

Shibetti v Z Rest., Diner & Lounge, Inc.

2022 NY Slip Op 31349(U)

April 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 517343/20

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of April, 2022.

P R E S E N T:

HON. CARL LANDICINO,

Justice.

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BONNIE SHIBETTI and KATRINA PUCCINI, individually and on behalf of all others similarly situated,

Index No.: 517343/20

Plaintiffs,

-against-

DECISION AND ORDER

Z RESTAURANT, DINER AND LOUNGE, INC., ADEL FATHELBAB, ADAM FATHELBAB, KAMAL FATHELBAB, and ESSAM ELBASSIONY,

Motion Sequence #2

Defendants.

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The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

NYSCEF Doc Nos.
30-48
52-60
65-71

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Upon the foregoing papers in this proposed class action regarding claims of sexual harassment in the workplace, defendants Z Restaurant, Diner and Lounge, Inc. (Z Diner), Adel Fathelbab (Adel) and Adam Fathelbab (Adam) (collectively, moving defendants) move (motion sequence #2) for an order: (1) dismissing the claims asserted against them in the amended complaint, pursuant CPLR 3211 (a) (7); (2) converting the instant motion

to one for summary judgment, pursuant to CPLR 3211 (c); and (3) striking certain portions of the amended complaint, pursuant to CPLR 3024 (b).

Background

The Proposed Class Action

On September 16, 2020, plaintiffs Bonnie Shibetti (Shibetti) and Katrina Puccini (Puccini) (collectively plaintiffs), individually and on behalf of a purported class of similarly situated plaintiffs, commenced this action for violations of the New York City Human Rights Law, Administrative Code of the City of New York § 8-107 *et seq.* (NYCHRL) that plaintiffs and the putative class members allegedly suffered while employed at the Parkview Diner at 2939 Cropsey Avenue in Brooklyn (Parkview Diner). On December 1, 2020, plaintiffs filed an amended complaint.

The amended complaint alleges that defendant Z Diner “is a current or former owner, operator, licensor, licensee, lessee, or manager of the restaurant known as the Parkview Diner located at 2939 Cropsey Avenue in Brooklyn . . .” and that defendants Adel and Adam are current or former owners, operators, licensors, licensees, managers and employees of the Parkview Diner and the current or former President and Vice President of Z Diner, respectively (NYSCEF Doc No. 26, amended complaint at ¶¶ 33, 35, 36, 38 and 39). The amended complaint alleges that defendants Kamal Fathelbab (Kamal) and Essam Elbassiony (Essam) are current or former owners, operators, licensors, licensees, managers and employees of the Parkview Diner (*id.* at ¶¶ 41 and 44). The amended complaint alleges that plaintiffs Shibetti and Puccini are former employees of defendants (*id.* at ¶¶ 45-46). The amended complaint alleges that:

“defendants engaged in a long-standing pattern and practice of creating and maintaining a sexually hostile and abusive work environment by, among other things, refusing to engage in any appropriate course of action to prevent, investigate, or discipline repeated acts of sexual harassment and assault taken by Kamal Fathelbab and other male employees against Ms. Shibetti, Ms. Puccini and other female employees at the Parkview Diner” (*id.* at ¶ 22).

The amended complaint alleges that the “‘toxic’ environment and egregious and unlawful conduct” at the Parkview Diner “was condoned and sanctioned by the management and owners of the Parkview Diner” (*id.* at ¶ 12).

The amended complaint alleges that during Shibetti’s employment at the Parkview Diner from June 2015 through April 2016, defendants subjected her to a hostile work environment, sexual harassment and retaliation (*id.* at ¶¶ 58-59). Specifically, Kamal allegedly “followed Ms. Shibetti into the woman’s restroom, physically cornered her, pushed her up against a wall, and pulled his [] out of his pants[,]” “grabbed Ms. Shibetti’s hand and placed it on his [] inside the kitchen at the Parkview Diner[,]” and “repeatedly made sexually explicit comments to Ms. Shibetti, including ‘can I f[] you’; ‘let me f[] you’; ‘please just f[] me once’; and ‘let’s go to a hotel.’” (*id.* at ¶¶ 61-63). The amended complaint alleges that “Marcos Solis grabbed Ms. Shibetti’s head in the middle of the diner floor and smashed her head into his crotch” and that Parkview Diner customers witnessed the assault (*id.* at ¶¶ 69-70). The amended complaint alleges that “Miguel Tzaquitza intentionally ‘jiggled’ Ms. Shibetti’s breast with his elbow at the soda fountain inside the Parkview Diner” (*id.* at ¶ 71). Additionally, the amended complaint alleges that defendants

retaliated against Shibetti for complaining about the sexual harassment by terminating her employment (*id.* at ¶ 23).

Regarding Puccini, the amended complaint alleges that defendants subjected Puccini to a sexually hostile and abusive work environment, unlawfully discriminated against Puccini because she was pregnant by removing her from the work schedule and telling her not to return to work until after she gave birth, and retaliated against Puccini by terminating her employment after she asserted claims against them (*id.* at ¶¶ 24-25 and 80). The amended complaint alleges that Kamal “repeatedly required Ms. Puccini to send him sexually explicit photos of herself as a condition of her employment at the Parkview Diner” and “would not sit any customers at Ms. Puccini’s assigned tables unless she first sent him nude photos of herself” (*id.* at ¶¶ 81-82). In addition, Kamal allegedly sent Puccini and other female employees at the Parkview Diner “pornographic photos and videos on his cell phone” (*id.* at ¶ 87).

The amended complaint also alleges that one New Year’s Eve, Kamal picked Puccini up in his car as she was walking to the subway after her shift and “pulled his [] out of his pants and drove Puccini to a nearby hotel where he “attempted to force her onto the bed to engage in sex acts with him” (*id.* at ¶¶ 89-91). The amended complaint alleges that in August 2016, Adel “abruptly and unlawfully removed Ms. Puccini from the schedule without notice when Ms. Puccini was approximately six (6) months pregnant” and told her to “[c]ome back after you give birth” (*id.* at ¶¶ 92-93). In addition, the amended complaint alleges that defendants terminated Puccini’s employment “just a few weeks after she asserted legal claims against them . . .” (*id.* at ¶ 96).

Regarding other female employees at the Parkview Diner, the amended complaint alleges that Brittany Hiotis (Hiotis), a former hostess, was sexually assaulted and harassed by Kamal inside the Parkview Diner when she was 18 years old (*id.* at ¶ 97). Kamal allegedly approached Hiotis inside the Diner and “asked if she ‘liked girls’ and whether she ever had a ‘threesome’” (*id.* at ¶ 98). The next day, Kamal allegedly asked Hiotis to help him install temporary light fixtures inside the women’s restroom at the Parkview Diner during an electrical blackout and “showed Ms. Hiotis sexually explicit photos and videos on his cell phone - including photos and videos depicting women performing sex acts on him and photos depicting animals having sex - and sexually assaulted her” (*id.* at ¶¶ 99-101). The amended complaint alleges that several hours later, Hiotis contacted the police and Kamal was arrested at the Parkview Diner (*id.* at ¶ 102).

In addition, the amended complaint alleges that Essam sexually assaulted and harassed Kathy Camacho (Camacho), a former waitress at the Parkview Diner (*id.* at ¶ 105). Essam allegedly made sexual comments to Camacho about her breasts and buttocks, grabbed her buttocks and rubbed her shoulders (*id.* at ¶ 106). Essam also allegedly asked Camacho and another female waitress to have a “threesome” (*id.* at ¶ 107). The amended complaint further alleges that on another occasion Adel followed Camacho into the women’s restroom at the Parkview Diner for no apparent reason (*id.* at ¶ 108).

The amended complaint alleges that Adel and Adam “were fully aware that Kamal Fathelbab had a proclivity to sexually harass and assault females when they hired him at the Parkview Diner” and “were also fully aware that Kamal Fathelbab was arrested at the Parkview Diner for sexually assaulting Brittany Hiotis when she was just a teenager, yet

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they never disciplined him and permitted him to continue to work at the Parkview Diner for years . . .” even after plaintiffs commenced an action in federal court (*id.* at ¶ 13; *see also* ¶¶ 67 and 72). Defendants allegedly attempted to “pay off” Hiotis by offering her \$3,000 for not testifying against Kamal in the ensuing criminal proceedings (*id.* at ¶ 9). Adel and Adam also allegedly “aided and abetted Kamal Fathelbab’s unlawful sexual misconduct by enabling him to continue to sexually harass and assault the female employees at the Parkview Diner” (*id.* at ¶ 14). Specifically, the amended complaint alleges that Adel and Adam were “fully aware that [Parkview Diner employees] Marcos Solis and Miguel Tzaquitza sexually assaulted plaintiff Bonnie Shibetti inside the Parkview Diner, yet they failed to terminate their employment” (*id.* at ¶ 15-16). Adel and Adam also allegedly “knew or should have known that a number of former waitresses were accusing [Parkview Diner employee] Essam Elbassiony of sexual harassment and assault, yet they failed to discipline him and permitted him to work at the Parkview Diner for years” (*id.* at ¶ 17). The Parkview Diner allegedly had no written policies to document such complaints and did not provide any sexual harassment training (*id.* at ¶¶ 19-20).

Regarding the purported class, the amended complaint alleges that the first, fourth and fifth causes of action are brought under CPLR 901 *et seq.* on behalf of themselves and “[a]ll female persons employed by defendants at any time between September 2015 through the present (the ‘NYCHRL Class Period’) with claims that defendants engaged in a pattern and practice of creating and maintaining a sexually hostile and abusive work environment at the Parkview Diner (the ‘NYCHRL Class Members’)” (*id.* at ¶ 47).

The amended complaint asserts the following causes of action: (1) sexual discrimination under NYCHRL § 8-107 (1) asserted against all defendants; (2) pregnancy discrimination asserted by Puccini under NYCHRL § 8-107 (1) and (22) against all defendants; (3) retaliation under NYCHRL § 8-107 (7) against all defendants; (4) aiding and abetting discrimination under NYCHRL § 8-107 (6) against all individual defendants; and (5) employer liability under NYCHRL § 8-107 (13) against all defendants.

The Prior Federal Court Action

Prior to commencing this proposed class action, plaintiffs filed a class action complaint against defendants in federal court for violations under the NYCHRL and the Fair Labor Standards Act, and for underpayment of wages in violation of the New York Labor Law (NYLL) (*see Shibetti v Z Restaurant, Diner and Lounge, Inc.*, 478 F Supp 3d 403 [ED NY 2020], Cogan, J.) (Federal Action).

After the parties conducted some discovery in the Federal Action, including depositions, plaintiffs filed an April 9, 2020 motion to certify the NYLL and NYCHRL class. On May 21, 2020, defendants moved to dismiss plaintiffs' NYCHRL claims for lack of subject matter jurisdiction. By an August 7, 2020 decision and order in the Federal Action, Judge Cogan dismissed plaintiffs' NYCHRL claims for lack of supplemental jurisdiction. Approximately one month later, on September 16, 2020, plaintiffs commenced this action in state court.

The amended complaint in this action references the Federal Action and Judge Cogan's August 7, 2020 decision and order, which noted, among other things, that plaintiff's claims are "quite strong," "make defendants look terrible" and remarked that the

“toxic” work environment at the Parkview Diner, which included “nude pictures, lewd remarks, sexual assaults, quid pro quo proposals and other intolerable conduct” should be “placed on the first available trial calendar” in state court (*see* amended complaint at ¶ 2).

Moving Defendants’ Instant Dismissal Motion

Moving defendants, Adel, Adam and Z Diner, moved for an order: (1) dismissing the first cause of action against Adel and Adam in their personal capacities and as principals of Z Diner; (2) dismissing the second cause of action for pregnancy discrimination against Adam in his personal capacity as principal of Z Diner; (3) dismissing the third cause of action; (4) dismissing the fourth cause of action; (5) dismissing the fifth cause of action against Adel and Adam individually and in their personal capacities as principals of Z Diner; and (6) striking those portions of the amended complaint that reference Judge Cogan’s decision and order in the Federal Action, Kamal’s arrest and an alleged offer to compromise, pursuant to CPLR 3024 (b).

Moving defendants submit an attorney affirmation annexing court filings in the Federal Action, as well as excerpts from deposition transcripts of the testimony of Kamal, Hiotis, Shibetti, Adam, Marcos Solis, Puccini and Camacho and a declaration from Nicoletti. Moving defendants also submit Adam’s affidavit, in which he attests that he is Z Diner’s Secretary and that Kamal and Essam are no longer employed by Z Diner.

Moving defendants contend that there are no allegations in the amended complaint evidencing that Adel and Adam participated in or knew about the allegedly improper conduct, which is necessary to hold them personally liable under the statute. Moving defendants argue that plaintiffs’ sworn deposition testimony contradicts the allegations in

the amended complaint and demonstrates that Adel and Adam promptly investigated and resolved the only two incidents that were reported to them. In addition, moving defendants assert that all witnesses testified that they were not subjected to sexual harassment from Adel or Adam, and that neither of them assisted Kamal and/or Essam in committing the alleged misconduct. Moving defendants thus argue that the allegations that Adel and Adam were aware of the discrimination and harassment cannot be accepted as true under CPLR 3211 (a) (7). In addition, moving defendants argue that the allegations that Puccini was unlawfully terminated cannot be accepted as true because Puccini admitted that her termination was justified and acknowledged in written letters that she received about missing work.

Moving defendants contend that the second cause of action for pregnancy discrimination fails against Adam because the amended complaint alleges that Adel, not Adam, improperly removed Puccini from her work due to her pregnancy (*see* amended complaint at ¶¶ 92-93), and that Adam cannot be held liable solely because he is a corporate officer of Z Diner when he did not personally participate in the alleged discriminatory act. Moving defendants also argue that the third cause of action for retaliation against Puccini fails because she admitted that there was a legitimate, nondiscriminatory reason for her termination (i.e., missing work). Moving defendants also rely upon warning letters issued to Puccini, receipt of which were acknowledged by her.

Moving defendants contend that the fourth cause of action against the moving defendants for aiding and abetting sex discrimination fails because there are no allegations suggesting that moving defendants “actually participated” in the conduct giving rise to this

claim. Moving defendants argue that the amended complaint does not allege that they ever knew about the other defendants' alleged misconduct because it was not reported to them. Moving defendants contend that the allegation that Adel and Adam knew that Kamal would continue to sexually harass female employees at the Parkview Diner, yet never disciplined him, is contradicted by plaintiffs' deposition testimony that they never reported an assault committed by Kamal. In addition, moving defendants argue that the allegation that Adel and Adam did not discipline Essam or take remedial measures against Kamal despite accusations of sexual harassment are contradicted by Camacho's and Shibetti's testimony that they did not report the harassment to Adel or Adam.

Moving defendants similarly claim that there are no allegations that they assisted Tzaquitzal and Solis. Rather, moving defendants contend that, at most, they are alleged to have made efforts to remediate Tzaquitzal's and Solis' conduct but were ineffective. In addition, moving defendants contend that the reference to Kamal's arrest does not support a retaliation claim because he was arrested *after* Shibetti was terminated, the charges against him were ultimately dismissed and the allegations that led to his arrest are irrelevant to Puccini's allegations of *quid pro quo* harassment.

Regarding the fifth cause of action for employer liability against Adel and Adam, moving defendants contend that dismissal is warranted because Adel and Adam are not plaintiffs' employers under the NYCHRL. Rather, moving defendants argue that the Court of Appeals has interpreted the Administrative Code to hold only corporate employers strictly liable for discriminatory acts of their managers and supervisors.

Moving defendants request that the court provide plaintiffs notice under CPLR 3211 (c) that it is converting the instant dismissal motion into a summary judgment motion.

Finally, moving defendants seek an order, pursuant to CPLR 3024 (b), striking all references to the following in the amended complaint: (1) “dicta” in Judge Cogan’s decision and order in the Federal Action; (2) Kamal’s arrest; and (3) an alleged offer to compromise. Moving defendants contend that such references in the amended complaint are “scandalous,” “prejudicial” and “unnecessary.” Regarding Kamal’s arrest, moving defendants argue that those allegations are inadmissible because Kamal’s arrest did not lead to a conviction, and thus, does not go to his credibility and has no probative value. Moving defendants also argue that any reference to them “paying off” Hiotis is inadmissible and should be stricken from the amended complaint.

Plaintiffs’ Opposition

Plaintiffs, in opposition, submit an attorney affirmation annexing deposition transcript excerpts from the testimony of Puccini, Adel, Adam, Hiotis and Robert Stracquadaine (Stracquadaine). Stracquadaine testified that he was a customer at the Parkview Diner when he witnessed a man grab Shibetti from the back of her head and push her face into his crotch near the Parkview Diner’s coffee station. Stracquadaine testified that he did not call the police to report the incident because “the restaurant told me that they would take care of it.” Stracquadaine specifically testified that he spoke to Adam about the incident and Adam advised that “we’ll take care of it.”

Moving defendants also submit an affidavit from Tarek Ibrahim (Ibrahim), the manager of the Parkview Diner from January 2017 through March 2020, who attests that

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he is aware, through conversations with Adel and Adam, as well as through his own observations, that Adel and Adam have long known that Kamal is a sexual predator and was sexually harassing and assaulting female employees at the Parkview Diner, including Shibetti and Puccini. Ibrahim attests that Adam told him that Kamal was a “problem,” a “troublemaker,” and “[redacted] up” and told him about Kamal’s alleged sexual harassment and assault of a waitress from 2015 through 2017. Ibrahim also attests that Adam told him that he, Adel and Kamal previously worked together at another diner in Staten Island where at least one female employee accused Kamal of sexual harassment and assault, and that Adel and Adam paid the woman off to silence her. Ibrahim further attests that after Puccini filed a lawsuit against the Parkview Diner, Adam directed him to watch Puccini “very closely and look for any reason to fire her.” Finally, Ibrahim attests that in February 2020, he observed a conversation between Adel, Kamal and Essam, during which Adel admitted that he knew what Kamal did to plaintiffs because Kamal had done it before.

Plaintiffs also submit an opposing memorandum of law arguing that plaintiffs do not consent to converting their dismissal motion into a summary judgment motion as “this motion does not involve purely legal issues” and “plaintiffs are not laying bare all of their proof on this motion.” Plaintiffs contend that further discovery is necessary regarding new factual issues raised by Ibrahim’s affidavit. Plaintiffs also argue that their motion to certify a class under NYCHRL was pending in the Federal Action when Judge Cogan ruled that he did not have subject matter jurisdiction over those claims, and that they require discovery regarding the class.

Plaintiffs contend that there is overwhelming evidence that, in addition to aiding and abetting Kamal's sexual harassment and assault, Adel and Adam directly discriminated and retaliated against plaintiffs. Plaintiffs claim that Adel and Adam have always known that Kamal was a sexual predator. Plaintiffs argue that Adel and Adam subjected all female employees of the Parkview Diner to a "toxic" work environment, had no policies or procedures in place to address the sexual harassment, failed to provide training, and failed to document complaints of illegal behavior.

Plaintiffs further contend that the fact that Adel and Adam directly discriminated against plaintiffs on the basis of gender is demonstrated by their testimony. Specifically, they point to plaintiffs' testimony that: (1) Adam laughed in Shibetti's face when she told him that Tzaquitzal assaulted her, and did not investigate her allegations or discipline Tzaquitzal; (2) Adel and Adam threatened to terminate Shibetti's employment when she complained to them that Solis assaulted her, and a week later they terminated her; (3) Adam often precluded Shibetti from using the restroom during her shifts; (4) Adam was dismissive of Shibetti, turning his back and walking away whenever Shibetti attempted to talk to him about employment issues; (5) Adel and Adam removed Puccini from the schedule when she was six months pregnant, told her to come back after she gave birth and mistreated her; and (6) on October 21, 2018, 11 days after Puccini filed the Federal Action, Adam and Adel began issuing written warnings to Puccini regarding her schedule.

Plaintiffs contend that defendants' mistreatment of Puccini during her pregnancy is a form of gender discrimination. Plaintiffs note that defendants do not dispute that plaintiffs have an actionable claim for pregnancy discrimination against Adel, since they

are only moving to dismiss that claim against Adam on the ground that he was not the one who “personally informed” Puccini that she was being removed from the schedule. Plaintiffs contend that it does not matter whether Adam “personally informed” Puccini since Adam testified that he was responsible for setting the schedules for all wait staff at the Parkview Diner when Puccini was removed from the schedule in August 2016.

Regarding the retaliation claim, plaintiffs contend that the evidence that Adel and Adam terminated Shibetti’s employment a few weeks after she was sexually harassed and assaulted by Tzaquitza and Solis demonstrates a valid retaliation claim. Plaintiffs also point to Ibrahim’s affidavit wherein he attests that he was directed to watch Shibetti closely and look for any reason to fire her. Plaintiffs also note that Adel and Adam started issuing Puccini written warnings regarding her schedule a mere 11 days after she commenced the Federal Action. Plaintiffs contend that their claim for “aiding and abetting” the sexual harassment states a valid cause of action based on Adam, Adel and Ibrahim’s testimony whereby they admitted that they knew of Kamal’s history of illegal behavior. Plaintiffs also point to their own testimony that Adel and Adam threatened to fire them if they complained about Kamal.

Finally, plaintiffs contend that moving defendants’ motion to strike allegations from the amended complaint is meritless. They assert that such motions are generally disfavored and rest in the court’s discretion. Plaintiffs assert that Judge Cogan’s decision and order in the Federal Action is relevant, although they do not intend to introduce it at trial. Plaintiffs note that defendants previously moved to preclude them from conducting discovery with respect to Kamal’s arrest record in the Federal Action, but the motion was

denied. Plaintiffs assert that admissibility of Kamal's arrest should be the subject of a motion *in limine*. Regarding the "offer to compromise," plaintiffs contend that moving defendants' motion to strike is frivolous because Hiotis is not a plaintiff to the lawsuit and the money Adel and Adam offered her was not in an effort to reach an accord in this lawsuit. Plaintiffs argue that Adel and Adam's alleged attempt to bribe Hiotis is proof of their attempt to conceal Kamal's proclivity for sexually harassing females and to obstruct the criminal prosecution that followed Kamal's arrest.

Moving Defendants' Reply

Moving defendants, in reply, submit Adel's and Adam's affidavits as well as an affidavit from moving defendants' counsel attaching additional deposition transcript excerpts, Puccini's declaration and a copy of a complaint filed by Ibrahim (Essam's brother) in a lawsuit for underpayment of wages against the Parkview Diner.

Adam denies directing Ibrahim to watch Puccini closely to terminate her and claims that Puccini was legitimately terminated for missing too many shifts. Adam also attests that Kamal was terminated in February 2020 after Adel and Adam received confirmation that Puccini had taken nude photos of herself in the Parkview Diner's bathroom and sent them to Kamal. Adel also denies Ibrahim's allegations, denies knowledge of any other sexual harassment lawsuit filed against Kamal or the Parkview Diner and denies ever "paying off" a former employee.

Moving defendants also submit a reply memorandum of law in which they reiterate their contentions that plaintiffs are bound by sworn admissions in their depositions and that Adel and Adam did not personally participate in any alleged sexual harassment. Moving

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defendants also note that plaintiffs did not oppose that portion of the motion seeking to dismiss the fourth cause of action relating to allegations concerning Tzaquitza, Solis and/or Essam. Moving defendants assert that the caselaw is clear that plaintiffs' failure to warn moving defendants about the existence of Kamal's alleged discriminatory conduct warrants dismissal of the fourth cause of action, as a matter of law.

Discussion

(1)

Moving Defendants' Dismissal Motion

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115 [2d Dept 2019]; *Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017]). Allegations consisting of bare legal conclusions must not be considered (see *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Gorbatov*, 155 AD3d at 837, quoting *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, [2d Dept 2006]).

A court may consider affidavits or deposition testimony submitted by plaintiff to remedy any defects in the complaint, but not for the purpose of determining whether there is evidentiary support for the pleading (*see Leon*, 84 NY2d at 88; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). “If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Sokol*, 74 AD3d at 1181-1182; *see also Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 257-258 [2d Dept 2012]). “[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Consideration of evidentiary materials “will almost never warrant dismissal under CPLR 3211 (a) (7) unless the materials establish conclusively that [the plaintiff] has no cause of action” (*Hendrickson*, 102 AD3d at 258 [internal quotation marks omitted]; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

Conversion of a motion to dismiss to one of summary judgment remains in the court’s discretion when a case involves a purely legal issue of law rather than any issues of fact (*see CPLR 3211 [c]*; *Sokol*, 74 AD3d 1183 [“the Supreme Court providently exercised its discretion in declining to convert the defendant’s motion into a motion for summary judgment pursuant to CPLR 3211 (c)”]; *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). “A court’s election to treat a pre-answer motion to dismiss as a motion for summary judgment generally requires adequate notice to the parties” (*Bronner v Butterfield*, 2 AD3d 475, 475 [2d Dept 2003]).

Here, the court declines to convert moving defendants' motion to one for summary judgment. While some limited discovery took place in the Federal Action on the NYCHRL claims and while moving defendants have submitted affidavits as well as deposition excerpts in support of their dismissal motion, plaintiffs are entitled to conduct additional discovery so that they may lay bare their proof. This is a purported class action where NYCHRL claims are alleged on behalf of all female employees of the Parkview Diner from September 2015 to present and discovery regarding class certification has not taken place in this action. Under these circumstances, conversion of moving defendants' dismissal motion is inappropriate.

Turning to the first and second causes of action for sex discrimination and pregnancy discrimination under the NYCHRL, the statute prohibits discrimination by an employer or employee or agent thereof to discriminate against an employee on the basis of "gender" or "sexual and reproductive health decisions" (*see* NYCHRL § 8-107 [1]). The Court of Appeals has also emphasized that "all provisions of the City Human Rights Law should be construed broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Suri v Grey Global Group, Inc.*, 164 AD3d 108, 113 [1st Dept 2018] [internal quotation marks omitted], quoting *Albunio v City of New York*, 16 NY3d 472 [2011]; *see also Nelson v HSBC Bank USA*, 87 AD3d 995, 997 [2d Dept 2011]).

Sexual harassment "is one species of sex- or gender-based discrimination" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 75 [1st Dept 2009]). "There is no 'sexual harassment provision' of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based,

inter alia, on gender (Administrative Code § 8-107 [1] [a])” (*id.*). The NYCHRL also prohibits an employer from refusing to provide a reasonable accommodation to the needs of an employee for the employee’s pregnancy (NYCHRL § 8-107 [22]). “Discrimination on the basis of pregnancy is a form of gender discrimination” (*Goston-Green v City of New York*, 184 AD3d 24, 34 [2d Dept 2020]).

“To state a claim for discrimination under the NYCHRL, a plaintiff must allege facts plausibly suggesting differential treatment of some degree based on a discriminatory motive; ‘the NYCHRL does not require either materially adverse employment actions or severe and pervasive conduct’” (*Tulino v City of New York*, US Dist Ct, SD NY, May 19, 2016, Furman, J.). “To plead a sex discrimination claim under the NYCHRL, Plaintiff need only allege facts showing that she was treated ‘less well’ because of her sex” (*Ibrahim v Fidelity Brokerage Services LLC*, US Dist Ct, SD NY Jan. 9, 2020, Caproni, J.; *see also Ayers v Bloomberg, L.P.*, 2022 NY Slip Op 01762 [2d Dept Mar. 16, 2022] [“Under the NYCHRL, the plaintiff must establish that she or he was subject to an unfavorable employment change or treated less well than other employees on the basis of a protected characteristic”]; *Bilitch v New York City Health and Hospitals Corp.*, 194 AD3d 999, 1003 [2d Dept 2021]).

“The NYCHRL does not distinguish between claims of ‘discrimination’ and ‘harassment’ or hostile work environment, which is a term of art borrowed from the more restrictive Title VII jurisprudence” (*Ibrahim*, *supra*). “To state a hostile work environment claim under the NYCHRL, a plaintiff must simply allege facts tending to show they were subject to unwanted gender-based conduct” (*Tulino*, *supra*. [internal quotation marks

omitted]). “Significantly, the NYCHRL imposes liability for harassing conduct even if that conduct does not qualify as severe or pervasive . . .” (*id.* internal quotation marks omitted]).

Here, accepting the facts as pleaded in the amended complaint as true, and according plaintiffs the benefit of every possible favorable inference, the courts finds that plaintiffs have stated a cause of action against moving defendants for sex and pregnancy discrimination. The amended complaint contains multiple allegations suggesting that plaintiffs were treated differently and “less well” due to their sex (*see Ayers v Bloomberg, supra*). Specifically, the numerous and detailed allegations of harassment against Kamal, Essam, Tzaquitzal and Solis adequately plead that plaintiffs suffered sex discrimination and a hostile work environment. The amended complaint adequately pleads that moving defendants unlawfully discriminated against Puccini because she was pregnant, failed to provide her with work hours and unlawfully removed her from the schedule while she was pregnant in violation of NYCHRL § 8-107 (1) and (22).

The affidavits and deposition transcript excerpts submitted by moving defendants do not negate the truth of the allegations in the amended complaint and do not conclusively establish that plaintiffs have no causes of action (*see Guggenheimer, 43 NY2d at 275; Hendrickson, 102 AD3d at 258*). Adel and Adam may have been aware of the sexual harassment and gender discrimination at the Parkview Diner by virtue of being onsite and through personal observation. Indeed, Ibrahim’s affidavit suggests that Adel and Adam have long known about Kamal’s sexual harassment of female employees. In addition, the fact that sexual harassment at the Parkview Diner is alleged by multiple employees against four male employees suggests a level of pervasiveness of a discriminatory environment

such that Adel and Adam could not help but be aware of it. Further, the allegation that Adel removed Puccini from the Parkview Diner schedule when she was six months pregnant and told her to “come back after you give birth” suggests that the Parkview Diner management, including Adam and Adel, were personally involved in creating an environment where female employees were treated “less well” than male employees. Further, Adam’s deposition testimony that he was personally involved in setting the Parkview Diner schedule suggests that he was involved in management decisions and supports a liberal view of the pleadings of the amended complaint.

Regarding the third cause of action, the NYCHRL prohibits retaliation by an employer against an employee on the basis of a protected activity, including the filing of a sex discrimination lawsuit (*see* NYCHRL § 8-107 [7]). Retaliation is adequately pled by alleging that the plaintiff engaged in protected activity that his or her employer was aware of, plaintiff suffered an adverse employment action and there is a causal connection between the protected activity and the adverse action (*see Bilitch*, 199 AD3d at 1004; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528 [1st Dept 2016]). Here, the allegation that Puccini was terminated several weeks after she asserted legal claims in the Federal Action adequately pleads a retaliation claim against the moving defendants (*see Kaplan v New York City Dept. of Health and Mental Hygiene*, 142 AD3d 1050, 1051-1052 [2d Dept 2016]). Puccini’s acknowledgement that she received a written warning about missing work does not prove that unlawful retaliation did not occur. The timing of Puccini’s termination raises factual questions regarding the cause of her termination.

Regarding the fourth cause of action for aiding and abetting discrimination against

Adel and Adam, the NYCHRL prohibits any person from aiding, abetting, inciting, compelling or coercing the doing of any the statutorily prohibited discriminatory acts (see NYCHRL § 8-107 [6]; *Doe v Bloomberg*, 36 NY3d 450, 454 [2021]). The NYCHRL imposes vicarious liability on employers when: “(1) the employee or agent exercised managerial or supervisory responsibility” or “(2) the employer knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee’s or agent’s discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility”; or (3) “the employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct” (NYCHRL 8-107 [13][b]; *Bloomberg*, 36 NY3d at 454-455).

“[W]here a plaintiff’s employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL” (*Bloomberg*, 36 NY3d at 459). “Rather, those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct” (*id.*). “An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the NYSHRL and the NYCHRL” (*Ananiadis v Mediterranean Gyros Products, Inc.*, 151 AD3d 915, 918 [2d Dept 2017]). A supervisor need not make derogatory comments or unwelcomed sexual advances to be liable; rather, a supervisor’s failure to take remedial measure can rise to the level of “actual participation”

(see *Ananiadis*, 11 AD3d at 918). “Indeed, a failure to conduct a proper and thorough investigation or to take remedial measures upon a plaintiff’s complaint of discriminatory conduct is sufficient to impose liability on an aiding and abetting theory” (*id.*).

Here, apart from the inferences that can be drawn about Adam and Adel’s knowledge of the pervasive sex discrimination and harassment at the Parkview Diner, the amended complaint alleges that the “toxic” environment at the Parkview Diner was sanctioned by Adel and Adam. The amended complaint thus alleges that Adel and Adam were fully aware of Kamal’s behavior for years but failed to discipline him and permitted him to continue working at the Parkview Diner. The amended complaint similarly alleges that Adel and Adam were aware of Essam’s, Solis’ and Tzaquizal’s inappropriate behavior, but failed to take any steps to discipline them, prevent further incidents, to document the assaults and to provide sexual harassment training. As noted above, the evidence submitted by moving defendants does not conclusively refute the allegations that Adel and Adam had knowledge of this improper behavior. Accordingly, plaintiffs have stated a viable claim against Adel and Adam individually based on an aiding and abetting theory (see *Ananiadis*, 11 AD3d at 918).

Regarding the fifth cause of action for employer liability asserted against Adel and Adam, NYCHRL provides that an employer shall be liable for discrimination in violation of the statute (see NYCHRL § 8-107 [13]). However, “where a plaintiff’s employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the City HRL [and] those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by

others, or for retaliation against protected conduct” (*Bloomberg*, 36 NY3d at 460). As owners of Z Diner, individual defendants Adel and Adam are not “employers” within the meaning of the NYCHRL (*id.* at 453 [holding that Michael Bloomberg was not plaintiff’s “employer” under NYCHRL merely due to his status as owner of Bloomberg, L.P.]). Accordingly, the fifth cause of action is dismissed as against Adel and Adam for failure to state a cause of action.

(2)

Moving Defendants’ Motion to Strike

CPLR 3024 (b) permits the court, upon motion, to strike any “scandalous or prejudicial matter unnecessarily inserted in a pleading” (CPLR 3024 [b]). Such motions are disfavored, and rest within the court’s sound discretion and will be denied if the allegations are relevant to a cause of action (*see New York City Health and Hospitals Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]; *Vice v Kinnear*, 15 AD2d 619, 619 [3d Dept 1961]; *Chiapperini v Gander Mountain Co., Inc.*, 48 Misc 3d 865, 881 [Sup Ct, Monroe County 2014]). Matters that are admissible but not necessary for the sufficiency of the pleadings that would cause undue prejudice to the adverse party may be struck (*see JC MFG., Inc. v NPI Elec., Inc.*, 178 AD2d 505, 506 [2d Dept 1991]).

Here, the court denies moving defendants’ motion to strike the allegations regarding Kamal’s arrest and the alleged offer to compromise because those allegations may be relevant to the causes of action asserted in the amended complaint. However, the court grants the motion to strike the references to Judge Cogan’s decision in paragraph 2 of the amended complaint, and orders that all but the first line of paragraph 2 is stricken. While

Judge Cogan’s decision and order in the Federal Action can be found in public records, citation to his arguable evaluation of the merits of this cause of action, which was dismissed on jurisdictional grounds in the Federal Action, is not relevant and may be prejudicial to defendants. The court has considered the parties’ remaining contentions and finds them to be without merit. Accordingly, it is

ORDERED that the branch of moving defendants’ motion (motion sequence #2) for an order dismissing the amended complaint, pursuant to CPLR 3211 (a) (7), is granted solely to the extent that the fifth cause of action is dismissed as against individual defendants Adel and Adam; the dismissal motion is otherwise denied; and it is further

ORDERED that the branch of moving defendants’ motion (motion sequence #2) for an order converting the dismissal motion to a motion for summary judgment, pursuant to CPLR 3211 (c), is denied; and it is further

ORDERED that the branch of moving defendants’ motion (motion sequence #2) to strike portions of the amended complaint, pursuant to CPLR 3024 (b), is granted solely to the extent that the second, third, and fourth sentences of paragraph 2 of the amended complaint (quoting Judge Cogan in the Federal Action) are hereby stricken; that branch of the motion is otherwise denied.

This constitutes the decision and order of the court.

ENTER

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FILED
KINGS COUNTY CLERK
2022 APR 21 AM 10:29
Carl J. Landicino, J.S.C.