

Ja Lee Kao v Onyx Renewable Partners L.P.
2022 NY Slip Op 30788(U)
March 8, 2022
Supreme Court, New York County
Docket Number: Index No. 654411/2021
Judge: Margaret Chan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X
JA LEE KAO,

Plaintiff,

- v -

ONYX RENEWABLE PARTNERS L.P., ORP JOINT
HOLDINGS GP LLC, BLACK ONYX INVESTMENTS,
LLC, BILAL KHAN, JONATHAN MAXWELL

Defendant.
-----X

INDEX NO. 654411/2021

MOTION DATE 11/24/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 37, 38, 39

were read on this motion to/for DISMISS

Plaintiff, a former president and chief executive officer (CEO) of Onyx Renewable Partners, LP (Onyx), a limited partnership formed under the laws of Delaware, with its principal place of business in New York City, resigned from Onyx in June 2021. Plaintiff seeks relief based on the parties' Employment Agreement and alleged gender discrimination in violation of New York City Human Rights Law and New York State Human Rights Law. Jonathan Maxwell (defendant), the Chairman of the Onyx Board of Directors, is a resident of the United Kingdom. Defendant moves to dismiss the complaint as against him under CPLR 3211(a)(7) and (8) for failure to state a cause of action and lack of personal jurisdiction, respectively. Plaintiff opposes the motion.

BACKGROUND

As alleged in the complaint, plaintiff was an investment banker for Blackstone Advisory Partners and assisted Blackstone Energy Partners (BEP) in identifying management teams to form a renewable company "focused on the development and financing of commercial industrial ("C&I") and small-scale utility solar photovoltaic energy generation projects." (NYSCEF # 1 – Complaint, ¶ 16). Onyx is the company that BEP formed in October 2014. Matt Rosenblum, at plaintiff's introduction, was appointed Onyx's first CEO whose responsibility was "the overall business, strategy, and business management" (*id.*, ¶¶ 17-18). Plaintiff was Onyx's President as of May 4, 2015, "responsible for the execution and

management of the business” (*id.*, ¶ 18). On July 1, 2015, she and Onyx entered into the Employment Agreement (*id.*, ¶ 1), which is the focus of this action.

Onyx has one general partner, ORP Joint Holdings GP LLC (ORP GP), and three limited partners. Black Onyx Investments, LLC (Black Onyx) is one of the limited partners. The other two limited partners are each 50% capital investors in Onyx (*id.*, ¶ 9). Black Onyx receives distributions from Onyx only after the two investment partners receives their distributions from Onyx to cover their investment plus a specified rate of return on their investment. ORP GP manages and makes all decisions for Black Onyx (*id.*). ORP GP also makes all the decisions for Onyx. In 2017, ORP GP delegated its authority to a board of directors of Onyx [Onyx BOD], which “consisted of three Blackstone employees and three Onyx employees, including [plaintiff]” (*id.*, ¶ 19).

In January 2019, when Rosenblum vacated his CEO position at Onyx, ORP GP appointed plaintiff to the CEO position and delegated to her all employment matters (except those related to the CEO) and “the day to day management of the Partnership and its subsidiaries, including hiring, compensation and direction of all employees . . .” (*id.*, ¶ 21). Plaintiff’s Employment Agreement with Onyx was amended and supplemented by written resolution of ORP GP (*id.* at 2, fn.1; ¶ 20).

In January 2020, Onyx’s sole sponsor, the Blackstone Group (Blackstone), a Delaware corporation “conduct[ed] a sales process for up to 100% of Blackstone’s interest in Onyx. This process continued through 2020” (*id.*, ¶ 22). The successful bidder was SDCL Energy Efficiency Income Trust PLC (SEEIT), an investment company incorporated in England and Wales, which acquired 50% of Blackstone’s general and limited partnership interests in Onyx, the rights in existing operating project portfolios, and a specified project pipeline (the Hemisphere Transaction) (*id.*, ¶¶ 22-23). Defendant Jonathan Maxwell is the owner of SEEIT and manages its investment in Onyx. Bilal Khan, a Blackstone employee, was Chairman of the Onyx BOD until March 16, 2021, when defendant was appointed to replace Khan (*id.*, ¶¶ 10-11). After SEEIT’s acquisition, Onyx was wholly capitalized by Blackstone and SEEIT (NYSCEF # 1 – Complaint, ¶¶ 7, 16). The Hemisphere Transaction closed on February 26, 2021, which closing plaintiff facilitated since December 2020 while also running Onyx (*id.*, ¶ 25).

Plaintiff alleges that “[a]fter the Hemisphere Closing, the new Onyx BOD removed [plaintiff’s] discretion as CEO to continue making decisions on the development project pipeline, the core of Onyx’s business.” (*id.*, ¶ 29). She claims that her discretion was limited on specified projects to be developed by 2022 and on all projects beyond 2022 and that the Onyx BOD would review all project opportunities independently regardless of size. Additionally, the Onyx BOD indicated that there were no long-range development plans or intention to invest in projects that Onyx historically had done (*id.*).

With this change, in accordance with the Employment Agreement, plaintiff submitted her notice of resignation on April 23, 2021, citing her diminished role and lack of authority that adversely affected her duties as President and CEO (*id.*, ¶¶ 31-33). Plaintiff pointed out several provisions in the Employment Agreement including that the right to assert her departure for Good Reason which plaintiff claims would exclude her from the post-employment restrictive covenants (*id.*, ¶ 32). Plaintiff also claims that she is entitled to receive base compensation and benefits during the severance term under section 8 (d) and (e) of the Employment Agreement (*id.*, ¶ 34). On April 30, 2021, Onyx, acting at ORP GP's direction, forwarded plaintiff a proposed Transition and Separation Agreement and General Release in which Onyx sought to have plaintiff "waive substantial rights" that she identified in her notice of resignation, (*id.*, ¶¶ 42-49). Plaintiff also claims that the proposed Transition and Separation Agreement "was substantially different than every other separation agreement offered to prior male employees who were separated from Onyx under adverse circumstances" (*id.*, ¶ 50).

Plaintiff alleges that her employment terminates on December 31, 2022, but plaintiff claims that she has not received her base compensation and benefits since June 2, 2021 (*id.* ¶¶ 35-36). Plaintiff's termination date was ultimately agreed by the parties to be June 2, 2021 (*id.*, ¶ 68).

Plaintiff also claims that under section 22 of the Employment Agreement – Legal Fees – Onyx "shall pay all cost and expenses of the parties to this Agreement, including, without limitation, all legal fees and expenses of the Executive." (*id.*, ¶ 37). Plaintiff alleges that Onyx breached the Employment as it has not paid the attorney's fees. Plaintiff notes that Khan had represented that Onyx would pay plaintiff's legal expenses to negotiate a separation agreement (*id.*, ¶¶ 39-40).

Plaintiff's remaining financial claim is that she had not received a fair market valuation on her Black Onyx units. According to plaintiff, Black Onyx sends the employee a notice of repurchase upon the employee's termination date pursuant to sections 4.3(d) and 10.1(a) of the Black Onyx LLCA. Black Onyx has not sent plaintiff a repurchase notice (*id.*, ¶¶ 70-73)

For her claim of discrimination based on gender, plaintiff asserts that "[d]efendants' response to [her] resignation for Good Reason, [gave] rise to an inference of discrimination" (*id.*, ¶ 51). She claims that as CEO, she was paid substantially less than her male predecessor in the same role (*id.*, ¶ 52). Plaintiff charges that as CEO, she and her team expended time and energy to research different areas to expand Onyx's business and create better returns for Onyx's sponsor. After educating defendant Khan and Blackstone on her findings and forming a separate energy efficiency firm to house these initiatives, Khan pursued the initiatives with entities led predominantly by males (*id.*, ¶ 54).

As to defendant specifically, plaintiff claims that, except for an email request for plaintiff to reach out to a colleague, defendant never reached out to her as CEO of Onyx in the three months of due diligence or two months pre-closing. Plaintiff also claims as discriminatory, defendant's statement – "Happy International Woman's Day" – to the attendees at the first weekly meeting by videoconference; plaintiff was the only female in attendance. Defendant then "sarcastically declared that SDCL is even going to hire 'a woman' to be in its NYC office and that [plaintiff] would like her because they had a lot in common." However, plaintiff states that "[o]ther than their gender, their backgrounds are not similar (*id.*, ¶¶ 55-58).

As for plaintiff's retaliation claims, plaintiff points to her May 17, 2021 response to ORP GP's Proposed Transition Agreement or Separation Agreement. Plaintiff's response took issue with the Board's position that plaintiff is terminated for cause or wrong-doing, which included non-compete, non-solicit, and non-disparagement language. Plaintiff found the Board's letter to be threatening as it gave a time limit of twenty-one days for consideration, or else the offer of a limited release from liability would be revoked. Plaintiff believed that defendant and Khan encouraged two male members of her team to undermine her authority and credibility with her employees (*id.* at 14). Plaintiff informed Khan that "one of the reasons for [her] resignation was that Maxwell has made [her] feel very uncomfortable as an Asian American woman" (*id.*) and recounted the first videoconference meeting where defendant wished her a Happy International Woman's Day, and that defendant never reached out to her directly. Additionally, plaintiff stated that defendant's behavior on the weekly conference calls in which he remained muted, not look into the camera, and kept busy on his cell phone was "clearly designed to make [her] uncomfortable and to intimidate her" (*id.*). Plaintiff then compared the departure treatment she received to that of two men who were treated fairly without having to give up their rights (*id.* at 15).

Plaintiff alleges that Khan responded to her on May 21, 2021, and constructively terminated plaintiff's employment without cause, replaced her, and removed her from all meeting invitations, and other employees were granted access to plaintiff's emails (*id.*, ¶¶ 61-64).

Defendant moves to dismiss the complaint as against him for lack of personal jurisdiction. And should there be a finding of jurisdiction, defendant moves to dismiss the plaintiff's discrimination claim against him for failure to state a cause of action. As for plaintiff's retaliation claims, defendant contends that there is no causal connection between the discrimination charges first appearing in plaintiff's May 17, 2021 letter, after her alleged adverse employment action on April 23, 2021, when she sent her resignation letter. Defendant also points out that the resignation letter did not mention any discriminatory acts.

DISCUSSION

Personal Jurisdiction

Defendant argues that the court lacks personal jurisdiction over him because he resides in the United Kingdom, and his investment company that purchased an interest in Onyx is also in the United Kingdom. Defendant claims that while he “acts as the Chairman of the Board of Directors for the sole member of the general partner in [Onyx],” he has no title or role in Onyx (NYSCEF # 24 – Deft’s MOL at 5). Defendant points to plaintiff’s allegation of his only presence, through virtual means, as his only contact in New York. The virtual presence was his company-wide videoconference in which he wished all attendees a “Happy International Woman’s Day” and saying to plaintiff that she would like the new female employee he is hiring for his company’s New York office (*id.* at 8). Defendant asserts that this one virtual contact is insufficient to invoke New York’s long arm jurisdiction.

Plaintiff counters that under New York’s long arm statute, one transaction is sufficient to assert jurisdiction over defendant Defendant. Under CPLR 302[a][1], “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the defendant’s activities and the claim asserted” (*James v iFinex*, 185 AD3d 22, 29 [1st Dept 2020] quoting *Deutsche Bank Sec., Inc. v Montana Bd. Of Invs.*, 7 NY3d 65, 71 (2006) [internal quotation marks omitted]). Plaintiff marshals the allegations in her complaint showing that defendant purchased a 50% interest in Onyx, which is headquartered in New York, when plaintiff, a New York resident, was Onyx’s CEO and President; and defendant was the Chairman of Onyx BOD.

Plaintiff has shown that this court has jurisdiction over defendant under New York’s long arm jurisdiction (CPLR 302[a][1]).¹ because of defendant’s purposeful business transaction and involvement in Onyx at the time that plaintiff served as its CEO and President. Plaintiff has asserted allegations of discrimination and retaliation during defendant’s tenure as Chairman of the Onyx BOD, which had the authority to make decisions for Onyx. And plaintiff has alleged that since defendant’s interest in Onyx from December 23, 2020 to the time of plaintiff’s termination date, defendant created a hostile work environment at her workplace, discriminated and retaliated against her. Notably, the focus of plaintiff’s discrimination claim against defendant is the videoconference on March 1, 2021, when defendant wished the attendees a Happy International Woman’s Day even though she was the only woman in attendance. This occurred after defendant owned

¹ Given the finding of jurisdiction under CPLR 302[a][1], plaintiff’s alternative argument that the court has specific jurisdiction over defendant under CPLR 302(a)(3) is academic and will not be addressed.

50% in Onyx albeit before taking over as Chairman of Onyx BOD. Given defendant's involvement in Onyx while plaintiff was Onyx's CEO and President, this court has personal jurisdiction over defendant.

Plaintiff's Discrimination Claim

On a motion to dismiss under CPLR 3211 (a)(7) for failure to state a cause of action, plaintiff's allegations in the complaint are presumed to be true and are accorded every favorable inference (*Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [1st Dept 2005]). However, allegations that consist of bare legal conclusions or are incredible are not given such consideration (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

In the eighth cause of action, plaintiff lodges a discrimination claim based on gender against defendant under the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL). The NYSHRL and the NYCHRL prohibit discrimination in employment on the basis of gender, that is plaintiff's allegation (Executive Law § 296[1][a]; Administrative Code of City of NY § 8-107[1][a]).

Plaintiff has the initial burden to establish a prima facie case of discrimination by showing that (1) she is a member of a protected class, (2) she was qualified to hold the position, (3) she suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]).

The first two elements are not at issue here. Based on the complaint, the third element – that plaintiff suffered an adverse employment action – occurred after she received ORP GP's April 30, 2021 Proposed Transition Agreement in response to her April 23, 2021 resignation for good reason notice. Plaintiff asserts that ORP GP's response gave rise to an inference of discrimination, the fourth element.

The particular discrimination allegations against defendant is the one-time "Happy International Woman's Day" wish that defendant had made on a videoconference call on March 1, 2021 (NYSCEF # 28 at 15). The next phrase is defendant's announcement in the same conference call that his company, SDCL, will be hiring a woman for its New York City office and that plaintiff would like her because they have a lot in common. This, plaintiff alleges, was declared sarcastically (*id.*, ¶ 58). Plaintiff adds that other than their gender, she and SDCL's prospective employee had nothing in common. Plaintiff also complains that defendant "never reached out to [her] as CEO of Onyx, directly" "in the three months of due diligence or two months pre-closing," except to request, by email, that she contact a colleague about a project opportunity (NYSCEF # 1, ¶ 55).

Whether ORP GP's rejection of her resignation for good reason is an adverse employment action does not speak to defendant's involvement in her discrimination claim. And it is unclear how defendant's conduct, as set forth in the complaint, constitutes an adverse employment act or unlawful discrimination based on gender.

The phrase "Happy International Woman's Day" is innocuous, just as the phrase "Happy Mother's Day" is innocuous even if it was said to a group that consisted of one woman. That defendant stated that his own company was hiring a woman for its New York office and that plaintiff would like her because they are similar may have set plaintiff apart, but this statement is also innocuous, even if it was said sarcastically. Indeed, nowhere in the complaint does plaintiff allege that the singular comments were offensive or showed animosity based on gender.²

The other allegations that make up plaintiff's discrimination claim – the inequality in pay between her and Rosenblum (whom she introduced to Onyx); the preference of male employees; and the assignment of projects to her male employees instead of her despite her background work on these projects – either predated defendant's involvement in Onyx or were directed at Blackstone and Khan.

Plaintiff's claim that her salary was less than her predecessor's salary predates defendant's time at Onyx. Plaintiff became President of Onyx on May 4, 2015, and took on the CEO position at Onyx in January 2019. Defendant bought 50% of Blackstone's interest in Onyx in 2021, a year after Blackstone put its interest in Onyx up for sale, and took over as Chairman of the Onyx BOD in March 2021 – years after plaintiff's salary was set.

Plaintiff's assertion on the company's preference for male employees leaves unexplained her role as the company's president and CEO. When plaintiff took over the CEO position, she oversaw the hiring, compensation, and direction of all the employees for the Partnership and its subsidiaries, including her company. In any event, this assertion does not mention defendant's involvement nor does it give a time frame. Finally, plaintiff's claim of not being assigned certain projects were directed at Khan, a Blackstone employee. Again, defendant is not mentioned, nor a time frame provided.

Plaintiff's Retaliation Claim

On plaintiff's retaliation claim under the ninth cause of action in her complaint, plaintiff asserts that the Proposed Transition Agreement misconstrued

² While plaintiff's attorney states in the memorandum of law in opposition to defendant's motion that defendant misstated the videoconference call as company-wide, the call, in fact, was a weekly executive-level call. Plaintiff's attorney also characterizes the manner of defendant Maxwell's statement as condescending and offensive. However, these characterizations by plaintiff's attorney appear in neither the complaint nor plaintiff's several affidavits in this action.

her Employment Agreement and discriminated against her based on her gender in retaliation for her April 23, 2021 and May 17, 2021 notices. It is unlawful to retaliate against an employee for opposing discriminatory practices under both the NYSHRL and NYCHRL (Executive Law § 296[1][e]; Administrative Code of the City of NY § 8-107[7]). To make out a claim for retaliation, plaintiff must show that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action (*Forrest*, 3 NY3d at 312-313) or an action that disadvantaged plaintiff (*Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018] [internal citations omitted]). “A prima facie case of retaliation requires evidence of a subjective retaliatory motive for the protected activity.” (*Pace University v New York City Com’n on Human Rights*, 85 NY2d 125, 128 [1995]).

Here, plaintiff’s discrimination and retaliation claims are based on her May 17, 2021 response to defendants’ April 30, 2021 Proposed Transition Agreement, and her April 23, 2021 resignation for good reason notice. The adverse employment action – the Proposed Transition Agreement which rejected her resignation for good reason – occurred on April 30, 2021, before her May 17, 2021 protected activity. In other words, the alleged retaliation occurred before and not because of her protected activity. Moreover, based on the allegations in the complaint, the April 23, 2021 notice of resignation did not complain of discrimination and thus does not constitute a “protected activity” (*Borawski v Abulafia*, 140 AD3d 817 [2d Dept 2016]). Accordingly, in the absence of a causal connection between any protected activity and the asserted adverse action, the retaliation claim must be dismissed against defendant Maxwell (*see Forrest*, 3 NY3d at 313).

CONCLUSION

In sum, plaintiff has not stated a cause of action for gender discrimination and retaliation against defendant. And the eighth and ninth causes of action for discrimination and retaliation against defendant are dismissed.³ Thus, it is

ORDERED that defendant Jonathan Maxwell’s motion to dismiss the complaint pursuant to CPLR 3211(a)(7) as against him is granted; it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint against defendant Jonathan Maxwell; it is further

ORDERED that the caption is amended to reflect the dismissal of the complaint against defendant Jonathan Maxwell and shall read as follows:

³ While defendant Maxwell also seeks to dismiss the retaliation claim against the other defendants, he lacks standing to do so (*Connor v AMA Consulting Engineers PC*, 72 Misc 3d 1215(A) [Sup Ct Aug 3, 2021]). Accordingly, the court does not reach this issue.

JA LEE KAO,

Plaintiff,

- v -

ONYX RENEWABLE PARTNERS L.P., ORP JOINT HOLDINGS GP LLC, BLACK ONYX INVESTMENTS, LLC, and BILAL KHAN,

Defendants.

it is further

ORDERED that defendant Jonathan Maxwell shall serve a copy of this order with notice of entry on the Clerk of General Clerk's Office and the County Clerk who are directed to mark their records to reflect the change in the caption; and it is further

ORDERED that such service upon the General Clerk's Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/suptmanh).

3/8/2022

DATE



MARGARET CHAN, 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