SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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ANABEIVA PEREZ,

Plaintiff,

- v -

RJR MAINTENANCE GROUP INC, NYC HEALTH & HOSPITALS/BELLEVUE

Defendant.

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INDEX NO. 652938/2023

MOTION DATE 09/05/2023, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 26, 27

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendants' motions to dismiss are determined as follows:

Plaintiff commenced the instant action alleging that the defendants violated the New York State Human Rights Law and New York City Human Rights Law by terminating/not hiring her permanently as a housekeeper at Bellevue Hospital. Essentially, she alleges that after successfully working for five months and being granted leave by defendant NYC Health & Hospitals to travel to her birthplace of Colombia that she was suddenly terminated upon her return for the pretextual reason that she could not meet the job requirement of being able to speak English. With its motion, defendant RJR Maintenance Group, Inc. ("RJR") argues that the Court lacks subject matter jurisdiction, and that the complaint fails to state a cause of action. At the heart of both these arguments is that RJR was not plaintiff's employer. Similarly, defendant New York City Health + Hospitals/Bellevue ("H+H") moves to dismiss pursuant to CPLR 3211(a)(1) and (7).

As a preliminary matter, it is conceded that Bellevue is not a suable entity (*see Alameda v New York City Health & Hosps. Corp.*, 2018 NY Slip Op 32936[U][Sup Ct, New York County 2018]). Accordingly, the case is dismissed as to Bellevue.

Further, the branch of RJR's motion seeking to dismiss for lack of subject matter jurisdiction is denied. The crux of RJR's argument is that the Court may only have jurisdiction over a party defendant pursuant to the subject statute and regulation if it was the plaintiff's employer, which it was not. This speaks more to the factual question of whether RJR was plaintiff's employer and whether plaintiff fails to state a cause of action pursuant to CPLR 3211(a)(7) (*see Thrasher v US Liab. Ins. Co.*, 19 NY2d 159 [1967]). It is well settled that the New York State Supreme Court has subject matter jurisdiction over discrimination claims predicted on the New York State and New York City Human Rights Law (*see generally* Executive Law § 297; Administrative Code of the City of NY §§ 8-107 and 8-502).

As to the branch of defendant H+H's motion pursuant to CPLR 3211(a)(1), a party seeking relief on the ground that its defense is founded upon documentary evidence "'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*see Goshen v Mutual Life Ins. Co. of New York,* 98 NY2d 314 [2002], quoting *Leon v Martinez,* 84 NY2d 83, 88 [1994]). H+H's argument is that the official job specification for plaintiff's position explicitly listed an English language qualification that a service aide must have the "[a]bility to read and write English and to understand and carry out simple instructions" and plaintiff's complaint states that "Plaintiff Perez only spoke Spanish." Nevertheless, to the extent that the complaint did not say that she also could not read English or carry out simple instructions, it was plead that she had no difficulty in completing her job duties, and as she apparently worked the position for five months, this does not serve to utterly refute plaintiff's claims. Thus, this branch of the motion is denied.

As to both defendants' motions to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon,* 84 NY2d at 87-88; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). Here, both defendants argue that the plaintiff failed to plead sufficient facts to demonstrate that they were

plaintiff's employer or joint employers. Additionally, defendant H+H argues that plaintiff fails to allege sufficient facts to establish that it discriminated against her based on her national origin.

In analyzing whether a plaintiff has stated a cause of action for violations of the New York State and New York City Human Rights Laws based on discrimination, the First Department applies a liberal pleading standard wherein the plaintiff must only give defendants " 'fair notice' of the nature of the claim and its grounds" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009] quoting *Swierkiewicz v Sorema N.A.*, 534 US 506 [2002]). Here, plaintiff plead that defendants were joint employers.

"Under this doctrine, an employee may be formally employed by one entity but assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity" (*see Cannizzaro v City of New York*, 82 Misc3d 563 [Sup Ct, New York County 2023] citing *Arcuelo v On-Site Sales & Mktg., LLC*, F3d 193 [2d Cir 2005]). When determining if a defendant is actually a joint employer, courts analyze the party under the "immediate control" test which looks at several relevant factors like "hiring, firing, discipline, pay, insurance, records, and supervision," but the most important factor is the "right to control the means and manner of the worker's performance" (*see Brankov v Hazzard*, 142 AD3d 445 [1st Dept 2016]). Here, plaintiff plead that RJR hired plaintiff as a housekeeper to work at Bellevue and that RJR and that H+H were joint employers. She further averred that H+H agreed to directly hire the plaintiff, that H+H permitted plaintiff to travel to her home country of Colombia, and that H+H was the one to call her while she was away to tell her to come back to Bellevue and sign her full-time contract. Given the fact intensive nature of determining whether someone is a joint employer, at this stage defendants' motions should be denied (*see Cannizzaro*, 82 Misc3d 563). Whether plaintiff can sustain its burden on summary judgment is not relevant at this juncture. Likewise, the timing of plaintiff's termination just after returning from permitted leave to her home country permits the inference along with the other plead facts that she was discriminated against based on her national origin (*see generally Herskowitz v State*, 222 AD3d 587 [1st Dept 2023]).

Accordingly, defendant RJR's motion to dismiss is denied in its entirety; and it is further

ORDERED that defendant H+H's motion is granted solely to the extent that plaintiff's complaint is dismissed as to Bellevue and denied in all other respects; and it is further

ORDERED that within 14 days of the upload of this order onto NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants; and it is further

ORDERED that defendants shall file and serve answers within 20 days of service of a copy of the order with notice of entry; and it is further

ORDERED that the parties shall jointly submit a proposed preliminary conference order to Part 46 via email within 60 days of the date of the upload of this order onto NYSCEF.

This constitutes the decision and order of the Court.

4/5/2024
DATE

RICHARD G. LATIN, J.S.C.

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