

<b>Malnar v Giorgio Armani Corp.</b>
2015 NY Slip Op 31217(U)
July 15, 2015
Supreme Court, New York County
Docket Number: 154399/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
CLARE MALNAR, *et al.*,

Plaintiffs,

Index No. 154399/2015

-against-

**DECISION/ORDER**

GIORGIO ARMANI COPORATION, *et al.*,

Defendants.  
-----X

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Clare Malnar (“Malnar”) commenced this putative class action on behalf of herself and all other similarly situated unpaid interns employed by defendants to recover damages for violations of the New York Labor Law. Defendant Giorgio Armani Corporation (“GAC”) now moves for an Order pursuant to CPLR § 3211(a)(1) and (7), (c), 8303 and 22 NYCRR 130-1.1(a) and (c) dismissing plaintiff’s complaint and for the imposition of sanctions against plaintiff and her counsel. For the reasons set forth below, GAC’s motion is denied.

The relevant facts and procedural history are as follows. On May 1, 2015, named plaintiff Clare Malnar filed a complaint on behalf of herself and a putative class of similarly

situated individuals to recover unpaid wages for work performed as an intern for GAC. On May 29, 2015, GAC's counsel sent a letter to plaintiff's counsel demanding that her complaint be dismissed and threatening a motion for sanctions if counsel failed to comply. Annexed to the letter was an affidavit of GAC's Vice President of Human Resources Karen Gerena-Perez ("Ms. Perez"). In the affidavit, Ms. Perez attests that plaintiff was never an intern or employee for GAC; rather, plaintiff interned for A/X Armani Exchange. Ms. Perez further attests that the corporation Presidio International, Inc. ("Presidio"), not GAC, does business as A/X Armani Exchange and during the relevant time period GAC was not affiliated with Presidio.

In response to the letter, plaintiff's counsel notified GAC that her research had indicated that GAC owned a significant portion of Presidio and, as such, she could not dismiss the complaint at this pre-discovery stage. In response to this letter, GAC's counsel again sent an email demanding that the complaint be dismissed, yet again threatening sanctions. Shortly thereafter, GAC filed the instant motion to dismiss.

After the motion was filed, in an attempt to resolve the issue, plaintiff amended the complaint. In the amended complaint, Sabrina Jailall ("Jailall") was added as a named plaintiff. It is undisputed that Jailall worked for GAC at one time. Further, Presidio was added as a defendant. Additionally, the amended complaint included allegations that defendants GAC and Presidio operate "as part of a single integrated enterprise" that "jointly employed" the plaintiffs. Notwithstanding plaintiffs' filing of an amended complaint, GAC has represented that it wishes to have its motion applied to the amended complaint pursuant to its rights under the courts holding in *Sage Realty Corp. v. Proskauer Rose*, 251 A.D.2d 35 (1<sup>st</sup> Dept 1998), wherein the court found "that the moving party has the option to decide whether its motion should be applied

to the new pleadings.” Accordingly, the court shall analyze GAC’s motion to dismiss in relation to the amended complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the present case, as an initial matter, GAC’s motion for an Order pursuant to CPLR § 3211(a)(1) dismissing plaintiffs’ complaint on the ground that a defense is founded upon documentary evidence is denied. GAC asserts that plaintiff Malnar’s claims against it must be dismissed as Malanar never worked for GAC. In support of this assertion, GAC has only provided the affidavit of Ms. Perez wherein she attests that “Malnar was never an intern or employee for GAC” and “during the relevant time period GAC was not affiliated with Presidio.” However, such affidavit is insufficient to establish that Malnar’s claims against GAC must be

dismissed on the ground that it is not the proper party as it is well-settled that affidavits are not “documentary evidence” pursuant to CPLR § 3211(a)(1). See *Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 432 (1<sup>st</sup> Dept 2014) (“To qualify as ‘documentary,’ the papers content must be essentially undeniable and . . . , assuming the verity of the paper and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test.)”).

Additionally, GAC’s motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiffs’ complaint on the ground that it fails to state a cause of action is denied. GAC contends that plaintiff Milnar’s claims against it cannot stand as the complaint does not sufficiently allege that GAC is a “joint-employer” of plaintiff. However, such contention is without merit. The amended complaint alleges that

Defendants are a single and/or joint employer under the NYLL in that they share common business purpose and ownership, maintain common control, oversight and direction over the operations of the work performed by plaintiffs, including payroll practices. Upon information and belief each Defendant has had substantial control of Plaintiffs’ working conditions and over the unlawful policies and practices alleged herein.

Contrary to GAC’s contention, this allegation is sufficient to allege a “joint-employer” theory of liability against GAC to survive a motion to dismiss.

Finally, GAC’s motion for an order sanctioning plaintiff Malnar and her attorney is denied as the conduct complained about does not warrant sanctions. Indeed, as evidenced by this court’s denial of GAC’s motion to dismiss, there is no merit to GAC’s contention that plaintiff Malnar’s actions in refusing to discontinue this action was frivolous.

Based on the foregoing, GAC’s motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 7/15/15

Enter: OK

J.S.C.  
CYNTHIA S. KERN  
J.S.C.