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

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JA KAO,

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 654411/2021

MOTION DATE 04/05/2022, 04/29/2022

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 102, 103, 104, 105, 107, 108, 109, 110, 111, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 115, 116, 117, 118, 119, 120, 121, 130, 131, 140, 141, 142, 143

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Defendants Onyx Renewable Partners, L.P. (Onyx), ORP Joint Holdings GP, LLC (ORP GP), and Bilal Khan (collectively, Onyx Defendants) move pursuant to CPLR 3211(a)(7) for an order dismissing the ninth cause of action against them for retaliation for failure to state a cause of action (motion seq. 006). Plaintiff opposes the motion. Plaintiff separately moves pursuant to CPLR 3205(b) and 1003 for leave to amend her complaint and to add previously dismissed defendant Jonathan Maxwell as a party (motion seq. 007).[1] Defendants and Maxwell oppose the motion.

Background

Plaintiff is the former President and Chief Executive Officer (CEO) of Onyx, a limited partnership formed under the laws of Delaware with its principal place of business in New York City (NYSCEF # 1-Orignial Complaint, ¶¶ 6, 7, 18). Plaintiff became President on Onyx in 2015, and on July 1, 2015, plaintiff and Onyx entered into an Employment Agreement (*id.*, ¶ 1), which is the focus of this action. In 2019, plaintiff became CEO of Onyx (*id.*, ¶ 6).

[1] Motion sequences 006 and 007 are consolidated for disposition.

ORP GP is Onyx's general partner, with authority to make decisions for Onyx except for those it delegates to others such as officers of Onyx (*id.*, ¶ 8). Defendant Black Onyx Investments, LLC (Black Onyx) is one of Onyx's three limited partners (*id.*, ¶ 9). The other two limited partners are non-party Blackstone Group, Inc. (Blackstone) and SDCL Energy Efficiency Income Trust PLC (SEEIT), which purchased 50% interest in Onyx from Blackstone in February 2021; this purchase is referred to as the Hemisphere Transaction (*id.*, ¶¶ 9, 22-23). Jonathan Maxwell is an employee and owner of SEEIT and manages SEEIT's investment in Onyx (*id.*, ¶ 11). In 2017, ORP GP delegated its authority to the board of directors of Onyx (Onyx BOD), which consisted of three Blackstone employees and three Onyx employees including plaintiff (*id.*, ¶ 19). Khan, who is employed by Blackstone, manages Blackstone's investment in Onyx and was the chairman of Onyx BOD. In March 2021, Maxwell replaced Khan as chairman of Onyx BOD (*id.*, ¶¶ 10-11).

Plaintiff alleges that following the Hemisphere Transaction, her discretion as CEO to make decisions "on the development project pipeline, the core of Onyx's business" was removed by the new Onyx BOD (*id.*, ¶ 29). On April 23, 2021, citing her diminished role and lack of authority that adversely affected her duties as President and CEO, plaintiff submitted her notice of resignation (*id.*, ¶¶ 31-33). 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 the notice of resignation (*id.*, ¶¶ 42-49). Plaintiff 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 similar circumstances" (*id.*, ¶ 50).

On May 17, 2021, plaintiff sent an email to Khan alleging that defendants discriminated against her (*id.*, ¶ 60). In his May 21, 2021 response to the email, Khan wrote "'[n]ow that you have announced your departure to the full staff, we believe it is in the best interests of the Company to have Onyx's CFO and COO immediate[ly] assume positions as Interim Co-CEOs, supported by the rest of the Leadership Team, to provide continuity of business operations and to signal a smooth transition to the remaining members of the Onyx team, while we conduct a search for a new CEO'" (*id.*, ¶ 62). Thereafter, plaintiff alleges that her position was given to the male CFO and COO of Onyx as Interim Co-CEOs (*id.*); she was removed from all management responsibilities and excluded her from meetings (*id.*, ¶ 63). Defendants also allegedly facilitated other Onyx employees' interference with plaintiff's professional obligations to outside entities by granting them access to plaintiff's email account, such that they were able to cancel plaintiff's meetings without consulting her (*id.*, ¶ 64). After Onyx confirmed that plaintiff had no further responsibilities, it was agreed through counsel that June 2, 2021 would be plaintiff's final day of employment at Onyx (*id.*, ¶¶ 66, 68).

Plaintiff filed this action in July 2021, asserting claims for, *inter alia*, breach of various provisions of the Employment Agreement, gender discrimination and retaliation under New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

Defendants answered the complaint (NYSCEF #'s 21, 22), while Maxwell moved to dismiss for lack of personal jurisdiction and failure to state a cause of action on the sole claims asserted against him – retaliation and discrimination (NYSCEF #'s 23-27). Plaintiff opposed the motion (NYSCEF #'s 26-28). In its Decision and Order dated March 8, 2022 (March 8 Decision), the court rejected Maxwell's jurisdictional arguments but dismissed the complaint against him (NYSCEF # 98). As for the discrimination claim, the court found that Maxwell's alleged conduct was insufficient to constitute an adverse employment act or unlawful discrimination based on gender (*id.* at 6-7).

As for the retaliation claim, the court wrote:

> 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 [ ] (*see Forrest*, 3 NY3d at 313).

(*id.* at 8).[2]

The court directed that the Clerk enter judgment dismissing the complaint against Maxwell and amending the caption to reflect the dismissal (*id.* at 8-9).

Onyx Defendants' Motion to Dismiss (006)

The Onyx Defendants move to dismiss the retaliation claim against them, arguing that as the court found in its March 8 Decision dismissing the claim against

[2] While Maxwell moved to dismiss the retaliation claim against all the defendants, the court noted that he lacked standing to seek this relief (NYSCEF # 98 at 8, n. 3).

Maxwell, the complaint fails to adequately allege a connection between the asserted protective activity and the alleged adverse employee action.

Plaintiff opposes the motion, arguing that in addition to the Proposed Transition Agreement, defendants took adverse actions against her after she sent the May 17, 2021 email, including effectively terminating her without cause on May 21, 2021 (NYSCEF # 1, ¶ 61). Plaintiff argues that as the Onyx defendants fail to address these post-May 17, 2021 actions, their motion should be denied. Alternatively, plaintiff argues that the proposed First Amended Complaint (FAC) – which is the basis for her motion to amend – sufficiently pleads retaliation.

The original complaint does not state a claim for retaliation against the Onyx defendants because it does not allege a causal connection between the asserted adverse employment action—i.e., the April 30, 2021 Proposed Transition and Separation Agreement and the protected activity—i.e., plaintiff's May 17, 2021 email (NYSCEF #1, ¶ 121). That said, the issue remains as to whether the FAC corrects this deficiency.

Plaintiff's Motion To Amend (007)

Plaintiff seeks leave to amend the complaint to: (i) re-add Maxwell as a party based on additional allegations to support her discrimination and retaliation claims against him that were dismissed by the March 8 Decision; (ii) include additional allegations as against defendants Onyx, ORP GP, Black Onyx and Khan (together, defendants) to support the retaliation claim; and (iii) add supplemental allegations concerning events that occurred after the filing of the original complaint.

Maxwell and defendants separately oppose the motion. Maxwell argues that the complaint cannot be amended to include new claims against him since the March 8 Decision dismissed the claims against him with prejudice, and that, in any event, the proposed amendments are futile since the new allegations do not state claims against him for either gender discrimination or retaliation including because Maxwell is not alleged to have participated in any asserted retaliation.

As for defendants, they argue that the motion to amend should be denied because plaintiff unduly delayed in filing the amended complaint and that they have been prejudiced as a result. Moreover, they argue that the proposed FAC fails to state a claim for retaliation against them. In this regard, they argue that neither allegations as to defendants' efforts to transition plaintiff's responsibilities following her voluntary resignation nor those regarding the post-employment valuation of Black Onyx Units give rise to a potentially meritorious claim for retaliation.

Leave to amend a pleading pursuant to CPLR 3025 (b) "shall be freely given," in the absence of prejudice or surprise resulting from the delay (*Thompson v*

Cooper, 24 AD3d 203, 205 [1st Dept 2005]). That said, in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). Thus, leave to amend will be denied when "the proposed action fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d at 205 [internal citations omitted]; *see also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

At the outset, with regard to the proposed amended claims asserted against Maxwell, the prior dismissal of the complaint, which addressed the merits and included a direction for the Clerk to enter a judgment in Maxwell's favor, requires the denial of the motion to amend as to Maxwell (*Playboy Enterprises Int'l Inc. v Meredith Corp.*, 2021 WL 1316695 [Sup Ct NY Co. 2021] [dismissing action against defendant and directing the judgment be entered in its favor precluded plaintiff from seeking leave to amend]; *N. Am. Van Lines, Inc. v Am Int'l Companies*, 11 Misc3d 1076 (A), * 4 [Sup Ct NY Co. 2006], *aff'd* 38 AD3d 450 [1st Dept 2007] [denying leave to amend previously dismissed complaint]); *see also Panagoulopoulos v Carlos Ortiz Jr. MD, P.C.*, 143 AD3d 792, 792 [2d Dept 2016] [once the trial court granted defendants' motion to dismiss the complaint, "there was no complaint before the court to amend"]; *accord, Allen v Murray House Owners Corp.*, 130 AD2d 356, 357 [1st Dept 1987] [stating that leave to replead dismissed counterclaim should not have been permitted after its dismissal for failure to state a cause of action absent good grounds for repleading]). In this connection, the court notes that plaintiff had an opportunity, but failed, to seek leave to amend the complaint in response to Maxwell's dismissal motion and that she has filed a notice to appeal the March 8 Decision (NYSCEF # 106).

The next issue is whether the proposed FAC is sufficient to state a claim for retaliation against the defendants. Under the NYSHRL and NYCHRL (Executive Law § 296[1][e]; Administrative Code of the City of NY § 8–107[7], it is unlawful to retaliate against an employee for opposing discriminatory practices. To make out a claim for retaliation under the NYSHRL, a 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]).

Here, the proposed FAC sufficiently alleges the elements of retaliation such that the motion to amend to add this claim should be granted as to defendants. Specifically, plaintiff alleges that she informed her colleague Fletcher, who was made interim CFO following her resignation, that she was considering legal action for gender discrimination; that plaintiff shared her concerns about her treatment

after the consummation of the Hampshire Transaction with Onyx's director of HR; that Khan asked Fletcher for information about plaintiff immediately after she submitted her notice of resignation on April 23, 2021; that following the notice, plaintiff was quickly presented with a highly unfavorable Proposed Transition Agreement between her and ORP GP that specifically required her to release her claims under the NYSHRL and NYCHRL; that plaintiff's treatment by various colleagues worsened after she submitted her notice of resignation; that after she expressly complained about discrimination on May 17, 2021, she was constructively discharged almost immediately by Khan on behalf of ORP GP; and that she was denied severance and payment for her non-permanent Black Onyx Units and stripped of her permanent units (NYSCEF # 117, ¶¶ 65, 78-101; 109-114).

Thus, in contrast to the original complaint, the proposed FAC adequately alleges a causal connection between the protected activities which were closely followed in time by the alleged adverse actions or actions that disadvantaged plaintiff. Furthermore, plaintiff need not plead that an Onyx's employee told defendants of her concerns about gender discrimination since an inference can be made from the facts alleged as to their knowledge (*see Zann Kwan v Andalex Group LLC,* 737 F3d 834, 844 [2d Cir. 2013] [for the purpose of establishing a prima facie cause of retaliation a plaintiff may rely on general corporate knowledge of her protected activity] [internal citation and quotation omitted]). As for defendants' assertion that the adverse actions alleged by plaintiff, including her constructive discharge, are attributable to her resignation, as opposed to protected activities, such assertion is insufficient to support a finding that the proposed retaliation claim is without merit (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 [1st Dept 2009] [holding that "no challenged conduct [under the NYCHRL] may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, 'reasonably likely to deter a person from engaging in protected activity.'"]).

Next, contrary to defendants' argument, it cannot be said at this juncture that allegations regarding defendants' valuation of the Black Onyx units in December 2021 are insufficiently related to any protected activity given that this action alleging discrimination was filed within five months of the valuation (*Collins v Indart-Etienne*, 59 Misc3d 1026, 1054 [Sup Ct Kings Co. 2018][" The courts have found up to eight months between the last protected activity and retaliatory action to be a close enough in proximity to establish causation"]).[3] That said, however,

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[3] To the extent defendants argue that actionable post-employment retaliation must be based on adverse actions that impact the ability of a plaintiff to secure future employment, the cases relied on by defendants indicate that such limits apply only to Title VII's protections (*see e.g. Thompson v Morris Heights Health Center*, 2012 WL 1145964,* 5 [SD NY 2012][noting that that "there are no bright-line rules defining the boundaries of adverse action in the context of post-employment retaliation; as a result courts must pore over each case to determine whether the challenged employment action reaches the level of

defendants are correct that plaintiff's alleged complaints about her treatment by Khan before she became CEO in November 2016 (*id.*, ¶ 30), are too remote from the asserted adverse actions or actions disadvantaging plaintiff to provide a basis for a retaliation claim.

Regarding defendants' argument they will be prejudiced by plaintiff's delay in moving to amend, such argument is unavailing. It is well established that "delay alone is not sufficient ground for denying leave to amend" (*see also Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002]). Instead, the party opposing the amendment must show prejudice which occurs when the party "has been hindered in preparation of its case or has been prevented from taking some measure in support of [its] position" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 655 [1st Dept 2009]). Here, defendants have not pointed to any prejudice of this nature, particularly given that discovery is ongoing.

Next, plaintiff is granted leave to add the proposed tenth cause of action based on events occurring after she filed the complaint (*Lucien v 141 E 72nd S., Inc.*, 225 AD2d 317, 318 [1st Dept 1996] [finding that the trial court abused its discretion in declining to permit plaintiff to add new allegations based on events occurring after the filing of the complaint]). The proposed tenth cause of action seeks a declaratory judgment that plaintiff holds permanent Black Onyx Series B Units that are not subject to repurchase or forfeiture. This cause of action is based on allegations that in December 2021, defendants sent plaintiff a letter denying that she held permanent units (NYSCEF # 117, ¶¶ 176-179). Contrary to defendants' argument, the declaratory relief is not duplicative of the breach of contract claim which relates to the calculation and payment of the "Repurchase Price" to plaintiff for non-permanent Black Onyx Units as opposed to permanent units (*id.*, ¶¶ 146-47, 177).

The proposed eleventh cause of action alleges the breach of the implied duty and good faith and fair dealing against defendant Black Onyx Investment LLC and ORP GP based on the MLP LLC Agreement and, specifically, its provisions as to the Black Onyx units. This cause of action is based on allegations that defendants' December 2021 valuation, which placed a value of $0 on plaintiff's non-permanent units, constituted a breach of the covenant of good faith and fair dealing (*id.*, ¶¶ 180-188). As the proposed breach of contract claim alleges the failure to pay plaintiff for the full value of the Black Onyx units, based on specific provisions of the MLP LLC Agreement (*id.*, ¶¶144-148), there is no basis for asserting a separate claim for the breach of good faith and fair dealing (*see e.g. A.D.E. Sys., Inc. v Energy Labs, Inc.*, 183 AD3d 791, 794 [1st Dept 2016] [holding dismissal was

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adverse. However, the [Second] Circuit has limited the scope of Title VII's protections to proscribe only those actions injurious to *current* employment or the ability to *secure future* employment" [internal citations and quotations omitted][emphasis in the original]).

warranted as "defendant could not breach the covenant of good faith and fair dealing merely by exercising a right expressly afforded to it under the parties' agreement"]; *see generally, Miller v HCP & Co.*, 2018 WL 656378, at * 8-9 [Del Ch Feb. 1, 2018], *aff'd* 194 A3d 908 [2018]). Thus, leave to add the proposed eleventh cause of action under the FAC is denied.

Finally, insofar as the proposed amendments regarding Onyx's obligation to pay plaintiff's legal fees as alleged in the proposed fourth and fifth causes of action are contrary to holding in the court's Decision and Order dated September 15, 2022, (NYSCEF # 150), leave to amend is denied.

In view of the above, it is

ORDERED that plaintiff's motion to amend (motion seq. 007) is denied as to Maxwell and granted as to defendants Onyx Renewable Partners, L.P., ORP Joint Holdings GP, LLC, and Bilal Khan to the extent that plaintiff shall be permitted to amend her complaint consistent with this Decision and Order; and it is further

ORDERED that within 30 days of service of a copy of this Decision and Order with notice of entry together with the First Amended Complaint consistent with this Decision and Order, the First Amended Complaint shall be deemed served upon defendants; and it is further

ORDERED that defendants shall answer the First Amended Complaint within 20 days of it being deemed served upon them; and it is further

ORDERED that the motion to dismiss (motion seq. 006) is denied as moot.

11/28/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[x]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE