

Perrotte v Bloomberg, LP

2021 NY Slip Op 30386(U)

February 9, 2021

Supreme Court, New York County

Docket Number: 451470/2020

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. BARBARA JAFFE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>HALEY PERROTTE,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">PART</td> <td>IAS MOTION 12</td> </tr> <tr> <td>INDEX NO.</td> <td><u>451470/2020</u></td> </tr> <tr> <td>MOTION DATE</td> <td>_____</td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001</u></td> </tr> </table>	PART	IAS MOTION 12	INDEX NO.	<u>451470/2020</u>	MOTION DATE	_____	MOTION SEQ. NO.	<u>001</u>
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BLOOMBERG, LP, LLOYD PREECE, JOHN DOES
1-10,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-13, 23, 25, 26, 31 were read on this motion to dismiss/compel.

Defendants move pursuant to CPLR 3211(a)(7) for an order dismissing the first and third causes of action of plaintiff's complaint, and to compel her to verify her pleadings. Plaintiff opposes only as to the first cause of action for *quid pro quo* discrimination and the motion to compel.

I. MOTION TO DISMISS

A. Pertinent portions of complaint (NYSCEF 10)

On March 12, 2018, plaintiff began working at defendant Bloomberg LP (LP), a privately held company with some 20,000 employees in 167 locations. Defendant Preece is employed by LP and was plaintiff's team leader.

Soon after she began working at LP, plaintiff "discovered" that its professional and social culture and work environment was "highly sexualized," an environment that had "existed for decades." In support, plaintiff recounts three instances of having been "stalked" by two male

coworkers and cites various lawsuits brought against LP and its individual employees and media reports detailing incidents of demeaning and sexualized conduct against female employees engaged in by high level LP employees and its CEO. She also observed male employees rate female employees according to their attractiveness and some of them told her that some female employees “who engaged in sexual favors were promoted and that ‘hot girls’ in sales were given better territories to close the deals with clients.”

Plaintiff alleges to have excelled there within a month of her hiring, offering multiple emails in support, and claims that despite her consistent hard work and superior performance, Preece commenced “a campaign to demean, harass and demoralize her because she was a woman.” She relates an instance where, during a work happy hour at a local bar, two of plaintiff’s coworkers told her that Preece had been “bragging” to several of her male coworkers about looking up her skirt when she would walk up a glass staircase at LP to see the color of her underwear. When plaintiff confronted Preece about this conduct and told him that she was uncomfortable with him as her team leader, he replied, “[T]his could get much worse for you if you don’t stop trying to cause me problems.” A female team member warned plaintiff several times that Preece was staring at her. Plaintiff felt uncomfortable when Preece sat next to her.

Plaintiff fruitlessly complained about Preece to an LP manager and LP’s Human Resources Department (HR), after which Preece retaliated “by giving her a negative performance review [and] denying her any career opportunities, training and/or any chance of promotion, particularly, to account management.” Preece denied plaintiff a transfer from his team.

In or about May 2019, Preece refused plaintiff’s request to continue training for a management position with an LP account manager and sabotaged her efforts with others. Plaintiff repeatedly complained about Preece to HR, claiming to have provided it with over ten

distinct examples of Preece's sexual harassment of her and recounting the comments of other team members about Preece's frequent targeting of her and his inappropriate behavior.

By email dated August 23, 2019, an HR representative addressed plaintiff's complaints about Preece by observing that plaintiff had not personally heard Preece talk about looking up her skirt, nor was she able to report whom Preece had addressed. Thus, the representative was unable to investigate the incident.

On September 4, 2019, plaintiff was terminated.

B. Contentions

1. Defendants (NYSCEF 7-12)

Defendants argue that absent a common law cause of action for harassment, plaintiff must, but does not, set forth the statute on which she relies for her claim of *quid pro quo* harassment, thereby failing to satisfy the standards for notice pleading under CPLR 3013. To the extent that she references the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL), they maintain that absent allegations that she was subjected to unwelcome sexual advances or sexual demands, and that her response to those sexual advances or demands was used, either explicitly or implicitly, as the basis for decisions affecting her compensation, terms, conditions or privileges of her employment, she fails to state a cause of action for *quid pro quo* sexual harassment.

According to defendants, to state such a cause of action, tangible job benefits must be linked by the plaintiff's superior to the plaintiff's acceptance or rejection of sexual advances. Here, however, they observe that plaintiff bases her cause of action solely on a statement that she neither heard nor witnessed. Even accepting her allegations as true, defendants maintain, a second-hand report of an alleged comment about Preece's conduct constitutes neither a sexual

demand nor a request for sexual activity.

Plaintiff's *quid pro pro* claim additionally fails, argue defendants, absent the pleading of facts linking an employment action to her acceptance or rejection of a sexual advance. Instead, they observe, she alleges that, at some unspecified time, she "confronted" Preece about the hearsay statement and that his response contains no sexual proposition or indication that it was tied to plaintiff's rejection of a sexual advance. Moreover, they maintain, there is nothing in the complaint indicating that plaintiff's termination, or any other change relating to her employment that she attributes to Preece, was conditioned on her refusal to submit to a sexual proposition. Rather, they observe, plaintiff alleges that she was fired in retaliation for complaining to the company's human resources department. Absent a *quid pro quo*, defendants state that plaintiff fails to state a cause of action for *quid pro quo* harassment.

2. Plaintiff (NYSCEF 25, 26)

Plaintiff advises that she advances her cause of action for *quid pro quo* harassment solely under the NYSHRL. (NYSCEF 25).

By affidavit dated September 9, 2020, plaintiff reiterates much of her complaint, adding that during her first conversation with Preece, he told her that he had heard "a lot of negative things about [her] from [his] manager . . . and that if [she] wanted to change management's opinion of [her], [she] should do "anything" and "everything," which she interpreted as a "sexual proposal." In exchange, he said, he would give positive feedback about her to management to alter their opinions of her. Preece also advised that if she did not do what he wanted, he would relay negative feedback to management, and make it difficult for her to progress to account management, a position he knew she sought. She claims that Preece often reminded her of the power he had over her, and that when she expressed a lack of interest in doing anything and

everything he wanted, his evaluation of her performance became negative. (NYSCEF 26).

Plaintiff also alleges that after her first HR meeting concerning Preece, he told her that “[n]ow [she was] definitely not moving to Account Management this year. . . . [and that he] will be speaking with [the manager].” She argues that Preece’s unwelcome sexual conduct was used implicitly as the basis for employment decisions affecting her, that he tacitly linked tangible job benefits to the acceptance or rejection of his sexual advances, and that she suffered the consequences when she rejected them. She maintains that her allegations clearly state a claim of *quid pro quo* harassment under the state HRL given her characterization of Preece as having “sexualized [their] relationship,” and his warning that she needed to do “anything” and “everything” he said in order to for him to provide favorable feedback about her to management, which she understood as sexual in nature. She claims that he would sit next to her and stare at her and observes that when she confronted Preece about looking up her dress and told him how uncomfortable it made her, he responded by threatening her and retaliating against her. (*Id.*).

3. Defendants’ reply (NYSCEF 31)

Defendants argue that plaintiff’s “self-serving affidavit,” although properly considered in opposition to a motion to dismiss “for the limited purpose of remedying defects in the complaint,” conclusively demonstrates that she has no cause of action and contains new allegations that are not included in her complaint. Moreover, they observe, the facts alleged by plaintiff’s counsel in her affirmation, which contains improper legal argument, are not based on personal knowledge and she reiterates the arguments set forth in her initial brief.

B. Discussion

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged as true,

and afford the plaintiff “the benefit of every possible favorable inference.” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “The motion must be denied if from the four corners of the pleadings ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “[O]n a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party.” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

1. Quid pro quo sexual harassment

Pursuant to NYSHRL, it is an unlawful discriminatory practice for an employer to, *inter alia*, fire or discriminate against an individual in the terms, conditions or privileges of employment because the individual’s sex. (Executive Law § 296[1] [a]). A plaintiff seeking to recover for sexual harassment must proceed by claiming that he or she was subject to, *inter alia*, *quid pro quo* sexual harassment. (*Meritor Sav. Bank FSB v Vinson*, 477 US 57, 64–65 [1996]; *Karibian v Columbia Univ.*, 14 F3d 773, 777 [2d Cir 1994], *cert denied* 512 US 1213 [1994]).

The issue in a *quid pro quo* sexual harassment case brought under the State Human Rights Law is whether one or more employment decisions are linked to unwelcome sexual conduct. Sexual harassment occurs when such unwelcome sexual conduct is the basis, either explicitly or implicitly, for employment decisions affecting compensation or the terms, condition or privileges of employment.

(*Franco v Hyatt Corp.*, 189 AD3d 569, 569 [1st Dept 2020]).

Sexual conduct encompasses sexual demands, sexual overtures, sexual harassment, and

prohibited conduct. (*Messer v Fahnestock & Co., Inc.*, 2008 WL 4934608, *14 [ED NY 2008]). Implicit sexual pressures and harassing conduct are also prohibited. (*Id.*; see *Father Belle Cmty. Ctr. v New York State Div. of Human Rights on Complaint of King*, 221 AD2d 44, 50 [4th Dept 1996], *lv denied*, 89 NY3d 809 [1997] [unwelcome sexual conduct includes, among other things, verbal or physical conduct of sexual nature used explicitly or implicitly as basis for employment decision]; see also PJI 9:6 Employment Discrimination – Quid Pro Quo Claims [same]). Moreover, “the absence of a supervisor’s direct pressure for sexual favors as a condition of employment does not negate indirect pressure or necessarily doom the claim.” (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 115–16 [1st Dept 2018]). To the extent that the Court in *Suri* affirmed the grant of summary judgment to the defendant of the plaintiff’s gender discrimination claim under the NYSHRL, absent any accompanying discussion of it, it does not constitute authority for the proposition that a direct demand for sexual favors in exchange for a favorable employment decision is required for pleading and proving a *quid pro quo* claim.

2. Analysis

While plaintiff infers a sexual connotation from Preece’s warning to her that she should do “anything” and “everything” in order for him to provide her with positive feedback, the complaint contains no instance of him asking her to do anything sexual or even objectionable, and she repeats the amorphous characterizations in lieu of specifics when she contends that she expressed to him a lack of interest in doing “anything” and “everything.” Preece’s alleged conduct in obtaining, without plaintiff’s knowledge, a vantage from which he could look up her skirt became “unwelcome sexual conduct” relating to plaintiff only when she learned of it after the fact from a third party. And, when plaintiff confronted Preece about that conduct, his response was devoid of sexual connotation, and plaintiff cites no authority for the proposition

that his conduct suffices, as a matter of law, to constitute *quid pro quo* sexual harassment.

By contrast, in *Franco, supra*, the plaintiff had alleged a series of sexually-tinged acts that the defendant, his supervisor, had repeatedly directed at him. And in *Suri, supra*, the plaintiff alleged that the defendant had told her that she had beautiful hair, had complimented her boots, and later, while seated next to her at a table during a business meeting, touched and squeezed her leg. (*See also New York State Div. of Human Rights v Young Legends, LLC*, 90 AD3d 1265 [3d Dept 2011] [supervisor engaged in “touchy-feely” interactions with employees, made remarks with sexual innuendo, and pressured plaintiff to visit him alone in his apartment]).

Plaintiff’s reliance on media reports, prior lawsuits, and second-hand information provided by other present and former employees concerning LP’s work environment does not buoy her case at this juncture of her action. Nor does she cite authority for the proposition that such sources may be used to support her claim. (*See Prince v Cablevision Sys. Corp.*, 2005 WL 1060373 [SD NY 2005] [rejecting plaintiff’s argument that sexual harassment claim should be analyzed in context of alleged “sexualized atmosphere” at workplace, as plaintiff did not allege that she heard or witnessed single derogatory comment or other sex-based offensive conduct or that she was present for or affected by atmosphere]; *see also Alfano v Costello*, 294 F3d 365 [2d Cir 2002] [not only must environment be hostile objectively but plaintiff must have perceived it subjectively to have been hostile]). Rather, plaintiff’s allegations in support of her cause of action for *quid pro quo* sexual harassment are more properly considered in relation to her separate cause of action for a hostile work environment, which is not challenged on this motion.

For all of these reasons, the facts set forth in the complaint and in plaintiff’s affidavit, viewed in the light most favorable to plaintiff, constitute an insufficient basis for finding, as a matter of law, the existence of an explicit or implicit demand for sexual favors in exchange for

favorable employment consideration, and thus, plaintiff does not state a cause of action for *quid pro quo* sexual harassment.

II. MOTION TO COMPEL AMENDMENT OF VERIFICATION

Defendants argue that plaintiff should be compelled to amend the verification annexed to her complaint because she did not personally verify the complaint and there are no grounds for attorney verification under CPLR 3020(d). They claim to have notified plaintiff's counsel that the verification was deficient and asked for a personal verification, and that in reply, plaintiff's counsel abandoned her initial reason for submitting an attorney verification based on the pseudonymous filing, and provided an amended verification, signed by counsel, as plaintiff lives in a county other than the one in which her attorney currently maintains her office due to the COVID19 pandemic. In response to defense counsel's advice that the amended attorney verification was deficient under CPLR 3020(d), as the signature block in the email attaching the amended verification reflects an office address located within New York County, and as Governor Cuomo's Executive Order 202.7 permits the virtual notarization of documents during the COVID-19 pandemic, plaintiff's counsel refused to remedy the defective verification and amended verification. Absent proper verification, defendants assert, the attorney verification should be disregarded and plaintiff should be directed to verify the allegations in her complaint.

Plaintiff argues that defendants are not entitled to a verified complaint. Rather, they may treat the complaint as unverified and respond accordingly, and are not entitled to the alternative relief. (NYSCEF 25). In reply, defendants claim that plaintiff's gamesmanship with respect to the verification of her complaint, warrants an order compelling her to verify it personally.

Pursuant to CPLR 3022, "[a] defectively verified pleading shall be treated as an unverified pleading." Absent an argument from defendants that they are entitled to a verified

complaint, their motion fails.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing plaintiff's first and third causes of action, and those claims are severed and dismissed, and the motion to compel verification is denied; and it is further

ORDERED, that the parties are directed to enter into a preliminary discovery conference order pursuant to the notice posted to the action on December 16, 2020. (NYSCEF 37).

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2/9/2021
DATE


BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE