At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of June, 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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CHRISTINA CALIXTE, individually and on behalf of all others similarly situated,

Plaintiff,

- against - Index No. 522952/22

14 STREET MEDICAL, P.C. and YAN FELDMAN,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	3-13
Opposing Memorandum of Law	18
Reply Memorandum of Law	19

Upon the foregoing papers in this action for racial discrimination, harassment and retaliation against plaintiff's former employer, defendants 14 Street Medical, P.C. (14 Street Medical) and Yan Feldman (Feldman) (collectively, Employer Defendants) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint and awarding them costs and disbursements.

On August 9, 2022, plaintiff Christina Calixte (Calixte or plaintiff) commenced this action "individually and on behalf of all others similarly situated" by filing a summons and a 21-page complaint verified by counsel (*see* NYSCEF Doc No. 1).

> The complaint alleges that Calixte, "an African American woman" was employed by the Defendants as a Clinical Manager from about March 7, 2022 through April 20, 2022 (a total of ***43 days***) (*id.* at ¶¶ 8-9). Her duties included . . . training employees, auditing clinic operations, establishing a budget, reviewing treatment plans, and communicating with Defendants for $20.00 per hour (*id.* at ¶¶ 49-50). Defendant Feldman, a Caucasian man, is allegedly the President and Chief Executive Officer of defendant 14 Street Medical and Calixte's former supervisor. The complaint alleges that "the acts of Defendant Street Medical . . . were committed by Defendant Feldman individually while actively engaging in the ownership of 14 Street Medical.

Specifically, the complaint alleges that "[t]hroughout her employment, [she] was treated differently and became a target and victim of race discrimination. On or about March 31, 2022, Calixte allegedly contacted Feldman and told him that "there were hours missing in the overall calculation of her wages". Feldman allegedly "dismissed" Calixte's complaint. On or about April 14, 2022, Calixte's pay statement was allegedly inaccurate again so she advised Feldman that 14 Street Medical was incorrectly calculating her wages. Feldman allegedly responded "are you accusing me of not paying you, are you accusing my company of stealing?". The complaint alleges that "Defendants did not provide Plaintiff with accurate wage statements with each payment received" . Allegedly, "[i]nstead of calculating overtime as time and half for over 40 hours of work per week, the Defendants erroneously calculated overtime as time and half for over 80 hours of work for every two weeks worked".

The complaint alleges that Feldman "retaliated" against Calixte for inquiring about her pay statements and warned that if she continued to complain she would be terminated. In addition, the complaint alleges that Feldman stated; **You (Plaintiff Calixte) are a slave to his clinic … you eat from the palms of my hands**" (*id.* at ¶ 81). The complaint alleges that the front desk manager, "Zahra [Mehdi] told Plaintiff that Feldman had made similar comments to other African American employees" and "Calixte was aware that Feldman was aggressive and disrespectful towards her and soft spoken to other non-African American employees".

On or about April 20, 2022, Plaintiff notified Feldman of her intent to resign from her position due to his discriminatory conduct" . Calixte alleges that she told Feldman that an employer should never make discriminatory comments, such as the word '**slave**', to subordinate African American women employees. Feldman allegedly responded "**[w]e are all slavers of clinical process …**". The complaint alleges that in an attempt to intimidate and retaliate against Plaintiff, Feldman had his attorney send Plaintiff a letter requiring her to stop making defamatory remarks". The complaint alleges that "[n]o longer able to endure the race discrimination, the hostile work environment, the retaliation, and the emotional and psychological trauma, Plaintiff Calixte *was forced to resign* from her position on April 20, 2022". Thus, the complaint alleges that Calixte was constructively terminated.

The complaint also contains class action allegations for a class broadly consisting of "all current and former non-exempt employees of Defendants . . ." within six years prior

to the commencement of this action (*id.* at ¶¶ 28-45). The complaint alleges that Calixte and the proposed class have the following questions of law and fact in common:

> "[w]hether Defendants failed to furnish the Rule 23 NYLL Class with complete and accurate wage statements with each payment of wages including, *inter alia*, hours worked, rate of pay, overtime rate, and other statutorily required information pursuant to the NYLL and supporting regulations [and]
>
> "[w]hether Defendants failed to keep true and accurate employment records including, *inter alia*, all records reflecting all hours/shifts worked by and wage payments made to the Rule 23 NYLL Class, as required by the NYLL" (*id.* at ¶ 33).

The complaint asserts eight causes of action against theDefendants for: (1) race discrimination in violation of NYSHRL; (2) race based hostile work environment in violation of NYSHRL; (3) retaliation in violation of NYSHRL; (4) race discrimination in violation of NYCHRL; (5) race based hostile work environment in violation of NYCHRL; (6) retaliation in violation of NYCHRL; (7) retaliation in violation of the NYLL; and (8) wage statement violation of NYLL on behalf of Calixte, individually, and on behalf of the proposed class action members.

The Defendants' Pre-Answer Dismissal Motion

On or about October 13, 2022, the Defendants filed this pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), based on an attorney affirmation and a moving memorandum of law.

Defense counsel asserts that "the documentary evidence which consists of Plaintiff's employment agreement, her payroll records *and text messages* with her former supervisors, unequivocally establishes that each of Plaintiff's claims is completely without

merit". Defense counsel argues that plaintiff's claims for retaliation and discrimination fail, as a matter of law, because "there are no allegations that she was engaged in any protected activity" or "that she ever complained about less favorable treatment based on her race". The defense also contends that "[c]omplaints that do not implicate a protected class are insufficient as a matter of law to constitute protected activity under the NYSHRL or the NYCHRL and cannot be the basis for a retaliation claim under either the NYSHRL or the NYCHRL".

Defense counsel further contends that plaintiff's retaliation claims are unsustainable because "there are no allegations that any adverse action was taken against her[,]" "there is no allegation that she did anything but voluntarily resign" and she did not allege that continued employment with the Defendants was not feasible, since the text messages reflect that she inquired about reapplying for employment. Defense counsel argues that the allegations in the complaint are insufficient to claim a hostile work environment based on race because "[t]he Complaint is devoid of a single specific factual allegation demonstrating that any harassment to which Plaintiff claims she was subjected was based on her race". Defense counsel asserts that concerning communications between Plaintiff and Feldman, Plaintiff erroneously contends related to her race are nothing more than petty slights and trivial inconveniences that are not actionable . . ." .

Defense counsel argues that plaintiff's Labor Law claims on behalf of herself and a purported class "are bereft of any factual averments to support claims, either individually or by a class, that she and unspecified others were not paid all of her wages". Defense

counsel further asserts that plaintiff's wage statements and employment contract demonstrate that her Labor Law claims are meritless, without providing *any detailed explanation* why.

The Defendants' moving memorandum of law asserts that "Plaintiff's payroll records confirm that Plaintiff was paid in accordance with her Employment Agreement" (NYSCEF Doc No. 14 at 5).

Regarding the class action allegations in the eighth cause of action for violation of NYLL § 195 (3), defense counsel argues that it may not be maintained as a class action because a plaintiff cannot seek liquidated damages for the putative class as damages are deemed penalties under New York Law (NYSCEF Doc No. 14 at 18).

Defense counsel submits the following exhibits in support of the dismissal motion: (1) the summons and complaint; (2) Calixte's employment agreement; (3) Calixte's payroll records; (4) corporate records of 14 Street Medical reflecting that Rajat Lamington, M.D. is the sole shareholder; (5) text messages between Calixte, her former co-workers at 14 Street Medical and Feldman (Exhibits E, F, G and H), none of which have been authenticated (*see* NYSCEF Doc Nos. 9-12); and (6) an April 21, 2022 letter from defense counsel confirming that Calixte resigned from her employment with 14 Street Medical.

Calixte, in opposition, submits an opposing memorandum of law arguing that the documents annexed to defense counsel's moving affirmation are inadmissible (NYSCEF Doc No. 18 at 2). She further argues that the documents submitted by defense counsel do

not warrant dismissal under CPLR 3211 (a) (1) because they do not absolutely refute her allegations in the complaint. Calixte also contends that the text messages are not "essentially undeniable," and thus, do not qualify as documentary evidence within the meaning of CPLR 3211 (a) (1) (*id.* at 12).

Calixte asserts that she sufficiently pled that she suffered "an adverse employment action" since she "specifically pled that she was constructively terminated and therefore suffered an adverse action under the law". Calixte further argues that she adequately pled a connection between her mistreatment by the Defendants and her race by specifically alleging what Feldman said to her about being a "**slave to his clinic**" (*id.* at 2).

Discussion

(1)

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim[s]" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]; *see also 1911 Richmond Ave. Assocs., LLC v G.L.G. Cap., LLC*, 60 AD3d 1021, 1022 [2009]). "In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]). Importantly, the Second Department has held that text messages do not constitute

documentary evidence under CPLR 3211 (a) (1) because their contents are not "essentially undeniable" (*Kalaj v 21 Fountain Place, LLC*, 169 AD3d 657, 658 [2019])

Defendants' counsel erroneously contends that dismissal is warranted, pursuant to CPLR 3211 (a) (1), because "[p]laintiff's factual allegations are inconsistent, inaccurate and refuted *by the text messages*" which were submitted by defense counsel as Exhibits E, F, G and H. The text messages between plaintiff Calixte and her former supervisors at 14 Street Medical will not be considered because they do not constitute "documentary evidence" within the meaning of CPLR 3211 (a) (1), as a matter of law.

In addition, Defendants have failed to establish that dismissal is warranted, pursuant to CPLR 3211 (a) (1), based on defense counsel's submission of Calixte's employment agreement, her payroll records and the corporate records of 14 Street Medical. None of those documents, on their face, conclusively dispose of Calixte's claims.

(2)

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference

(*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2011]; *see also Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]).

A. *The First and Fourth Causes of Action*

The first and fourth causes of action asserted against the Employer Defendants are for racial discrimination in violation of NYSHRL and NYCHRL, respectively.

"A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case [by alleging] that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Importantly, "[t]he NYSHRL and NYCHRL prohibit employment discrimination on the basis of race, and for retaliation against an employee for opposing discriminatory practices" (*Griffith v MetroPlus Health Plan Inc.*, 78 Misc 3d 1241 (A) [Sup Ct Kings County 2023] [citing to Executive Law § 296 (1), (7); Administrative Code § 8-107 (1), (7)]).

Here, the complaint sufficiently alleges that Calixte's supervisor/manager, defendant Feldman, made racially charged statements, including references to slavery, to Calixte and threatened termination when Calixte asked Feldman to investigate deficiencies in her wage statement. The complaint also alleges that Calixte was constructively terminated in April 2022 because the mistreatment and race discrimination in her workplace was so unbearable that she was allegedly "forced" to resign.

B. *The Second and Fifth Causes of Action*

The second and fifth causes of action asserted against the Defendants are for racially based hostile work environment in violation of NYSHRL and NYCHRL, respectively.

"A plaintiff claiming a hostile work environment animated by discrimination in violation of the NYSHRL must show that the workplace is permeated with 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" (*Reichman v City of New York*, 179 AD3d 1115, 1118 [2020]). "Under the NYCHRL, a plaintiff claiming a hostile work environment need only demonstrate that he or she was treated 'less well than other employees' because of the relevant characteristic" (*id.* at 1118). However, the conduct alleged must exceed what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences" (*id.*).

Here, the complaint sufficiently alleges that Calixte was faced with racial discrimination from her supervisor, defendant Feldman, who allegedly compared her to a "slave" and communicated with her in an aggressive manner when she inquired about errors in her wage statements, while he communicated with other Caucasian employees of 14 Street Medical in a soft-spoken manner. Contrary to defense counsel's contention, defendant Feldman's alleged reference to slavery when speaking to Calixte, an African American woman, well exceeded a petty slight.

C. *The Third and Sixth Causes of Action*

The third and sixth causes of action asserted against the Employer Defendants are for retaliation in violation of NYSHRL and NYCHRL, respectively.

"[A] plaintiff alleging retaliation in violation of NYSHRL must show that (1) he or she engaged in a protected activity by opposing conduct prohibited thereunder; (2) the defendant was aware of that activity; (3) he or she suffered an adverse action based upon his or her activity; and (4) there was a causal connection between the protected activity and the adverse action" (*Reichman v City of New York*, 179 AD3d at 1119; *see also Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 667 [2019] [same]). The Second Department has noted that while the NYCHRL has similar elements, "[t]he NYCHRL offers retaliation victims, like discrimination victims, broader protection than its NYSHRL counterpart" (*Reichman v City of New York*, 179 AD3d at 1119).

Here, the complaint alleges that Calixte was engaged in protected activity by opposing the Defendants' incorrect calculations of her wages in her wage statements and her supervisor's allegedly racist and discriminatory responses to her legitimate inquiries. The complaint alleges that Calixte was mistreated by her Caucasian supervisor, defendant Feldman, who made racially charged statements referencing slavery and acted aggressively toward Calixte, an African American woman, in retaliation for her repeated inquiries about errors in her wage statements. The complaint alleges that "[n]o longer able to endure the race discrimination, the hostile work environment, the retaliation, and the emotional and psychological trauma, Plaintiff Calixte *was forced to resign* from her position on April 20,

2022" (NYSCEF Doc No. 1 at ¶ 102 [emphasis added]). The foregoing allegations in the complaint are sufficient to allege violations under NYSHRL and NYCHRL for retaliation.

D. *The Seventh Cause of Action*

The seventh cause of action asserted against the Employer Defendants is for retaliation in violation of the NYLL. NYLL § 215 (a) (1) provides that:

> "No employer or his or her agent . . . shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee *has made a complaint to his or her employer*, or to the commissioner or his or her authorized representative, or to the attorney general or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes *violates any provision of this chapter*, or any order issued by the commissioner . . ." (emphasis added).

The Second Department has held that "a plaintiff must allege that he or she complained about a specific violation of the Labor Law to support a claim of retaliatory discharge pursuant to Labor Law § 215[,]" yet the complaint need not identify the specific NYLL section that was violated (*see Epifani v Johnson*, 65 AD3d 224, 236 [2009]).

Here, the complaint sufficiently states a cause of action under Labor Law § 215 (a) (1) by alleging that Calixte was constructively terminated in April 2022 after making repeated complaints to her supervisor, defendant Feldman, regarding the Defendants' incorrect calculations of her wages and Feldman's refusal to address the compensation issues that Calixte raised. Defendant Feldman allegedly retaliated against Calixte for inquiring and complaining about her incorrect wage statements by threatening to fire her, speaking to her aggressively compared to her Caucasian colleagues and making offensive

and racially discriminatory references to slavery, until Calixte was allegedly forced to resign.

E. ***The Eighth Cause of Action***

The eighth cause of action asserted against the Employer Defendants is for wage statement violation of the NYLL on behalf of Calixte, individually, and on behalf of proposed class action members.

NYLL § 195 (3) requires that employers provide a statement with every payment of wages, listing information about the rate and basis of pay, including the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked. NYLL §195 (3) also specifically states that "[u]pon the request of an employee, an employer *shall furnish an explanation in writing* of how such wages were computed . . ." (emphasis added).

Here, the complaint alleges that the Employer Defendants violated NYLL § 195 (3) by failing to provide Calixte with accurate and complete wage statements in March and April 2022 with the requisite information. In addition, the complaint specifically alleges that Calixte repeatedly requested an explanation from defendant Feldman for how the Defendants calculated her wages to no avail. The complaint sufficiently alleges that the Employer Defendants failed to furnish Calixte with a written explanation of her wage statements, as explicitly required under NYLL § 195 (3).

However, the complaint's conclusory class action allegations in paragraphs 28-45 seeking to broadly assert a class action on behalf of "all current and former non-exempt

employees of Defendants, at any time six years prior to the filing of this action through the entry of judgment . . ." for the Employer Defendants' alleged violation of NYLL § 195 (3) is rejected. Not only is such a class overly broad, but there are no factual allegations in the complaint that the Defendants regularly failed to provide its employees, other than Calixte, with the requisite wage statement information in violation of NYLL § 195 (3). Accordingly, it is hereby

ORDERED that the Employer Defendants' dismissal motion (mot. seq. one) is only granted to the extent that: (1) the class action allegations in paragraphs 28 through 45 of the complaint are stricken and dismissed, and (2) that branch of the eighth cause of action that asserts a claim for violation of NYLL § 195 (3) *on behalf of a proposed class* is dismissed; the Defendants' pre-answer dismissal motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.