

Mejia v T.N. 888 Eighth Ave. LLC Co
2017 NY Slip Op 31701(U)
August 14, 2017
Supreme Court, New York County
Docket Number: 150228/2014
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

-----X
JUDITH MEJIA,

Plaintiff,

Index No.:
150228/2014

-against-

T.N. 888 EIGHTH AVENUE LLC CO d/b/a
COSMIC DINER, ELIAS "LOUIE" TSANIAS,
JOHN DIMOS, ABC CORPORATIONS #1-10,
And JOHN DOES #1-10, Jointly and Severally,

Defendants.

-----X

ROBERT KALISH, J.:

Upon review of the submitted papers:

- Plaintiff's motion pursuant to CPLR 2221(d) to reargue the Court's prior order dated December 21, 2016 as to the dismissal of Plaintiff's fifth cause of action for unlawful retaliation pursuant to the New York City Human Rights Law ("NYCHRL") is denied;
- Plaintiff's motion pursuant to CPLR 2221 to renew and/or reargue the Court's prior order dated December 21, 2016 as to the dismissal of a cause of action for unlawful retaliation pursuant to Labor Law §215 is denied; and
- the Plaintiff's motion to amend her complaint is granted solely to the extent that the Plaintiff may amend the complaint to include a new cause of action for unlawful retaliation based upon the Defendants' alleged violation of Labor Law §215.

PROCEDURAL BACKGROUND

By order dated December 21, 2016, this Court granted the motion by Defendants T.N. 888 Eighth Avenue LLC CO d/b/a Cosmic Diner ("Cosmic Diner"), Elias "Louie" Tsanias (Tsanias) and John Dimos (Dimos) seeking summary judgment dismissing Plaintiff Judith Mejia's complaint. Plaintiff now moves for the following relief:

- leave to reargue pursuant to CPLR 2221(d) the Court's December 21, 2016 decision with respect to the Court's dismissal of the Plaintiff's fifth cause of action for unlawful retaliation and discrimination in violation of the NYCHRL;
- leave to renew and/or reargue the cause of action for unlawful retaliation in violation of Labor Law §215 pursuant to CPLR 2221, and, upon renewal or reargument, for an order denying Defendants' motion for summary judgment dismissing this cause of action; or
- in the alternative, leave to replead the cause of action for unlawful retaliation in violation Labor Law §215, pursuant to CPLR 3025.

BACKGROUND AND FACTUAL ALLEGATIONS

This Court previously set forth the background and factual allegations of the underlying action in its decision dated December 21, 2016, granting Defendants' motion for summary judgment dismissing all eight of the Plaintiff's causes of action (See Plaintiff's exhibit 9). Without reiterating the entirety of its prior decision dated December 21, 2016, the following

Plaintiff concedes that Tsanias was not properly served and is not a party in this action.

background relates to the matter currently before the Court.

Plaintiff is a woman of Colombian descent and is over 40 years of age. Prior to quitting in August 2013, Plaintiff had been employed by the Cosmic Diner as a waitress since 2006. Plaintiff alleged that Defendants had subjected her to discrimination, a hostile work environment, and unlawful retaliation, as a result of her gender, national origin, and age, and because she had engaged in protected activity.

The Plaintiff alleged the following eight causes of action against the Defendants:

- Plaintiff's first cause of action alleges that she was discriminated against based upon her gender in violation of both the New York State Human Rights Law ("NYSHRL") and NYCHRL including that she was subjected to a hostile work environment based upon her gender. Plaintiff claims that the employees repeatedly touched and spoke to her in a sexual manner and that it affected the condition of her employment. Plaintiff claims that she reported this harassment to management, who failed to act and also participated in the harassment.
- Plaintiff's second cause of action mirrors the first one, and further alleges that Plaintiff was subject to gender-based discrimination in that the terms and condition of her employment were disparate to those of male employees.
- Plaintiff's third cause of action alleges that she was discriminated against based on her race and/or national origin in violation of both the NYSHRL and NYCHRL including that she was subjected to a hostile work environment based upon her race and/or national origin. Plaintiff alleges that she was subject to a hostile work environment because employees ridiculed Plaintiff based on her protected characteristics and that the conduct was severe and pervasive. Plaintiff further alleges that management knew or should have known about

the discrimination but did not take remedial actions.

- Plaintiff's fourth cause of action alleges that she was discriminated against based upon her age in violation of both the NYSHRL and NYCHRL including that she was subjected to a hostile work environment based upon her age.
- Plaintiff's fifth cause of action alleges that the Defendants retaliated against her when she complained about the incidents of sexual harassment and other instances of hostile work environment. Plaintiff further contends that she was retaliated against for engaging in a federal wage and hour lawsuit against Defendants. She further alleges that the unlawful retaliation culminated in a lawsuit against her and a false report to a news outlet.
- Plaintiff's sixth cause of action alleges malicious prosecution, and was voluntarily withdrawn by the Plaintiff at oral argument on November 3, 2016.
- Plaintiff's seventh cause of action alleges abuse of process, and was voluntarily withdrawn by the Plaintiff at oral argument on November 3, 2016.
- Plaintiff's eighth cause of action alleges defamation in that Plaintiff alleges that the Defendants published a false statement about Plaintiff and that she was harmed by this statement.

In particular, the Plaintiff's fifth cause of action alleged that the Defendants retaliated against her when she complained about the incidents of sexual harassment and other instances of hostile work environment. Plaintiff labeled her complaints to be a "protest to Defendant about the severe and pervasive race and/or national origin and gender discrimination, sexual harassment and hostile work environment she was subjected to during her employment with Defendant," and alleged that such protest was a "protected activity under the New York State and

City Human Rights Laws" (Complaint, ¶ 117). As a result of the alleged unlawful retaliation, Plaintiff claimed to have suffered anxiety and physical illness, and to have suffered a retaliatory discharge by Defendants in violation of the NYSHRL and NYCHRL.

As indicated in the complaint and in this Court's prior decision dated December 21, 2016, Plaintiff had joined a class action wage and hour lawsuit against Defendants in October 2012. In relevant part, the class action complaint had alleged that the Plaintiffs were entitled to unpaid wages from Defendants for overtime work and for unpaid minimum wages. Plaintiff alleged that after Plaintiff joined the lawsuit, the "national origin, gender, sexual harassment and age discrimination worsened." (Complaint, ¶ 47).

On July 19, 2013, Defendants commenced an action against Plaintiff, alleging that Plaintiff had fraudulently reduced customers' checks in return for a bigger tip. Defendants further claimed that Plaintiff fraudulently added a service charge before presenting the check to customers.

Plaintiff did not deny making mistakes on checks, however she stated that "mistakes happened when Defendants retaliated against Plaintiff by seating as many customers as possible in her section" (Complaint, ¶ 60).

Shortly after Defendants commenced their lawsuit against Plaintiff, a reporter from the New York Post wrote an article about Defendants' lawsuit. Defendants claim that they did not arrange the story, and that the reporter learned of the lawsuit by reviewing the docket of recently filed complaints.

Plaintiff alleged that, after the commencement of the wage and hour suit, the discrimination against her worsened and she believed that Defendants were trying to make her quit.

Plaintiff alleged that Defendants commenced their own lawsuit against her because she had participated in the wage and hour lawsuit. Plaintiff alleged that, as a result of this lawsuit and the news article, she experienced chest pains and other health ailments, and could not return to work for medical reasons. In August 2013, Plaintiff advised Defendants that she would not be returning to work.

Defendants voluntarily withdrew their complaint against Plaintiff in September 2013, evidently because Plaintiff quit and told Defendants that she did not intend to return.

In September 2014, Plaintiff filed the complaint in the underlying action. Defendants then moved, pursuant to CPLR 3212, for summary judgment dismissing Plaintiff's complaint.

The Court's prior decision dated December 21, 2016

By decision dated December 21, 2016, this Court held that the Defendants had established prima facie that it was entitled to summary judgment dismissing the Plaintiff's discrimination claims brought pursuant to both the NYSHRL and NYCHRL (Plaintiff's first, second, third, and fourth causes of action).² This Court further determined that Plaintiff failed to raise a triable issue of fact that she was subjected to sexual harassment and gender/race/age/national origin discrimination by reason of a hostile work environment, or that she was treated differently based on those characteristics. In pertinent part, this Court stated:

"Plaintiff does not deny making mistakes on the checks submitted in the record and speculates about the motive of the news reporter. Even viewing facts in the light most favorable to Plaintiff, Plaintiff has not established that any additional allegations regarding harassment, including the lawsuit against Plaintiff or the news article, were the result of a discriminatory animus or that she was treated less well due to any protected characteristics."

(*Mejia v T.N. 888 Eighth Ave. LLC Co*, 2016 NY Slip Op 32578(U),

*29 (Sup Ct, NY County 2016)).

²The Court's December 21, 2016 decision also dismissed the Plaintiff's sixth cause of action for malicious prosecution and Plaintiff's seventh cause of action for abuse of process as both causes of action were voluntarily withdrawn by the Plaintiff at oral argument. The Court also dismissed the Plaintiff's eighth cause of action for defamation.

In addition, this Court indicated in its December 21, 2016 decision that any alleged incidents that had occurred between 2006 and 2009 were time-barred as outside of the three-year statute of limitations for actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL.

With respect to the unlawful retaliation claims under the NYSHRL and NYCHRL (Plaintiff's fifth cause of action), this Court found that Plaintiff could not demonstrate that she had engaged in protected activity or that she had suffered from an adverse employment action:

"Besides the 2009 incident, Plaintiff claims that she repeatedly complained to her supervisors about alleged discriminatory conduct but does not provide any specific instances, dates or times for these complaints. Defendants deny any additional reports made by Plaintiff. Even assuming, *arguendo*, that Plaintiff engaged in protected activity, she cannot demonstrate an adverse employment action."

(*Id.* at *33).

Further, this Court specifically addressed Plaintiff's joinder in the wage and hour lawsuit alleging that Defendants failed to pay Plaintiffs all the wages they were entitled to. This Court cited to *Pezhman v City of New York* (47 AD3d 493, 494 (1st Dept 2008)), in determining that Plaintiff's joinder in the wage and hour lawsuit did not constitute a protected activity under the NYSHRL or NYCHRL, because filing a grievance about conduct other than unlawful discrimination is not a protected activity under the NYSHRL or NYCHRL.

Plaintiff's assertions in support of the instant motion to renew, reargue, or replead

Plaintiff is seeking to renew, reargue, or replead a cause of action alleging unlawful retaliation in violation of the New York Labor Law (NYLL). Plaintiff argues that she expressly cited Labor Law §215 as a basis for her unlawful retaliation claims, but that, as a result of Defendants' motion for summary judgment, the Court was not able to consider it.

Despite not stating a specific cause of action for Labor Law §215, Plaintiff's counsel argues that the complaint "clearly spells out a retaliation claim under NYLL §215" (Gabrielle Vinci affirmation, ¶ 9). In support of her contention, Plaintiff argues that paragraph one of her complaint stated this action was "based upon Plaintiff's gender, age, race and/or national origin discrimination, sexual harassment of Plaintiff, hostile work environment, and retaliation and retaliatory constructive discharge against Plaintiff, brought pursuant to the [NYSHRL], the [NYCHRL], and the [NYLL's] anti-retaliation provisions, including NYLL §215" (Complaint, ¶ 1). Plaintiff argues that as all of the paragraphs of the complaint are incorporated into the fifth cause of action, unlawful retaliation in violation of Labor Law §215 should also be "melded" into her fifth cause of action.

Plaintiff acknowledges that she did not address a potential claim for Labor Law §215 in her opposition to the Defendants' motion for summary judgment or during oral argument because Defendants' papers were confusing and disorganized.³ Counsel for Plaintiff states, "[i]t was my understanding that Defendants were not attacking the sufficiency of this claim on summary judgment, as was Defendants' burden to have the claims dismissed on summary judgment" (Vinci affirmation, ¶ 9).

In addition, Plaintiff argues that the motion for renewal should be granted in the interest of justice because Plaintiff sufficiently alleged all of the elements of a Labor Law §215 claim. Plaintiff further contends that her excuse for failing to address the Labor Law §215 claim is reasonable, because Plaintiff was attempting to respond to Defendants' "convoluted" papers (*Id.*, ¶ 8).

In support of the motion to reargue, Plaintiff claims that the Court overlooked that Plaintiff had sufficiently pled a claim for Labor Law §215. In addition, Plaintiff argues that the Court overlooked and/or misapprehended the law with respect to the hostile work environment and unlawful retaliation claims under

³ The Court notes that Plaintiff's brief in opposition to the motion for summary judgment listed the eight causes of action in the complaint. These were set forth in the same way that the Court lists them in this decision. There was no reference to Labor Law §215, and the fifth cause of action was listed as one for unlawful retaliation in violation of the NYSHRL and NYCHRL.

the NYCHRL, and that the Court should not have dismissed those claims. Plaintiff argues that it was irrefutable that she was subject to a hostile work environment and faced unlawful retaliation as a result of joining the lawsuit, in violation of the NYCHRL.

In the alternative, Plaintiff requests leave to replead her claim for unlawful retaliation in violation of Labor Law §215. Plaintiff maintains that she faced unlawful retaliation for engaging in the wage and hour lawsuit against Defendants, by being subjected to a hostile work environment. She contends that the unlawful retaliation culminated in their lawsuit against her and the false report to a news outlet.

Plaintiff maintains that Defendants will not be prejudiced if the Court grants leave to amend, because Defendants were aware of Plaintiff's Labor Law §215 claim. Plaintiff notes that in her response to Defendants' demand for a verified bill of particulars, she claimed to have been treated worse after she sued for wages, overtime, and tips. Plaintiff further advises that, although the wage and hour lawsuit settled in 2015, and Plaintiff agreed to discontinue that lawsuit, Plaintiff did not sign a release with respect to the instant action.

Defendants oppose Plaintiff's motion. Among other things, Defendants argue that Plaintiff intentionally omitted the purported Labor Law §215 claim, as no independent cause of action

for this was asserted and Plaintiff did not reference it in the briefs. In addition, they claim that they will be prejudiced by delay and surprise if Plaintiff is able to amend the pleadings to include this cause of action.

Defendants further argue that "final judgment invokes the doctrine of res adjudicata [sic], collateral estoppel and issue preclusion" (Defendants' memorandum of law at 8). According to Defendants, as the issue of unlawful retaliation has already been decided by the Court, Plaintiff is not entitled to further litigation.

DISCUSSION

Plaintiff's instant motion addresses both the Court's prior decision dismissing Plaintiff's fifth cause of action for unlawful retaliation under the NYCHRL and a claim for unlawful retaliation pursuant to Labor Law §215, which the Plaintiff argues was sufficiently alleged in the pleadings.

Initially, the Court notes that the Plaintiff is requesting judicial remedies relating to two distinct issues:

1. The Plaintiff is moving to reargue the Court's December 21, 2016 decision dismissing Plaintiff's fifth cause of action for unlawful retaliation under the NYCHRL⁴ and

⁴The Court notes that in its December 21, 2016 decision it specifically dismissed the Plaintiff's fifth cause of action for unlawful retaliation under both the NYSHRL and the NYCHRL. However, in the instant motion the Plaintiff has moved to reargue the Court's dismissal of the Plaintiff's fifth cause of action for unlawful retaliation only as to the NYCHRL. The Court notes that the Plaintiff was free to also move for reargument as to the Court's dismissal of the Plaintiff's fifth cause of action for unlawful retaliation pursuant to the NYSHRL in the instant motion

2. the Plaintiff is moving to renew/reargue the Court's December 21, 2016 decision as to a claim for unlawful retaliation pursuant to Labor Law §215, which the Plaintiff argues was sufficiently alleged in the pleadings, or in the alternative to amend the pleading to specifically include a cause of action for unlawful retaliation pursuant to Labor Law §215.

Said distinction is significant because the Court's December 21, 2016 decision did dismiss the Plaintiff fifth cause of action for unlawful retaliation under the NYCHRL, but made no such determination as to any argued "claim" for unlawful retaliation pursuant to Labor Law §215 since said cause of action was not specifically alleged in the complaint.

The Court will first address the Plaintiff's motion to reargue the Court's December 21, 2016 decision dismissing Plaintiff's fifth cause of action for unlawful retaliation under the NYCHRL. The Court will then address the Plaintiff's motion as to a claim for unlawful retaliation pursuant to Labor Law §215, which the Plaintiff argues was sufficiently alleged in the pleadings.

had the Plaintiff wished to do so. As such, this Court will not address its dismissal of the Plaintiff's fifth cause of action for unlawful retaliation under the NYSHRL, nor will it entertain any additional motions to reargue said dismissal as the Plaintiff freely chose not to address said dismissal in the instant motion.

Motions to reargue pursuant to CPLR §2221

CPLR 2221(d) sets forth the requirements for motions to reargue:

- (d) A motion for leave to reargue:
1. shall be identified specifically as such;
 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the Court of appeals.

The movant bears the initial burden on a motion to reargue a prior decision pursuant to CPLR 2221. Further a motion for leave to reargue a prior decision pursuant to CPLR 2221 is addressed to the sound discretion of the Court (*See Fardin v 61st Woodside Assoc.*, 125 AD3d 593 (2nd Dept 2015); *Cuomo v Ferran*, 77 AD3d 698, 700 (2d Dept 2010)).

In order to prevail on a motion to reargue, the burden is on the movant to establish a basis for this Court to conclude that the Court's prior decision "overlooked or misapprehended" matters of fact or law in determining the prior motion. Further, the purpose of a motion to reargue "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Mangine v Keller*, 182 AD2d 476, 477 (1st Dept 1992), citing *Fosdick v Hempstead*, 126 NY 651 (1891)).

A motion for reargument "may be granted only upon a showing 'that the Court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.' Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) citing *Schneider v Solowey*, 141 AD2d 813 (2nd Dept 1988); *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *Foley v Roche*, 68 AD2d 558 (1st Dept 1979); see also *Kent v 534 E. 11th St.*, 80 AD3d 106 (1st Dept 2010); *Matter of Carter v Carter*, 81 AD3d 819 (2nd Dept 2011)). "Necessarily, where a new argument is presented on the motion, that argument could not have been 'overlooked or misapprehended' ... in the first instance" (*People v D'Alessandro*, 13 N.Y.3d 216, 219 (2009), citing *People v Bachert*, 69 N.Y.2d 593 1987)).

Plaintiff has not established a sufficient basis for reargument of the Court's December 21, 2016 decision dismissing the Plaintiff's fifth cause of action for unlawful retaliation under the NYCHRL

Upon review of the submitted papers, the Plaintiff's motion for leave to reargue the Court's decision dismissing the Plaintiff's fifth cause of action for discrimination and unlawful retaliation in violation of the NYCHRL, is denied. In opposition to Defendants' motion for summary judgment, Plaintiff was unable to raise a triable issue of fact with respect to her claims for

discrimination in violation of the NYCHRL, because she failed to link the Defendants' lawsuit, or subsequent actions, to any age/race/national origin/gender-based discriminatory motive (See e.g. *Matias v New York & Presbyt. Hosp.*, 137 AD3d 649, 650 (1st Dept 2016) ["The absence of any evidence [that Defendants were motivated by] discriminatory animus is equally fatal to any claim of mixed motive [under the NYCHRL]]").

In addition, Plaintiff did not raise a triable issue of fact with respect to her claim that she was subject to unlawful retaliation, in violation of the NYCHRL, after she commenced her lawsuit. The filing of a lawsuit is not considered protected activity within the meaning of the NYCHRL because it does not constitute opposing discriminatory practices (See e.g. *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted) [Filing worker's compensation claim not considered a protected activity under the NYCHRL as "it does not constitute opposing or complaining about unlawful discrimination"])).

The purpose of a motion for reargument "is not to serve as a vehicle to permit the unsuccessful party to reargue once again the very questions previously decided" (*Mangine v Keller*, 182 AD2d 476, 477 (1st Dept 1992) (internal quotation marks and citations omitted)).

Accordingly, as the Plaintiff already presented the instant arguments in its papers submitted in opposition to the Defendants' motion for summary judgment, and as the Court did not misapprehend any facts or law in making its prior determination dismissing the Plaintiff's fifth cause of action for unlawful retaliation pursuant to the NYCHRL, Plaintiff's motion for leave to reargue the Court's dismissal of said cause of action is denied.

The Plaintiff's complaint did not include a specific cause of action for unlawful retaliation pursuant to Labor Law §215

The Court will now address the Plaintiff's motion as to a claim for unlawful retaliation pursuant to Labor Law §215, which the Plaintiff argues was sufficiently alleged in the pleadings. Before addressing the substance of the Plaintiff's instant motion to renew/reargue the Court's prior decision and/or to amend her pleadings, the Court must first note that the Plaintiff's complaint does not include a specific cause of action alleging unlawful retaliation as prohibited by Labor Law §215. Specifically, the Plaintiff's fifth cause of action only alleges "retaliation" against the Defendants in violation of New York State and New York City Human Rights Laws in reference to discrimination. Said cause of action does not allege "retaliation" in violation of Labor Law §215 in reference to the fact that the Plaintiff joined a class action wage and hour lawsuit against Defendants.

The Plaintiff commenced the underlying action more than three years ago on or about January 30, 2014 by serving the Defendants with a summons with notice through the Secretary of State. On or about September 30, 2014, the Plaintiff filed a complaint alleging the eight causes of action previously indicated in the instant decision. Said complaint includes a single reference to Labor Law §215 that only appears in the first paragraph of the complaint:

1. This is a civil action for monetary damages and such other relief as the Court deems just and proper based upon Plaintiff's gender, age, race and/or national origin discrimination, sexual harassment of Plaintiff, hostile work environment, and retaliation and retaliatory constructive discharge against Plaintiff, brought pursuant to the New York State Human Rights Law, New York Executive Law 290 et seq., (the "Executive Law" or the "New York State Human Rights Laws"), the New York City Administrative Code 8-107 and 8-502 et seq., (the "Administrative Code" or the "New York City Human Rights Law") and the New York Labor Law ("NYLL")'s anti-retaliation provisions, including NYLL §215. Said discrimination and retaliation adversely affected the terms and conditions of Plaintiff's employment and resulted in her eventual wrongful discharge from said employment.

No other portion of the Plaintiff's complaint makes any reference to Labor Law §215. Specifically, the Plaintiff's fifth cause of action for unlawful retaliation as laid out in the Plaintiff's complaint (Complaint, ¶¶ 113-126) includes repeated references to the New York State and New York City Human Rights Laws, but does not include a single reference to Labor Law §215 apart from indicating that "Plaintiff repeats and realleges each

and every allegation contained in paragraphs '1' through '103' as if set forth herein"(Complaint, ¶113), which includes the only reference to Labor Law §215 in paragraph 1.

It is clear from the language of paragraphs 113 through 126 of the Plaintiff's complaint that the Plaintiff's fifth cause of action for "retaliation" was based upon the Defendant's alleged violation of New York State and New York City Human Rights Laws and not an alleged violation of Labor Law §215. Said paragraphs do not include any direct references to Labor Law §215 nor is there any reference in said paragraphs to the fact that the Plaintiff joined a class action wage and hour lawsuit against Defendants (Complaint, ¶¶ 113-126).

As such, the Court concludes from the language of the Plaintiff's complaint that the Plaintiff did not state a specific cause of action against the Defendants for unlawful retaliation based upon an alleged violation of Labor Law §215.

Plaintiff's failure to clearly state a cause of action against the Defendants for unlawful retaliation based upon an alleged violation of Labor Law §215 in the complaint, and Plaintiff's admitted failure to present any argument in opposition to the Defendants' motion for summary judgment based upon a cause of action pursuant to Labor Law §215 is not a basis for renewal or reargument.

At its core, this portion of the Plaintiff's instant motion is based upon the single argument that the allegations in her pleadings were sufficient to make out a cause of action for unlawful retaliation against the Defendants based upon an alleged violation of Labor Law §215. However, although the Plaintiff's argue in their memorandum of law that "[t]he four corners of Plaintiff's complaint sufficiently alleged all of the elements of unlawful retaliation under the NYLL and Plaintiff expressly pled her reliance on NYLL §215" (Plaintiff's memorandum of law 7), at no point does the Plaintiff argue that her complaint clearly asserted a cause of action against the Defendants for unlawful retaliation based upon an alleged violation of Labor Law §215. As previously stated in the instant decision, this Court finds that the Plaintiff's complaint did not clearly state a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215.

This lack of clarity in the complaint was compounded by Plaintiff's counsel's failure to make reference to any cause of cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215 in Plaintiff's response to the Defendant's motion for summary judgment (Gabrielle Vinci affirmation, ¶ 9 ["When listing Plaintiff's Fifth Cause of Action for unlawful retaliation, in the draft, I inadvertently did not specifically cite Plaintiff's claim for unlawful retaliation under the NYLL, even though the Complaint clearly spells out a retaliation claim under NYLL §215."])).

It cannot be overstated that a Court's determination of the motions submitted before it hinges upon the arguments that the Parties present in their submitted papers. Although the principles of summary judgment place the prima facie burden upon the moving party [in this case the Defendants], it is still upon the respondent [in this case the Plaintiff] to present clear, specific arguments in opposition. It is upon the Parties' counsels to present clear, specific arguments, whether in support of a motion for summary judgment or in opposition, and the Court cannot be expected to clarify issues that arise due to oversights on the part of Parties' counsels.

The Plaintiff's failure to clearly state a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215 in her complaint may be "repaired" through amendment, if warranted. However, as the Plaintiff failed to clearly state a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215, she cannot now request renewal and/or reargument of the Court's prior decision dismissing said charge.

According to CPLR 2221 (e) (2) and (3), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion" (See e.g. *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432, 432 (1st Dept 2014)). Plaintiff cannot satisfy the statutory requirements for renewal because the Plaintiff's failure to clearly allege a cause of action for unlawful retaliation based upon an alleged Labor Law §215 claim does not transform said unalleged cause of action into a "new fact."

Moreover, "[r]enewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v Peguero*, 72 AD3d 600, 602 (1st Dept 2010) (internal quotation marks and citation omitted)). Even though Plaintiff argues that

Defendants' papers were confusing, Defendants moved for summary judgment dismissing every cause of action in the complaint. It was unreasonable that plaintiff did not address dismissal of the potential Labor Law §215 cause of action if, as she claims, said claim was sufficiently alleged in the complaint.

Similarly, the fact that the Plaintiff failed to clearly state a cause of action in her complaint for unlawful retaliation based upon an alleged violation of Labor Law §215 does not create a basis for reargument of the Court's prior decision. "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Cuomo v Ferran*, 77 AD3d 698, 700 (2d Dept 2010) (internal quotation marks and citations omitted); CPLR 2221(d)).

Plaintiff's counsel acknowledges that, when listing the fifth cause of action for retaliation in her opposition to the motion for summary judgment, she "inadvertently" did not specifically cite to Labor Law §215. Further, Plaintiff did not mention any NYLL claims during oral argument. As no arguments regarding Labor Law §215 were presented to the Court, this Court could not have overlooked or misapprehend any facts or law relating to Labor Law §215 in rendering its December 21, 2016 decision.

The Plaintiff's "cause of action" for unlawful retaliation based upon an alleged violation of Labor Law §215 was never before the Court within the context of the Defendants' motion for summary judgement for the simple reason that the Plaintiff failed to clearly state said cause of action in her pleadings. The Court's prior decision could not have dismissed or even addressed a cause of action that the Plaintiff never clearly asserted in her pleadings.

In short, the Plaintiff cannot move to renew or reargue the Court's prior decision dismissing a cause of action that was never clearly stated in the pleadings. Accordingly, the Plaintiff's motion to renew/reargue the Court's December 21, 2016 decision as to a cause of action for unlawful retaliation pursuant to an alleged violation of Labor Law §215 (that was not addressed by the Court in its prior decision, not argued by either of the Parties in their submitted papers or at oral argument, and not clearly alleged in the Plaintiff's complaint) is hereby denied.

The Plaintiff has established a sufficient basis for amending the complaint to include a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215, and the Defendants will not be subject to prejudice or surprise by Plaintiff amending the complaint to include said charge

"Leave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay unless the proposed amendment is palpably insufficient or patently devoid of merit." (*Capezzano Constr. Corp. v Weinberger*, 150 AD3d 811, 811 (2d Dept 2017) (internal quotation marks and citations omitted); CPLR 3025(b)).

As previously stated, in October 2012, Plaintiff became a putative plaintiff in a class action complaint commenced against Defendants in federal court. Plaintiff alleged in part that she, and other similarly situated current and former employees of Defendants, were entitled to unpaid wages for overtime as required by NYLL § 650. The complaint further stated that Plaintiffs were entitled to unpaid minimum wages, unpaid spread of hours pay, retained tips and/or gratuities under NYLL § 196-d, and liquidated damages under the NYLL.

In the instant motion to amend, Plaintiff alleges that, after joining the class action complaint, she was subjected to unlawful retaliation by the Defendants. Specifically, Plaintiff maintains that Defendants commenced a frivolous lawsuit against her, subjected her to a hostile work environment, and called a reporter to the restaurant to write an article exposing the

lawsuit commenced against her. Plaintiff further argues that the unlawful retaliation she suffered, as a result of commencing the wage and hour lawsuit, ultimately led to her constructive discharge. She further alleges that she is unable to find a job as a result of Defendants' retaliatory actions.

The anti-retaliation provision contained in Labor Law §215(1)(a), as it applies to Plaintiff, provides that no employer shall "discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee . . . , (iii) because such employee has caused to be instituted . . . a proceeding under or related to this chapter."

To establish a prima facie case of unlawful retaliation, Plaintiff must plead: "(1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the Plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." (*Salazar v Bowne Realty Assoc., LLC*, 796 F Supp 2d 378, 384 (EDNY 2011)).

Upon review of Plaintiff's complaint, the Court finds that although the complaint did not clearly allege a specific cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215, the factual allegations are sufficient both to form a basis for a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215 and to put the Defendants on notice that the Plaintiff was making said claim.

Plaintiff specifically alleges in the complaint that she joined in a federal wage and hour case against the Defendants and that immediately afterwards she was subjected to unlawful retaliation in the form of increased harassment, being told she could not share in tips, having her hours cut, being forced to cover more tables, and intimidation (Complaint ¶¶ 47-55). The Plaintiff further alleges in the Complaint the Defendants engaged in a baseless lawsuit against her as a form of unlawful retaliation (Complaint ¶¶ 56-63). The Court further notes that the section of the Plaintiff's complaint referring to the allegedly retaliatory baseless lawsuit comes right after the section of the Plaintiff's complaint wherein the Plaintiff alleges that the Defendants retaliated against her for joining in the federal wage and hour case. As such, the complaint can be read to allege that the Defendants commenced the allegedly retaliatory baseless lawsuit against the Plaintiff in unlawful retaliation to her joining the federal wage and hour case.

It is undisputed that Plaintiff engaged in a protected activity under the NYLL. While employed by Defendants, she participated in a lawsuit alleging that Defendants violated various provisions of the NYLL by not paying her the wages that she was entitled to. Defendants were aware that she was a participant in this action. "[F]iling suit to recover [her] overtime wages . . . qualifies as protected activity under the .

. . NYLL." (*Fei v WESTLB AG*, 2008 WL 594768, *3, 2008 US Dist LEXIS 16338, *8 (SD NY 2008)). Further, courts have found that "[l]awsuits in response to a former employee's attempt to vindicate his rights can constitute retaliation." (*Id* citing *Lovejoy-Wilson v NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir NY Aug 31, 2001)). Further, there is no indication in the record that Plaintiff "waived any claim for retaliation as part of [the] settlement of [her] claim for unpaid [wages]." (*Kelly v Xerox Corp.*, 256 AD2d 311, 312 (2d Dept 1998)).

As such, the Court finds that the Plaintiff has sufficiently alleged a causal connection by asserting that Defendants harassed Plaintiff right after she joined the class action and that the Defendants commenced their own action against Plaintiff approximately nine months after this date.

In addition, the Court finds that the Defendants would not be subjected to any prejudice or surprise by allowing the Plaintiff to amend the complaint solely to the extent of adding a cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215. For the reasons so stated, although the complaint did not clearly state a cause of action pursuant to Labor Law §215, the complaint did include sufficient factual allegations to put the Defendants on notice that the Plaintiff was making such a claim. In point of fact, the complaint includes a section heading that specifically reads "Plaintiff

Joins a Wage and Hour Lawsuit Against Defendants and Suffers Severe Retaliation and Increased Discrimination." In addition, the Plaintiff's bill of particulars specifically indicates the following:

"Plaintiff joined a wage and hour lawsuit against Defendants after they kept taking tips from Plaintiff even after they were sued by Helen Ruzie and Liliana Radsinska. Plaintiff alleges that she was treated worse after she sued for her wages, overtime and tips. Although the wage case itself settled, these facts are relevant to Plaintiff's retaliation claims."

(Bill of Particulars Response No. 3)

Read together, the Plaintiff's complaint and her Bill of Particulars were more than sufficient to place the Defendants on notice that the Plaintiff was making a claim against the Defendants for unlawful retaliation based upon an alleged violation of Labor Law §215, regardless of the fact that the Plaintiff's failed to clearly allege a specific cause of action to this effect.

In addition, at oral argument on the Defendants' original motion for summary judgment, Plaintiff's counsel specifically argued that the alleged retaliation was based in part upon the fact that the Plaintiff had joined on a federal class action against the Defendants stemming from a wage dispute (Oral Argument 52-54). Although Plaintiff's attorney never specifically indicated at oral argument that the Plaintiff's retaliation claim was based upon Labor Law §215, Plaintiff's counsel's argument at oral argument further placed the Defendant

on notice that Plaintiff was making a claim against the Defendants for unlawful retaliation based upon the Plaintiff's involvement in the class action suit.

As such, upon a reading of the pleadings, the bill of particulars, and having construed all reasonable inferences and allegations in Plaintiff's favor, the Court finds that the Plaintiff has sufficiently alleged a claim for unlawful retaliation based upon an alleged violation of Labor Law §215.

Further, upon review of the pleadings, the bill of particulars and the arguments presented at oral argument on the Defendants' prior motion for summary judgment, the Court finds that the Defendants were on notice that the Plaintiff was making an unlawful retaliation claim based upon the allegation that the Defendants unlawfully retaliated against the Plaintiff for joining in the class action wage suit against the Defendants. As such, the Court finds that the Defendants would not be prejudiced by amending the complaint to include a new ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215.

Accordingly, the Plaintiff's motion to amend the complaint is granted solely to the extent that the Plaintiff may amend the complaint to include a new ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215 (See e.g. *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499,

500 (1st Dept 2010) [Plaintiff does not have to establish the "merit" of the proposed new allegations but just demonstrate that they are not "clearly devoid of merit"]).

Further, in order to ensure that the Defendants face no prejudice, the Plaintiff will only be allowed to amend their pleadings solely to include a new ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215 based upon the relevant allegations already included in the complaint.. Said amendment to the pleadings will not include any additional factual allegations apart from those already made in the complaint. The only permitted amendment to the complaint will be the addition of a new enumerated ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215. Said cause of action may incorporate any allegations made in the complaint relevant to the Plaintiff's new ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215.

In addition, as the Plaintiff has filed a note of issue indicating that all discovery has been completed in the instant action, the Court will not allow any additional discovery in the underlying action as to the Plaintiff's added cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215. Granting Plaintiff's motion to amend the complaint solely to the extent of adding a ninth cause of action for unlawful

retaliation based upon an alleged violation of Labor Law §215, without any additional allegations, and not allowing any additional discovery is entirely consistent with the Plaintiff's argument that the pleadings "clearly spells out a retaliation claim under NYLL §215." As the allegations in the complaint were sufficient to allege a unlawful retaliation claim under NYLL §215, it can be assumed that both parties conducted all previous discovery with this in mind.

In addition, within 15 days of the date of the instant decision, the Plaintiff shall serve and file the so-amended complaint, including a copy of the instant decision with notice of entry, upon Defendants' counsel in accordance with the CPLR's requirements for service of a pleading.

Further, the Defendants shall have 30 days from the date of service of the amended complaint to respond in any manner authorized by the CPLR.

The Court's prior decision dated December 21, 2016 dismissed the Plaintiff's first, second, third, fourth, fifth, sixth, seventh, and eighth causes of action upon summary judgment. The Court's prior decision dated December 21, 2016 is hereby modified so as to remove the determination that the Plaintiff's complaint is dismissed "in its entirety."

The Plaintiff's sole remaining cause of action against the Defendants in the underlying action is the Plaintiff's new ninth cause of action for unlawful retaliation based upon an alleged violation of Labor Law §215.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff Judith Mejia's motion for leave to reargue the Court's December 21, 2016 decision with respect to Plaintiff's cause of action for unlawful retaliation and discrimination in violation of the NYCHRL is denied; and it is further

ORDERED that Plaintiff's motion for leave to renew the Court's December 21, 2016 decision with respect to Plaintiff's cause of action for unlawful retaliation pursuant to Labor Law §215 is denied; and it is further

ORDERED that Plaintiff's motion for leave to reargue the Court's December 21, 2016 decision with respect to Plaintiff's cause of action for unlawful retaliation pursuant to Labor Law §215 is denied; and it is further

ORDERED that Plaintiff is granted limited leave to amend the complaint solely to the extent of adding a new ninth cause of action alleging unlawful retaliation in violation of Labor Law §215 based upon the relevant allegations already included in the complaint; it is further

ORDERED that within 15 days of the date of the instant decision, the Plaintiff shall serve and file the so-amended complaint, including a copy of the instant decision with notice of entry, upon Defendants' counsel in accordance with the CPLR's requirements for service of a pleading; it is further

ORDERED the Defendants shall have 30 days from the date of service of the amended complaint, to respond in any manner authorized by the CPLR; it is further

ORDERED that the Court's prior decision dated December 21, 2016 is hereby modified so as to remove the determination that the Plaintiff's complaint is dismissed "in its entirety"; and it is further

ORDERED that the Clerk is directed to restore the underlying case to the calendar on the Plaintiff's only remaining cause of action against the Defendants for unlawful retaliation based upon an alleged violation of Labor Law §215.

Dated: August 17, 2017

ENTER:

Robert D. Kalish
HON. ROBERT D. KALISH
J.S.C.