SHORT FORM ORDER

INDEX No. 12-30974
CAL. No. 16-00723OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY, J.S.C.

MOTION DATE 9-8-16 (005)
MOTION DATE 6-10-17 (006)
ADJ. DATE 3-21-17
Mot. Seq. # 005 - MD
Mot. Seq. # 006 - MD

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NEDIME PEREZ,

Plaintiff,

- against -

UNITED PHARM USA INC., and MOHAMED ABDEL-MAKSOUD, an individual,

Defendants.

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers 5 - 9 ; Answering Affidavits and supporting papers 10 - 13 ; Replying Affidavits and supporting papers 14 - 16 ; Other Pltf's Sur-Reply 17 - 18 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability on the fifth cause of action in the amended complaint for retaliation in violation of Labor Law §215(a)(1) is denied; and it is

ORDERED that the cross-motion by defendants for summary judgment dismissing plaintiff's amended complaint is denied.

In this employment discrimination action, plaintiff alleges that she was subjected to sexual harassment by her supervisor, defendant Mohamed Abdel-Maksoud ("Abdel-Maksoud"), the owner, Chief Executive Officer and operator of defendant United Pharm USA, Inc. ("United Pharm"), a pharmacy and retail store located in Brooklyn, New York. Plaintiff alleges that the sexual harassment by

Abdel-Maksoud was severe and pervasive, included unwelcome sexual advances, offensive contact and inappropriate conversations, which created a hostile work environment. Plaintiff also alleges that Abdel-Maksoud sought a quid pro quo relationship wherein she was offered continued employment in exchange for sexual favors. Plaintiff alleges that she was terminated in retaliation for complaining about Abdel-Maksoud's sexual harassment and rebuffing his sexual advances.

In October 2012, plaintiff commenced this action against the defendants for sexual harassment and retaliation in violation of the New York State and New York City Human Rights laws (first and second causes of action), and for assault and battery against Abdel-Maksoud (third and fourth causes of action). In February 2014, upon being granted leave of the court, plaintiff amended her complaint to allege a fifth cause of action against defendants for retaliation under Labor Law §215(1)(a). Issue has been joined and discovery completed. Plaintiff now moves for summary judgment on the fifth cause of action.

In support of her motion, plaintiff submits, among other items, the pleadings, excerpts from the transcripts of her deposition testimony and that of Abdel-Maksoud, and a notice from the Department of Labor ("DOL") informing defendants that Ms. Perez is eligible for unemployment benefits. Plaintiff argues the DOL notice proves defendants violated Labor Law §215(1)(a) by directing her to clock out before she left the pharmacy to make a medication delivery to a client, therefore, her motion should be granted.

Defendants oppose the motion and cross-move for summary judgment dismissing the amended complaint. Defendants argue that excerpts of deposition transcripts are insufficient to satisfy the requirements for summary judgment, therefore the motion should be denied. It is also argued that defendants' counsel does not have a record of receiving Abdel-Maksoud's deposition transcript, thus plaintiff should be precluded from relying on it. Substantively, defendants argue plaintiff cannot make out a prima facie case on her first and second causes of action as her claims amount to episodic petty workplace trivialities. As to the assault and battery claims, it is argued that no rational fact finder would deem harmful or offensive Abdel-Maksoud's conduct of brushing by plaintiff in the tight pharmacy space in which they worked. Defendants argue that the fifth cause of action must be summarily dismissed as the DOL notice is inadmissible hearsay and there is no evidence that plaintiff's termination was retaliatory or that she was not paid for the 15 minutes it took her to make the medication delivery.

In response, plaintiff argues the cross-motion is untimely, and that the contentions therein (other than those that relate to the fifth cause of action) do not "relate back" to the filing date of the motion, and thus should not be considered. As to the merits of the cross-motion, plaintiff argues that defendants have not raised an issue of fact to overcome her prima facie showing of entitlement to summary judgment on the fifth cause of action, and as to the first through fourth causes of action, issues of fact exist. With respect to the transcripts, it is argued that Civil Practice Law and Rules (CPLR) §3212 does not require submission of an entire transcript and states that defendants' counsel was provided with Abdel-Maksoud's transcript for execution. In reply, defendants' counsel points to purported inconsistencies between plaintiff's deposition testimony and her affidavit and addresses the Abdel-Maksoud transcript and the untimeliness of the cross motion. Upon seeking the court's leave, plaintiff submits a sur-reply in further opposition to defendants' cross-motion.

As an initial matter, the court will address the non-substantive arguments. The excerpts of the deposition transcripts proffered by plaintiff will be considered as, under the circumstances, they qualify as admissible evidence in support of the motion for summary judgment (*see* ***Pavane v Marte***, 109 AD3d 970, 971 NYS2d 562 [2d Dept 2013]; ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 864 NYS2d 554 [2d Dept 2008]). Moreover, although plaintiff did not submit the complete transcripts with her original motion papers, the defendants cured any defect by annexing certified transcripts to their opposition papers (*see* ***Gallway v Muintir***, 142 AD3d 948, 38 NYS3d 8 [2d Dept 2016]). Further, plaintiff has demonstrated that defendants' counsel was provided with a copy of Abdel-Maksoud's transcript for his review and signature, and that an executed copy was not returned within 60 days (*see* id.; ***Rosenblatt v St. George Health & Racquetball Assocs., LLC.***, 119 AD3d 45, 984 NYS2d 401 [2d Dept 2014]; ***Mazzarelli v 54 Plus Realty Corp.***, *supra*). Furthermore, defendants neither argue that the excerpts are inadmissible nor raise any challenges as to their accuracy (*see* ***Rosenblatt v St. George Health & Racquetball Assocs., LLC.***, *supra*; ***Pavane v Marte***, *supra*). Notably, the deposition transcript of Abdel-Maksoud submitted by defendants is unsigned and thus adopted as accurate (*see* ***Asif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Additionally, with regard to plaintiff's affidavit, while it was submitted to elucidate her deposition testimony, the two are not contradictory, and whatever discrepancies exist between them raise credibility questions that cannot be resolved in the summary judgment context (see ***Ferrante v American Lung Assn.***, 90 NY2d 623, 665 NYS2d 25 [1979]; ***Conciatori v Port Auth. of New York and New Jersey***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]).

The following has been gleaned from the deposition transcripts and sworn statements before the court. Plaintiff was employed from September 2011 to July 2012 as the manager at United Pharm. Plaintiff, as did all employees, had to punch in upon arriving at work, and punch out at the end of the day. Her regular work hours were 10:00 a.m. to 6:00 p.m., Monday through Friday. According to plaintiff, her duties included, among others, completing daily assignments given to her by her supervisor, Abdel-Maksoud, and when needed, delivering prescription medications to pharmacy clients.

Plaintiff testified that during her period of employment she was constantly subjected to Abdel-Maksoud's sexual advances, inappropriate conversations and unwelcome offensive touching. She avers that Abdel-Maksoud stored shoes that he changed into at work under her desk and upon retrieving them would look up her skirt/dress and once touched her legs. When she moved his shoes to a different location, he put the shoes back under her desk and insisted that they remain there. Plaintiff also testified that Abdel-Maksoud brushed the front of his body against her buttocks, touched her breasts, suggested she wear low cut blouses and shorter skirts and even offered to purchase such clothing for her. She testified that one day he left Victoria Secret's coupons on her desk and told her not to mention it to her husband. Plaintiff testified that anytime Abdel-Maksoud moved from his computer workstation in the pharmacy, she became nervous and guarded as she never knew when he would say something to her that was offensive or attempt to touch her.

Plaintiff further testified that Abdel-Maksoud arranged for her to go on a business trip out of the country, and sometime later advised her he would accompany her, and told her not to tell her husband. When she told Abdel-Maksoud she was not comfortable traveling with him and would not keep the business travel a secret from her husband, Abdel-Maksoud canceled the trip. Plaintiff testified he often

insisted on speaking with her in the vermin-infested basement away from anyone else's presence at which time he would have inappropriate conversations with her. Plaintiff also testified that every morning, in an area in the back of the pharmacy out of the earshot of other employees, Abdel–Maksoud would give her daily assignments. During several of these conversations, Abdel-Maksoud told her while motioning with his arms to the pharmacy, she "could have all of this." Plaintiff testified she interpreted the offer as one of financial benefits in exchange for a sexual relationship with him. In other conversations Abdel-Maksoud allegedly told plaintiff she had to like him to continue her employment, that she was paying too much attention to her husband and not enough to him, and that she had to choose between him and her husband.

On Wednesdays, Abdel-Maksoud's day off, his normal routine was to come to the pharmacy in the morning to give plaintiff her daily assignment. On one Wednesday, he summoned her outside, told her to get in the passenger seat of his car, and proceeded to drive. Plaintiff testified she was very frightened and told him so, but when asked, he would not tell her where he was taking her. He drove her around for a few blocks and then took her back to the pharmacy. Plaintiff returned to her desk crying and distraught.

Plaintiff, upon questioning, set forth the approximate dates that these incidents occurred and testified that she told Abdel-Maksoud that she did not like or want to be touched by him and was offended by his conduct and conversations. Based on her testimony, affidavit and the allegations in her complaint, the aforementioned incidents started in October 2011 and continued on a regular basis during the time she was employed at United Pharm, with an incident occurring at least once a month.

The incident which allegedly led to plaintiff's termination occurred on July 25, 2012. Plaintiff testified she left work at 6:00 p.m., and on her way home, stopped to deliver prescription medications to a pharmacy client. At approximately 6:15 p.m., plaintiff called the pharmacy to inform Abdel-Maksoud that the delivery had been completed. At the time of her call, Abdel-Maksoud was busy, so plaintiff spoke to another employee who agreed to pass the information on to Abdel-Maksoud and to punch out her timecard. A few minutes later, Abdel-Maksoud called plaintiff to reprimand her for failing to punch out when she left the pharmacy. During the cell phone conversation, plaintiff explained to Abdel-Maksoud that she was delivering a prescription to a client, therefore, it was improper to ask her to punch out while she was still working. Abdel-Maksoud told plaintiff she had to punch out when she left the pharmacy even if she was traveling to make a work-related delivery. An argument ensued and the conversation was ended. Later that evening plaintiff received a text message from Abdel-Maksoud telling her to bring in the keys to the pharmacy and retrieve her belongings. Plaintiff maintains she attempted to discuss the message with Abdel-Maksoud but he refused. The next workday, which she believed was a Monday, she returned the keys and approximately two weeks later she applied for unemployment benefits with the DOL.

Plaintiff's application for unemployment benefits was originally denied as defendants informed the DOL that Ms. Perez quit, which is consistent with Abdel-Maksoud's deposition testimony. He testified that after the cell phone conversation, plaintiff did not return to work for a week, leading him to conclude that she quit. Plaintiff testified that she provided the DOL with additional information, including the aforementioned text message from Abdel-Maksoud to return the keys. Based on the notice

from the DOL dated August 17, 2012 and addressed to United Pharm, additional information was also provided by defendants. The notice informed United Pharm that the information it furnished on August 16, 2012 was considered, and that the claimant (plaintiff herein) was eligible for unemployment benefits. The notice provides a reason for the determination, to wit:

> Reason:
> You state the claimant was terminated on 7/25/12 for not following employer's instructions. You asked the claimant to punch out before she made the delivery for the company. The claimant disagreed, started to argue and was terminated. However, your request is a direct violation of the NYS Labor Law.

The notice sets forth that if the employer is not satisfied with the determination it may request, not later than 30 days from the date of the notice, a hearing before an impartial Administrative Law Judge. Defendants did not request a hearing.

To establish a prima facie case of retaliation under Labor Law §215(1), plaintiff must be able to show that, while she was employed by defendants, she made a complaint about the employers' "violation of the New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result" (***Higueros v New York State Catholic Health Plan, Inc.***, 526 F Supp 2d 342, 347 [ED NY 2007]). Further, there must be "a nexus between the employee's complaint and the employer's retaliatory action" (***Id.***; *see also* ***Quintas v Pace Univ.***, 23 AD2d 246, 804 NYS2d 67, 68 [1st Dept 2005]). Once a plaintiff establishes a prima facie case of retaliation under Section 215, the burden shifts to the defendant to produce evidence suggesting that it had a legitimate, non-retaliatory explanation for its actions (***Higueros v New York State Catholic Health Plan, Inc.***, *supra*). Plaintiff must then persuade the fact finder that the proffered explanation is pretextual (***Id.***).

An amendment to Labor Law §215, known as the Wage Theft Protection Act, effective as of April 9, 2011, prohibits an employer, or the officer or agent of a corporation, from discharging, penalizing, or in any other manner discriminating or retaliating against an employee who in good faith believes that the employer violated the Labor Law and has made a complaint about such violation (*see* Labor Law §215(1)(a), as amended by L 2010, ch 564, §10). The statute further provides that "[a]n employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section" (Labor Law §215 (1) (a)). Rather "[a]ll that is required is that the complaint to the employer be of a colorable violation of the statute" ***Figura v North Country Janitorial, Inc.***, 53 Misc 3d 881, 885, 37 NYS3d 697 [Sup Ct Warren County 2016]; ***Weiss v Kaufman***, 2010 NY Slip Op 33261[U], *2, 2010 WL 4858896 [Sup Ct NY County 2010]). "This chapter refers to any provision of the Labor Law" (***Starikov v Ceva Freight, LLC***, 153 AD3d 1377, ___NYS3d___ [2d Dept 2017] [internal quotations omitted]). Thus, if the complaint made by an employee is not governed by a provision in the Labor Law, a Section 215 claim cannot be sustained (*see* ***Grella v St. Francis Hosp.***, 45 Misc 3d 1222[A], 5 NYS3d 328 [Sup Ct Nassau County 2014], *affd* 149 AD3d 1046, 53 NYS3d 330 [2d Dept 2017]).

Here, plaintiff has come forward with sufficient evidence to support a prima facie case of unlawful retaliation and raise a genuine triable issue of fact as to whether defendants' proffered reason for her termination was pretextual. Plaintiff premises her Section 215 claim on defendants' violation of Labor Law §§652 and 191.

Although plaintiff cites Labor Law § 652, it is Department of Labor Regulations (12 NYCRR 1200) § 142-2.1(b) and § 142-3.1(b) which provide that an employee is entitled to compensation for each and every hour that "an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and [this compensation] shall include time spent in traveling to the extent that such traveling is part of the duties of the employee." Labor Law § 191 provides that failure to compensate an employee for work performed is a violation of the New York Labor Law.

As plaintiff was terminated the same day of her complaint, it can be concluded that there exists as issue of material fact as to whether her Labor Law complaints were a motivating factor in her discharge (*see* ***Parker v Sony Pictures Entertainment, Inc.***, 260 F3d 100 [2d Cir 2001], *affd* 286 F3d 192 [2d Cir 2004]; ***Esmilla v The Cosmopolitan Club***, 936 F Supp 2d 229 [SD NY 2013]). Thus, summary judgment in defendants' favor is not warranted with respect to plaintiff's ability to make out a prima facie case of retaliation under Section 215 (*see* ***Esmilla v The Cosmopolitan Club***, *supra*; ***Weinstein v Klocke of America, Inc.***, 151 AD3d 1110, 58 NYS3d 102 [2d Dept 2017]). However, it is also argued that a legitimate, non-retaliatory reason exists for terminating plaintiff. Defendants argue that plaintiff was terminated for insubordination. However, other than Abdel-Maksoud testifying that plaintiff was insubordinate, no other evidence has been proffered to corroborate his testimony. In fact, he gave conflicting testimony as to whether plaintiff was terminated or quit. Moreover, "on a motion for summary judgment on a retaliation claim, the question before the Court is not whether [p]laintiff has actually demonstrated that [d]efendants' proffered reason for her termination was entirely false, but rather, whether, based on the evidentiary showing to date, [p]laintiff may invite the jury to ignore the [d]efendants' proffered legitimate explanation and conclude that retaliation was a motivating factor, whether or not the employer's proffered explanation was also in the employer's mind" (***Esmilla v The Cosmopolitan Club***, *supra*, at 250 [internal quotations omitted]). Thus, it cannot be concluded "that there is no genuine dispute as to any material fact regarding the issue of pretext" (***Id.***).

Plaintiff is also not entitled to summary judgment, as the DOL notice which she maintains proves she was terminated in retaliation for complaining of the Labor Law violation is not certified (*see* CPLR 4518[c]) or otherwise authenticated or rendered admissible evidence. Therefore, plaintiff's motion for summary judgment on her favor on the fifth cause of action and the branch of defendants' cross-motion for summary judgment dismissing this cause of action must be denied (*see* ***Esmilla v The Cosmopolitan Club***, *supra*; ***Weinstein v Klocke of America, Inc.***, *supra*).

Turning to defendants' cross motion for summary judgment dismissing the amended complaint, the cross-motion is untimely as it was made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Jones v City of New York***, 130 AD3d 686, 13 NYS 3d 240 [2d Dept 2015]). The Court file indicates that the note of issue was filed on April 26, 2016, yet the cross-motion was made on November 15, 2016. While a court is not prohibited from entertaining an untimely cross-motion in cases where a timely motion for summary judgment is made on "nearly identical grounds" (***Wernicki v***

Knipper, 119 AD3d 775, 776, 989 NYS2d 318 [2d Dept 2014]), the instant cross-motion does not present such a situation (*see* ***Farrell v Herzog***, 123 AD3d 655, 998 NYS2d 202 [2d Dept 2014]). Nevertheless, as it appears that both sides consented to several extensions, the Court will entertain the cross-motion, and deny it as questions of fact exist precluding summary judgment.

Substantively, the Human Rights Law and the New York City Human Rights Law both make it an unlawful discriminatory practice for an employer to discharge, or to discriminate in terms, conditions or privileges of employment because of the sex of any individual (*see* Executive Law § 296 [1][a]; Administrative Code of the City of New York § 8-107[1][a]; ***Ananiadis v Mediterranean Gyros Prods., Inc.***, 151 AD3d 915, 917, 54 NYS3d 155 [2d Dept 2017]; ***Overbeck v Alpha Animal Health, P.C.***, 124 AD3d 852, 2 NYS3d 541 [2d Dept 2015]). "When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex" (***Ananiadis v Mediterranean Gyros Prods., Inc.***, *supra* at 97; ***Matter of Father Belle Community Ctr. v New York State Div. of Human Rights***, 221 AD2d 44, 50, 642 NYS2d 739 [4th Dept 1996]). "Moreover, under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices (*see* Executive Law § 296 [1][e], [7]; Administrative Code of the City of New York § 8-107[7]]; ***Overbeck v Alpha Animal Health, P.C.***, *supra* at 853).

A claim of sexual harassment in the work place may proceed under a theory of hostile work environment or quid pro quo (***Ortega v Bisogno & Meyerson***, 2 AD3d 607, 769 NYS2d 279 [2d Dept 2003]; ***Fella v County of Rockland***, 297 AD3d 813, 747 NYS2d 588 [2d Dept 2002]; *see also* ***Matter of Father Belle Community Center v New York State Div. of Human Rights***, *supra*). A hostile work environment exists "when the workplace is permeated with discriminatory intimidation, ridicule and insult...that is sufficiently severe or pervasive to alter the conditions of the victim's employment" (***Father Belle Community Center v New York State Div. of Human Rights***, *supra* at 50). Such a claim may be made out in the absence of proof of linkage between the offensive conduct and decisions affecting employment and does not require proof of economic loss (***Id.***).

Quid pro quo harassment occurs when unwelcome sexual conduct, whether sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, is used, either explicitly or implicitly, as a basis for employment decisions affecting compensation, terms, conditions or privileges of the complainant's employment (***Father Belle Community Center v New York State Div. of Human Rights***, *supra*). The issue in a quid pro case is whether the supervisor expressly or tacitly linked tangible job benefits to the acceptance or rejection of sexual advances and is made out whether the employee rejects the advances and suffers the consequences or submits to the advances in order to avoid those consequences (***Id.***). "Because the focus in on the prohibited conduct–the unwelcome sexual overtures–and not on the victim's reaction to it, there is no requirement that the victim suffer actual economic loss (***Id.*** at 50).

In the case at bar, even assuming that defendants met their initial burden, and viewing the evidence in the light most favorable to plaintiff (*see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]), a reasonable person could find that Abdel-Makoud's conduct was offensive, severe and persuasive and that he used his position to intimidate plaintiff, and made unwelcome advances towards her thereby creating an objectively hostile or abusive environment in violation of the Human Rights Law (*see* ***Overbeck v Alpha Animal Health, P.C.***, *supra*; *see also* ***McRedmond v Sutton***

Place Rest. & Bar, Inc., 95 AD3d 671, 945 NYS2d 35 [1st Dept 2013]). Similarly, a fact finder could determine that plaintiff's proof overlaps both theories of quid pro quo and hostile work environment (*see* ***Matter of Father Belle Community Center v New York State Div. of Human Rights***, *supra*). Abdel-Maksoud's denial that he engaged in any of the alleged conduct raises credibility issue that the court may not decide on a motion for summary judgment (*see* ***Ferrante v American Lung Assn.***, *supra*; ***Overbeck v Alpha Animal Health, P.C.***, *supra*; *see also* ***McRedmond v Sutton Place Rest. & Bar, Inc.***, *supra*).

United Pharma can be held liable for the discriminatory conduct by Abdel-Maksoud, as he is the sole owner and CEO of United Pharma (*see* ***Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights***, 71 AD3d 890, 897 NYS2d 177 [2d Dept 2010]). In addition, Abdel-Maksoud can be held individually liable to plaintiff based on his ownership interest in United Pharma (*see* ***Id.***).

With regard to plaintiff's retaliation claims, "the court's role in evaluating a summary judgment request is to determine only whether proffered admissible evidence would be sufficient to permit a rational finder of fact to infer a retaliatory motive" (***Zann Kwan v Andalex Group LLC***, 737 F3d 834, 844 [2d Cir 2013]; ***Jute v Hamilton Sundstrand Corp.***, 420 F3d 166, 173 [2d Cir 2005]). Thus, if a defendant satisfies its burden of showing that plaintiff is unable to make out a prima facie case of retaliation, or offers a legitimate, non-retaliatory reason for the challenged actions, "plaintiff must either counter the defendant's evidence by producing evidence that the reasons put forth by the defendant were merely a pretext, or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive" (***Brightman v Prison Health Serv., Inc.***, 108 AD3d 739, 970 NYS2d 789 [2d Dept 2013]; ***Delrio v City of New York***, 91 AD3d 900, 938 NYS2d 149 [2d Dept 2012]). Here, not only is there an issue of fact as to whether defendants' proffered reasons meet the minimal burden, the totality of the circumstances surrounding plaintiff's termination are suspect. Plaintiff denies that she was ever disciplined or reprimanded and Abdel-Maksoud concedes that he never documented any incidents or discussions and that he was generally satisfied with her work. Abdel-Maksoud also averred that plaintiff quit and denied that she was fired. Thus, it is clear that an issue of fact exists as to whether the defendants' reasons for plaintiff's termination were merely pretextual (***Ferrante v American Lung Assn.***, *supra*; ***Overbeck v Alpha Animal Health, P.C.***, *supra*).

Accordingly, the motion and cross-motion are denied.

Dated: January 19, 2018

HON. DAVID T. REILLY J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**