SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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SHERINA THOMAS,

Index Number: 158961/13

Plaintiff,

Motion Sequence Numbers: 1 and 2

- against -

Decision and Order

EONY LLC and DAVID SHAVOLIAN,

Defendants.

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Arthur F. Engoron, Justice

Motions One and Two are consolidated for disposition and disposed of as follows:

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1-4, were used on these parallel motions to dismiss, pursuant to CPLR 3211(a)(7), for failure to state a cause of action:

Papers Numbered:

Moving Papers (Motion 1) 1
Moving Papers (Motion 2) 2
Opposition Papers 3
Reply Papers 4

Upon the foregoing papers, the motions to dismiss are denied.

Background

Plaintiff Sherina Thomas alleges in the instant complaint that defendant David Shavolian, owner of defendant EONY LLC, plaintiff's employer, sexually harassed her in the following ways:

1. insisted that plaintiff "stand right next to him [in restrooms] while he urinated" (¶ 22);

2. asked plaintiff to "take a look" at his anal rash (¶ 25);

3. called plaintiff into his office while his pants were down and his penis exposed, and told plaintiff "to help him put lotion on his penis" (¶ 26);

4. told plaintiff, "[Y]our ass is so big. Do you prefer oral or traditional missionary sex?" (¶ 27);

5. begged plaintiff "to get pictures of female genitalia for him to view" (¶ 28);

6. propositioned plaintiff "for oral sex" (¶ 29);

7. conditioned extra salary on succumbing to his "sexual advances" (¶ 34);

8. all in all, "constructively terminat[ing]" plaintiff's employment (¶ 39).

She also claims that these actions disgusted her and that she complained about and objected to them. E.g., ¶¶ 29, 31. Her complaint claims that defendants violated NY Executive Law § 296(1), prohibiting, inter alia, discrimination based on gender in hiring, firing or conditions of employment (first cause of action); violated NY Executive Law § 296(7), prohibiting, inter alia, discrimination based on retaliation against a person who opposes any forbidden practice (second cause of action); violated Administrative Code of the City of New York § 8-107(1), prohibiting, inter alia, discrimination in hiring or firing based on gender (third cause of action); violated Administrative Code § 8-107(1)(e), prohibiting retaliation for opposing any forbidden practice (fourth cause of action); violated Administrative Code § 8-107(13), essentially imposing liability upon employers who are aware of the forbidden practices of their employees and do not prevent them (fifth cause of action); violated Administrative Code § 8-107(19), imposing liability for coercing, intimidating, threatening, or interfering with anyone attempting to exercise the rights protected by the aforesaid provisions (sixth cause of action); and intentionally inflicted emotional distress on plaintiff (seventh cause of action).

Defendants moved, pursuant to CPLR 3211(a)(7), to dismiss on the ground that the complaint fails to state a cause of action. Subsequently, plaintiff filed a federal action based on the same facts alleged herein and, after that, filed a Notice of Voluntary Discontinuance of this case.

Discussion

This Court is aghast that any attorney would, with a straight face, claim that the conduct alleged (which, solely for purposes of this motion, is deemed to be true) does not fit squarely within the City and State anti-discrimination and anti-harassment laws. Talk about a hostile work environment! If defendants are correct, these laws, and similar ones throughout the country, would have to be scrapped as ineffective and rewritten from scratch. Based on the totality of the complaint, including matters not mentioned above, defendant Shavolian seems to have hired plaintiff principally so that he could sexually harass her, and, once she was beholden to him for her employment, to have followed through completely.

Interestingly, if plaintiff is to be believed, Shavolian showed his true colors well before he hired her, and, conceivably, plaintiff accepted employment with the idea of bringing this lawsuit. Be that as it may, the City and State have made clear that the conduct alleged is unacceptable in the workplace and have imposed liability for it (and, in this Court's humble opinion, rightfully so).

Plaintiff's intentional infliction of emotional distress claim is a much closer call. It is somewhat a judicially disfavored claim, and the conduct must be, in a word, "outrageous." However, all things considered, including the explicit sexuality, the urinating in proximity, the exposed penis, and the employment relationship (prior to said relationship, Shavolian fondled plaintiff's breast and asked her, "Do you shave or wax your pussy?"), this Court finds that plaintiff has stated a claim sufficiently to withstand a motion to dismiss.

The sole argument plaintiff propounds against the motion to dismiss is that the motion is moot, as plaintiff has since voluntarily discontinued the action. See generally, CPLR 3217(a)(1). Although this Court might have found that argument persuasive if it were asserted on a clean slate, it is foreclosed by such cases as BDO USA, LLP v Phoenix, 113 AD3d 507, 511 (1st Dept 2014) (notice [to discontinue] untimely because … served … after defendants filed their motions to dismiss"). Thus, ironically, the motion to dismiss is denied on its merits, an argument plaintiff does not assert, and is not denied on the procedural ground that plaintiff does assert.

Conclusion
Motion denied.

Dated: May 22, 2014

Arthur F. Engoron, J.S.C.