Renk v Renk
2020 NY Slip Op 33959(U)
November 25, 2020
Supreme Court, New York County
Docket Number: 153019/2020
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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KIMBERLY RENK, Index No. 153019/2020

Plaintiff

- against - DECISION AND ORDER

LINDA RENK, RICHARD J. RENK, JR., AND SEQUIN, LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for age discrimination, retaliation, a hostile work environment, and constructive discharge under the New York State and New York City Human Rights Laws, N.Y. Exec. Law § 296(1); N.Y.C. Admin. Code § 8-107, and for defamation. Defendants Linda Renk and Sequin, LLC, move to dismiss the amended complaint based on plaintiff's failure to plead any such claim against them. C.P.L.R. § 3211(a)(7).

II. THE AMENDED COMPLAINT

The amended complaint claims that Sequin, LLC, a costume jewelry manufacturing business that plaintiff co-founded and managed with her sister, Linda Renk (Linda), and Linda retaliated against plaintiff after she filed an action in 2018 to determine Sequin's ownership structure. Plaintiff claims that, after she filed the 2018 action, Linda began to attack plaintiff verbally

and physically in the presence of Sequin employees and customers and to undermine plaintiff's position within the company, assisted by their brother, defendant Richard J. Renk (RJ). Plaintiff alleges that Linda and RJ directed Sequin employees to exclude plaintiff from business communications, client meetings, and business travel plans under the guise of giving younger employees an opportunity to develop relationships with Sequin's international clients and with other manufacturers. Plaintiff complained repeatedly about this unfavorable treatment to Kelly St. Hilaire, the head of Sequin's human resources department, but the complaints did not prompt any investigation or intervention on plaintiff's behalf.

Plaintiff further claims that defendants either participated in or condoned a hostile work environment, in which other Sequin employees treated her unfavorably. Plaintiff alleges that Sequin employees unfairly blamed her for their unsatisfactory year-end bonuses, even though Linda had rebuffed plaintiff's repeated attempts to discuss annual employee bonuses and compensation structures and thus had excluded plaintiff from the bonus determinations that they previously had made together. Plaintiff further complained to Linda, demanding information about Sequin's finances and employees' compensation for which plaintiff believed she was being maligned.

Plaintiff also seeks to hold Sequin liable for condoning

defamatory statements, originating from an unidentified source, when a rumor circulated to her parents, aunt, and husband that plaintiff was intoxicated and incapacitated in her office. These statements prompted plaintiff and St. Hilaire to telephone plaintiff's parents to deny the accusation. St. Hilaire also accompanied plaintiff to a medical facility where plaintiff's blood was drawn, establishing her sobriety when the accusation was made.

On March 6, 2020, Sequin suspended plaintiff due to her "ongoing and unremedied misconduct." Aff. of Frederick Andrew Braunstein, Ex. A ¶ 73 and Ex. 11. Plaintiff claims her suspension resulted from her filing of the 2018 action, her subsequent complaints to Sequin's human resources department, and her insistence on knowing Sequin's finances and its employees' bonus structure.

III. STANDARDS APPLICABLE TO DEFENDANTS' MOTION

Upon defendants' motion to dismiss plaintiff's amended complaint under C.P.L.R. § 3211(a)(7), "defendants bear the burden of establishing that the complaint fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). In evaluating defendants' motion, the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in her favor. Id.; JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759,

764 (2015); Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dep't 2020). The court will not give such consideration, however, to allegations that consist of only bare legal conclusions, Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d at 5; Doe v. Bloomberg L.P., 178 A.D.3d 44, 47 (1st Dep't 2019), with which plaintiff's amended complaint is replete. Instead, the court accepts as true only plaintiff's allegations of facts that set forth the elements of a legally cognizable claim and from them draws all reasonable inferences in her favor. Dismissal is warranted if the amended complaint fails to allege facts that fit within any cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007).

IV. NEW YORK STATE AND NEW YORK CITY DISCRIMINATION CLAIMS

A. Age Discrimination

Plaintiff claims that defendants discriminated against her because of her age under both the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Laws (NYCHRL). N.Y.C. Admin. Code § 8-107(1)(a). Plaintiff herself alleges in her amended complaint, however, that defendants suspended her due to her ongoing and unremedied

misconduct, not due to her age. Nor does plaintiff allege that her age affected her salary or other employment benefits. Instead, plaintiff consistently attributes her unfavorable treatment to the action she filed in 2018, the unsatisfactory year-end bonuses for which she was blamed, and her subsequent complaints to Sequin's human resources department about her work environment and demands to Linda for information relating to the bonuses.

The only instance that plaintiff relies on to support an inference of age discrimination is when younger Sequin employees, instead of her, were chosen to attend a business meeting, combined with the fact that she was Sequin's second oldest employee. Plaintiff's own allegations demonstrate that this instance and other similar treatment marginalizing plaintiff from the business were not due to age discrimination by defendants. First, plaintiff alleges that only unidentified persons, not Linda or anyone in a supervisory capacity at Sequin, informed plaintiff that younger employees were sent to the meeting so they could develop their own professional relationships with Sequin's international clients and with other manufacturers. Second, plaintiff alleges that any such explanation of allowing "'younger' employees to take my place as an owner and partner in the organization" was simply a "guise" for the "concerted effort to discredit, defame, and malign my reputation and status in my

company." Braunstein Aff. Ex. A ¶ 61 and Ex. 7, at 1.

Thus, rather than claiming that defendants' reasons for their conduct were a pretext for age discrimination, plaintiff claims that giving younger employees opportunities was a pretext for defendants' efforts to diminish her stature with clients and business partners. See Cadet-Legros v. New York Univ. Hosp. Ctr., 135 A.D.3d 196, 200-201 (1st Dep't 2015); Bennett v. Health Management Sys., Inc., 92 A.D.3d 29, 45 (1st Dep't 2011). Even if defendants did not justify their conduct, inadequate or petty reasons are inconsequential as long as they are non-discriminatory. Forrest v. Jewish Guild for Blind, 3 N.Y.3d 295, 308 n.5 (2004).

Plaintiff unquestionably alleges unfavorable treatment, but any inference that the unfavorable treatment was based on her age would be pure speculation, because none of her allegations supports such a claim. See Sayeh v. 66 Madison Ave. Apt. Corp., 73 A.D.3d 459, 461 (1st Dep't 2010); Johnson v. Lord & Taylor, 25 A.D.3d 435, 435 (1st Dep't 2006). In fact, she admits that defendants treated her unfavorably because she filed a lawsuit in 2018, because they allowed Sequin employees to blame her unfairly for their insufficient bonuses, because she complained repeatedly to Sequin's human resources department about that hostility, and because she demanded information about Sequin's finances and employees' compensation. In sum, plaintiff's allegations,

accepted as true, fail to raise the inference that, even if defendants' conduct embarrassed or humiliated her, any denial of accommodations, advantages, or privileges was due to her age. McCabe v. Consulate Gen. of Can., 170 A.D.3d 449, 450 (1st Dep't 2019); Massaro v. Department of Educ. of the City of N.Y., 121 A.D.3d 569, 570 (1st Dep't 2014); Bennett v. Health Management Sys., Inc., 92 A.D.3d at 45-46. See Forrest v. Jewish Guild for Blind, 3 N.Y.3d at 307-308; Matias v. New York & Presbyt. Hosp., 137 A.D.3d 649, 650 (1st Dep't 2016); Wecker v. City of New York, 134 A.D.3d 474, 475 (1st Dep't 2015).

B. Retaliation

To establish retaliation under the NYSHRL, N.Y. Exec. Law § 296(1)(e) and (7), and NYCHRL, N.Y.C. Admin. Code § 8-107(7), plaintiff must demonstrate that she participated in a protected activity, that defendants knew of this activity and acted adversely against her, and a causal connection between the protected activity and adverse action. Akinde v. New York City Health & Hosps. Corp., 169 A.D.3d 611, 612 (1st Dep't 2019); Abe v. New York Univ., 169 A.D.3d 445, 447 (1st Dep't 2019); Massaro v. Department of Educ. of the City of N.Y., 121 A.D.3d at 569-70. See Bateman v. Montefiore Med. Ctr., 183 A.D.3d 489, 490-91 (1st Dep't 2020); Schmitt v. Artforum Intl. Mag., Inc., 178 A.D.3d 578, 584-85 (1st Dep't 2019); Petit v. Department of Educ. of the City of N.Y., 177 A.D.3d 402, 403-404 (1st Dep't 2019). Unlike

the NYSHRL, the NYCHRL expressly forbids retaliation "in any manner," N.Y.C. Admin. Code § 8-107(7); Williams v. New York City Hous. Auth., 61 A.D.3d 62, 70 (1st Dep't 2009), requiring a more liberal interpretation than state or federal anti-discrimination laws. N.Y.C. Admin. Code § 8-130; Albunio v. City of New York, 16 N.Y.3d 472, 477 (2011); Williams v. New York City Hous. Auth., 61 A.D.3d at 70. Plaintiff's alleged retaliation need not result in "an ultimate action," such as discharge or another materially adverse change in her employment, N.Y.C. Admin. Code § 8-107(7); Williams v. New York City Hous. Auth., 61 A.D.3d at 70; the retaliation only must be reasonably likely to deter plaintiff from engaging in protected activity. N.Y.C. Admin. Code § 8-107(7); Williams v. New York City Hous. Auth., 61 A.D.3d at 71.

Plaintiff claims defendants retaliated against her because she filed a lawsuit in 2018, subsequently complained to Sequin's human resources department about her treatment by other Sequin employees, and inquired about employees' compensation that she believed was a source of their hostility. While plaintiff unquestionably alleges retaliation, it was not due to protected activity as required to violate the NYSHRL or NYCHRL. Her 2018 lawsuit, complaints to Sequin's human resources department, and demands for information do not amount to protected activity, because none of that activity concerned any claimed discrimination based on her age. Sims v. Trustees of Columbia

Univ. in the City of N.Y., 168 A.D.3d 622, 622 (1st Dep't 2019); Cadet-Legros v. New York Univ. Hosp. Ctr., 135 A.D.3d at 206-207; Massaro v. Department of Educ. of the City of N.Y., 121 A.D.3d at 569-70; Whitfield-Ortiz v. Department of Educ. of City of N.Y., 116 A.D.3d 580, 581 (1st Dep't 2014). Plaintiff's 2018 lawsuit sought to determine Sequin's corporate ownership on grounds entirely unrelated to plaintiff's age. Massaro v. Department of Educ. of the City of N.Y., 121 A.D.3d at 570. Similarly, plaintiff's communications to Sequin's human resources department and demands to Linda did not include complaints of age discrimination. Sims v. Trustees of Columbia Univ. in the City of N.Y., 168 A.D.3d at 622; Whitfield-Ortiz v. Department of Educ. of City of N.Y., 116 A.D.3d at 581.

C. Hostile Work Environment

To establish a hostile work environment under the NYSHRL and NYCHRL, plaintiff must show that defendants created, encouraged, approved, condoned, or acquiesced in an objectively hostile or abusive workplace environment, which altered the conditions of her employment. N.Y. Exec. Law § 296(1); N.Y.C. Admin. Code § 8-107(1)(a) and (13)(b)(1); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d at 310-11; Bateman v. Montefiore Med. Ctr., 183 A.D.3d at 490; Doe v. Bloomberg L.P., 178 A.D.3d at 45, 48; Gordon v. Barock Sapir Org. LLC, 161 A.D.3d 480, 481 (1st Dep't 2018). Again, while plaintiff may allege that defendants actively

encouraged, approved, participated, or were involved in conduct that created a hostile work environment for her, she fails to allege the elemental facts of how defendants' hostility was based on her age. Mejia v. T.N. 888 Eighth Ave. LLC Co., 169 A.D.3d 613, 614 (1st Dep't 2019); Abe v. New York Univ., 169 A.D.3d at 447; Arifi v. Central Moving & Stor. Co., Inc., 147 A.D.3d 551, 551 (1st Dep't 2017); Llanos v. City of New York, 129 A.D.3d 620, 620 (1st Dep't 2015). Instead, she specifically alleges that her hostile work environment was motivated by defendants' "unbridled greed" and "concerted effort to literally steal Kimberley's ownership and equity interests in Sequin LLC." Braunstein Aff. Ex. A ¶ 2.

Plaintiff also claims that defendants condoned or acquiesced in her hostile work environment by not intervening or taking corrective action, but there was no hostility based on her age to intervene in or to correct. Defendants are not liable under the NYSHRL or NYCHRL for any hostile work environment. They are liable only for hostility based on plaintiff's membership in a protected class.

D. Constructive Discharge

To establish a claim of constructive discharge, plaintiff must show that defendants deliberately created working conditions so intolerable, difficult, or unpleasant that a reasonable person would be compelled to resign. Polidori v. Societe Generale

Groupe, 39 A.D.3d 404, 405 (1st Dep't 2007); Mascola v. City Univ. of New York, 14 A.D.3d 409, 410 (1st Dep't 2005). See Morris v. Schroder Capital Mgt. Intern., 7 N.Y.3d 616, 622 (2006). To establish defendant employers' deliberate conduct, plaintiff must show more than defendants' "lack of concern" and "mere negligence or ineffectiveness," Polidori v. Societe Generale Groupe, 39 A.D.3d at 405, distinguishing the conduct from the standard for an actionable hostile work environment. Gaffney v. City of New York, 101 A.D.3d 410, 411 (1st Dep't 2012).

At most, the amended complaint alleges Sequin's lack of concern and negligence about plaintiff's alleged hostile work environment. Even if Sequin's response to plaintiff's concerns was completely ineffective, negligence does not demonstrate the deliberateness required to sustain a claim for constructive discharge. La Porta v. Alacra, Inc., 142 A.D.3d 851, 852-53 (1st Dep't 2016); Polidori v. Societe Generale Groupe, 39 A.D.3d at 405-406; Mascola v. City Univ. of New York, 14 A.D.3d at 410.

Most significantly, once again plaintiff does not connect either defendant's creation of her intolerable work environment to her membership in a protected class. Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP, 116 A.D.3d 134, 141 (1st Dep't 2014); Polidori v. Societe Generale Groupe, 39 A.D.3d at 405-406; Mascola v. City Univ. of N.Y., 14 A.D.3d at 410. See Mejia v.

T.N. 888 Eighth Ave. LLC Co., 169 A.D.3d at 614. Moreover, even if she shows that Linda deliberately created the allegedly intolerable working conditions, plaintiff does not claim that those conditions forced her to resign. Hernandez v. Central Parking Sys. of N.Y., Inc., 63 A.D.3d 411, 411 (1st Dep't 2009). Instead, she alleges that Sequin suspended her from the company, contradicting her constructive discharge claim. Polidori v. Societe Generale Groupe, 39 A.D.3d at 405-406.

V. DEFAMATION CLAIMS

A defamation claim requires a false statement, disseminated without authorization or privilege to a third party, causing special damages or constituting defamation per se. Franklin v. Daily Holdings, Inc., 135 A.D.3d 87, 91 (1st Dep't 2015); Frechtman v. Gutterman, 115 A.D.3d 102, 104 (1st Dep't 2014). Plaintiff alleges that an anonymous individual, who plaintiff believes must be associated with Sequin, informed her mother that plaintiff was intoxicated and passed out in the Sequin offices. Even though plaintiff identified Linda as disseminating the defamatory statement, plaintiff does not claim against Linda, and the only evidence that plaintiff offers to support her belief is the absence of any denial after she charged Linda. Rather than claiming against Linda, plaintiff claims that Sequin is liable for the anonymous defamatory statement because St. Hiliaire failed to investigate the source of the false statement on

Sequin's behalf or restore plaintiff's reputation.

A. Slander

Even were the court to consider holding Sequin liable for the anonymous defamatory statement, plaintiff alleges that St. Hilaire accompanied plaintiff to a medical facility that drew her blood, verifying that plaintiff was not intoxicated in the workplace. St. Hillaire then verified plaintiff's sobriety to her parents. Thus plaintiff's own allegations show that Sequin and her parents, to whom the anonymous individual disseminated the defamatory statement, received proof that plaintiff was not intoxicated, eliminating any injury to plaintiff's reputation. Schmitt v. Artforum Intl. Mag., Inc., 178 A.D.3d at 589; 161 Ludlow Food, LLC v. L.E.S. Dwellers, Inc., 176 A.D.3d 434, 435 (1st Dep't 2019); Franklin v. Daily Holdings, Inc., 135 A.D.3d at 93.

B. Slander *Per Se*

Slander per se, which does not require special damages, is a statement (1) charging plaintiff with a serious crime, (2) that tends to injure her in her business or profession, (3) that she has a loathsome disease; or (4) imputing unchastity to a woman. Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992); Nolan v. State of New York, 158 A.D.3d 186, 195 (1st Dep't 2018). Plaintiff's allegations that an anonymous individual reported to plaintiff's mother that plaintiff "appeared to be drunk and was passed out at

her desk in the office during work hours," Braunstein Aff. Ex. A ¶ 118, amounts to slander per se because the statement injured plaintiff in her business or profession. Meer Enters., LLC v. Kocak, 173 A.D.3d 629, 631 (1st Dep't 2019); Torati v. Hodak, 147 A.D.3d 502, 504 (1st Dep't 2017); Frechtman v. Gutterman, 115 A.D.3d at 104. Although defendants insist that the qualification, plaintiff "appeared" to be intoxicated, transforms the statement into non-actionable opinion, an appearance of intoxication in the workplace during business hours is just as much a fact as actual intoxication and still injurious to plaintiff's business or profession. Certainly being "passed out at her desk" conveys plaintiff's incapacity to carry out her professional duties.

Nevertheless, while plaintiff claims that Sequin is liable for this statement because St. Hilaire failed to investigate its source and restore the presumed damage to plaintiff's reputation from the statement, Sequin may be held vicariously liable for its employee's slander in the first instance only if its employee committed the slander in the course of employment. Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 377 (1986). See Pehzman v. City of New York, 29 A.D.3d 164, 168 (1st Dep't 2006). Plaintiff's failure not only to specify definitively that Linda or another Sequin employee made the report to plaintiff's mother, but also to specify any of the circumstances of that report to

indicate that it was in the course of the speaker's employment with Sequin, is fatal to her slander claim against Sequin, even if the report constitutes slander per se.

VI. CONCLUSION

For the reasons explained above, the court grants the motion by defendants Linda Renk and Sequin, LLC, to dismiss the amended complaint against them for age discrimination, retaliation, a hostile work environment, constructive discharge, slander, and slander per se. C.P.L.R. § 3211(a)(7).

DATED: November 25, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.