SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SYLWIA KRZYZOWSKA,

Plaintiff,

-against-

LINMAR CONSTRUCTION CORP., ADAM NOWICKI, AND MICHAEL P. MARANCA,

Defendants.

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Index No.: 154853/2014

DECISION AND ORDER

Motion sequence #001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action arising from alleged gender/pregnancy discrimination, defendants Linmar Construction Corp. ("Linmar"), Adam Nowicki ("Nowicki"), and Michael P. Maranca ("Maranca") (collectively, "defendants") move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff Sylwia Krzyzowska ("plaintiff").

Factual Background

According to the Complaint, Nowicki and Maranca are co-owners of Linmar, a general contractor for whom plaintiff was employed from August 2012 until her termination on January 3, 2013.

Plaintiff alleges that she was hired as an office manager to perform administrative functions in connection with the bidding process for projects at various hospitals, matters of insurance, purchase and change orders, and field orders. Plaintiff answered phones, handled filing, performed receptionist duties, and was responsible for office and cleaning supplies.

Plaintiff claims that there was a sexist and demeaning tone toward her and female nonemployees; for example, one was called "a bit- - ," and another, "coffee and milk" (due to her

skin color).

Yet, in August 2013, plaintiff was awarded a performance-based pay raise, and promised a further raise in December 2013.

However, when plaintiff informed defendants that she was pregnant, the December pay raise was cancelled and defendants conspired to fire her.

Thereafter, on January 3, 2014, New York suffered a severe weather storm and warnings to stay home were issued. Plaintiff, "fearing for her safety and the safety of her unborn child" texted Nowicki, asking whether the office was open. He did not respond until after 9:00 a.m., at which time, plaintiff advised that she was staying home due to the dangerous weather. Nowicki did not acknowledge her text until after 2:00 p.m., demanding that plaintiff call him. When she did, Nowicki informed her that he and Maranca discussed the problem of her pregnancy, and that she was being fired because two people were required carry out her job functions. Nowicki later that day told plaintiff's lawyer that plaintiff was fired because her "position no longer exists."

Plaintiff was subsequently advised that she fired because of her subpar work performance and "spotty" attendance.

Plaintiff alleges that she was afforded only three days off in connection with her hospital operation in May 2013, and for pregnancy related hospital visits. Plaintiff's termination because she needed time off for pregnancy-related hospital visits is itself unlawful. And, her performance-based raise in August 2013 and promise of a future raise belie defendants' claim of subpar performance.

Plaintiff further asserts that defendants' conduct is part of a pattern of illegal conduct consisting of making illegal cash payments to employees, hiring Nowicki's daughter, welfare

fraud involving Nowicki's brother, and using non-union subcontractors on union projects.

As a result, plaintiff alleges causes of action for (1) gender/pregnancy, in that plaintiff was discriminated against "in the terms, conditions, and privileges of her employment" in violation of the Human Rights Law and the City Law; (2) aiding and abetting such discrimination, in that defendants, separately and together, aided and abetted discrimination against her in violation of the Human Rights Law and the City Law;[1] and (3) intentional infliction of emotional distress, by defendants' extreme and outrageous conduct, which caused plaintiff severe emotional distress.

In support of dismissal, defendants argue that there is no allegation that during the relevant time period, plaintiff was actually pregnant. The sole reference to her pregnancy, that she told defendants that she was pregnant, is insufficient to show that she was a member of a protected class, which is necessary to state a discrimination claim. Nor does the complaint allege that she was qualified to hold the position or that her duties were adequately performed. She was fired because it took two people to perform her job as she was doing only half of her responsibilities. As indicated on various memos, plaintiff's sub-par job performance was the basis for her termination, regardless of whether she was pregnant. She routinely talked on her cell phone during office hours, was late to work on several occasions, took days off, misfiled documents causing customer and office confusion, and let the hot plate on when she left in a hurry (which could have caused a fire). When confronted with various of these issues, plaintiff was dismissive in her response, and minimized her actions. And, as indicated in a memo of her

[1] Though not specifically cited, plaintiff is alleging claims under New York State Human Rights Law ("NYSHRL") (NY Executive Law §290 *et seq.*) and New York City Human Rights Law ("NYCHRL") (NYC Admin Code §8-101 *et seq.*).

annual performance review, she was given "solely [a] cost of living adjustment,"not a performance based raised, and was slotted to be replaced. Further, plaintiff does not allege when she told defendants of her pregnancy, or defendants' reaction to the news. Thus, there is no allegation showing that her discharge occurred under circumstances giving rise to discrimination. And, plaintiff does not identify any gender specific discriminatory conduct directed at her. The sole specific example is alleged profanity that was directed at another person.

The aiding and abetting discrimination claim also fails. As an individual cannot aid and abet his own conduct, in the event Nowicki and Maranca are considered her employers, they cannot be held liable for this claim.

And, the intentional infliction of emotional distress claim fails because there are no claims of extreme and outrageous conduct. The complaint does not allege that any of the defendants had knowledge of plaintiff's pregnancy, and there are no facts indicating that she suffered extreme emotional distress. Merely firing an employee is not outrageous conduct. Defendants also argue that as an at-will employee, under New York law, she has no claim for intentional infliction of emotional distress for wrongful termination.

Lastly, defendants seek sanctions as a result of plaintiff's and her attorney's attempt to intimidate them into a monetary settlement of this matter. Plaintiff's attorney has threatened to contact defendants' customers of defendants' purported criminal behavior alleged in the complaint. Such is in violation of the Code of Professional Responsibility DR 7-105(A) (22 NYCRR 1200.36(a)) which admonishes lawyers from threatening to present criminal charges to gain an advantage in a civil matter.

Plaintiff opposes dismissal, and cross moves for sanctions against defendants. Plaintiff

attests that her first year was uneventful, except for the sexist tone in the office. Nowicki variously referred to her as "piekna" which means "beautiful" in Polish, and "panna," meaning "unmarried woman."

Plaintiff states she used her cell phone, instead of the office phone, to make personal phone calls (especially after she and her family learned she was pregnant) but only during lunchtime and other breaks, and at moments of quiet.

The filing system was "a complete mess" when she arrived and she improved it. And, like other employees, she made odd mistakes. However, during the work day, she generated a "very considerable amount of documents reflecting" her competence, was never vulgar or dismissive, and always professional.

Plaintiff also asserts she was first 15 minutes late in November 2012 for leaving her wallet at home and then in January 2013 due to subway train issues. She also took time off: April 3, 2013 for being sick, April 26, 2013 for pre-surgery appointment, and May 1, 2013 for surgery. When plaintiff discovered she was pregnant, she advised defendants that she had "a medical issue that would require a number of hospital visit." Nowicki, *via* email, requested that plaintiff provide the dates she would work less hours or take off. Although not acknowledged by defendants, plaintiff emailed her response that she needed to take a day off on September 4, 2013, and a few days for Thanksgiving or Christmas, a couple of hours off on one day during the first week of October, and on October 19, 2013.

After learning on June 26, 2013 that she was pregnant, she advised Nowicki of her need for insurance, which was promised at her interview but not yet provided, and he asked her if she

was eligible for Medicaid. Plaintiff advised that her income was over the limit.[2]

At her annual review in August 2013, she was told that her promised pay raise would be deferred to December "with a smaller increase in the meantime."

Plaintiff finally told Nowicki she was pregnant in September 2013, when plaintiff began showing and when Nowicki asked her what was wrong with her due to her need for the days off.[3]

On January 3, 2014, when plaintiff advised she was not going to work due to the severe weather storm, Nowicki told her that her pregnancy was a "fant," meaning "booby prize." Plaintiff denies cursing at Nowicki during this conversation, and states that Nowicki threatened to come to plaintiff's house to get the office keys and give her a severance pay check, despite her repeated objections to him coming to her home. Nowicki called plaintiff repeatedly, leaving "sinister" messages, all while defendant's husband (who is also her counsel) was out of the country. Plaintiff was alone, felt intimidated, and was very scared at the prospect of Nowicki confronting her in her home.

Since the parties' affidavits present irreconcilable versions of plaintiff's employment with Linmar, and plaintiff's account must be deemed as true on a motion to dismiss for facial sufficiency, defendants' motion cannot be granted. And, defendants' documents, *i.e.*, memos, email, and Nowicki's affidavit are insufficient to establish a defense based on documentary evidence. Plaintiff's competing attestations, when accepted as true, adequately state a claim for gender/pregnancy discrimination. Further, plaintiff alleged that she understood that Nowicki and

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[2] Plaintiff denies that the conversation about the Medicaid occurred on June 24, 2013, as she did not know she was pregnant at that time.

[3] Plaintiff submits a photograph taken of her in early December in the office showing the visibility of her pregnancy.

Maranca were co-owners of Linmar, and thus, can be held liable as plaintiff's employer due to their ownership interest in Linmar. And, since these defendants claim that they were mere employees, they may be held liable for aiding and abetting discrimination by actually participating in the conduct giving rise to the discrimination claim. Issues of ownership and personnel decision-making powers can be clarified through discovery.

As to her intentional infliction of emotional distress claim, plaintiff asserts that she was particularly vulnerable since she was seven-months pregnant, and at home alone during a severe weather storm, when she was fired by defendants. Nowicki used a callous and mocking tone and said that he knew where she lived.

Finally, plaintiff seeks sanctions against defendants, arguing that their violation of plaintiff's rights was part of their general wanton indifference to civil obligations and the law. Nowicki's perjurious statements in support of defendants' motion, defendants' attempt to buy her off, and defendants' failure to include relevant emails, warrant sanctions.

Plaintiff also denies that any threats were made to file criminal charges against defendants and denies requesting any defendants make a monetary settlement. Plaintiff simply sought a resolution of the issues, namely, to reinstate plaintiff back to work, before resorting to legal action. And, plaintiff considered issuing non-party subpoenas, but only if research revealed it was permissible to do so prior to the joining of issue.

In reply, defendants argue that plaintiff's opposition, which the parties agreed was to be served by August 26, 2014, was filed on August 27, 2014 with an explanation that counsel had difficulty scanning the document the night before, but without a request for an extension time. Defendants point out that plaintiff contradicts her complaint in some instances and corroborates

defendants' claims in others. And, plaintiff's silence on some of defendants' other statements shows the merit of defendants' motion. Plaintiff was out of the office and late on many more days than she states, and never told Nowicki or Maranca that she was pregnant. Plaintiff's explanation of her threats to contact defendants' customers is unpersuasive and insufficient. And, the caselaw plaintiff cites in support of her claims are distinguishable.

In response, plaintiff refutes the additional assertions made by defendants in reply, and argues that discovery will demonstrate the falsity of defendants' claims.

Discussion

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Such a motion to dismiss may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

To be considered "documentary," the evidentiary papers must be unambiguous and of undisputed authenticity and be "essentially undeniable" and able to support the motion on its own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, --- N.Y.S.2d ----, 2014 WL 4232688, 2014 N.Y. Slip Op. 06007 [1st Dept 2014] *citing* Siegel, Practice Commentaries, supra, at 2); *Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]

citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")).

Thus, as "Professor Siegel recognizes, 'even correspondence' may, under appropriate circumstances, qualify as documentary evidence. In our electronic age, emails can qualify as documentary evidence if they meet the 'essentially undeniable' test" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc., supra, citing Art and Fashion Group Corp. v Cyclops Prod.*, Inc., --- AD3d ---, 2014 N.Y. Slip Op --- [1st Dept 2014] [decided simultaneously herewith]; *see also Langer v Dadabhoy*, 44 AD3d 425, 843 NYS2d 262 [1st Dept 2007], lv denied 10 NY3d 712 [2008]).

However, affidavits and deposition transcripts do not qualify as "documentary evidence" for purposes of this rule (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013] (affidavits are insufficient); *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011] (affidavits and deposition transcripts are insufficient); *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004] (affidavits and depositions cannot be the basis for this motion)).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*) and 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

On a CPLR 3211(a)(7) motion to dismiss, defendant may "test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 980 NYS2d 21 [1st Dept 2014]). When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff has stated a cause of

action to whether it has one" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, *supra, citing* John R. Higgitt, CPLR 3211[A] [7]: Demurrer or Merits–Testing Device?, 73 Albany Law Review 99, 110 [2009]).

Gender/Pregnancy Discrimination (First Cause of Action)

Plaintiff has stated a cognizable claim for discrimination based on pregnancy under both NYSHRL and NYCHRL.

A. NYSHRL

The Human Rights Law, as set forth in the Executive Law §296 (1)(a), makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment, *inter alia*, because of the individual's sex (NYSHRL §296 (1)(a)).

While neither the NYSHRL nor the NYCHRL explicitly names pregnancy as a type of discrimination, the Court of Appeals consistently held that employment discrimination on the basis of pregnancy falls within the prohibitions of the Executive Law §296 (1)(a) as sex or gender discrimination (*see Mittl v New York State Div of Human Rights*, 100 NY2d 326, 794 NE2d 660 [2003] (holding that "the Human Rights Law prohibits discharge of an employee because of pregnancy") *citing* Executive Law §296 (1); *Elaine W. v Joint Diseases N. Gen. Hosp.*, 81 NY2d 211, 216, 597 NYS2d 617 [1993] (holding that "distinctions based solely upon a woman's pregnant condition constitute *sexual* discrimination")[citation omitted]).

"The standards for establishing unlawful discrimination under section 296 of NYSHRL are the same as those governing Title VII cases under the Federal Civil Rights Act of 1964"

(*Mittl, citing Ferrante v American Lung Assn.*, 90 NY2d 623, 629, 665 NYS2d 25 [1997]; *see generally, Espaillat v Breli Originals*, 227 AD2d 266, 268, 642 NYS2d 875 [1st Dept 1996]; 42 USC §2000e *et seq.*; *see* 42 USC §2000e–2 [a][1]). Furthermore, the NYSHRL provides the same protections as does the federal Pregnancy Discrimination Act of 1978 ("PDA"). PDA was enacted as an amendment to Title VII of the Civil Rights Act of 1964 ("Title VII"), to clarify that pregnancy discrimination is a form of *gender* discrimination, prohibited by Title VII (*see* 42 USC §2000e [k][4]; *Saks v Franklin Covey* Co., 316 F3d 337, 343 [2d Cir 2003]; *Ingenito v Riri USA, Inc.*, 2013 WL 752201 [EDNY 2013], *citing AT & T Corp. v Hulteen*, 556 US 701, 701, 129 SCt 1962 [2009]). "An employment practice is unlawful in contravention of the PDA when pregnancy is 'a motivating factor' for an adverse employment action" (*Ingenito*; *Briggs v Women in Need, Inc.*, 819 FSupp2d 119, 126 [EDNY 2011]; *see also Saks*, 316 F3d at 343; *Kerzer v Kingly Mfg.*, 156 F3d 396, 400 [2d Cir 1998]).

"In addition, employment discrimination cases are [. . .] generally reviewed under [a] notice pleading standard" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, *supra*]). Under a notice pleading, plaintiff need not plead specific facts, but only need give defendant "fair notice" of the nature and grounds of her claims (*id.*).

The parties agree that to state a claim for discrimination, a plaintiff must allege that she is a member of a protected class, that plaintiff was discharged from a position for which she was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination (*Mittl,* 100 NY2d 326, *supra*).

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[4] Tile VII, Section 42 USC §2000e (k) states in pertinent part:
"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy."

Here, the complaint and plaintiff's affidavit[5] allege, *inter alia*, that plaintiff was in a protected class due to her pregnancy immediately prior to her discharge; she was hired by both Nowicki and Maranca to work for Linmar as an office manager based on her past experience of working at another construction company in Queens in which she worked as an Administrative Assistant.[6] Thus, plaintiff alleges that she was qualified for the position for which she was hired. Further, plaintiff sufficiently asserts that she was terminated from her job shortly after telling Nowicki that she was pregnant. Though defendants dispute being told of plaintiff's pregnancy, it is undisputed that she was noticeably pregnant by December 2013, a month before she was terminated.

With respect to the timing of her termination and whether there are facts giving rise to an inference of discrimination, it has been held that temporal proximity between a plaintiff's termination and the announcement of her pregnancy can raise such an inference (*Smith v K & F Industries, Inc.*, 190 FSupp 643 [SDNY 2002][finding inference of discrimination where termination occurred one month after announcement of plaintiff's pregnancy]; *see Flores v Buy Buy Baby, Inc.*, 118 FSupp2d 425, 430–31 [SDNY 2000]; *Bond v Sterling*, Inc., 997 FSupp 306 [NDNY 1998]; *cf. Koester v New York Blood Center*, 55 AD3d 447, 866 NYS2d 87 [1st Dept 2008] [*temporal proximity* between disabled employee's hotline complaint of disability and race

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[5] Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

[6] Defendants acknowledge their reliance on plaintiff's resume, which details her experience in providing various types of administrative support for various other employers, including "Working with Estimators, preparing proposals, providing price quotes, and following-up with Contractors"; "Managing Accounts Receivable, Accounts Payable, and Collections"; "Submitting paperwork . . ." and other similar duties.

discrimination and employer's decision to terminate employee was alone insufficient to support employee's claim of retaliatory discharge where termination followed *more than one year* of progressive disciplinary complaints from employee's supervisors concerning her repeated unapproved absences, lateness, poor performance and unprofessional behavior]).

Here, given the alleged timing of plaintiff's discharge, *i.e.*, approximately three months after telling Nowicki of her pregnancy on September 27, 2011, and one month after she became noticeably pregnant, and receiving a call from Nowicki in January 3, 2014 that he and Maranca had previously discussed the "problem" with her pregnancy and the need to terminate plaintiff, plaintiff sufficiently states "circumstances raising an inference of discrimination" (*Bond v Sterling, Inc.*, 997 FSupp 306 [NDNY 1998]).

In an employment discrimination context, plaintiff is not required to do more to defeat a CPLR 3211 motion (*see Artis v Random House, Inc.*, 34 Misc 3d 858, 936 NYS2d 479 [Sup Ct, New York County 2011], *citing Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756, 874 NE2d 720 [2007][the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor]; *see also Vassallo v The Burmax Co., Inc.*, 2012 WL 2050564 (Trial Order)[Sup Ct, Suffolk County 2012]). Thus, defendants' arguments that plaintiff has failed to demonstrate, *inter alia*, that she was qualified for the position (Affirmation in Support of Motion to Dismiss, p. 10) or her right to relief for gender/pregnancy discrimination are insufficient to support their motion to dismiss.

Furthermore, contrary to defendants' arguments, whether Nowicki or Maranca knew of plaintiff's pregnancy, is a disputed fact, which does not "completely negate the allegations

against the moving defendants" so as to defeat plaintiff's cause of action for pregnancy discrimination at this pleading stage (*see Lawrence v Graubard Miller*, 11 NY3d 588, *supra*). And, since this CPLR 3211 motion does not permit the Court to make a factual determination of disputed facts, the court does not reach the analysis suggested by defendants, *i.e.*, that they had a proper, non-discriminatory legitimate reason for terminating plaintiff based on her poor performance and alleged poor attendance issues (Affirmation in Support of Motion to Dismiss, p. 11).

It is also noted, unlike on a motion for summary judgment, defendants' submission of the affidavit of Nowicki and memos documenting "Mike and Adams" numerous discussions with plaintiff's "missing" or misfiled papers and significant problems with her job duties, do not qualify as documentary evidence to support dismissal pursuant to CPLR 3211(a)(1).

Therefore, plaintiff adequately stated a claim for pregnancy discrimination under NYSHRL.

B. NYCHRL

Plaintiff likewise adequately stated her claim for pregnancy discrimination under NYCHRL.

NYCHRL §8-107(1) provides, in pertinent part:

> "It shall be an unlawful discriminatory practice:
> (a) For an employer or an employee or agent thereof, because of the actual or perceived [. . .] gender [. . .] to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."
> (NYC Admin Code §8-107(1)(a)).

This statute, as revised by the Local Civil Rights Restoration Act of 2005 (the 2005 Restoration Act), is construed by courts more liberally than its state or federal counterparts[7] (*Zakrzewska v The New School*, 14 NY3d 469, 902 NYS2d 838 [2010]; *Williams v New York City Housing Authority*, 61 AD3d 62, 872 NYS2d 27 [2009][a court must evaluate the claims with regard for the statute's "uniquely broad and remedial purposes); *Brightman v Prison Health Services, Inc.*, 62 AD3d 472, 878 NYS2d 357 [1st Dept 2009]; *Loeffler v Staten Island Univ Hosp.*, 582 F3d 268, 278 [2d Cir 2009]). Therefore, since plaintiff adequately stated her claim for pregnancy-based discrimination under the State HRL, such allegations are equally sufficient for her claim under the even broader protection of the City HRL.

Aiding and Abetting Discrimination (Second Cause of Action)

Nowicki's and Maranca's Liability

An individual may be liable for discrimination in violation of the NYSHRL as either an employer (Executive Law §296(1)), or as an "aider and abettor" (*id.*, §296(6)).

As to the first cause of action for gender/pregnancy discrimination, Section 296(1) of the NYSHRL provides for individual liability where a defendant has "an ownership interest," or if the defendant has "the authority to 'hire and fire' employees" (*see Edwards v Jericho Union Free Sch. Dist.*, 2012 WL 5817281, at *7 [EDNY 2012]; *see also Scalera v Electrograph Sys., Inc.*, 2012 WL 991835, at *14–15 [EDNY 2012] (noting the circumstances under which individuals may be liable under NYSHRL)).

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[7] The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (Admin Code §8–130).

Accepting the facts in the complaint and plaintiff's affidavit as true for purposes of this CPLR 3211 motion, and drawing all reasonable inferences therefrom, the court finds that plaintiff has a cognizable claim against Nowicki and Maranca for pregnancy discrimination under the NYSHRL. Plaintiff's asserts that Nowicki and Maranca are co-owners of Linmar; that they hired plaintiff (Complaint ¶¶4-5, 8); and, after plaintiff announced her pregnancy to Nowicki, Nowicki and Maranca had a discussion about "the problem" of plaintiff's pregnancy, which culminated in her termination. Such assertions are sufficient to support the claim that Nowicki and Maranca actually participated in the alleged discriminatory conduct at issue. Therefore, they could be held individually liable as "an employer" under NYSHRL §296(1).

Under both Exec Law §296(6) and NYC Admin Code §8-107(6), an individual employee may be held liable for aiding and abetting discriminatory conduct.[8] However, courts have held that an individual cannot aid and abet his own alleged discriminatory conduct (*Hardwick v Auriemma*, 116 AD3d 465, 983 NYS2d 509 [1st Dept 2014] ("Since it is alleged that Auriemma's own actions give rise to the discrimination claim, he cannot also be held liable for aiding and abetting")). Thus, inasmuch as Nowicki and Maranca's alleged actions give rise to the discrimination claim, and they are "employers" of plaintiff, they cannot be held liable for aiding and abetting, and this claim fails (*see Raneri v McCarey*, 712 FSupp2d 271, 282 [SDNY 2010]).

Nowicki initially attested, in support of dismissal, that he and Maranca, along with two others, were employees of Linma (see Nowicki's initial affidavit: "In addition to myself and Mr.

[8] The language of both NYSHRL and NYCHRL is identical, providing that "it shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so" (Exec Law §296(6); NYC Admin Code §8-107(6)).

Maranca, Linmar has two other office employees" (¶3)). However, neither Maranca nor Nowicki ever deny that they are co-owners of Linmar, as plaintiff alleges in her complaint (¶¶ 4-5). Plaintiff attests that she was "hired by Defendants Nowicki and Maranca to work" for Linmar (Affidavit dated August 26, 2014, ¶3), and that after they discussed her pregnancy, Nowicki terminated her. In a reply affidavit, Nowicki attests that he and Maranca are co-owners of Linmar. As plaintiff acknowledges, individuals "are liable as employers under Section 296(1) only if they have 'an ownership interest,' or if they 'themselves, have the authority to `hire and fire' employees" *(Edwards v Jericho Union Free School Dist.*, 904 F.Supp.2d 294 [EDNY 2012]). That Maranca and Nowicki are also employees does not obviate the uncontested co-ownership interests they have in Linmar. Therefore, as plaintiff's "employers" they may be held liable under the first cause of action for gender/pregnancy discrimination, and the aiding and abetting claim is dismissed.

Intentional Infliction of Emotional Distress (Third Cause of Action)

The elements of a cause of action for intentional infliction of emotional distress are (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress (*Graupner v Roth*, 293 AD2d 408 [1st Dept 2002] citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be "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" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]). This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of

Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [citations omitted]). Those few claims of intentional infliction of emotional distress that have been upheld by Courts were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff (*Seltzer v Bayer*, 272 AD2d 263 [1st Dept 2000]; *see, e.g., Shannon v MTA Metro-North R. R.*, 269 AD2d 218, 219 [1st Dept 2000] ["a pattern of harassment, intimidation, humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 AD2d 2, 3 [1st Dept 1999] ["through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant"]; *Harvey v Cramer*, 235 AD2d 315 [1st Dept 1997] [misdiagnosis of HIV status is sufficiently outrageous if intentional, as to which an issue of fact was raised by evidence that doctor also told plaintiff's long-term partner the diagnosis and provided free medical care to the partner in exchange for sexual favors]).

In this case, plaintiff's allegations in her Complaint and affidavit fail to support the claim that defendants' conduct, while upsetting to plaintiff, was so extreme or outrageous, or that defendants' conduct falls in a category of deliberate, systematic and malicious harassment over a significant period of time, to support her third cause of action. Defendants terminated plaintiff on the phone, and that she was alone during a storm, faced with the possibility that Nowicki would come to her home with a severance check and to collect the office keys does not rise to level of extreme and outrageous conduct "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"(*see American Credit Card Processing Corp. v. Fairchild*, 11 Misc.3d 972, 810 N.Y.S.2d 874 [Supreme Court, Suffolk County 2006] *citing, Seltzer v. Bayer*, 272 A.D.2d 263, 709 N.Y.S.2d 21 [1st Dept 2000] (finding that allegations that the defendant dumped a pile of cement on the sidewalk in front of the plaintiff's house, tossed lighted cigarettes into the plaintiff's backyard, threw eggs on his front steps, and made discriminatory-based threats were insufficient to support a cause of action for intentional infliction of emotional distress)).

Sanctions

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 (c) states that conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Here, the written correspondence between counsel for both parties contesting, with emotionally-charged and strong language, the propriety of plaintiff's termination do not warrant sanctions. And, although "sanctions could be awarded should it be shown that plaintiff's allegations of unethical and criminal conduct are materially false or were made merely to harass or injure defendants or gain some leverage in the instant litigation (22 NYCRR 130–1[c][2],[3]), the record, at this early stage of the action, does not permit such findings" (*see Liapakis v Sullivan*, 290 AD2d 393, 736 NYS2d 675 [1st Dept 2002]).

Therefore, the requests by plaintiff and defendants for sanctions against the other party are denied, as this juncture, as premature.

Conclusion

Based on the foregoing, it is hereby

ORDERED that branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted solely as to the second cause of action for aiding and abetting discrimination and the third cause of action for intentional infliction of emotional distress, and the second and third causes of action are hereby severed and dismissed; and it is further

ORDERED that branch of defendants' motion for sanctions is denied, without prejudice; and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied, without prejudice; and it is further

ORDERED that defendants shall serve their Answer within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 5, 2014, 2:15 p.m. in Part 35, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

Dated: September 19, 2014

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

HON. CAROL EDMEAD