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

Katherine Brooks Harris, Sydney McNeal and Yuqing ("Chelsea") Wei,	:	Index No. 154172/2018
	:	Hon. Doris Ling-Cohan
Plaintiffs,	:	
-against –	:	IAS Part 36
CBS News Communications Inc., CBS News Inc., Charlie Rose Inc., and Charles Peete Rose Jr. a/k/a Charlie Rose,	:	Motion Sequence No. 004
	:	**Oral Argument Requested**
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS CHARLIE ROSE INC. AND CHARLES PEETE ROSE JR.

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PRELIMINARY STATEMENT

Defendants Charlie Rose Inc. ("CRI") and Charles Peete Rose Jr. ("Rose") respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(7), to dismiss the Complaint. Defendants CBS News Communications Inc. and CBS News Inc. (collectively, "CBS") filed a motion to dismiss the Complaint in its entirety. *See* Dkt. No. 18. As set forth in CBS' memorandum of law, none of the three Plaintiffs alleges a cognizable claim of gender discrimination, harassment or retaliation against ***any of the defendants*** and, thus, both causes of action for violations of § 8-107(1) and (7) of the New York City Human Rights Law fail as a matter of law. *See* Dkt. No. 19 at 13-18. CRI and Rose join in CBS' motion to dismiss the Complaint in its entirety, with prejudice.

The Complaint does not state a valid claim that CRI or Rose discriminated against Katherine Brooks Harris ("Harris"), Sydney McNeal ("McNeal") or Yuqing Wei ("Wei") on the basis of gender. The Complaint does not plead facts establishing that Rose or CRI treated Harris, McNeal or Wei less well than other employees based upon their gender. *See* Point I, *infra*. The Complaint does not plead facts establishing that CRI or Rose took unlawful action against any Plaintiff in retaliation of any protected activity allegedly taken by her. *See* Point II, *infra*. In sum, Plaintiffs fail to allege any cognizable claim that CRI or Rose violated the New York City Human Rights Law ("NYCHRL").

Tacitly recognizing the weakness of their factual allegations, Plaintiffs seek to bolster their threadbare and conclusory claims by exploiting the #MeToo Movement and bootstrapping the accusations of sexual harassment made by *third parties* against Rose in articles published by The Washington Post. Plaintiffs are not alleged to have had any knowledge of a single one of those accusations set forth in the articles. These hearsay accusations do not and cannot supply the missing link to the legally deficient claims.

STATEMENT OF FACTS[1]

CBS "is a longstanding American television and radio service" and its broadcasts include the *CBS Evening News*, *CBS This Morning*, and *60 Minutes*. Compl. ¶ 22.

Rose is a television journalist and was the host and executive producer of *Charlie Rose* from 1991 through 2017. Compl. ¶¶ 24, 26. *Charlie Rose* was produced by CRI, a television production company, taped at Bloomberg LP studios, and distributed by the Public Broadcasting Service ("PBS"). *Id* at ¶ 27. Rose also co-anchored *CBS This Morning* from 2012 through November 2017 (*id*. at ¶ 28), and was a substitute anchor for *CBS Evening News* and a correspondent for CBS' *60 Minutes* until November 2017. *Id*. at ¶¶ 29-30.

Wei is not alleged to have been employed by CRI. Rather, CBS employed Wei commencing in September 2015. Compl. ¶ 53. In April 2016, Wei was promoted to an executive assistant to Ryan Kadro ("Kadro"), the executive producer of *CBS This Morning*. *Id*. at ¶¶ 54-56. In January 2017, Kadro directed Wei to also support Rose as a *CBS This Morning* co-anchor. *Id*. at ¶ 57. From May through November 2017, Wei "worked as a Broadcast Associate (a/k/a Anchor Assistant) for *CBS This Morning*, reporting to Mr. Rose." *Id*. at ¶ 60.

CBS employed Harris as a "Broadcast Assistant" for *CBS This Morning* commencing in January 2016. Compl. ¶ 37. In March 2017, Rose offered Harris employment with CRI, which Kadro encouraged her to accept. *Id*. at ¶¶ 42, 45, 47. From April through November 2017, Harris was employed by CRI as an Associate Producer. *Id*. at ¶ 48.

McNeal was employed by CRI as an Executive Assistant to Rose from April through November 2017. Compl. ¶¶ 50-51.

[1] CRI and Rose understand that, for purposes of this motion to dismiss, the well-pleaded factual allegations in the Complaint must be considered to be true. However, it is noted that, in the event the case goes forward despite the failure to state any legally cognizable claim, the evidence in the form of Plaintiffs' own words in emails and actions will fatally contradict the allegations in their Complaint.

On November 20, 2017, The Washington Post published an article entitled *"Eight Women Say Charlie Rose Sexually Harassed Them — With Nudity, Groping and Lewd Calls"* ("2017 Post Article"). Compl. ¶ 78. On November 21, 2017, CBS summarily terminated Rose's employment and PBS cancelled distribution of *Charlie Rose*, resulting in the end of the broadcast show. *Id*. at ¶¶ 31, 90. As a result, Harris and McNeal's employment by CRI was terminated – along with every one of the other employees of the *Charlie Rose* production company (CRI). Compl. ¶ 91; Dkt. No. 23. Neither Harris nor McNeal allege having any adverse change in their employment by CRI before CRI was forced to shut down. Wei does not allege that any adverse change in her employment with CBS was taken by Rose or CRI. Wei continues to be employed by CBS. Compl. ¶ 108.

Because the 2017 Post Article did not contain any accusation by any of the Plaintiffs, the statement Rose published on Twitter on November 20, 2017, in response to the 2017 Post Article (Compl. ¶ 83) clearly was not addressed to, did not concern, and was not related to Harris, McNeal, or Wei. Therefore, nothing in the Twitter statement could constitute a purported "admission" to any allegation made by these Plaintiffs in the Complaint. Rose is alleged also to have met with the CRI staff in order to address the 2017 Post Article. Compl. ¶ 84. Nothing Rose allegedly stated at the CRI staff meeting about the 2017 Post Article could have been addressed to, concerned, or related to allegations made by Harris, McNeal or Wei in this Complaint. *Id*. Thus, any alleged statement by Rose is not relevant to Plaintiffs' claims.

The Washington Post published an article entitled *"Charlie Rose's Misconduct Was Widespread at CBS and Three Managers Were Warned, Investigation Finds"* on May 3, 2018 – one day *before* Plaintiffs filed the Complaint. Compl. ¶ 118. This article mentions each of the Plaintiffs and repeats verbatim the Complaint's allegations.

STANDARD OF REVIEW

Dismissal is proper under CPLR 3211(a)(7) where "the pleading fails to state a cause of action." As CBS identifies, while the Court is to "accept all facts as alleged in the pleading to be true," "bare legal conclusions are not presumed to be true and are not accorded every favorable inference." *Hernandez v. Weill Cornell Med. Coll.*, 2015 N.Y. Slip. Op. 51022(U), at *4 (Sup. Ct. Bronx Co. 2015); *see* Dkt. No. 19 at 6. "If the facts as alleged do not fit within any cognizable legal theory, the cause of action must be dismissed." *Oszustowicz v. Admiral Ins. Brokerage Corp.*, 49 A.D.3d 515, 516 (2d Dep't 2008).

ARGUMENT

I. The Complaint Fails To State A Valid Cause of Action for Gender Discrimination.

NYCHRL § 8-107(1)(a) provides that an employer may not "discriminate against such person in compensation or in terms, conditions or privileges of employment" on the basis of various protected statuses, including "gender." CBS sets forth the standard to state a valid discrimination claim under NYCHRL § 8-107(1)(a). Dkt. No. 19 at 13. A complaint must allege facts demonstrating that the plaintiff "has been treated less well than other employees because of her gender." *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009). "There is no 'sexual harassment provision' of the [NYCHRL] to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender." *Id.* at 75. The NYCHRL is not a "general civility code." *Id*. at 79. In assessing whether plaintiffs are alleged to have been treated less well because of gender on a motion to dismiss, the Court must disregard bare legal conclusions. *See Hernandez*, 2015 N.Y. Slip. Op. 51022(U), at *4; *Russo v. New York Presbyterian Hosp.*, 972 F. Supp. 2d 429, 452 n.18 (E.D.N.Y. 2013). As shown by CBS and below, the Complaint fails to state any cognizable

claim of gender discrimination under NYCHRL § 8-107(1)(a) ***against any defendant***. *See* Dkt. No. 19 at 13-16.

First, Plaintiffs do not allege a single "term[]," "condition[]" or "privlege[] of employment" that Plaintiffs were deprived of on the basis of gender. *See Russo*, 972 F. Supp. 2d at 451 (when alleging sexual harassment, "a plaintiff must still establish that she suffered a hostile work environment *because of her gender*") (emphasis in original); *Chin v. New York City Hous. Auth.*, 106 A.D.3d 443, 445 (1st Dep't 2013) (hostile work environment claims fail where plaintiff fails to demonstrate "that she has been treated less well than other employee because of her protected status; or that discrimination was one of the motivating factors for the defendant's conduct"); *Watkins v. New York City Health & Hosp. Corp.*, 2018 N.Y. Slip. Op. 31054(U), at *21 (Sup. Ct. N.Y. Co. 2018) (hostile work environment claims fail where "no evidence that defendants' behavior was motivated because of his protected status").

Harris and McNeil allege that their jobs at CRI were terminated in November 2017. Compl. ¶ 91. However, neither Harris nor McNeil alleges that her employment was terminated *because of her gender*.[2] Wei alleges that **CBS** took adverse employment action against her, including demotions. *See* Compl. ¶¶ 100-03, 106, 109-10. However, Wei does not allege that any such acts were taken by CRI or Rose. In fact, neither CRI nor Rose are alleged to have employed Wei. Compl. ¶ 60. Moreover, as CBS makes clear, Wei does not allege that any of these purported injuries occurred *because of her gender*. *See* Dkt. No. 19 at 14.

Second, CBS has established also that the Complaint fails to plead facts to establish any cognizable claim of gender harassment. *See* Dkt. No. 19 at 14-16. Plaintiffs' conclusory

[2] Of course, there is no possibility that the terminations were because of gender. Following publication of the Washington Post article, CBS terminated Rose's employment on *CBS This Morning* and PBS cancelled the distribution of *Charlie Rose*, which effectively put CRI out of business. Compl. ¶¶ 31, 78, 90-91; Dkt. No. 23. There can be no dispute that this was the direct and only cause of Harris and McNeal's termination of employment with CRI (together with all of the other CRI employees).

allegations that they were subjected to "sexual touching," "sexual comments," and "sexual advances" (Compl. ¶ 64) do not suffice and the alleged examples set forth in Complaint ¶ 65 are devoid of factual context. As CBS has shown, the alleged isolated examples are not legally cognizable. *See* authorities cited in Dkt. No. 19 at 14-15; *ses also Williams*, 61 A.D.2d at 79 ("we recognize that the broader purposes of the City HRL do not connote an intention that the law operate as a 'general civility code'").

The Complaint attempts to seize upon routine workplace interactions and banter and spin them into actionable conduct by omitting the context and tone and using suggestive language (*i.e.*, "sexually"). In the absence of the context, tone, and setting in which comments allegedly were made by Rose or in which Rose allegedly "touched" any of the Plaintiffs, the Complaint does not establish that a reasonable person in Plaintiffs' employment relationship would have perceived the alleged conduct as unwanted gender-based conduct. The conclusory examples are meaningless.

The conclusory allegations that Rose "threatened to fire Plaintiffs, intimidated them and/or verbally abused them" (Compl. ¶ 75) do not remedy the factual deficiencies of their claim. Plaintiffs do not allege that any of these examples of purported abusive conduct was gender-based. *See* Dkt. No. 19 at 15 & n.5. It is well-settled that alleged criticism and use of profanity do not rise to actionable conduct under the NYCHRL. *See, e.g., Chin,* 106 A.D.3d at 444 (being "variously yelled at," "subjected to the occasional offensive remark," and "required to perform … undesirable clerical tasks" does not state a claim under NYCHRL); *Katz v. Beth Isr. Med. Ctr.*, 2001 U.S. Dist. LEXIS 29, at *43 (S.D.N.Y. Jan. 4, 2001) ("being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments" not actionable conduct); *Rodas v. Estee Lauder Cos., Inc.*, 2010 N.Y. Slip. Op. 33199(U), at *15-16 (Sup. Ct.

N.Y. Co. 2010) ("being unfairly micromanaged" amounts to a "mere inconvenience or annoyance," not actionable employment discrimination"); *Silvis v. City of New York*, 95 A.D.3d 665, 665 (1st Dep't 2012) (being "subjected to a relentless stream of reprimands" is not actionable discrimination).

II. The Complaint Fails to State a Valid Cause of Action for Retaliation.

To plead a legally viable claim for retaliation under the NYCHRL § 8-107(7), Plaintiffs must allege that: (a) they engaged in a protected activity; (b) their employer knew of the protected activity; (c) their employer engaged in conduct reasonably likely to deter a person from engaging in that protected activity; and (d) there was a causal connection between the protected activity and the alleged retaliatory conduct. *See Brightman v. Prison Health Serv., Inc.*, 108 A.D.3d 739, 740 (2d Dep't 2013). The Complaint falls woefully short of establishing each element of a retaliation claim against CRI or Rose. *See* Dkt. No. 19 at 16-18.

With respect to Harris and McNeal, the Complaint does not allege facts establishing that they engaged in any protected activity. The Complaint pleads in wholly conclusory fashion, grouping all Plaintiffs together, that: "Plaintiffs opposed, objected to and/or complained about Mr. Rose's unlawful conduct." Compl. ¶ 69. The Complaint however details only purported complaints made by ***Wei to CBS***. Compl. ¶¶ 70, 95. The lack of a single fact pleaded to support this bare conclusion with respect to Harris and McNeal is fatal. *See Whitfield-Ortiz v. Dep't of Ed.*, 116 A.D.3d 580, 581 (1st Dep't 2014) (affirming dismissal of retaliation claim where plaintiff "did not state the substance of her alleged complaints, to whom she allegedly complained, or when such complaints were made"); *Hernandez*, 2015 N.Y. Slip. Op. 51022(U), at *6 (retaliation claim properly dismissed upon failure to allege protected activity, and "[s]ince the first prong is not satisfied, there is no need to consider the others"); *see also McFadden v.*

Amodio, 149 A.D.3d 1282, 1283-84 (3d Dep't 2017) (conclusory allegations insufficient to connect adverse employment action to protected activity); Dkt. No. 19 at 16-17.

Harris and McNeal's retaliation claim fails also because the Complaint does not allege any retaliatory conduct by CRI or Rose. Harris and McNeal assert that they were "terminated" from CRI after the Washington Post published the article about Rose on November 20, 2017. Compl. ¶ 91. Harris and McNeal do not, and cannot, allege that their termination was the result of any retaliatory intent or conduct because everyone at CRI who worked on *Charlie Rose* lost their jobs after PBS cancelled distribution of the show. *See* Dkt. Nos. 20 and 23. Harris and McNeal's claim of unlawful retaliation fails as a matter of law.

With respect to Wei, she allegedly voiced concerns twice directly to CBS and CBS personnel. Compl. ¶¶ 69-71, 95. Those allegations cannot suffice as the basis of a retaliation claim against Rose or CRI because neither is not alleged to have had any knowledge of Wei's purported complaints to CBS. Moreover, the Complaint does not allege that CRI or Rose took any conduct, let alone retaliatory conduct, against Wei as a result of the complaints she allegedly made to CBS.

As set forth by CBS, the purported retaliatory conduct by Rose alleged at Complaint ¶ 75 is not sufficiently connected to any protected activity to be actionable under § 8-107(7). *See* Dkt. No. 19 at 18. As shown above, Complaint ¶ 75's allegations of criticism and harsh language do not rise to actionable conduct under NYCHRL. *See* Point I, *supra*. The Complaint does not plead facts showing that any such alleged conduct was taken by Rose in retaliation because the Plaintiffs engaged in protected activity. Absent a causal connection between alleged protected activity and retaliatory conduct, a claim for retaliation cannot stand. *See, e.g., Anderson v. Davis Polk & Wardell, LLP*, 850 F. Supp. 2d 392, 413 (S.D.N.Y. 2012) (dismissing retaliation claims

where plaintiff "failed to plausibly allege a causal nexus"); *Diaz v. New York State Catholic Health Plan, Inc.*, 133 A.D.3d 473, 474 (1st Dep't 2015) (affirming dismissal of retaliation claims where the complaint did not allege "the requisite causal nexus between the protected activity and the adverse action"). Moreover, the failure to allege facts showing that Rose or CRI had actual knowledge of any purported protected activity precludes a finding that Rose or CRI took any action based thereon. *McFadden*, 149 A.D.3d at 1283-84 (retaliation claim dismissed "in light of plaintiff's conclusory allegations" regarding "the requisite causal nexus").

III. The Complaint Fails to State a Valid Cause of Action for Aiding and Abetting.

To the extent the Complaint purports to assert a claim against CRI or Rose for allegedly aiding and abetting a violation of the NYCHRL (Compl. ¶¶ 138 and 146), such claim fails as a matter of law. First, the conclusory allegations at Complaint ¶¶ 138 and 146 do not specify which defendant is alleged to have aided and abetted a primary violation of the NYCHRL. Nor do they specify who is the alleged primary violator. In the absence of such factual allegations, the pleading fails to satisfy the basic notice requirements of CPLR § 3013. Second, the purported aiding and abetting claims are fatally defective also because the Complaint does not plead facts establishing that CRI or Rose "actually participated" in the alleged discriminatory conduct, let alone that they had any "direct, purposeful participation." *See Brice v. Sec. Operations Sys., Inc.*, 2001 U.S. Dist. LEXIS 1856, at *11 (S.D.N.Y. Feb. 26, 2001); *see also* authorities cited in Dkt. No. 19 at 10-11; NYCHRL § 8-107(6). As shown above, the Complaint does not allege that CRI or Rose had actual knowledge of any of the conduct allegedly taken by CBS in violation of the NYCHRL. As CBS has demonstrated, the aiding and abetting claims must be dismissed. Dkt. No. 19 at 10-11.

CONCLUSION

For all of the reasons set forth herein and in the memorandum of law submitted by CBS News Communications Inc. and CBS News Inc., Charlie Rose Inc. and Charles Peete Rose Jr. respectfully request the Court to enter an Order granting their motion and dismissing the Complaint as against them in its entirety with prejudice, and granting them such further relief as the Court deems just.

Dated: September 6, 2018
New York, New York

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