

Wixon v Broadway Regency Rest. LLC

2013 NY Slip Op 30145(U)

January 17, 2013

Sup Ct, New York County

Docket Number: 111927/11

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROCHELLE WIXON, TERESA RIVERA, DRAGANA TATIC, CHARKARMALY SIDNEY, HODAN BULHAN, CHRISTINE ANDERSON, RANDI MARTIRE, and NIDIA BRAVO,

Plaintiffs,

- v -

BROADWAY REGENCY RESTAURANT LLC, ROOFTOP LOUNGE LLC, ASCOT PROPERTIES, LLC, VIKRAM CHATWAL, VIVEK CHATWAL, RICHARD ADDISON, and JASON ASH,

Defendants.

Index No.: 111927/11

Motion Date: 05/11/12

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to _____ were read on this motion to dismiss.

FILED

JAN 25 2013

NEW YORK COUNTY CLERK'S OFFICE

Notice of Motion/Order to Show Cause -Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 5
6, 7
8, 9

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants move to dismiss portions of plaintiffs' complaint in this action alleging sexual harassment and discrimination in violation of the New York City Human Rights Law (Administrative Code of City of NY) §8-107 ("HRL").

Defendants' assert that the claims of plaintiffs' Charkarmaly Sidney and Randi Martire should be dismissed on the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

grounds of statute of limitations and failure to state a cause of action. CPLR 3211 (a) (5)&(7). Defendants argue that these plaintiffs fail to establish any acts of defendants occurred within the limitations period.

"A civil action . . . based on an alleged violation of the Human Rights Law is governed by a three-year Statute of Limitations." Jones v State, 149 AD2d 470, 471 (2d Dept 1989). This action was commenced on October 20, 2011. With respect to plaintiff Charkarmaly Sidney, the complaint alleges that she was employed until December 2008 and alleges discriminatory acts during November 2008. These allegations combined with the affidavit in opposition to the motion that states that she received cash for shifts worked after September 2008, are sufficient, for purposes of CPLR 3211, to survive defendants' statute of limitations challenge. As stated by the Court,

The defendants contend that the cause of action based on [] discrimination must be dismissed as barred by the Statute of Limitations. However, the allegations in the complaint, if proven, would establish a continuous violation. Therefore, the cause of action to recover damages for [] discrimination should not be dismissed as time-barred.

Dye v Catholic Medical Center of Brooklyn and Queens, Inc., 273 AD2d 193, 194 (2d Dept 2000). Similarly, the affidavit of plaintiff Randi Martire in opposition to the motion sets forth that the general allegations in the complaint with respect to the harassment were individually suffered by her and that she as well

was paid on a cash basis by the defendants through November 2008. Therefore, based upon the current facts asserted by plaintiffs Randi Martire's claims are not time-barred.

Defendants also assert that the claims of plaintiffs Teresa Rivera, Dragana Tatic and Randi Martire fail to state any cause of action against the defendants (CPLR 3211 [a] [7]). The court shall deny this application. In analyzing plaintiffs' claims this court is directed that

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, the facts alleged in the complaint must be accepted as true, and the plaintiff must be accorded the benefit of every possible favorable inference.

* * *

The plaintiff alleged, in her complaint, that her coworkers, . . . , routinely, repeatedly, and over a significant period of time, directed sexually and racially offensive language at her. She asserted that she repeatedly told them to refrain from such behavior, and complained to her supervisors about the behavior, but that the behavior continued, unaddressed and consciously ignored by [the employer's] management. The plaintiff further alleged that the environment at her place of employment consequently became intolerable, and that, as a result, she felt constrained to leave her employment with [the employer]. Because the complaint expressly alleged that the challenged conduct occurred on more than a few isolated occasions, but instead pervaded the workplace, and that [the employer] acquiesced in or condoned the conduct, the complaint states a cause of action pursuant to Executive Law § 296 (1) (a), based on sex and race harassment that creates a hostile work environment.

Mitchell v TAM Equities, Inc., 27 AD3d 703, 704-706 (2d Dept 2006). This court is further directed that "the pertinent issue is whether claimant has a cause of action, not whether one has

[*4]
been stated in the complaint." Brown v State, 125 AD2d 750, 751
(3d Dept 1986).

For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred.

Williams v New York City Housing Authority, 61 AD3d 62, 78 (1st Dept 2009). Unlike the standard that prevails under the federal and state anti-discrimination statutes, plaintiffs are not required to plead or prove under the HRL that the complained of acts were "severe or pervasive." Id. at 78-79; see Farrugia v North Shore University Hosp., 13 Misc3d 740, 748-749 (Sup Ct, NY County, 2006).

Here, the common allegations in the complaint set forth that the plaintiffs collectively suffered the discriminatory acts complained of over a period of time and that they left their employment because of the conduct. At this stage of the litigation these allegations are sufficient to set forth a viable cause of action for sexual discrimination irrespective of the fact that certain of the individual plaintiffs also allege discriminatory acts unique to themselves.

As to individual plaintiff Randi Martire, the court shall deny the motion as the allegations in the complaint as amplified by the affidavit in opposition to the motion set forth that she

herself specifically suffered the acts complained of individually. See Brown v State, 125 AD2d 750, 751 (3d Dept 1986) ("where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint").

With respect to defendant Richard Addision, plaintiffs allege in paragraph 33 of the complaint that he along with defendant Jason Ash would initiate inappropriate contact with plaintiffs and such a claim is sufficient to survive CPLR 3211 dismissal.

The court shall also deny defendants' application to dismiss the action against defendants Ascot Properties, Vikram Chatwal and Vivek Chatwal on the grounds that the allegations that they are "employers" under the HRL are insufficient plead. Plaintiffs argue that those defendants may be held liable under the "single employer" doctrine and this court finds that for pleading purposes the plaintiffs' argument has merit. The Appellate Division has held that

Patrowich v Chemical Bank (63 NY2d 541 [1984]) has been broadly read to adopt the "economic reality" test for determining who may be sued as an "employer" under the Human Rights Law (Executive Law art. 15), although the cases do not invariably use the phrase "economic reality." This test requires the plaintiff to put forth evidence that shows the corporate employee sued (i.e., the putative employer) has an ownership interest in the company or power to do more than carry out personnel decisions made by others.

Kaiser v Raoul's Restaurant Corp., 72 AD3d 539, 540 (1st Dept 2010) (citations and internal quotations omitted). In Kaiser, analogous to this case, the Court held that the two individual defendants, who were owners and officers of the co-defendant corporate restaurant that employed the plaintiffs, could be held liable for violations of the State Human Rights Law under the applicable standard. In their complaint, plaintiffs allege variously that they were employed at AVA Lounge, and that Ascot Properties LLC, Vikram Chatwal, Vivek Chatwal, Rooftop Lounge LLC and/or Broadway Regency Restaurant LLC are co-owners or have an ownership interest in AVA Lounge, which allegations are sufficient to meet their pleading burden for purposes of going forward.

Accordingly, it is

ORDERED that defendants' motion is DENIED; and it is further ORDERED that the parties are directed to attend a preliminary conference on February 5, 2013, at 9:30 A.M., at the Courthouse, Room 103, 71 Thomas Street, New York, NY 10023.

This is the decision and order of the court.

Dated: January 17, 2013

ENTER:

FILED
 JAN 25 2013
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 COUNTY CLERKS OFFICE

[Signature]
 DEBRA A. JAMES
 J.S.C.