SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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MAIRENY RODRIGUEZ,

Plaintiff,

-against-

DECISION / ORDER
Index No. 21149/2015E

ZEE BROTHERS, INC.., et als.,

Defendants

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The following papers numbered 1 to 9 read on the below motion noticed on August 15, 2016 and duly submitted on the Part IA15 Motion calendar of **January 23, 2017**:

Papers Submitted	Numbered
Def. Notice of Motion, Memo of Law, Exhibits	1,2,3
Pl.'s Memo. of Law in Opp., Aff., Exhibits	4,5,6
Def.'s Aff. In Reply, Memo of Law, Exhibits	7,8,9

Upon the foregoing papers and after oral argument, the defendants Zee Brothers, Inc. ("Zee Brothers"), Eli Grego ("Grego"), Alex Ramos ("Ramos"), and Joseph Zeitoune ("Zeitoune")(collectively, "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Maireny Rodriguez ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This action sounding in employment discrimination and sexual harassment arises out of Plaintiff's employment with defendant Zee Brothers, a clothing store in the Bronx. Plaintiff allegedly began working there as a "helper" in October 2014 with varying work hours. Plaintiff claims that she reported to a number of different managers at Zee Brothers, including "Annalise," "Sam," and co-defendant Ramos. According to the complaint and Plaintiff's deposition testimony, Ramos sexually harassed Plaintiff on an ongoing and pervasive basis. Plaintiff alleged that Ramos would make inappropriate sexual remarks throughout the day. On one occasion, Ramos told Plaintiff "[g]ive me a kiss. Nobody else is going to know." On another occasion, when Plaintiff arrived late for work, Ramos told her "We can resolve the matter. If you

give me a kiss, you won't have to work as hard. It won't be as rough for you. If you need to come in late, it won't be a problem for you." Ramos also demanded that Plaintiff take a cab with him to a nearby hotel to have sex. Plaintiff also alleged that after rejecting these advances, Ramos would only become more aggressive and put his hands on Plaintiff's arm. On other occasions, he would place his hands on Plaintiff's waist from behind, and then allowed his hands to rise up her back towards her neck, while offering a massage.

Shortly after Plaintiff began working at Zee Brothers, she discovered that she was pregnant. Plaintiff notified one of her supervisors (Sam, Annalise, and Ramos) by allegedly providing a doctor's note stating that Plaintiff could work during her pregnancy. In response, Zee Brothers allegedly denied Plaintiff's requests to adjust her work schedule to attend prenatal appointments. In addition, Ramos made certain comments to Plaintiff, including "If I was you, I would get rid of it. I would have an abortion;" "We don't need you anymore. Pregnant women are worthless;" "You are not worth anything to this store with that belly;" "We don't even know why you're having a kid;" "You'll go through a lot of changes;" and "You're a bum." Plaintiff further alleges that another Zee Brothers employee, "Davi" was seemingly aware of this harassment and told Ramos "You don't know how much trouble you could get in for harassing a pregnant woman. You're violating the laws." Plaintiff states that she complained to Ramos and Annalise about this conduct. Ramos did not let her speak with the owners of Zee Brothers - co-defendants Grego and Zeitoune. Plaintiff alleges that nothing was done in response to her complaints. In particular, Annalise mocked her complaints and told her that Ramos was only fooling around.

Plaintiff alleges that in January 2015, Ramos fired her. Plaintiff thereafter commenced this action against the Defendants, asserting causes of action for employment discrimination, retaliation and hostile work environment in violation of New York State Human Rights Law, N.Y. Exec. Law §290, et seq. ("New York State HRL"), as well as New York City Human Rights Law, N.Y. Admin. Code §8-101, et seq. (New York City HRL"), as well as causes of action for intentional infliction of emotional distress and assault and battery.

Defendants now move for summary judgment, dismissing Plaintiff's complaint in its entirety. Defendants submit an affidavit from Grego, who states that he is a co-owner of Zee

Brothers. Grego contends that Plaintiff was not terminated. Instead, she "took it upon herself to not return to work." Grego further states that co-defendant Ramos lacked any authority to fire employees. Plaintiff simply did not return to work, until one day in January 2015 when she came to the store and secretly recorded a conversation with Ramos. Grego asserts that Plaintiff never complained to him about any improper treatment, and she admitted as such at her deposition. Grego claims that Plaintiff was a former employee with varying hours, as reflected in payroll and timecard records that Defendants include with their motion papers. Grego further states that, contrary to Plaintiff's contentions, Zee Brothers has had other pregnant employees and their pregnancy has never been an issue with the company. Furthermore, Ramos is a long-trusted employee who, the best of Grego's knowledge, had no record of discipline or prior complaints. Grego asserts that there was a posted sign at Zee Brothers stating in sum and substance that if any employee had a problem they should contact the designated phone number. Grego believes that Plaintiff was aware of this sign but she never complained to him or anyone else about improper treatment. Plaintiff's claim to the effect that Grego and Zeitoune "insured that [Ramos] would not be disciplined" is baseless because Plaintiff admitted that she never filed a complaint. Grego goes on to refute specific allegations in Plaintiff's complaint, and he asserts that Plaintiff is without any evidence to substantiate her claims.

Defendants also submit an affidavit from Ramos, who asserts at the outset that he had no authority to hire or fire employees. Ramos notes that he became a supervisor at Zee Brothers beginning in January 2015, and he was Plaintiff's supervisor for a period of about five days. Even during this period, Plaintiff generally received daily job instruction from Yeneris Gomez. Ramos claims that at some point in December 2014 and the beginning of 2015, Plaintiff began to complain to him and Gomez about activities that Plaintiff's doctor told her she could not do because she was pregnant. Eventually, on January 11, 2015, Plaintiff "volunteered that she would return to work with a doctor's note" and at no point did anyone threaten to fire her if she did not bring a note in. Plaintiff, however, never brought in a doctor's note and never returned to work. Plaintiff was not terminated. If anything, the company tried to accommodate her by scheduling her on slower days. Ramos states that the next time he saw Plaintiff was two weeks later at the store when Plaintiff "attempted to confront [him]." After this lawsuit was

commenced, Ramos learned that Plaintiff secretly taped Ramos with "the individual owners of the company" physically present. To the best of Ramos's knowledge, Plaintiff did not attempt to speak with them. Ramos affirms without reservation that Zee Brothers does not discriminate against its employees, and also states that he never touched Plaintiff in any manner, never used any inappropriate language in front of her, and never disrespected her. Ramos further claims that Plaintiff never filed a complaint about him, and her allegations are baseless.

Defendants further provide an affidavit from Yeneris Gomez, an employee of Zee Brothers. She alleges that Plaintiff never told her that Ramos was "hitting on her" and Plaintiff never said anything to Gomez involving improper conduct. Gomez also asserts that she never noticed any improper conduct on the part of Ramos and she was unaware of any complaints. After Plaintiff began employment, she informed Gomez that she was pregnant and she began to complain about pregnancy-related aches and pains. Gomez asserts that she herself worked at the store throughout her pregnancy and no one forced or encouraged Plaintiff to lift heavy objects or work excessively. Zee Brothers has had several other pregnant employees and none of them were ever treated in a discriminatory manner.

In their memorandum of law, Defendants argue that Plaintiff's deposition testimony establishes "a complete absence of proof to support her claims for discrimination on the basis of pregnancy, retaliation, sexual harassment, and intentional infliction of emotional distress." Plaintiff admitted that she had no documentation to support her claim that she began working at Zee Brothers in June 2014. Payroll records confirm that she actually worked there from October 14, 2014 through January 11, 2015. Plaintiff further stated that her hours actually increased after December 2014, contrary to her claims otherwise, and she had nothing in writing guaranteeing her a certain amount of hours per week. Plaintiff admitted that she did not have a copy of the letter from the doctor stating that she could work during her pregnancy. Plaintiff confirmed that she showed up at the store on January 15, 2015 to secretly record a conversation with Ramos so as to get evidence necessary to sue him. Ramos, further, did not use the words "terminate" and Plaintiff never filed a claim for unemployment benefits. Although she claimed that she had depression as a result of this incident, Plaintiff did not seek treatment for depression because she was stressed. In addition, Plaintiff confirmed that when she commenced employment at Zee

Brothers, Ramos was not her supervisor but her co-worker, and she actually reported to another co-worker, "Annalise." Plaintiff admitted that she had no documents or recordings memorializing the various allegations described in paragraph 38 of her complaint. She further admitted that she never told Annalise the "specifics" regarding Ramos's alleged conduct, and she never filed a complaint with the owners of the company even though the conduct occurred on store premises. Plaintiff further admitted that, contrary to the allegations in her complaint, she was unaware of any other employees who were terminated because of their pregnancy. Furthermore, despite naming the two Zee Brothers owners in her lawsuit, Plaintiff admitted that the owners did not know about the alleged sexual misconduct and that she never made an effort to talk to Grego, one of the owners. Plaintiff also confirmed that the Defendants retaliated against her because of her pregnancy, not because she resisted Ramos's advances. Finally, Plaintiff admitted that Ramos never hit her, never used the word "termination," and she never received written documentation that she was terminated or that Zee Brothers ever refused to change her schedule due to prenatal appointments.

Defendants argue that summary judgment is warranted because Plaintiff has failed to establish a prima facie case of pregnancy discrimination. Specifically, the record is clear that Plaintiff cannot establish that any adverse employment action was taken against her because she was never terminated. Defendants' alleged refusal to make scheduling changes, even if true, are insufficient to establish an adverse employment action. The evidence indicates that Plaintiff actually walked off the job and was never terminated. Further, there is no indication that Plaintiff's position was later filled by a non-pregnant employee. Accordingly, Plaintiff has failed to establish a prima facie case of discrimination under either State HRL or City HRL. Conclusory allegations otherwise are insufficient.

Defendants also argue that Plaintiff's claims of sexual harassment have no merit and must be dismissed, because the factual record is completely devoid of direct or circumstantial evidence of such conduct. Plaintiff does not make clear whether she is proceeding under a *quid pro quo* harassment theory or a hostile work environment theory. In either event, there is a complete absence of evidence substantiating her claims. Furthermore, Plaintiff has provided no proof of treatment for physical or psychological injuries. Finally, Plaintiff admitted that she never

complained to anyone regarding improper conduct of Ramos. Plaintiff's "vague and conclusory comments are insufficient to defeat" summary judgment. Defendants claim that Plaintiff's retaliation action is essentially one of constructive discharge, however Plaintiff has not established such a cause of action. Plaintiff was not fired, but left on her own volition.

Finally, Defendants argue that summary judgment should be granted on Plaintiff's cause of action for intentional infliction of emotional distress, because her claims are unsubstantiated and do not allege sufficiently "outrageous" conduct to support such a cause of action.

Plaintiff opposes the motion on several grounds. First, Plaintiff asserts that issues of fact preclude dismissal of her pregnancy discrimination, sexual harassment, and hostile work environment claims. Plaintiff relies on her deposition testimony and a supplemental affidavit detailing various comments from Ramos, her supervisor, that show a pattern of demeaning sexual and discriminatory conduct. Plaintiff argues that these comments, combined with unwanted touching from Ramos, unquestionably supports her hostile work environment claim. Plaintiff further notes that Defendants' motion papers fail to address her hostile work environment claim, and for that reason alone this claim must survive dismissal. Plaintiff further argues that she has provided evidence showing an adverse action, and circumstances giving rise to the inference of discrimination, and accordingly her State and City HRL claims must be sustained. While Defendants argue that Plaintiff was not actually terminated, her testimony reciting specific comments from Ramos, and more Ramos comments elicited in an audio recording, establish that Plaintiff was terminated and that her termination occurred under discriminatory circumstances. Having demonstrated a prima facie case of discrimination, the burden shifted to Defendants to provide a legitimate non-discriminatory reason for the adverse action. While Defendants contend that Plaintiff voluntarily quit her employment, the audio recording and Plaintiff's allegations raise an issue of fact as to the "true reason" that her employment ended. Plaintiff further contends that her City HRL must survive dismissal because Defendants cannot carry their burden of proving that not one motivating factor for Plaintiff's termination was based on her pregnancy or sex. Under this analysis, Plaintiff was not required to demonstrate that Defendants' proffered reasons for her dismissal were false or played no role in the employment decision. Rather, once there is an inference of discrimination or retaliation,

Defendants had the burden of showing that discrimination played no role, and not even one motivating factor for her dismissal was based on pregnancy or sex. Plaintiff argues that Defendants have failed to carry this burden.

Plaintiff also argues that "issues of fact and substantial evidence preclude summary judgment" on her retaliation claims under State and City HRL. Here, Plaintiff alleges that she complained of harassment to her supervisors- Sam, Annalise, and Ramos, but nothing was done, and Annalise condoned Ramos' behavior by stating tat Ramos was only fooling around and he sexually harassed everyone. Plaintiff claims that the testimony as well as audio recording from Ramos raise an issue of fact regarding her claims of retaliation.

Finally, Plaintiff alleges that issues of fact preclude summary judgment on her claims of intentional infliction of emotional distress. It is evident that the discriminatory comments and disparate treatment that Plaintiff was forced to endure, from being touched without her consent, to being sexually harassed by her immediate supervisor and being told to have an abortion, was an outrageous pattern of behavior warranting denial of Plaintiff's motion.

In reply, Defendants argue, among other things, that Plaintiff has not offered anything in the way of evidence to substantiate her claims or refute that affidavits that Defendants presented in support of their motion. Defendants assert that Plaintiff has asserted only vague and conclusory claims that are not demonstrably provable. On the issue of retaliation, Plaintiff did explain why she did not bring the allegedly improper conduct to the attention of Zeitoune or Grego, who she erroneously alleges are the owners in her complaint. In fact, on the day that she secretly recorded Ramos, Plaintiff stated that those individuals were in plain view, but she did not make any complaints to them. Further, Plaintiff has offered no proof that she was actually terminated by Zee Brothers. Plaintiff's reliance on a secret audio recording is misplaced, as certain statements are mischaracterized by Plaintiff's counsel and there is no proof that any pregnant employee at Zee Brothers was ever terminated. Defendants argue that Plaintiff has failed to come forward with competent evidence of employment discrimination, sexual harassment, or that a severe and pervasive hostile work environment existed or that pregnant females were treated less well. Furthermore, Plaintiff neglected to mention that Ramos was only her manager for eleven days out of the nearly three months that she worked at Zee Brothers, and

he had no authority to make decisions concerning the terms of her emplyoment. Defendants add that although claims under the City HRL must be given "independent liberal construction," the standard for sustaining a City HRL claim is not one of strict liability. There must be at least some evidence of incidents or patterns established other than Plaintiff's own testimony. Defendants also note that Plaintiff is unable to establish that she endured an adverse employment action, as there is no evidnce that she was actually terminated.

Furthermore, Defendants argue that Grego and Zitoune are not personally liable for any claims, because they are not owners of the company (contrary to the inaccurate assertions made in Grego's moving affidavit), and there is no basis for imputing liability to them. Plaintiff had to show that the employer became a party to discriminatory conduct by acquiescing, encouraging, condoning, or approving it. Here, Plaintiff admitted that she never complained to these individuals about Ramos's conduct. Grego submits a supplemental affidavit indicating that he was not, in fact, a owner of Zee Brothers, and further alleging that Ramos was a non-managerial hourly employee who did not have the authority to fire, hire, discipline, or make decisions about employment.

Defendants re-assert their contentions that Plaintiff has no sustainable claim for retaliation because she has not suffered an adverse employment action. Finally, Plaintiff's intentional infliction of emotional distress claim should be dismissed because she failed to demonstrate that allegedly extreme or outrageous conduct actually occurred.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept.

2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Pregnancy Discrimination

Pregnancy discrimination is a form of gender discrimination (see 42 USC 2000[e][k]; *Saks v. Franklin Covey Co.*, 316 F.3d 337, 343 [2nd Cir. 2003]). Under State HRL, the standard of recovery is similar to the federal standards under title VII of the Civil Rights Act of 1964 (*see Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326 [2003]). Accordingly, employment discrimination claims brought under the State HRL are generally analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 7 92 [1973]) for cases brought pursuant title VII. To demonstrate a prima facie case for employment discrimination in violation of State HRL, a plaintiff must show 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 N.Y.3d 295). To prevail on a motion for summary judgment dismissing a plaintiff's State HRL claims, a defendant must show either that the plaintiff cannot establish every element of intentional discrimination, "or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual" (*id* at 305-306).

In order to prevail on a motion for summary judgment dismissing a plaintiff's City HRL

claims, a defendant must demonstrate entitlement to summary judgment under both the *McDonnell Douglas* burden-shifting framework outlined above, as well as the "mixed -motive" framework (*see Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 113 [1st Dept.2012]; *Hudson v. Merrill Lynch & Co., Inc.*, 138 A.D.3d 511 [1st Dept. 2016]). Under the more lenient "mixed-motive" framework, a plaintiff should prevail in an action under the City HRL if she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision (*see Melman* at 127, citing *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 [1st Dept. 2009]). "If a plaintiff can prevail on a "mixed motive" theory, it follows that he or she need not prove that the reason proffered by the employer for the challenged action was actually false or entirely irrelevant. Rather, under this analysis, the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was "motivated at least in part by ... discrimination" (*Id.*, citing *Estate of Hamilton v. City of New York*, 627 F.3d 50, 56 [2d Cir.2010] [internal quotation marks omitted]) or, stated otherwise, was "more likely than not based in whole or in part on discrimination" (*Id.*, citing *Aulicino v. New York City Dept. of Homeless Servs.*, 580 F.3d 73, 80 [2d Cir.2009] [internal quotation marks omitted]).

Defendants contend that, in this case, Plaintiff has not established a prima facie case of discrimination because, while she was pregnant, she was never actually terminated and thus did not suffer an "adverse employment action." In opposition, however, Plaintiff submitted an affidavit stating that in January 2015, her supervisor Ramos indeed fired her. Plaintiff testified at her deposition that Ramos fired her (Pl. EBT at 26; 44:23-25) and he also told her that "it wasn't worth it for [her] to continue working there unless [she] was to leave [her] belly there at the store" (id. At 45:1-6). Plaintiff also submitted the recitation of an audio recording of a conversation with Ramos, where he states "You don't understand, this is not a good thing - you being pregnant it changes things: look at what happened last time." Plaintiff replies "Yeah, they got rid of her too. You don't do things like that." Ramos responds "But you just got to understand, that's how they are." Plaintiff then states "You got rid of me and I was working fine. You saw that I really needed this job, you let the owners tell you what to do." Ramos then states "And you're making me laugh right now. I can't take the chance of something happening to you

in the store. I'm responsible. Well, I already explained this to your cousin. She understands, why can't you understand?" Although Plaintiff admitted that Ramos did not use the words "terminate," and she never applied for unemployment benefits, the foregoing contentions and evidence at a minimum raises an issue of fact and refutes Defendants' contention that Plaintiff voluntarily resigned from her job. The affidavits in support of the motion that conflict with Plaintiff's testimony and audio recording merely confirm the existence of a material issue of fact regarding whether Plaintiff was terminated that cannot be resolved on a motion for summary judgment (*see Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, 202 A.D.2d 191 [1st Dept. 1994]).

Furthermore, the Court assumes for the purposes of this motion that Ramos indeed had the authority to fire Plaintiff, as that was her understanding at the time, and both Grego and Ramos confirm that Ramos was Plaintiff's supervisor in January 2015. In any event, when viewing the facts in a light most favorable to Plaintiff, her subjective belief that Ramos was her supervisor and had the authority to terminate her was reasonable (*see Poolt v. Brooks*, 38 Misc.3d 1216[A], at 5 [Sup. Ct., N.Y. Cty., 2013], citing *Burlington Industrines, Inc. v. Ellerth*, 524 U.S. 742, 759 [1998]["If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one.... Apparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized"]).

Defendants also claim that Plaintiff failed to carry her *de minimus* prima facie burden of discrimination because there is no evidence that her position was filled by a non-pregnant employee. However, in order to meet her initial burden, Plaintiff only had to demonstrate that her termination "occurred under circumstances giving rise to an inference of discrimination" (*Forrest, supra*). Here, the audio recording and deposition testimony allows for such an inference. Plaintiff also testified that once she learned that she was pregnant, she gave a doctor's note to "Sam" - her immediate supervisor at the time (Pl. EBT at 39, 44). In an affidavit, Plaintiff further claims that after informing her employer that she was pregnant, she was told "[p]regnant women are worthless," "you are not worth anything to this store with that belly," "you are a bum" and "if I was you, I would get rid of it. I would have an abortion." Under the

circumstances presented, Plaintiff has demonstrated the existence of circumstances giving rise to the inference of discrimination even though there is no evidence of others being terminated due to pregnancy. Contrary to Defendants' contentions, Plaintiff's allegations of discriminatory comments and harassment are "not conclusory but quite specific" and therefore competent to raise an issue of fact (*see Ballen-Steir v. Hahn & Hessen, LLP*, 284 A.D.2d 263, 264 [1st Dept. 2001]).

Defendants argue that Plaintiff has failed to prove "pretext," however the audio recording as well as Plaintiff's testimony regarding specific comments from Ramos are enough to raise an issue of fact as to (1) whether or not Plaintiff voluntarily left her employment, and (2) whether Defendants' allegedly legitimate reason for the end of Plaintiff's employment is false, and her pregnancy was the true reason. The alleged verbal comments from Ramos and others can serve as evidence of discriminatory motivation where, as here, Plaintiff has shown a nexus between the remarks and the employment action at issue (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 124 [2nd Dept. 2015], citing *Sandiford v. City of New York Dept.of Educ.*, 94 A.D.3d 593, 595 [1st Dept. 2012], *aff'd*, 22 N.Y.3d 914 [2013]). Because there are issues of fact that preclude summary judgment under the *McDonnell-Douglas* framework, Defendants cannot prevail under the more lenient "mixed-motive" framework applied to Plaintiff's New York City Human Rights Law claims (*see Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 [1st Dept. 2009]). Accordingly, Defendants are not entitled to summary judgment with respect to Plaintiff's discrimination claims under State and City HRL.

Sexual Harassment - Hostile Work Environment

Defendants next argue that Plaintiff's claims of sexual harassment have no merit and should be dismissed. There are two distinct types of sexual harassment: (1) *quid pro quo* or "tangible job action" harassment, where tangible job action is taken based upon submission to or rejection of unwelcome sexual requests or conduct, and (2) "hostile work environment" sexual harassment, where the workplace is permeated with discriminatory conduct to create an abusive working environment (*see Poolt v. Brooks*, 38 Misc.3d 1216[A] [Sup. Ct., N.Y.Cty., 2013]; *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d at 310; N.Y. Exec. Law § 296[1][a]). Under

State HRL, as noted, a plaintiff has an actionable hostile work environment claim "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Hernandez v. Kaisman*, 103 A.D.3d 106, 957 N.Y.S.2d 53 [1st Dept 2012], *quoting Harris v. Forklift Systems, Inc., supra*][internal quotation marks omitted]; see also *Ferrer v. New York State Div. of Human Rights*, 82 A.D.3d 431 [1st Dept. 2011]; *see also Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP.*, 120 A.D.3d 18 [1st Dept. 2014]). Under City HRL, a plaintiff need not demonstrate that the complained-of conduct is "severe" or "pervasive," but merely needs to show that she has been "treated less well than other employees because of her gender" (*see Short v. Deutche Bank Securities, Inc.*, 79 A.D.3d 503, 506 [1st Dept. 2010]; citing *Williams v. New York City Hous. Auth., supra* at 78), and the conduct must be something "more than non-actionable petty slights and minor inconveniences" (*id*). Accordingly, a hostile work environment claim made under the City HRL may only be dismissed where the court is faced with a "truly insubstantial case" in which the defendant's behavior cannot be said to fall within the "broad range of conduct that falls between 'severe and pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other." (see *Hernandez v. Kaisman*, at 114).

In this case, Defendants argue that the sexual harassment cause of action must be dismissed because there is simply no evidence of such harassment. Defendants assert "Plaintiff's claims do not make clear whether she is proceeding under a quid pro quo harassment theory of a hostile work environment theory. In either event, the complete absence of evidence renders the analysis the same" (Defs.' Br. At Page 13). Plaintiff's deposition testimony and supplemental affidavit, however, contains a host of allegations against defendant Ramos, her alleged supervisor or manager, alleging that he, among other things: inappropriately touched her without consent; asked her for a kiss so she wouldn't have to work as hard, or could come in late; asked her to go take a cab together to a hotel to have sex; made inappropriate comments asking her to leave her husband; constantly stare at her during work hours; openly discussed his attraction to her with other employees; that Ramos became physically aggressive when Plaintiff rejected his advances. Plaintiff further alleges that Ramos advised Plaintiff to "get rid of" her pregnancy and and "have an abortion;" and stated, among other things, "[w]e don't need you anymore. Pregnant women

are worthless" and "[y]ou are not worth anything to this store with that belly." Plaintiff further alleges that she eventually complained to Ramos and Annalise about this conduct, but nothing was done, and Ramos did not allow her to speak with the owners of Zee Brothers - co-defendants Grego and Zeitoune - about her complaints. The foregoing allegations are sufficient to demonstrate a viable cause of action of a hostile work environment under both State and City HRL (*see Hernandez v. Kaisman*, 103 A.D.3d 106; *see, e.g., Cole v. Sears, Roebuck & Co.*, 120 A.D.3d 1159 [1st Dept. 2014]).

While Defendants have submitted affidavits denying that any of the foregoing took place, those affidavits do not eliminate all material issues of fact. Plaintiff's failure to provide documentary evidence (aside from an audio recording) is not fatal to her allegations. Indeed, a plaintiff may demonstrate the existence of a hostile work environment or discriminatory conduct through her own deposition testimony (*see, e.g., Kapchek v. United Refining Co., Inc.*, 57 A.D.3d 1521 [4th Dept. 2008]; *see also Sier v. Jacobs Persinger & Parker*, 276 A.D.2d 401, 401-402 [1st Dept. 2000]; *see also Belton v. Lal Chicken*, 138 A.D.3d 609 [1st Dept. 2016][jury credited plaintiff's testimony and court properly admitted video tape of the supervisor's conduct]). This Court cannot resolve issues of credibility at the summary judgment stage (*see Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499), and a defendant cannot prove entitlement to summary judgment by merely pointing to gaps in a plaintiff's proof (*see Alvarez v. 21st Century Renovations, Ltd.*, 66 A.D.3d 524 [1st Dept. 2009]). This Court further notes that, in any event, Defendants' moving papers failed to adequately address their entitlement to dismissal of Plaintiff's hostile work environment cause of action. Accordingly, Defendants are not entitled to summary judgment on these claims.

Retaliation

To make out a retaliation claim under City HRL, a complaint must allege that (1) plaintiff participated in a protected activity known to defendants, (2) defendants took an action that disadvantaged the plaintiff, and (3) there is a causal connection between the protected activity and the adverse action (*see Fletcher v. Dakota*, 99 A.D.3d 43, 51-52 [1st Dept. 2012]). Under State HRL, the complaint must allege that (1) plaintiff engaged in a protected activity by

opposing conduct prohibited there under; (2) defendants were aware of that activity; (3) plaintiff was subject to an adverse action; and (4) there was a causal connection between the protected activity and the adverse action (*id* at 51).

In this matter, Plaintiff alleges that she complained about harassing behavior to her supervisors Sam, Annalise, and Ramos. In response, Annalise told Plaintiff that Ramos was "only fooling around" and Plaintiff claims that Ramos did not let her speak with the "owners" of Zee Brothers regarding her complaints. Nothing was done in response to Plaintiff's complaints, and Plaintiff claims that she was given the "silent treatment" and forced to take on difficult tasks or to complete tasks quicker than other employees. In January 2015, Ramos – allegedly her manager or supervisor- fired her. Again, while Defendants vehemently contend that Plaintiff was not fired, but left the job voluntarily, this dispute only raises issues of credibility that cannot be resolved on a motion for summary judgment.

Liability of Eli Grego and Joseph Zietoune, individually

Under State HRL, "[a]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it" see *Clayon v. Best Buy Co., Inc.*, 48 A.D.3d 277 [1st Dept. 2008], quoting *Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.2d 684, 687 [1985]). Here, Plaintiff cannot sustain her State HRL causes of action against Grego or Zietoune individually because she admitted at deposition that she never told these individuals about any harassing or discriminatory conduct. Plaintiff has failed to set forth any other evidence indicating that these defendants actually knew about or participated in any wrongful conduct (*id.*, *compare McRedmond v. Sutton Place Restaurant and Bar, Inc.*, 95 A.D.3d 671, 673 [1st Dept. 2012]).

Plaintiff's City HRL causes of action against those individual defendants, however, remain viable, because unlike State HRL, "the City HRL imposes strict liability on employers for the acts of managers and supervisors, including where, as here, the "offending employee 'exercised managerial or supervisory responsibility'" (*see McRedmond v. Sutton Place Restaurant and Bar, Inc.*, 95 A.D.3d 671 at 673, citing *Zakrzewska v. New School*, 14 N.Y.3d 469, 479-80 [2010], quoting Administrative Code of City of N.Y., §8-107[13][1])." Here,

Defendants admit that Ramos was Plaintiff's supervisor at relevant times in January 2015, the month she was allegedly terminated. Accordingly, there are issues of fact as to whether Ramos indeed have such managerial or supervisory authority over the Plaintiff, notwithstanding any allegations otherwise found in Defendants' moving papers. While Grego has submitted an affidavit stating that he was not, in fact, an owner of Defendant, he does not state whether he or Zietoune employed Ramos, the alleged perpetrator of the wrongful conduct. Accordingly, these defendants failed to demonstrate the absence of their individual liability under City HRL.

Defendants' moving papers do not address the issue of whether defendant Zee Brothers, Inc. is entitled to dismissal of Plaintiff's causes of action on these specific grounds.

Intentional Infliction of Emotional Distress

In order to state a claim for intentional infliction of emotional distress in New York, an employee must allege that (1) the employer or co-worker engaged in extreme or outrageous conduct; (2) the employer or co-worker intentionally or recklessly caused the employee's emotional distress; and (3) the employee suffered severe emotional distress as a result of the employer's or co-worker's conduct (*see Murphy v. American Home Prods.*, 58 N.Y.2d 293 [1983]). The conduct complained of must go beyond all reasonable bounds of decency, exceed what is usually tolerated by society, and be of the most egregious nature (*id.* at 303; *see also Belanoff v. Grayson*, 98 A.D.2d 353 [1st Dept. 1984]). The employer's conduct must "consist of more than mere insults, indignities, and annoyances" (*see Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169 [2nd Dept. 1989]). In order to survive a motion to dismiss, a "plaintiff must allege conduct that is 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*see 164 Mulberry Street Corp. v. Columbia Univ.*, 4 A.D.3d 49, 56 [1st Dept. 2004], quoting *Murphy v. American Home Prods.*, supra). Given this high threshold, Courts have routinely dismissed claims for intentional infliction of emotional distress brought by terminated at-will employees, in cases where the plaintiff failed to allege sufficiently outrageous conduct (see *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169).

In this matter, even if the conduct is deemed to be sufficiently "outrageous," Plaintiff has

not demonstrated that she actually suffered any severe emotional distress as a result. Plaintiff only states in a conclusory fashion that, as a result of Defendants' conduct, she "suffered from and continue to suffer from severe emotional distress" (Pl. Aff. At Par. 26). This bare assertion is insufficient to sustain a cause of action sounding in intentional infliction of emotional distress (*see Klein v. Metropolitan Child Services, Inc.*, 100 A.D.3d 708 [2nd Dept. 2012]), and Plaintiff submitted no medical evidence substantiating her testimony that she sought therapeutic treatment as a result of depression following this incident (*see, e.g., Erani v. Flax*, 193 A.D.2d 777 [2nd Dept. 1993]). Accordingly, this cause of action is dismissed.

Assault and Battery

Defendants' moving papers do not completely address their entitlement to dismissal of Plaintiff's assault and battery claims against Ramos. In any event, there are issues of fact as to whether Ramos engaged in conduct that placed Plaintiff in imminent apprehension of harmful contact, or engaged in offensive bodily contact without Plaintiff's consent (*see, e.g., Timothy Mc. v. Beacon City School Dist.*, 127 A.D.3d 826 [2nd Dept. 2015]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is granted only with respect to Plaintiff's fifth cause of action, alleging intentional infliction of emotional distress, and with respect to Plaintiff's State HRL claims against defendants Grego and Zeitoune, individually, and those claims are dismissed with prejudice, and it is further,

ORDERED that the remaining branches of Defendants' motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 4/3, 2017

Mary Ann Brigantti

Hon. Mary Ann Brigantti, J.S.C.