SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

JUAN HERNANDEZ,

Plaintiff,

- v -

EDISON PROPERTIES,

Defendant.

Index No.: 103762/12

Motion Date: 03/22/13

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to dismiss complaint.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendant moves pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss the complaint of pro se plaintiff.

The defendant argues that plaintiff's complaint is barred by the prior adjudication of a discrimination complaint plaintiff previously filed with the New York State Division of Human Rights (NYSDHR). The court notes that the movant failed to append a copy of the challenged pleading to the moving papers necessitating the court's retrieval of the pleading from the internal court file in order to evaluate the parties' and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

arguments.

The pro se plaintiff argues in opposition to the motion that the complaint does not mention or reference the prior discrimination adjudication and merely states that it is "unfair" that defendant's discharged him. Plaintiff also argues that the complaint is asserting causes of action based upon the New York City Human Rights Law (see Administrative Code of City of NY § 8-107) and 42 USC 1981 which were not raised before NYSDHR.

Plaintiff's arguments in opposition to the motion are contrary to settled law and therefore the court shall grant dismissal of this action based upon the doctrine of election of remedies as embodied within Executive Law 297 (9) and Administrative Code §8-502 (a).

As stated by the First Department,

> Executive Law § 297(9) provides a civil cause of action for discriminatory practice, unless an administrative complaint has already been filed and has not been dismissed for "administrative convenience." These remedies are intended to be mutually exclusive. Once a complainant elects the administrative forum by filing a complaint with the Commission on Human Rights, that becomes the sole avenue of relief, and subsequent judicial action on the same complaint is generally barred, except in the one instance where dismissal is for "administrative convenience." (Marine Midland Bank v New York State Division of Human Rights, 75 NY2d 240, 245 [1989]; Nagle v John Hancock Mut. Life Ins. Co., 767 F Supp 67 [SD NY 1991]).
>
> Plaintiff makes the common law argument that he is unschooled, was without benefit of counsel, and his knowledge of English is "rudimentary," despite a decade of waiting on tables in a mid-Manhattan restaurant. But there is no indication that the Legislature intended to

> import any "knowledgeable" prerequisite for the election of remedies delineated in §297 (9) to become valid. The statute does not provide that a grievant have advice of counsel, or a full appreciation of the finality of an election to proceed in the administrative forum. The policy of the statute is result oriented: since plaintiff has had the benefit of a full hearing and determination on the merits of his claim, with the advantages of less expense and swifter resolution than he could have had in the judicial arena, his attempted recourse to the courts was thereby foreclosed."

Magini v Otnorp, Ltd., 180 AD2d 476, 477 (1st Dept 1992). As further elucidated by a trial court in this Department considering similar claims

> When petitioner filed her claims of discrimination before DHR, her choice of that forum for adjudication of her claims foreclosed her from seeking additional redress in court based on those claims. NY Exec Law §§ 297(9), 300; Freudenthal v County of Nassau, 99 NY2d 285, 290 (2003); Marine Midland Bank v New York State Div. of Human Rights, 75 NY2d 240, 245 (1989); Universal Packaging Corp. v New York State Div. of Human Rights, 270 AD2d 586, 587 n.1 (3d Dept 2000); Legg v Eastman Kodak Co., 248 AD2d 936, 937 (4th Dept 1998). The remedies for violation of the New York Human Rights Law available through commencement of a judicial action and available through DHR's administrative process are mutually exclusive. Petitioner must elect one avenue of redress or the other. NY Exec Law §§ 297(9), 300. E.g., Marine Midland Bank v New York State Div. of Human Rights, 75 NY2d at 243-44; Pan Am World Airways v New York State Human Rights Appeal Bd., 61 NY2d 542, 548 (1984); Universal Packaging Corp. v New York State Div. of Human Rights, 270 AD2d at 587; Legg v Eastman Kodak Co., 248 AD2d at 937. Petitioner's preclusion from commencing an action in court, once she filed her complaint with DHR, encompasses any judicial action based on the same incidents of claimed discriminatory conduct as in her DHR complaint. Emil v Dewey, 49 NY2d 968, 969 (1980); Benjamin v New York City Dept. of Health, 57 AD3d 403, 404 (1st Dept 2008); Brown v Wright, 226 AD2d 570, 571 (2d Dept 1996); Ehrlich v Kantor, 213 AD2d 447 (2d Dept 1995). She is deprived of her judicial "cause of action," (NY Exec Law § 297[9]; Hirsch v Morban Stanley

> & Co., 239 AD2d 466, 467 [2d Dept 1997]; Brown v Wright, 226 AD2d at 571) even if her judicial action claimed a different form of discrimination, such as national origin or disability, or arbitrary conduct not claimed in her DHR complaint, and even if her judicial action is against additional parties not named in the DHR complaint, as this proceeding is. Benjamin v.New York City Dept. of Health, 57 AD3d at 404; Hirsch v Morban Stanley & Co., 239 AD2d at 468; Craig-Oriol v Mount Sinai Hosp., 201 AD2d 449, 450 (2d Dept 1994); James v Coughlin, 124 AD2d 728, 730 (2d Dept 1986).

White v New York State Div. of Human Rights, 28 Misc 3d 1224(A), 2010 NY Slip Op 51485(U) (Sup Ct, Bronx County 2010, Billings, J.) (emphasis added).

In this case, plaintiff's claims, whatever the nomenclature used in the complaint, "arise from the same alleged discriminatory and retaliatory practices" as asserted before NYSDHR and therefore plaintiff's claims are barred by the election of remedies doctrine even if plaintiff now attempts to seek relief under the NYC Human Rights Law and 42 USC 1981. "[P]laintiff's S[tate] HRL claims previously asserted and the C[ity] HRL claims now raised arise from the same alleged discriminatory and retaliatory practices. Having elected to pursue redress for those grievances before the SHRL, plaintiff is now foreclosed from bringing either CHRL or SHRL claims before this court. This result is in accord with the great weight of the authority from within this District." Alvarado v Manhattan Worker Career Ctr., 01 Civ 9288, 2002 WL 31760208 (US Dist Ct, SD NY, Dec 10, 2002, Motley, J.). The Court further stated that

"the Section 1981 claim must be dismissed. It is well-established in the Second Circuit that NYSDHR findings of 'no probable cause' preclude a subsequent claim pursuant to Section 1981 based on the same facts unless the plaintiff can demonstrate that he did receive a full and fair opportunity to litigate the issues before the NYSDHR." Id. Plaintiff does not assert that he was denied the opportunity to present and argue his claims before the NYSDHR and therefore such claims are now barred from adjudication in this forum.

Accordingly, it is

ORDERED that the defendant's motion to dismiss plaintiff's complaint is GRANTED and the complaint is hereby DISMISSED.

This is the decision and order of the court.

Dated: March 31, 2013 **ENTER:**

DEBRA A. JAMES J.S.C.