

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

480

CA 24-00817

PRESENT: CURRAN, J.P., BANNISTER, DELCONTE, AND HANNAH, JJ.

REBECCA J. KLYMN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SUPREME COURT, MONROE COUNTY, UNIFIED COURT
SYSTEM OF STATE OF NEW YORK, OFFICE OF COURT
ADMINISTRATION AND OFFICE OF THE MANAGING
INSPECTOR GENERAL FOR BIAS MATTERS,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), AND
LAW OFFICE OF ANNA MARIE RICHMOND, BUFFALO, FOR PLAINTIFF-APPELLANT.

DAVID NOCENTI, OFFICE OF COURT ADMINISTRATION, NEW YORK CITY (PEDRO
MORALES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Michael
Siragusa, A.J.), entered April 30, 2024. The order granted
defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion is denied,
and the complaint is reinstated.

Memorandum: Plaintiff, the former secretary to a former New York
State Supreme Court Justice, commenced this action against Supreme
Court, Monroe County, Unified Court System of the State of New York,
Office of Court Administration, and Office of the Managing Inspector
General for Bias Matters (collectively, defendants) alleging, inter
alia, that defendants discriminated against her on the basis of sex in
violation of the Human Rights Law ([NYSHRL] Executive Law § 290 *et*
seq.), in relation to alleged sexual abuse and harassment of plaintiff
by the former Justice. Plaintiff now appeals from an order that,
inter alia, granted defendants' pre-answer motion to dismiss the
complaint pursuant to CPLR 3211 (a) (7) and (c) on the grounds that,
inter alia, plaintiff was not defendants' employee and therefore
defendants were not liable under the NYSHRL. We reverse the order,
deny the motion, and reinstate the complaint.

Initially, absent from the record is any indication that Supreme
Court, Erie County, provided adequate notice to the parties that it
was treating defendants' motion as one for summary judgment and we
therefore review plaintiff's contentions in the context of a motion to
dismiss pursuant to CPLR 3211 (a) (7) (*see* CPLR 3211 [c]; *Mihlovan v*

Grozavu, 72 NY2d 506, 508 [1988]; *Ward v Guardian Indus. Corp.*, 17 AD3d 1100, 1101 [4th Dept 2005]; *Costanza Constr. Corp. v City of Rochester*, 135 AD2d 1111, 1111-1112 [4th Dept 1987]). Here, we agree with plaintiff that the complaint states a cause of action against defendants for a violation under the NYSHRL. "On a motion to dismiss pursuant to CPLR 3211 (a) (7), [this Court] must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference" (*Van Ostrand v Latham*, 222 AD3d 1382, 1383 [4th Dept 2023] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "The court may also consider affidavits and other evidentiary material to establish conclusively that plaintiff has no cause of action" (*Tauro v Gait*, 158 AD3d 1261, 1262 [4th Dept 2018] [internal quotation marks omitted]). Additionally, as with the allegations of the complaint, this Court must accept as true plaintiff's submissions in opposition to the motion (see *id.*).

Supreme Court granted defendants' motion because it determined, inter alia, that "[t]he evidentiary proof conclusively establishes that . . . plaintiff was not the employee of any of the named defendants." Here, however, "accept[ing] the facts as alleged in the complaint as true [and] accord[ing] plaintiff[] the benefit of every possible favorable inference" (*Stevens v Perrigo*, 122 AD3d 1430, 1430 [4th Dept 2014] [internal quotation marks omitted]), we conclude that plaintiff sufficiently alleged that defendants were plaintiff's employers (see *Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; see *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082, 1083 [4th Dept 1985]). "[T]he really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter" (*Griffin*, 29 NY3d at 186 [internal quotation marks omitted]; see also *PB-20 Doe v St. Nicodemus Lutheran Church*, 228 AD3d 1233, 1234 [4th Dept 2024]). We conclude that plaintiff sufficiently alleged an employment relationship by alleging factors including that defendants paid plaintiff's salary (see *GTE Corp.*, 109 AD2d at 1083) and had the power to control plaintiff's conduct (see generally *PB-20 Doe*, 228 AD3d at 1234-1235).