FILED
CLERK, U.S. DISTRICT COURT
2007 MAR -7 P 5:05

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff, v. ROCK-N-ROLL, LLC, d/b/a QUIZNOS, MICHAEL BARBEE d/b/a QUIZNOS Defendants.	CASE NO. CV 05-04787 SGL (JTLx) ORDER DENYING DEFENDANT MICHAEL BARBEE'S MOTION FOR SUMMARY JUDGMENT

Pending before the Court is defendant Michael Barbee's ("Barbee") motion for summary judgment on the grounds that (1) the plaintiff failed to exhaust its administrative remedies; (2) Title VII liability does not extend to individuals; and (3) Barbee is not the alter ego of defendant Rock-N-Roll, LLC. The motion came on regularly for hearing before the Court on March 5, 2007. Upon consideration of the parties' submissions, the arguments of counsel, and the case file, the Court hereby DENIES Barbee's motion.

I. BACKGROUND

Plaintiff United States Equal Employment Opportunity Commission ("EEOC") brought this action against defendants Michael Barbee and Rock-N-Roll, LLC (collectively "defendants") to correct unlawful employment practices and provide

MAR - 8 2007
55
C.D.

relief to four former employees who were allegedly sexually harassed while working for defendants' Quizno's store. Defendant Barbee, as an individual, bought the franchise on September 19, 2001. (Barbee deposition transcript, "Barbee depo.," 29:7-10). Barbee signed all of the franchise agreements as an individual. (Barbee depo., 30:1-4). Barbee, as an individual, was subject to a credit check by the franchisor, The Quizno's Franchise Company. (Barbee depo., 28:6-15). Barbee entered into contracts to build the business and took personal responsibility for payment of expenses. (Barbee depo., 29:23-30:4).

Subsequently, on October 22, 2001, Barbee formed Rock-n-Roll, a Limited Liability Corporation. (Barbee decl., ¶ 2). The address for Rock-N-Roll, LLC, was Barbee's home address. (Barbee depo., 166:2-20). Barbee is and has been the sole member, manager, and operator of Rock-N-Roll, LLC, with ultimate decision-making power regarding hiring, firing, promotions, pay, benefits, full-time or part-time status, purchasing business supplies, accounts receivable, accounts payables, all company policies and procedures, and human resources. (Barbee depo., 36:9-38:17; 65:2-13). Barbee was required to obtain permission from the Quizno's franchisor to transfer the franchise agreement between himself and Quizno's to Rock-N-Roll, LLC. (Barbee depo., 29: 15-19). Barbee does not recall receiving permission from Quizno's to transfer the franchise agreement to Rock-N-Roll, LLC. (Barbee depo., 29:20-30:2). Barbee told his employees that he was the franchisee. (Barbee depo., 163:15-18).

Barbee received no set salary but instead received "whatever's left over after bills are paid." (Barbee depo., 74:16-75:8). Barbee claims not to have received any profit from the sale of the franchise, and has not earned any income since selling the store. (Barbee depo., 52:17-18, 60:6-10, 60:20-23). After Barbee sold the store, Rock-N-Roll, LLC, lost all its holdings and ceased engaging in any business. (Barbee depo., 36:15-18, 61:19-21).

On June 20, 2003, charging party Patrice Austin submitted charge forms that

described Barbee as the "Owner" who, among others, sexually harassed Ms. Austin. (Exh. 7 to Noh decl.). Barbee responded to the charge by providing a written response and documents requested by the EEOC. He confirmed that he wrote the response by himself, without assistance from anyone else. (Barbee depo., 111:12-113:25). Ms. Austin filed a separate suit in state court (apart from the instant one brought by the EEOC); Barbee filed an answer in *pro per* in his individual capacity. (Exh. 4 to Noh decl.) Defendant Rock-N-Roll never filed an answer, and Ms. Austin sought entry of default against defendant Rock-N-Roll. (Exh. 5 to Noh decl.). Ms. Austin settled with both defendants on January 18, 2006. (Exh. 1 to Noh decl). Barbee signed the settlement release on behalf of himself as well as Rock-N-Roll. (Exh. 1 to Noh Decl.).

On August 5, 2004, the EEOC issued a Letter of Determination after investigating Ms. Austin's charge. (Exh. 2 to Noh Decl.). Barbee admitted the EEOC contacted him to conciliate the charge and that he had the opportunity to resolve the case. (Barbee depo. 136: 6-18). The EEOC filed the instant litigation after efforts to conciliate failed.

II. STANDARD ON A MOTION FOR SUMMARY JUDGMENT

The party moving for summary judgment has the initial burden of establishing that there is "no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); see British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978); Fremont Indemnity Co. v. California Nat'l Physician's Insurance Co., 954 F. Supp. 1399, 1402 (C.D. Cal. 1997).

If, as here, the non-moving party has the burden of proof at trial, the moving party has no burden to negate the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' – that

is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Id. (citations omitted).

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings. . . . [T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Pro. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish the essential elements to that party's case, and on which that party would bear the burden of proof at trial. Celotex, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmovant. Id. at 248. However, the court must view the evidence presented "through the prism of the substantive evidentiary burden." Id. at 252.

III. Discussion

A. Exhaustion of Administrative Remedies

Barbee argues that the EEOC has not exhausted its administrative remedies because neither the EEOC nor any of the alleged claimants on whose behalf the EEOC is prosecuting have ever filed a Charge of Discrimination naming Barbee individually or alleging Barbee was their employer.

The EEOC responds that Ms. Austin's original and amended charge specifically named Barbee as the "Owner" who subjected her to sexual harassment. Thus, the EEOC contends that the original and amended charge adequately charged Barbee.

Moreover, the EEOC argues that, even if Barbee had not been adequately charged in the Ms. Austin's original and amended charge, Barbee's motion should

be denied because a Title VII suit against a party not named in an EEOC charge is permitted where: (1) The EEOC or the unnamed party should have anticipated a Title VII suit against the unnamed party; (2) the unnamed party is a principal or agent of a named party or if they are substantially identical; (3) the EEOC could have inferred that the unnamed party violated Title VII; **or** (4) the unnamed party had notice of the EEOC conciliation efforts and participated in the EEOC conciliation efforts. Sosa v. Hiraoka, 920 F.2d 1451, 1458-59 (9th Cir. 1990). The EEOC argues that, though it need only meet one of the four factors set forth in Sosa v. Hiraoka, it can and has met all of them.

First, Barbee could and should have anticipated this suit because the original and amended charge named him as the owner, he admitted he received it, and he admitted to providing a written response and documents requested by the EEOC. Further, he was sued by Ms. Austin in state court for the same charge and settled the lawsuit with her, on behalf of himself and Rock-N-Roll, LLC.

Second, Barbee is the principal or agent of Rock-N-Roll, LLC, because he was its sole member, manager and operater. He had ultimate decision-making authority over hiring, firing, promotions, pay, benefits, full-time or part-time status, purchasing business supplies, accounts receivable, accounts payable, all company policies and procedures, and human resources.

Third, the EEOC could have inferred Barbee violated Title VII while doing business as Quizno's as demonstrated by his deposition testimony as referenced above.

Fourth, Barbee received notice of conciliation efforts and participated in EEOC conciliation proceedings.

Thus, Barbee is mistaken in claiming that administrative remedies were not exhausted against him. Ms. Austin's original and amended charge both clearly allege that she was sexually harassed by Barbee, and that he was the "Owner" of the store. It also states that he terminated her. As such, administrative remedies

were exhausted as to Barbee. Moreover, even if administrative remedies were *not* exhausted, the instant litigation is still proper because at least one factor under the Sosa test, and in fact all the factors, have been satisfied. The original and amended charges in and of themselves should have led Barbee to anticipate the instant litigation; especially given that as the sole member of Rock-N-Roll, LLC, no one *besides* Barbee could have anticipated the charge.

Barbee is the principal of Rock-N-Roll, LLC, which is the named party; the EEOC could reasonably infer that Barbee violated Title VII, and Barbee participated in conciliation efforts with the EEOC.

Thus, Barbee's motion for summary judgment fails.

B. Title VII Individual Liability

Relying on Miller v. Maxwell's International Inc., 991 F.2d 583, 587 (9th Cir. 1993), which limits Title VII liability to the employer and not individual employees, Barbee alleges he cannot be sued under Title VII as an individual. The EEOC responds that Barbee is in fact a statutory employer under Title VII.

To determine whether an individual is a statutory employer, the Supreme Court in Clackamas Gastroenterology Assocs. P.C. v. Wells, 538 U.S. 440 (2003), stated that an employer is the is the person, or group of persons, who owns and manages the enterprise. Id. at 448-49. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. Id. Conversely, the high court also identified six non-exhaustive factors to determine whether an individual is an *employee*: (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so, to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written

agreements or contracts; (6) whether the individual shares in the profits, losses, and liabilities of the organization. Id.

Barbee admitted he is and has been the sole member, manager, and operator of Rock-N-Roll, LLC, with ultimate decision-making power regarding hiring, firing, promotions, pay, benefits, full-time or part-time status, purchasing business supplies, accounts receivable, accounts payables, all company policies and procedures, and human resources. (Barbee depo., 36:9-38:17; 65:2-13). As such, he does not satisfy any of the factors of being an employee, but does exhibit all the elements of control identified to be an employer. Accordingly, he is a statutory employer and subject to suit under Title VII.[1]

As Barbee exhibits all the characteristics of an employer as defined by the Supreme Court in Clackamas, he is subject to liability under Title VII.

C. Barbee's Alter Ego Status

Barbee contends that although the EEOC has alleged that Barbee is the alter ego of Rock-N-Roll, LLC, the corporate veil should not be pierced because the EEOC has not plead facts, nor do any facts exist, that would support such a finding.

Determining whether an alter ego exists depends on the circumstances of each particular case and is seen as an issue for the trier-of-fact. Mid-Century Ins. Co. v. Gardner, 9 Cal. App. 4th 1205, 1212 (1992). Under California law, "(i)ssues of alter ego do not lend themselves to strict rules and prima facie cases. Whether the corporate veil should be pierced depends upon the innumerable individual equities of each case." United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977). Nonetheless, there are two general requirements which must be satisfied before such a determination can be made: "(1) That there

---

[1]Defendant's reliance on and interpretation of Miller is entirely misplaced. Miller only states that individual *employees* cannot be subject to liability under Title VII. Miller v. Maxwell's International Inc., 991 F.2d 583, 587 (9th Cir. 1993). It does not in any way stand for the proposition that individuals who are *employers* are not subject to liability. Id.

be such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist, and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow." Platt v. Billingsley, 234 Cal. App. 2d 577, 582 (1965); First W. Bank and Trust Co. v. Bookasta, 267 Cal. App. 2d 910, 915 (1968); Automotriz Del Golfo De California v. Resnick, 47 Cal.2d 792, 796, 306 P.2d 1, 3 (1957).

The Court may consider a variety of factors to help determine whether both prongs of this test have been satisfied. Associated Vendors, Inc. v. Oakland Meat Co., Inc., 210 Cal. App. 2d 825, 838 (1962); Bookasta, 267 Cal. App. 2d at 915.[2] Some of those factors include: "commingling of funds and other assets . . . the treatment by an individual of the assets of the corporation as his own . . . sole ownership of all of the stock in a corporation by one individual or the members of a family . . . [and] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual." Associated Vendors at 838-39. A bare "allegation that a corporation is the alter ego . . . is insufficient to justify the court in disregarding the corporate entity in the absence of allegations of facts from which it appears that justice cannot otherwise be accomplished." Vasey v. California Dance Co., 70 Cal. App. 3d 742, 749 (1977).

1. Unity of Interests

With regard to the "unity of interests and ownership" test set out in Automotriz, "although not dispositive, substantial ownership of a corporation and dominance of its management, as has been shown here, are factors favoring the

---

[2]In Bookasta, allegations sufficient to state a cause of action on the alter ego theory included allegations that "the individuals . . . 'dominated' the affairs of the corporation; that a 'unity of interest and ownership' existed . . . that the corporation [was] a 'mere shell and naked framework' for individual manipulations; that its income was diverted to the use of the individuals; that the corporation was . . . inadequately capitalized . . . and that adherence to the fiction of separate corporate existence would, under the circumstances, promote injustice." Bookasta, 267 Cal. App. 2d at 915-16.

piercing of the corporate veil. U.S. v. Healthwin-Midtown Convalescent Hospital and Rehabilitation Center, Inc., 511 F. Supp. 416 (C.D. Cal. 1981); Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825, 837 (1963); McCombs v. Rudman, 197 Cal.App.2d 46 (1961). The Healthwin court dealt with similar circumstances to those in the instant case where the defendant was a majority shareholder, was president of the business, served as a member of its board, and was the only person to sign the business checks, and concluded that piercing the corporate veil under such circumstances was proper.

In the instant case, Barbee is and has been the sole member, manager, and operator of Rock-N-Roll, LLC with ultimate decision making power regarding hiring, firing, promotions, pay, benefits, full-time or part-time status, purchasing business supplies, accounts receivable, accounts payables, all company policies and procedures, and human resources. (Barbee depo., 36:9-38:17; 65:2-13). Further, he made the decision to sell the very successful franchise for *no profit*. Thus, he has exhibited not only substantial but complete ownership and dominance over Rock-N-Roll, LLC. There is also a genuine issue of material fact as to whether his personal finances were inextricably intertwined with those of Rock-N-Roll, LLC, because he did not behave as an arms length creditor but instead paid himself with "whatever was left" after the bills were paid.

2. Inequitable Result

The alter ego doctrine is an equitable doctrine where the basic motivation is to assure a just and equitable result. Alexander v. Abbey of the Chimes, 104 Cal. App.3d 39, 48 (1980). In Alexander, the court found that the net effect of the transaction was to leave the company as "a hollow shell without means to satisfy its existing and potential creditors." Id.

In the instant case, there is also a triable issue of fact as to whether Rock-N-Roll, LLC exists as a mere shell because after Barbee's sale of the Quizno's store, Rock-N-Roll, LLC lost all its holdings and ceased engaging in any business.

(Barbee depo., 36:15-18, 61:19-21).

Accordingly, there are clearly issues of genuine material fact for the fact-finder to determine whether Barbee is the alter ego of Rock-N-Roll, LLC.

IV. Conclusion

Based on the foregoing reasons, Barbee's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

DATE: 3-6-07

STEPHEN G. LARSON
UNITED STATES DISTRICT JUDGE