

<b>Diaz v Cayre Group Ltd.</b>
2009 NY Slip Op 32922(U)
December 10, 2009
Supreme Court, New York County
Docket Number: 114671/08
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PART 7

PRESENT  
Index Number : 114671/2008

DIAZ, ALBERT

vs  
CAYRE GROUP

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 9/29/09

MOTION SEQ. NO. 601

MOTION CAL. NO. 30

The following papers, numbered 1 to 0 were read on this motion to/for SS

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits A-K  
Answering Affidavits – Exhibits A, B  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-5	
6-7	
8	


*Reply to Opp. to X-motion*  
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*  
*decided according to the proposed memorandum*  
*Decision and Order.*

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

**FILED**  
DEC 16 2009  
NEW YORK  
COUNTY CLERK'S OFFICE  
MICHAEL D. STALLMAN  
J.S.C.

Dated: 12/10/09

  
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  
NEW YORK COUNTY - - PART 7

ALBERT DIAZ,

Plaintiff,

- against -

THE CAYRE GROUP LTD., AMIN CAYRE,  
JACK CAYRE, SUSAN PINK, & TRACY  
CREO ROSSI,

Defendants.

Index No.: 114671/08

Decision and Order

**FILED**

DEC 16 2009

NEW YORK  
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Albert Diaz (Diaz) sues to recover damages for alleged employment discrimination in violation of the New York City Human Rights Law (Administrative Code of the City of New York [Admin. Code] § 8-107) (City HRL). Defendant Tracy Creo Rossi (Rossi), in her answer, asserted a counterclaim and a cross claim alleging, inter alia, sexual harassment in violation of the City HRL, the New York State Human Rights Law (Executive Law § 296) (State HRL), and Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-2 [a] [1]) (Title VII). Defendants The Cayre Group Ltd. (Cayre), Amin Cayre, Jack Cayre and Susan Pink (collectively, the Cayre defendants) now move, and plaintiff cross-moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss defendant Rossi's cross claim and counterclaim.

BACKGROUND

Defendant Cayre is in the business of designing, producing, and distributing apparel for women and children. Defendant Amin Cayre is President, defendant Jack Cayre is Chairman of the Board,

and defendant Susan Pink (Pink) is Executive Vice President, of Cayre. Plaintiff Diaz was employed by Cayre as a graphic designer from September or October 2007 until his termination on September 15, 2008. Defendant Rossi was employed by Cayre as Design Director from about May 2004 until June 16, 2008. During his employment at Cayre, Diaz reported to Rossi, and, after Rossi left, to Pink; Rossi, during her employment, reported to Pink.

In his complaint, plaintiff alleges that defendants discriminated against him based on his gender, by subjecting him to sexual harassment, and by retaliating against him for complaining about the harassment. More specifically, plaintiff alleges that defendant Rossi sexually harassed him and created a hostile work environment, through numerous, repeated sexual comments, innuendos, and conduct. See Verified Complaint, ¶¶ 28-68. Diaz did not report the alleged harassment to any of the Cayre defendants (*id.*, ¶ 69), but, by letter dated June 11, 2008, an attorney for plaintiff wrote to Amin Cayre to complain about the alleged harassment by Rossi. *Id.*, ¶ 70. On June 16, 2008, after Rossi met with Pink and Amin Cayre to discuss the allegations against her, Rossi left the employ of Cayre.

In her counterclaim against Diaz, Rossi alleges that she was subjected to "repeated sexual advances, sexual verbal communications, and sexually oriented written materials promulgated by Plaintiff." Verified Answer, Counterclaim and

Cross Claim, ¶ 11. Specifically, Rossi alleges that, on one occasion, Diaz showed her a picture of a penis, which he told her was his (*id.*, ¶ 12); and that Diaz sent her e-mails which included the word "chardas," which Rossi alleges means "to do it" or "make love" in Spanish. *Id.*, ¶ 13. Rossi further alleges that Diaz falsely accused her of "illegal sexual advances," and thereby colluded with the Cayre defendants to terminate her employment. *Id.*, ¶ 18. In her cross claim against the Cayre defendants, Rossi alleges that they colluded with plaintiff to create a hostile environment and to falsely accuse her of sexual harassment (*id.*, ¶¶ 24, 26), and failed to promulgate rules to prevent such a hostile workplace environment. *Id.*, ¶ 25. Although Rossi also alleges that she was wrongfully terminated as a result of false accusations of harassment, she acknowledges, in her opposition, that she resigned, contending that she "may have felt that she had no option but to resign" after being confronted with accusations of misconduct. Rossi's Memorandum of Law in Opp. to Plaintiff's Cross Motion (annexed to Hollander Aff. in Opp.), at 6; see Hollander Aff. in Opp., ¶ 5.

#### DISCUSSION

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction. See CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must "accept the facts as alleged in the

complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88; see *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence' are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999) (citation omitted), *affd* 94 NY2d 659 (2000); see *Robinson v Robinson*, 303 AD2d 234, 235 (1<sup>st</sup> Dept 2003); *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1<sup>st</sup> Dept 1994).

Where the moving party offers evidentiary material, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one. See *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *Pincus v Wells*, 35 AD3d 569, 570 (2d Dept 2006); *Meyer v Guinta*, 262 AD2d 463, 464 (2d Dept 1999). "A CPLR 3211 dismissal 'may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 (2005), quoting *Held v Kaufman*, 91 NY2d 425, 430-431 (1998); see *Leon*, 84 NY2d at 88.

The Cayre defendants, and plaintiff, seek dismissal of Rossi's claims, which are based on alleged violations of due

process, common-law wrongful discharge, negligence, intentional infliction of emotional distress, discriminatory discharge, and hostile work environment. In opposition, Rossi addresses only the claims based on alleged employment discrimination and intentional infliction of emotional distress.<sup>1</sup> Thus, to the extent that Rossi asserts claims based on alleged violations of constitutional rights, common-law wrongful discharge, and negligence, the motion to dismiss is granted without opposition.

#### SEXUAL HARASSMENT/HOSTILE WORK ENVIRONMENT CLAIMS

The standards for determining claims of discrimination brought under the State HRL are the same as under Title VII. To prevail on a claim of hostile work environment, a plaintiff must show that the "workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'." *Harris v Forklift Sys., Inc.*, 510 US 17, 21 (1993), quoting *Meritor Sav. Bank v Vinson*, 477 US 57, 65, 67 (1986). Generally, to be actionable, "[t]he incidents [of harassment] must be repeated and continuous; isolated acts or occasional episodes will not merit relief." *Kotcher v Rosa & Sullivan Appliance Ctr.*, 957 F2d 59, 62 (2d Cir

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<sup>1</sup>The Court notes that Rossi's opposition papers indicate that they are submitted in opposition to plaintiff's cross motion. However, as they, in part, address the arguments of the Cayre defendants, the Court will consider them as opposition to the Cayre defendants' motion as well.

1992); see *Clark County School Dist. v Breeden*, 532 US 268 (2001); *Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 (2d Cir 2000).

Further, a hostile work environment claim requires proof that the alleged misconduct was both "objectively and subjectively offensive, such that a reasonable person would find the conduct hostile or abusive, and such that the plaintiff did, in fact, perceive it be so." *Matter of State Div. of Human Rights v Stoute*, 36 AD3d 257, 263 (2d Dept 2006), citing *Oncale v Sundowner Offshore Servs., Inc.*, 523 US 75, 81 (1998); see *Harris*, 510 US at 21. Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 US at 23.

Until recently, the standards for recovery in discrimination claims brought pursuant to the City HRL were also the same as for cases brought under Title VII, but the First Department has made clear that the provisions of the City HRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]), are "to be construed more broadly than federal civil rights laws and the State HRL." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 74 (1<sup>st</sup> Dept 2009). To that end, courts must conduct an "independent liberal construction analysis" of

claims brought under the City HRL. *Id.* at 66. With respect to claims of sexual harassment, the court in *Williams* rejected the "severe and pervasive" standard as "unduly restrictive" (*id.* at 77), but continued to recognize that the law cannot operate as a "'general civility code'" (*id.* at 79 [citation omitted]), and found that conduct which is "nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" is not actionable. *Id.* at 80.

Here, Rossi's claim that she was subjected to sexual harassment and a hostile work environment is based, essentially, on a single specific incident, namely, plaintiff's display of a picture of a penis. To the extent that Rossi also alleges that e-mails containing a Spanish word for "making love" contributed to a hostile work environment, evidence submitted by the Cayre defendants, unrefuted by Rossi, shows that she casually used the same word in numerous e-mails to plaintiff. See E-mails, Exs. G, H, I to Steinberg Aff. in Support of Cayre Defendants' Motion. Further, her claim that she was subjected to "repeated sexual advances" is completely unsupported by any factual allegations.

Similarly, her allegations that plaintiff and the Cayre defendants colluded to create a hostile environment and to terminate her, are devoid of facts in support. The additional allegation, made for the first time by her attorney in opposition papers, that she may have been forced to resign, is patently

insufficient to support such a claim, especially in light of evidence that she chose to leave, despite being advised to think it over. See June 16, 2008 Memo, Ex. A to Pink Aff. in Support. Notably, Rossi submits no affidavit based on personal knowledge, either to amplify the pleadings or to attempt to rebut the documentary evidence.

Thus, under either the State or City HRL standards, Rossi's allegations are insufficient to sustain a claim for discrimination. Likewise, her Title VII claim, even if not barred by her failure to show that she timely filed a complaint with the Equal Employment Opportunity Commission (see *Joseph v Price Costco*, 100 Fed Appx 857 [2d Cir 2004][filing claim with EEOC is a precondition to bringing Title VII action which can be waived by court or parties]), cannot survive.

#### INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS

A cause of action for intentional infliction of emotional distress requires that a plaintiff prove that a defendant's conduct was "so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983) (internal quotation marks and citation omitted; see *Howell v New York Post Co.*, 81 NY2d 115, 122 (1993) (citation omitted); *Freihofer v Hearst Corp.*, 65 NY2d 135, 143-144 (1985). "[T]he

'requirements of the rule are rigorous, and difficult to satisfy.'" *Howell*, 81 NY2d at 122 (citation omitted).

In this case, the alleged conduct of plaintiff, even if true, is not sufficiently outrageous and extreme to meet the required standard. Rossi's allegations that the Cayre defendants colluded with plaintiff to create a hostile work environment, and to falsely accuse her of misconduct in an effort to terminate her, also are insufficient to support a claim for intentional infliction of emotional distress. *See Murphy*, 58 NY2d at 303.


Accordingly, it is

ORDERED that the motion of defendants The Cayre Group Ltd., Amin Cayre, Jack Cayre and Susan Pink, and the cross motion of plaintiff Albert Diaz, are granted, and defendant Tracy Creo Rossi's counterclaim against plaintiff and cross claim against the Cayre defendants are dismissed; and it is further

ORDERED the remaining claims are severed and shall continue, and are transferred to the Civil Court per CPLR 325(d)

Separate CPLR 325(d) order filed herewith.

Dated: December 16, 2009  
New York, NY

**FILED**  
DEC 16 2009  
NEW YORK  
COUNTY CLERK'S OFFICE  
  
MICHAEL STALLMAN, J.S.C.