

Mejia v T.N. 888 Eighth Ave. LLC CO

2018 NY Slip Op 30737(U)

April 24, 2018

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

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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.

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ROBERT KALISH, J.:

This action stems from plaintiff Judith Mejia's allegations that she was subject to discrimination and retaliation in violation of the New York State Human Rights Law (NYSHRL), New York City Human Rights Law (NYCHRL) and the New York Labor Law (NYLL), while she was employed by defendants T.N. 888 Eighth Avenue LLC CO d/b/a Cosmic Diner (Cosmic Diner), Elias "Louie" Tsanias (Tsanias)¹ and John Dimos (Dimos). On December 21, 2016, this court granted defendants' motion for summary judgment dismissing the eight causes of action in the complaint. Plaintiff subsequently moved, among other things, for leave to replead the cause of action for unlawful retaliation under Labor Law § 215. Plaintiff was granted leave to amend the complaint, solely to the extent of adding a new ninth cause of action alleging unlawful retaliation under Labor Law § 215, based upon the relevant allegations already included

¹ Plaintiff concedes that Tsanias was not properly served and is not a defendant in this action.

in the initial complaint.² Defendants now move, pursuant to CPLR 3211 (a) (7), for an order dismissing the remaining cause of action in the amended complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

This court has previously decided several motions between the parties and assumes familiarity with the previous rulings which extensively set forth the allegations. In brief, prior to quitting in August 2013, plaintiff had been employed by the Cosmic Diner as a waitress since 2006. Plaintiff is a woman of Colombian descent and is over 40 years of age. Plaintiff filed the initial complaint in the underlying action in 2014. Plaintiff alleged that defendants had subjected her to discrimination, a hostile work environment, and retaliation, as a result of her gender, national origin, and age, and because she had engaged in protected activity. The complaint contained eight causes of action, grounded in discrimination and retaliation in violation of the NYSHRL and the NYCHRL, and for defamation. The sixth and seventh causes of action for malicious prosecution and abuse of process were voluntarily withdrawn by plaintiff during oral argument. *See Vinci* affirmation, exhibit 1, Complaint.

Without reiterating the entirety of the allegations, as relevant to the instant motion, as indicated in the initial complaint, in October 2012, plaintiff became a putative plaintiff in a federal class action lawsuit against defendants (federal lawsuit). The federal lawsuit alleged that defendants violated the Fair Labor Standards Act (FLSA) and the NYLL by, among other things, failing to pay its employees minimum wage and overtime. Plaintiff alleged that, after she joined the federal lawsuit, defendants' harassment continued, as she believed they were trying to get her

² The prior order granting summary judgment and dismissing the complaint in its entirety was modified, and the case was restored to the calendar for the remaining cause of action.

to quit. The complaint stated the following, in pertinent part:

“In or about October of 2012, Plaintiff joined in as a Plaintiff in a Federal Wage and Hour case against the Defendants to collect years of unpaid wages. Immediately, the national origin, gender, sexual harassment and age discrimination worsened. Plaintiff was subjected to non-stop verbal abuse, intimidation, harassment, offensive behavior, and discrimination. Defendants tormented her and directed their employees to torment her as well. It was clear that Defendants were determined to make Plaintiff quit. She was cursed at ignored, threatened, screamed at and humiliated.”

Id., ¶ 47.

Further, plaintiff claimed that, after joining the federal lawsuit, defendants cut her hours and would not allow her to share tips from the tables, which ultimately resulted in a reduced salary. Despite cutting her hours, defendants purportedly overworked plaintiff when she was there, in an attempt to overwhelm her and have her make mistakes. Plaintiff claimed that several employees began to intimidate and threaten her.

Lawsuit Against Plaintiff

On July 19, 2013, defendants commenced an action against plaintiff, alleging that, among other things, plaintiff had fraudulently reduced customers' checks, and then, in return, requested a bigger tip. Defendants claimed that, in mid-July 2013, a customer reported to the cashier that plaintiff offered him an arrangement to reduce prices on the menu in return for a bigger tip for herself. The cashier had reported that the customer, who was a New Jersey restaurant owner, told her to report the incident to management. The complaint alleged that, as a result of the bribes and kickbacks, plaintiff improperly took a minimum of \$75,000 from defendants.

Plaintiff did not deny making mistakes on checks. However, “mistakes happened when defendants retaliated against Plaintiff by seating as many customers as possible in her section.”

Complaint, ¶ 60. She further alleged that cashiers “purposefully looked for and then failed to correct” plaintiff’s mistakes as a way to commence a “bogus lawsuit against [plaintiff] in an attempt to make her quit her employment.” *Id.*, ¶ 61. In addition, plaintiff argued that the “alleged scheme is even more preposterous because servers at Defendant Cosmic Diner are required to pool all of their tips.” *Id.*, ¶ 62.

New York Post Article

Shortly after defendants commenced their lawsuit against plaintiff, a reporter from the New York Post wrote an article about their lawsuit. Apparently, the reporter came to the diner, interviewed plaintiff, and took a picture of plaintiff for the article. Plaintiff states in her complaint that Dimos sat the reporter at plaintiff’s table and then “smiled menacingly at plaintiff.” *Id.*, ¶ 65.

The New York Post article was entitled, “Waitress Served bribes with breakfast: lawsuit.” Vinci affirmation, exhibit 3 at exhibit 2. The article continued with the following, in pertinent part:

“The owners of the Cosmic Diner in Midtown say a longtime waitress, Judith Mejia, reduced customers’ tabs in exchange for cash. Mejia’s self-serving cost them at least \$75,000 over the years, says a lawsuit the owners filed in Manhattan Supreme Court last week . . . Mejia . . . denied the allegations . . . Mejia claims the suit is retaliation for discrimination complaints that she and two other workers have made against their employer.”

Id.

Defendants maintained that they did not arrange the story or the photo, and that the reporter learned of the lawsuit by reviewing the docket of recently filed complaints. Dimos testified that he did not call the newspaper and that he did not know how the newspaper found

out about the lawsuit.

Plaintiff had alleged in her complaint that, after defendants became aware of the FLSA lawsuit, in addition to the harassment, defendants retaliated against her by commencing a baseless lawsuit against her and arranging for the reporter to expose this lawsuit. The complaint stated that, as a result of this lawsuit and the news article, plaintiff developed medical problems. The complaint further alleged that the retaliatory actions, including the “infamy” of the news article, prevents her from getting a job. More particularly, the complaint stated, “[u]pon information and belief [plaintiff] cannot find a job because an internet search of her name reveals that she had been accused of stealing from restaurants.” Complaint, ¶ 76.

In September 2013, after plaintiff stopped working for defendants, defendants voluntarily discontinued the lawsuit against her.

By a decision and order dated December 21, 2016, this court granted defendants’ motion for summary judgment dismissing the eight causes of action in the complaint. *See Mejia v T.N. 888 Eighth Ave. LLC Co*, 2016 NY Slip Op 32578(U), (Sup Ct, NY County 2016).

On January 20, 2017, plaintiff filed a motion seeking to renew, reargue or replead a cause of action alleging unlawful retaliation in violation of the NYLL. Plaintiff argued that, despite not specifically designating a cause of action for unlawful retaliation in violation of Labor Law § 215, the court had overlooked that she had in fact sufficiently pled this claim.

Plaintiff further argued that the court overlooked or misapprehended the law with respect to unlawful retaliation under the NYCHRL, and claimed that she was retaliated against after she joined the lawsuit. In the alternative, plaintiff requested leave to amend the complaint to replead her claim for unlawful retaliation in violation of the NYLL.

The court noted that, in actuality, plaintiff was requesting two distinct forms of relief. First, plaintiff was seeking to reargue the court's December 21, 2016 decision granting summary judgment on the fifth cause of action alleging retaliation under the NYCHRL. The court denied plaintiff's motion for reargument, noting that plaintiff was unable to link defendants' actions to any discriminatory motive. The court further added that commencing a lawsuit is not a protected activity within the NYCHRL because it does not constitute opposing discriminatory practices.

The court then addressed the relief requested related to plaintiff's claim for unlawful retaliation in violation of the NYLL. Contrary to plaintiff's contention, the court stated that it did not construe the language in plaintiff's complaint to sufficiently state a cause of action against defendants for an alleged violation of Labor Law § 215. While plaintiff had alleged retaliation in violation of the NYSHRL and NYCHRL in the cause of action for retaliation, the court found that there was no direct reference in that cause of action to Labor Law § 215 or to the lawsuit. The court reiterated that, out of the eight causes of action, there was no cause of action for unlawful retaliation in violation of Labor Law § 215. It noted that the single reference to this statute was only included in the first paragraph of the complaint, summarizing the civil action. Even though defendants moved for summary judgment dismissing the complaint, it was unreasonable that plaintiff did not address the dismissal of a potential NYLL cause of action, if, as she had averred, it was sufficiently alleged in the complaint.

As there was never a cause of action before the court for an unlawful retaliation based on an alleged violation of Labor Law § 215, the court found that there could be no basis for reargument or renewal, and these requests were denied.

Nevertheless, the court granted the portion of plaintiff's motion seeking to amend the

complaint to add a ninth cause of action for unlawful retaliation based on an alleged violation of Labor Law § 215. As indicated in the decision, to establish a claim under Labor Law § 215, 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 (ED NY 2011).

The court found that plaintiff sufficiently alleged that she engaged in a protected activity by commencing the federal lawsuit and that defendants retaliated against her by commencing their own lawsuit against her. Plaintiff adequately pled the existence of a causal connection between the two events as only nine months had passed. The court further noted that, although the federal lawsuit settled in 2015, and plaintiff agreed to discontinue that lawsuit, plaintiff did not sign a release with respect to the instant action.

The court found defendants would not be prejudiced or surprised by allowing the amendment, because the complaint, the bill of particulars, and counsel’s argument at oral argument provided defendants with sufficient notice of a potential claim for unlawful retaliation in violation of Labor Law § 215. Nonetheless, the court instructed plaintiff that she was only allowed to amend the complaint to include this new ninth cause of action based on the relevant allegations already included in the complaint. Furthermore, as plaintiff had filed the note of issue indicating that discovery was complete, to ensure that defendants faced no prejudice, the court stated that it would not allow for any additional discovery. In its decision and order dated August 14, 2017, the court stated the following, in relevant part:

“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."

See Mejia v T.N. 888 Eighth Ave. LLC Co, 2017 NY Slip Op 31701 (U), * 33 (Sup Ct, NY County 2017).

The Instant Action

Pursuant to the court's directive, plaintiff filed an amended complaint on August 28, 2017 including a ninth cause of action for retaliation in violation of Labor Law § 215. In the cause of action, plaintiff states that she engaged in protected activity under the NYLL by joining as a plaintiff in a federal wage and hour lawsuit against defendants in October 2012. After she joined as a plaintiff, in violation of the Labor Law § 215, defendants retaliated against her by subjecting her to a "series of adverse actions." Amended complaint, ¶ 141.

In defendants' motion to dismiss the ninth cause of action, they argue that plaintiff cannot successfully plead a cause of action for unlawful retaliation because there was no documentation that plaintiff had ever complained to anyone about the way she was treated. "Plaintiff was never terminated in retaliation under Labor Law 215 because it never occurred No retaliatory discharge in fact occurred under LL 215 absent Notice from her to Management about any complaints while employed." Dimos Aff, ¶ 5.

They contend that her allegations of harassment are unfounded, noting, "[i]t speaks

volumes she made no affidavit of merits to rebut her co-workers” on the initial motion for summary judgment. *Id.*, ¶ 4. In addition, defendants argue that there is no support for plaintiff’s allegations that she was asked to serve more tables or that she was intimidated. They state that plaintiff “never rebutted Defendants’ evidence in support of Summary Judgment including affidavits from Plaintiff’s co-workers who aver they worked side-by-side at Cosmic [and that] . . . she was a contented employee . . . and there had been no discrimination or harassment of her nor was the Diner a Hostile Work Environment.” *Id.*, ¶ 3.

Defendants further note that plaintiff did not submit an affidavit to rebut the allegations that she altered the customer’s check and requested a higher tip. Defendants continue that plaintiff did not submit any evidence to rebut defendants’ allegations that they had no involvement in seating a reporter at one of plaintiff’s tables for the purposes of creating an unfavorable article.

In addition, defendants allege that the record belies plaintiff’s arguments that she suffered from medical problems and was forced to quit as a result of defendant’s actions. Specifically, as previously indicated by defendants, plaintiff filed for, and received, unemployment benefits commencing in August 2013. Plaintiff had testified that, during the period she applied for unemployment benefits, she was healthy, ready, willing and able to work.

According to defendants, plaintiff’s hours were never cut and she was never told that she could not share tips. They assert that, as reported on her tax returns, she earned the same amount of money in every year, including the last year she worked for defendants.

Further, according to defendants, plaintiff did not engage in any protected activity in 2012 for the purpose of Labor Law § 215. As of October 2012, Helena Ruzic (Ruzic) was the

only named plaintiff in the class action complaint against defendants. According to defendants, plaintiff did not formally join until she was added to an amended complaint in February 2014, which was already seven months after she voluntarily left her employment with the Cosmic Diner. As a result, defendants content, plaintiff's allegations that, once she joined the complaint in 2012 the discrimination worsened, are misleading, as plaintiff was not formally joined until a much later time period.

In opposition, plaintiff argues that, by allowing her to amend the complaint, the court has already determined that the proposed cause of action could survive a motion to dismiss. Regardless, plaintiff alleges that she has pled a viable cause of action for retaliation under the NYLL. She states that, while she was employed by defendants, she engaged in protected activity by making a complaint regarding defendants' failure to pay her properly under the NYLL and FLSA. Plaintiff continues that she engaged in protected activity as early as October 2012, when she publicly filed her consent to sue and that defendants were aware of plaintiff's participation in the lawsuit. Vinci affirmation, exhibit 4 at 1. Finally, as set forth above, plaintiff claims that there was a causal connection between the adverse actions she suffered and her known participation in the federal lawsuit.

DISCUSSION

Many of defendants' arguments for why plaintiff fails to state a cause of action revolve around plaintiff's failure to submit an affidavit in opposition to defendants' contentions. For example, defendants cite to affidavits they submitted during various points during the action suggesting that plaintiff was a satisfied employee who was not discriminated against or

harassed.³ They also claim that plaintiff never disputed the cashier's statements regarding the customer's statements about plaintiff's request for a bigger tip in return for lowering the bill. However, defendants have "moved to dismiss under CPLR 3211 (a) (7), which limits us to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff;"

Miglino v Bally Total Fitness of Greater N.Y., Inc., 20 NY3d 342, 351 (2013).⁴

These issues of credibility between the parties, as raised by defendants, are not appropriate for consideration on a motion to dismiss. *See e.g. Ippolito v Lennon*, 150 AD2d 300, 304 (1st Dept 1989) (internal citations omitted) ("For purposes of a motion to dismiss, the credibility of the parties is not under consideration and plaintiff's statements in opposition to the motion are accepted as true"); *see also Lee v Dow Jones & Co., Inc.*, 121 AD3d 548, 549 (1st Dept 2014) (internal quotation marks and citations omitted) ("In the circumstances presented, the court improperly considered affidavits and deposition testimony submitted by defendant in

³ It is unclear why defendants continue to mention plaintiff's claims for discrimination and harassment under the NYSHRL and NYCHRL as the court has already granted summary judgment dismissing these claims.

⁴ The court notes that plaintiff is mistaken in her argument that the standard for amending a pleading is the same for a motion to dismiss. As the Appellate Division, First Department has held, in pertinent part:

"While the validity of a proposed amended pleading should be examined upon a motion to amend, its legal sufficiency and merit must be sustained unless the alleged insufficiency or lack of merit is clear and free from doubt. This function of the reviewing court is predicated upon concepts of judicial economy and efficiency. It is not meant to supplant the motion to dismiss or for summary judgment."

Hawkins v Genesee Place Corp., 139 AD2d 433, 434 (1st Dept 1988) (internal citations omitted).

deciding its CPLR 3211 (a) (7) motion to dismiss the complaint. CPLR 3211 (a) (7) limits [the court] to an examination of the pleadings to determine whether they state a cause of action”).

According to defendants, plaintiff has not submitted any evidence to establish that defendants willfully initiated the reporter’s story. In addition, defendants argue that plaintiff never suffered from any medical problems as a result of any alleged retaliation because she submitted unemployment forms indicating that she was healthy. Nonetheless, on a motion to dismiss, “plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face.” *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d at 351.

Here, as set forth below, plaintiff has sufficiently stated a cause of action for retaliation in violation of Labor Law § 215. As set forth in the complaint, plaintiff alleged that she joined as an opt-in plaintiff while she was employed by defendants and that they were aware of this lawsuit. Although defendants argue that plaintiff was not legally engaged in protected activity until she was formally named as a plaintiff, this argument is unavailing. The record indicates that, on October 22, 2012, plaintiff signed a consent to become party plaintiff. This form was publicly filed and included on the docket sheet for the Ruzic/FLSA action against defendants.

The anti-retaliation provision contained in Labor Law § 215, 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; *see also Wigdor v SoulCycle LLC*, 139 AD3d 613, 613 (1st Dept 2016) (internal quotation marks and citations omitted) (“Labor Law § 215 (1) (a), which prohibits an employer from retaliating against an employee for engaging in

protected activities, was clearly intended to provide employees with a cause of action against their current and former employers”).

As previously stated, to establish a prima facie case of 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 at 384.

While employed by defendants, plaintiff 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.⁵ As a result, plaintiff has sufficiently pled that she engaged in a protected activity under the NYLL. “[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, *6 (SD NY 2008, Mar. 5, 2008, No. 07-CV-8785 [HB] [FM]).

Plaintiff then alleged that, in retaliation for her participation in the federal lawsuit, defendants subjected her to adverse employment actions, including commencing a baseless lawsuit against her. Plaintiff has alleged that there was no basis for this lawsuit. She continued that, as a result of the lawsuit, the reporter wrote an article which negatively impacted her job opportunities. An adverse action is one that “might have dissuaded a reasonable worker from making or supporting similar charges. Courts have routinely held that this definition encompasses a broad range of retaliatory acts” *Oram v SoulCycle LLC*, 979 F Supp 2d 498,

⁵ Notably, defendants do not deny being aware that plaintiff had joined the federal lawsuit while she was still working for them. Instead, they focus on the discrepancy in dates as to when she would have been considered to have been engaged in a protected activity.

510 (SD NY 2013) (internal quotation marks and citations omitted). Defendants' lawsuit can be construed as an adverse action taken against plaintiff as "Courts have held that baseless claims or lawsuits designed to deter claimants from seeking legal redress constitute impermissibly adverse retaliatory actions" *Torres v Gristede's Operating Corp.*, 628 F Supp 2d 447, 472 (SD NY 2008).

Defendants argue that plaintiff cannot demonstrate any adverse treatment because there are no documented complaints to management. However, under Labor Law § 215 (1) (a), there is no requirement that plaintiff document complaints to management about NYLL violations. Workers are protected when they make internal complaints to management about violations of the NYLL or when they institute formal legal proceedings. *See* NYLL § 215 (1) (a) (i).

In addition, defendants deny mistreating plaintiff after she commenced the lawsuit and reiterate that she was not fired, but voluntarily left her job. Nevertheless, for purposes of this motion, because defendants initiated an action against plaintiff, combined with Plaintiff's allegations concerning schedule changes and intimidation as a result of filing her lawsuit, Plaintiff has sufficiently pled that she suffered from an adverse action as a result of her complaints under the NYLL. *See e.g. Kreinik v Showbran Photo, Inc.*, 2003 WL 22339268, *9, 2003 US Dist LEXIS 18276, *30 (SD NY Oct. 14, 2003, No. 02-Civ-1172 [RMB] [DF]) (Plaintiff sufficiently alleged adverse actions under Labor Law § 215 by sufficiently alleging that the "counterclaims asserted against him could harm his reputation in his industry and negatively affect his prospective employment or business opportunities").

Lastly, plaintiff has sufficiently alleged a causal connection by asserting that defendants harassed plaintiff right after she joined the federal lawsuit and then commenced their own action

against plaintiff approximately nine months later. *See Torres v Gristede's Operating Corp.*, 628 F Supp 2d at 473 (“An inference of retaliation is established by a causal connection between the protected activity and the adverse action”).

Accordingly, at this stage, plaintiff has adequately pled a retaliation claim under Labor Law § 215 and defendants’ motion to dismiss is denied. *See e.g. EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005) (“Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss”).

CONCLUSION

Accordingly, it is

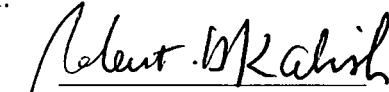
ORDERED that the motion of defendants T.N. 888 Eighth Avenue LLC CO d/b/a Cosmic Diner and John Dimos to dismiss the amended complaint is denied; and it is further

ORDERED that plaintiff’s remaining claim shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: April 24, 2018

ENTER:


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