

Higgins v Gladstone Gallery LLC

2024 NY Slip Op 31733(U)

May 14, 2024

Supreme Court, New York County

Docket Number: Index No. 150934/2022

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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LAURA HIGGINS,

Plaintiff,

- v -

GLADSTONE GALLERY LLC, BARBARA GLADSTONE,
MAX FALKENSTEIN

Defendants.

-----X

INDEX NO. 150934/2022

MOTION DATE 03/23/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

Plaintiff commenced this action for retaliation under the New York City and State Human Rights Law (NYCHRL and NYSHRL, respectively) and New York Labor Law, defamation, assault, intentional infliction of emotional distress, against defendants, Gladstone Gallery LLC (Gallery), Barbara Gladstone (Gladstone) and Max Falkenstein (Falkenstein) (collectively, defendants), stemming defendants alleged misconduct and termination of plaintiff’s employment with the Gallery. Defendants now move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint. The motion is opposed. For the following reasons, the motion is denied.

BACKGROUND AND FACTUAL ALLEGATIONS

In the original complaint, plaintiff alleged that she began her employment with Gallery in September 2016 as a manager. Plaintiff reported directly to Gladstone, the owner and president of the Gallery, and Falkenstein, the Gallery’s senior partner. Plaintiff’s work responsibilities included maintaining calendars, attending meetings, and overseeing art exhibitions. At some point, plaintiff started complaining about irregularities in the payroll system. According to plaintiff, Stacey Tunis, the Gallery’s financial director, admitted to plaintiff that the Gallery had mishandled funds. Plaintiff further alleges that she complained to Gladstone, but that he ignored plaintiff’s complaints and did not address the issue. Plaintiff also alleged that defendants: paid male employees more than female employees, even when the male employees worked in lower-level positions; hired a black person for an assistant role, instead of a white person, for no other reason than their skin color; and ignored an accusation by a lesbian employee that she was discriminated against based on her sexual orientation.

Plaintiff alleged that after she made the above complaints, Gladstone began a retaliatory campaign to ruin plaintiff, through harassment and bullying. On October 20, 2020, Gladstone

allegedly threw a Gallery book at her. On July 7, 2021, Falkenstein held a meeting with plaintiff, during which he stated that her interactions with Gladstone had become contentious and that their conflicts had put him in the middle of their disputes. When plaintiff attempted to explain that Gladstone's behavior was in retaliation against her for complaining about payroll violations and discrimination, Falkenstein accused her of "pulling the victim card." The next day, plaintiff tendered her resignation to Falkenstein. On July 9, 2021, plaintiff told Falkenstein that she was ambushed at the July 7 meeting. In response, he told her that her performance was "sub-par." The complaint refers to her termination as a "constructive discharge."

Shortly after that, plaintiff interviewed for a job at the George Condo Studio (Studio). Around July 16, 2021, Studio offered her a position. Plaintiff was supposed to start work on August 2, 2021, but the Studio rescinded the offer around July 28, 2021, the day after her "onboarding meeting." Plaintiff alleged that "upon information and belief" that Gladstone defamed her to George Condo, Studio's owner, and this was the reason Studio withdrew the offer.

The original complaint contained seven causes of action. The first and second causes of action were for retaliation under the NYCHRL and NYSHRL, respectively. The third cause of action alleged intentional infliction of emotional distress. The fourth cause of action alleged defamation. The fifth cause of action alleged assault. The sixth cause of action alleged prima facie tort as an alternative to the third and fifth causes of action. And the seventh cause of action alleged retaliation under New York Labor Law § 215 of the New York Labor Law.

Defendants moved to dismiss the complaint based on the statute of limitations and failure to state a cause of action. Plaintiff opposed the motion and cross-moved for leave to amend the complaint. By decision dated January 10, 2023, the Court dismissed the third and fifth causes of action as untimely. The Court dismissed the fourth cause of action for failing to specify the nature of the defamation. The Court upheld the other causes of action, those related to retaliation and the prima facie tort. The Court also granted plaintiff's cross-motion to amend the complaint. The proposed amended complaint includes additional allegations supporting her retaliation claims.

Defendants served another pre-answer motion to dismiss the complaint on the grounds that the amended causes of action fail to state a cause of action. While acknowledging that plaintiff intended to allege additional statements in the amended complaint to strengthen her claims, defendants contend that plaintiff failed to identify a protected activity in which she indulged for purposes of seeking relief based on retaliation. Moreover, defendants argue that plaintiff failed to causally connect the allegations brought against them to any protective activity. They argue that plaintiff failed to sufficiently allege an adverse employment action in her amended complaint. Defendants further contend that the prima facie tort cause of action should be dismissed because plaintiff failed to allege that disinterested malevolence was the sole motivation and failed to plead special damages. Defendants also contend that this cause of action is a reiteration of the dismissed defamation claim.

In opposition, plaintiff argues that she has identified the protected activity and alleged sufficient details that would connect defendants' conduct to said activity. Plaintiff also contends

that defendants are making similar arguments to those when they previously moved for dismissal of the original complaint and should be precluded under the law of the case. Plaintiff contends that she has alleged an adverse employment action in the amended complaint. Plaintiff further argues that the Court already upheld the disinterested malevolence motive in its previous decision and that this cause of action is duplicative of the defamation claim. Finally, plaintiff argues that her allegation of loss of employment with the Studio is sufficient to allege special damages.

DISCUSSION

The law of the case doctrine generally precludes relitigating an issue decided in an action where there previously was a full and fair opportunity to address the issue (*Town of Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept 2012]).

Initially, the Court already decided defendants' arguments that plaintiff failed to plead malice in support of her claim for prima facie tort. In considering the prima facie tort cause of action, the Court concluded in the prior decision that although the term "disinterested malevolence" was not mentioned in the original complaint, there were enough allegations indicating that Gladstone's conduct toward plaintiff revealed a malicious motive. The Court also held that the proposed amended complaint clarified the malicious motive. Thus, as the issue concerning defendants' malice was already addressed in the prior decision, the law of the case precludes the Court from relitigating that argument.

On the other hand, defendants' argument that plaintiff's claim for prima facie tort should be dismissed on the basis that the complaint fails to plead special damages was not previously decided by the Court. The prior decision held that defendants' arguments for dismissing this claim based on lack of special damages and duplication were first raised in their reply papers and were thus not subject to analysis and resolution, and therefore, not precluded by the law of the case doctrine. The Court further finds that the prima facie tort claim is not duplicative of plaintiff's dismissed defamation claim, as it is based on alleged independent tortious conduct.

In support of defendants to dismiss plaintiff's claim for prima facie tort, defendants reiterate their argument that plaintiff failed to allege special damages. Plaintiff's allegation that defendants caused Studio to rescind her employment there, resulting in lost wages, is sufficient to allege special damages (*see Diorio v Ossining Union Free Sch. Dist.*, 96 AD3d 710, 712, [2d Dept 2012]; *Starishevsky v Parker*, 225 AD2d 480, 480 [1st Dept 1996]). Accordingly, the branch of defendants' motion to dismiss plaintiff's claim for prima facie tort is denied.

On a motion to dismiss pursuant to CPLR 3211(a)(7), 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]).

The remaining causes of action involve retaliation pursuant to the NYCHRL, NYSHRL Labor Law § 215. A plaintiff makes a prima facie case for retaliation under the NYCHRL by

showing that “(1) [plaintiff] engaged in a protected activity by opposing conduct prohibited thereunder; (2) defendants were aware of the activity; (3) [plaintiff] was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action” (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]). Under the NYCHRL, “the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant ‘took an action that disadvantaged’ him or her” (*Harrington v City of New York*, 157 AD3d 582 [1st Dept 2018]).

In the amended complaint, plaintiff alleges that she complained to Gladstone on three occasions about conduct violating New York State and City laws: the disparity of pay between male and female employees, reverse discrimination, and an employee subject to sexual orientation discrimination.

Here, plaintiff alleges a claim for retaliation under both the NYCHRL and NYSHRL. The amended complaint alleges, in detail, incidents meant to constitute retaliatory conduct in response to her complaints, including additional incidents and specific statements allegedly made by defendants related to the claims of retaliation. This includes Falkenstein’s reactions to plaintiff’s comments about Gladstone’s treatment of her, and Gladstone’s effort to undermine her post-employment prospects with Studio. Indeed, the amended complaint alleges how Gladstone’s treatment of plaintiff deteriorated after she complained to Gladstone about certain violations of the law. For example, plaintiff alleges that after she reported defendants’ alleged violation of the labor laws, defendants made it appear as if she was unable or unwilling to perform her work, including by excluding her from meetings on tasks relevant to her duties. Plaintiff also alleges a causal connection between her protected activity and defendants’ conduct. Plaintiff asserts that one month prior to, and only a few days before her constructive discharge, she raised the issue of pay disparity between male and female employees to Falkenstein and Gladstone. Thus, plaintiff alleges that she was engaged in a protected activity, and defendants were aware of that activity (*see Farmer v Shake Shack Enterprises, LLC*, 473 F. Supp. 3d 309, 331 [SD NY 2020] [“When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication virtually always constitutes the employee’s opposition to the activity”]). The amended complaint, which provides more specific dates and time frames as well as more incidents of defendants’ conduct than the original complaint, has made out causes of action related to retaliation. Accordingly, defendants’ motion to dismiss plaintiff’s claims pursuant to the NYCHRL and NYSHRL is denied.

To state a claim for retaliation under New York Labor Law § 215, a plaintiff must allege that, while employed by an employer, the employee made a complaint about the employer’s violation of New York Labor Law and, as a result, was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action (*Day v Summit Sec. Servs. Inc.*, 53 Misc. 3d 1057, 1061 [Sup Ct., New York County 2016], *affd*, 159 AD3d 549 [1st Dept 2018]). The cause of action for retaliation under the Labor Law involves retaliatory actions related to plaintiff’s protected activity of complaining about pay disparity based on gender, which violates the Labor Law. As discussed in the above, plaintiff alleges a series of incidents constituting retaliatory actions by defendants stemming from plaintiff’s complaints. Thus, the

branch of defendants' motion to dismiss plaintiff's claim under New York Labor Law § 215 is denied.

Accordingly, it is hereby,


ORDERED that defendants' motion to dismiss the amended complaint is denied; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days; and it is further

ORDERED that defendants shall serve and file their answer to the amended complaint within twenty (20) days of the receipt of this decision and order with notice of entry.

This constitutes the decision and order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

5/14/2024
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE