SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

----------X

SANDEEP REHAL,

Plaintiff,

- v -

HARVEY WEINSTEIN, THE WEINSTEIN COMPANY LLC, THE WEINSTEIN COMPANY HOLDINGS LLC, ROBERT WEINSTEIN, AND FRANK GIL,

Defendants.

----------X

INDEX NO. 151738/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, 30, 33, 37

were read on this motion to dismiss.

Defendant Robert Weinstein (movant) moves pursuant to CPLR 3211(a) (7) for an order dismissing this action as against him. Plaintiff opposes.

I. COMPLAINT (NYSCEF 15)

To the extent that it pertains to this motion, plaintiff alleges as follows:

Plaintiff was 26 years old when she was employed by defendants as a personal assistant to defendant Harvey Weinstein, from approximately February 2013 to February 13, 2015 at defendant The Weinstein Company's (TWC) Manhattan office. There, she was "forced to work in a pervasive and severe sexually hostile work environment . . . defined by endless offensive, degrading, and sexually harassing actions, statements, and touching at the hands of" Harvey, in violation of the New York City Human Rights Law (NYCHRL), Administrative Code of the City of New York § 8-101, *et seq.*

Service as Harvey's personal assistant included "catering to his sexual appetites and activities," and to his "demeaning and often abusive family members." In addition to listening to Harvey's telephone calls, reading and responding to his emails, managing his doctor appointments and drivers, shopping, and obtaining clean underwear for him, plaintiff was required to "be involved in and aware of the preparations for, and clean up after, [his] extremely prolific sexual encounters."

As a condition of her employment, plaintiff was required to work with Harvey when he was naked. He touched her without her consent and required that she sit with him in the back of his chauffeured car where he would touch her thigh. When she began dressing in pants, he would rub between her thighs, and when she crossed her legs, he would touch the back of her legs and backside. He walked close to her when exiting the car and pressed against her, in addition to other "extremely offensive physical contact, which should never occur in the work environment."

Harvey regularly referred to plaintiff with sexist and sexual language such as "cunt" or "pussy," along with other offensive comments about her in the presence of other TWC employees. He often commented on her appearance, leered at her, and complained when she started to wear pants. He emphasized his power to her.

Plaintiff was also required to maintain Harvey's list of contacts including those identified by asterisk as his "girls." She was ordered to obtain and set up an apartment near the office for his sexual encounters, and purchase women's lingerie as well as other gifts. She was required to manage Harvey's stash of devices containing medication for erectile dysfunction and provide him with one some three times a week when he would go to meet a woman at a hotel. When the medications were no longer available from the usual source, plaintiff was ordered to find

another, and was paid $500 by TWC for doing so. She was also tasked with regularly cleaning up semen on Harvey's couch in his office, picking up his used condoms, and cleaning up rooms before housekeepers arrived.

By February 2015, the hostile work environment created by Harvey, which movant, a director and co-chair of TWC and owner of a significant portion thereof, "condoned and enabled," had "escalated to an emotional breaking point" for plaintiff, thus leaving her the sole option of resigning. Due to the "incessant sexual harassment" she endured, plaintiff continues to suffer from "severe emotional distress, anxiety, depression, humiliation, fear, anguish and loss of self-esteem."

On information and belief, plaintiff alleges that Harvey's conduct in this regard, and his use of the office, TWC, and staff, was reported in the New York Times, The New Yorker, and Vanity Fair, and was "common knowledge" in the office, and to management, movant, and defendant Gil.

Before being forced to leave her job, plaintiff reported "various matters relating to [Harvey] to others within the company" and authored a document entitled "Harvey's Friends," which she believes was recently destroyed by Harvey, who also may have had her personnel file destroyed.

Based on these facts, plaintiff advances causes of action against, as pertinent here, movant, for discrimination and harassment in violation of the NYCHRL and for aiding and abetting Harvey's discriminatory conduct.

II. MOTION TO DISMISS

A. Movant's contentions (NYSCEF 13)

Movant argues that the complaint contains an insufficient factual basis for finding that he

was plaintiff's employer within the meaning of the NYCHRL or that he engaged in any conduct for which he may be held liable based thereon, absent any allegation that he selected and engaged her, that he paid her a salary or wages, that he had the power to dismiss her, and that he had power or control over her conduct. Rather, plaintiff alleges in her complaint that Harvey hired her, that Harvey had "absolute" power over her employment, and that her employment relationship was with TWC. Thus, movant's status as a principal and owner of TWC, he maintains, does not render him personally liable for Harvey's conduct, relying on, among other decisions, *Griffin v Sirva*, 29 NY3d 174 (2017).

Movant also contends that plaintiff fails to state a cause of action for aiding and abetting Harvey's discriminatory conduct absent any nonconclusory allegation that he shared Harvey's discriminatory intent or purpose, or actively participated in that conduct.

Movant complains that the complaint lacks notice of how he treated plaintiff worse than other employees based on her gender and of his discriminatory animus toward women in general. While he acknowledges that plaintiff need satisfy only the standard of notice pleading for claims brought under the NYCHRL, he asserts that her conclusory allegations are insufficiently particular and thus fail to comply with CPLR 3013 by affording him no notice of the case against him. That Harvey's conduct was a matter of common knowledge, moreover, he claims, does not constitute fair notice of the claim against him.

b. Plaintiff's contentions (NYSCEF 24)

Plaintiff argues that movant may be held liable for discrimination as an employer under the NYCHRL, given his ownership interest in plaintiff's corporate employer, and that as an owner, he had "ultimate hiring and firing authority." In light of the broader liability provided for under the NYCHRL, as compared with the NYSHRL, plaintiff maintains that a more expansive

construction of the term "employer" serves the remedial purposes of the former. She observes that as Harvey's conduct was common knowledge at TWC and known or should have been known by movant (§8-107[13][b]), he had a duty to maintain a workplace free of sexual harassment, and that his failure to do so renders him liable as an aider and abettor of Harvey's and TWC's abuse of plaintiff and others. She distinguishes *Griffin* on the ground that it does not concern the liability of an owner and chief executive officer for a company's sexual harassment of employees under his ultimate control. Rather, in *Griffin*, she observes, the Court only addressed whether a corporate entity acting as an agent of another may be an employer under the NYSHRL. She thus relies on *Patrowich v Chem. Bank*, 63 NY2d 541, 543-544 (1984). Moreover, she contends, any person may be held liable as an aider and abettor.

As additional evidence of movant's liability, plaintiff offers the June 5, 2018 employment agreement between Harvey and TWC that provides that Harvey and movant "shall equally share authority over all operations and the overall direction of the Company," with all employees reporting directly to Harvey and movant. Additionally, on October 11, 2017, she notes, it was reported in the New York Times that earlier that month, as stories about Harvey's conduct became known, and as movant and other TWC board members expressed shock about it, Harvey had emailed movant and the other board members stating that "they knew about the payouts" he made to women who had complained of his conduct. Plaintiff also references an action filed by the New York State Attorney General containing allegations of movant's acquiescence in Harvey's sexual harassment of TWC employees and interns, and use of corporate employees and resources to facilitate his sexual activities with others.

C. Movant's reply (NYSCEF 30)

Movant argues that plaintiff misconstrues the test for employer liability, claiming that an

owner or executive of a business must have "participated in some way" in the alleged discriminatory or harassing conduct, or at least directly supervised the plaintiff. He challenges plaintiff's attempt to distinguish *Griffin*, observing that in *Patrowich*, the case on which she relies, the claim was also brought under the NYSHRL, and that the two statutes are "generally treated" as comparable as to whom may be held liable. Moreover, he denies that *Patrowich* stands for the proposition that an ownership interest alone is sufficient for holding the individual holding that interest liable.

In response to the action brought against him by the Attorney General, movant alleges that plaintiff's reliance on the provision of the employment agreement is misplaced, contending that by the time the agreement was signed, plaintiff had left TWC. He otherwise takes issue with plaintiff's interpretation of that provision.

D. Oral argument (NYSCEF 37)

At oral argument on the motion, movant asserted that a recent federal case, *Canosa v Ziff*, 2019 WL 498865, *2 (SD NY 2019), is directly on point and warrants that the instant case be dismissed as against him.

III. ANALYSIS

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Nonetheless, allegations asserting bare legal conclusions are not entitled to such consideration. (*Simkin v Blank*, 19 NY3d 46, 52 [2012]).

In accepting all of the plaintiff's allegations as true, the court may not express "any opinion as to the plaintiff's ability to ultimately establish the truth of these averments before the trier of the facts." (*Cooper v 620 Properties Assocs.*, 242 AD2d 359, 360 [2d Dept 1997], quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). "The motion must be denied if from the four corners of the pleadings 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A. Employer

Section 8-107(l)(a) of the NYCHRL prohibits an "employer or an employee or agent thereof" from discriminating against any person in the "terms, conditions or privileges of employment." The employer liability standard "is designed to provide an incentive to establish a policy against discrimination, hold employers to a high level of liability for employment discrimination, and present employers with a fair opportunity to mitigate the amount of civil damages imposed for discriminatory conduct." (Report of the Committee on General Welfare, Local Law 39, June 18, 1991, New York City Legislative Annual, 1991).

Whether movant is correct in arguing that more than his corporate ownership must be pleaded need not be addressed as plaintiff alleges in the complaint that he "condoned and enabled" Harvey's misconduct. (*See McRedmond v Sutton Place Restaurant and Bar Inc.*, 95 AD3d 671 [1st Dept 2012] [defendant-owner subject to liability under NYSHRL and NYCHRL for discriminatory conduct of plaintiff's co-worker given evidence raising issues of fact whether he condoned or aided and abetted co-worker's conduct]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006] [plaintiff stated NYSHRL claim against corporate founder and managing member as one

having ownership interest or power to do more than carry out personnel decisions made by others and thus to be considered an "employer"], citing *Patrowich v Chemical Bank,* 63 NY2d 541, 543-544 [1985]). As the decisions cited by movant are either factually or legally distinguishable, they are not addressed, nor are plaintiff's submissions offered in reply.

However, movant's reliance on *Griffin v Sirva,* 29 NY3d 174 (2017), should be addressed. There, the Court was tasked with answering the following certified question from the Second Circuit: "[W]hat is the scope of the term 'employer' for these purposes, *i.e.* does it include an employer who is not the aggrieved party's 'direct employer,' but who, through an agency relationship or other means, exercises a significant level of control over the discrimination policies and practices of the aggrieved party's 'direct employer'?" As movant fails to distinguish himself from a "direct employer" or equate himself with the individual defendants in *Griffin*, who were sued on the basis of their agency relationship with the plaintiff's direct employer, *Griffin* is inapposite.

Lest there be any confusion, the Court in *Griffin* relied on *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082 (4th Dept 1985), in which the plaintiff's wages and benefits were paid by the employment agency through which the defendant GTE had hired her, thereby rendering her status as an employee of GTE uncertain. The Court thus set forth four factors to be considered in determining whether an employer/employee relationship existed between the plaintiff and GTE: "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct. (36 NY Jur, Master and Servant, § 2)." (*Id.* at 1083).

Here, by contrast, there is no question that movant, a corporate owner with a significant interest in TWC, was not plaintiff's supervisor, co-worker, or employer by agency. Thus, his

status as an employer does not depend on whether he hired, fired her, paid her, or had control over her conduct.

Support for distinguishing *Griffin* is found in *Pepler*. There, the Court held that the plaintiff had adequately stated a claim against the defendant-managing member of the defendant LLC as the plaintiff's employer, observing that he was an individual with an ownership interest or power to do more than carrying out personnel decisions made by others. The Court thus reversed the pre-answer dismissal of the plaintiff's claim, rejecting the notion that a plaintiff must plead a corporate owner's actual participation in an act of discrimination against him or her. (*Pepler*, 33 AD3d at 434).

In *Canosa v Ziff*, on which movant also relies, the plaintiff is variously described as "either an employee or independent contractor" or "consultant" of TWC. (2019 WL 498865, *2). The court held that as the plaintiff did not allege that the defendant, the same defendant sued here, "had any power whatsoever over [her] hiring or firing, her salary, or her work," he was not liable "under an employer theory," citing *Griffin*. (*Id*. at 19). As in *Griffin*, the court did not address the issue presented here, namely, whether movant's status as a corporate officer of TWC with a significant ownership interest in it suffices to render him subject to liability as the plaintiff's employer, and as in *Griffin*, the court's failure to address that issue is reasonably explained as arising from the uncertainty of the plaintiff's employment status. Here, by contrast, movant admits that plaintiff's employment relationship was with TWC; she is not alleged to be an independent contractor or consultant. That Harvey "hired" and had "absolute control" over her, is thus irrelevant to movant's motion. Thus, like *Griffin, Canosa* is distinguishable from the instant case.

That an individual is an employer does not end the inquiry, as "an 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" (*State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 688 [1985]), which plaintiff alleges in her complaint. Thus, movant's argument that he should not be subject to strict liability for Harvey's conduct (*see Marchuk v Faruqi & Faruqi*, 100 F Supp 3d 304, 308 [SD NY 2015] [law not so broad that it imposes strict liability on individual "for simply holding an ownership stake in a liable employer."]; *Zach v East Coast Restoration & Constr. Consulting Corp.*, 2015 WL 5916687 [SD NY 2015] [same]), is premature, even if viable, given the legislative intent to incentivize corporate responsibility to establish policies against discrimination.

B. Aiding and abetting

Pursuant to section 8-107(6) of the NYCHRL, it is an unlawful discriminatory practice for "any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or attempt to do so." To be held liable for aiding and abetting an act forbidden by the statute, "a failure to conduct a proper and thorough investigation or to take remedial measures upon a plaintiff's complaint of discriminatory conduct is sufficient . . ." (*Ananiadis v Mediterranean Gyros Products, Inc.*, 151 AD3d 915, 918 [1st Dept]).

Here, as plaintiff alleges that movant knew or should have known of Harvey's discriminatory conduct, and condoned and enabled it, she states a cause of action for aiding and abetting Harvey's conduct. (*See Ananiadis*, 151 AD3d at 918 [defendants failed to demonstrate *prima* facie that they acted appropriately in response to complaints, thereby failing to show that they did not aid and abet alleged discriminatory conduct despite awareness of company policy]).

C. Sufficiency of factual allegations and notice

It is not disputed that plaintiff's complaint of employment discrimination is generally reviewed under notice pleading standards. Thus, the plaintiff "'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." (*Burhans v The State of New York*, 2015 WL 195095, at *4 [Sup Ct, NY County 2015], citing *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]).

Here, numerous instances of Harvey's allegedly discriminating and harassing conduct are detailed in the complaint, along with the allegation that movant condoned and enabled that conduct. This constitutes fair notice to movant of his alleged discriminatory conduct.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that defendant Robert Weinstein's motion is denied in its entirety; if is further

ORDERED, that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on July 31, 2019 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

20190513161953BJAFFECCA9D8EF86B04E6C837AC5F94392C61A

5/13/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED	**X**	**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**