Ramirez v 3690 Jad Food Corp.
2016 NY Slip Op 33105(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: 22663/2015E
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

KASSANDRA RAMIREZ,

Plaintiff,

-against-

3690 JAD FOOD CORP. et al.,

Defendants.

Index No. 22663/2015E

DECISION AND ORDER

Hon. Sharon A. M. Aarons

Defendants 3690 FOOD CORP. and Rolando Duran move, pre-answer, to dismiss the complaint against them. Plaintiff submitted written opposition with supporting affidavit and exhibits. The motion is granted to the extent of dismissing the eighth cause of action for intentional infliction of emotional distress and is otherwise denied.

This action stems from incidents that are alleged to have occurred throughout plaintiff's employment as a cashier with defendant 3690 JAD FOOD CORP., alleged to be doing business as C-Town Grocery Store, from June 2014 to November 2014. The first, second, third and fourth causes of action are predicated on allegations of sex and gender discrimination and retaliation pursuant to the Human Rights Laws of New York State and New York City (hereinafter the State HRL and the City HRL, respectively). The fifth cause of action is predicated on allegations that defendants failed to pay minimum wages pursuant to Labor Law § 652 and 12 NYCRR 142-2.1. The sixth cause of action is to recover unpaid overtime. The seventh cause of action is predicated on allegations of retaliation with respect to actions taken to enforce legal wage provisions pursuant to Labor Law § 215. The eighth cause of action is for intentional infliction of emotional distress. Defendants 3690 and Rolando Duran now move, pre-

answer, by notice of motion entered July 7, 2015, pursuant to CPLR 3211 (a) (7) to dismiss the complaint against them for failure to state a cause of action.

I. Sex/Gender Discrimination and Retaliation

3690 and Duran argue that the complaint fails to state a cause of action inasmuch as it does not specify the number of individuals employed. They further contend that they cannot be held liable as employees or for the acts of employees. No specific argument is otherwise raised with respect to the adequacy of the allegations. Plaintiff counters that the complaint is sufficient in these respects.

Pursuant to the State HRL, it is "unlawful discriminatory practice . . . [f]or an employer . . . because of an individual's . . . sex . . . to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment" (Executive Law § 296 [1] [a]).[1] The City HRL contains a nearly identical provision covering "gender" (Administrative Code § 8-107 [1] [a]). To make out a cause of action for discrimination based on a sexually hostile work environment under the State HRL, a plaintiff must allege that, because of her sex, she was subjected to a workplace that 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" (Hernandez v Kaisman, 103 AD3d 106, 111 [1st Dept 2012], quoting Harris v Forklift Systems, Inc., 510 US 17, 21 [1993]; see Chin v New York City Hous. Auth., 106 AD3d 443, 444-445 [1st Dept 2013], lv denied 22 NY3d 861 [2014]). Further, "[a]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it" (Matter of State Div. of Human Rights v St. Elizabeth's Hosp., 66

[1] It is noted that a recent amendment to the Executive Law is now in effect (see Executive Law § 296, as amended by L 2015, ch 369).

NY2d 684, 687 [1985] [internal quotation marks and citation omitted]; see McRedmond v Sutton Place Rest. & Bar, Inc., 95 AD3d 671, 673 [1st Dept 2012]). The State HRL, as it existed during the alleged acts and when this action was commenced, did not apply to employers with fewer than four employees with respect to claims of sexual harassment (see former Executive Law § 292 [5]).[2]

Under the more expansive City HRL, however, a plaintiff need only allege that she "has been treated less well than other employees because of her gender" (Williams v New York City Hous. Auth., 61 AD3d 62, 77 [1st Dept 2009], lv denied 13 NY3d 702 [2009]; see Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth., 132 AD3d 149, 156 [1st Dept 2015]; Chin v New York City Hous. Auth., 106 AD3d at 445; Short v Deutsche Bank Sec., Inc., 79 AD3d 503, 505-506 [1st Dept 2010]). The City HRL also imposes strict liability on employers for discriminatory acts of those employees who stand in a "managerial or supervisory capacity" to the victim (Zakrzewska v New School, 14 NY3d 469, 477 [2010], quoting Administrative Code § 8-107 [13] [b] [1]; see McRedmond v Sutton Place Rest. & Bar, Inc., 95 AD3d 671, 673 [1st Dept 2012]). This City HRL provision does not apply to employers with fewer than four employees (Administrative Code § 8-102 [5]). Finally, "[o]n a CPLR 3211 motion to dismiss, the Court accepts facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines whether the facts as alleged fit within any cognizable legal theory" (People v Sprint Nextel Corp., 26 NY3d 98, 113 [2015] [citation omitted]).

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[2] The most recent version of the State HRL now applies to all employers within New York with respect to claims of sexual harassment, regardless of the number of employees (see Executive Law § 292 [5], as amended by L 2015, ch 363).

Contrary to 3690 and Duran's contentions, while the complaint, at some points, refers to defendant Rolando Duran as an employee [complaint at ¶¶ 10, 12-13], it also alleges that he is the owner of 3690 [complaint at ¶ 11] and that he was the person that hired plaintiff [complaint at ¶ 31]. The complaint refers to more than four specific employees by name. Thus, making all inferences in plaintiff's favor, she adequately alleged that 3690 is an employer within the meaning of the State and City HRLs. As for 3690 and Duran's contention that they cannot be held liable for the acts of employees, it is similarly without merit. To that end, plaintiff's allegations of a hostile work environment indeed center on the words and conduct of various employees at the grocery store where she worked, whom she refers to as defendants Alex Doe, Papo Doe and Arsenio Doe.[3]

Plaintiff alleges that Alex, a grocery bagger, said to her "'[c]hupa mi...' (in Spanish — translated as '[s]uck my...')," "'[y]ou're beautiful,'" "'[y]ou've got big boobs,'" "'[n]ice legs'" and "'[l]ets have twins'" [complaint at ¶ 54]. Plaintiff further alleges that Alex made "unwelcome advances," "frequently touch[ed]" and "brush[ed] into [her] without her consent," "asked [her] to go with him to Crotona Park after work so that they would go on the rock and 'make babies'" and once instructed her to "go to the bathroom with him" and then "attempted to show [her] his penis" [complaint at ¶¶ 55-60]. According to plaintiff, she "complained to [Duran] about the sexual harassment she was forced to endure," but he "did not conduct any sort of investigation or take any remedial action in response to [her] complaints" [complaint at ¶ 63]. She continued that "[n]ot only was no action taken, but the sexual harassment escalated and [defendants] began to blatantly retaliate against [plaintiff], reducing her hours of work and giving her the silent

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[3] The use of a Doe placeholder in this way is expressly permissible and does not render the individuals themselves, as defendants assert, fictitious, within any true meaning of the word (see CPLR 1024).

treatment" [complaint at ¶ 64]. Plaintiff further alleges that Papo, her manager and Duran's brother, would have to be told when she needed to void an order, and he "would sexually tell [her], '[y]ou need my finger ... my finger'" when doing so [complaint at ¶¶ 16, 67]. She also alleged that Papo "asked [plaintiff] and [another cashier] to a nearby hotel for 'drinks,'" "would touch female cashiers [at the grocery store] on the butt, without invitation," "kiss female cashiers . . . on the neck, without consent" and "attempted to touch [her, but] she resisted his unwelcome advances" [complaint at ¶¶ 69-71]. Plaintiff claims that Arsenio, a grocery bagger, told her "'I love you,'" "repeatedly attempted to touch [her] hands without invitation," had a habit of getting very close to [her]," "made a sexual gesture towards her" and "approached [her] and pulled down the zipper of his pants, while saying 'Here' [and] laughing" [complaint at ¶¶ 75-79]. Plaintiff alleges that, when she told Duran about Arsenio's conduct, he said, "'Well, if you don't feel comfortable working here. Then leave'" [complaint at ¶ 82].

The allegations that plaintiff was subjected to the foregoing words and acts, told Duran — who, according to her, owned the store and hired her — and that he thereafter did nothing in response, suffice to make out a cause of action under the State HRL under the theory that Duran and, by extension, 3690, became parties to the discrimination by "encouraging, condoning, or approving it" (Matter of State Div. of Human Rights v St. Elizabeth's Hosp., 66 NY2d at 687; see McRedmond v Sutton Place Rest. & Bar, Inc., 95 AD3d at 673). Furthermore, plaintiff's allegation that her manager was involved in the discrimination suffices to impose liability under the City HRL (see Zakrzewska v New School, 14 NY3d at 477; McRedmond v Sutton Place Rest. & Bar, Inc., 95 AD3d at 673). Hence, 3690 and Duran's reference to the economic reality test is inapposite, and there is no merit to their claim that plaintiff has failed to state a cause of

action pursuant to the State and City HRLs. The branch of the motion to dismiss the first, second, third and fourth causes of action is denied.

II. Wage Provisions and Retaliation

3690 and Duran argue, without citing any authority, that plaintiff failed to specify precisely which of the named defendants employed her and, instead, alleged that she was employed by five separate defendants. They further argue that, with respect to the wage retaliation claim, plaintiff failed to allege which defendant she complained to. They do not raise any other objection to the adequacy of the complaint with respect to these causes of action. Plaintiff counters that she adequately alleged that she was employed by 3690, her employer was Duran and she complained to him. She further offers an affidavit and W-2 as exhibits attached to her opposition papers in which she avers and documents same.

3690 and Duran's argument in this regard is utterly devoid of merit. The complaint indicates that plaintiff was employed by 3690 and Duran [complaint at ¶¶ 11, 31], she "made requests to be paid for the hours she worked in excess of 40 hours per week, but was denied" [complaint at ¶ 45], her "request for proper pay was denied each and every time" [complaint at ¶ 46] and she "was discouraged from seeking proper pay for her actual hours worked" [complaint at ¶ 47]. Plaintiff further alleges that, starting in November 2014, she "began to [be] pa[id] . . . by check," defendants "ensured that [she] work[ed] less than 40 hours per week" and that their "payroll practices w[ere] designed to avoid informing [her] that she had worked more than [40] hours per work week, thereby entitling her to overtime premium pay" [complaint at ¶¶ 48-50]. The Court finds that the allegations suffice at this preliminary stage. Even assuming that they were insufficient, however, the affidavit and W-2 submitted with the opposition papers adequately supplement the complaint [opposition, exhibits A and C] (see CPLR 3211 [c];

Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]). In her affidavit, plaintiff avers that she "complained to . . . Duran . . . about not being paid proper wages" and that, "[i]n retaliation for [her] complaints, the hostile work environment [she] faced increased and [she] was ultimately terminated" [Ramirez aff, at ¶ 9]. Reading the complaint broadly and considering plaintiff's affidavit and W-2, she has adequately pleaded that Duran was her employer and that she complained to him about her wages. The branch of the motion to dismiss the fifth, sixth and seventh causes of action is denied.

III. Intentional Infliction of Emotional Distress

3690 and Duran argue that this cause of action is duplicative of the other causes of action, as plaintiff failed to allege emotional harm or medical injuries. They further argue that the complaint is insufficient inasmuch as it does not allege that Duran intended to inflict emotional distress on her. Plaintiff counters that the allegations of pervasive sexual harassment constituted extreme and outrageous conduct.

A cause of action for intentional infliction of emotional distress may only be maintained "where the [defendants'] conduct has been 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" (Howell v New York Post Co., 81 NY2d 115, 122 [1993]; see Mitchell v New York University, 129 AD3d 542, 543 [1st Dept 2015], lv denied 26 NY3d 908 [2015]; Schottenstein v Silverman, 128 AD3d 591, 592 [1st Dept 2015]). Circumstances supporting a cause of action for intentional infliction of emotional distress have been found where the defendants "intentionally and maliciously engaged in a pattern of harassment, intimidation and abuse, causing [the plaintiff] unjustified demotions, lost pay and psychological and emotional harm over a period of years" (Shannon v MTA Metro-N. R.R., 269 AD2d 218,

219 [1st Dept 2000]; see Warner v Druckier, 226 AD2d 2, 3 [1st Dept 1999]; Collins v Willcox Inc., 158 Misc 2d 54, 56-57 [Sup Ct, NY County 1992]). A corporate defendant may be vicariously liable for intentional infliction of emotional distress committed by employees where it "had knowledge of the offensive conduct and ignored it" (Jara v Initial Contract Servs., 267 AD2d 106, 107 [1st Dept 1999]). However, intentional infliction of emotional distress, being a cause of action of last resort, does not lie where "the conduct complained of falls well within the ambit of other traditional tort liability" (Baliva v State Farm Mut. Auto. Ins. Co., 286 AD2d 953, 954 [4th Dept 2001] [internal quotation marks, emphasis and citations omitted]; see Doin v Dame, 82 AD3d 1338, 1340 [3d Dept 2011], lv denied 16 NY3d 708 [2011], lv denied 17 NY3d 713 [2011]; Leonard v Reinhardt, 20 AD3d 510, 510 [2d Dept 2005]; Conde v Yeshiva University, 16 AD3d 185, 187 [1st Dept 2005]).

Here, the conduct constituting the factual predicate for plaintiff's cause of action for intentional infliction of emotional distress is precisely the same conduct which forms the basis of her sexual harassment cause of action. Furthermore, all of the emotional damages which would be compensable under an intentional infliction of emotional distress claim are equally available pursuant to the State and City HRLs (see Executive Law § 297 [9]; Batavia Lodge No. 196, Loyal Order of Moose v New York State Div. of Human Rights, 35 NY2d 143, 146-147 [1974]; State Commn. for Human Rights v Speer, 29 NY2d 555, 557 [1971], revg on dissenting mem 35 AD2d 107 [2d Dept 1970]; Matter of Ballard v HSBC Bank USA, 42 AD3d 938, 938-939 [4th Dept 2007]), including punitive damages under the City HRL (see Administrative Code § 8-502 [a]; Walsh v Covenant House, 244 AD2d 214, 215 [1st Dept 1997]). Plaintiff, in opposition to the motion, has not identified any way in which, absent an intentional infliction of emotional distress claim, she would be without an adequate avenue of recovery in light of her claims under

the State and City HRL. Thus, even assuming that the allegations otherwise make out a cause of action for intentional infliction of emotional distress, the cause of action is nonetheless duplicative of her statutory discrimination claims and must be dismissed on that basis (see Conde v Yeshiva University, 16 AD3d at 187; Mohammed v Great Atl. & Pac. Tea Co., Inc., 44 Misc 3d 396, 399-400 [Sup Ct, NY County 2014]; Charney v Sullivan & Cromwell LLP, 17 Misc 3d 1105[A]; 2007 NY Slip Op 51832[U], *1-2 [Sup Ct, NY County 2007]; see also McIntyre v Manhattan Ford, Lincoln-Mercury, 256 AD2d 269, 270 [1st Dept 1998]; compare 164 Mulberry Street Corp. v Columbia University, 4 AD3d 49, 58 [1st Dept 2004], lv dismissed 2 NY3d 793 [2004]). The branch of the motion addressed to the eighth cause of action is granted.

As for plaintiff's remaining contentions, she has requested that the dismissal of any cause of action be without prejudice to seek leave to replead (see generally CPLR 3211 [e]). Because the Court sees no way that plaintiff would be able to properly replead a cause of action for intentional infliction of emotional distress against 3690 and Duran, her request is denied (see Genger v Genger, 135 AD3d 454, ___, 22 NYS3d 433, 434 [1st Dept 2016]; Greentech Research LLC v Wissman, 104 AD3d 540, 541 [1st Dept 2013]). In addition, the Court declines plaintiff's invitation to impose costs and sanctions at this juncture (see 22 NYCRR 130-1.1), but notes that whole branches of the motion were unsupported by any citation to legal authority and, further, many of the authorities appearing in their motion papers were inapposite.

For the foregoing reasons, it is hereby

ORDERED that the motion is granted to the extent that the eighth cause of action for intentional infliction of emotional distress against defendants 3690 JAD FOOD CORP. and Rolando Duran is dismissed with prejudice; and it is further

ORDERED that the motion is in all other respects denied.

Dated: March 8, 2016

SHARON A. M. AARONS, J.S.C.