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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 116676/2006

ASMOLOV, FILIPP

VS.

GRAND CENTRAL PARTNERSHIP

SEQUENCE NUMBER : 005

AMEND

INDEX NO. 116676/06

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... 1-4	1, 2
Answering Affidavits — Exhibits A-J	3, 4
Replying Affidavits Supp. 1-2	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 12 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: DEC 10 2008

MARTIN SHULMAN J.S.C.

J.S.C

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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FILIPP ASMOLOV,

Plaintiff,

-against-

GRAND CENTRAL PARTNERSHIP, INC., and MERCEDES MERCADO,

Defendants.

Index No: 116676/06
Decision and Order

Hon. Martin Shulman, J.S.C.:

Plaintiff, Filipp Asmolov ("Asmolov" or "plaintiff") commenced this action against defendants, Grand Central Partnership, Inc. ("GCP" or "defendant") and Mercedes Mercado ("Mercado"), alleging *quid pro quo* sexual harassment, discrimination, a hostile work environment and retaliation pursuant to the New York State Human Rights Law (Exec. Law § 290, *et seq.*) and City Human Rights Law (N.Y.C. Adm. Code §8-101, *et seq.*).

Exactly two years later, Asmolov now moves to amend his complaint (Exhibit 4 to motion) to allege causes of action against Marc Wurzel, Esq., GCP's General Counsel ("Wurzel") under an aiding and abetting theory for allegedly participating in acts of discrimination/harassment against Asmolov in violation of the New York State and City Human Rights Laws.

Background

As pleaded in his initial complaint ("Complaint" as Exhibit 1 to Motion), and attested to in his supporting affidavit, Asmolov tells the following story. Plaintiff began working for the GCP as a tourist greeter in September 2005. Shortly thereafter,

Mercado, his direct GCP supervisor, made sexual demands as a condition of his continued employment and plaintiff felt constrained to engage in sexual relations with her to keep his job (Asmolov Aff. in support of Motion at ¶ 4, Complaint at ¶¶ 6-9). Plaintiff claims he made it clear to Mercado that her repeated demands "were unwanted and unwelcome." (Complaint at ¶ 10). In or about April 2006, Asmolov finally refused to comply with her sexual demands and thereafter was subject to verbal harassment and intimidation during business and non-business hours (Asmolov Aff. in support of Motion at ¶¶ 6-7). Because of the hostile work environment, plaintiff believed he had no choice but to resign in April 2006, *viz.*, Mercado's ongoing conduct of harassment and retaliation caused plaintiff to be constructively discharged from his employment at the GCP (Asmolov Aff. in support of Motion at ¶ 8, Complaint at ¶15). When he personally handed in his resignation letter to Paula Horowitz, Mercado's supervisor (and in Mercado's presence), he also handed her an envelope containing "sexually charged emails from Mercado."

(Asmolov Aff. in support of Motion at ¶ 9).

Proposed Amended Complaint

Within the context of these complaint allegations, Asmolov, apparently with the benefit of deposition discovery completed two years after the commencement of this action, now seeks leave to amend his complaint to join Wurzel as a defendant. Plaintiff claims he just learned of Wurzel's "calculated inaction" in not only failing to investigate prior complaints about Mercado which would have exposed her earlier and prevented her unwelcomed conduct against plaintiff, but also in failing to investigate Mercado after plaintiff's "forced" resignation. Asmolov further claims Wurzel's malicious actions

evinced a pattern which aided and abetted Mercado's acts of harassment (Asmolov Aff. in support of Motion at ¶¶ 9-12, Proposed Amended Complaint at ¶¶ 80-85). Plaintiff's counsel finally contends that the proposed amendment is timely made, not prejudicial and meritorious.

GCP's Opposition

The following was gleaned from GCP's opposition to the proposed amendment: (1) as early as 2007, plaintiff was already aware of the "new" information he purportedly discovered after depositions taken of Mercado and Wurzel in the Spring and Summer 2008; (2) these new allegations, if any, "do not constitute viable causes of actions and are not supported by the record. . ." (Ayazi Opp. Aff. at ¶ 6); (3) GCP's then Vice President of Corporate Affairs did investigate a prior 2002 complaint against Mercado (Exhibit A to Ayazi Opp. Aff.) at a time when Wurzel had no oversight responsibility for the Tourist Greeter Department (Ayazi Opp. Aff. at ¶ 7); (4) the prior 2005 complaint against Mercado (Exhibit D to Ayazi Opp. Aff.) did not even allege any form of discrimination (*Id.*); (5) prior to Asmolov's resignation, plaintiff admittedly never complained to any GCP managerial staff member about Mercado's conduct (Exhibit F to Ayazi Opp. Aff.); and (6) plaintiff's unjustifiable two year delay in moving for leave to amend his complaint unduly prejudices GCP and Wurzel.

Discussion

To successfully join Wurzel, GCP's General Counsel, as a new party-defendant two years after plaintiff commenced this action, plaintiff has to affirmatively demonstrate that Wurzel aided and abetted acts of discrimination, *quid pro quo* sexual

harassment and a hostile work environment against Asmolov. What facts would Asmolov need to allege to sustain a claim against Wurzel as an aider and abetter?

The State "Human Rights Law provides for individual liability where a person 'aid[s], abet[s], incite[s], compel[s] or coerce[s] the doing of any of the acts forbidden' by the Human Rights Law. N.Y. Exec. Law § 292(6). [See also, N.Y.C. Adm. Code § 8-107(6)]. Thus, in order to hold . . . [Wurzel] personally liable as an aider or abetter, plaintiff must establish that he 'actually participated in the conduct giving rise to the discrimination claim.' *Tomka v. Seiler*, 66 F.3d 1295, 1317 (2d Cir. 1995) . . ." (bracketed matter added). *Monastra v. NYNEX Corp.*, 2000 U.S. Dist. LEXIS 13142 [* 22-23] (S.D.N.Y. 2000). In *Brice v. Security Operations Systems, Inc.*, 2001 U.S. Dist. LEXIS 1856 (S.D.N.Y. 2001), the Federal Court cited with approval to State case law *in pari materia* to establish the requisites for aiding and abetting liability:

> [It] requires that the aider and abettor "share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose." New York Times Co. v. City of New York, Comm'n on Human Rights, 79 Misc.2d 1046, 1049, 362 N.Y.S.2d 321, 324 (Sup. Ct. 1974), aff'd, 49 A.D.2d 851, 374 N.Y.S.2d 9 (1st Dep't 1975), aff'd, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d (1977) . . . Consequently to find a defendant actually participated in discriminatory conduct requires a showing of "direct, purposeful participation."

Against this backdrop, this court must consider whether Asmolov's *alleged facts* drawn from his affidavit and supporting exhibits fit within this aiding and abetting liability theory. Unequivocally, and even if true, they do not. What is clear from the record thus far is that only Mercado is *inter alia* alleged to have engaged in *quid pro quo* sexual harassment against Asmolov and/or created a hostile work environment. Plaintiff has not alleged a single fact charging Wurzel or any other supervisory personnel with

intentionally and purposefully participating in such alleged acts. Then again, the only complaint about Mercado's conduct he ever made to GCP appears to be when he filed this action. Moreover, plaintiff's creative characterization of Wurzel's alleged failure to investigate the earlier two, albeit irrelevant, complaints lodged against Mercado or even conduct a post-resignation investigation (which GCP strenuously denies) as "calculated inaction" does not even remotely support an aiding and abetting liability claim against Wurzel.

"While leave to amend a complaint should be freely granted (*see* CPLR 3025[b]), leave should be denied where, as here, the proposed amendment is palpably insufficient and patently devoid of merit . . ." *Mid-Valley Oil Co., Inc. V. Hughes Network Systems, Inc.*, 54 A.D.3d 393, 862 N.Y.S.2d 291, 292 (2nd Dept. 2008); *see also*, *Lucca Massimo, Ltd. v. Wolowitz*, 281 A.D.2d 186, 721 N.Y.S.2d 233 (1st Dept., 2001)(failure to submit evidence of intentional and unjustified procurement of a sales contract breach). Parenthetically, it is therefore unnecessary to address the issue of whether plaintiff's two year delay in seeking leave to amend his complaint was fatal to his motion. Accordingly, it is

ORDERED that plaintiff's motion for leave to amend his complaint is denied in its entirety.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
December 10, 2008

Hon. Martin Shulman, J.S.C.