

Bradford v Burrell

2010 NY Slip Op 30136(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 108471/08

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**
Index Number: 108471/2008

PART 35

BRADFORD, SUSAN KENDALL

vs
BURRELL, ANNE W.

INDEX NO. _____

Sequence Number : 005

MOTION DATE 12/9/09

PARTIAL SUMMARY JUDGMENT

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by George W. Elkins for partial summary judgment dismissing the Complaint of the plaintiffs Susan Kendall Bradford, Jennifer Sue Link and Santa Hennigan as asserted against him is denied; and it is further

ORDERED that plaintiffs' cross-motion pursuant to CPLR 2217(a), 5015(a), 2201 and/or §362(a) of the US Bankruptcy Code, renewing, vacating, and/or modifying the sua sponte Order of the Court, and upon such renewal, vacatur and/or modification, severing and staying all claims against 74 Seventh, LLC ("74 Seventh"), and vacating any other stay as to the other defendants, including the stay entered by this Court's Order, and the automatic stay of discovery, pursuant to CPLR 3214(b), is granted; and it is further

ORDERED that all cross-claims by 74 Seventh, LLC and claims against 74 Seventh, LLC are severed, and stayed, pending the resolution of 74 Seventh, LLC's bankruptcy, a lifting or suspension of the automatic stay or the occurrence of some event rendering 11 U.S.C. § 362 inapplicable to this matter; and it is further

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED
JAN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

ORDERED that 74 Seventh, LLC is directed to obtain a no-fee Index Number and file an RJI for the severed claims and cross-claims; and it is further

ORDERED that plaintiffs' cross-motion pursuant to CPLR 3025(c), for leave to serve and file a Supplemental Summons and Amended Verified Complaint against proposed additional defendant Services Mangia, Inc. is granted, and the plaintiffs shall serve and file said Supplemental Summons and Amended Verified Complaint within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Elkins shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JAN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated 1/22/2010

ENTER:  J.S.C.
HON. CAROL EDMEAD

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: PART 35

-----X
SUSAN KENDALL BRADFORD, JENNIFER SUE LIM,
and SARRA HENNIGAN,

Index No. 108471/08
Sequence 005

Plaintiffs,

-against-

ANNE W. BURRELL, 74 SEVENTH, LLC
d/b/a CENTRO VINOTECA, SASHA MUNIAK,
and GEORGE W. ELKINS,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

FILED
JAN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this discrimination action, defendant George W. Elkins ("Elkins") moves pursuant to CPLR 3212 for partial summary judgment dismissing the Complaint of the plaintiffs Susan Kendall Bradford, Jennifer Sue Lim, and Sarra Hennigan ("Hennigan") (collectively, "plaintiffs") as asserted against him.¹

In response, plaintiffs cross move, pursuant to CPLR 2217(a), 2221(a), 5015(a), 2201 and/or §362(a) of the US Bankruptcy Code, renewing, vacating, and/or modifying the *sua sponte* Order of the Court, and upon such renewal, vacatur and/or modification, severing and staying all claims against 74 Seventh, LLC ("74 Seventh"), and vacating any other stay as to the other defendants, including the stay entered by this Court's Order, and the automatic stay of discovery, pursuant to CPLR 3214(b). Plaintiffs also cross move pursuant to CPLR 3025(c), for leave to serve and file a Supplemental Summons and Amended Verified Complaint against proposed

¹ By correspondence dated October 27, 2009, Elkins withdrew the branch of his motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). Thus, the Court only considers Elkins's instant arguments for summary judgment dismissing the Complaint.

additional defendant Services Mangia, Inc.

Factual Background

Plaintiffs allege that defendants 74 Seventh d/b/a Centro Vinoteca ("Centro" or "74 Seventh"), Sasha Muniak ("Muniak"), Elkins, and Anne W. Burrell ("Burrell") (collectively, "defendants") discriminated against them on the basis of sex in violation of the New York State Human Rights Law §296 *et seq.* ("State HRL"), and the New York City Human Rights Law § 8-1-101 *et seq.* ("City HRL"), while employed at a restaurant known as "Centro Vinoteca" in New York, NY 10014 ("Centro"). In their third and fourth causes of action, plaintiffs allege that the defendants took adverse employment actions against them, by failing to provide a nondiscriminatory workplace. In their fifth and sixth causes of action, plaintiffs allege that the defendants harassed them and created a hostile work environment. In their seventh and eighth causes of action, plaintiffs allege, *inter alia*, that defendants retaliated against them based on plaintiffs' complaints.

Previously, defendants 74th Seventh, Muniak and Elkins moved to dismiss the Complaint for failure to state a cause of action. By Decision and Order dated March 16, 2009, this Court denied defendants' motions, holding that plaintiffs stated claims against all defendants. No Notice of Appeal, or motion for reargument was filed. Thereafter, 74 Seventh filed for bankruptcy and this Court issued an Order, dated October 26, 2009, staying all proceedings in this matter (the "Order").

In support of summary judgment, Elkins argues that he has been sued solely in his alleged capacity as Owner, Principal, Director, Manager, Officer and Member of 74 Seventh and his alleged liability is derivative only. There is no allegation in the Complaint that Elkins personally

performed any hostile act, said any discriminatory word, or caused anything untoward, directly or indirectly, against or contributed to the harassment of plaintiffs individually or collectively. Nor is it alleged that Elkins, other than in a derivative ownership role, contributed to or caused plaintiffs to suffer any adverse employment action, created or contributed to the creation of a hostile work environment, or retaliated or assisted in any retaliation against the plaintiffs for making complaints. Elkins points out that plaintiffs allege that 74 Seventh is employer of all plaintiffs, and which, together with other individual defendants, was responsible for failing to provide a non-discriminatory work environment for plaintiffs.

Further, the Operating Agreement of 74 Seventh, which owns and operates Centro, establishes that Elkins has never been a member or principal of 74 Seventh. The Operating Agreement indicates that Muniak owns a ninety-nine (99%) percent membership interest in 74 Seventh and that Services Mangia, Inc. owns the remaining 1% membership interest. Elkins is not mentioned in the Operating Agreement in any capacity as owning or controlling any part or portion of 74 Seventh. Elkins further denies that he ever owned, had, or ever exerted any Membership, Officership, or Ownership of any kind in 74 Seventh. Muniak also states in his affidavit that no other Operating Agreement was ever drafted, drawn, filed or exists on behalf of 74 Seventh, nor was there any amendment or modification to this Operating Agreement. Further, Muniak attests that Elkins has never been a Member, Owner, Director, Officer in 74 Seventh.

Elkins further attests that he has never been a Shareholder, Officer, Director or Member of Services Mangia Inc. As such, argues Elkins, he is not a person subject to being sued by plaintiffs in any ownership capacity, and plaintiffs' allegations against him are demonstrably false, erroneous, and fall short of that which would permit a recovery against him in this

litigation based upon the allegations of plaintiffs' Complaint.

In opposition to summary judgment, plaintiffs argue that since information necessary to oppose the motion is still in the possession of defendants, and there has been essentially no discovery to date, the motion should be denied pursuant to CPLR 3212(f). Elkins has not been deposed and Burrell failed to appear for her September 2009 deposition.

Notwithstanding the absence of discovery, plaintiffs argue, Elkins is liable to plaintiffs as an active participant and aider and abettor of Burrell's discriminatory conduct for failing to investigate plaintiffs' allegations of mistreatment and take action to prevent it pursuant to HRL 296(6). Elkins is also bound by his judicial admission in the August 6, 2009 Verified Answer, that he is a member of 74 Seventh. However, since the fact of his membership is not controlling on the issue of Elkins's personal liability, defendants assume for purposes of this motion that Elkins was not a member of that entity at the relevant time. A corporate employee with no ownership interest who nonetheless "had the full authority to make and carry out the decision to terminate the Plaintiff... and [made] the relevant personnel decision to eliminate" plaintiffs' position is properly subject to suit under New York's Human Rights Law. As set forth in the affidavit of Hennigan, Elkins was the Director of Operations at Centro, and he was responsible for its day-to-day management and operations. Elkins was Hennigan's direct supervisor and supervisor of the other plaintiffs and defendant Burrell. Elkins had the authority to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including both the wrongdoer, Burrell, and the plaintiffs.

Plaintiffs also contend that Muniak concedes that Elkins was "a consultant and advisor" who assisted in the business and administrative end of' 74 Seventh, and describes Elkins as an

"employee." As such, when made aware of the allegations of abuse by the plaintiffs, Elkins had the obligation to commence an investigation and take other action to stop the abusive behavior, all of which he failed to do. Instead, Elkins sent Hennigan a stunning email in February 2008, stating: "don't buy into her [Burrell's] s###. I will find a way to deal with her early next week." Then, in obvious retaliation for plaintiffs' complaints of the discriminatory mistreatment they had suffered, Elkins promptly terminated Bradford and Lim outright and constructively terminated Hennigan. Such "actual participation" by Elkins in the misconduct by Burrell is sufficient to impose liability as an "aider and abettor" to Burrell.

Plaintiffs also assert that their claims against 74 Seventh should be severed and stayed pursuant to §362(a) of the US Bankruptcy Code and any other stay, including the stay of discovery pursuant to CPLR 3214(b) should be vacated, as section 362 provides for a stay of proceedings as against the debtor only and does not encompass non-bankrupt co-defendants. It would be unjust to force plaintiffs to await the conclusion of the bankruptcy proceedings before resolving their claims as against Burrell, Muniak, and Elkins. Further, to the extent that there is any other stay against the other defendants, such as the stay of discovery imposed pursuant to CPLR 3214(b) as a result of defendants' instant motion, any such stay should be vacated so that discovery in this matter can begin, almost a year and a half after the filing of the complaint.

Plaintiff also argues that the cases cited by defendants on *respondeat superior* are irrelevant.

Plaintiffs also seek leave to serve and file a supplemental summons and amended verified complaint against proposed additional defendant, Services Mangia, Inc. which defendant has just been brought to plaintiffs' attention as a partial owner of the Centro. Plaintiffs' Proposed

Supplemental Summons and Amended Verified Complaint has substantial merit and will not cause surprise or prejudice to the adverse parties, and this Court should adhere to this State's strongly held policy that leave to amend should be freely granted (CPLR 3025(b)). This amendment is required because Services Mangia, Inc., is and was a 1% owner of Centro and, therefore, has liability to the plaintiffs for the discriminatory treatment that they suffered.

Defendants oppose plaintiffs' cross-motion, arguing that plaintiffs' request for severance is short sighted, counter-productive, undermines the comprehensive disposition of this litigation, fails to serve the interests of justice, multiplies the work of this Court, and fails to serve the interest of any of the parties hereto, including those of the plaintiffs themselves.

Defendants argue that severance and partial litigation would result in a significant waste of judicial resources. Plaintiffs' request would not provide any substantial benefit to this Court, the system of justice, nor even the plaintiffs. It is not unusual for Courts to stay proceedings against all parties despite the fact that the Bankruptcy Code provides for an automatic stay only against the debtor where the Court perceives the interests of justice and the court's interest in controlling the dockets are better served.

The Bankruptcy stay permits the debtor time to protect it from having to defend itself from claims as well as having to continue to pursue judicial proceedings on its own behalf. Thus, even 74 Seventh's cross-claim against Burrell and Burrell's claim for indemnification by 74 Seventh would necessarily be stayed by the Bankruptcy Code, and would have to be litigated in a second trial at the termination of the Bankruptcy proceedings.

There also would be two rounds of discovery. Discovery would be restricted to the individual defendants at this time, requiring counsel, at the termination of the Bankruptcy

proceedings, to take additional discovery in the severed action against 74 Seventh, cross-claim by 74 Seventh against Burrell, and Burrell's claim for indemnification by 74 Seventh.

In addition, there would have to be two trials, as the liability of 74 Seventh could not be adjudicated in the first trial, nor would 74 Seventh's cross-claim against Burrell or Burrell's claim of indemnification by 74 Seventh be determined.

Also, 74 Seventh's cross-claim against Burrell, on grounds that any damages that might have been incurred by plaintiffs were caused by Burrell acting outside the scope of her employment, cannot be litigated in a setting of plaintiffs' action against only the individual defendants as the rights of 74 Seventh are inextricably interwoven with those of Burrell. Also, Burrell's indemnification claims against 74 Seventh necessarily implicate the rights and liabilities of the debtor 74 Seventh. Thus, such claims cannot be litigated at this time while 74 Seventh is in Bankruptcy and must await a second trial to determine if 74 Seventh is, in fact, liable to indemnify Burrell.

In reply and opposition to plaintiffs' cross-motion, Elkins points out that only after he submitted documentary evidence in his original motion papers did plaintiffs assert a different theory of liability to hold Elkins liable. Plaintiffs' allegations are plain, clear and factually erroneous.

Plaintiffs' mere allegation that Elkins's principal place of business is located at 16 East 48th Street, New York, New York, is erroneous and does not ascribe any act of discrimination to him. The documentary evidence submitted with Elkins's original motions papers show that the allegations that he was and still is Director of Operations, partial owner, principal manager director or officer of 74 Seventh, that he is "Sr VP. Managing Director of Mangia Hospitality

Group," and that he was responsible for day-to-day management of Centro, are entirely and objectively erroneous, false, and untrue.

Both Muniak and Elkins have sworn that Elkins was merely employed as a consultant and advisor who assisted in the business and administrative operation of 74 Seventh.

Assuming that Elkins was Director of Operations, such does not give him any ownership of the entity, nor does it make him more than a hired employee required to follow the directives of the owner of the said entity, Muniak. Further, since there is no allegation in the Complaint that Elkins actively participated in some way in discriminatory conduct or failed to take steps to curtail the same, the allegation of his being Director of Operations is meaningless.

The fact that Elkins was an employee assisting in the administrative functions of Centro, without more, does not create any potential liability for discrimination against plaintiffs. Also, the allegation that Muniak is Elkins's partner and supervisor does not indicate any wrongdoing by Elkins. The affidavits of Elkins and Muniak establish that Elkins did not have the power to hire and fire plaintiffs. Plaintiff Hennigan's affidavit indicates that Hennigan was actually the Manager and Supervisor of plaintiffs Lim and Bradford, and in no way states that Elkins personally fired any of the plaintiffs. Hennigan merely states that Hennigan received an email from Elkins which stated he loved working with her. This is not an allegation of wrong-doing or discrimination. Hennigan also states she passed complaints to Elkins and Muniak, to which Elkins allegedly replied that "he would find a way to deal with her [Burrell], which does not allege any wrongdoing on the part of Elkins.

Plaintiffs' counsel's speculations that Elkins was the Director of Operations with the power to discipline and fire employees and the obligation to investigate and stop the abusive

behavior, who terminated Bradford and Lim and constructively terminated Hennigan, are not alleged in the Complaint and are no substitute for facts for consideration by this Court in deciding this motion for partial summary judgment.

Plaintiffs do not ascribe any wrongdoing to Elkins. Although the Hennigan Affidavit states that Elkins had the power to hire and fire employees, Hennigan nowhere states that such firing ever took place. Moreover, there is no statement from either Lim or Bradford. Hennigan states that Bradford was fired at the behest of Burrell and carefully avoids saying that it was Elkins, personally, who fired Bradford. Rather, Hennigan states "Elkins and defendants terminated both Bradford and Lim." This catch-all phrase, which, of course, includes Muniak and other Managers, could collectively be correct, and yet Elkins did not fire Bradford. Likewise, in her affidavit, Hennigan states that Lim was fired by the collective defendants; she does not say that Elkins personally had anything to do with the firing. In fact, Hennigan was the Manager of the restaurant; Elkins was an administrative advisor to the owner. If anyone failed to correct the work environment, it was the on-site Manager, not the visiting administrator.

In plaintiffs' reply in further support of their cross-motion, plaintiffs argue that the law is well settled that the automatic stay provisions of the Federal bankruptcy laws do not extend to nonbankrupt codefendants and the cases cited by defendants are not inapposite.

Further, there is no issue that the action against the nonbankrupt codefendants may implicate the property of the bankrupt. At the hearing held on November 23, 2009, pursuant to Bankruptcy Code §341, the bankrupt entity's Managing Member, defendant Muniak, specifically testified that the debtor received no loans from any member and did not loan any money to any person or entity. The property of the debtor, therefore, is entirely separate from the property that

is implicated in this lawsuit, *i.e.*, that of Muniak, Elkins, Burrell, and (if the instant application is granted) that of Services Mangia, Inc.

Defendants cite no support for the proposition that there would be "two rounds" of discovery and trials with respect to 74 Seventh's claim for indemnification against Burrell. Plaintiffs note this "claim" for indemnification is not an asset of the bankrupt entity; it is not listed on the Debtor's Schedules; indeed, this claim accrues, if at all, only "at the time of the payment of the judgment." Here, the entire bankrupt estate consists of a total of only about \$3,000 which might conceivably be available to pay the unsecured liabilities of \$476,097.69, which amount does not even count the 74 Seventh's liability to the plaintiffs, which is not listed on 74 Seventh's Schedules. Further, given the reality of priority claims-such as legal fees-there will be no distribution whatsoever for the plaintiffs herein in the bankruptcy. Thus, 74 Seventh lacks sufficient assets to pay plaintiffs and its indemnification claim against Burrell, therefore, will never accrue.

Also, Burrell's claim against 74 Seventh for indemnification-to the extent that it exists since that is also not listed on the Debtor's Schedules-is also an unsecured claim and is therefore going to be wiped out entirely by the bankruptcy.

Further, it is 74 Seventh that chose to file its voluntary bankruptcy petition and, to the extent that this hinders or prejudices its own indemnification claim against Burrell, this is no fault of the plaintiffs and must not act to destroy, or even delay, plaintiffs' claims against the nonbankrupt codefendants. Also, the filing of this bankruptcy petition must not accrue to the benefit of Muniak, the nonbankrupt principal of the bankrupt entity, who, along with defendants Elkins and Burrell, are the only people who would benefit by indefinitely staying the instant

action.

Plaintiffs also point out that defendants' opposition papers do not address plaintiffs' request for leave of the Court to amend their Complaint to add an additional defendant, Services Mangia, Inc.

Further, Elkins's instant motion to dismiss the complaint against him should be denied. The issue is not Elkins' authority over 74 Seventh, but his authority over Burrell, plaintiffs, and the other employees at the restaurant. There are numerous emails from Elkins actually exercising his direct authority over plaintiffs and other restaurant employees as the "Exec. VP, Managing Director, Mangia Hospitality Group" on subjects as diverse as (i) tip pooling, (ii) the identification of managers, (iii) interviewing a prospective new restaurant employee, and (iv) directing the receipt and distribution of food and china deliveries. As such, defendants' affidavits fail to support their claim for the extraordinary relief herein sought of summary dismissal of plaintiffs' "aiding and abetting" claims against Elkins.

Discussion

As an initial matter, the Court first addresses plaintiffs' cross-motion because this action has been stayed by the Court due to the bankruptcy filing, thereby depriving Elkins the ability to seek summary relief from the Court.

Section 362 of the Bankruptcy Code provides for an automatic stay upon the filing of petition under any chapter of the Bankruptcy Code. 11 U.S.C. § 362(a). "The stay is a broad stay of litigation that stays a wide variety of actions that would affect interfere with the property of the debtor." However, it has been recognized that the filing of a bankruptcy petition by one defendant stays an action against said defendant, only as to that defendant, and not as to the other

nonbankrupt defendants (*Velez v Seymour Moslin Assocs., Inc.*, 278 AD2d 164, 719 NYS2d 11 [1st Dept 2000]; *Ali v DeMaddis*, 14 Misc 3d 638, 830 NYS2d 484 [Sup Ct Suffolk County 2006] (stating “While the stay provisions of the Bankruptcy Code do automatically stay all proceedings against the debtor, they do not apply to non-filing parties, even a spouse who may be jointly liable on a debt with the debtor-filer)).

That plaintiffs’ claims against 74 Seventh, 74 Seventh’s cross-claim against Burrell, and Burrell’s claim for indemnification against 74 Seventh would have to be litigated in a second action and at a second trial, if at all, at the termination of the Bankruptcy proceedings, does not warrant the application of the stay as to all remaining defendants. In any event, the indemnification claims accrue at the time of payment of judgment. Further, Elkins fails to cite any legal support for the proposition that the possibility of “two rounds” of discovery warrants a stay of the entire action. Thus, plaintiffs’ cross-motion to renew, vacate, and/or modify the *sua sponte* Order of the Court staying this action due to 74 Seventh’s bankruptcy proceeding, and upon such renewal, vacatur, and/or modification to sever and stay their claims against 74 Seventh only, is granted.

Turning to Elkins’s motion for summary judgment, as the proponent for summary relief, Elkins must establish that the “cause of action . . . has no merit” (see CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire’s Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary

proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad, supra; Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562).

As to the third and fourth causes of action, a claim for intentional discrimination under both the State HRL and the City HRL requires a showing that (1) plaintiffs are members of a protected class; (2) plaintiffs were qualified for their positions; (3) *plaintiffs suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination* (*Forrest v Jewish Guild for the Blind*, 3 NY3d at 305) (emphasis added). The Complaint alleges that Elkins had the power to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including the plaintiffs herein. (Comp. ¶¶19, 20). The Complaint also alleges that defendants (which includes Elkins) failed to properly investigate

complaints concerning Burrell, and that Lim and Bradford were terminated and that Hennigan was constructively discharged after plaintiffs made complaints about Burrell's actions.

As to plaintiffs' fifth and sixth causes of action, in order to state a hostile work environment claim under both the State HRL and the City HRL, plaintiff must establish that the workplace was "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment'" and that the ridicule and insults were gender-based (*McGarvey v Foley, Hickey, Gilbert & O'Reilly*, 294 AD2d 226, 741 NYS2d 858 [1st Dept 2002]; see also *Clayton v Best Buy Co., Inc.*, 48 AD3d 277, 851 NYS2d 485 [1st Dept 2008]). This determination may be made by considering the frequency of the alleged conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with any of plaintiff's work performance (*Brennan v Metropolitan Opera Ass'n, Inc.*, 284 AD2d 66, 729 NYS2d 77 [1st Dept 2001]).

As to the seventh and eighth causes of action, in order to make out a claim for retaliation under both the State HRL and the City HRL, a plaintiff must adequately allege that: (1) they engaged in a protected activity; (2) their employer was aware that they participated in such activity; (3) they suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse action (*Hernandez v Bankers Trust Co.*, 5 AD3d 146, 773 NYS2d 35 [1st Dept 2004]).

Elkins failed to establish entitlement to summary judgment as a matter of law as to plaintiffs' claims. Elkins' argument that the evidence establishes that Elkins "is not now, nor was he ever, an owner, partner, officer, director or member of any entity which owns or operates"

74 Seventh, and as such, plaintiffs' "causes of action against Elkins, all of which are based on derivative, *respondeat superior* theory of liability" lacks merit.

Elkins's submissions, *i.e.*, the Operating Agreement, indicating that Muniak and Services Mangia, Inc. are the sole members in 74 Seventh, initially overcomes plaintiffs' claim that Elkins was "partial owner, principal, manager, director, and/or officer" of 74 Seventh. " However, Elkins admitted in his August 6, 2009 Verified Answer (¶3), that he *is a member of 74 Seventh*. Further, the Operating Agreement does not defeat plaintiffs' allegations that Elkins had the power to (i) discipline employees, (ii) set rates of pay and (iii) hire and fire employees, including the plaintiffs herein. Section 2.1 of the Operating Agreement states that "The Company shall be managed by one or more Managers. The Manager may, but need not, be a Member.

Additionally, an individual employee who actually participates in conduct giving rise to a discrimination claim may be held personally liable (*Miotto v Yonkers Public Schools*, 534 F Supp 2d 422 [2008]; *Storr v Anderson School*, 919 F Supp 144 [1996] [plaintiff stated cause of action against former supervisor under statute making it an unlawful practice to aid and abet acts forbidden under Human Rights Law where plaintiff alleged that supervisor created hostile work environment by making sexually lewd remarks and derogatory remarks about employee's age while in her presence]; *Gentile v Town of Huntington*, 288 F Supp 2d 316 2003] [former employee could maintain an employment discrimination claim against his former supervisor under provision making it an "unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden" by NYHRL, where employee's complaint alleged that supervisor actually participated in the conduct giving rise to his discrimination claim]). Elkins's affidavit indicates that he was an "employee," who served as a

“consultant and advisor who in the business and administrative end of” 74 Seventh.

More importantly, Elkins, who supplied the affidavit in support of his own motion to dismiss, has not yet been deposed (*see International Rescue Committee v Reliance Ins. Co.*, 230 AD2d 641, 646 NYS2d 112 [1st Dept 1996] (stating “at this early stage of the litigation, the IAS court properly denied the motion for summary judgment since ‘it appear[ed] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but [could not] then be stated’”). Notably, Hennigan’s affidavit indicates that Elkins was a day-to-day manager and her direct supervisor at 74th Seventh. According to Hennigan, after she reported Lim and Bradford’s complaints of discrimination to Elkins, Elkins responded in an email, “don’t buy into her [Burrell’s] s###. I will find a way to deal with her early next week.” Hennigan states that Elkins then terminated Bradford and Lim, and then constructively terminated her. Such statements raise an issue of fact as to Elkin’s role at 74 Seventh concerning the plaintiffs, which should be explored at least at a deposition.

The record, at this juncture, raises an issue as to Elkin’s managerial role at 74th Seventh, his ability to hire and fire plaintiffs, his failure to sufficiently investigate the complaints made against Burrell, and his ultimate termination of Lim and Bradford, and constructive termination of Hennigan. Therefore, Elkins’ motion for partial summary judgment is denied.

As to the branch of plaintiffs’ cross-motion to vacate the stay of discovery pursuant to CPLR 3214(b), this application is moot. While CPLR 3214(b) grants an automatic stay of discovery upon the filing of a motion for summary judgment, in light of this Court’s determination above, further discovery in this action, including but not limited to depositions of the parties, is warranted, and shall proceed forthwith.

As to the branch of plaintiffs' motion to serve and file an Amended Verified Complaint against Services Mangia, Inc., such application is granted, as unopposed. Leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by George W. Elkins for partial summary judgment dismissing the Complaint of the plaintiffs Susan Kendall Bradford, Jennifer Sue Lim, and Sarra Hennigan as asserted against him is denied; and it is further

ORDERED that plaintiffs' cross-motion pursuant to CPLR 2217(a), 2221(a), 5015(a), 2201 and/or §362(a) of the US Bankruptcy Code, renewing, vacating, and/or modifying the *sua sponte* Order of the Court, and upon such renewal, vacatur and/or modification, severing and staying all claims against 74 Seventh, LLC ("74 Seventh"), and vacating any other stay as to the other defendants, including the stay entered by this Court's Order, and the automatic stay of discovery, pursuant to CPLR 3214(b), is granted; and it is further

ORDERED that all cross-claims by 74 Seventh, LLC and claims against 74 Seventh, LLC are severed, and stayed, pending the resolution of 74 Seventh, LLC's bankruptcy, a lifting or suspension of the automatic stay or the occurrence of some event rendering 11 U.S.C. § 362 inapplicable to this matter; and it is further

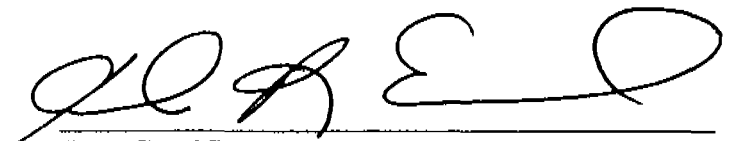
ORDERED that 74 Seventh, LLC is directed to obtain a no-fee Index Number and file an RJI for the severed claims and cross-claims; and it is further

ORDERED that plaintiffs' cross-motion pursuant to CPLR 3025(c), for leave to serve and file a Supplemental Summons and Amended Verified Complaint against proposed additional defendant Services Mangia, Inc. is granted, and the plaintiffs shall serve and file said Supplemental Summons and Amended Verified Complaint within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that Elkins shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 22, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD,

FILED
JAN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE