

Riggs v Charlie Rose Inc.
2021 NY Slip Op 31784(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 159167/2019
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

-----X INDEX NO. 159167/2019

GINA G. RIGGI, Plaintiff, MOTION SEQ. NO. 001

- v -

CHARLIE ROSE INC., CHARLES PEETE ROSE, JR. a/k/a CHARLIE ROSE, and BLOOMBERG, L.P, Defendants. DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 34, 36

were read on this motion to/for DISMISSAL

On this pre-answer motion to dismiss, defendants Charlie Rose, Inc. and Charlie Rose (collectively "Rose" or "defendants") move the court seeking partial dismissal of plaintiff's complaint with respect to the causes of action for age discrimination; retaliation; violations of New York Labor Law; and unjust enrichment/quantum merit. (NYSCEF Doc. No. 10-17; 36).¹

Plaintiff opposes the motion and cross-moves to amend the complaint to add causes of action for breach of contract and promissory estoppel. (NYSCEF Doc. No. 18-23).

When considering a defendant's motion to dismiss plaintiff's complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (See Leon v Martinez, 84 NY2d 83, 87-88 [1994].) Although a court should not be concerned with the ultimate merits of the case (see Anguita v Koch, 179 AD2d 454, 457 [1st Dept 1992]), these considerations do not apply to allegations consisting of bare legal conclusions, as well as, factual claims which are flatly contradicted by documentary evidence. (See Simkin v Blank, 19 NY3d 46, 52 [2012].)

Plaintiff, a professional makeup artist, provided make-up services for the Charlie Rose television shows "Charlie Rose" and "Charlie Rose: The Week" from 1995 through 2017. Plaintiff alleges in her complaint gender discrimination, age discrimination, and retaliation under New York City Human Rights Law (NYCHRL), as well as, unjust enrichment/quantum merit and violations of sections 191, 193 and 198 of New York Labor Law (NYLL). (NYSCEF Doc. No. 1, summons and complaint).

¹ Defendants concede that plaintiff has sufficiently pled her gender discrimination claim.

Defendants argue that as plaintiff fails to assert facts supporting her age discrimination claim, said claim must be dismissed. With respect to plaintiff's retaliation claim where she alleges that after complaining that Charlie Rose grabbed and twisted her arm, he, in retaliation, shifted her makeup duties from himself to others, defendants argue that as plaintiff did not provide regular makeup services to Rose after May 4, 2012, as evidenced by her May 4, 2012 e-mail, any purported retaliation occurred over three years before the commencement of this lawsuit and is thus, time barred. (NYSEF Doc. No. 15, *Exhibit D*). Additionally, defendants aver that plaintiff's NYLL §§191 and 193 claims asserting that she was misclassified as an independent contractor and denied ancillary benefits such as paid time off, severance, and contributions to Social Security, Workers Compensation, and Unemployment Insurance, must fail as plaintiff submitted invoices to Rose as an independent contractor for two decades; NYLL §§ 191 and 193 do not govern ancillary benefits, and NYLL §§ 191 and 193 do not protect plaintiff insofar as she provided services in a professional capacity and earned over nine hundred dollars per week. Defendants further argue that if the court were to permit plaintiff's NYLL claims, only the claims arising within the six-year period prior to the commencement of this action are within the statute of limitations. Finally, defendants contend that plaintiff's quasi-contract claims for unjust enrichment and/or quantum merit should be dismissed as there was an agreement between the parties whereby plaintiff provided over twenty years of makeup services and submitted invoices monthly for payment of her services.

Plaintiff opposes the motion and cross-moves to amend the complaint to add theories for breach of contract or implied contract and promissory estoppel in connection to the allegation that she was improperly categorized as an independent contractor.

With respect to the branch of the motion seeking dismissal of plaintiff's age discrimination and retaliation claims, plaintiff withdraws any claims for age discrimination and retaliation. (NYSCEF Doc. No. 23, *Memorandum in Opposition and in Support of Cross-Motion* at 2 n 2). As to her NYLL claims, plaintiff alleges that she was an employee and not an independent contractor as Rose exercised complete control over her work, including directing the manner and means of her performance; setting her work schedule; providing necessary tools; and reimbursing her for supplies she purchased. Plaintiff argues that Rose improperly raises affirmative defenses as a basis for dismissal rather than asserting said defenses in an answer and exploring the factual disputes during discovery. Furthermore, plaintiff avows that the invoices relied on in defendants' motion do not constitute documentary evidence that plaintiff was an independent contractor.

Plaintiff does not oppose the application of the six-year statute of limitations regarding her NYLL claims and withdraws her claims under NYLL § 191, save for claims under §§ 193 and 198. Plaintiff argues that the "professional exemption in §198 is inapplicable to her claims under §193; that there are questions of fact as to whether she is a "professional" as defined by the statute; and that there are four reasons why she should not be considered an exempt bona fide professional. Specifically, plaintiff maintains that she received no specialized training; she did not work independently and was closely controlled; her work did not require consistent exercise of discretion and judgment; and her work has not been proven to be intellectual and varied in nature. Finally, plaintiff maintains that her claims for unjust enrichment and quantum merit

should not be dismissed as they are sufficiently pled, and Rose cannot establish that there was any valid, enforceable contract which would preclude her from recovering in quasi-contract.

In reply and in opposition to the cross-motion, Rose argues that the remaining claims under NYLL §§ 193 and 198 and for quasi-contract should be dismissed and plaintiff's application for leave to amend denied. With respect to NYLL § 193, defendants reiterate that, despite arguments to the contrary, this provision does not apply to plaintiff who was a professional and earned over nine hundred dollars per week and, further, that NYLL § 193 does not apply to the discretionary employment benefits plaintiff is seeking. As to NYLL § 198, defendants argue that this provision does not provide any substantive rights and thus, does not give rise to a cause of action. Regarding plaintiff's claim for quasi-contract, defendants argue that the invoices and IRS 1099 forms establish the existence of an agreement between the parties whereby Rose paid plaintiff the invoiced amounts for services rendered. As no claim can arise in quasi-contract where an agreement exists pertaining to the subject matter, defendants assert plaintiff's claim for quasi-contract must be dismissed. Finally, defendants argue that plaintiff's motion to amend must be denied as her proposed breach of contract and promissory estoppel claims are frivolous and based upon employment agreements between Rose and other employees rather than an agreement between Rose and plaintiff.

As an initial matter, the branch of the motion seeking dismissal of plaintiff's claims for age discrimination; retaliation; and NYLL § 191 are moot as plaintiff has withdrawn these claims.

With respect to plaintiff's NYLL § 198 claims, NYLL § 198-c requires "any employer who is a party to an agreement to pay . . . benefits or wage supplements to employees" to pay those benefits or wage supplements within 30 days after such payments are required to be made. NYLL § 198-c (2) defines benefits or wage supplements as "includ[ing] . . . but . . . not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." Labor Law § 198-c (3) states that Labor Law § 198-c "shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week."

Here, the arguments advanced by plaintiff, in opposition to dismissal, that she should not be classified as a "professional" is belied by her complaint wherein she describes, in detail, her professional expertise in the field of make-up artistry. Particularly, she indicates that she had "a distinguished 30-year career as a makeup artist in the television industry", "studied [t]heatrical makeup at the Boston Conservatory of Music, and prior to commencing employment with Bloomberg and Rose, worked for some of the most well-known shows on television, including Saturday Night Live, 60 Minutes, Nightline, Geraldo, Good Morning America, Conan O'Brien, the Gordon Elliott Show, and Hard Copy." She noted that "[h]er work has appeared on almost every major network, including CBS, NBC, ABC, BBC, Reuters, WTN, MSG, and the Food Network." (NYSCEF Doc. No. 1, *complaint* at 23). Plaintiff also asserts in her complaint that "[t]hroughout her career, [she] has provided makeup for countless well-known individuals, including political figures, such as: Presidents Barack Obama, Bill Clinton and Jimmy Carter; English Prime Minister Tony Blair; Soviet President Mikhail Gorbachev; Israeli Prime Ministers Benjamin Netanyahu and Ariel Sharon; United States Secretaries of State John Kerry, Hillary

Clinton, Madeline Albright, Condoleezza Rice and Henry Kissinger; and United States Senator Bernie Sanders [and]... for such personalities as Rosa Parks, Bill Gates, Warren Buffet, Angelina Jolie, Leonardo DiCaprio and Mikhail Baryshnikov among many others.” (NYSCEF Doc. No. 1, *complaint* at 24). Plaintiff’s other professional accolades include being nominated for an Emmy Award for her work on the Sally Jesse Raphael Show, being a member of the National Academy of Television Arts and Sciences (“NATAS”), judging the NATAS Daytime Emmy Awards, being elected Governor of the Creative Crafts of NATAS NYC on two occasions, teaching seminars for NATAS NYC, membership in New York Women in Film and Television (“NYWIFT”), which requires accreditation and peer sponsorship for membership, and membership in the International Alliance of Theatrical Stage Employees (“IATSE”), which requires passing an examination demonstrating requisite professional skills for membership. (NYSCEF Doc. No. 1, *complaint* at 25-26).

Furthermore, the statute is clear and, insofar as professionals earning in excess of nine hundred dollars per week are not entitled to paid time off or similar wage benefits and supplements under NYLL § 193, these claims must be dismissed. By her own admission, plaintiff is a learned professional who, for over twenty years, submitted invoices to Rose seeking compensation for services rendered which exceeded nine hundred dollars per week. (See NYSCEF Doc. Nos. 13-14, *Exhibit B Invoices*, *Exhibit C Form 1099s*, respectively; see also Labor Law § 198-c[3]; *Naderi v N. Shore-Long Is. Jewish Health Sys.*, 135 AD3d 619 [1st Dept 2016].)

As to plaintiff’s NYLL § 193 claims, NYLL § 193 prohibits deductions from the wages of an employee except where specifically provided for within the statute and expressly agreed upon by the parties. (Labor Law § 193[1][a]). As noted above, NYLL § 198 states that “benefits or wage supplements” includes, but is not limited to, reimbursement for expenses; health, welfare, and retirement benefits; and vacation, separation or holiday pay. However, NYLL § 198-c[3] states that the section shall not apply to a person in a bona fide professional capacity earning in excess of nine hundred dollars per week. Plaintiff has not proffered or asserted that there was an agreement between herself and Rose that she would be subject to wage deduction. To the contrary, there appears to be an implied agreement that plaintiff would provide makeup services, submit invoices, and receive payment, which she did for over twenty years. Moreover, while NYLL § 193 permits wage deduction in specific instances, benefits and wage supplements such as paid time off, which plaintiff seeks here, such is governed by NYLL § 198-c and is inapplicable to professionals earning in excess of nine hundred dollars weekly. As such, plaintiff’s claims under NYLL §193 must be dismissed.

Therefore, plaintiff’s claims for unjust enrichment and quantum merit must also be dismissed as plaintiff is not entitled to the benefits she seeks under NYLL § 198 and 193 as she agreed to be paid as an independent contractor who would provide makeup services for Rose and submit invoices for payment, as evidenced by over two decades of paid invoices and income tax forms. Plaintiff’s argument that defendant makes a conclusory argument regarding an agreement between the parties regarding pay and benefits without annexing an agreement is contradictory as plaintiff’s cross-motion is devoid of any employment agreement, contract, or wage deduction forms evidencing an agreement regarding her status as an employee who would be entitled to ancillary benefits such as wage deduction. Further, plaintiff, in her cross-motion, does not refute

the invoices and tax forms annexed to the moving papers establishing that plaintiff provided services, submitted invoices for said services, and was paid the amount invoiced for said twenty-year period as a make-up artist for Rose. Additionally, plaintiff does not assert seeking to be hired as a staff/employee makeup artist of the show or network at any point during her two decades of service. As such, plaintiff's request for ancillary benefits is both belated and without merit.

In accordance with the foregoing, plaintiff's application for leave to amend to include breach of contract and promissory estoppel must be denied and it is hereby,

ORDERED that the causes of action for age discrimination, retaliation, and NYLL § 191 are withdrawn; and it is further

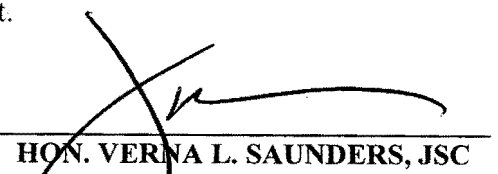
ORDERED that the causes of action for violations of NYLL §§ 198 and 193 and unjust enrichment/quantum merit are dismissed; and it is further

ORDERED that plaintiff's cross-motion to amend is denied; and it is further

ORDERED the defendant is directed to serve and file an answer in accordance with the CPLR and the parties are further directed to appear remotely for conference on August 25, 2021, details for which will be provided no later than August 18, 2021.

This constitutes the decision and order of the Court.

May 21, 2021


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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					OTHER
					REFERENCE