Dominguez commenced the instant action asserting claims for, *inter alia*, sexual harassment and retaliation pursuant to the New York City Human Rights Law (“NYCHRL”) as well as battery against defendants Shai Gruber (“Gruber”) and Caliber Associates II, Inc. (“Caliber”). Defendants now move for an order pursuant to CPLR §§ 3211(a)(1) & (7) dismissing the complaint. For the reasons set forth below, defendants’ motion is granted in part and denied in part.

The relevant facts are as follows. Defendant Caliber is a real estate agency with its headquarters located at 211 East 43rd Street, New York, New York. Defendant Gruber is the owner of Caliber. Plaintiff was hired under the title Independent Sales and Rental Associate by

defendants in or around June 2013 and defendant Gruber was her supervisor. For the first two months, plaintiff was in a training program during which she was required to come into the office every day for specific hours and perform various tasks assigned to her by defendant Gruber. During this two month period, plaintiff learned how to use defendants' computer system, how to use digital editing, how to set up her accounts and had her photo taken for defendants' website. During this time, plaintiff was also responsible for taking pictures of certain apartments for defendants' website and for the other real estate agents working for defendants. On or about July 31, 2013, plaintiff obtained her real estate license and was promoted to the title of Real Estate Agent. As a Real Estate Agent, defendants provided plaintiff access to many listings for apartments throughout New York City and plaintiff was tasked with marketing those listings using resources provided by defendants.

From the time plaintiff was hired in July 2013, defendant Gruber would frequently review plaintiff's work and question her about how she was performing her work. Plaintiff alleges that beginning in or around October 2013, defendant Gruber began to "sexually harass" her by making inappropriate comments about her looks and her body. Specifically, plaintiff alleges that defendant Gruber told her she needed to use her looks to rent apartments and take clients out for drinks and that her "qualifications" were her looks and her body. Plaintiff alleges that such treatment continued for months but that she ignored the comments and attempted to perform her job.

On or about December 13, 2013, defendant Caliber held its annual holiday party which plaintiff attended. Plaintiff alleges that at the end of the party, she and a friend from Caliber decided to leave and go to a local bar and that defendant Gruber joined them although he was not

invited. Plaintiff alleges that she was intoxicated at the bar and that defendant Gruber began to touch her without her consent by “grabbing her buttocks, breasts and pulling her onto his lap” but that she rejected defendant Gruber’s advances. Plaintiff further alleges that outside of the bar, defendant Gruber again began to touch her without her consent “by grasping her hand and forcing her to reach down his pants until she could feel his pubic hair.” Plaintiff alleges that when she pulled her hand away, defendant Gruber told her “it’s ok, nobody is going to know, nobody is going to see, it’s fine” but that she forcefully objected to defendant Gruber’s advances. Following the incident, plaintiff resigned from her position at Caliber and commenced the instant action against defendants alleging causes of action for violations of the NYCHRL and for battery. Defendants now move for an Order pursuant to CPLR §§ 3211(a)(1) & (7) dismissing the complaint.

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). Moreover, on a motion to dismiss pursuant to CPLR § 3211(a)(7), the complaint is to be afforded a liberal construction and the court must “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.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, “bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence...are not presumed to be true on a motion to dismiss

for legal insufficiency.” *O’Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154 (1st Dept 1993).

As an initial matter, defendants’ motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff’s second cause of action for aiding and abetting discrimination in violation of New York City Administrative Code (“Admin. Code”) § 8-107(6), which prohibits “any person to aid, abet, incite, compel...or coerce the doing of any of the acts forbidden under this chapter” is granted without opposition as “[p]laintiff concedes that Defendant Gruber could not aid or abet his own actions.” Additionally, it is well-settled that a corporation may not aid, abet, incite or compel discrimination or retaliation under the NYCHRL. *See Malena v. Victoria’s Secret Direct, LLC*, 886 F. Supp.2d 349 (S.D.N.Y. 2012).

Further, defendants’ motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff’s third cause of action for interference with protected rights in violation of Admin. Code § 8-107(19), which prohibits “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...any right granted or protected pursuant to this section” is granted without opposition as “[p]laintiff concedes that her claims for interference with protected rights should be dismissed” as she has not alleged that defendants actually interfered with any protected activity she has engaged in.

Defendants’ motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff’s fifth cause of action for retaliation is also granted. To sufficiently plead a cause of action for retaliation, plaintiff must allege that “(1) she has engaged in a 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 N.Y.3d 295, 312-13 (2004). Here, plaintiff fails to state a cause of action for retaliation as she has not alleged that she suffered an adverse employment action based upon engaging in a protected activity. Indeed, plaintiff “concedes that her claim for retaliation cannot be sustained” as she “resigned rather than wait to be terminated by Defendants after she engaged in the protected activity of objecting to sexual advances of her employer.”

However, defendants’ motion for an Order pursuant to CPLR § 3211(a)(1) dismissing plaintiff’s first cause of action for sexual harassment pursuant to Admin. Code § 8-107(1) on the ground that plaintiff lacks standing to bring said claim because she was an independent contractor is denied. To “recover under New York’s Human Rights Law, a plaintiff must demonstrate that he or she had an employment relationship with the defendant employer.” *Strauss v. New York City Dep’t of Education*, 26 A.D.3d 67, 69 (3d Dept 2005). It is well-settled that the “NYCHRL...excludes independent contractors from protection.” *Hopper v. Banana Republic, LLC*, 2008 WL 490613 at *3 (S.D.N.Y. 2008); *see also* Admin. Code § 8-107(1). However, “[w]hether a hire is a common-law employee or independent contractor depends on factors including, *inter alia*, the hiring party’s right to control the work, whether the hiring party provides the hired party’s benefits, the duration of the parties’ relationship, and how payment is made.” *Hopper*, 2008 WL 490613 at *3; *see also* *Scott v. Massachusetts Mut. Life Ins. Co.*, 86 N.Y.2d 429, 433 (1995)(“It is by now well settled that ‘a determination that an employer-employee relationship exists may rest upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results.’”) Further, the existence of an agreement between a plaintiff and defendant that states that plaintiff is an independent

contractor is not conclusive evidence that an employee-employer relationship does not exist. *See Murphy v. ERA United Realty*, 251 A.D.2d 469, 470 (2d Dept 1998)(“Although it is undisputed that the plaintiff signed an agreement stating that she was an independent contractor,...it cannot be said as a matter of law that the plaintiff was an independent contractor” based on the terms of the agreement and relationship between plaintiff and defendant).

Here, defendants’ motion to dismiss plaintiff’s first cause of action for sexual harassment on the ground that she is an independent contractor is denied as the documentary evidence provided by defendant fails to definitively dispose of plaintiff’s claim. In support of their motion, defendants provide a copy of the employment agreement signed by the plaintiff which states that plaintiff “shall be treated as an independent contractor for all purposes.” However, the agreement is not dispositive and does not resolve all factual issues regarding plaintiff’s employment status. Indeed, the case law makes clear that whether a plaintiff is an employee or an independent contractor turns on many factors, including, *inter alia*, the amount of control defendant exerted over plaintiff and whether benefits were provided to plaintiff. Defendants’ assertion that even taking those other factors into account, plaintiff was still an independent contractor is without merit as such assertion is only properly made on a motion for summary judgment. As this is a motion to dismiss, the court must take plaintiff’s allegations in the complaint as true. Here, the complaint sufficiently alleges the existence of an employee-employer relationship, specifically stating “[t]hat at all times relevant hereto, Plaintiff Dominguez was an employee of Defendant Caliber,” that defendant Caliber was her employer and that “Defendant Gruber was Plaintiff Dominguez’s supervisor and had supervisory authority over [her].”

Further, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's fourth cause of action alleging discrimination in violation of Admin. Code § 8-107(13), which provides for employer liability for discriminatory conduct by an employee, agent or independent contractor, is denied as plaintiff sufficiently alleges discriminatory conduct by defendant Gruber and alleges that defendant Gruber is the owner and employee of defendant Caliber. Defendants' assertion that such cause of action must be dismissed on the ground that it merely "reflect[s] the standard for imputing liability to an employer for acts of an employee and [does] not create a separate cause of action" is without merit. To support such assertion, defendant relies on the District Court's decision in *Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ.*, 2012 WL 4483046 (E.D.N.Y. 2012), a case that involved allegations of gender discrimination. However, defendants' reliance on the *Filippi* decision is misplaced as such decision did not address the issue of whether an allegation of discrimination in violation of Admin. Code § 8-107(13) may be brought as its own cause of action. Indeed, courts have held that a violation of Admin. Code § 8-107(13) may be maintained as its own cause of action. *See Artis v. Random House, Inc.*, 34 Misc.3d 858, 866 (Sup. Ct. N.Y. Co. 2011) ("Under the City Human Rights Law, ...plaintiff would state a claim for defendants' vicarious liability...since she alleges that defendants' employees or agents ordered and carried out the retaliation. N.Y.C Admin. Code § 8-107(13)(a).")

Finally, defendants' motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's sixth cause of action for battery must be denied. To sufficiently plead a cause of action for battery, a plaintiff must allege an intentional touching of plaintiff's person without plaintiff's consent. *See Wende C. v. United Methodist Church*, 4 N.Y.3d 293, 298 (2005). Here,

