SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIKE PELLERITO, VICTOR GORELICK, DEBBIE MONSERRATE, JIM PAGET, JONATHAN GRAY and DAVID FELICIANO,

Plaintiffs,

Index No. 65382/2013

-against-

NANCY SILBERKLEIT,

Defendant.

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MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S MOTION TO DISMISS

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Rules

PRELIMINARY STATEMENT

This action was commenced by the Plaintiffs employees as a last resort to end the relentless and escalating pattern of harassment, retaliation and abuse endured at the hands of Defendant Co-Chief Executive Officer inside the workplace, and even extending outside of the workplace as well as to Plaintiffs' family members.[1] As set forth in the Complaint, after Plaintiff employees failed to support Defendant's false claim of harassment and instead reported Defendant's own gender based discriminatory conduct, Defendant retaliated against Plaintiffs by escalating the situation to the point where Plaintiff employees fear for their safety on a daily basis and require the posting of armed guards at the company. In addition to creating a retaliatory hostile working environment which continues to date, Defendant retaliated against Plaintiffs outside of the workplace by stalking them and their families. Absent this Court's intervention, Plaintiffs left without a remedy for Defendant's outrageous action which is well beyond the bounds of civilized society.

For brevity's sake, the Court is respectfully referred to the Statement of Facts for a full recitation of the facts at issue on this motion to dismiss. No factual affidavit is included. Based upon the Complaint and the points of law herein, Defendant's motion to dismiss must be denied in its entirety.

[1] Defendant's assertion at page 1 of Defendant's Memorandum of Law, that the Complaint was somehow timed or intended to effect her failed campaign for the Office of Mayor of Rye City, where she received only 128 votes (3% of vote according to the Westchester County Board of Elections), cannot be taken seriously and is denied in its entirety.

ARGUMENT

DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED IN ITS ENTIRETY

Though no statutory provision is stated within the notice of motion identifying the basis of the motion, the accompanying memorandum of law refers to CPLR 3211(a)(7) and argues that each cause of action fails to state a claim. When determining a motion under CPLR 3211(a)(7), the Court accepts the Complaint's factual allegations as true and provides Plaintiffs all favorable inferences. Marchionni v. Drexler, 22 A.D.3d 814, 803 N.Y.S.2d 196, 197 (2d Dept. 2005)(citing Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). Where Plaintiffs can succeed upon any reasonable view of the allegations, Defendant's motion to dismiss must be denied. Marchionni, supra. Moreover, where the motion is addressed to the Complaint as whole – as it is here – it must be denied as long as the Complaint states one legally sufficient cause of action. Birnbaum v. Citibank, N.A., 97 A.D.2d 392, 393, 467 N.Y.S.2d 213 (2d Dept. 1983) (citations omitted).

At page 2 of the Defendant's memorandum of law, mention is made also to CPLR 3211(a)(2) but no argument is made at any juncture regarding jurisdiction and therefore is presumed to be either a typographical error and/or abandoned.

As set forth herein, Defendant's motion fails under both provisions and must be denied in its entirety.

I. PLAINTIFFS STATE A CLAIM UNDER NEW YORK STATE HUMAN RIGHTS LAW ("NYSHRL") FOR BOTH GENDER DISCRIMINATION AND RETALIATION

Claims under NYSDHL for gender based discrimination and retaliation are analyzed in an identical fashion to Federal Title VII claims. Aurecchione v. State Div. of Human Rights, 98

NY2d 21 (2002); Stetson v. NYNEX Service Co., 995 F.2d 355, 360 (2d Cir.1993) (Plaintiff's claim under New York's Human Rights Law "is governed by the same standards as his federal claim"); Fordham v. Islip Union Free School District, 662 F.Supp.2d 305 (E.D.N.Y. 2009)(standard for retaliation claims under NYSHRL and Title VII is the same).

Defendant's entire argument on this point erroneously centers upon an alleged failure to assert certain "specific facts" Defendant, though not the law, deem necessary. This argument fails to recognize that courts assess employment discrimination claims under a particularly relaxed "notice pleading" standard. Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 145 (1st Dept. 2009). "Notice pleading" does not require specific facts, but only "fair notice" of the nature and grounds of her claims." Artis v. Random House, Inc., 34 Misc.3d 858 (Sup. Ct., New York Co., 2011).

As a result, "a complaint in an employment discrimination lawsuit ... need not include ... specific facts establishing a prima facie case of discrimination .... When a ... court reviews the sufficiency of a complaint (on a motion to dismiss based upon the pleadings), its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims," Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 145 (1st Dept. 2009). Similarly, "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [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).

Further, Defendant's arguments demonstrate a misunderstanding between *pleading* standards and *evidentiary* standards. With respect to pleadings in discrimination cases, the Supreme Court, in Swierkiewicz v. Sorema N.A., supra, rejected the concept that there is a heightened pleading standard and, thus, held that the survival of a complaint in an employment discrimination case does not rest on whether it contains specific facts establishing a *prima facie* case under the standard set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Swierkiewicz, 534 U.S. at 510 ("The *prima facie* case under McDonnell Douglas ... is an evidentiary standard, not a pleading requirement."); see also Williams v. N.Y. City Hous. Auth., 458 F.3d 67, 71–72 (2d Cir.2006) (applying Swierkiewicz holding to retaliation claims); Leibowitz v. Cornell Univ., 445 F.3d 586, 591 (2d Cir.2006) (applying Swierkiewicz holding to discrimination claims under Title VII). To hold otherwise would not only "narrowly constrict the role of the pleadings," but also be inappropriate in certain cases, such as where plaintiffs, following discovery, may "produce direct evidence of discrimination." Swierkiewicz, 534 U.S. at 511, 122 S.Ct. at 997 (internal quotations, alterations, and citations omitted).

Defendant's misunderstanding as to the notice pleading standard applied on a motion to dismiss seems to stem from the fact that none of the cases cited in support of Defendant's NYSHRL argument involve a motion under CPLR 3211(a)(7). Instead, each of the four cases cited by Defendant involve only motions for summary judgment under CPLR 3212 made after discovery, not pre-discovery motions to dismiss under CPLR 3211(a)(7). See, Defendant's memorandum of law at pages 3-4, citing, Wharton v. Town of North Hempstead, 22 Misc.3d 83 (2d Dept., App. Term, 2009)(affirming lower court decision granting summary judgment motion); Forrest v. Jewish Guild for the Blind, et al., 3 N.Y.3d 295 (2004)(reversing lower

court's denial of summary judgment motion); Hernandez v. Bankers Trust Co., 5 A.D.3d 146 (1st Dept. 2004)(affirming lower court decision granting summary judgment motion); Pace v. Ogden Servs. Corp., 257 A.D.2d 101 (3d Dept. 1999) (affirming lower court decision granting summary judgment motion). Of course, the *evidentiary* standard applicable on a post-discovery motion for summary judgment is inapplicable herein.

Under the applicable notice pleading standard, courts have completely rejected the arguments advanced by Defendant herein. For example in, Fowler v. Scores Holding Co., 677 F.Supp2d 673 (S.D.N.Y. 2009), the court held as follows at page 683:

> The Court notes that Fowler has to-date not pled that she suffered an adverse employment action, as required under both the NYSHRL and the NYCHRL... Further, Fowler has not yet connected any change in the conditions of her employment to discrimination based on her sex. ***Nevertheless, the Court finds that, given the permissive pleading requirements for employment discrimination claims, Fowler has satisfied her burden at this stage.*** See, Harper v. New York City Hous. Auth., No. 09 Civ. 5303, 673 F.Supp.2d 174, 180-81, 2009 WL 3861937, at *4 (S.D.N.Y. Nov. 6, 2009) (denying motion to dismiss employment discrimination claim for failure to adequately allege adverse employment action); Kear v. Katonah Lewisboro Central School, No. 05 Civ. 7038, 2007 WL 431883, at *6 (S.D.N.Y. Feb. 7, 2007) (same). (emphasis supplied).

Even assuming, arguendo, the *evidentiary* standards urged by Defendant was applicable at this juncture (which they are not), the burden of proof at the *prima facie* stage is *de minimis*, Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir.1994) (citations omitted), and, as demonstrated herein, after amply satisfied requiring denial of Defendant's motion in its entirety.

Finally, as expressly stated by the Legislature, the NYSDHL is to be liberally construed in favor of the Plaintiffs further warranting denial of Defendant's Motion New York State Executive Law § 300.

A. Plaintiffs State A Claim For Retaliation Under NYSHRL

Plaintiffs have adequately stated a claim for retaliation under the NYSHRL. New York Executive Law Section 296 (1)(e) prohibits employers from retaliating against employees or job applicants for opposing practices prohibited by the statute or for filing a complaint, testifying, assisting or participating in a discrimination proceeding. This is the NYSHRL.

Defendant's argument reflects a misunderstanding as to the applicable standard for this claim. The Defendant begs the Court to alter established rules of notice of pending without justification. This effort must be rejected.

As recently explained in Dixon v. City of New York, 2008 WL 4453201. *18 (E.D.N.Y. 2008), where, as here, a retaliatory hostile work environment is involved the standard is as follows:

> "Rather than apply the traditional Title VII retaliation standard, [ ] courts consider so-called retaliatory hostile work environment claims under the rubric generally reserved for construing pure hostile work environment claims. Success or failure of the retaliatory hostile work environment claim therefore hinges not so much on whether the plaintiff can make out the [McDonnell Douglas] *prima facie* case outlined above but whether he can prove the existence of a hostile work environment." Nugent v. St. Luke's/Roosevelt Hosp. Ctr., No. 05 Civ. 5109, 2007 WL 1149979, at * 12 (S.D.N.Y. April 18, 2007).

Further, Plaintiffs do not have to demonstrate an actual underlying violation. Instead, "Plaintiff must demonstrate only that he had a 'good faith, *reasonable* belief that the underlying challenged actions of the employer violated the law.'" Dottolo v. Byrne Dairy, Inc., 2010 WL 2560551 (N.D.N.Y. 2010) (citing Wimmer, 176 F.3d at 134 (quoting Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir.1988) (emphasis added).

Even assuming that the McDonnell Douglas evidentiary standard advanced by the Defendant applied as opposed to the notice pleading requirement (which it does not), these

necessary elements are clearly met here.[2] First, contrary to Defendant' argument, "protected activity" has never been limited to formal complaints or testimony before the New York State Division of Human Rights or a Court. Instead, the law is well settled that "protected activity" includes "informal protests of discriminatory employment practices, including making complaints to management." Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir.1990); see also, Sorrentino v. Bohbot entertainment and media, Inc. , 265 A.D. 2d 245 (1st Department 1999)(upholding $2 million verdict in favor of Plaintiff retaliated against for making statements as part of internal company investigation); Crawford v. Metropolitan Government of Nashville and Davidson County, 555 U.S. 271, 276, 129 S.Ct. 846 (2009)(Protection of the opposition clause of Title VII anti-retaliation provision extended to an employee who spoke out about discrimination in the form of sexual harassment allegedly perpetrated against her, not on her own initiative, but in answering questions during an employer's internal investigation of employee's coworker's complaints of sexual harassment). In this regard, the complaint is replete with gender based complaints by the Plaintiff employees to the employer's independent human resource specialist, i.e., protected activities. (See, e.g., Complaint at paras. 65, 78-84, and 151, et seq.).

As to the second evidentiary prong, same does not require the Plaintiff to demonstrate that the individual who took the adverse employment action had knowledge of the Plaintiff's protected actions. See, Henry v. Wyeth Pharmaceuticals, Inc., 616 F.3d 134, 147-48 (2d Cir. 2010). Notwithstanding the foregoing, Defendant is specifically alleged to have been aware of the Plaintiffs' protected activity. (See, e.g., para. 157).That specific allegation is enough.

[2] The McDonnel Douglas evidentiary standard for a Retaliation Claim under the NYSHRL requires: (a) that plaintiff participated in a protected activity known to the defendant; (b) that Plaintiff suffered a materially adverse employment action, and (c) that there is a causal connection between the protected activity and the adverse action. See, e.g. Richardson v. Comm'n on Human Rights and Opportunities, 532 F.3d 114, 123 (2d Cir. 2008).

Moreover, as Co-Chief Executive Officer of the company and prior litigant in the actions detailed in the Complaint, Defendant can reasonably be presumed to know the results of the company's internal investigation and Plaintiffs' complaints regarding Defendant's gender based harassment as part of same as forth in the Complaint. Leon v. Martinez, 84 NY2d at 87-88 (plaintiffs must be given benefit of every possible favorable inference on motion to dismiss for failure to state claim).

More, the law's definition of what is materially adverse employment action is much broader than that argued by the Defendant. Indeed, "the standard for an adverse employment act in the retaliation context is lower than the standard for a disparate treatment claim as, for a retaliation claim, a plaintiff need only show that the action would have dissuaded a reasonable worker from speaking out against discrimination." Eldridge v. Rochester City S.D., __ F.Supp.2d ___, 2013 WL 5104279 (W.D.N.Y. 2013)(quoting Early v. Wyeth Pharm., Inc., 603 F.Supp.2d at 577); see also, Burlington Northern and Santa Fe Railway Co. v White, 548 U.S. 53, 126 S.Ct. 2405 (2006). Significantly, "[t]he scope of the anti-retaliation provision extends beyond the workplace-related or employment-related retaliatory acts and harm." Burlington Northern, supra, 126 S.Ct. at 2414. Moreover, "[o]ur precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim once they reach a critical mass." Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir.2002) (pertaining to First Amendment retaliation claim) see also, Olsen v. County of Nassau, 615 F.Supp. 35, 42 (E.D.N.Y. 2009)(applying aforesaid standard to jury verdict in Title VII claim).

As explained in Olsen, supra at 42, and particularly applicable herein, this is because:

> Repeated acts of public ridicule, disparaging comments, minor disciplinary actions and unfavorable or undesirable work assignments—carried out with discriminatory animus-may be just as damaging and, in many cases, more damaging to a person's work environment than a single material adverse employment action, such as a promotion or

> demotion. For that reason, these "otherwise minor incidents," if they "occur often and over a longer period of time," are "actionable" once "they attain [a] critical mass," as the jury herein found. Phillips, 278 F.3d at 109 (pertaining to a First Amendment retaliation claim).

In this regard, it has long been recognized that "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action so as to satisfy the second prong of the retaliation *prima facie* case." Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir.1999), abrogated on other grounds by Burlington N.., 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345; Thomas v. iStar Financial, Inc., 438 F.Supp.2d 348, 365 (S.D.N.Y. 2006)("A hostile work environment could also constitute a materially adverse change that might dissuade a reasonable worker from reporting activity prohibited by TitleVII").

As to the third evidentiary prong, the Complaint, it is specifically alleged that Plaintiffs sustained adverse employment activity caused by Defendant at para. 158. This allegation is supported by facts depicting a retaliatory hostile work environment created and escalated by the Defendant to punish Plaintiffs for their protected activity against her. (See, e.g., paras. 97-98, 101-106, 116, 120, 123, 127, 130,141, 148 and 151, et seq.). As set forth in the Complaint, Defendant's escalating conduct ultimately necessitated armed guards at the company only after publication of the earlier independent human resource findings which incorporated and adopted Plaintiffs' reports of the facts. (See, e.g., paras 97-100). This escalating conduct, together with Defendant's inquiries about the location of a missing handgun (and the inference same would be used against them) and stalking of Plaintiffs and their families, continues to date. (See, e.g., paras at 100, 116, 120 et seq. and 148). There is a stated definite causal connection between the protected activity and the adverse action. Defendant's harassment and abusive tactics both inside and outside of the office increased in nature, scope and intensity following the protected activity and continued to the time the Complaint was filed.

Furthermore, hostile environment exists where, as here, the workplace is permeated with 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. Forrest v. Jewish Guild for the Blind, 3 NY3d 295 (2004). This claim does not require Plaintiffs prove psychological injury or resignation from their employment, McRedmond v. Sutton Plance Restaurant and Bar, Inc., 95 A.D.3d 671, 672 (2012), and, "is measured by the totality of the circumstances, of which no single one is determinative". Id. (internal quotations omitted). When Plaintiff employees feel physically unsafe and threatened to the point that armed guards are needed to protect them from Defendant's escalating forms of retaliation, same cries out for immediate judicial intervention and is one reason Plaintiffs had to commence the instant action.

Based upon the foregoing, Defendant's motion should be dismissed in its entirety. Even assuming, arguendo, the Court adopts the misplaced arguments made by the Defendant, the proper remedy to grant is leave to amend as opposed to dismissal.

B. Plaintiffs State A Claim For Discrimination Under NYSHRL

As to the gender based discrimination claim, Defendant's argument also reflects a misunderstanding of the law. New York State Executive Law § 296(1)(a) makes it an unlawful discriminatory practice for an employer to refuse to hire, to discharge, or to discriminate in compensation or in terms, conditions or privileges of employment because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic-violence-victim status of any individual.

As previously set forth, Defendant's argument should be rejected in its entirety as same employs the incorrect standard. As demonstrated in Swierkiewicz, supra, the Complaint herein

amply satisfies the required notice pleading standard. There, the Supreme Court rejected the employer's motion to dismiss noting at 534 U.S. at 514 that Swierkiewicz had:

> alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.

As in Swierkiewicz, supra, here the 29 page, 176 paragraphs Complaint gives Defendant fair notice of what Plaintiffs' claims are and the grounds upon which they rest. Each of the Plaintiffs allege that they were, at repeated and various times, treated differently and targeted because of their gender. (See, e.g., Plaintiffs were repeatedly and publicly referred to as parts of anatomy at paras. 45, 64, 80). Indeed, Plaintiffs allege that Defendant's repeated inappropriate sexual comments were used in conjunction with Defendant's constant threats to fire Plaintiffs, threats which Defendant continues to carry out to date by way of false accusations of gender related misconduct or other wrongdoing as well as attempts to falsify such evidence against Plaintiffs. (see, e.g., paras. 82-83, 120, 140-142 et seq.). Adequate notice is supplied.

Nevertheless, should the Court adopt Defendant's misplaced argument that the McDonnell Douglas evidentiary standard applies at this juncture, Plaintiffs' Complaint satisfies same. In order to prove a *prima facie* Title VII claim, the McDonnell Douglas evidentiary standard requires plaintiffs show: (1) they are members of a protected class; (2) they were qualified for their position and satisfactorily performed their duties; (3) they suffered an adverse employment action; and (4) the circumstances surrounding that action giving rise to an inference of discrimination. Sank v. City University of New York, No. 10 Civ. 4975, 2011 WL 5120668, at *8 (S.D.N.Y. Oct.28, 2011) (citing Williams v. R.H. Donnelly, 368 F.3d 123, 126 (2d

Cir.2004). Again, even assuming that the evidentiary standard as opposed to a pleading requirement is necessary herein (which it is not), these elements are clearly met here.

First, the Complaint identifies five male employees and one female employee by name, all of whom were subjected to differential treatment at different junctures by the Defendant who used her gender as a weapon against them. (See, e.g., paras 64, 80 and 82 as to male employees; 43-47, 63 as to female employee; para 152-53 as to all employees)[3]. The Courts have long considered both male and female employees members of protected classes. See, e.g., Oliveras v. Wilkins, Not reported in F.Supp., 2010 WL 423107 (S.D.N.Y. 2010) (denying motion to dismiss male employee's claim of reverse gender discrimination). Second, from their hiring and duration of employment Plaintiffs' qualifications can be reasonably inferred by the pleadings. See, Miller v. National Ass'n of Securities Dealers, Inc., 703 F.Supp. 230, f.n.7 (E.D.N.Y. 2010) (inference of minimal qualifications heightened based on length of employment) (citations omitted).

Third, as previously discussed above, by way of their Memorandum of Law, Defendant evinces a complete misunderstanding of the term "adverse employment action" as being limited to active or constructive discharge as opposed to the broad interpretation of this phrase by the Courts. "[T]here is no exhaustive list of what constitutes an adverse employment action. Courts have held that termination, demotion, denial of promotion, addition of responsibilities, involuntary transfer that entails objectively inferior working conditions, denial of benefits, denial of a requested employment accommodation, denial of training that may lead to promotional opportunities, and shift assignments that make a normal life difficult for the employee, among other things, constitute adverse employment actions." Little v. NBC, 210 F.Supp.2d 330, 384

[3] Should the Court require each Plaintiff to specifically be identified by gender despite the obvious and reasonable inference that Plaintiff Mike Pellerito is a male, Plaintiff Victor Gorelick is a male, Plaintiff Jim Paget is a male, Plaintiff Jonathan Gray is a male, and Plaintiff David Feliciano is a male whom Defendant repeatedly referred to as "penis[es]" rather than by name as set forth in the complaint, the appropriate remedy is to permit amendment rather than Defendant' draconian suggestion of dismissal. Likewise, Plaintiff Debbie Monserrate is repeatedly described as "a female" at paras. 43, et seq.

(S.D.N.Y.2002). In this regard, it has long been recognized that "unchecked retaliatory co-worker harassment, if sufficiently severe, may constitute adverse employment action..." Richardson, supra. In any event, adverse employment action is alleged at para. 158 of the Complaint as well as in the totality of the conduct described in the Complaint. See also, paras 120, et. seq. 154 and 159.

Fourth, the circumstances alleged give rise to an inference of discrimination sufficient to submit to jury. See, e.g., Petrosino v. Bell Atlantic, 385 F.3d 210 (2d Cir. 2004)(evidence of sexually offensive exchanges at daily assignment meetings and sexual graffiti in terminal boxes was admissible to support employee's claim of hostile work environment on basis of sex, notwithstanding fact that all employees, not just the plaintiff employee, were routinely exposed to the sexually offensive language and graphic). See also, Leibowitz v. Cornell Univ., 584 F.3d 487, 502 (2d Cir.2009) ("It is well-settled that an inference of discriminatory intent may be derived from a variety of circumstances, including ... [the employer's] invidious comments about others in the employee's protected group ....").

II. PLAINTIFFS STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ("IIED")

As noted by the Court of Appeals, the IIED "tort is as limitless as the human capacity for cruelty." Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 122 (1993). Defendant's motion ignores well-settled law that a cause of action for intentional infliction of emotional distress is viable where "severe mental pain or anguish is inflicted through ***a deliberate and malicious campaign of harassment or intimidation***." Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765 (1970) (emphasis added); Mitchell v. Giambruno, 35 A.D.3d 1040, 1042, 826 N.Y.S.2d 788 (3d Dept. 2006) ("Although insulting language intended to denigrate a person may not, in and of itself, rise to the required level of extreme and outrageous conduct, liability may be

premised on such expressions where . . . defendants' campaign of harassment and intimidation is constant."); see also Cavallaro v. Pozzi, 28 A.D.3d 1075, 814 N.Y.S.2d 462 (4th Dept. 2006). Specifically, "courts applying New York law have found the existence of a campaign even absent (a) unrelenting harassment directed at a single plaintiff; and (b) physical threats." Allam v. Meyers, 09 CIV. 10580 KMW, 2011 WL 721648 (S.D.N.Y. Feb. 24, 2011).

Contrary to Defendant's argument, courts, including the Second Department, have found that much lesser conduct than that alleged as amounting to a campaign which states a cause of action for IIED. Indeed, even "a campaign of harassing telephone calls may state a cause of action for intentional infliction of emotional distress." Gill Farms Inc. v. Darrow, 256 A.D.2d 995, 997, 682 N.Y.S.2d 306 (3d Dept. 1998) (citing Flatley v. Hartmann, 138 A.D.2d 345, 346, 525 N.Y.S.2d 637 (2d Dept. 1988) (refusing to dismiss intentional infliction claim predicated upon harassing hang-up telephone calls, even where no actual threats were made)).

In Flatley, the Court rejected defendant's motion to dismiss, even in the absence of defendant making actual threats, because the record established the existence of questions of fact as to whether the defendant's conduct exceeded the bounds of decency and as to whether the plaintiff suffered distress as a result. Flatley v. Hartmann, 138 A.D.2d 345, 346, 525 N.Y.S.2d 637 (2d Dept. 1988). Of course, the harassing hang-up telephone calls in Flatley is conduct that is far less outrageous than the Defendant's conduct here.

As another example, in 164 Mulberry Street Corp. v. Columbia Univ., 4 A.D.3d 49, 53, (1st Dep't 2004), several plaintiffs restaurateurs alleged that defendant professor at Columbia University wrote letters to plaintiffs as part of an academic study, which falsely accused plaintiffs of having caused severe food poisoning. The court found defendant's conduct "outrageous" reasoning that "these several letters could be construed in the aggregate as

presenting a campaign of harassment, albeit directed against distinct individuals, so it cannot be said as a matter of law that the fact of individual impacts vitiates what seems to have been serial acts perpetrated by a single source." Id. at 56.

Here, Defendant's collective words, threats, and action set forth in the Complaint clearly exceeds that set forth in Gill Farms, supra, Flatley, supra, and 164 Mulberry Street Corp., supra, requiring Defendant's motion be denied in its entirety.

Another settled point of law ignored by Defendant is that given Defendant's supervisory position over the Plaintiff employees, "[t]he extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives the defendant actual or apparent power to damage the plaintiff's interests." Vasarhelyi v. New Sch. for Soc. Research, 230 A.D.2d 658, 661, 646 N.Y.S.2d 795 (1st Dept. 1996) (citing Prosser & Keeton, Torts § 12, at 61 (5th ed)). In Vasarhelyi, the Court specifically stated: "As president of the academic institution that employed her, defendant . . . was in a position giving him apparent power to impair plaintiff's [the chief financial officer] professional standing." Id. Here, Defendant abused and continues to abuse her power position as co-CEO at Archie to damage the Plaintiffs' interests through a campaign of harassment and intimidation. For example, the Complaint notes that Plaintiff Paget "on two separate occasions [fell] to his knees and begg[ed] Defendant, 'Please don't ask me to lie' about the Employees and Officers of Archie Comics." See, Complaint, para. 141. This is just one example within the escalating campaign where the consequences of Defendant's malicious abuse of power are made apparent.

It is critical to view Defendant's conduct for what it is – a deliberate and malicious campaign focused on harassing, intimidating, and subduing employees. This campaign affected

employees' interests in their professional standing and economic livelihood due to her position of power as co-CEO. The gravity of her campaign is further evidenced through the Human Resource Independent Professional's Report, which specifically states that employees "indicated they had directly and regularly heard Nancy make threats in the office, particularly threatening employees' jobs. One employee relayed that the heard Nancy threaten nine different employees' jobs on more than one occasion." See, Complaint, para. 83.

Further demonstrating the outrageous nature of Defendant's conduct, in Eves v. Ray, 42 A.D.3d 481, 483 (2d Dept. 2007), the Second Department specifically noted that the plaintiff on the IIED counterclaim "continued to engage in this conduct despite the fact that the defendant had obtained a temporary order of protection and was pursuing a harassment charge against the plaintiff." . As in Eves v. Ray, here, Defendant remained committed to her campaign despite TRO and Permanent Injunction and escalated same after learning of Plaintiffs' factual allegations against her. This further exemplifies Defendant's action, when viewed in totality, was an outrageous operation consisting of harassment and intimidation.

As the law fails to support Defendant's position, Defendant is left to argue the facts. In this regard, Defendant mistakenly argues that "Plaintiffs use a few alleged statements by Defendant, over more than two decades, take them out of context and string them together to attempt to show her as 'deranged.'" See, Defendant's Memorandum of Law at p. 7. However, this characterization is simply false. Plaintiffs provide more than "a few alleged statements" and instead Plaintiffs' Complaint is packed with specific examples continuing to date that explicitly demonstrate Defendant's unrelenting and malicious campaign of harassment and intimidation. See, e.g., Complaint, paras. 18, 24, 44, 58-60, 63-85, 103, 106, 140-41.

Here Defendant's motion erroneously focuses on specific instances that, when looked at in isolation, may not rise to the level of outrageousness necessary for an IIED claim. As such, Defendant's motion painstakingly extracts and isolates a few alleged statements from their Complaint context in a failed attempt to undermine the Complaint and dumb down the severity of Defendant's outrageous, horrid, and persistent operation. Defendant deliberately points to a few instances of Defendant's outrageous conduct, attempting to isolate such incidents from the sum, and thereby ignores discussing Defendant's most outrageous activity. For example, the motion states, "[a]ccording to Plaintiffs' Complaint, for example, the use of the word 'penis' and the mere mention of sex toys would be outrageous in the modern world and an affront to societal decency." See, Defendants Memorandum of Law at p. 7. Again, Defendant's view of the Complaint is misplaced, an attempt to distract this Court from the real issue here which requires the Complaint be read and considered in its totality. When read in its entirety, the Complaint clearly describes Defendant's deliberate and malicious campaign of harassment and intimidation, as well as the anguish resulting from Defendant's conduct.

As an example of Defendant's misplaced argument, the Complaint does not allege that simply using the word 'penis' is an affront to modern societal decency. Rather, the Complaint explains and demonstrates how Defendant initiated a deliberate and disturbed campaign of outrageous conduct directed towards Plaintiff Employees, where the word "penis" became somewhat of a campaign slogan and her preferred method of referring to male employees in lieu of their names. See, Complaint, paras. 64, 80.

As another example, Defendant purposely avoids discussing the Report of Independent Human Resource Professional, who was employed by Archie Comics to investigate the disruptive and dangerous behavior of Defendant. See, Complaint, para. 65. This Report

concluded that Defendant's "conduct cannot be tolerated and in my opinion, Nancy [the Defendant] should no longer work at the ACP [Archie Comics] offices and should have no further direct conduct with ACP employees and vendors." See, Complaint, para. 66. Defendant's Motion also ignores the New York County Supreme Court Action against Defendant – also initiated by Archie Comics – and resulting Temporary Restraining Court and Permanent Injunction extended by that Court against Defendant. See, Complaint, para. 65-70.

Also, albeit predictably, the motion fails to address the incident involving Defendant's accusing a young and sick girl from the Ronald McDonald House for "stealing Betty's wig", that Defendant solicited an individual to have "Hell's Angels" come to Archie Comics in an effort to intimidate employees, that Defendant brought an ex-NFL Football player to intimidate employees at Archie Comics, that Defendant inquires about missing guns inferring her intent to use same against Plaintiffs, that Defendant has stalked and threatened to stalk Plaintiff Employees as well as their families. See, Complaint, paras. 18, 100, 103-105, 148.

In addition to sufficiently stating the outrageous nature of Defendant's conduct, the Complaint sufficiently alleges the resultant emotional distress suffered by the Plaintiffs. While Plaintiffs are required to allege mental suffering caused by the Defendant, "[i]t will be for the trier of facts to determine whether such injuries were actually suffered, and whether the conduct of the defendant was such that it may be said that it went beyond all reasonable bounds of decency." Id. Here, the Complaint clearly explains how and what resulting emotional distress Plaintiff Employees suffered as a result of Defendant's conduct. See, e.g., Complaint, paras. 148, 159, 172-73 (describing how Defendant intended to cause and did cause Plaintiff employees to suffer and continue to suffer "severe mental anguish, emotional distress, including but not

limited to, depression, humiliation, embarrassment, stress and anxiety, loss of self-esteem and self-confidence, insomnia, loss of appetite and emotion pain and suffering . . . .").

In closing, where reasonable persons may differ concerning the outrageous nature of Defendant's conduct, it is a question for the jury, 164 Mulberry St. Corp. v. Columbia Univ., 4 A.D.3d 49, 56, 771 N.Y.S.2d 16 (2004); Restatement, Torts 2d, § 46, Comment h. New York law requires that the Court view Defendant's conduct in totality where the "deliberate and malicious campaign of harassment [and] intimidation" is apparent, truly outrageous under New York law, and significant enough to cause severe emotional distress to those she directed her actions toward. As such, Defendant's motion must be denied in its entirety. See, e.g. Marchionni, supra (affirming lower court's denial of defendant's motion to dismiss intentional infliction of emotional distress claim as sufficiently plead); Plechavicius v. Mendoza, 128 A.D.2d 763, 512 N.Y.S.2d 1015 (2d Dept. 1987) (same).

Based upon the foregoing, Defendant's motion should be dismissed in its entirety. Even assuming, arguendo, the Court adopts the misplaced arguments made by the Defendant, the proper remedy is to grant leave to amend as opposed to dismissal.

III. PLAINTIFFS STATE A CLAIM FOR INTERFERENCE WITH PERFORMANCE OF THEIR CONTINUED CONTRACTUAL RELATIONS

Contrary to Defendant's argument, Plaintiffs have clearly stated a claim in this regard. S & S Hotel Ventures v. 777 S.H. Corp., 108 A.D.2d 351 (1st Dept. 1985); Schroders, Incorporated v. Hogan Systems, Inc., 137 Misc.2d 738, 742-743 (Supreme Ct., New York County 1987). Here, Plaintiffs allegations depict a pattern and practice of intentional interference with Plaintiffs' performance of their continued contractual relations as employees of Archie Comics. Plaintiffs' employment with the third-party Archie Comics is contractual in nature, albeit terminable at will, and Defendant has relentlessly and maliciously acted in the myriad of

ways described in the complaint in an attempt to sever these contracts. In S & S Hotel Ventures, supra, such allegations were upheld as sufficiently stating a cause of action as follows at pages 354-355:

> ***Such a cause of action requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, and its intentional interference with the performance of that contract by the third party without justification*** (Morris v. Blume, Sup., 55 N.Y.S.2d 196, 199, aff'd. 269 App.Div. 832, 56 N.Y.S.2d 414; see Maurer v. Hynes, 34 A.D.2d 867, 310 N.Y.S.2d 849; Muller v. Star Supermarkets, Inc., 49 A.D.2d 696, 697, 370 N.Y.S.2d 768). (emphasis added).

(emphasis supplied). See, also, Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc., 5 A.D.3d 352 (2d Dept. 2004) (Affirming lower court's denial of Defendant's 3211(a)(7) motion to dismiss where "[t]he plaintiff satisfied the pleading requirements for its tortious interference claims by, inter alia, making specific allegations identifying those of its customers who were purportedly contacted by the defendants, describing the challenged conduct and the existing and prospective customer agreements affected by that conduct").

Also contrary to Defendant's argument, Plaintiffs are not required to allege conduct amounting to an independent tort (although as previously set forth herein, same does) or a crime. This very argument was rejected as follows in S & S Hotel Ventures, supra at 355:

> ***Defendant asserts that a plaintiff claiming such interference must prove the existence of physical violence, fraud, misrepresentation, the institution of a civil suit or criminal prosecution, or the use of forceful economic pressure. However, the cases are not so limited***. ... the additional allegations that defendant maliciously withheld its consent or delayed such consent for its own benefit are sufficient affirmative action (Albemarle Theatre v. Bayberry Realty Corp., 27 A.D.2d 172, 277 N.Y.S.2d 505). The second cause of action alleges that the delay and failure to consent were intended to benefit a favored customer of defendant or to cause a renegotiation of the loan on less favorable terms. Defendant has done something more than remain inactive (Albemarle, supra, 27 A.D.2d at 175, 277 N.Y.S.2d 505). Such actions constitute a breach of legal duty existing "independent of contractual relations between the parties." (Channel Master Corp. v. Aluminium Limited Sales, 4 N.Y.2d 403, 408, 176 N.Y.S.2d 259, 151 N.E.2d 833). Such legal duty may flow from the contract itself (Rich v. New York Central & Hudson River Railroad Co., 87 N.Y. 382, 390; Robbins v. Ogden Corp., 490 F.Supp. 801). (emphasis supplied).

Notwithstanding that Plaintiffs are not so required, Defendant's conduct as alleged and described in the Complaint herein clearly amounts, at the very least, to violations of New York Penal Law §240.25, Harassment in the First Degree[4]; New York Penal Law §240.26, Harassment in the Second Degree[5]; New York Penal Law §240.45, Criminal Nuisance in the Second Degree.[6]

Defendant's argument that her position and interest in the company insulates her from liability on this claim is incorrect because the Complaint assumes Defendant's wrongful conduct is unjustified and outside the course and scope of her employment as Co-CEO, contrary to the interest of Archie Comics, and separate and distinct from any conduct by or on behalf of Archie Comics itself. (See, e.g., Complaint at paras. 12-13). In Morris v. Blume, 55 N.Y.S.2d 196, 199 (Sup. Ct. 1945) aff'd, 269 A.D. 832, 56 N.Y.S.2d 414 (App. Div. 1945), the court rejected Defendant's argument that a corporate officer could not interfere with a plaintiff's performance of a contract with the corporation itself due to having a justifiable interest in the transaction. In rendering its decision, the court reasoned as follows at page 198-99:

> Under the allegations of the complaint, Blume [corporate president] is acting unlawfully and outside the scope of his authority as agent of the corporation. The complaint alleges, in effect, that the defendant is making use of his powers as president to do something not authorized by the board of directors…

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[4] New York Penal Law §240.25, Harassment in the First Degree expressly provides that:
> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

[5] New York Penal Law §240.26, Harassment in the Second Degree expressly provides that:
> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person... or 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

[6] New York Penal Law §240.45, Criminal Nuisance in the Second Degree expressly provides that:
> A person is guilty of criminal nuisance in the second degree when: 1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons…

> The acts of the defendant Blume, being, under the allegations of the complaint, independent, tortious acts committed by him not within his lawful powers as an officer or agent of the corporation, he may not escape the consequences of those acts on the theory of respondeat superior.Greyhound Corporation v. Commercial Casualty Ins. Co., 259 App.Div. 317, 19 N.Y.S.2d 239.

More importantly and contrary to Defendant's arguments, the court in Morris denied defendant's motion to dismiss where the president – an officer of the corporation – prevented the plaintiff – an employee of the corporation – from performing his employment contract. Id.

As in Morris, supra, Defendant herein cannot escape liability as her conduct is unjustified, it is illegal, and clearly alleged to have occurred while she was acting outside of her lawful powers as an officer of and independent of Archie Comics. In Para 148 of the Complaint it is alleged that Defendant stalked the Plaintiffs, in Para 163 of the Complaint it is alleged that Defendant acted with malice and through wrongful reasons, and in Para 165 it is alleged that "Defendant noted with the sole and improper purpose of interfering with the economic relationships of Plaintiff Employees with Archie Comics. Collectively, these allegations establish she acted unlawfully and outside the scope of her authority as agent of the corporation.

Finally, Defendants' suggestion that an interference amounting to a breach is required is also incorrect because "[a]n unlawful interference with a person in the performance of his contract with a third person is as much a legal wrong as an unlawful inducement of a breach of that contract by a third person." Morris, supra. at 199; see also, S & S Hotel Ventures, supra at 354-55 ("Although here, there was no breach by Denitex, the allegations plainly assert wrongful interference with the performance of the contract between Denitex and plaintiff")(citing Navarro v. Fiorita, 271 App.Div. 62, aff'd 296 N.Y. 783; Cyg-Knit v. Denton Sleeping Garment Mills, 26 A.D.2d 800, 273 N.Y.S.2d 831).

In short, Defendant's conduct here has far exceeded that held actionable in each of the aforementioned cases. Here, Defendant has intentionally and improperly interfered with Plaintiffs' business relations with Archie Comics. She is note justified in her actions. She is acting outside her lawful powers as an officer of Archie Comics and engaging in criminal conduct- independent of Archie Comics. As is evidenced throughout the Complaint, Defendant has, through malicious and wrongful means, deliberately affected Plaintiffs' ability to carry out their contract with Archie by making performance more burdensome, intentionally interfering with, and repeatedly acting to sever same.

Based upon the foregoing, Defendant's motion should be dismissed in its entirety. Even assuming, arguendo, the Court adopts the misplaced arguments made by the Defendant, the proper remedy is grant leave to amend as opposed to dismissal.

IV. DEFENDANT'S REQUEST THAT PLAINTIFFS SHOULD NOT BE GRANTED LEAVE TO REPLEAD SHOULD BE REJECTED AS AN IMPROPER ATTEMPT TO CREATE NON-EXISTENT PRECLUSIVE EFFECT AS THE SUBJECT MOTION IS NOT ON THE MERITS AND SHOULD BE DENIED IN ITS ENTIRETY

It is well settled that motions to dismiss pursuant to CPLR 3211(a)(7) are not on the merits and not binding on any determination as to replead and Defendant's request to bar same is premature. Indeed, the Second Department said in Sullivan v. Nimmagadda, 63 A.D.3d 908, 882 N.Y.S.2d 164 (2d Dept. 2009), that "dismissal of an action for failure to state a cause of action has limited preclusive effect" and that a dismissal "pursuant to 3211 (a)(7) was not on the merits" (citations omitted). Based upon the foregoing, Defendant's motion should be denied in its entirety, especially where her legal arguments may fail upon discovery. Under these circumstances, even assuming, arguendo, the Court adopts the misplaced arguments made by the

Defendant, the proper remedy is to grant leave to amend as opposed to dismissal as such dismissal would not be on the merits.

V. DEFENDANT'S REQUEST FOR SANCTIONS IS THE SOLE FRIVOLOUS CONDUCT IN THIS ACTION WARRANTING SANCTIONS AGAINST HER

It is well settled that frivolous conduct includes making a frivolous motion for costs or sanctions such as that by the Defendant here. Southern Blvd. Sound, Inc. v. Felix Storch, Inc., 167 Misc. 2d 731 (App. Term 1996); Patterson v. Balaquiot, 188 A.D.2d 275 (1st Dept. 1992); Shelley v. Shelley, 180 Misc. 2d 275 (Sup 1999). Here, Defendant's motion is based upon erroneously cited standards that do not apply to motion to dismiss (as previously discussed herein). The Plaintiffs and the Court have been compelled to invest time and energy to address erroneously cited standards. Based upon the foregoing, not only should Defendant's motion should be denied in its entirety, but in the event sanctions are awarded, same should be awarded only against Defendant who brought the motion and argued for relief based upon incorrect and inapplicable standards (as set forth above).

CONCLUSION

WHEREFORE, Plaintiffs respectfully pray for an Order denying the Defendant's motion to dismiss, and for such other and further relief as this Court may deem just and proper.

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