[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 103104/2010
PUGLIESE, LISA
VS.
ACTIN BIOMED LLC
SEQUENCE NUMBER : 001
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 08 2011
COUNTY CLERK'S OFFICE
NEW YORK

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court

Dated: 4/8/11

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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LISA PUGLIESE,

Plaintiff,

Index Number 103104/2010
Submission Date 1/12/11
Mot. Seq. No. 001
DECISION and ORDER

ACTIN BIOMED LLC, ARCHER BIOSCIENCES, MICHAEL WEISER, MD, JASON STEIN, MD, SANDRA SILBERMAN, AND STUART GREEN, ESQ.

Defendants.

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Appearances:

For Plaintiff :
Bader Yakaitis & Nonnenamacher LLP
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212-465-1110

For Defendants:
Wilson Elser Moskowitz Edelman & Dicker LLP
By Ricki E. Royer, Esq.
Celena R. Mayo, Esq.
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212-490-3[illegible]

Papers considered in review of this motion and cross-motion :

Papers	**Numbered**
Notice of Motion/Affid/Memo. in Supp. of Mot.	1
Affirm. of Counsel in Opp. to Defendant's Mot.	2
Notice of Cross-Motion/Affid/Memo in Supp.	3
Affirm in Opp. to Cross-Motion	4
Reply Memo. in Further Supp.	5

HON SALIANN SCARPULLA, J.:

Plaintiff Lisa Pugliese ("Pugliese") commenced this employment action in Supreme Court, New York County, in March, 2010. Instead of serving an answer, defendants removed the action to the United States District Court for Southern District of New York. Defendants then made a pre-answer motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). In response, Pugliese withdrew the fourth, sixth, seventh and

eighth causes of action, all federal law claims, as a result of which the federal court, by order dated June 29, 2010, remanded the action back to this Court.

In the complaint, Pugliese alleges that as vice-president of defendant Archer Biosciences, Inc., ("Archer") she was "subject to and forced to participate in what can best be termed as severe regulatory improprieties performed by each of the individually named defendants." Defendants Michael Weiser, MD ("Weiser"), Jason Stein, MD ("Stein") and Sandra Silberman, MD ("Silberman") are the owners of Archer, with defendant Stuart Green Esq. ("Green") serving as general counsel to defendant Action Biomed LLC ("Actin") (hereinafter collectively "defendants"), Archer's parent company.

In paragraph 89 of the complaint Pugliese alleges that the corporate malfeasance included "the treatment of patients with expired drugs, reporting inaccurate data to the FDA, falsifying data, falsifying the results of clinical testing, falsifying and/or misrepresenting clinical results, lack of regulatory oversight, lack of drug accountability, lack of safety oversight and questionable data being submitted to the FDA." Because of her refusal to acquiesce, Pugliese alleges defendants subjected her to severe and pervasive hostility in retaliation and in attempt to force her to quit.

Pugliese also alleges that defendants created a hostile work environment by pervading it with unwelcome sexually charged comments and oral and electronic communications. Pugliese alleges that "the pervasive and inappropriate sexually explicit workplace environment was also reflected in the routine use of profane and misogynistic

language used throughout the office and during meetings." As a result of the aforesaid alleged conduct, in April, 2009, when the company relocated from New Jersey to New York City, Pugliese was allegedly compelled to take medical leave and not return to the headquarters again.

Pugliese's remaining non-federal claims allege: (1) gender-based discrimination under New York City Human Rights Law ("HRL") § 8-107(1)(a) (first cause of action); (2) retaliatory conduct under HRL § 8-107(7)(I) (second cause of action); (3) retaliatory conduct under New York Labor Law ("Labor Law") §740, "the whistleblower law,"[1] (third cause of action); (4) vicarious liability against Archer and Actin (the fifth cause of action); (5) breach of contract (the ninth cause of action); (6) promissory estoppel (the tenth cause of action); (7) libel and slander (the eleventh and twelfth causes of action); (8) intentional tortious interference with business and contracts (the thirteenth cause of action); (9) "intentional infliction of a harm hostile environment" (the fourteenth cause of action); and (10) negligent infliction of harm (the fifteenth cause of action).

Pugliese now moves for default judgment under CPLR 3215(a) as defendants had not interposed an answer in two months following remand. Defendants oppose the default motion, arguing that because Pugliese never served them with a copy of the remand order with notice of entry, defendants' time to answer the complaint has not lapsed.

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[1]Pugliese does not specifically mention Labor Law § 740 in her complaint, but she concedes throughout her papers that § 740 is at issue in her third cause of action.

Defendants cross-move for dismissal of the remaining claims under CPLR 3211(a)(1),(7). In their cross-motion, defendants argue that Archer does not fall under the definition of "employer" pursuant to HRL § 8-102(5), because Archer allegedly employed only three employees. In support, defendants attach an uncertified copy of what is alleged to be part of the payroll record for the relevant period.

In addition, defendants offer countless citations to federal caselaw to support their argument that Pugliese may not maintain her discrimination and retaliation causes of action, because Pugliese failed to "plead specific and sufficient facts that establish a workplace was so 'permeated with discriminatory intimidation, ridicule and insult' as to render it actionable." (Def. Brief, ¶ 18). Defendants also argue that on the basis of federal precedent and the First Department ruling in *Mascola v City Univ. of N.Y.* (14 A.D.3d 409, 410 (1st Dep't 2005)), Pugliese failed to allege sufficiently severe and pervasive work conditions to plead constructive discharge.

With respect to the retaliation claims, defendants argue that Pugliese has not sufficiently pled that she participated in a qualifying protected activity prior to any alleged adverse employment action, because she never alleged to have filed any complaints of discrimination with Archer. Defendants also argue that the complaint has not established the existence of adverse employment action, such that materially alter the terms of her employment. (Def. Brief, ¶ 27).

In the alternative, defendants argue that the "election of remedies" provision in Labor Law § 740(7) provides that a litigant who brings a claim under this law perforce waives any and all rights and remedies otherwise available to her, "arising from the same course of conduct," "under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." Accordingly, defendants submit that Pugliese's state law claims, including the HRL causes of action, must be dismissed. Finally, defendants attack Pugliese's Labor Law § 740 claim on the ground that Pugliese has not sufficiently particularized "a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety." The rest of the defendants' cross-motion concerns dismissal of the remaining state causes of action.

Because Pugliese opposes the dismissal of only the HRL and whistleblower causes of action, the Court deems the ninth cause of action for breach of contract, the tenth cause of action for promissory estoppel, the eleventh cause of action for libel, the twelfth cause of action slander, the thirteenth cause of action for intentional tortious interference with business and contracts, the fourteenth cause of action for "intentional infliction of a harm hostile environment," and the fifteenth cause of action for negligent infliction of harm to be abandoned and dismisses them. *See Genovese v Gambino*, 309 A.D.2d 832, 833 (2nd Dep't 2003).

Discussion

Pugliese does not contend that she served defendants with the June 29, 2010 order with notice of entry, remanding this action back to this state court. As a result, defendants' time to answer the complaint has not lapsed. Moreover, and in any event, to the extent that defendants defaulted in answering the complaint, the defendants have shown a reasonable excuse and potentially meritorious defense. For all the foregoing reasons, Pugliese's motion for a default judgment is denied.

With respect to the cross-motion, upon considering an application pursuant to CPLR 3211(a), the court must afford the pleading a liberal construction, "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). It is only where the factual allegations in the complaint are "flatly contradicted by documentary evidence" or consist of bare legal conclusions that they are not presumed to be true or accorded every possible favorable inference. *See Biondi v Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999); CPLR 3211 (a)(1),(7).

To succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby

definitively disposing of the opposing party's claims. *Leon*, 84 N.Y.2d at 88; *see also Fischbach & Moore v Howell Co.*, 240 A.D.2d 157, 157 (1st Dep't 1997).

In *Williams v New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009), *lv denied* 13N.Y.3d 702 (sexual harassment), *Phillips v City of New York*, 66 A.D.3d 170, 176 (1st Dep't 2009) (disability discrimination), and *Vig v The New York Hairspray Co., L.P.*, 2009 N.Y Slip. Op. 6466, *6 (1st Dep't 2009) (disability discrimination), the Appellate Division, First Department, reminded the lower courts that they must separately analyze discrimination cases arising in New York City under the more expansive New York City's 2005 Local Civil Rights Restoration Act ("the Restoration Act"). Not only is the federal caselaw not instructive in the analysis of the HRL § 8-107, but pre-the Restoration Act state precedent must be reviewed anew. *Williams* 61 A.D.3d at 79.

The core of the Restoration Act was the revision of Administrative Code § 8-130, the construction provision of the HRL. The Restoration Act clarified and reinforced that construction of New York City Human Rights Law should be more expansive and remedial than, and independent of, its federal and state counterparts. *Williams*, 61 A.D.3d at 66. The Restoration Act provides that the provisions of the HRL were previously construed too narrowly to ensure protection of the civil rights of all persons covered by law, and mandates that the interpretations of the state or federal provisions should be viewed as a "floor" below which the HRL cannot fall rather than a "ceiling" above which it cannot rise. *Williams*, 61 A.D.2d at 67-68 (quoting Restoration Act § 1).

In *Williams*, the First Department rejected adoption of the federal prerequisite for a claim of retaliation that plaintiff establish at the pleading stage "materially adverse impact on terms and conditions of employment." Instead, the First Department wrote that "[i]n assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities." *Williams*, 61 A.D.3d at 71.

On a claim of sexual harassment, the court in *Williams* also spurned the requirement that the alleged harassment be "severe and pervasive," because this standard "'assign[ed] a significantly lower importance to the right to work in an atmosphere free from discrimination' than other terms and conditions of work." Williams, 61 A.D.3d at 73 (citing *Judith J. Johnson, License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment,* 62 Md. L. Rev. 85, 87 (2003)). In addition, in *Williams,* the First Department noted that the HRL does not distinguish between gender discrimination and gender harassment, and adopts a single zero-tolerance standard that any "unequal treatment based on gender regardless of whether the conduct is 'tangible' (like hiring or firing) or not" is actionable. *Williams*, 61 A.D.3d at 79.

Using the more broad standards of the HRL, particularly as interpreted by the Appellate Division in *Williams,* the Court cannot say, at this stage in the proceedings, when no discovery has taken place, that Pugliese's allegations are legally insufficient to set forth a claim. Pugliese alleged that she witnessed defendants, Archer's owners and directors, exchange gender-related communications on the subject of Pugliese's sexual characteristics and body parts, the activities had carried no legitimate business purpose and are prohibited under the HRL. *See Midamerica Prods., Inc. v Derke*, 2009 N.Y. Slip. Op. 30719U, *7-8 (Sup. Ct., New York County, March 30, 1999) (rejecting *Mascola v City Univ. of N.Y.* ,14 A.D.3d 409, 410 (1st Dep't 2005) as overruled by *Williams*). Also, on the papers submitted, Archer has not shown as a matter of law that it is not an "employer" under the HRL § 8-102(5), because defendants submitted hearsay payroll records in an inadmissible form and did not address the issue of independent contractors, who also count towards the minimum person-in-the-employ requirement.

However, while Pugliese has sufficiently stated causes of action for discrimination and retaliation under the HRL, the Court, pursuant to Labor Law § 740(7), must nonetheless dismiss these causes of action as waived by Pugliese's election to plead a whistleblower cause of action. Labor Law § 740(7) states that:

> Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

The courts have limited this waiver to all claims that "arise out of the same acts" as those that gave rise to the Labor Law § 740, and/or that "relate to" the retaliatory actions on which the whistleblower cause of action is based. *Bordan v North Shore University Hosp.*, 275 A.D.2d 335, 336 (2nd Dep't 2000). The waiver operates upon the filing and service of the complaint containing the whistleblower cause of action, and is not affected by whether plaintiff withdraws the Labor Law § 740 cause of action or whether the court dismisses it. *See Reddington v Staten Island University Hosp.*, 11 N.Y.3d 80, 87-88 (2008).

Here, all of Pugliese's causes of action arise out of the same acts as those that gave rise to the Labor Law § 740 claim, and all are related to the retaliatory actions on which the whistleblower claim is based. *See Owitz v Beth Israel Medical Center*, 2004 N.Y. Slip. Op. 50046U, *4 (Sup. Ct., New York Co., January 29, 2004) (dismissing sexual harassment claims). As in *Owitz*, in each cause of action, Pugliese "repeats and realleges" everything that went before, relying on the same allegations of fact to support both the HRL causes of action and the whistleblower claim.

Further, Pugliese alleges that Archer's wrongful constructive termination relates to both the gender discrimination and retaliation and discrimination arising from Pugliese's objections to defendants' alleged unlawful activities. *Bones v Prudential Fin., Inc.*, 54 A.D.3d 589, 589 (1st Dep't 2008). In pleading a whistleblower cause of action, Pugliese has waived all other claims which arise out of the defendants' alleged adverse

employment actions.[2] Thus, the first and second causes of action for gender discrimination and retaliation are dismissed. *See Reddington*, 11 N.Y.3d at 80 (assertion of whistleblower claim under Labor Law § 740 required dismissal of, among others, age discrimination claim); *See Owitz*, 2004 N.Y. Slip. Op. 50046U, at 4 (Sup. Ct., New York Co., January 29, 2004) (dismissing sexual harassment claims).

The remaining Labor Law § 740 cause of action itself is insufficiently stated. It is essential to the viability of a Labor Law § 740 claim that plaintiff specify the law, rule or regulation that has actually been violated by defendants' behavior and describe how defendants' activities have endangered the health or safety of the public. *Cohen v Hunter College*, 80 A.D.3d 452, 452 (1st Dep't 2011); *Blumenreich v North Shore Health System, Inc.*, 287 A.D.2d 529, 530 (2nd Dep't 2001). Here, while Pugliese accuses defendants, among other things, of reporting inaccurate data to the FDA, falsifying the results of clinical testing and treating patients with expired medications, the complaint does not specify what federal and state laws and regulations defendants allegedly violated. Such general description of legal violations is conclusory and is insufficient to state Labor Law § 740 cause of action. *See Pail v Precise Import Corp.*, 256 A.D.2d 73, 74 (1st Dep't 1998) (allegations that defendants violated its federal and state tritium

[2]While the Court dismissed causes of action nine through fifteen as abandoned, these claims would also have been deemed waived by reason of Pugliese's assertion of a Labor Law § 740 cause of action.

distribution licenses). The complaint is also silent on the effect, if any, the alleged violations have on "the health and safety of the public."

Because Pugliese elected to file a whistleblower cause of action, she has waived assertion of her other causes of action arising out of the same alleged conduct. Additionally, as Pugliese has failed to sufficiently plead her whistleblower cause of action, that too must be dismissed

In accordance with the foregoing, it is

ORDERED that plaintiff's motion for a default judgment against defendants pursuant to CPLR 3215 is denied; and it is further

ORDERED that defendants' cross-motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/7/11
New York, New York

FILED
ENTER:
APR 08 2011
Salvatore Scarpulla, J.S.C.
NEW YORK
COUNTY CLERK'S OFFICE