Spano v New Team
2018 NY Slip Op 31829(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 153586/16
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
Justice

PART 47

Spano

-v-

New Team

INDEX NO. 153586/16

MOTION DATE _____

MOTION SEQ. NO. 4

The following papers, numbered 1 to _____, **were read on this motion to/for** _____

Notice of Motion/Order to Show Cause – Affidavits – Exhibits _____ **No(s).** _____

Answering Affidavits – Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Plaintiff Elisabeth Spano commenced this action on April 28, 2016 by filing a complaint against defendant New Team LLC, her former employer, and defendant Kevin Henry Hassett, her former supervisor at New Team (the "New Team Defendants"), based on their alleged violations of the New York State Human Rights Law, N.Y. Exec. L. § 296 ("NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 ("NYCHRL") for allegedly failing to hire and promote plaintiff to the Senior Brand Developer position because she was not a first-generation Italian. Plaintiff also alleged that defendants improperly terminated her after she complained of Mr. Hassett's discriminatory conduct to the human resources department at New Team. Based upon certain emails produced by defendant Millercoors, LLC in response to plaintiff's subpoena, plaintiff filed a motion for leave to amend her complaint to add claims against Millercoors and Anheuser-Busch Inbev SA/NV for aiding and abetting the New Team Defendants' discriminatory conduct under Executive Law § 296(6) and NYC Admin. Code. § 8-107(6). By order dated October 10, 2017, this court granted plaintiff's unopposed motion to amend and plaintiff filed her first amended verified complaint on October 11, 2017. Defendants Millercoors and Anheuser-Busch now move, pursuant to CPLR 3211, to dismiss the first amended verified complaint as asserted against them.

Defendant Millercoors first argues that insofar as plaintiff's claims are based on aiding and abetting New Team's refusal to hire plaintiff based on national origin, these claims are time-barred by the three-year statute of limitations governing these claims. CPLR 214. In response, plaintiff argues that these claims are timely because they relate back to the filing of the original complaint in April 2016, and because the accrual date for these claims was tolled by the continuing violations doctrine.

Dated: _____

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** ..... **MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
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In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct; (2) the new defendant is "united in interest" with the original defendant; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well. *Mileski v. MSC Indus. Direct Co.*, 138 A.D.3d 797 (2d Dep't 2016). Here, the additional defendants Millercoors, and its parent company Anheuser-Busch, were clients of defendant New Team, who was hired by Millercoors to market certain of its products. As such, these defendants are not "united in interest" since they operate as separate entities and the claims asserted against them are based on different conduct to which the defendants may have different defenses. *Id.* Plaintiff's argument that defendant New Team may be contractually liable to indemnify defendant Millercoors for damages arising from plaintiff's claims is too speculative to show vicarious liability for purposes of the relation-back doctrine.

However, plaintiff has sufficiently alleged that the claims based on aiding and abetting the New Team Defendants' failure to hire and their failure to promote her are based on a "single continuing pattern of unlawful conduct" of filling the Senior Brand Developer Position with a first-generation Italian to preserve the "authentic presentation of the brand." *St. Jean Jeudy v. City of New York*, 142 A.D.3d 821, 823 (1st Dep't 2016). Although the continuing violations doctrine only applies to the claims under the NYCHRL, even under the NYSHRL, plaintiff is not precluded from using the prior acts as background evidence in support of her timely claim based on aiding and abetting the New Team Defendants' failure to promote plaintiff to the Senior Brand Developer Position. *Id.*

Dated: _____

_____ **, J.S.C.**

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Defendants next argue that plaintiff has failed to state a claim against them for "aiding and abetting" New Team's discriminatory conduct. In order to recover under Section 296(6) of the NYSHRL, the plaintiff must show that the defendants "actually participated" in the discrimination. *Hughes v. Twenty-First Century Fox, Inc.*, 304 F.Supp.3d 429, 451 (S.D.N.Y. 2018). To 'actually participate" in the discrimination, the defendant need not itself take part in the primary violation. *Lewis v. Triborough Brdige and Tunnel Auth.*, 77 F.Supp.2d 376, 380-81 (S.D.N.Y. 1999). However, "aiding and abetting liability requires that the aider and abettor share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose." *Hughes*, 304 F.Supp.3d at 451.

Although defendants Millercoors and Anheuser-Busch were not plaintiff's employers, plaintiff has clearly pleaded facts, which are amplified by the emails filed in opposition to the motions to dismiss, suggesting that these defendants bore the requisite discriminatory intent of hiring only a first-generation Italian to fill this position. For example, plaintiff attaches an email from Marco Seminaroti, an employee of defendant Anheuser-Busch's predecessor-in-interest, to defendant Millercoors, in which Mr. Seminaroti expresses his concern about compromising the "authentic presentation of the brand" by having "less and less first generation Italian(s)" working at New Team to promote the brand. Affirmation of Michael D. Zahler dated January 11, 2018 ("Zahler Aff."), Exh. A. Defendants' contention that Mr. Seminaroti was merely expressing a general preference rather than a directive to hire a first-generation Italian is undermined by the rest of the email, in which Mr. Seminaroti suggests that Millercoors work with a headhunter he met recently to find "quality Italian candidates" to fill the position. Zahler Aff., Exh. A. Defendant Millercoor's employees respond to Mr. Seminaroti's email by stating that if this headhunter "can help us find good talent then we should definitely try them." Zahler Aff., Exh. B. In fact, subsequent emails between defendant Millercoors and defendant New Team suggest that New Team did in fact work with this headhunter to recruit candidates for the position. Zahler Aff., Exh. C.

Dated: _____ _____, J.S.C.

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This is sufficient to show that defendant Millercoors, as New Team's client, and defendant Anheuser-Busch, as Millercoors' parent corporation, may have "compelled or coerced" New Team's alleged discriminatory employment decision to only hire a first-generation Italian for the Senior Brand Developer Position. *Schindler v. Plaza Construction*, 154 A.D.3d 495, 496 (1st Dep't 2017).

However, to the extent the aiding and abetting claims are based on New Team's retaliatory termination of plaintiff, these claims should be dismissed. Plaintiff's claims for retaliatory termination are based on her allegations that she was terminated by New Team for reporting Mr. Hassett's discriminatory conduct to New Team's human resources department. Plaintiff does not allege that defendants Millercoors and Anheuser-Busch were aware of plaintiff's complaints or participated in the decision to terminate plaintiff.

Accordingly, it is

ORDERED that the motions to dismiss are granted in part and denied in part; and it is further

ORDERED that the fourth and eighth causes of action in the first amended verified complaint are dismissed only insofar as they are based on aiding and abetting the New Team Defendants' retaliatory termination of plaintiff and refusal to hire under the NYSHRL.

A status conference is set for Thursday, August 30, 2018 at 9:30 AM.
IAS Part 47, 80 Centre Rm. 320

Dated: 8/1/18

_____, J.S.C.

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