

Schindler v Plaza Constr. LLC
2017 NY Slip Op 30029(U)
January 9, 2017
Supreme Court, New York County
Docket Number: 153291/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MICHELE SCHINDLER

Index No. 153291/16

Plaintiff,

Motion seq. no. 001

-against-

DECISION AND ORDER

PLAZA CONSTRUCTION LLC, PLAZA
CONSTRUCTION GROUP, INC., JORDAN PANEL
SYSTEMS CORP., and BLUE LAKE CRANE &
EQUIPMENT, LLC,

Defendants.

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BARBARA JAFFE, J.:

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By notice of motion, defendant Plaza Construction LLC (Plaza) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint as against it. Plaintiff opposes.

I. BACKGROUND

The action arises from the alleged discriminatory termination of plaintiff, a female licensed crane operator, because of her gender. In her complaint dated April 18, 2016, plaintiff alleges as follows: In August 2014, she was assigned by her union to a construction site in Brooklyn, where Plaza was the general contractor who allegedly directed her work and was responsible for employment decisions, defendant Jordan Panel Systems Corp. (Panel) was a subcontractor in charge of the crane operation, and defendant Blue Lake Crane & Equipment, LLC (Blue Lake) was the paymaster who issued checks to plaintiff. She alleges that shortly after

commencing work, her union informed her that one of the contractors onsite felt that she was “inadequate” for the job, and that such an appraisal was baseless given her 12 years of experience and that no one onsite at the time knew anything about the quality of her skills, but only that she was a woman. In November 2014, plaintiff was informed that her crane was being taken “out of operation” and that she had been “laid off.” (NYSCEF 1).

Following her termination, plaintiff discovered that defendants were still operating a crane at the site employing a male crane operator. Adding to her humiliation, she claims, a photograph of her was posted at the entrance to the site, a procedure typically reserved for situations where workers are banned for misconduct. She alleges that she was fired because of her gender, and advances a cause of action against all defendants pursuant to the New York City Human Rights Law (NYC HRL). (*Id.*).

Sometime before plaintiff’s employment, Plaza had entered into two subcontracts with Panel for metal wall panel work, and metal roofing and skylight work, respectively. Each subcontract contains the following pertinent provision:

ARTICLE 10: Administration and Supervision of the Work

- A. [Panel] shall furnish a competent and adequate staff as necessary for the proper administration, coordination, supervision and superintendence of the Work; . . . and keep an adequate force of skilled Workmen on the job to complete the Work in accordance with all requirements of the Contract Documents.

(NYSCEF 6-7).

The subcontracts also contain indemnity provisions, wherein Panel agreed to indemnify Plaza for claims arising from it or its employees’ acts or omissions. The parties also agreed that

[Panel] or [its] sub subcontractors, agents, employees, material suppliers or anyone directly or indirectly employed by them are not agents, servants or employees of [Plaza]

by virtue of this Subcontract [Panel] or [its] employees shall not in any way directly or indirectly represent that they are agents, servants or employees of [Plaza]. [Panel] is solely responsible for the work, direction, compensation and personal conduct of its officers, employees, [and] agents

(*Id.*).

II. CONTENTIONS

Plaza argues that plaintiff fails to allege any facts demonstrating that it was her employer, or a joint employer, nor does plaintiff identify which, if any, subcontractor employed her to operate the crane. To the extent that plaintiff alleges facts supporting a theory of joint employment, Plaza contends, they are conclusory and controverted by its subcontracts with Panel, wherein Panel retained the authority to hire, manage, discipline, promote, and fire its own employees, and that Plaza's general supervisory control over their engagement as a general contractor does not render it a joint employer. (NYSCEF 4).

Plaza also maintains that plaintiff's pleadings are devoid of any plausible facts from which discrimination may be inferred, as she merely alleges that an unidentified contractor thought her work inadequate, and that she was terminated three months later and replaced by a male crane operator. Moreover, it argues, the temporal gap between the comments she allegedly received and her firing militate against a finding of discrimination, and her allegation that she was replaced by a male operator is conclusory and unsupported, as she does not specify which entity hired him nor otherwise corroborate the fact. (*Id.*).

In opposition, by affidavit dated July 21, 2016, plaintiff alleges that as she was assigned to the job by her union, the identity of her employer is often unclear, and while she understood that Blue Lake issued her checks, she did not know on whose behalf it did so. She asserts that

she received instructions from employees of both Plaza and Panel, but that the former instructed her where to position the crane and what materials to lift. She alleges that a superintendent of Plaza contacted her union, claiming that she was inadequate, that the superintendent constantly harassed and insulted her, requested that she engage in unsafe work, and, on one occasion, hid her crane, which she later discovered in a building controlled by Plaza. She also claims that only Plaza could have posted her picture, which was meant to humiliate her, particularly as the reason given for her termination had nothing to do with misconduct. (NYSCEF 13).

Plaintiff argues that the subcontracts submitted by Plaza are inadmissible, absent a foundation for their admission, and that defense counsel's affirmation is insufficient. In any event, she claims that the agreements prove nothing about her relationship with Plaza because she was not a party to them, and that the necessarily fact-intensive criteria for determining Plaza's status as a joint employer are impossible to apply without discovery. She additionally argues that the NYC HRL does not require the existence of an employer-employee relationship so long as Plaza aided and abetted in her discrimination. Thus, she contends, the documentary evidence does not conclusively preclude her claim. (NYSCEF 11).

Plaintiff also asserts that her allegation that she was replaced by a male employee sufficiently articulates circumstances giving rise to an inference of discrimination, and that she need not disprove Plaza's theoretical objections to the substance of the allegation, nor otherwise specify how she will prove it. (*Id.*).

In reply, Plaza offers the affidavit of its chief operations officer, who attests to the authenticity of the subcontracts in issue. He contends that the agreements clearly delineate the responsibilities of each party, that Panel was solely responsible for its own employees,

notwithstanding that plaintiff is not named in the agreement, and that plaintiff fails to specify, beyond her vague “understanding,” whether the superintendent was an employee of Plaza. In any event, it contends, the superintendent’s basic instructions to plaintiff on the job site do not render Plaza a joint employer. (NYSCEF 14).

Plaza also asserts that plaintiff’s observation of a male crane operator on the job site alone does not establish that she was “replaced,” nor does her bare allegation of disparate treatment give rise to an inference of discrimination. Plaza also observes that plaintiff’s gender was neither referenced in the comments she allegedly received nor the offensive actions directed toward her, and thus are not probative of gender-based animus. Moreover, it contends that plaintiff’s reclassification of her claim based on aiding and abetting discrimination must, for the same reasons, also fail, and in any event, the claim is deficient absent any allegation of a discriminatory scheme or intent. (*Id.*).

III. ANALYSIS

A. Plaza’s documentary evidence

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence provided that the evidence conclusively establishes, as a matter of law, a defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-99 [1994]). While the court must construe the pleadings liberally, it is not required to accept the truth of allegations that are flatly contradicted by documentary evidence. (*Maldonado v DiBre*, 140 AD3d 1501, 1505 [3d Dept 2016], *lv denied* 28 NY3d 908; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). The evidence must be “unambiguous, authentic, and undeniable.” (*Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 725 [2d Dept 2016]).

A plaintiff may of course assert a cause of action for employment discrimination against his or her employer. In certain instances, a nonemployer may be subject to liability under the NYC HRL as a “joint employer” where it had “immediate control over the other company’s employees,” and particularly control over the terms and conditions of the plaintiff’s work. Other relevant factors include “commonality of hiring, firing, discipline, pay, insurance, records, and supervision” of the plaintiff, but the most important factor is the extent to which the nonemployer controls “the means and manner of the [plaintiff’s] performance.” (*Brankov v Hazzard*, 142 AD3d 445, 446 [1st Dept 2016], quoting *Haight v NYU Langone Med. Ctr., Inc.*, 2014 WL 2933190 [SD NY 2014]; *Strohl v Brite Adventure Ctr., Inc.*, 2009 WL 2824585, *8 [ED NY 2009] [“Whether the alleged employer exercised control over the employee’s conduct and the incidents of his employment remains the most important consideration”]).

In *Adler v 20/20 Companies.*, the plaintiffs asserted Labor Law § 215 claims against their employer, 20/20 Companies, and Verizon, as a joint employer. At issue was a similar contract, whereby 20/20 had agreed to assume “the sole responsibility and authority” in the “selection, hiring, management, coaching, evaluation, discipline, promotion and employment termination” of its employees, and Verizon agreed to “take no action or engage in any behavior that would be reasonably construed as the exercise or indicia of the employer rights or responsibilities or otherwise substantiate a ‘joint employer’ . . . status for Verizon with respect to [20/20’s] employees” (82 AD3d 915, 917 [2d Dept 2011]). The Appellate Division, Second Department, found that the contract flatly contradicted the plaintiffs’ allegation that Verizon exercised supervisory control over them, thereby precluding its liability as a joint employer. (*Id.*).

While the contract in *Adler* is similar to the subcontracts in issue here, it is

distinguishable. First, the plaintiffs in *Adler* were employees of 20/20, whereas here, absent any allegation that plaintiff was employed by Panel, the subcontracts do not preclude the possibility that Plaza may have employed her. Moreover, in contrast to the contracts in issue in *Adler*, the subcontracts here are silent as to Plaza's actions and/or obligations toward Panel's employees. And while not dispositive, the provision relied on by Plaza appears in the subcontracts' indemnity provisions, the apparent purpose of which is to shift the risk of liability to Panel based on its employees' wrongful acts, not to shift the risk of liability occasioned by Plaza's own discriminatory actions.

Accordingly, *Adler* is inapposite, and in light of the broad and remedial purpose favoring discrimination plaintiffs under the NYC HRL, the subcontracts do not preclude the possibility that Plaza may have sufficiently controlled the means and manner of plaintiff's work to a degree that it was plaintiff's joint employer. (*See eg Ouedraogo v Durso Assoc., Inc.*, 2005 WL 1423308, *3 [SD NY 2005] [as determination of joint employer status fact-intensive inquiry, "based on the circumstances of the whole activity, viewed in light of economic reality," dismissal premature absent discovery (internal quotation marks omitted)], citing *Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61 [2d Cir 2003]).

Thus, Plaza's documentary evidence does not conclusively establish, as a matter of law, a defense to plaintiff's claim.

B. Sufficiency of plaintiff's pleadings

A party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and

accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon*, 84 NY2d at 87). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]).

However, when the court considers evidentiary material submitted by the parties, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one,” and the motion should be denied “unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 145-146 [1st Dept 2014]). Affidavits may be considered on a motion to dismiss to preserve inartfully pleaded, yet potentially meritorious claims. (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]).

To state a discrimination claim under the NYC HRL, the plaintiff need not allege specific facts, “but need only give fair notice of the nature of the claim and its grounds.” (*Vig v New York Hairspray Co., LP*, 67 AD3d 140, 145 [1st Dept 2009]; *Phillips v City of New York*, 66 AD3d 170, 189 n 6 [1st Dept 2009], *overruled on other grounds by Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]). A plaintiff states a *prima facie* cause of action for employment discrimination by alleging facts supporting the following elements: (1) he or she is a member of a protected class, (2) who was well-qualified for his or her position, (3) that he or she was treated adversely or differently by the defendant, (4) and the adverse action was effected “under circumstances giving rise to an inference of discrimination.” (*Santiago-Mendez v City of New York*, 136 AD3d 428, 428-429 [1st Dept 2016]). The plaintiff’s burden to state a cause of

action and withstand a CPLR 3211(a)(7) motion is “de minimis.” (*Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]).

However, allegations which amount to legal conclusions absent factual support are insufficient to state a cognizable discrimination claim (*Askin v Dept. of Educ. of City of New York*, 110 AD3d 621, 622 [1st Dept 2013]; *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677 [2d Dept 2006]), even though the provisions of the NYC HRL, compared to its federal and state counterparts, “should be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible” (*Romanello v Intesa Sanpaolo, S.p.A*, 22 NY3d 881, 885 [2013]).

1. Joint employer

Here, accepting the allegations in plaintiff’s pleadings and affidavit as true, as plaintiff alleges that the superintendent dictated specifically where to position her crane and what materials to lift, it may be reasonably inferred that Plaza exercised control over the means and manner of her work at the job site beyond the general supervisory control of a general contractor. (*Cf. Huges v SJC Group, Inc.*, 2013 WL 4399226, *6 [SD NY 2013] [plaintiff’s allegations insufficient to establish joint employment, as defendant’s alleged activities limited to ensuring subcontractor’s compliance with subcontract]). In any event, the determination of Plaza’s status requires a fact-intensive inquiry which plaintiff is entitled to explore in discovery. (*See supra*, III.A.).

2. Gender discrimination

Accepting plaintiff’s allegations as true and affording them all favorable inferences, she sufficiently alleges that she was a member of a protected class (a woman), that she possessed

requisite qualifications given her 12-years' experience as a licensed crane operator, and that she was subject to unearned criticism, ridicule, and humiliation from Plaza's superintendent, and ultimately fired, all on account of her gender. (*See Brathwaite*, 98 AD3d at 445 [in light of *de minimis* burden, plaintiffs sufficiently alleged membership in protected class, that they were qualified for their positions, that they were laid off, and that such action gave rise to inference of discrimination]).

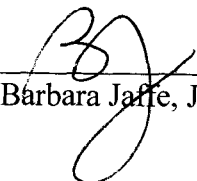
Plaintiff's observation of a male crane operator doing her exact work after she was terminated warrants an inference of discrimination sufficient to proceed on her claim and notwithstanding whether she was actually "replaced" by the male. (*See Montana v First Fed. Sav. & Loan Assn. of Rochester*, 869 F2d 100, 105 [2d Cir 1989] [that plaintiff's former responsibilities were divided and transferred to two younger employees sufficient to support inference of discrimination]; *see also Jessamy v City of New Rochelle, New York*, 292 F Supp 2d 498, 516 [SD NY 2003] ["(T)he fact that a plaintiff was either not replaced by someone outside of his or her protected class, or not even replaced at all, may weaken, but certainly does not eliminate, the inference of discrimination." (internal quotation marks omitted)]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Plaza Construction LLC's motion to dismiss the complaint is denied.

ENTER:



Barbara Jaffe, JSC

DATED: January 9, 2017
New York, New York