

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. Justice

PART 17

Index Number : 160830/2013
EDWARDS, DILEK
vs
NICOLAI, CHARLES V
Sequence Number : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 12, were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits Memorandum of Law - 2
ITs Memorandum of Law - 3 Declaration of ITs Counsel - 4 Exhibit A - 5
Answering Affidavits - Exhibits
Memorandum of Law - 6
Replying Affidavits
Letter Submission by ITs Counsel 4/16/14 - 7; Letter Submission by Ds Counsel 4/16/14 - 8
Letter Submission by Counsel 5/19/14 - 9; Letter Submission ITs Counsel 5/20/14 - 10
Upon the foregoing papers, it is ordered that this motion is

No(s) 1-2
No(s) 3-5
No(s) -6
Nos. 7-10
Nos. 11-12

Decided in accordance with the attached Decision/Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 11, 2016

Signature line, J.S.C.

SHLOMO HAGLER

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

DILEK EDWARDS,

Plaintiff,

- against -

CHARLES V. NICOLAI and
STEPHANIE ADAMS,

Defendants.

Index No.: 160830/2013

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiff Dilek Edwards ("Edwards") seeks to recover damages for alleged employment discrimination based on gender, and for defamation to the extent her claim is based on an allegedly false police report filed by defendant Stephanie Adams ("Adams").¹ Defendants make this pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Plaintiff opposes the motion.

Background

The following factual allegations are taken from plaintiff's Amended Complaint, and are presumed to be true for purposes of this motion.

Plaintiff Edwards was employed as a yoga and massage therapist by Wall Street Chiropractic and Wellness ("WSCW"), located at 75 Wall Street in lower Manhattan, from April 2012 to

¹At oral argument on March 31, 2014, and in plaintiff's Memorandum of Law in Opposition, plaintiff has withdrawn the prong of her defamation claim relating to statements allegedly made by Adams to the New York Post (Tr. of Oral Argument, dated March 31, 2014 at 34; plaintiff's Memorandum of Law at 8, fnt. 4).

October 2013 (Notice of Motion, Exhibit "A" [Amended Complaint, ¶¶ 3, 11, 25]). Defendant Charles V. Nicolai ("Nicolai") is co-owner of WSCW, and oversees all of the chiropractic and therapeutic services provided by WSCW (*Id.* at ¶¶ 4, 5). He hired plaintiff, trained her, oversaw her work, and fired her (*Id.* at ¶¶ 5, 25). Defendant Adams is co-owner and chief operating officer of WSCW and is married to Nicolai (*Id.* at ¶¶ 6, 17).

Throughout the period of her employment at WSCW, plaintiff's work was praised by Nicolai. Although he told her, in June 2013, that his wife might become jealous of her because she was "too cute," plaintiff maintained a strictly professional relationship with him (*Id.* at ¶¶ 18-20). Plaintiff met Adams only one time, at the WSCW office, and their meeting was cordial (*Id.* at ¶ 21).

On October 29, 2013, at approximately 1:15 a.m., plaintiff noticed a missed call on her personal phone from Adams. Approximately fifteen minutes later, plaintiff received a text message from Adams "out of the blue", which stated that she wanted to make it clear to plaintiff that "[y]ou are NOT welcome any longer at Wall Street Chiropractic, DO NOT ever step foot in there again, and stay the [F...] away from my husband and family!!!!!!! And remember I warned you" (*Id.* at ¶¶ 22-24). The following day on October 30, 2013, at approximately 9:00 a.m., plaintiff received an email from Nicolai, which stated: "You are fired and no longer welcome in our office. If you call or try to come back, we will call the police" (*Id.* at ¶ 25). Plaintiff

subsequently tried to call the WSCW office, but discovered that her number was blocked. Plaintiff was too afraid to collect her personal belongings from WSCW's office (*Id.* at ¶¶ 26, 29).

In addition, on October 30, 2013, Adams filed a complaint with the New York City Police Department, claiming that plaintiff made threatening phone calls and threatened to come to the WSCW office. Adams further reported that this so alarmed her that she changed the locks to her home and office (*Id.* at ¶¶ 33, 36). The Amended Complaint alleges that Adams' statements were false, that Adams knew the statements to be false and that these statements were made with the intent of harming plaintiff (*Id.* at ¶¶ 34-35, 39). Plaintiff contends, rather, that what actually occurred was that Nicolai changed the locks to his office, where he was temporarily staying, because he was afraid of Adams, who had raged at him about her suspicions of plaintiff (*Id.* at ¶ 38).

Plaintiff commenced the instant action in December 2013, alleging two causes of action against Nicolai and Adams for "Gender Discrimination - Sexual Harassment and Wrongful Termination," in violation of the New York State Human Rights Law (Executive Law § 290 et seq.) ("NYSHRL"), and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code § 8-101 et seq.]) ("NYCHRL"); and a third cause of action against Adams for defamation. At oral argument on the instant motion, on the record, plaintiff withdrew any hostile work environment claim (Tr. of Oral Argument, dated March

31, 2014 at 34). See also Plaintiff's Memorandum of Law at 8. To the extent that plaintiff suggested at oral argument that a quid pro quo sexual harassment claim may still exist (Tr. of Oral Argument, dated March 31, 2014 at 33), plaintiff offers no argument in support of that claim, and her opposition papers make clear that her claim here is for wrongful termination based on gender. See Plaintiff's Memorandum of Law in Opposition to Defendants' Motion, at 8.

Motion to Dismiss

It is well settled that on a CPLR 3211 (a) (7) motion to dismiss addressed to the facial sufficiency of the complaint, the pleadings are to be liberally construed (see CPLR 3026), and "[t]he scope of the court's inquiry . . . is narrowly circumscribed" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept. 2003]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y.*, 8 AD3d 99, 99 [1st Dept. 2004]). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs 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]). "[T]he court must accept as true not only 'the complaint's material allegations' but also 'whatever can be reasonably inferred therefrom' in favor of the pleader" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d at

375-376 (citation omitted); *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). However, as stated in *SWR Assocs. v Bellport Beach Prop. Owners*, 129 AD2d 328 [2d Dept 1987]:

The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings . . . does not apply to allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence.

(129 AD2d at 331 [citations omitted]:)

In opposition to such a motion, "a plaintiff may submit affidavits 'to remedy defects in the complaint' and 'preserve inartfully pleaded, but potentially meritorious claims'" (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362 [1998] quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976]).

Discrimination under the NYSHRL and the NYCHRL

Under both the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or otherwise to discriminate against an individual in the terms, conditions or privileges of employment because of, as pertinent here, the individual's sex or gender. See Executive Law § 296(1)(a); Administrative Code § 8-107(1)(a).² Both the NYSHRL and the NYCHRL also require that

²"Sex" and "gender" generally are considered to be interchangeable terms for purposes of the human rights laws. See *DeCintio v Westchester County Med. Ctr.*, 807 F2d 304, 306 [2d Cir 1986], cert denied 484 US 965 [1986].

their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130. Further, the NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) ("Restoration Act"), "explicitly requires an independent liberal construction analysis in all circumstances . . . targeted to understanding and fulfilling . . . the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws" *Williams v New York City Housing Authority*, 61 AD3d at 66. See Administrative Code §. 8-130; *Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept. 2011]; *Nelson v HSBC Bank USA*, 87 AD3d 995, 996-997 [2d Dept. 2011]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (state law provides greater disability protection than federal law and city law provides even broader disability protections than the state).³

In addition, employment discrimination claims are assessed "under a particularly relaxed "notice pleading" standard. *Krolick v Natixis Sec. N. Am. Inc.*, 36 Misc 3d 1227(A), *5, 2011 NY Slip Op. 52525(U) (Sup Ct, NY County 2011), quoting *Vig v New*

³Section 8-107(1)(a) of the NYCHRL provides that "it shall be an unlawful discriminatory practice: (a) for an employer....because of the actual or perceived...gender...of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment."

York Hairspray Co., L.P., 67 AD3d at 145 [1st Dept. 2009]. Under that standard, "a plaintiff alleging employment discrimination 'need not plead [specific facts establishing] a prima facie case of discrimination' but need only give 'fair notice' of the nature of the claim and its grounds." *Vig v New York Hairspray Co., L.P.*, 67 AD3d at 145, quoting *Swierkiewicz v Sorema, N.A.*, 534 US 506, 514-515 (2002). See *Krzyzowska v Linmar Constr. Corp.*, 2014 WL 4787283, *8 (Sup Ct, NY County 2014).

To state a claim for employment discrimination, a plaintiff must allege that she is a member of a protected class, that she was discharged from a position for which she was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination. See *Rainer N. Mittl Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003] (under the NYSHRL); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept. 2012] (under the NYCHRL).

Applying the above standards, plaintiff's Amended Complaint alleging claims of gender-based discrimination under the NYSHRL and NYCHRL, given every favorable inference, is insufficient to withstand a pre-answer motion to dismiss.⁴

Plaintiff's Allegations in the Amended Complaint of Discrimination based on Jealousy

The first two causes of action allege that defendants

⁴Plaintiff has failed to submit any affidavits in opposition to defendants' motion to dismiss.

