

**Piscopo v Hennessee Group, LLC**

2007 NY Slip Op 34494(U)

January 4, 2007

Supreme Court, New York County

Docket Number: 103904/06

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

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LEEANA PISCOPO,

Plaintiff,

-against-

HENNESSEE GROUP, LLC, CHARLES  
GRADANTE and E. LEE HENNESSEE,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 103904/06  
Motion Seq. No. 001

In this action, plaintiff claims that her employment was terminated after she disclosed that she was pregnant to defendant Charles Gradante and after E. Lee Hennessee allegedly stated that plaintiff and Alex Smith-Ryland, who is the father of plaintiff's child, could not both continue to work at defendant Hennessee Group, LLC. Defendants Gradante and Hennessee are both managing principals of Hennessee Group, LLC.

Plaintiff's Complaint seeks to recover unpaid wages, the sum of \$11,000, liquidated damages in the amount of 25% of the total amount due pursuant to Labor Law § 198, actual damages for past and future earnings, bonuses, grade level increases, pension contributions and other employment benefits in an amount to be determined at trial, and punitive damages, together with interest and attorneys' fees, based on the following causes of action:

- (i) failure to pay wages in violation of Labor Law § 190(1) (first cause of action);

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(ii) violation of Labor Law § 194 ("New York State Equal Pay Law") (second cause of action);

(iii) violation of the privacy provision of the Health Insurance Portability and Accountability Act ("HIPAA") by disclosing plaintiff's pregnancy status to other people (third cause of action);

(iv) breach of contract (fourth cause of action);

(v) disability discrimination in violation of Executive Law § 290 *et seq.* ("New York State Human Rights Law") (fifth cause of action);

(vi) disability discrimination in violation of the Administrative Code of the City of New York § 8-101 *et seq.* ("New York City Human Rights Law") (sixth cause of action);

(vi) gender discrimination in violation of the New York State Human Rights Law (seventh cause of action); and

(vii) gender discrimination in violation of the New York City Human Rights Law (eighth cause of action).

Defendants now move for an order dismissing plaintiff's Complaint in its entirety.

Defendants argue that the first cause of action for failure to pay wages in violation of the Labor Law must be dismissed because "[e]xcept for manual workers, all other categories of employees entitled to statutory protection under Labor Law § 191 are limited

by definitional exclusions of one form or another for employees serving in an executive, managerial or administrative capacity (see, Labor Law § 190 [5], [6], [7])." Gottlieb v. Kenneth D. Laub & Co., 82 N.Y.2d 457, 461 (1993). See also, Taylor v. Blaylock & Partners, L.P., 240 A.D.2d 289 (1st Dep't 1997); Nornberg v. Thai Magic Co., Inc., 10 Misc.3d 1076(A) (Sup. Ct., N.Y. Co. 2006).

Although plaintiff denies that she was employed in an "executive" capacity, and argues that further discovery is warranted as to the nature of her job duties while employed by defendant, there is no dispute that plaintiff was employed as a Senior Vice President at an annual salary of \$100,000 with a 1.5% equity interest in the firm.

Accordingly, this Court finds that plaintiff is not entitled to statutory protection under Labor Law § 191. That portion of the motion seeking to dismiss the first cause of action is, therefore, granted.

Defendants next argue that the second cause of action for relief pursuant to the Equal Pay Law must also be dismissed for failure to state a claim.

In order to establish a violation of the statute, "a plaintiff must show that: 1) the employer pays different wages to employees

of opposite sexes; 2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and 3) the jobs are performed under similar working conditions." Rose v. Goldman, Sachs & Co., Inc., 163 F.Supp.2d 238, 242 (S.D.N.Y. 2001).

"To survive a motion to dismiss, a plaintiff is required to proffer factual support for the allegation that her employer violated" the statute and may not rely on "vague, conclusory, and speculative allegations". Rose v. Goldman, Sachs & Co., Inc., supra at 243.

Defendants argue that the plaintiff's Complaint in this action fails to establish a violation of the Equal Pay Law because the Complaint does not present any facts as to which employee was paid more than plaintiff, how much of a difference in salary existed, what position the employee held, what similar skills, efforts and responsibilities both positions entailed, and how similar the working conditions were.

Plaintiff, on the other hand, argues that the Complaint sufficiently sets forth a cause of action under the Equal Pay Law since paragraph 38 specifically alleges that plaintiff was paid wages "at a rate less than the rate at which Defendants paid wages to male employees performing equal work under similar working

conditions, on jobs the performance of which required equal skill, effort and responsibility.”

While this Court finds this allegation to be too conclusory to withstand the instant motion to dismiss, plaintiff is granted leave to re-plead her second cause of action in order to more fully proffer factual support for her claim. See, Frasier v. General Electric Co., 930 F.2d 1004 (2nd Cir. 1991).

That portion of defendants' motion seeking to dismiss the third cause of action on the ground that HIPAA, a federal statute, does not create a private right of action is granted without opposition.

Defendants next move to dismiss the fourth cause of action for breach of contract which is based on a purported June 2003 oral agreement for failure to state a claim on the ground that it is barred by the Statute of Frauds since the agreement was not capable of being performed within one year. See, GOL § 5-701(a)(1).

Plaintiff argues that the fourth cause of action is not barred by the Statute of Frauds since the June 2003 oral agreement was reduced to writing and memorialized in a letter dated July 15, 2003, signed by defendant Charles Gradante as President and CEO of Hennessee Group LLC.

The letter sets forth plaintiff's annual salary and references "an annual bonus given at the end of every calendar year." The letter further indicates that plaintiff "has a 1.5% equity interest in the Hennessee Group LLC, which permits her to draw down monies in excess of \$35,000 at any time, in addition to her annual bonus."

Although defendants argue in reply that the terms of the letter do not support plaintiff's claim in the Complaint that she is entitled to a non-discretionary annual bonus equal to 1.5% of year end owners' equity, this Court finds that the letter is evidence of an agreement between the parties which is sufficient to overcome the Statute of Frauds. Therefore, that portion of defendants' motion seeking to dismiss plaintiff's fourth cause of action for breach of contract is denied.

Finally, defendants move to dismiss plaintiff's fifth, sixth, seventh and eighth causes of action which seek relief pursuant to the New York State and New York City Human Rights Laws for failure to state a claim. Defendants argue that the allegations in the Complaint indicate that plaintiff was given a choice that applied equally to plaintiff as well as to Mr. Smith-Ryland.

Thus, defendants contend that there are no facts alleged in the Complaint to demonstrate that the choice given to plaintiff and Smith-Ryland was due to plaintiff's gender or her pregnancy.

Plaintiff, on the other hand, contends that the Complaint sufficiently alleges adverse employment actions as a result of her being pregnant, including requiring plaintiff to produce a doctor's note, subjecting plaintiff to harsher terms and conditions of employment, unfounded criticism and generally hostile behavior from defendants, badgering by defendants Gradante and Hennessee about her morning sickness, and requiring plaintiff to update them on her pregnancy/personal life in front of a co-worker.

This Court finds that the issue of whether plaintiff received discriminatory treatment as a result of her pregnancy and/or gender are issues of fact to be explored during discovery. Those portions of the motion seeking to dismiss the fifth, sixth, seventh and eighth causes of action are, therefore, denied.

Accordingly, based on the papers submitted and the oral argument held on the record on September 13, 2006, defendants' motion is granted to the extent of dismissing plaintiff's first and third causes of action with prejudice, and dismissing plaintiff's second cause of action with leave to re-plead within 30 days of service of a copy of this order with notice of entry.

Defendants shall then serve an answer or otherwise move with respect to plaintiff's Amended Complaint within 20 days of said service.

A preliminary conference shall be held in IA Part 12, 60  
Centre Street, Room 341 on March 14, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: January 4, 2007

  
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Barbara R. Kapnick  
J.S.C.

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