SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Imani Bayne

INDEX NO. 160086/2022

MOT. DATE

- v -

MOT. SEQ. NO. 001

The Loc God, Corp. et al

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).____
Replying Affidavits ECFS DOC No(s).____

This is an action for discrimination, retaliation, unpaid wages/overtime and negligence by a former employee of the defendant The Loc God Corp. ("LGC"). Defendants LGC, The LOC God Salon, Corp. ("LGSC"), Nia I. Menerville ("Menerville"), and Vertell Davis ("Davis") move to dismiss this action in part, preanswer, pursuant to CPLR § 3211[a][7]. Specifically, defendants move to dismiss the complaint against Davis, as well as plaintiff's discrimination claims, negligence-based claims, breach of contract and quantum meruit claims, intentional and negligent infliction of emotional distress claims and prima facie tort claims. Plaintiff opposes the motion except to the extent that she concedes to dismissal of her prima facie tort and quantum meruit claims. The court's decision follows.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The 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 (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

Defendant argues that plaintiff has not alleged sufficient facts to support the claims she has asserted against Davis pursuant to the New York State Human Rights Law ("NYSHRL"), Executive Law § 296 *et seq*, and the New York City Human Rights Law ("NYCHRL"), Admin Code § 8-107 *et seq.* In her complaint, plaintiff alleges that Davis "was and is a manager of LGC and LGSC", assigned plaintiff duties along with Menerville and otherwise carried out orders from Menerville re: plaintiff such as "tak[ing] Plaintiff's ipad away from her", being hostile and belligerent and physically intimidating plaintiff, and

Dated: 10/2/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☑ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

demanding that plaintiff return a company issued cellphone. At this stage of the litigation, plaintiff has alleged sufficient facts to support the allegations that Davis participated in conduct giving rise to the inference of discrimination and had more power than simply carrying out the personnel decisions of others (*see generally Patrowich v. Chemical Bank*, 63 NY2d 541 [1984]). For the same reasons, plaintiff's claims for violation of the Labor Law against Davis survive defendants' motion to dismiss. Accordingly, the motion as to Davis is denied.

Defendants next argue that plaintiff has failed to allege sufficient facts to support a prima faice cause of action for discrimination. A *prima facie* case of discrimination requires a showing by the plaintiff 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]). Only if these elements are satisfied will there be a rebuttable presumption of discrimination which the employer can then rebut by proving a legitimate, independent, non-discriminatory reason for the adverse employment action (*id.* citing *Ferrante v. American Lung Association*, 90 NY2d 623 [1997]; see also *McDonnell Douglas Corp. v. Green*, 411 US 792 [1973]). If the employer is successful, the burden then shifts back to plaintiff who must prove that the reason being offered is a pretext, and therefore false. Here, Plaintiff alleges that she is a female, was qualified for the position held, was treated differently and terminated due to her sex and was subjected to sexual harassment. These allegations are sufficient to survive defendants' motion.

To establish a claim of retaliation under the broad standards of the New York City Human Rights Law, Plaintiff must demonstrate: "(1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse action" (*Feingold v. New York*, 366 F.3d 138, 156 [2nd Cir, 2004]). Here, there is no dispute that plaintiff participated in a protected activity. Plaintiff claims that he suffered adverse employment actions which were a result of his complaints of discrimination. Based upon the court's review of the complaint, the court finds that plaintiff has alleged a prima facie case of retaliation by asserting a causal connection between her protected activity of complaining of discrimination and sexual harassment and asking for it to stop and the termination based on temporal proximity between the complaint and plaintiff's termination. Accordingly, the motion to dismiss plaintiff's retaliation claims is also denied.

Defendants next move to dismiss plaintiff's claim for ninth cause of action for negligent hiring, retention and supervision against LGC and LGSC. To establish this claim plaintiff must show "that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury" (*Norris v Innovative Health Sys., Inc.*, 184 AD3d 471, 472 [1st Dept 2020] [internal quotation marks and citation omitted]; see also *N. X. v Cabrini Med. Ctr.*, 280 AD2d 34, 42-43 [1st Dept 2001], *affd as mod*, 97 NY2d 247 [2002] ["[I]t is settled law that a necessary element of a negligent supervision claim requires a showing that the defendant knew of the employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure [and] failure to establish this element renders the tortious conduct unforeseeable as a matter of law" [citations omitted]). The court finds that contrary to defendants' contention, the complaint sufficiently alleges that the corporate defendants knew or should have known of its employees inappropriate conduct vis-à-vis complaints by plaintiff about Davis to Mennerville. Accordingly, this claim also survives defendant's motion. For the same reasons, the tenth cause of action for negligence based upon respondeat superior also survives.

A cause of action for intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Chanko v. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co.*, 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [is] utterly intolerable in a civilized community" (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

Meanwhile, a cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers plaintiff's physical safety or causes plaintiff to fear for his or her own safety (*Bernstein v. East 51st Street Development Co., LLC,* 78 AD3d 590 [1st Dept 2010] quoting *Sheila C. v. Povich*, *supra* at 130). A person "to whom a duty of care is owed ... may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations" (*Ornstein v. New York City Health and Hospitals Corp.,* 10 NY3d 1881 N.E.2d 1 [2008]).

In the First Department, a cause of action for negligent infliction of emotional distress must arise from "extreme and outrageous conduct" (see *Melendez v. City of New York*, 171 AD3d 566 [1st Dept April 18, 2019]; compare *Taggart v. Costabile*, 131 AD3d 243 [2d Dept 2015]; see also *Lau v. S & M Enterprises*, 72 AD3d 49 [1st Dept 2010]). "Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide" (*Wolkstein v. Morgenstern,* 275 AD2d 635 [1st Dept 2000] quoting *Rocco v. Town of Smithtown*, 229 AD2d 1034, appeal dismissed 88 NY2d 1065). Further, a cause of action for negligent infliction of emotional distress should generally not be allowed if it is duplicative of tort or contract causes of action (*Wofkstein*, *supra*).

A cause of action for negligent infliction of emotional distress must be based on allegations of conduct "so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community" (*Wolkstein, supra*, quoting *Hernandez v. City of New York*, 255 AD2d 202 [1st Dept 1998]).

At this stage of the litigation, plaintiff has alleged sufficient facts which would establish that the defendants engaged in conduct such as impersonating the plaintiff and demanding that plaintiff have sex with female customers which goes "beyond all possible bounds of decency" and is "utterly intolerable in a civilized community" as to be actionable (*Suarez v. Bakalchuk*, 66 AD3d 419 [1st Dept 2009] quoting *Murphy v. American Home Prods. Corp.*, 58 NY2d 293 [1983]). Accordingly, defendants' motion to dismiss plaintiff's intentional and negligent infliction of emotional distress claims is also denied.

The balance of the motion is granted to the extent that plaintiff concedes to dismissal of her claims for prima facie tort and quantum meruit. Accordingly, these claims are severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion to dismiss is granted only to the extent that plaintiff's claims for prima facie tort and quantum meruit are severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the parties in the above captioned matter are hereby directed to submit a proposed Preliminary Conference order on consent on or before November 15, 2023.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11:

Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at:

https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf

Proposed preliminary conference orders must be filed on NYSCEF. If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 10/2/23
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.