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

PRESENT: DIANE A. LEBEDEFF PART 8

012024612003

LUCARELLI, LYDIA
VS
PARZIALE, GARY

INDEX NO. 3

MOTION SEQ. NO.

MOTION CAL. NO. 66

SEQ 1
DISMISS ACTION

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1—7
Answering Affidavits — Exhibits	

FILED
JUL 14 2004
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JUL 08 2004

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
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LYDIA LUCARELLI,

Plaintiff,

-against-

Index No. 120246/03
Mot. Seq. No. 001

GARY PARZIALE, individually and in his capacity as an agent of TFS Energy Futures, LLC, and TFS ENERGY FUTURES, LLC,

Defendants.

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DIANE A. LEBEDEFF, J.:

Defendants Gary Parziale ("Parziale") and TFS Energy Futures, LLC ("TFS"), move to dismiss the first and fourth causes of action on statute of limitations grounds (CPLR 3211 [a] [5]), and the remaining discrimination claims for failure to state a cause of action (CPLR **3211 [a]** [7]).

It is noted the organizational defendant sued herein was originally named. Tradition Financial Services ('Tradition"). Following the making of the instant motion, the parties stipulated that plaintiff could file an amended complaint substituting TFS Energy Futures, LLC ("TFS") for Tradition. The amended caption is set forth above. However, the only affidavit supporting the motion was signed by a Tradition official and makes statements of facts relating to Tradition and Parziale. No further affidavit has been submitted on behalf of either defendant. Accordingly, any factual arguments raised on behalf of the defendants are disregarded as unsupported.

Background

Plaintiff alleges she was employed "as a screen clerk at the New York Mercantile Exchange" ("NYMEX"), the leading futures exchange for oil, natural gas and other energy products. Her job entailed clearing trades for seven individual brokers who were in turn employed by member trading firms or brokerages. She alleges that defendant Parziale was a broker employed by TFS, and that both defendants are members of NYMEX, which "regulated and controlled ... all day to day employment activities" of both plaintiff and Parziale.

Plaintiff alleges that in March of 2001, Parziale verbally harassed her by calling her an extremely offensive epithet and touched her leg without permission. She further alleges, on information and belief, that in April of 2001, Parziale wrote obscene graffiti about her on the walls of the men's bathroom at NYMEX, where it remained for months. Indeed, in mid-June of 2001, plaintiff was told the graffiti had not been removed and that more graffiti had been added.

Plaintiff allegedly complained to NYMEX, and to Parziale's supervisor at TFS, identified as "Scooter," but both ignored her complaints. She also alleges that she lost weight, became emotionally and physically sick, and her work suffered from the stress and anxiety, causing lost earnings. Further, plaintiff alleges that one of the brokers who employed her to clear trades, asked her if she was planning to sue NYMEX, and then fired her on or about August 7, 2001, and that at an unspecified time "plaintiff was forced to leave working at Defendants," apparently referring to NYMEX.

In October of 2001, plaintiff commenced an action naming NYMEX, Parziale and TFS, which remains pending against NYMEX (*Lucarelli v. New York Mercantile Exchange, et al.*, Index No. 119749/01, the "NYMEX Action"). Defendants Parziale and TFS did not appear or answer in the NYMEX Action. Plaintiff did not move for a default or take any other action to prosecute the claims against them therein. There is no proof of service as to these defendants nor any motion requesting extension of time to serve.

Instead, in November of 2003, plaintiff commenced the instant action, containing many of the same allegations asserted in the NYMEX Action. An amended complaint herein was filed in February of 2004, to correct the name of the corporate defendant and the date she stopped working for NYMEX.

In opposition to the motion to dismiss, plaintiff submits an affidavit including new allegations that she became so sick from the harassment that she "had to take July and August 2001 off from work," and that the harassment and retaliation continued when she returned to work in September of 2001. Plaintiff avers that in September and October of 2001, Parziale told "everyone at NYMEX' not to talk to her or hire her, or she would sue them. She further asserts that, as a result of Parziale's statements, and in retaliation for her complaints about sexual harassment, she was fired by five of the seven brokers for whom she cleared trades, resulting in the loss of most of her income, and that she was ostracized by other women and brokers at NYMEX. Plaintiff alleges that she eventually left NYMEX, because she could no longer take the harassment and had lost most of her income,

Intentional** Tort **Claims

The intentional torts alleged in the first and fourth causes of action are governed by the one-year statute of limitations (CPLR 215 [3]). The conduct forming the basis for the claims – respectively sounding in defamation and intentional infliction of emotional distress – are identified as having occurred in March and April of 2001, over two years before the instant complaint was filed.

In part, plaintiff urges that these claims are timely because she allegedly suffered from a "patted' of harassment and intimidation, continuing until she **was** forced to leave **work** in August of 2003. However, even if this view were adopted, a complaint must allege some wrongful action occurred within the limitations period *(Shannon v. **MTA Metro-North** R.R.*, **269** A.D.2d 218,219 [lst Dept. 20001, "the continuing tort doctrine **...** permit[s] the plaintiff to rely on wrongful conduct occurring more than one year prior to commencement of the action, so long **as** the final actionable event occurred within one year of the suit"). The complaint, even as amplified by plaintiffs affidavit, contains no allegations of specific defamatory words published by the named defendants, or specific instances of outrageous conduct on the **part** of such defendants, within the year **prior** to commencement of this action. Accordingly, the claims appear to be stale.

Next, plaintiff argues the action is nevertheless timely under **CPLR** 205 (a), which provides, that if an action is "timely commenced and terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits," then plaintiff may commence a new action within six months after termination of

an earlier suit. Plaintiff asserts entitlement to recourse to this provision because the defendants were timely sued in the NYMEX Action and, rather than seeking a default against them, plaintiff commenced the instant action.

This contention is unsupportable as to TFS because the first action named Tradition, not TFS, as the defendant. For such reason, the arguments regarding CPLR 205 (a) are applicable only to the individual defendant.

As to the individual defendant, plaintiff fails to advance any proof of service of the initial action upon him and an inspection of the County Clerk's file reveals no proof of such service, no appearance on his behalf, and no service of any subsequent papers upon him by either plaintiff's or NYMEX's counsel. To have recourse to CPLR 205 (a), there must be a showing that there was an earlier commencement of litigation *(George v. Mt. Sinai Hospital,* 47 N.Y.2d 170, 175 [1979], discussing CPLR 205 [a], "In addition to the listed exceptions, the courts have created one apparent additional exception, holding that if the first action was never properly commenced because of a failure to serve the defendant, the statute is inapplicable"). Accordingly, there is a want of support for plaintiff's contention that the first action was either "timely commenced" or commenced at all.

Even if it were assumed *arguendo* that an earlier action might have been commenced, plaintiff advances nothing to show the initial action was "terminated" *(Gem Flooring, Znc. v. Kings Park Industries, Inc.,* 5 A.D.3d 542, 544 [2d Dept. 2004], "Under CPLR 306-b, as amended in 1997, a plaintiff must still serve a defendant within 120 days, but the action is no longer 'deemed dismissed' if service is not made within that time period. Rather, the statute provides that 'the court, upon motion, shall dismiss the action

without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.' Here, there was no showing in the record that the plaintiff effected service of the first action upon [defendant] within 120 days after the filing of the action, and the plaintiff never moved to extend its time to effect service. Thus, the plaintiff could not avail itself of CPLR 205 [a]" [citations omitted]), No showing of the termination of the prior action having been advanced here, this argument is found unavailing.

Eased on the foregoing, the first and fourth causes of action are severed and dismissed.

Discrimination Claims

The second and third causes of action allege violations of the provisions of New York State and New York City law prohibiting sexual harassment, retaliation and discrimination in employment (New York State Executive Law §§ 292 [11,296[2], [6], [7] and [13]; Administrative Code of the City of New York §§ 8-101, 8-102 [1], 8-107 [4], [6], [7] and [18]).

On a motion to dismiss pursuant to CPLR 321 1 (a) (7), the court must assume the truth of the allegations in the pleading, and "resolve all inferences which reasonably flow therefrom in favor of the pleader" (*Sanders v. Winship*, 57 N.Y.2d 391,394 [1982]). Further, "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268,275 [19771). Additionally, in relation to the discrimination claims raised here, a plaintiff "need not plead a *prima facie* case of

discrimination" and, on a motion to dismiss, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims" (*Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 [2002]; see also *Schwaller v. Squire Sunders & Dempsey*, 249 A.D.2d 195, 196 [1st Dept. 1998], describing plaintiff's pleading burden as ***"de minimis").***

Particularly in relation to the discrimination claims, the court must disregard a number of contentions and arguments advanced. As to arguments based on factual assertions contained in the moving affidavit, that moving affidavit related to an entity which is no longer a party to this proceeding and lends no relevant support to the motion as addressed to TFS and its relationship to Parziale. Additionally, those new points belatedly raised in reply papers must be disregarded (*Dannasch v. Bifulco*, 184 A.D.2d 415, 417 [1st Dept. 1992], 'The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion").

Defendants clearly have contended that the plaintiff has failed to set forth sufficient offensive acts and that the acts pleaded were isolated or few in number (supporting brief, p. 8). The complaint describes sexually explicit graffiti – both words and pictures – posted for months in a men's bathroom, with more added over the course of time; it is fair to consider that each individual viewing of such graffiti constituted a republication. The court further declines to hold, on the face of a pleading, that such actions did not alter plaintiff's working conditions. Accordingly, these arguments are found insufficient to support dismissal.

In relation to the other points of law raised by defendants, it must be noted that plaintiff's second and third cause of action rest upon specifically identified statutory provisions which apply to "any person," *i.e.* Executive Law § 292 (1) and § 296 (2), (6), (7) and (13), and § 8-102 (1) and § 8-107 (4), (6), (7) and (18) of the Administrative Code of the City of New York. Each statute provides it is unlawful for a person to aid or abet any prohibited conduct (Executive Law § 296 (6) and § 8-107 (6) of the Administrative Code of the City of New York; *see,* e.g., *Dunson v. Tri-Maintenance & Contractors, Inc.*, 171 F. Supp.2d 103,105 [S.D.N.Y.2001], aiding and abetting claim "may be made against defendant who has no control or authority over plaintiff, even defendant that is independent contractor for employer may be held liable, as long as there is direct participation in discriminatory acts"). As relevant to the aiding and abetting claims, plaintiff has asserted primary violations in connection with employment and/or denial of the advantages of a place of public accommodation in the related NYMEX Action, which have not been dismissed and for purposes of this motion must be assumed to state a cause of action.

Here, the complaint alleges Parziale was the author of sexually offensive graffiti displayed in the workplace, directly participating in discriminatory acts. The complaint also fairly implies that TFS condoned his actions when it failed to take any action when plaintiff complained to a TFS supervisor (*Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546,560 [1st Dept. 2003], "an 'employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning or approving it,"' quoting *Youth Action Homes v. State Div. of Human Rights*, 231 A.D.2d 7, 13 [1st Dept. 1997]). Given the standards applicable to the motion, the court does not find

a basis for dismissal has been advanced by these arguments.

The balance of the arguments raised appear to assume that defendants can be sued only if claims are raised against them as employers. This argument misses the mark, for the complaint appears to rest upon aiding and abetting liability.

Finally, the complaint is unclear as to whether any employment-type relationship between plaintiff and defendants is alleged, and movants' denial of such relationship lacks any supporting showing by way of affidavit, NYMEX materials addressing NYMEX structure, or citation to case law. A discrimination claim need only describe an economic relationship which falls into a broad definition of an employer-employee relationship, which depends on consideration of factors including the exercise of significant control or influence over the conditions of the plaintiffs employment (see ***Kent v. Papert Companies, Inc.***, 309 A.D.2d **234,247-248** [1st Dept. **20031,** the "touchstone" of an actual or prospective relationship of employer and employee under the Executive Law and Administrative Code, is "'mutually beneficial economic substance"'; see *Dortz v. City of* ***New York,*** **904** F. Supp. **127 [S.D.N.Y. 19951,** denying motion to dismiss employment discrimination claim against medical school that provided services at a city hospital, even though school did not have ultimate authority to hire or fire plaintiff and did not pay her wages, where its employees exercised significant influence and control over conditions of her employment and her "fate" at the hospital; see generally 18 **N.Y.** Jur. **2d,** Civil Rights **§ 33,** ***Existence*** *of* ***Employment*** *Relationship*). Because of the existence of cognizable aiding and abetting claims, the claims have a sufficient legal basis to withstand dismissal without the resolution at this time of whether plaintiff intends to plead that the defendants

are liable as employers, which can be clarified by a bill of particulars. **A** bill of particulars will also clarify the extent to which the appearance of the word "retaliation" in paragraphs 38, 40 and **41,** and other similarly isolated words, are intended to add any substantial element to the basic claims raised as described above. Given that the complaint states cognizable claims, the branch of the motion seeking dismissal is denied, with leave to renew on proper papers following amplification of the pleading and any necessary discovery.

Negligence Claim

Plaintiffs fifth cause of action sounds in negligence, but clearly embraces allegations of the intentional torts of defamation and intentional infliction of emotional distress, which are barred by the statute of limitations for reasons set forth above. These intentional tort allegations are not properly included within a negligence claim (*Romero v. **State,*** 294 A.D.2d 730,733 [3rd Dept. 20021, app. dismissed **98** N.Y.2d 727 [2002], "claimant stated allegations of negligence in **an** improper attempt to support the intentional torts pleaded in the claim").

Accordingly, the fifth cause of action is severed and dismissed with leave to replead within fifteen (15) days of the date of this decision.

* * *

The motion is granted to the extent set forth above and otherwise denied. The arguments raised in reply are not reached, for they are not properly before the court.

This matter is set down for a preliminary conference on August 9, 2004, at 9:45 a.m. in Part 8 (Room 540), at which time a compliance conference has previously been scheduled in the NYMEX Action. Counsel might wish to consider consolidation of these matters under this new index number, which procedure would allow the most ample time for discovery.

This decision constitutes the order of the court.

Dated: July 8 ,2004

J.S.C.