SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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DEANNA FLORES, ASHLEYANN BERRIOS,

Plaintiff,

- v -

DINOSAUR RESTAURANTS, LLC,ABC CORPS. 1-10, XYZ COMPANIES. 1-10, JANE & JOHN DOES 1-20

Defendant.

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INDEX NO. 656613/2022

MOTION DATE 08/28/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

Plaintiffs Deanna Flores ("Flores") and Ashleyann Berrios ("Berrios") (together, plaintiffs), former employees of Dinosaur Restaurants, bring this action on behalf of themselves and all others similarly situated, against defendants Dinosaur Restaurants, LLC. ("Dinosaur Restaurants"), ABC Corps. 1-10, XYZ Companies 1-10, and Jane and John Does, 1-20, (collectively "defendants"). Plaintiffs state that their supervisor Stephen Lloyd ("Lloyd") sexually harassed them and other employees at the Dinosaur Restaurants. Plaintiffs further claim that when they informed defendants of Lloyd's actions, defendants did not sufficiently address the issue, and plaintiffs and the putative class members were retaliated against either by Lloyd or other management.

Plaintiffs argue that defendants' failure to sufficiently and meaningfully remedy the situation constituted sexual harassment, a hostile workplace and retaliation, in violation of Executive Law § 290 et seq. of the New York State Human Rights Law, and Title 8 of the New York City Administrative Code, § 8-107. They filed the current motion to maintain the case as a class action pursuant to CPLR 901 and 902.

Dinosaur Restaurants filed a cross-motion to stay this action while its appeal of the court's denial of their motion to dismiss is determined. Alternatively, they argue that this case should not

be maintained as a class action because plaintiffs fail to meet their burden to certify a class under CPLR 901 and 902.

The motion and cross-motion are denied for the reasons stated below.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Dinosaur Restaurants operates a chain of barbeque restaurants across the State of New York, including Harlem (NYSCEF Doc. No. 1, Complaint, ¶ 4; NYSCEF Doc. No. 44, aff of Braddock, ¶ 2). Plaintiffs Flores and Berrios were employed by Dinosaur Restaurants at the Harlem location (NYSCEF Doc. No. 37, Braddock affirmation, ¶ 4). During the relevant time, plaintiffs attest that they were both supervised by Lloyd (NYSCEF Doc. Nos. 45-46, aff of Berrios and Flores respectively, at ¶ 6).

Plaintiffs attest that during their employment with defendants, Lloyd consistently called them and the purported class members sexually inappropriate names and made inappropriate comments (*id*., ¶ 7). Specifically, Lloyd would allegedly use terms such as "bitch," "whore," and "slut" on a regular basis when referring to employees and would engage in unwanted physical touching (*id.*, ¶ 10). Plaintiffs also attest that Lloyd called the male employees "sexy," made comments about the size of their genitalia, and engaged in unwanted physical touching (*id.*, ¶ 10). This allegedly created a hostile work environment for plaintiffs and the purported class members (*id.*, ¶ 11).

Plaintiffs and the purported class members complained about Lloyd's behavior to the general manager (*id.*, ¶ 12). However, plaintiffs attest that the general manager reviewed Lloyd's behavior superficially and merely asked him to stop, which Lloyd ignored (*id.*).

For instance, Flores filed a formal complaint against Lloyd on July 1, 2021 (NYSCEF Doc. No. 26, Sattiraju's affirmation, exhibit C). When Flores filed her formal complaint against Lloyd, she also sent a letter to Human Resources on July 4, 2021 informing them that she experienced a hostile work environment from another superior for filing her complaint against Lloyd (*id.*). In response, the Chief Operating Officer, Mike Nugent, reviewed Flores's complaint against Lloyd and determined, on July 8, 2021, that there was not enough evidence to take disciplinary action against him (NYSCEF Doc. No. 26, Sattiraju's affirmation, exhibit D). Mr. Nugent stated that he would instead monitor Lloyd's behavior and further informed Flores that her schedule could not be accommodated to avoid having the same shifts with Lloyd (*id.*).

Around the same time, on July 5, 2021, the Kitchen Director, Garth Caruso, who was working at the Harlem location, personally heard Lloyd state to an employee who worked in the kitchen, Sylvia Vasquez, that her "'rear end' bounced" when dicing the vegetables (NYSCEF Doc. No. 28, Sattiraju's affirmation, exhibit E). In response, an incident report was generated and Lloyd was admonished for his inappropriate behavior (*id.*).

Both plaintiffs aver that when complaints were filed against Lloyd, however, he would be overly stern and short with plaintiffs and the purported class members (NYSCEF Doc Nos. 45-46 respectively, ¶¶ 12, 14). They state that defendants did not take sufficient and meaningful action to stop Lloyd from sexually harassing and creating a hostile work environment, (*id.*, ¶¶ 13, 15), and as a result, they were made to feel that they either had to accept Lloyd's actions or risk losing their jobs (¶¶ 17, 21).

Lisa Braddock, the Chief Financial Officer of Dinosaur Restaurants, states that Berrios and Flores were employed as bartenders and servers at the Harlem location and did not work at any other locations (NYSCEF Doc. No. 37, ¶¶ 3-4). She also states that notwithstanding plaintiffs' allegations, Lloyd exclusively worked at the Harlem restaurant and his date of termination was September 10, 2021 (*id.*, ¶ 6).

Procedural History

Plaintiffs filed their summons and complaint on June 3, 2022. Dinosaur Restaurants answered the complaint on July 29, 2022. On December 19, 2022, Dinosaur Restaurants filed a motion to dismiss the class action claims on the ground that plaintiffs failed to timely move for class certification. On December 30, 2022, plaintiffs cross-moved for an order to extend their deadline to file their motion for class certification. On January 10, 2023, the court denied Dinosaur Restaurants' motion and granted plaintiffs' cross-motion.

On February 17, 2023, Dinosaur Restaurants filed a notice of appeal of the court's January 10, 2023 decision on their motion to dismiss the class action claims. Plaintiffs then filed the instant motion on March 2, 2023. Oral argument on the instant motion and cross-motion were held on August 28, 2023.

ANALYSIS

A. Dinosaur Restaurants' Cross-Motion to Stay the Case

Dinosaur Restaurants filed a cross-motion to stay the case, pursuant to CPLR § 2201, until its appeal of the court's January 10, 2023 decision on its motion to dismiss is resolved. Dinosaur

Restaurants argues that if the case is not stayed, it would suffer prejudice because its appeal can be dispositive of the case as a class action. It would thus be more economical to await the final determination of its appeal.

CPLR 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." "A trial court has 'broad discretion with respect to stays as prescribed by CPLR 2201'" (*Matter of Rockman v Nassau County Sheriff's Dept.*, 224 AD3d 757, 758 [2d Dept 2024] [citations omitted]). This broad discretion exists in "order to avoid the duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay" (*Trump v Trump*, 81 Misc 3d 1228[A], 2024 NY Slip Op 50023[U], *2 [Sup Ct, NY County 2024] [internal quotation marks and citation omitted]).

"A stay can be a drastic remedy, 'on the simple basis that justice delayed is justice denied. It should therefore be refused unless the proponent shows good cause for granting it'" (*660 Riverside Dr. Aldo Assoc. LLC v Marte*, 178 Misc 2d 784, 786 [Civ Ct, NY County 1998], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2201:7, at 11]). "[A] stay to await a definitive appellate determination is more readily granted when such appellate determination is 'imminent' (*Pludeman v Northern Leasing Sys., Inc.*, 2015 NY Slip Op 32047 [U], *2 [Sup Ct, NY County 2015]).

Applying the law to the facts at hand, Dinosaur Restaurants' cross-motion to stay the case pending its appeal is denied. Dinosaur Restaurants failed to make a showing that its appeal was perfected even though it indicated that it would perfect in its motion papers. There is also no showing by Dinosaur Restaurants that the appellate determination is imminent.

For all these reasons, Dinosaur Restaurants' cross-motion to stay the case is denied.

B. <u>Plaintiffs' Motion For Class Certification</u>

In their moving papers, plaintiffs seek to certify a class comprised of "[e]ach and every person employed by Defendant at any of its New York locations in which Stephen Lloyd performed work in any position on or after the date that is six years before the filing of the Complaint, between June 3, 2016 and March 2, 2023, regardless of current employment status" (NYSCEF Doc. No. 32, p. 5; *see also* plaintiffs' proposed Notice of Class Action). However, in their complaint, plaintiffs define the class to include "all employees of Defendants who worked

during the Class Period in location with Stephen Lloyd who were subject to sexual harassment" (NYSCEF Doc. No. 1, ¶7).

The Standard

Article 9 of the CPLR (Class Actions) "is modeled on Rule 23 of the Federal Rules of Civil Procedure, the policy of which 'is to favor the maintenance of class actions and for a liberal interpretation'" (*Pruitt v Rockefeller Ctr. Properties, Inc*, 167 AD2d 14, 20-21 [1st Dept 1991] [citation omitted]; *see also Gudz v Jemrock Realty Co., LLC.*, 105 AD3d 625, 626 [1st Dept 2013]; *City of New York v Maul,* 14 NY3d 499, 509 [2010]). "Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court" (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]). "While it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this 'inquiry is limited' and such threshold determination is not intended to be a substitute for summary judgment or trial" (*Kudinov*, 65 AD3d at 482 [internal citation omitted]; *see also Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010])). "Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman*, 74 AD3d at 422).

It is "[t]he party seeking class certification [that] bears the burden of establishing the criteria prescribed in CPLR 901(a)" (*Kudinov*, 65 AD3d at 481). "This burden must be met by providing an evidentiary basis for class certification" (*id.*). "General and conclusory allegations in the pleadings or affidavits are insufficient to meet" the burden of class action certification (*Nawrocki v Proto Const. & Dev. Corp.*, 27 Misc 3d 1211[A], 2010 NY Slip Op 50676[U], *3, [Sup Ct, NY County 2010], *affd* 82 AD3d 534 [1st Dept 2011], citing *Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]).

CPLR 901 (a) Requirements

"CPLR 902 states that a class action can only be maintained if the prerequisites promulgated by CPLR 901 (a) are met" (*Pludeman,* 74 AD3d at 421). Those prerequisites are (1) that the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable ("numerosity"), (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members ("commonality"), (3) the claims or defenses of the representatives parties are typical of the claims or defenses of the class ("typicality"), (4) the representatives parties will fairly and adequately protect the interests of the

class ("fair and adequate representation"), and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority") (CPLR 901).

The criteria under CPLR 901 (a) "should be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]). If the prerequisites set out in CPLR 901 (a) are met, plaintiffs must further show that the action is maintainable under CPLR 902.

Here, plaintiffs argue that they have met their burden of class certification based on the evidence on the record. They submit, among other documents, their affidavits in support of their motion to certify.[1] Nonetheless, as shown below, plaintiffs' motion to certify the class fails because the 'statements in their affidavits are "[c]onclusory assertions [and] are insufficient to satisfy the statutory criteria" of CPLR 901 (a), (*Pludeman*, 74 AD3d at 422).

1. Numerosity

Under CPLR 901 (a) (1), one or more members of a class may sue as representative parties on behalf of all if "the class is so numerous that joinder of all members, whether otherwise required or permitted is impracticable." Under New York law, "40 [is] the presumed threshold of numerosity for class certification" (*Agolli v Zoria Hous.*, LLC, 188 AD3d 514, 514 [1st Dept 2020]).

Plaintiffs argue that they met the numerosity argument because there are more than approximately 75 individuals in the class. Dinosaur Restaurants argues, among other things, that plaintiffs fail to meet the numerosity requirement because the statute of limitations for sexual harassment narrows down the time in which plaintiffs and the purported class can bring their claims.

Plaintiffs do not meet the numerosity element because the statute of limitations narrows the time frame in which plaintiffs can bring their claims and because plaintiffs fail to provide any

[1] In support of their motion to certify the class, plaintiffs initially submitted affirmations (NYSCEF Doc. Nos. 30-31), in violation of CPLR 2106. There is nothing in the record to indicate that either plaintiff is qualified to submit an affirmation instead of an affidavit, as they are not attorneys, physicians, osteopaths or dentists. Plaintiffs' affirmations are thus inadmissible under CPLR 2106 (*see also* NYSCEF Doc. No. 42-43, August. 28, 2023 letter to court annexing decision denying class certification in *Flores v Dinoaur Restaurants, LLC*, Sup Ct, NY County, Mar. 23, 2023, Bluth, J., index No. 656614/2022]). Nonetheless the court will consider the affidavits that plaintiffs and Dinosaur Restaurants submitted after the motion to certify was filed, since both plaintiffs and defendants have submitted them in attempt to rectify the deficiency of their affirmations that were initially filed.

evidentiary support to show that the purported class consists of approximately 75 individuals. Plaintiffs filed their complaint on June 3, 2022 and "the statute of limitations for claims under both the State and City Human Rights Law (HRL) is three years" (*Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [1st Dept 2016]; *see also* CPLR 214 [2]). Plaintiffs and the purported class thus cannot bring claims under the State and City Human Rights Laws that accrued prior to June 3, 2019. This raises the question of whether plaintiffs' assertions that the class comprises of approximately 75 members still stands because narrowing the time frame of the claims by three years may also narrow the number of employees allegedly affected by Lloyd's actions. Additionally, plaintiffs fail to provide any evidentiary support to satisfy the numerosity element.

2. Commonality

Commonality requires that "there are questions of law or fact common to the class which predominate over any question of only individual members" (CPLR § 901 [a] [2]). "In reaching this result, we recognize that commonality cannot be determined by any 'mechanical test' and that 'the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action'" (*City of New York v Maul*, 14 NY3d 499, 514 [2010]; *see also Maddicks v Big City Properties, LLC*, 34 NY3d 116, 125 [2019]). "Rather, it is 'predominance, not identity or unanimity,' that is the linchpin of commonality" (*id.*). "The Supreme Court of the United States held that 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation'" (*Alli v The City of New York*, 2024 NY Slip Op 31009[U], *8 [Sup Ct, Kings County 2024] [citations omitted]).

Plaintiffs argue that they meet commonality because the common questions of law and/or fact predominate over questions affecting individual class members. Defendants argue that plaintiffs have failed to offer evidence that common questions of fact or law predominate among the putative class members or that the questions can be determined by generalized proof.

Section § 296 [1] of Executive Law states in pertinent part that "[i]t shall be an unlawful discriminatory practice for an employer . . . because of an individual's . . . sex . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." An employer may be "held liable for a hostile work environment when it encouraged or acquiesced in the unwelcome sexual conduct by an employee or subsequently condoned the offending behavior" (*Franco v Hyatt Corp.*, 189 AD3d 569, 569-570 [1st Dept 2020]). "Under the City Human Rights

Law, gender discrimination rests on the broader consideration of whether a plaintiff has been treated less well than other employees because of his/her gender" (*id.* at 570).

Further, "[u]nder the State Human Rights Law, a claim for retaliation requires that (1) the employee has engaged in a protected activity, (2) of which the employer was aware, (3) the employee suffered an adverse employment action, and (4) there is a causal connection between the protected activity and the adverse action" (*id.* at 571). Under the City Human Rights Law, however, "the retaliatory act complained of need only be 'reasonably likely to deter a person from engaging in protected activity'" (*id.*; *see also* Administrative Code of City of New York § 8-107 [7]).

Here, plaintiffs fail to meet the commonality element because they do not provide sufficient factual evidence to show that there are questions of law or fact common to the class which predominate over any question of only individual members.

First, plaintiffs fail to provide any factual basis that the purported class is sufficiently cohesive. "Sexual harassment occurs when such unwelcome sexual conduct is the basis, either explicitly or implicitly, for employment decisions affecting compensation or the terms, condition or privileges of employment" (*Franco*, 189 AD3d at 569). The nature of plaintiffs' claims, of sexual harassment and hostile work environment, thus would require fact specific inquiries in each purported class members' experience, including plaintiffs', as to whether Lloyd's actions and comments were unwelcome and whether plaintiffs and each member of the purported class was treated less well than other employees because of their gender. The inquiry would also require determining the steps that defendants took or did not take to address each complaint from the purported class members and whether their actions were sufficient to address Lloyd's alleged misconduct.

Second, plaintiffs' differing definitions of the class in their moving papers and their complaint call into question whether commonality has been satisfied. In a class action, "the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative" (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 71 [2d Dept 2006]). If the definition of the class in the moving papers stands, it would include individuals who worked with Lloyd but were not subject to the alleged sexual harassment or a hostile work environment, as there is no nonconclusory evidence in the record to demonstrate that every person

who ever worked with Lloyd was sexually harassed. In other words, this overbroad definition would encompass employees of defendants who would have little connection with the claims being litigated here. If the definition of the class in the complaint stands, then only employees who were subject to the alleged sexual harassment by Lloyd would be included in the class. Plaintiffs thus fail to clearly define the class that they seek to certify so as to establish commonality.

Plaintiffs' definition of the class is further overbroad because they fail to provide evidentiary basis that the purported class includes employees who worked with Lloyd at any of its Dinosaur Restaurants' locations. Plaintiffs conclusorly state in their affidavits that Lloyd worked at locations other than Harlem, but they fail to provide any factual basis to support such statements. It is defendant's evidence of Lloyd's payroll records that demonstrates that, during the relevant time, Lloyd worked exclusively at the Harlem location (NYSCEF Doc. No. 37, ¶¶ 9-10; *see also* NYSCEF Doc. No. 38). Plaintiffs thus do not meet their burden to show that the purported class includes any employees who worked at locations other than Harlem.

Additionally, plaintiffs' statements in their affidavits are conclusory, which is not sufficient to meet their burden to certify. In their affidavits, which appear to be almost identical, plaintiffs attest in vague, conclusory statements that Lloyd sexually harassed them on a regular basis without further specification.

While plaintiffs generally state that the purported class members were also sexually harassed by Lloyd on a regular basis, they fail to submit any supporting affidavits from any of these purported class members. "Such a dearth of evidence means that the existence of potential class members [. . .] remains entirely speculative at this point and does not meet even the liberal standard for granting class certification" (*see Aldape v Ocinomled, Ltd*, 79 Misc 3d 1235[A], 2023 NY Slip Op 50811[U], *3 [Sup Ct, NY County 2023]. Similarly, plaintiffs' affidavits fail to identify one single incident, by providing a date or a time or a single name of a male employee who was subject to Lloyd's sexual harassment, despite their statements that male employees are part of the purported class.

In light of the foregoing, the court need not address the other elements under CPLR 901 (a), and the motion to certify is denied.

The court has considered the parties' remaining contentions and finds them unavailing.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs Deanna Flores and Ashleyann Berrios's motion to certify the class is denied; and it is further

ORDERED that defendant Dinosaur Restaurants, LLC.'s cross-motion to stay the proceeding while their appeal is pending is denied.

This constitutes the decision and order of the Court.

5/10/2024
DATE

RICHARD G. LATIN, J.S.C.

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