Baker v County of Suffolk
2016 NY Slip Op 32246(U)
October 31, 2016
Supreme Court, Suffolk County
Docket Number: 13-11072
Judge: Joseph C. Pastoressa

SHORT FORM ORDER

INDEX No. 13-11072
CAL. No. 15-01981OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 3-22-16 (002)
MOTION DATE 3-23-16 (003)
ADJ. DATE 5-11-16
Mot. Seq. # 002 - MG
003 - MG;CASEDISP

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RACHANA BAKER,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK, NEW YORK and DAVID MOHR,

Defendants.

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ROBERT PREVITO, ESQ.
Attorney for Plaintiff
33 Walt Whitman Road, Suite 310
Huntington Station, New York 11746

DENNIS M. BROWN, ESQ.
SUFFOLK COUNTY ATTORNEY
Attorney for Defendant Suffolk County
100 Veterans Memorial Highway
P. O. Box 6100
Hauppauge, New York 11788-0099

MEYER, SUOZZI, ENGLISH AND KLEIN, P.C.
Attorney for Defendant Mohr
1350 Broadway Suite 501
New York, New York 10018

Upon the following papers numbered 1 to 50 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21, 34 - 42 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 31, 44 - 48 ; Replying Affidavits and supporting papers 32 - 33, 49 - 50 ; Other memorandum of law 43 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant The County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by the defendant David Mohr for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages allegedly sustained by the plaintiff as a result of sexual harassment in the workplace in violation of New York State's Human Rights Law. The plaintiff alleges that she was sexually harassed by her supervisor, the defendant David Mohr (Mohr), while employed by the defendant County of Suffolk within the Department of Social Services (DSS) (collectively the County). In her complaint, the plaintiff sets forth three causes of action. The first cause of action alleges that the defendants violated the Human Rights Law. The second cause of action seeks damages for intentional infliction of emotional distress. The third cause of action seeks to recover damages from the County for Mohr's actions based on the doctrine of respondeat superior. The plaintiff does not allege that the County took any adverse employment action against her for reporting Mohr's behavior.

The plaintiff commenced this action by the filing of a summons and complaint on April 22, 2013. Thereafter, Mohr moved to dismiss the complaint pursuant to CPLR 3211(a)(7). By order dated May 14, 2015, the undersigned granted Mohr's motion to the extent that the plaintiff's second cause of action for intentional infliction of emotional distress was dismissed.

The County now moves for summary judgment dismissing the complaint on the grounds that it cannot be held liable for Mohr's action under the Human Rights Law, that the plaintiff's second cause of action has been dismissed, and that it cannot be held liable under respondeat superior. In support of its motion, the County submits, among other things, copies of the pleadings, the affidavit of the assistant commissioner of DSS, the transcript of the plaintiff's deposition, its written discrimination and sexual harassment policy, copies of certain job descriptions within DSS, and documents relating to its investigation of the plaintiff's complaint of sexual harassment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557; ***Rebecchi v Whitmore***, 172 AD2d 600; ***O'Neill v Fishkill***, 134 AD2d 487). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the part opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557; ***Perez v Grace Episcopal Church***, 6 AD3d 596; ***Rebecchi v Whitmore***, *supra*).

At her deposition, the plaintiff testified that she was hired to work as an account clerk with DSS in 2005, that she was promoted to senior account clerk in 2009, and that upon her promotion began reporting directly to Mohr, as well as her direct supervisor in the "TA Accounting Department," Laura Racano (Racano), and the principal account clerk Carol Passik (Passik). She indicated that Passik was a supervisor above Racano and below Mohr, and that Mohr was the "finance head." She stated that Mohr

often made unwelcome comments about her attire and her physical appearance. The plaintiff further testified that, on January 11, 2012, Mohr physically grabbed her with two hands "right from [my] buttocks," and held her around her hips, all in front of witnesses. She stated that she reported the incident to Racano and Passik that day, and that she and Passik reported the incident to Ken Knappe, Mohr's supervisor and the administrator of the finance department. She indicated that Mohr stroked her back on January 12, 2012, and that Mohr purposely "bumped" his body into her body while she was conversing with a coworker on January 26, 2012. The plaintiff further testified that two incidents happened on January 27, 2012, the first when Mohr grabbed her and hugged her/stroked her shoulder without her permission after she had done him a favor related to work, and the second when Mohr grabbed her shoulder and pulled her towards him. She stated that two prior incidents in 2010 involved Mohr touching her in a stairwell and making a comment about the size of her breasts relative to those of a coworker. She indicated that she filed a formal complaint on February 22, 2012, and that Mohr was removed from the building where she worked on June 19, 2012. The plaintiff further testified that she suffered work-related stress during the period that Mohr remained in her building, that she sought professional help with her problems, and that after Mohr was removed she felt somewhat better. She stated that there were no changes to her job duties, pay, or hours after she complained about Mohr's behavior, that she continued to receive good work evaluations, and that Mohr never evaluated her work performance.

In her affidavit, Traci Barnes (Barnes) swears that she is the assistant commissioner of DSS responsible for personnel, staff development and facilities management, and that she is in charge of the special investigative unit (SIU) and security for all DSS offices. She states that, pursuant to the County's discrimination policy, she was the departmental designee for discrimination and sexual harassment complaints at the time of the plaintiff's allegations, and that she became aware of the plaintiff's complaints in mid-January 2012 when she was so advised by Kenneth Knappe, Mohr's supervisor. She indicates that she subsequently learned that the plaintiff made additional complaints in late January 2012, and assigned investigator William Hobbs (Hobbs) of the SIU to investigate the plaintiff's complaints "as well as those of another DSS employee." Barnes further swears that Hobbs interviewed the plaintiff on February 22, 2012 and, as a result of his investigation into the complaints of the two employees, Hobbs determined that "most of the specific complaints made by plaintiff, and [the other employee] were supported by independent witness statements." She indicates that, as a result of Hobbs' report dated June 19, 2012, the commissioner of DSS immediately ordered Mohr transferred to another unit in another building. She states that, in correspondence dated August 20, 2012, Mohr was suspended without pay for a period of 30 days, and advised of the filing of disciplinary charges against him and that he would be notified about the date of a formal hearing. She asserts that, in a written agreement between the parties finalized on or about May 1, 2014, Mohr agreed to a settlement of the disciplinary charges against him wherein he was demoted three pay grade levels for a period of 18 months, and agreed to attend counseling regarding his behavior in the workplace. Barnes further swears that neither Mohr nor his supervisor, Kenneth Knappe, had authority to make personnel decisions, although Mr. Knappe "could make recommendations with respect [to] changes in the distribution of personnel and workloads to increase efficiency."

The standards for recovery under § 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (***Ferrante v American Lung Assn.***, 90 NY2d 623). A claim of sexual harassment may proceed on the theory that the discriminatory conduct was so pervasive as to alter the conditions of the victim's employment, that is, a hostile work environment, or on the theory that unwelcome sexual advances or other sexual conduct was the quid pro quo for promotions and other employment conditions (***Ortega v Bisogno & Meyerson***, 2 AD3d 607; ***Fella v County of Rockland***, 297 AD2d 813).

A hostile work environment exists "'[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'"(***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 310, quoting ***Harris v Forklift Sys.***, 510 US 17, 21; *see* ***Beharry v Guzman***, 33 AD3d 742). Even a single incident of sexual harassment can create a hostile work environment if the alleged conduct is sufficiently severe (*see* ***San Juan v Leach***, 278 AD2d 299, 300). To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (*see* ***Matter of State Div. of Human Rights [Greene] v St. Elizabeth's Hosp.***, 66 NY2d 684; ***Matter of Totem Taxi v New York State Human Rights Appeal Bd.***, 65 NY2d 300, 305).

To obtain summary judgment in its favor dismissing the complaint as against it, a defendant employer must demonstrate that it did not approve of, acquiesce in, or condone any alleged discriminatory conduct, and that it did not retaliate against the plaintiff for reporting the incident (*see* ***Ellis v Child Development. Support Corp.***, 5 AD3d 430). Here, the County has established its prima facie entitlement to summary judgment regarding the issue of its acquiescence or condonation of Mohr's actions. It is undisputed that the County did not retaliate against the plaintiff for reporting Mohr to her supervisors and Mr. Knappe. In addition, the County investigated the plaintiff's complaints, found them to be supported by the evidence, and took immediate action based upon Hobbs' report.

Nonetheless, the County may be found liable for Mohr's behavior if it empowered Mohr to take tangible employment actions against the plaintiff and effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" (***Vance v Ball State Univ.***, 133 S Ct 2434, 2443, quoting ***Burlington Industries, Inc v Ellerth***, 524 US 742). Here, the County established its prima facie entitlement to summary judgment on the issue of its liability as the job descriptions submitted herein indicate that the County did not empower Mohr with the requisite authority to effect any change in the plaintiff's employment. Accordingly, the County has established its prima facie entitlement to summary judgment dismissing the plaintiff's first cause of action under the Human Rights Law.

In addition, the County has established its prima facie entitlement to summary judgment dismissing the plaintiff's second and third causes of action. The County contends that the order dated May 14, 2015, granting Mohr's motion to dismiss the plaintiff's second cause of action for intentional infliction of emotional distress, is the law of the case freeing it from its obligation to show its entitlement to summary judgment on the issue. "The doctrine of 'law of the case' is a rule of practice, an

articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, quoting ***Martin v City of Cohoes***, 37 NY2d 162; ***Brownrigg v New York City Hous. Auth.***, 29 AD3d 721). Here, the plaintiff had a full and fair opportunity to be heard on the issue at the time of the prior motion, and it is determined that the matter has been resolved in favor of the defendants. In addition, the plaintiff does not address the issue in her opposition to the motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544; ***Welden v Rivera***, 301 AD2d 934).

Finally, the County contends that it is entitled to summary judgment dismissing the plaintiff's third cause of action based on respondeat superior. In her third cause of action the plaintiff alleges that the County is liable under respondeat superior for "the acts of David Mohr, by violating the Human Rights Law ... and the intentional tort of intentional infliction of emotional distress." For the reasons set forth above, the latter contention is no longer viable, and the only claim remaining is whether the County is liable under respondeat superior for Mohr's violation of the Human Rights Law. It is well settled that the doctrine of respondeat superior based on an agency relationship is not available in cases involving discrimination, including sexual discrimination and its sexual harassment component (***Matter of Father Belle Community Ctr. v New York State Div. of Human Rights***, 221 AD2d 44; ***Matter of State Univ. of N.Y. at Albany v State Human Rights Appeal Bd.***, 81 AD2d 688, *affd* 55 NY2d 896).

In opposition to the motion, the plaintiff submits, among other things, her affidavit, the affirmation of her attorney, the transcripts of her deposition and municipal hearing testimony, Hobbs' investigative reports for the two subject complaints against Mohr, and her completed sexual harassment complaint form. In her affidavit, the plaintiff swears that she has read the affirmation of her attorney, and that she agrees with the statements and arguments therein. She states that the defendants' actions in defending this lawsuit "is a repeat of the discrimination and sexual harassment I suffered on the job," and that Mohr should have been fired from his job after the finding of sexual harassment herein. She contends that Mohr "constituted an officer and a representative of [the County] charged ... to report his conduct to his supervisors, which he did not do." The plaintiff further states that the defendants' claim that Mohr "had no power over me" is false, and asks "if he had no power over me at my job, then who on Earth did?"

As the plaintiff's testimony at the municipal hearing held herein and at her deposition are essentially the same, it is deemed unnecessary to summarize the testimony at said hearing. In his affirmation, counsel for the plaintiff contends that the County is liable herein as Mohr was the plaintiff's supervisor and a "high-level managerial employee" of said defendant, making the question whether the County approved of, or condoned, Mohr's behavior irrelevant. It has been held that an employee's conduct can be imputed to an employer where the employee is a high-level managerial employee (***Ellis v Child Development. Support Corp.***, *supra*; ***Matter of Father Belle Community Ctr. v New York State Div. of Human Rights***, *supra* [liability imputed to employer where harasser is its highest ranking employee]).

In making this argument, counsel points to Mohr's job description which includes the language that the chief accountant "coordinates and evaluates the operations of various accounting units; Establishes deadlines and priorities; plans, assigns, reviews and supervises the work of a large staff." However, the plaintiff has failed to submit any evidence that Mohr acted as anything more than a middle level supervisor within a municipal department subject to civil service laws and regulations. The plaintiff testified that she considered herself a supervisor of account clerks, and that Mohr never wa. involved in the process of evaluating her work performance. In ***Vance v Ball State Univ.***, *supra*, the United States Supreme Court rejected the "nebulous definition" of a supervisor as one with the ability to exercise significant direction over another's daily work in favor of a test wherein the employer could only be found liable if the individual participating in the sexual harassment could directly effect a significant change in the plaintiff's employment status (***Vance v Ball State Univ.***, 133 S Ct at 2443). The plaintiff has failed to raise an issue of fact whether Mohr was a "high-level managerial employee" of the County with power to affect her employment status.

Counsel for the plaintiff further contends that the County acquiesced and/or condoned Mohr's actions as it knew of the plaintiff's complaint of sexual harassment on January 11, 2012 but did not act until February 22, 2012, and that "no corrective action took place until that investigation was completed in August 2012." It is undisputed that the plaintiff did not make a formal complaint regarding Mohr's behavior until February 22, 2012, and that the County investigated the plaintiff's complaint and acted on the same day that it received Hobbs' report substantiating the plaintiff's claims. The plaintiff's testimony at the municipal hearing and at her deposition indicates that she was undecided when or how she should proceed with her complaints against Mohr. The plaintiff fails to submit any evidence that the County acted outside of its discrimination and sexual harassment policy, the Civil Service Law, or the collective bargaining agreement governing the employment of the plaintiff as well as Mohr. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*; ***Rebecchi v Whitmore*** *supra*). Accordingly, the County's motion for summary judgment dismissing the complaint is granted

Mohr now moves for summary judgment dismissing the complaint against him on the grounds that he cannot be held individually liable under Human Rights Law §296. In her complaint, the plaintiff alleges that "the acts of the defendants ... constitutes discrimination ... under NYS Human Rights Law, Executive [Law] No. 296." It is well settled that a supervisor or coworker cannot be held individually liable under Human Rights Law §296(1) unless he or she is shown to have an ownership interest or any power to do more than carry out personnel decisions made by others (***Patrowich v Chemical Bank***, 63 NY2d 541; ***Matter of New York State Div. of Human Rights v ABS Elecs., Inc.***,102 AD3d 967). Here, it is undisputed that Mohr did not have an ownership interest in DSS, and the record establishes that Mohr did not have the power to independently carry out personnel decisions regarding the plaintiff.

To the extent that the plaintiff's complaint can be read to include a claim that Mohr violated Human Rights Law §296(6) in engaging in inappropriate behavior it is without merit. Human Rights Law § 296(6) provides that "[i]t 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 to attempt to do so." It is well settled that an individual cannot aid and abet their own violation of Human Rights Law §296[1]

(***Goldin v Engineers Country Club***, 54 AD3d 658, *lv denied* 13 NY3d 763; ***Strauss v New York State Dept. of Educ.***, 26 AD3d 67). To the extent that the plaintiff's complaint can be read to include a claim that Mohr violated Human Rights Law §296(6) in aiding and abetting the County's violation of the Human Rights Law it is similarly unavailing. An individual cannot be held liable for aiding and abetting a violation of Executive Law §296(1) if there was no legal basis for finding that the employer violated same in the first case (*see* ***Medical Express Ambulance Corp. v Kirkland***, 79 AD3d 886, *lv denied* 17 NY3d 716; *see also* ***Perks v Town of Huntington***, 251 F Supp 2d 1143). Accordingly, Mohr has established his prima facie entitlement to summary judgment herein.

In opposition to the motion, the plaintiff submits her affidavit, the affirmation of her attorney, the transcript of her deposition testimony, and a copy of Hobb's investigative report. In her affidavit, the plaintiff swears that she has read the affirmation of her attorney, and that she agrees with the statements and arguments therein. She states that Hobb's report concluded that Mohr "perpetrated numerous instances of sexual harassment," and that her deposition testimony explains that Mohr was her supervisor. She contends that the fact that she complained on January 11, 2012 and no investigation began until February 22, 2012 indicates that the County and Mohr did not take her complaints seriously.

In his affirmation, counsel for the plaintiff contends, among other things, that Mohr's motion is procedurally defective, and that Mohr was the plaintiff's supervisor and a high-level managerial employee of the County. Counsel's first contention that the subject motion is defective because it relies upon a previously submitted copy of Mohr's affidavit is without merit.

Moreover, the plaintiff has failed to raise an issue of fact requiring a trial of this action. As noted above, the record establishes that Mohr was not a high-level managerial employee of the County, or an individual with any power to do more than carry out personnel decisions made by others. In addition, the plaintiff has failed to submit any evidence that the County acted outside of its discrimination and sexual harassment policy, the Civil Service Law, or the collective bargaining agreement governing her and Mohr's employment. Accordingly, Mohr's motion for summary judgment dismissing the complaint is granted.

Dated: October 31, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION