SCANNED ON 7/27/2009

[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 103904/2006
PISCOPO, LEEANA
VS.
HENNESSEE GROUP, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 103904/06
MOTION DATE 3/18/09
MOTION SEQ. NO. 002
MOTION CAL. NO. 7

this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits Cross motion	3, 4, 5
Replying Affidavits	6, 7, 8

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

FILED
JUL 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/17/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☒ Pt 40 Trial for date, 1st available after 9/1/09

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

---------- X

LEEANA PISCOPO,

Plaintiff,

-against-

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

Defendants.

---------- X

Index Number	103904/2006
Submission Date	3/18/09
Mot. Seq. No.	002
Mot. Cal. No.	7

DECISION & ORDER

For Plaintiff:
Zabell & Associates, P.C.,
By: Saul D. Zabell, Esq.
Tim Domanick, Esq.
4875 Sunrise Highway, Suite 300
Bohemia NY 11716
631-589-7242

For Defendants:
Berke-Weiss & Pechman, LLP
By: Louis Pechman, Esq.
488 Madison Avenue, 11th Fl.
New York NY 10022
212-583-9500

Papers considered in review of this motion and cross-motion for summary judgment:

Papers	**Numbered**
Notice of Motion, Annexed Affs. & Exhibits, Memo of Law	1-2
Notice of Cross-Motion, Affs/ & Exhibits, Memo of Law	3-5
Def. Aff. and Memo of Law in Opp. to Cross Motion	6-7
Plaintiff's Reply Mem of Law	8

PAUL G. FEINMAN, J.

Plaintiff Leanna Piscopo commenced this action against her former employer, Hennessee Group, LLC (Hennessee Group), and the co-owners of Hennessee Group, Charles Gradante and E. Lee Hennessee (Hennessee). Defendants Gradante and Hennessee are husband and wife. The claims in the complaint are based on alleged violations of the equal pay and human rights law provisions of New York Labor Law, related common law claims, and alleged violations of the Administrative Code of the City of New York. Defendants have counterclaimed alleging that plaintiff breached a non-disclosure agreement.

Defendants have moved for summary judgment dismissing the complaint, and granting

judgment on their counterclaims. Plaintiff opposes the defendants' summary judgment motion and has cross-moved for summary judgment dismissing the first, second and fourth counterclaims.

The complaint alleges that Piscopo was an employee, and the Hennessee Group was an employer, within the meaning of New York State's Human Rights Law, Executive Law § 290 et seq. At all relevant times in the complaint, the Hennessee Group was engaged in the investment advisory business. Piscopo began her employment with the Hennessee Group in June 1998 and remained in their employ until January 2006. Piscopo was a Senior Vice President with the Hennessee Group, and claims to have had a 1.5% equity interest in the company, and an annual salary of $100,000.00, and was to be paid a non-discretionary annual bonus of $22,000.00 for the year 2005.

Plaintiff alleges that she became pregnant in 2005, during her employment with the Hennessee Group, and that the father of her child was a co-worker, Alex Smith-Ryland. In December 2005, Piscopo advised Gradante that she was pregnant, and claims that she was thereafter required to bring in a doctor's note, and was subjected to altered terms and conditions of employment, unfounded criticism, and generally hostile behavior from defendants after informing them of her pregnancy. During this time, Hennessee requested that Piscopo inform one of her co-workers of the fact of her pregnancy, which Piscopo refused to do. Subsequently, Piscopo was called into a meeting with Hennessee, to discuss issues of time and leave related to her pregnancy, specifically, her chronic lateness, only to find that this particular co-worker was present at the meeting.

Eventually, Hennessee called Piscopo and Smith-Ryland into her office, and demanded

that one of them leave the firm, stating that they could not both continue to work at the Hennessee Group. Piscopo stated that she would leave, since she knew that Smith-Ryland's immigration status depended on his continued employment. Piscopo claims that she was terminated as a result of these events, and that her termination was confirmed by Gradante who asked her why she was still on the premises after these events unfolded. After her termination, Piscopo claims that Hennessee continued to harass and stalk her at her home, and that Hennessee impugned her reputation for chastity and her propensity for truthfulness to Smith-Ryland.

The third through sixth causes of action in the complaint based on city and state Human Rights Law violations, and defendants' second counterclaim for breach of contract, are at the heart of these motions for summary judgment.

In the third and fifth causes of action, Piscopo asserts claims for breaches of the New York State Human Rights Law, for discrimination based on her disability and on her gender.

In the fourth and sixth causes of action, Piscopo asserts a claim for a violation of the New York City Human Rights Law, based on her disability, or her perceived disability, and based on her gender.

A movant's burden on a motion for summary judgment is to establish a prima facie case of entitlement to summary judgment through proof that there are no material issues of fact. *Zuckerman v City of New York,* 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Defendants offered the following facts in support of their motion, as proof that there are no material issues of fact regarding plaintiff's claims: Piscopo and Brian Snider were both Senior

Vice Presidents of Hennessee Group. They, along with Gradante and Hennessee, comprised the firm's Executive Committee. Piscopo T. 16, 45. As a Senior Vice President, Piscopo acted as a compliance officer, managed the financial books and records, interfaced with clients on a client servicing basis, and managed administrative projects. Piscopo T. 19.

Defendants claim that Piscopo's chronic lateness long pre-dated her pregnancy, that it was an ongoing problem, and a constant source of discussion between Snider, Hennessee, and Gradante. Piscopo T. 629. On April 12, 2005, six months before Piscopo became pregnant, Gradante send the following email to Piscopo:

> We need to talk about your position as senior executive and what responsibilities are inherent in your role. As of the writing of this e-mail at 10:30 am, you have not called in to the office as to your status. This is not the first time and is unacceptable. It is also against company policy. You must be sensitive to this policy as everyone in the office today at 10:30 am are wondering where you are and why they have to abide to policy that you seem to abuse. We need to address this issue and others that we agree are essential to running a sound business. I expect you to help me define the problem and for you to come up with a recommendation. Thank you.....see me as soon as you get in.

Affirmation of Louis Pechman, Esq., dated August 27, 2008, Exh. 5.

On April 25, 2005, Piscopo submitted a resignation letter to the Executive Committee as a result of a heated confrontation with Gradante, with respect to a benefits administration issue, in which Piscopo discovered Snider's salary. Piscopo T. 45-47, Pechman Affirmation, Exh. 11. In response to Piscopo's resignation, in April 2005, Hennessee went to Piscopo's apartment and, after many hours, convinced her to stay at Hennessee Group. Piscopo T. 45-47, 116-117.

During her deposition, Piscopo admitted to having been under a great deal of stress at work, during 2005, after the collapse of one of the funds that the Hennessee Group had recommended to its investors. Piscopo was the primary person responsible for assembling documents in connection with the regulatory investigations and lawsuits which followed the fund's collapse. Piscopo T. 131-32. Among all of this work-related stress, Piscopo became pregnant in October 2005, adding an extra dimension of stress to what was already an extraordinarily stressful time at work. Piscopo T. 125, 160.

According to defendants, Piscopo continued to arrive late to work in January 2006. Piscopo admitted that on January 4, 2006, she did not come in to work until after 11:30 A.M. Piscopo T. 395-396. At an Executive Committee Meeting on January 5, 2006, Snider and Gradante again addressed Piscopo's tardiness. Piscopo T. 299-300. Snider, at this point, still did not know that Piscopo was pregnant. Smith-Ryland T. 122-123. Piscopo objected to the discussion and left the meeting. Piscopo T. 307.

Later that same day, both Piscopo and Smith-Ryland left for a doctor's appointment together at about 2:45 P.M. When they returned to work after the doctor's appointment, at about 5 P.M., Hennessee told them that they could not be going to the doctor together, even though Piscopo stated that she had cleared it with Gradante. Piscopo T. 313 Piscopo claims that Hennessee then stated that they could not both continue to work there. Piscopo T. 330. Piscopo volunteered to terminate her employment, since Smith-Ryland's immigration status depended on his continued employment. Piscopo T. 330, 385-86.

On January 19, 2006, Hennessee sent Piscopo a letter inviting her to return to work, if it was not her intention to resign, but Piscopo refused this offer to return to work. This offer was

made in response to a letter from Piscopo, dated January 17, 2006, which stated that she intended to retain representation to negotiate a severance package, and that she was embarrassed about having had her personal life openly discussed in the office, against her wishes. Pechman Affirmation, Exh. 12. Defendants claim that Piscopo conceded that Hennessee's offer was unconditional. Piscopo T. 168, 548. Nevertheless, she refused the offer to return to work at the Hennessee Group. Piscopo T. 168.

The Human Rights Law Claims of Disability and Gender Discrimination

The burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), applies in discrimination claims brought pursuant to the New York State and New York City Human Rights Laws (NYSHRL and NYCHRL, respectively). *Matter of North Shore Univ. Hosp. v Rosa*, 86 NY2d 413 (1995).

> That framework requires a plaintiff in a disability-discrimination case to establish a prima facie case of discrimination, after which the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action in question. Once the defendant provides such a reason, the plaintiff shoulders the burden of showing "sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext" for discrimination.

Ferraro v Kellwood Co., 440 F3d 96, 100 (2d Cir 2006) (internal citation omitted).

Defendants claim that Piscopo's claim for discrimination under the NYSHRL and the NYCHRL must be dismissed because she failed to make out a prima facie case for discrimination on the basis of pregnancy or sex, citing the U.S. Supreme Court's decision in *McDonnell Douglas Corp. v Green*. Even if Piscopo successfully established a prima facie case, defendants

claim that they have rebutted that showing by articulating a legitimate, non-discriminatory reason for any employment action. Piscopo must "produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendants] were false, and that more likely than not [discrimination] was the real reason for the discharge," claim defendants, citing *Van Zant v KLM Royal Dutch Airlines* (80 F3d 708, 714 [2d Cir 1996][internal quotation marks and citation omitted]).

While defendants have stated the standard for entering a verdict after a trial, plaintiff's burden, in opposing defendants' motion for summary judgment, is merely to establish the existence of a triable issue of fact as to whether defendants' reason for terminating plaintiff was merely a pretextual cloak for a discriminatory firing.

The Court of Appeals has held that in pregnancy discrimination claims under the NYSHRL, "[t]o establish a prima facie case of discrimination, complainant must first show by a preponderance of the evidence that he or she is a member of a protected class, discharged from a position for which he or she was qualified and that the discharge occurred under circumstances giving rise to an inference of discrimination." *Rainer N. Mittl, Opthamologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 (2003).

Defendants established a prima facie case of entitlement to summary judgment, including proof of a legitimate reason for terminating plaintiff.

Plaintiff, however, has established a prima facie case of discrimination, and has raised a material issue of fact as to whether defendants' reason for terminating her was pretextual, and therefore discriminatory. Plaintiff established the first element of a prima facie case of discrimination through evidence that she is in a protected class, based on her gender and her

pregnancy, and that she was also in a protected class based on gender-based disability, i.e., pregnancy. Plaintiff has also submitted proof tending to establish the second element of a prima facie case of discrimination, that she performed her job in a satisfactory manner. Plaintiff points to Gradante's testimony (Gradante T. 22-23) as evidence that she had received excellent performance reviews and promotions, none of which alleged time and attendance problems. Further, defendant Hennessee expressly stipulated that plaintiff's termination was not performance based. Hennessee T. 186-187. The third element of plaintiff's claim requires proof of an adverse employment action. While defendants claim that plaintiff voluntarily resigned from her position, plaintiff claims that her meeting with Hennessee, on January 5, 2006, resulted in her termination. Plaintiff claims that based on her own knowledge of Hennessee's long relationship with Smith-Ryland and his family, coupled with Smith-Ryland's employment-dependent immigration status, Hennessee's facially neutral remark to the effect that one of the two would have to give up their employment, led to only one conclusion, as far as Piscopo was concerned, and that was that she was being terminated. According to plaintiff, when she questioned the intent of Hennessee's remark, Hennessee responded in the affirmative, stating, "[t]hen I guess it's you." Piscopo T. 330, 387-388. Later that same day, Gradante asked Piscopo, "so what are you doing here?" and then physically escorted Piscopo out of the premises, completing the adverse employment action.

As to the fourth element of plaintiff's discrimination claims, plaintiff argues that the sequence of events and timing of her termination give rise to an inference of discrimination. According to plaintiff, her time and attendance at work only became a performance related issue after plaintiff disclosed her pregnancy to her employers, in December 2005. Further facts are

offered to support an inference of discrimination. Piscopo claims that the topic of plaintiff and her pregnancy was constantly discussed in the office after the pregnancy was disclosed to her employers. Piscopo T. 317-321. Defendants began harassing plaintiff about the time she reported to work, and forced her to disclose her pregnancy to the rest of the office. Piscopo T. 287-288, 300-303. Hennessee stated that it was her right to disclose this information to other employees, and even consulted an attorney on this issue. Piscopo T. 321.

Defendants argue that discrimination protections "do not protect a pregnant employee from being discharged for absenteeism even if her absence was due to pregnancy or complications of pregnancy, unless other employees are not held to the same attendance standards," citing *Minott v Port Authority of NY and NJ* (116 F Supp 2d 513, 521 [SD NY 2000]). "Absent the necessary evidence of discrimination, enforcement of a facially neutral rule does not comprise a continuing practice of intentional discrimination." *Matter of Robinson v New York State Div. of Human Rights,* 277 AD2d 76, 78 (1st Dept 2000). They further argue that even if Piscopo's allegations are taken as true, Piscopo has failed to show that Hennessee's statements terminating her, followed by an unconditional offer to reinstate her, were based on any animosity toward her because of her pregnancy, or because she was female. Nor has Piscopo raised an inference that defendants' reasons for taking the actions they did and making the statements that were made, were a pretext, and that the adverse actions were in fact motivated by discrimination. Defendants claim that the facially neutral statement advising plaintiff and Smith-Ryland that one of them had to leave was non-discriminatory and complied with New York's Human Rights Law.

Defendants also claim that Piscopo will be unable to prove that their reason for

terminating her employment was a pretext for the pregnancy-related reason for her dismissal. Hennessee Group LLC had a total of five employees, argue defendants, and the absence of two employees from the office at the same time jeopardized the running of the company. The mere fact that Piscopo happened to be pregnant, and that her pregnancy was ostensibly the reason behind some of Piscopo's absences from her employment, does not entitle Piscopo to greater protections than non-pregnant employees would be entitled to, claim defendants, citing *Velez v Novartis Pharms. Corp.* (244 FRD 243, 264 [SD NY 2007]).

The court finds that the stark contrast between the plaintiff and defendants' versions of the facts surrounding the termination of plaintiff's employment create material issues of fact which preclude summary judgment.

Plaintiff has rebutted defendants' prima facie case of entitlement to summary judgment by establishing a prima facie case of pregnancy and disability discrimination. Plaintiff's proof raised triable issues as to whether the circumstances and the reasons surrounding her termination from employment with the defendants were merely a pretext for terminating her while pregnant. These factual issues preclude the granting of summary judgment. *See Chambers v TRM Copy Ctrs. Corp.*, 43 F3d 29 (2d Cir 1994).

Defendants' Counterclaim for Breach of Contract

Defendants have counterclaimed against Piscopo for breach of a non-disclosure agreement.

According to defendants, Piscopo conceded that she signed a standard Hennessee Group non-disclosure agreement (NDA), and a code of ethics, upon commencing her employment with Hennessee Group. Piscopo T. 35, 357, Exh. 19. Piscopo understood that her obligations under

the NDA continued after her separation from employment Piscopo T. 224-225. Under defendant's NDA policy, all information, including client information, performance numbers provided by the hedge funds, the commission structure, and commission schedules was confidential and strictly proprietary. Piscopo T. 21-25. Piscopo also conceded that she took Hennessee Group information contained on a flash drive to her new employer, and opened it on a computer at her new employer's office. Piscopo T. 207-208, where its contents were automatically uploaded to a drive on that computer. Piscopo T 199, 202. Piscopo admitted that she put proprietary and confidential information onto her new employer's computer. Piscopo T. 216-217.

Defendants have established a prima facie case of Piscopo's breach of the Hennessee Group's non-disclosure agreement through proof of the existence of the agreement, and evidence that Piscopo revealed confidential information to her subsequent employer. Piscopo concedes that through her actions, defendants' confidential information was installed on her new employer's computer. Piscopo claims that this conduct was not intentional. However intent is not an element of a claim for breach of contract. *See WorldCom, Inc. v Sandoval,* 182 Misc 2d 1021 (Sup Ct, NY County 1999). Defendants are entitled to partial summary judgment against Piscopo, on the second counterclaim, for breach of contract.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part to the extent that defendants shall have judgment against plaintiff on the second counterclaim for breach of contract, to wit, the non-disclosure agreement, in an amount to be determined at trial of the other counterclaims and the plaintiff's complaint; and it is further

ORDERED that defendants' motion is denied in all other respects; and it is further

ORDERED that plaintiff's cross motion for summary judgment dismissing the first, second and fourth counterclaims is denied, and it is further

ORDERED that the Clerk of Trial Support shall set this matter down for jury selection in Trial Part 40 before J.H.O. Gammerman at the first available date after September 1, 2009.

This constitutes the decision and order of the court.

Dated: July 17, 2009
New York, New York

J.S.C.

2009 Pt 12 D&O 103904 2006_002LD_ME