

Hernandez v Kaisman
2008 NY Slip Op 33341(U)
December 11, 2008
Supreme Court, New York County
Docket Number: 104989/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Jane S. Solomon
Justice

PART 55

Index Number : 104989/2007

HERNANDEZ, YAHAIRA

vs

KAISMAN, DR. ARDEN

Sequence Number : 004

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-10

0

DEC 15 2008
CLERK OF THE SUPREME COURT
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

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

Dated: 11/11/08

Jane S. Solomon
JANE S. SOLOMON J.S.C.

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

-----X
YAHAJRA HERNANDEZ, ESTHER HERARTE :
and JENNIFER STERN, :
 :
 :
 Plaintiffs, :
 :
 -against- :
 :
 DR. ARDEN KAISMAN, :
 :
 Defendant. :
-----X

INDEX NO. 104989/2007

DECISION AND ORDER

-----X
DR. ARDEN KAISMAN, :
 :
 Defendant/Third-Party :
 Plaintiff, :
 :
 -against- :
 :
 DR. PAUL BRISSON, :
 :
 Third-Party Defendant. :
-----X

FILED
DEC 15 2008
COUNTY OF NEW YORK CLERK

JANE S. SOLOMON, J.:

INTRODUCTION

Defendant Arden Kaisman ("Kaisman") moves to amend his third-party complaint to add BHRK Management Corp. ("BHRK") and PBAK LLC ("PBAK") as third-party defendants so as to assert a contribution and indemnification cause of action against them for Plaintiffs' hostile work environment claim against him. As explained below, Kaisman's motion is denied.¹

¹ At argument it was agreed that PBAK should not be a party.

FACTUAL BACKGROUND

Plaintiffs allege that they worked for Kaisman in his medical practice. Dr. Paul Brisson ("Brisson") was the other doctor in the office. Kaisman and Brisson were co-owners of BHRK, the entity which Kaisman and Brisson co-owned to manage their medical practices. Plaintiffs sued Kaisman for sex discrimination, assault, battery, and intentional infliction of emotional distress. Kaisman commenced a third-party action against Brisson and moved under CPLR § 3211(a)(7) to dismiss the Plaintiffs' complaint for failure to state a cause of action. The Court dismissed the assault claim with respect to Plaintiffs Herarte and Hernandez, dismissed the cause of action for intentional infliction of emotional distress with respect to all Plaintiffs, leaving Plaintiffs' claims under the New York City Administrative Code §§ 8-107 and 8-502, and perhaps under the Executive law, and defendant Stern's assault and battery claims.

Kaisman argues that he has a valid contribution and indemnity claim against BHRK because BHRK employed Plaintiffs and so is vicariously liable for the alleged hostile work environment created by himself or, as he asserts, Brisson. Kaisman bases his argument on cases which hold that an employer can be held liable to an employee on a sex discrimination claim if the employer knew about the discrimination and acquiesced or condoned the discriminatory conduct, or if the offending employee held a high

level managerial position. Kaisman alleges that Brisson sexually harassed Plaintiffs, although Plaintiffs make no allegation against Brisson.

In opposition, Brisson argues that the motion should be denied because it is not supported by an affidavit of merits or any evidentiary proof. Second, he contends that there is no merit to the claim against BHRK, arguing that it cannot be liable on a third-party claim for any actions taken by either Kaisman or himself.

Plaintiffs join the opposition to the motion and state that they "have no intention of implicating anyone but Kaisman." Plaintiffs' Affirmation in Opposition at ¶17. Permitting Kaisman to bring BHRK into the lawsuit would, in their view, "result in implicating parties who all the plaintiffs agree are not involved." Plaintiffs' Affirmation in Opposition at ¶10. In sworn statements, Plaintiffs refute the allegations made in the third-party complaint about Brisson's conduct. Indeed, they credit Brisson with saving Plaintiffs from the hostile work environment allegedly created by Kaisman.

DISCUSSION

Although leave to amend should be freely granted, "the movant must make some evidentiary showing that the proposed amendment has arguable merit." *Helene-Harrisson Corp. v.*

Moneyline Networks, Inc., 6 A.D.3d 151, 151 (1st Dept. 2004).

A Court cannot grant a motion to amend without passing on the underlying merits of the proposed amendments. *Non-Linear Trading Co., Inc. v. Braddis Assoc., Inc.*, 243 A.D.2d 107, 116 (1st Dept. 1998). Accordingly, a motion for leave to amend "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." *Id.*

Here, Kaisman's proposed amendment is not supported by an affidavit of merits or any evidentiary submissions, but only by an affirmation by his attorney, who has no personal knowledge. Further, it is unverified and alleged entirely upon information and belief. Even if a proper evidentiary submission was made, however, the motion would still be denied because, as a matter of law, the proposed amendment lacks merit.

Kaisman does not have a claim for indemnification and contribution against BHRK. Plaintiffs' hostile work environment cause of action is based on the conduct of Kaisman alone. He now seeks contribution and indemnification from BHRK based on a theory that BHRK was Plaintiffs' employer and that it should be vicariously liable for the actions of Kaisman and/or Brisson. A third-party claim for contribution is dependent on the claims made by the plaintiff in the main action. Contribution is available only when the plaintiff alleges facts under which a third-party defendant can be responsible for the culpable

conduct. Kaisman cannot seek contribution and indemnity on a theory which is inconsistent with Plaintiffs' claim that he alone is liable to them. Accordingly, he cannot impute to BHRK actions allegedly committed by Brisson which are contrary to Plaintiffs' Complaint.

A party cannot assert a contribution claim under a theory of vicarious liability based on the acts of another when the allegations in the contribution claim are inconsistent with and, if true, would defeat a plaintiff's cause of action. See *Lorette v. Bellevue Builders Supply, Inc.*, 59 A.D.2d 985, 985 (3rd Dept. 1977); *Ware v. Sand Lake Kiwanis Club, Inc.*, 100 Misc.2d 668, 669 (Sup. Ct. Albany Co. 1979).

Other than Brisson, the only other person whose conduct BHRK can be liable for is Kaisman. However, it is axiomatic that an allegedly active tortfeasor cannot seek contribution or indemnity from an entity which is vicariously liable for the tortfeasor's conduct. *Ruddock v. Boland Rentals, Inc.*, 5 A.D.3d 368, 370-71 (2nd Dept. 2004). Last, Kaisman's claim for common law indemnification must fail because "'a party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification.'" *Esteve v. Nash*, 55 A.D.3d 474, 474 (1st Dept. 2008) (quoting *Mathis v. Central Park Conservancy, Inc.*, 251 A.D.2d 171, 172 (1st Dept. 1998)).

*7]

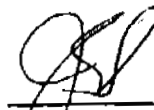
Kaisman relies on cases which hold that, under certain circumstances, an employee has a cause of action for sex discrimination against an employer for another employee's misconduct. It is true that an employer may be liable if it "had knowledge of and acquiesced in or condoned the discriminatory conduct" of another employee. *Bianco v. Flushing Hosp. Medical Center*, 54 A.D.3d 304, 305 (2nd Dept. 2008). It is also true that an employee may have a claim against an employer for "acts of discrimination perpetrated by a high-level managerial employee" because "there is no opportunity to make a complaint to upper-level management where the harasser is the highest ranking supervisor." *Matter of Father Belle Community Center v. New York State Div. of Human Rights*, 221 A.D.2d 44, 54 (4th Dept. 1996).

Kaisman's reliance on these cases is misplaced. These cases only address the liability of an employer to an employee on a direct sex discrimination claim. They do not deal with contribution and indemnity claims brought by an allegedly culpable party against an employer in a third-party action.

This constitutes the decision and order of this Court.

Dated: December 11, 2008

ENTER:



J.S.C.