

<b>Montiel v DeGeorgio</b>
2022 NY Slip Op 30849(U)
March 15, 2022
Supreme Court, New York County
Docket Number: Index No. 155126/2019
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. WILLIAM PERRY PART 23**

*Justice*

-----X

JESUS MONTIEL,

Plaintiff,

- v -

MICHAEL DEGEORGIO, JOHN SZYDLIK, BOAT BASIN  
PARTNERS LLC D/B/A BOAT BASIN CAFE, ACE ENDICO  
CORP., JOHN DOES 1-100

Defendant.

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INDEX NO. 155126/2019

MOTION DATE 10/15/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 71, 74

were read on this motion to/for DISMISSAL

Defendant Ace Endico Corp. (“Ace Endico”) moves, pursuant to CPLR 3211(a)(7), to dismiss the Second Amended Complaint against it in this action for alleged wrongful termination arising from discrimination.

**BACKGROUND**

Plaintiff, Jesus Montiel, a 38-year old Hispanic male, commenced this action seeking to recover damages from defendants, Michael DeGeorgio, John Szydlik, Boat Basin Partners LLC d/b/a Boat Basin Café (“Boat Basin”), Ace Endico, and John Does 1-100, for alleged wrongful termination in violation of the New York States Human Rights Law (“NYSHRL”) (see Executive Law §296) and the New York City Human Rights Law (“NYCHRL”) (see Administrative Code for the City of New York [“Administrative Code”] §8-107). Plaintiff was reportedly employed by Boat Basin and Ace Endico, where Michael DeGeorgio and John Szydlik were supervisors (see Second Amended Complaint, NYSCEF Doc. No. 78). John Does

1-100, whose names are unknown to plaintiff, are alleged to be employees of the known co-defendants, and participants in the wrongs committed against plaintiff (*id.*).

Plaintiff essentially claims that defendants participated in a pattern of discrimination, harassment, and retaliation against him that culminated in his wrongful termination in violation of the NYSHRL and NYCHRL (*id.*). He bases his claims on the following factual allegations.

On September 17, 1999, plaintiff was hired as a part-time busboy by nonparty Sunny Days In the Park Inc. (“Sunny Days”), which owned three restaurants, including Boat Basin Café (*id.*). The restaurants operated seasonally between March and November/December (*id.*). Plaintiff became a full-time employee after one year (*id.*). He was promoted to server in April 2002, and bartender in November 2007 (*id.*).

In 2010, plaintiff became Head Bartender at Boat Basin Café (*id.*). In 2016, Boat Basin Café began operating under new ownership, and plaintiff became an employee of Boat Basin and Ace Endico, single or joint employers (*id.*). In 2017, Ace Endico assumed control of the employees, management, and operations of Boat Basin Café (*id.*). In addition, Ace Endico hired Michael DeGeorgio as an executive chef, and John Szydlik as the General Manager of Boat Basin Café (*id.*).

In 2018, John Szydlik reportedly told plaintiff that the management of Boat Basin Café was considering replacing the male bartenders with Caucasian, female bartenders because the owners were “going for the ‘Hampton Look’” (*id.*). Plaintiff noticed that the restaurant began firing the older male employees and replacing them with younger, mostly female and Caucasian bartenders and servers (*id.*). In addition, plaintiff felt that the management of the restaurant was becoming increasingly hostile toward him (*id.*). Also, John Szydlik told plaintiff that most of the

older, male staff would not be rehired for the 2019 restaurant season because the owners wanted younger, attractive, female staff (*id.*).

On July 8, 2018, Michael DeGeorgio reportedly sent an email to all managers, including John Szydlik, instructing them to hire women behind the bar, and expressing dissatisfaction with the existing bartenders (*id.*). The same day, John Szydlik reportedly approached plaintiff and gave him an ultimatum; either step down from the position of Head Bartender and become a full-time Floor Manager, which, plaintiff states, meant a decrease in compensation, or stay on as Head Bartender, which, plaintiff states, meant seven-day work weeks (*id.*). Plaintiff expressed his desire to stay on as a bartender because he needed to support his family (*id.*). However, John Szydlik reportedly informed plaintiff that he was terminated because Michael DeGeorgio did not want him at the restaurant anymore (*id.*).

Plaintiff states that while he was never given an actual reason for the termination, he later learned that young, mostly female and Caucasian bartenders and servers were hired to replace him (*id.*). He also states that two other male bartenders were terminated and replaced by younger, Caucasian female bartenders (*id.*).

According to Brian Turnyanszki, Ace Endico's Comptroller, Boat Basin Café closed in October 2019 (*see* Turnyanszki Affid, NYSCEF Doc. No. 29). This action ensued.

The gravamen of the Second Amended Complaint is that defendants discriminated and retaliated against plaintiff, created a hostile work environment, and wrongfully terminated plaintiff's employment because of his age, race, color, national origin, and gender, in violation of the NYSHRL and NYCHRL (*see* Second Amended Complaint, *supra*). The pleadings allege causes of action against defendants for wrongful termination arising from willful discrimination based on plaintiff's age, race, color, national origin, and gender, in violation of the NYSHRL

(first cause of action) and the NYCHRL (second cause of action); subjecting plaintiff to a hostile work environment, arising from discrimination based on plaintiff's age, race, color, national origin, and gender, in violation of the NYSHRL (third cause of action) and the NYCHRL (fourth cause of action); retaliating against plaintiff because of his opposition to discrimination and harassment, and eventually terminating him, in violation of the NYSHRL (fifth cause of action) and the NYCHRL (sixth cause of action). Plaintiff also alleges causes of action against Michael DeGeorgio, John Szydlik, and John Does 1-100 for aiding abetting the commission of unlawful employment practices against plaintiff, in violation of the NYSHRL (seventh cause of action) and the NYCHRL (eighth cause of action). Plaintiff withdraws his claims against Boat Basin and Ace Endico for employer liability for discriminatory conduct by employees under the NYCHRL (*see* Mem in Opp, NYSCEF Doc. No. 61, p. 13).

Defendants answered, generally denying the allegations in the Second Amended Complaint and asserting multiple affirmative defenses (*see* Answer, NYSCEF Doc. No. 59). Ace Endico now seeks to dismiss the Second Amended Complaint against it.

### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*). In addressing a motion under CPLR 3211(a)(7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268 [1977]).

Preliminarily, Ace Endico argues that the claims against it must be dismissed because it is not a proper party to this action. Ace Endico asserts that it was not plaintiff's employer, that it had no relationship with plaintiff, and that it was merely a common shareholder with Boat Basin.

While the NYSHRL and NYCHRL govern discrimination in the traditional employer-employee relationship (*see Murphy v ERA United Realty*, 251 AD2d 469, 470 [2d Dept 1998]), the regulations do not define the term "employer." As a general rule, the determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results (*id.* [internal citations omitted]). Furthermore, courts have held that a plaintiff may maintain an employment discrimination action against an entity related to, but legally distinct from, the direct employer if the two entities operated as a single, integrated employer or as joint employers (*see Strauss v New York State Dept. of Educ.*, 26 AD3d 67, 70 [3d Dept 2005]). Thus, courts have created a four-prong test to determine whether a defendant falls within the ambit of the law (*see Jackson v Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP*, 42 Misc 3d 1230[A], \*3 [Civil Ct, Kings County 2014]). The courts must consider whether the proposed employer (1) had the power of selection and engagement of the employee; (2) paid the salary or wages to the employee; (3) had the power to dismiss the employee; and (4) had the power to control the employee's conduct (*id.*).

To support its position that it was not plaintiff's employer, Ace Endico relies, in part, on the affidavit of Brian Turnyanszki, which states, among other things, that "Ace Endico and the Boat Basin Café are two entirely separate and distinct entities;" that [o]ther than having one common shareholder, Ace Endico and the Boat Basin Café have quite literally nothing to do with each other's operation;" that "Ace Endico is a vendor of the Boat Basin Café;" that "[p]laintiff

was employed by the Boat Basin Café;” that Ace Endico never employed plaintiff; that “Ace Endico did not interview or hire [p]laintiff for his position at the Boat Basin Café;” that “Ace Endico did not pay [p]laintiff’s salary or benefits while he was employed at the Boat Basin Café;” that “Ace Endico did not in any way exercise any supervisory or managerial control over [p]laintiff, his co-workers or his supervisors while plaintiff was employed by the Boat Basin Café;” and that Ace Endico did not have any decision-making authority with respect to any aspect of [p]laintiff’s employment at the Boat Basin Café” (Turnyanszki Affid, *supra*).

In opposition, however, plaintiff submits a February 4, 2017 email from Michael DeGeorgio, a Boat Basin employee (*see* W-2, NYSCEF Doc. No. 54; 2018 1099-Misc Form, NYSCEF Doc. No. 54) to several Ace Endico employees, detailing the 2017 action plan to get the Boat Basin Café open and successful (*see* Email, NYSCEF Doc No. 40). The email includes plans for, among other things, the chef, maintenance, legal and bookkeeping, security, special events calendar, operations, and hiring (*id.*).

Plaintiff satisfactorily alleges that he was an employee of single or joint employees Boat Basin and Ace Endico (*see* Second Amended Complaint, *supra*). Furthermore, the February 4, 2017 email sufficiently establishes that Ace Endico possessed and exercised power and control over Bar Basin’s hiring and operations practices, so as to support a finding of joint employer liability (*see Strauss v New York State Dept. of Educ., supra*). As such, Ace Endico is a proper party to this action.

Ace Endico also contends that the action against it must nevertheless be dismissed because an employer cannot be held liable for the discriminatory conduct of its employees. This argument is unavailing since the pleadings satisfactorily allege that Boat Basin and Ace Endico encouraged, condoned, or approved the discriminatory conduct (*see Totem Taxi v State Human*

*Rights Appeal Bd.*, 65 NY2d 300, 305 [1985]). Plaintiff alleges, among other things, he was informed that the management of Boat Basin Café wanted to replace the male bartenders with Caucasian, female bartenders because the owners were going for the “Hamptons Look.”

Ace Endico further argues that plaintiff fails allege viable claims for relief. Ace Endico maintains that plaintiff’s allegations are merely contradictory conclusions and, in fact, plaintiff was replaced by another male. Ace Endico further states that other Hispanic, male bartenders were retained, and older, Hispanic bartenders were hired at the time of plaintiff’s termination.

As stated, plaintiff claims, among other things, that Ace Endico and codefendants wrongfully terminated him, subjected him to a hostile work environment, and retaliated against him because of willful discrimination based on his age, race, color, national origin, and gender, in violation of the NYSHRL and NYCHRL. The NYSHRL makes it “an unlawful discriminatory practice” for an employer to discriminate against an individual “in compensation or in terms, conditions or privileges of employment” because of “age, race, creed, color, national origin, ... sex ...” (Executive Law §296[1][a]; *see also Krause v Lancer & Loader Group, LLC*, 40 Misc 3d 385, 391-392 [Sup Court, NY County 2013]). Similarly, the NYCHRL states that it shall be “an unlawful discriminatory practice” for an employer to discriminate against an individual “in compensation or in terms, conditions or privileges of employment” because of the actual or perceived age, race, creed, color, national origin, gender ...” of the individual (Administrative Code §8-107[1][a]).

New York courts track the same standards as the federal courts in cases alleging discrimination in employment (*see Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 25-26 [2002]). In addition, the provisions of the NYCHRL mirror the provisions of the NYSHRL and should therefore be analyzed according to the same standards

(see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, n. 3 (2004)). Thus, to state a claim for discrimination under the NYSHRL or NYCHRL, a plaintiff must allege (1) that the plaintiff is a member of a protected class, (2) that the plaintiff was qualified for the position; (3) that the plaintiff suffered an adverse employment action, and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination (see *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1<sup>st</sup> Dept 2013]). In addition, the plaintiff need not plead specific facts establishing a prima facie case of discrimination, but rather, need only give “fair notice” of the nature of the claim and the grounds (*Vig v The New York Hairspray Co. L.P.*, 67 AD3d 140, 145 [1<sup>st</sup> Dept 2009]). The pleading must be sustained as stating a cause of action unless the conduct complained of consisted of nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences (see *McCormick v International Ctr. for the Disabled*, 2013 WL 2155585 [Sup Ct, NY County 2013] [internal citations omitted]).

Construing the pleading in the most favorable light (see *Leon v Martinez, supra*), plaintiff satisfactorily alleges viable claims against Ace Endico for discrimination under the NYSHRL and NYCHRL. The pleadings sufficiently allege that plaintiff, a 38-year old, Hispanic male, is a member of a protective class, and the allegations of plaintiff’s 17-year employment, coupled with multiple promotions, are sufficient to show that he was qualified for the position from which he was terminated (see *Slattery v Swiss Reinsurance America Corp.*, 248 F3d 87, 92 [2d Cir 2001]).

Furthermore, the pleadings sufficiently allege that plaintiff suffered adverse employment action, including a hostile work environment and wrongful termination, that occurred under circumstances giving rise to an inference of discrimination based on age, race, color, national

origin, and gender. A racially hostile work environment exists where “the workplace is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” (*Forrest v Jewish Guild for the Blind, supra, at 310* [internal citations omitted]). Adverse actions are those which affect the “terms, privileges, duration, or conditions of the plaintiff’s employment” (*Dortz v City of New York, 904 F supp 127, 156* [SD NY 1995]). Plaintiff satisfactorily alleges that he was told that the owners and management intended to terminate him and most of the male employees, and replace them with young, Caucasian female employees; that he was berated and humiliated in front of his coworkers; that he was given an ultimatum regarding his employment; and that he was wrongfully terminated under circumstances giving rise to an inference of discrimination, so as to survive a motion to dismiss (*see Askin v Department of Educ. of the City of N.Y., supra*).

However, the claims for retaliation under the NYSHRL and NYCHRL must fail since plaintiff fails to allege any facts to establish that he engaged in a protected activity; that his employer was aware that he participated in such activity, that he suffered adverse employment action based upon his activity, and that there was a causal connection between the protected activity and the adverse action (*see Forrest v Jewish v Jewish Guild for the Blind, supra, at 312-313*). Thus, the fifth and sixth causes of action alleging retaliation are dismissed.

Accordingly, it is

ORDERED that the motion to dismiss by Ace Endico Corp. is granted to the extent that the fifth and sixth causes of action in the Second Amended Complaint are dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to meet and confer and submit a proposed preliminary conference order, using the forms available on Justice Perry's Judicial Assignments page, to the court at [sfc-part23@nycourts.gov](mailto:sfc-part23@nycourts.gov), on or before April 15, 2022.

3/15/2022

DATE



WILLIAM PERRY, 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