At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of October, 2017.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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JULIE SHARPTON,

Plaintiff,

- against -

DYNASTY STAINLESS STEEL AND METAL INDUSTRIES, INC., and ALICIA LEE,

Defendants.

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DECISION AND ORDER

Index No. 513280/15

Mot. Seq. #2

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affirmation, and Exhibits Annexed	23-25
Opposing Affirmation, Memorandum of Law, and Exhibits Annexed	28-38, 39

The plaintiff Julie Sharpton (plaintiff), an African-American woman, commenced this action against her former employer, the defendant Dynasty Stainless Steel and Metal Industries, Inc., and one of its managers, the defendant Alicia Lee (collectively, defendants), alleging that they each violated the New York City Human Rights Law (Administrative Code of City of New York § 8-101, et seq.; hereafter, the City HRL) and the New York State Human Rights Law (Executive Law art 15; hereafter, the State HRL) by unlawfully discriminating against her in the terms and conditions of her employment based on her gender and race. She also alleges that these defendants retaliated by terminating her employment in response

to complaints she made to her supervisors about the racial discrimination and the failure to pay her the prevailing rate of wages under Labor Law § 220 ("Public Work – Hours, wages and supplements").

The defendants move, pre-answer, to dismiss plaintiff's first amended complaint, dated August 24, 2016 (the amended complaint), pursuant to CPLR 3211 (a) (1) as barred by documentary evidence and, in addition, pursuant to CPLR 3211 (a) (7) for failure to state a cause of action on which relief can be granted.

BACKGROUND

Facts and Allegations

The following recitation is taken from the amended complaint. References to the paragraphs of the amended complaint are indicated by AC ¶ ___.

Plaintiff resided in a public housing project (the project) that is owned and operated by the New York City Housing Authority (NYCHA) (AC ¶ 14). Between May and August 2015, she was an employee of the defendant Dynasty Stainless Steel and Metal Industries, Inc. (Dynasty), which was a construction contractor at the project (AC ¶¶ 13-14). The defendant Alicia Lee (Lee), a daughter of the owners of Dynasty, was the site manager (AC ¶¶ 6, 17). Dynasty retained a site-safety subcontractor (the site-safety subcontractor) to act as the safety supervisor at the project site (AC ¶ 23). The subcontractor is not a party to this action.

Plaintiff's claims are based on three distinct categories of allegations which can be summarized as follows: (1) racially denigrating comments at the project site; (2) failure to pay her the prevailing rate of wages; and (3) termination of her

employment in retaliation for her complaints about categories (1) and (2) above, and failure to rehire her as a laborer because she is a woman.

1. Racially Denigrating Comments

On July 8, 2015, while plaintiff was employed by Dynasty, John Burzo (Burzo), a Caucasian male, introduced himself to plaintiff at the project site (AC ¶ 21). Burzo was a site-safety instructor at the project site (AC ¶ 22). Although he was an employee of the site-safety subcontractor (AC ¶ 23), he "had managerial duties and responsibilities for Dynasty" (AC ¶ 24). He is not a party to this action.

When Burzo introduced himself to plaintiff, he allegedly asked her a series of racially motivated questions about the neighborhood (AC ¶ 25); namely, whether "there were any white people around" and, more so, that he would give her money if she could point out to him any white residents in the project (AC ¶ 25). Upon plaintiff informing him that he had a discriminatory view of the neighborhood, Burzo allegedly told her that "[he] used to hang out in this neighborhood many years ago and it was always riddled with crime and drugs and [that] no white people [were] living in the neighborhood" (AC ¶ 26). Plaintiff was upset by Burzo's discriminatory comments (AC ¶ 27).

In addition, Burzo allegedly told plaintiff about a past incident between the residents and contractors at one of the buildings in the project (AC ¶ 28). Burzo allegedly stated that "if [he] had been on site at the time [of the incident, he] would have fired up the grill (pointing to an outside grill in the apartment complex courtyard) with some chicken, ribs, hamburgers and franks, purchased some beers

and weed [*i.e.*, marijuana], and [given] it to the residents to keep them calm" (AC ¶ 28). Plaintiff was very offended by that comment (AC ¶ 28).

Burzo allegedly made several additional denigrating comments about the residents in the project (AC ¶ 29). He "alluded to the residents[']race as a reason for their laziness" (AC ¶ 29).

On July 9, 2015, Burzo allegedly "continued to make racially discriminatory comments to [plaintiff] about African Americans and the residents of the . . . project" (AC ¶ 30). After plaintiff asked Burzo to stop with his comments, he allegedly yelled that "what he said was the truth" and walked away (AC ¶ 31).

On July 10, 2015, Burzo allegedly made comments to plaintiff referencing her race and that of the other African Americans living in the project (AC ¶ 32). While plaintiff was talking with her African American coworkers about their wages, Burzo interrupted their conversation with a comment, "you people [African Americans] aren't used to having anything anyway, so just let it go" (AC ¶ 32).

On July 13, 2015, plaintiff complained to Dynasty's supervisor "Jay" about the racial comments (AC ¶ 33). Jay allegedly told plaintiff that he did not know how to handle her complaint and told her to speak to "Rick," a foreman for the site-safety subcontractor (AC ¶¶ 33-34). Jay never followed up on plaintiff's complaint or prepared a report (AC ¶ 35).

Later on July 13, 2015, plaintiff complained to Rick about Burzo's racially denigrating comments (AC ¶ 34).

The following day, on July 14, 2015, Burzo approached plaintiff and apologized to her for his earlier comments (AC ¶ 37). However, when plaintiff passed Burzo later that day, she allegedly heard him making racially denigratory comments about other employees (AC ¶ 37).

On July 15, 2015, plaintiff started working in the morning before she had time to sign in (AC ¶ 38). Burzo approached her and allegedly yelled at her that she could not delay her sign-in (AC ¶ 38). He allegedly told her that "you're done here, you're finished here" (AC ¶ 38). When plaintiff asked Jay whether she was fired, he told her that was not the case (AC ¶ 39).

Later on July 15, 2015, Jay allegedly told plaintiff that Burzo said that he (Burzo) could not continue working at the project site if she was still working there (AC ¶ 40). Plaintiff was concerned that Burzo would have her fired (AC ¶ 40). Jay also allegedly told plaintiff that defendant Lee was considering firing her because Burzo did not want to work with her (AC ¶ 40).

On July 17, 2015, plaintiff approached Burzo to discuss his racially denigratory and disturbing comments (AC ¶ 41). In response, Burzo was "dismissive and unapologetic" (AC ¶ 42). Burzo offered "another excuse" for his comments and, in addition, admitted to being angry at plaintiff for reporting him and for making him apologize to her for his prior comments (AC ¶ 42). That conversation occurred in Dynasty's trailer while plaintiff was signing out at the end of the work day (AC ¶ 43). "Managers from Dynasty were [then] present and therefore they were aware that

[Burzo] had been using racially discriminatory language" about which plaintiff had complained (AC ¶ 44). They allegedly witnessed Burzo admit that he had used the racially denigratory language and that he had apologized to plaintiff for using it (AC ¶ 44). On that same day, plaintiff complained to defendant Lee about Burzo's racially denigrating comments (AC ¶ 45).

On July 20, 2015, Jay allegedly told plaintiff that her job was in jeopardy because of her complaints about Burzo (AC ¶ 46).

2. Failure to Pay the Prevailing Rate of Wages

While plaintiff was working as a fire guard (that is between May 18 and June 18, 2015 [AC ¶ 19]), a NYCHA representative visited the project site and asked her about her hourly rate (AC ¶ 20). Plaintiff and the NYCHA representative discussed the concept of the prevailing rate of wages; *i.e.*, that employers at public works projects must pay their employees the prevailing rate of wages (AC ¶ 20).

On or about June 18, 2015, Dynasty changed plaintiff's duties from those of a fire guard to those of a flagger (AC ¶¶ 19, 47). In late June or early July 2015, while plaintiff was working as a flagger, she complained to defendants about not being paid the prevailing rate of wages to which flaggers on public works projects are entitled (AC ¶ 47). Defendants were allegedly paying plaintiff and other flaggers substantially less than the prevailing rate of wages rate (AC ¶ 47).

In early July 2015, plaintiff spoke to Lee about the prevailing rate of wages for flaggers (AC ¶ 48). Plaintiff believed that flaggers were entitled to a prevailing rate

of wages that was much higher than the rate she had been receiving as a fire guard (AC ¶ 48). Plaintiff was told by Lee that flaggers were not entitled to the prevailing rate of wages (AC ¶ 49). Separately, plaintiff informed Jay that flaggers should receive the prevailing rate of wages (AC ¶ 51). Plaintiff filed a complaint with the NYCHA regarding defendants' failure to pay her and other flaggers the prevailing rate of wages (AC ¶ 52).

During July and August 2015, following plaintiff's complaint about the underpayment of wages, defendants exchanged numerous emails with NYCHA representatives in regards to the prevailing rate of wages for the flaggers (AC ¶ 53). The NYCHA allegedly made it clear that defendants were required by law to pay flaggers the prevailing rate of wages (AC ¶ 53).

On July 23, 2015, the representatives of defendants and NYCHA attended, among others, a progress meeting of the project (AC ¶ 54). The meeting minutes allegedly include a statement that flaggers and/or crossing guards were owed the prevailing rate of wages and that "Dynasty need[ed] to comply" (AC ¶ 54). The minutes allegedly included a further statement that "a similar situation may apply to other unlisted classifications Dynasty intends to use such as Fire Guard/Watch [and] back pay must be provided to individuals previously incorrectly compensated. . . ." (AC ¶ 55 [italics omitted]).

Although defendants paid plaintiff some additional back pay for the hours she worked as a flagger, she did not receive the full prevailing rate of wages to which she

was entitled (AC ¶¶ 56, 108 [iv]). According to plaintiff, defendant Lee "barraged" her with telephone calls urging her to accept $20 per hour for the position of a flagger or a crossing guard, which rate of wages was somewhat greater than what she had received as a fire guard, but substantially less than the prevailing rate of wages for the position of a flagger or a crossing guard (AC ¶ 57).

To return to the chronology of events: on July 14, 2015, Lee told plaintiff that her job title as a flagger would be reclassified to that of a "tenant safety crossing guard," and that if she did not agree to that title at the $20 hourly rate of wages, then "perhaps [she] should look for other work" (AC ¶ 58). Plaintiff believed that she would be fired if she did not accept the $20 hourly rate of wages (AC ¶ 58).

On July 15, 2015, defendants instructed plaintiff and other flaggers to start signing in as "tenant safety crossing guards," even though their duties remained the same (AC ¶ 59). Defendants continued to pay plaintiff and other flaggers much less than the prevailing rate of wages (AC ¶ 59).

Plaintiff, however, continued to sign in as a flagger (AC ¶ 60). Defendants reprimanded her for not signing in as a crossing guard (AC ¶ 60). Plaintiff on occasion left the space on the sign-in sheet blank, rather than sign in as a crossing guard (AC ¶ 60). At least once, defendants wrote in "crossing guard" under plaintiff's name on the sign-in sheet (AC ¶ 60).

In an email to defendants, an NYCHA representative allegedly stated, "You may not rename a job duty . . . in order to pay a wage less than the prevailing wage" (AC ¶ 61).

3. Retaliation by Terminating Plaintiff's Employment; Failure to Rehire

Several weeks after she first complained about the prevailing rate of wages, plaintiff was effectively discharged from Dynasty (AC ¶ 62). On August 18, 2015, Lee told plaintiff that Dynasty had no more work for her that week, but that she should follow up with Lee thereafter (AC ¶ 63).

On August 20, 2015, defendants, upon information and belief, hired two crossing guards and one laborer (AC ¶ 64). The laborer was a man (AC ¶ 64).

During the week of August 24, 2015, plaintiff telephoned Lee to inquire whether Dynasty had any work for her (AC ¶ 65). Lee responded that Dynasty had no work for plaintiff that week (AC ¶ 65). Although plaintiff told Lee that she was an experienced laborer (AC ¶ 69), Lee stated that Dynasty only hired men to perform physical labor, and that, therefore, Dynasty would not hire her (AC ¶ 65). On several occasions when plaintiff telephoned Dynasty, Lee consistently told her that Dynasty was not hiring women as laborers (AC ¶¶ 68, 70). In the meantime, Dynasty hired several men as laborers (AC ¶ 71).

On September 15, 2015, plaintiff again telephoned Lee to find out whether Dynasty had any work available for her (AC ¶ 72). In that conversation, Lee allegedly

told plaintiff that Burzo had complained about her (AC ¶ 72), and that Burzo's complaints about her was one of the reasons why Dynasty did not rehire her (AC ¶ 72). Since September 15, 2015, Dynasty has not rehired plaintiff or even contacted her about any job prospects (AC ¶ 73).

The Instant Action

On October 30, 2015, plaintiff commenced the instant action by electronically filing a summons and complaint (the original complaint) with the Kings County Clerk. On December 29, 2015, defendants answered the original complaint. The action proceeded to discovery. On September 9, 2016, the parties stipulated that, as relevant herein, plaintiff may electronically file her amended complaint, and that defendants shall have thirty days from the date of such filing in which to interpose their amended answer (NYSCEF #20, ¶¶ 1-2). On September 26, 2016, plaintiff electronically filed her amended complaint. On October 16, 2016, defendants, in lieu of answering the amended complaint, served the instant motion to dismiss.

While the instant motion remained sub judice, this action was marked "disposed, motion pending." On April 21, 2017, plaintiff electronically filed with the Kings County Clerk a "Notice of Intention to Continue Prosecution of Action," stating that plaintiff has not abandoned this action (NYSCEF #40).

DISCUSSION

Procedural Matters

As an initial matter, the Court restores this action to active status. There is no indication that this action was dismissed pursuant to CPLR 3215 (c), and there is no basis for such dismissal. CPLR 3404 ("Dismissal of abandoned cases") does not apply to this pre-Note of Issue action (*see* Lopez v Imperial Delivery Serv., Inc., 282 AD2d 190, 198 [2d Dept 2001], *lv dismissed* 96 NY2d 937 [2001]). Further, no 90-day notice was served pursuant to CPLR 3216, and there was no order dismissing the complaint pursuant to 22 NYCRR 202.27 ("Defaults"). Restoration of this action to active status is, therefore, appropriate (*see* WM Specialty Mtge., LLC v Palazzollo, 145 AD3d 714 [2d Dept 2016]).

Next, the Court addresses plaintiff's threshold contention that defendants waived their right to move to dismiss those causes of actions of the amended complaint which were pleaded in the original complaint. According to plaintiff, the grounds for the defendants' waiver are two-fold: first, they answered the original complaint instead of moving to dismiss it, and, second, they stipulated to the amendment of the original complaint. Plaintiff's contention is not well-taken. Her amended complaint, once served and filed, superseded her original complaint and took its place (*see* Taub v Schon, 148 AD3d 1203 [2d Dept 2017]).

Defendants' consent to the amendment of the original complaint did not preclude them from moving to dismiss it. To amend a complaint under CPLR 3025 (b), a plaintiff need only show that the proposed amendment is not "palpably

insufficient" to state a cause of action and is not patently devoid of merit (*see* Lucido *v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008], *appeal withdrawn* 12 NY3d 804 [2009]). This standard of review is less stringent than the one employed on a motion to dismiss. Moreover, a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) "may be made at any subsequent time or in a later pleading, if one is permitted" (CPLR 3211 [e]). Lastly, the Court does not read the provision of the stipulation that granted defendants thirty days within which to answer the amended complaint as precluding them from exercising their alternative right under CPLR 3211 (a) of moving to dismiss it first in lieu of answering it. Accordingly, the Court will consider defendants' motion to dismiss on the merits.

Substantive Matters

As stated, defendants move to dismiss the amended complaint as barred by documentary evidence under CPLR 3211 (a) (1) and for failure to state a cause of action under CPLR 3211 (a) (7). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen *v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially

undeniable, would qualify as documentary evidence in the proper case" (*id.* at 84-85 [internal quotation marks omitted]). "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence" (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 682 [2d Dept 2017]). Here, defendants point to the amended complaint as the sole and exclusive "documentary evidence" warranting its dismissal. Defendants' position that the amended complaint, in and of itself, constitutes documentary evidence is untenable. The branch of defendants' motion for dismissal of the amended complaint pursuant to CPLR 3211 (a) (1) as barred by documentary evidence is denied as to both defendants (*see Tooma v Grossbarth*, 121 AD3d 1093, 1095 [2d Dept 2014]).

On a pre-answer motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "[T]he pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible favorable inference" (*Michaan v Gazebo Horticultural, Inc.*, 117 AD3d 692 [2d Dept 2014]). Applying these principles here, the Court will examine each of the nine causes of action asserted in the amended complaint. But before doing so, the Court will address defendants' broad contention that this action is merely about a private dispute between plaintiff and Burzo over his views.

Defendants' objection is based on their unduly narrow reading of the amended complaint. This litigation, as pleaded, is about: (1) defendants' refusal to rehire plaintiff *as a laborer* because she is a woman; (2) their discharge of plaintiff and their refusal to rehire her *in any capacity* because of her complaints to them about Burzo's racially denigrating comments in the work place; and (3) their discharge of plaintiff and their refusal to rehire her *in any capacity* because of her complaints to them about their failure to pay her and other flaggers the prevailing rate of wages.

Gender Discrimination Under the Human Rights Laws – Failure to Rehire Plaintiff as a Laborer (First and Fifth Causes of Action Against Both Defendants)

Pursuant to the City HRL, it is an "unlawful discriminatory practice" for an employer or an employee thereof, "because of the . . . gender . . . of any person . . . [t]o refuse to hire or employ . . . such person. . ." (Administrative Code § 8-107 [1] [a] [2]). Pursuant to the State HRL, it is an "unlawful discriminatory practice" for an employer, "because of an individual's . . . sex . . . , to refuse to hire or employ . . . such individual. . ." (Executive Law § 296 [1] [a]).

Plaintiff, a woman allegedly possessing experience as a laborer, charges defendants with unlawful discrimination by refusing to rehire her as a laborer because of her sex, while defendants hired several men as laborers. Applying the liberal pleading standards applicable to employment-discrimination claims under the Human Rights Laws, plaintiff has stated causes of action for defendants' violations on the basis of sex discrimination (*see* Walzer v Metropolitan Transp. Auth., 117 AD3d 525, 525-526 [1st Dept 2014]).

The City HRL applies to both defendants because its language encompasses both defendants: the employer Dynasty and the managerial employee Lee. Although the State HRL appears to be narrowly drawn to encompass only the employer, another provision of the State HRL makes it "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [thereunder], or to attempt to do so" (Executive Law § 296 [6]). The latter provision applies to defendant Lee. Accordingly, the branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of the first and fifth causes of action for gender discrimination is denied as to both defendants.

Racial Discrimination Under the Human Rights Laws – Termination on the Basis of Race (Second and Sixth Causes of Action Against Both Defendants)

Pursuant to the City HRL, it is an "unlawful discriminatory practice" for an employer or an employee thereof, "because of the . . . race . . . of any person . . . , to discharge from employment such person. . ." (Administrative Code § 8-107 [1] [a] [2]). Pursuant to the State HRL, it is an "unlawful discriminatory practice" for an employer, "because of an individual's . . . race . . . , to discharge from employment such individual . . ." (Executive Law § 296 [1] [a]).

Plaintiff alleges that she is a member of the protected class as an African American, that she was qualified to hold the positions of a flagger and a crossing guard, that she was discharged from employment, and that her discharge occurred under circumstances giving rise to an inference of racial discrimination. In

particular, plaintiff alleges that: (1) Burzo, a site-safety subcontractor's employee "with managerial duties and responsibilities for Dynasty," made numerous denigrating comments about African Americans to plaintiff and to others in her presence (AC ¶¶ 24-26, 28-30, 32, 37); (2) plaintiff's supervisor Jay allegedly told her that defendant Lee was considering firing her because Burzo did not want to work with her (AC ¶ 40); (3) Jay allegedly told plaintiff that her job was in jeopardy because of her complaints about Burzo (AC ¶ 46); (4) plaintiff was discharged from Dynasty because she complained about racial discrimination (AC ¶¶ 80 [ii], 98 [vi]); and (5) Lee allegedly told plaintiff that Burzo's complaint about plaintiff was one of the reasons why Dynasty did not rehire her (AC ¶ 72).

Assuming the truth of plaintiff's allegations, and giving them the benefit of every favorable inference, the Court concludes that plaintiff's racial discrimination claims are sufficient to withstand dismissal. As noted, Lee's potential liability under the State HRL is grounded on the aiding-and-abetting theory. Contrary to defendants' contention, the amended complaint sufficiently sets forth specific assertions as to each defendant. Accordingly, the branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of the second and sixth causes of action for racial discrimination is denied as to both defendants.

Retaliation Under the Human Rights Laws – Discharge for Complaining About Racially Denigrating Comments (Third and Seventh Causes of Action Against Both Defendants)

The City HRL and the State HRL each prohibit retaliation against any employee for opposing discriminatory practices (*see* Administrative Code § 8-107 [7] [i]; Executive Law § 296 [3-a] [c]). To make out an unlawful retaliation claim under the City HRL, "a plaintiff must show that (1) he or she engaged in a protected activity as that term is defined under the NYCHRL, (2) his or her employer was aware that he or she participated in such activity, (3) his or her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity, and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct" (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740 [2d Dept 2013]). Under the State HRL, a "plaintiff must show that (1) [he or] she has engaged in protected activity, (2) [his or] her employer was aware that [he or] she participated in such activity, (3) [he or] she suffered an adverse employment action based upon [his or] her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest*, 3 NY3d at 312-313).

Plaintiff's allegations state a cause of action for retaliation under both the City and the State Human Rights Laws. She alleges that (1) she is a member of the protected class as an African American; (2) she was qualified for the positions of a flagger and a crossing guard; (3) she engaged in a protected activity by complaining to Dynasty's management about Burzo's racially denigrating comments about

African Americans (AC ¶¶ 25-26, 28, 30, 32-34, 45); (4) although Burzo apologized to her for his comments (AC ¶ 37), he allegedly continued making them, including in the presence of Dynasty's management (AC ¶¶ 37, 42-44); (5) she was discharged from Dynasty and thus suffered an adverse employment action; and (6) the discharge occurred under the circumstances giving rise to an inference of discrimination, in that Burzo's complaints about plaintiff was one of the reasons why Dynasty did not rehire her (AC ¶ 72). Accordingly, the branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of the third and seventh causes of action for retaliation under the Human Rights Laws is denied as to both defendants (*see* Kaplan v New York City Dept of Health & Mental Hygiene, 142 AD3d 1050, 1051-1052 [2d Dept 2016]; Anderson v Edmiston & Co., Inc., 131 AD3d 416, 417 [1st Dept 2015]).

Aiding and Abetting Under the City HRL
(Fourth Cause of Action Against Defendant Lee)

An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under the City Human Rights Law (*see* Administrative Code § 8-107 [6]). The City HRL provides that it is "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [thereunder], or to attempt to do so" (Administrative Code § 8-107 [6]). Thus, "[w]here a defendant provided, or attempted to provide, assistance to the individual or individuals participating in the primary violation, he or she may be found liable for aiding and

abetting discriminatory conduct" (*Ananiadis v Mediterranean Gyros Products, Inc.*, 151 AD3d 915, 917 [2d Dept 2017]). "[T]he law is clear that a supervisor need not make derogatory comments . . . to subject himself or herself to liability. . . . Rather, . . . a supervisor's failure to take adequate remedial measures can rise to the level of actual participation. . . ." (*Ananiadis*, 151 AD3d at 917-918 [internal quotation marks omitted]).

Plaintiff alleges that after she complained to her supervisor Jay about Burzo's racially denigrating comments, Jay merely referred her to Rick, a supervisor with the site-safety subcontractor which employed Burzo. She did not follow up on her complaint or prepare an incident report (AC ¶¶ 33, 35). After he apologized, Burzo warned plaintiff "you're done here, you're finished here" (AC ¶ 38). Later the same day (July 15, 2015), Jay allegedly told plaintiff that defendant Lee was considering firing her because Burzo did not want to work with her (AC ¶ 40). Two days later (July 17, 2015), when plaintiff spoke with Burzo about his racially denigratory comments in the presence of Dynasty's managers, he was "dismissive and unapologetic" (AC ¶ 42). After plaintiff was let go and was calling Lee asking for work, Lee admitted to her that Burzo's complaints about her "was part of the reason why she was not hired back" (AC ¶ 72). Plaintiff has adequately stated a claim for aiding and abetting against defendant Lee. Accordingly, the branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of the fourth cause of action for aiding and abetting under the City HRL against defendant Lee is denied.

Hostile Work Environment Under the City HRL
(Eighth Cause of Action Against Both Defendants)

"A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Forrest*, 3 NY3d at 310 [internal quotation marks and alteration omitted]). "Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is . . . relevant to determining whether the plaintiff actually found the environment abusive. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment – one that a reasonable person would find to be so" (*id.* at 310-311 [internal citations and quotation marks omitted]).

"Verbal comments can serve as evidence of discriminatory motivation when a plaintiff shows a nexus between the discriminatory remarks and the employment action at issue" (*Chiara v Town of New Castle*, 126 AD3d 111, 124 [2d Dept 2015], *lv dismissed* 26 NY3d 945 [2015]). "In determining whether a comment is probative of discrimination, the following factors are considered: (1) whether the comment

was made by a decisionmaker, a supervisor, or a low-level coworker, (2) whether the remark was made close in time to the adverse employment decision, (3) whether a reasonable juror could view the remark as discriminatory, and (4) the context of the remark – that is, whether the remark related to the decision-making process. Even stray remarks in the workplace by persons who are not involved in the pertinent decision-making process may suffice to present a prima facie case, provided those remarks evidence invidious discrimination" (*id.* [internal citation omitted]).

Here, plaintiff has adequately stated a claim for hostile work environment by alleging that Burzo, an individual "with managerial duties and responsibilities for Dynasty," repeatedly made deprecatory, vulgar, and offensive remarks about African Americans, including that the neighborhood at issue was black and hence riddled with crime and drugs (AC ¶ 26), that food, beer, and marijuana would keep African Americans calm (AC ¶ 28), that African Americans were lazy (AC ¶ 29), and that African Americans were not entitled to the prevailing rate of wages because they were not "used to having anything anyway" (AC ¶ 32). Plaintiff alleges that Burzo's challenged conduct occurred on more than a few isolated occasions and pervaded the workplace (*i.e.*, that Burzo continued making denigrating comments about African Americans following his apology to plaintiff, including the comments he subsequently made in the managers' presence in Dynasty's trailer). Plaintiff also alleges that Dynasty acquiesced in or condoned Burzo's conduct, in that its managers warned plaintiff on several occasions that her job was in jeopardy because of her

complaints about Burzo (AC ¶¶ 40, 46). Accordingly, the branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of the eighth cause of action for hostile work environment under the City HRL is denied as to both defendants (*see* Anderson, 131 AD3d at 417).

Retaliation Under the Labor Law
(Ninth Cause of Action Against Both Defendants)

Labor Law § 215 provides for a private cause of action against an employer for discriminatory or retaliatory acts against its employees (*see* Adler v 20/20 Cos., 82 AD3d 914, 915 [2d Dept 2011]; *see also* Wigdor v SoulCycle, LLC, 139 AD3d 613 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]). Labor Law § 215 (1) (a) (i) provides, in relevant part, that it is unlawful for an employer or its agent to retaliate against an employee "because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter. . . ." "An informal complaint to an employer that the employer is violating a provision of the Labor Law suffices" (Laboy v Office Equip. & Supply Corp., 2016 WL 5462976, *7 [SD NY 2016] [collecting authorities], *report & recommendation adopted by* 2016 WL 6534250 [SD NY 2016], *appeal withdrawn* Case No. 16-4000 [2d Cir 2016]). An employee's reasonable and good faith belief that a violation of a provision of the Labor Law occurred is sufficient; proof of an actual violation is not required (*cf.* Zutrau v ICE Sys., Inc., 128 AD3d 1058, 1060 [2d Dept 2015] [construing Labor Law § 215 (1) (a) (i) before its amendment by L. 2010, ch. 564, § 10], *lv denied* 26 NY3d 907 [2015]).

Under Labor Law § 220 (3) (a), workers employed on public works projects must be paid the "prevailing rate of wages" for their trade or occupation in the New York locality where the work is performed (*see* Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp., 144 AD3d 1093, 1095 [2d Dept 2016]). As the precondition to relief, the Labor Law retaliation provision requires that "[a]t or before the commencement of any action under this section, notice thereof shall be served upon the attorney general by the employee" (Labor Law § 215 [2] [b]).

Here, plaintiff has stated a cause of action for retaliation under Labor Law § 215. She alleges that: (1) the project at issue was a public works project; (2) she complained to defendants that she was not paid the prevailing rate of wages; (3) several weeks after she first complained about her wages, she was taken off the schedule, informed that there was no more work for her, and was effectively terminated; and (4) notice of this action was provided to the Office of the Attorney General as required by Labor Law § 215 (2) (b) (AC ¶¶ 108 [i]-[v], 112). It is significant that following plaintiff's complaint to the NYCHA, Dynasty was directed to pay plaintiff and other flaggers the prevailing rate of wages.

Moreover, the potential for the contractors' reclassification of positions to avoid the payment of the prevailing rate of wages to their employees was specifically discussed at a project meeting which Dynasty attended. Notwithstanding the NYCHA's directive and the discussion at the project meeting, Dynasty failed to pay the full prevailing rate of wages to plaintiff and other flaggers, urged plaintiff to accept the lower hourly rate of wages, and reclassified her position from that of a

flagger to that of a crossing guard. The correlation between: (1) plaintiff's complaints about Dynasty's failure to pay her the prevailing rate of wages; (2) Lee's badgering of plaintiff to accept $20 per hour as the prevailing rate of wages as a flagger; (3) Lee's unilateral reclassification of plaintiff's job title from that of a flagger to that of a crossing guard; (4) plaintiff's refusal to sign in as a crossing guard; and (5) Lee's subsequent announcement to plaintiff that Dynasty had no more work for her – demonstrates the necessary causal nexus between the protected activity and defendants' retaliatory actions (*see* Ananiadis, 151 AD3d at 920). Accordingly, the remaining branch of defendants' motion under CPLR 3211 (a) (7) for dismissal of her claim for retaliation under Labor Law § 215 is denied as to both defendants (*see* Martinez v Alubon, Ltd., 111 AD3d 500, 501 [1st Dept 2013], *lv dismissed* 23 NY3d 939 [2014]).

One clarification is warranted, however. Plaintiff seeks, in addition to liquidated damages, "a civil penalty" in the amount of $20,000 under Labor Law § 215 (2) (a) (AC ¶ 111). The referenced statutory section provides for "liquidated damages" in an amount not to exceed $20,000, rather than for a "civil penalty" in the fixed amount as the amended complaint incorrectly asserts.

CONCLUSION

Accordingly, it is

ORDERED that this action is restored to active status; and it is further

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that, pursuant to CPLR 3211 (f), defendants shall electronically file and serve their answer to the amended complaint within ten days after service of this Decision and Order on defense counsel with notice of entry; and

ORDERED that the parties shall appear for a compliance conference on November 16, 2017, in the Centralized Compliance Part, Room 282 to report on the status of outstanding discovery and to set the deadline for the filing of a Note of Issue.

The foregoing constitutes the Decision and Order of the Court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT
J. S. C.