

Lewin v Macy's Retail Holdings, Inc.

2017 NY Slip Op 33229(U)

July 28, 2017

Supreme Court, Queens County

Docket Number: 700556/16

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

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TAMICIA LEWIN,

Index Number 700556/16

Plaintiff,

DECISION/ORDER

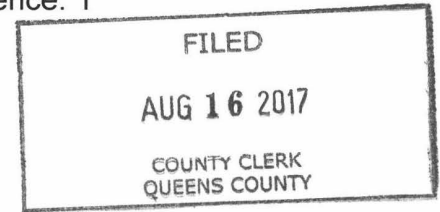
--against--

Motion Sequence: 1

MACY'S RETAIL HOLDINGS, INC., MACY'S
OF NEW YORK, and MACY'S INC.,

Defendants.

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The following papers numbered 1-9 read on defendants Macy's Retail Holdings, Inc., Macy's of New York and Macy's Inc.'s motion to dismiss and plaintiff's cross motion to amend her complaint to add Macy's Real Estate, LLC as an additional defenanadant.

PAPERS
NUMBERED

N.M., Memo of Law, Exhibits and Service...	1-4
N.C.M., Opp., Aff. and Service.....	5-7
Reply and Service.....	8-9

Upon the foregoing papers, it is ordered that these motions are determined as follows:

In this action, plaintiff Tamicia Lewin sues her former employer Macy's Retail Holdings, Inc., Macy's of New York and Macy's Inc. to recover damages for alleged employment discrimination based on race and gender; sexual harassment; unlawful retaliation; negligent hiring, retention and supervision; and respondent superior. Defendants' make this pre-answer motion for dismissal of the complaint pursuant to, inter alia, CPLR §3211 (a)(5) claiming the action is barred by statute of limitations and CPLR §3211(a)(7) that the complaint fails to state a claim.

In her verified complaint, plaintiff states that she was an employee of defendants Macy's Retail Holdings, Inc., Macy's of New York and/or Macy's Inc. Plaintiff further states that she is a woman of Christian faith and has an "African- American" appearance. Plaintiff is of Carribbean, European and Indian descent. Plaintiff started working for defendants as a sales associate at the Macy's store located at 90-15 Queens Boulevard, Elmhurst, New York in April of 2007. Plaintiff claims that she received an award in December 2009 for her superior performance as a sales associate at Macy's. Ms. Lewin claims that, at all relevant times, she was mocked by fellow employees as the "Christian girl" and "goodie two-shoes" because she refused to smoke cigarettes, illegal drugs and/or drink alcohol. She also claims that, at all relevant times, she was referred to by other Macy's employees as "black" and/or "nigger" due to her dark complexion. Ms. Lewin alleges that other Macy's employees would intimate and threaten her telling her she was not wanted at the store and that she should not return. Ms. Lewin alleges that this harassment and discrimination was severe, pervasive and created a hostile work environment. In or about, May of 2010, Ms. Lewin reported these incidents to Human Resources but she claims that Macy's failed to properly investigate or otherwise remedy the situation. After complaining two more times, Ms. Lewin claims that Human Resources stated that they "lost her file". In or about 2011, Ms. Lewin requested a transfer to a different floor but she claims that the discrimination and harassment intensified. Ms. Lewin alleges that she continued to complain through 2012. In or about January of 2013, Ms. Lewin was asked by Macy's to sign a special form regarding her wages. Ms. Lewin alleges that she was uncertain as to what the form said and asked her supervisor to allow her to read it. Ms. Lewin's

supervisor allegedly hurried her and pushed her to sign the form without reading it. After signing the form, Ms. Lewin was told she was suspended without any rationale. Ms. Lewin avers that her suspension was an act of retaliation for her complaints and harassment. As Ms. Lewin attempted to leave the premise, she claims that Macy's employees accosted her, dragged her into a back room and sexually assaulted her.

In support of their motion, defendants argue that the plaintiff's discrimination and harassment claims under New York City Human Rights Law (hereinafter "NYCHRL") are barred by its three year statute of limitations. Specifically, as plaintiff commenced this action on January 18, 2016, any allegations concerning events before January 18, 2013 are time-barred. Defendants claims that plaintiff has not alleged any facts to support her claim that she was subjected to any discrimination or harassment in 2013. While plaintiff vaguely alleges that she was discriminated and harassed at all relevant times, she does not provide any specific dates, details or names of the individuals allegedly involved. The only specific incidents alleged in her complaint in January of 2013 were her suspension from Macy's and subsequent assault. As such, defendants argue that her discrimination and harassment allegations are barred by the three year statute of limitations. Defendants also argue that plaintiff's negligent hiring, retention and supervision claim is barred by the New York Workers' Compensation Law Section 29(6), which provides the exclusive remedy for employees seeking to sue employers for negligent hiring, retention and supervision.

In the alternative, defendants aver the allegations in plaintiff's complaint are so vague and conclusory that she fails to state any causes of action. With respect to her first cause of action for harassment and discrimination, defendants argue the complaint

is devoid of any details regarding the identity of the individuals who created the hostile work environment. Similarly, defendants argue that plaintiff fails to plead any facts or the requisite elements to support her second and fourth cause of action for retaliation. Finally, defendants argue that plaintiff has improperly sued Macy's Inc. and Macy's of New York. Defendant submits an affidavit from Linda J. Balicki, an attorney employed by Macy's Corporate Services, Inc. in the Macy's Inc. law department, who states that "Macy's of New York" is not an incorporated entity in the Macy's Family but rather a fictitious name registered by Macy's, inc. in New York State. Ms. Balicki further states that Macy's Inc. does not operate any stores or employ any sales associates at the Macy's location involved in this action. She asserts that Macy's Retail Holdings, Inc. employed the sales associates at that location and Macy's Real Estate, LLC is the entity holding title to that location.

In opposition to the motion, plaintiff submits an affirmation from her attorney arguing that plaintiff's discrimination and harassment claims are not barred by the statute of limitation because of the continuing violation doctrine. Counsel further argues that plaintiff has sufficiently stated her causes of action under the extremely liberal standard of reviewing employment discrimination cases. Counsel avers that plaintiff has stated a viable claim for negligent hiring, retention and supervision because her claim falls within one of the exceptions to Workers' Compensation Law as an exclusive remedy. Specifically, plaintiff claims that the alleged intentional harassment, discrimination and sexual assault amounts to an intentional tort and therefore her claim fails with the exception

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359, citing *Weiss v Cuddy & Feder*, 200 AD2d 665). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144; *Cooper, supra*, 242 A.D.2d). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*Cooper*, 242 AD2d, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506). Furthermore, the pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra*). With respect to dismissal of a complaint pursuant to CPLR §3211 (a)(5), the defendant bears the initial burden of establishing prima facie that plaintiff's time to sue has expired (*Sabadie v. Burker*, 47 A.D3d 913).

In the instant case, the complaint was filed on January 18, 2016. Therefore, actions that occurred before January of 2013 would normally be barred by the statute of limitations unless said actions are timely as part of a continuing violation. In reviewing the complaint, taking into consideration NYCHL's mandate that its provisions be interpreted liberally, the court finds that allegations of discrimination and harassment practices permitted by plaintiff's former employer may collectively constitute one "unlawful employment practice" that created a hostile work environment into January of

2013. As such, defendants have failed to meet their prima facie burden in proving plaintiff's claims are time-barred.

With respect to that branch of the motion to dismiss the complaint pursuant to CPLR §3211(a)(7), the court has reviewed the complaint and finds that it sufficiently sets forth a cause of action for discrimination and/or harassment based upon gender, race and/or national origin in violation of NYCHRL and for retaliation for complaints of discrimination and/or harassment in violation of NYCHRL. The court further finds that plaintiff has failed to set forth a cause of action for sexual harassment in violation of NYCHRL and retaliation for reporting sexual harassment in violation of NYCHRL. No where in the plaintiff's complaint does she allege any sexual harassment in the work environment or retaliation for making complaints of sexual harassment. Plaintiff has also failed to properly plead her cause of action for negligent hiring, retention and supervision and failed to state a claim for "respondent superior".

With respect to defendants Macy's, Inc. and Macy's of New York, the court takes notice that Macy's Inc. does business in New York State under the fictitious name Macy's of New York. While Macy's of New York may be a non-jural entity, it is premature at this juncture of the litigation to find that Macy's Inc. is not the proper party for plaintiff to sue for her alleged discrimination claims.

Plaintiff's cross motion for leave to amend her pleadings to add Macy's Real Estate, LLC as defendants to this action is denied at this time. Plaintiff has failed to annexed a copy of the proposed pleadings as required by CPLR §3025(b). Plaintiff is advised to review her remedies under CPLR §3025(a).

Accordingly, defendants' motion is granted to the extent that plaintiff third, fourth, fifth and sixth causes of action are dismissed. The matter is also dismissed as to Macy's of New York only. Plaintiff's cross motion is denied in its entirety.

This is the decision and order of the court.

Date: July 28, 2017



Hon. Leslie J. Purificacion, JSC

