Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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AURA QUINONES,

Plaintiff,

-against-

NEIGHBORHOOD YOUTH & FAMILY SERVICES, INC., NANCY MAMIS-KING, LIZETTE TAIT, JACINTO FLORES and CHRISTINE PHILLIPS,

Defendants.

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Index No: 20399/07
Motion Date: 2/20/08
Motion Cal. No: 26 & 27
Motion Seq. No: 1 & 2

The following papers numbered 1 to 23 read on this motion by pro se plaintiff, for an order granting an extension of time to serve defendants with the summons and complaint, directing defendants' counsel to accept such service, and allowing plaintiff to conduct a people's search on all named defendants; and on this further motion by pro se plaintiff for a default judgment against defendants. Defendants cross-move for an order dismissing the action and an order prohibiting plaintiff from filing additional motions or another lawsuit against defendants for any claim related to the instant action.

	PAPERS[1] NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 7
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Upon the foregoing papers, it is ordered that the motions and cross-motion are disposed of as follows:

[1]The "Letter In Opposition to NYFS' Cross-Motions" and "Affidavit In Opposition to NYFS' Cross-Motions," belatedly submitted by pro se plaintiff without leave of this Court on February 21 and March 17, 2008, respectively, and after the submission of the underlying papers, will not be considered by this Court in the determination of the motions and cross-motion.

This is an action sounding in employment discrimination commenced by Pro Se Plaintiff Aura Quinones, a caseworker supervisor formerly employed by defendant Neighborhood Youth and Family Services, Inc., a non-profit provider of social services for youth and families, arising from the termination of her employment on November 14,1996. Subsequent thereto, plaintiff filed a complaint with the Equal Employment Opportunity Commission, which was withdrawn, and proceeded to file a formal complaint sounding in discrimination with the New York City Commission on Human Rights ("NYCCHR"). NYCCHR issued a Determination and Order After Investigation on April 30, 1997, "finding no probable cause to believe that [defendants] have engaged or are engaging in the unlawful discriminatory practices alleged in the complaint." Upon appeal, the Determination was vacated by the Commissioner on July 3, 1997, with an instruction "that the Law Enforcement Bureau may administratively close the complaint should [plaintiff] commence an action in the United States District Court." As result of this instruction, plaintiff filed a federal action on February 21, 1997 in the United States District Court for the Southern District of New York (the "District Court"), and the NYCCHR issued a Notice of Administrative Closure After Remand on September 12, 2007, administratively closing the complaint and advising of the manner in which the Order may be reviewed. The District Court partially dismissed the complaint, but granted plaintiff leave to amend her complaint, which was filed on March 28, 1997; a second amended complaint was filed on October 23, 1997, and a second amended complaint with addendum, which asserted new claims, was filed on April 14, 1998. On May 4, 1998, the District Court dismissed all of the new claims asserted by plaintiff in the "addendum," and denied her permission to assert new claims, however by Order dated May 19, 1998, the Court allowed plaintiff to "add back" her state and city law claims of employment discrimination.[2]

On June 11, 1999, the matter was referred by Judge Richard Conway Casey, the District Court judge assigned to the matter, to Magistrate Judge Douglas Eaton, a United States Magistrate Judge in the District Court, for the purposes of reporting and recommending on dispositive motions. After extensive discovery, including 15 depositions, and upon submission of a motion for summary judgment by defendants on August 23, 1999, Magistrate Judge Eaton, in a sixty page Report and Recommendation to Judge Casey dated April 30, 2001, recommended that "Judge Casey grant the motion for summary judgment and dismiss the second amended complaint with prejudice." By Order Accepting Report and Recommendations dated September 26, 2001, Judge Casey stated, inter alia, that "the Report is adopted in its entirety, summary judgment is granted in favor of defendants and plaintiff's second amended complaint is dismissed with prejudice." The order further denied plaintiff's request to reopen discovery, add new parties and have counsel appointed. Thereafter, plaintiff filed a motion for reconsideration and an appeal with the District Court and the United States Court of Appeals for the Second Circuit (the "Second Circuit"), respectively; the motion for reconsideration was denied on June 17, 2002 and the Second Circuit, by Summary Order dated November 23, 2005, affirmed as modified the decision of the District Court to the extent that the dismissal of plaintiff's "pendente state and city law claims to be without prejudice." Thereafter,

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[2] Plaintiff appealed the partial dismissal of the claims asserted in the second amended complaint with addendum, however, the United States Court of Appeals for the Second Circuit dismissed the appeal for lack of jurisdiction on November 5, 1998.

plaintiff's petition for a rehearing was denied by the Second Circuit on August 22, 2006. Likewise denied on January 8, 2007 was plaintiff's petition for a Writ of Certiorari filed with the United States Supreme Court. In the interim, on August 31, 2006, plaintiff commenced an action in this Court based upon the same claims of discrimination and wrongful termination under Index No. 19220/06, which was dismissed by order dated June 8, 2007 [Brathwaite Nelson, J.], in response to defendants' cross-motion for dismissal for lack of personal jurisdiction. On August 15, 2007, plaintiff filed the instant action, and on the next day filed a motion to reargue/renew the June 8, 2007 order in the action pending under Index No. 19220/06. Plaintiff filed an untimely Notice of Appeal on September 13, 2007, and the motion for reargument was denied by order of the Court dated November 27, 2007.

It is upon the foregoing that plaintiff moves for an order granting an extension of time to serve defendants with the summons and complaint, directing defendants' counsel to accept such service, and allowing plaintiff to conduct a people's search on all named defendants; and on this further motion by pro se plaintiff for a default judgment against defendants. Defendants cross-move for an order dismissing the action and an order prohibiting plaintiff from filing additional motions or another lawsuit against defendants for any claim related to the instant action.

Plaintiff Pro Se's Motions

CPLR § 306-b requires service of the summons and complaint within 120 days of filing. The provision, however, further provides that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." Therefore, in order for a plaintiff to prevail, it must be established either that there was good cause for plaintiff's failure to serve defendants within 120 days of the commencement of the action or that the court should grant the extension in the interest of justice. "Under CPLR 306-b, leave to extend the 120 day period should be liberally granted, particularly in those cases where expiration of the Statute of Limitations would prohibit recommencement of the action." Estate of Jervis v. Teachers Insurance and Annuity Association, 181 Misc.2d 971 (1999); see, Rosenzweig v. 600 North Street, LLC, 35 A.D.3d 705 (2nd Dept.2006); Chiaro v. D'Angelo, 7 A.D.3d 746 (2nd Dept. 2004); Foote v. Ruiz, 289 A.D.2d 374 (2nd Dept. 2001); Scarabaggio v. Olympia & York Estates Co., 278 A.D.2d 476 (2nd Dept. 2000). "The extension afforded by CPLR 306-b is applicable where [] service is timely made within the 120-day period but is subsequently found to have been defective (citations omitted)." Earle v. Valente, 302 A.D.2d 353 (2nd Dept. 2003).

The "good cause" and "interest of justice" standards require different analysis. A plaintiff seeking an extension of time to effect service of process for good cause shown should demonstrate a reasonable excuse for such delay, diligence in effecting service and establish the existence of a meritorious cause of action. See, Riccio v. Ghulam, 29 A.D.3d 558 (2nd Dept. 2006); Baione v. Central Suffolk Hosp., 14 A.D.3d 635 (2nd Dept. 2005); Kazimierski v. New York University, 18 A.D.3d 820 (2nd Dept. 2005); Lipschitz v. McCann, 13 A.D.3d 417 (2nd Dept.2004); Stuart v. Gimpel, 2 A.D.3d 625 (2nd Dept. 2003); Desilva v. Town of Brookhaven, 299 A.D.2d 409 (2nd Dept.

2002). Where, however, an extension in the interest of justice is sought, the court may consider all of the relevant factors before making its determination, with no one factor being dispositive. Scarabaggio v. Olympia & York Estates Co., 278 A.D.2d 476 (2nd Dept. 2000). "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-106 (2001); Valentin v. Zaltsman, 39 A.D.3d 852, 852 (2nd Dept. 2007); Riccio v. Ghulam, 29 A.D.3d 558, 815 N.Y.S.2d 125 (2nd Dept. 2006); Tarzy v. Epstein, 8 A.D.3d 656 (2nd Dept. 2004); Winter v. Irizarry, 300 A.D.2d 472 (2nd Dept. 2002); Rihal v. Kirchhoff, 291 A.D.2d 548 (2nd Dept. 2002).

Here, plaintiff has failed to demonstrate that an extension of time to serve is warranted in this matter based upon either a good cause shown or in the interest of justice. Plaintiff attempted to serve defendants on November 12, 2007 at the previous offices of the now defunct corporate entity, defendant Neighborhood Youth and Family Services, Inc., to no avail. Thereafter, plaintiff purportedly served the pleadings upon defendants' previous counsel in the underlying federal actions, Dewey & LeBoeuf, LLP,[3] which was the jurisdictional basis for dismissal in the action commenced in this Court on August 31, 2006 under Index No. 19220/06. There is no indication that any additional attempts to serve were made. Thus, there is a complete lack of due diligence displayed in attempting to serve defendants, and service upon the previous counsel for defendants, is palpably improper. Kazimierski v. New York University, 18 A.D.3d 820 (2nd Dept. 2005). "An attorney is not automatically considered the agent of his client for the purposes of the service of process (citations omitted)." Broman v. Stern, 172 A.D.2d 475, 476 (2nd Dept.1991); see, Fagelson v. McGowan, 301 A.D.2d 652 (2nd Dept. 2003). As the record is devoid of proof that defendants designated their former attorneys as their agent for the purposes of accepting service of process, Dewey & LeBoeuf, LLP lack authority to accept service on their behalf, and such service upon it was defective.

Likewise, there has been no showing of a meritorious action set forth in the complaint. Indeed, the claims upon which this action is based, to wit, employment discrimination, arises from matters and occurrences dating back to 1993, more than 15 years. Notwithstanding that these claims have been well adjudicated in the federal courts, plaintiff, who has been pro se from the inception of this protracted litigation, continues to waste judicial resources through the initiation of actions rooted in baseless claims. This Court will neither permit plaintiff pro se to further involve this Court in frivolous litigation nor countenance her relentless persistence in repeatedly relitigating, as set forth

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[3] LeBoeuf, Lamb, Greene & MacRae, LLP, the firm that previously represented defendants, merged with Dewey Ballantine on October 1, 2007, forming Dewey & LeBoeuf, LLP,

below, the same issues. The motion for an extension to serve the pleadings upon defendants thus is denied; the complaint hereby is dismissed for failure to obtain jurisdiction over defendants; and the motion for a default judgment is denied as academic in light of this Court's determination that jurisdiction was not obtained over defendants and an extension of time to serve was not warranted.

Defendants' Cross Motion

With respect to the cross-motion by defendants for an order dismissing the action and an order prohibiting plaintiff from filing additional motions or another lawsuit against defendants for any claim related to the instant action, defendants contend, inter alia, that the instant matter should be dismissed on the ground of issue preclusion.[4] Defendants assert that plaintiff's claims for employment and retaliatory discrimination have already be adjudicated in federal court. As such, defendants state that plaintiff is therefore estopped from re-litigating these claims in the instant action based upon the same occurrences.

"It is well settled that under the transactional approach adopted by New York in res judicata jurisprudence, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' (citations omitted). Pursuant to this approach, the doctrine bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions." Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 A.D.2d 1, 5 (1st Dept. 2000); see, also, Fogel v. Oelmann, 7 A.D.3d 485 (2nd Dept. 2004); MacGregor-Phillips v. MacGregor, 273 A.D.2d 206 (2nd Dept. 2000). Moreover, "collateral estoppel, a corollary to the doctrine of res judicata, 'precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same' (citation omitted). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted)." CRK Contracting of Suffolk, Inc. v. Jeffrey M. Brown & Associates, Inc. 260 A.D.2d 530 (2nd Dept. 1999); see, also, Abraham v. Hermitage Ins. Co., 47 A.D.3d 855 (2nd Dept.2008); Harley v. Adler, 7 A.D.3d 570 (2nd Dept. 2004); Lozada v. GBE Contracting Corp., 295 A.D.2d 482 (2nd Dept. 2002).

Here, a review of the relevant record reveals that there is a long and convoluted procedural history beginning in the administrative forum with the Equal Employment Opportunity Commission

[4] Defendants cross-motion and opposition additionally seek denial of the motion for a default judgment, however, as this Court denied the default motion as academic, the cross-motion and opposition will be considered with respect to the dismissal and estoppel issues.

and the New York City Commission on Human Rights. Thereafter, plaintiff has managed to successfully navigate through the state and federal court systems since February 21, 1997, the date of the filing of her first action in the District Court. Nevertheless, germane to the issue preclusion is the Report and Recommendation to Judge Casey by Magistrate Judge Douglas Eaton, a United States Magistrate Judge in the District Court for the Southern District of New York, dated April 30, 2001, which set forth all of the issues in a sixty page recommendation advising that plaintiff's second amended complaint be dismissed with prejudice. In the Report and Recommendation, Magistrate Judge Eaton states that plaintiff brings the District Court action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and under state and city laws against employment discrimination, sexual harassment and intentional infliction of mental distress. In making the recommendation for dismissal, Magistrate Judge Eaton stated the following, in relevant part:

> [Plaintiff's] evidence is insufficient to support any finding that [defendant's] proffered reasons [for plaintiff's termination] were objectively false. Instead, she merely argues that those reasons were subjectively wrong. She concedes that there was a severe friction and contention between her and [defendant Mamis-King, the Associate Executive Director/Programs], over various policy issues. This friction is the overarching reason proffered by [defendant]. In the absence of evidence of discrimination, such friction is a legitimate reason for firing an employee [citations omitted]. This is particularly true since [plaintiff] was a supervisor, and therefore had a responsibility to see that several employees implemented the policies decided by management. [Report at pgs. 13 & 14]
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> Accordingly, I recommend the Judge Casey dismiss the retaliation claim brought under Title VII. As far as I am aware, the same principles apply to the retaliation claims brought under State and City law. In the event that [plaintiff] asserts that a different principle applies to those claims, then I recommend that Judge Casey decline to accept pendent jurisdiction over them. [Report at pg. 56]
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> [Plaintiff] seeks to bring this State-law claim under our Court's supplemental jurisdiction, assuming that any of her federal claims survive. [] The allegations in the case at bar fail to meet New York's requirements for a claim of intentional infliction of emotional distress. [Report at pg. 59]

By Order of the United States District Court dated September 26, 2001, Judge Casey, in an eighteen page decision accepting the recommendation of Magistrate Judge Eaton, dismissed plaintiff's second amended complaint with prejudice. In doing so, Judge Casey stated, in pertinent part, the following with respect to plaintiff's claim based upon racial discrimination:

> Here, plaintiff has failed to produce any evidence to support her assertion that her termination was based on anything other than her insubordination. In fact, the record is "devoid" of any evidence which would suggest plaintiff's race or national origin was the reason for her termination. [] To the contrary, the record is replete with evidence of– and the plaintiff readily admits to– repeated incidences of [in]subordination. Accordingly, the Court adopts the Report's decision to grant summary judgment as to the federal, state and city law race discrimination claims. [Order at pg. 11]

With respect to plaintiff's claim for sexual harassment, Judge Casey determined, and stated that:

> In the present case, plaintiff complains of a co-worker sending her one note, which stated "Aura, My Sweetheart Please Marry Me!! Luv Ya J.F.:" on the reverse side the following response was written, "NO, SHE HAD SOMEONE JF BAD LUCK." Additionally, plaintiff claims she was subject to one sexual advance by the co-worker. See Report at 58. ("[S]he claimed there has been some 'unwanted touching' ...and that once, after a party, 'he gave me a ride home to my house. He wanted to have sex with me.'"). Plaintiff's complaints may be categorized as "relatively innocuous incidences" of unwanted behavior by a co-worker, and do not rise to the level of severity of pervasiveness this Court has recognized as reaching the level of workplace harassment [citations omitted]. Moreover, these isolated incidents could not be viewed by a reasonable person to have altered her work environment. [] Accordingly, the Court agrees that defendants' motion for summary judgment should be granted with respect to plaintiff's sexual harassment claim. [Order at pgs. 12 & 13]

In further finding that plaintiff's claim based upon retaliatory discrimination was not viable, and in declining the exercise of supplemental jurisdiction over plaintiff's state law claim of intentional infliction of emotional distress, Judge Casey stated:

> Plaintiff also claims that she suffered discrimination in the form of retaliation. [] Plaintiff claims she made internal complaints of discriminatory treatment to [defendant Mamis-King] and that she informed [defendant Mamis-King] of her plans to file a lawsuit. [] However, plaintiff can still not overcome defendants' proffered legitimate reason for her termination, that is, her insubordination. [citation omitted] Furthermore, because plaintiff has put forth no evidence that defendants' reasons for her termination were pretextual, no genuine issue of material fact exists. Thus, plaintiff's retaliation claims cannot survive summary judgment.

> As this Court agrees that plaintiff's federal claims should be dismissed, it denies the exercise of supplemental jurisdiction over plaintiff's state law claim of intentional infliction of emotional distress. Moreover, plaintiff did not cite instances that would demonstrate that defendants engaged in "'extreme and outrageous conduct' and that [they] intentionally or recklessly caused [her] to suffer emotion distress." [] [Order at pgs. 13 - 15]

Lastly, in reference to plaintiff's additional motions for supplemental discovery, permission to add new parties and have counsel appointed on her behalf, Judge Casey stated the following:

> In addition to the objections she raises to Magistrate Judge Eaton's Report and Recommendation, plaintiff has requested that discovery be reopened, that she be permitted to add new parties and that she be appointed counsel. The Court denies with each of these requests in turn. []
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> Plaintiff has been given ample time to state a claim. Discovery continued for over two years, during which plaintiff took 15 depositions. Further, plaintiff has "proffered no persuasive basis for the district court to conclude that further discovery would yield proof" of her claims [citation omitted]. The request for additional discovery will be denied where, as here, plaintiff has been unable to demonstrate the existence of any genuine issue of fact in the face of "ample opportunity" for discovery [citation omitted]. To re-open discovery under these circumstances would permit plaintiff "to engage in still another 'fishing expedition' in the hope that [s]he could come up with some tenable cause of action." [citation omitted]. Plaintiff's request for additional discovery is denied.
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> [] As the Court is adopting Magistrate Judge Eaton's Report in its entirety and granting summary judgment in favor of the defendants, plaintiff's claims are meritless and her request for counsel is therefore denied. [Order at pgs. 15 & 16]

By Summary Order of the United States Court of Appeals for the Second Circuit dated November 23, 2005, the District Court's Order was modified to the extent that the dismissal of plaintiff's "pendente state and city law claims to be without prejudice." In making this determination, the Second Circuit stated, in pertinent part, the following:

> Plaintiff [], pro se, appeals from (1) the judgment of the district court, granting summary judgment in favor of Neighborhood Youth and Family Services, Inc., and dismissing her second amended complaint

> brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as well as state and city law [.]
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> We review de novo a district court's grant of summary judgment. [] Summary judgment is appropriate where there is are no genuine issues of fact and the movant is entitled to judgment as a matter of law. []
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> We have carefully considered [plaintiff's] arguments on appeal and conclude that they are without merit. We affirm the judgment of the district court substantially for the reasons set forth by Magistrate Judge Douglas F. Eaton in his Report and Recommendation dated April 30, 2001, as adopted by the district court in its Memorandum and Oder dated September 26, 2001[.] We modify the judgment to reflect a dismissal of [plaintiff's] pendent state and city law claims to be without prejudice. See Carnegie-Mellon Univ. V. Cohil, 484 U.S. 343, 350 n.7 ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine... will point toward declining to exercise jurisdiction over the remaining state-law claims.").

Here, based upon the record before this Court, it is quite evident that the occurrences upon which the instant action is based, arise from the same transactions and series of transactions which have been litigated ad nauseam on the administrative, state and federal levels. More pointedly, plaintiff has freely perused the court system over the last twelve years, and has had numerous bites at the apple as she attempts to fashion a viable cause of action. Indeed, the federal record, which this Court has recited in painstaking detail, is replete with indicia that the issues raised in the prior action are identical, and plaintiff should be precluded from re-litigating same as she has had more than a full and fair opportunity to be heard on these matters. Nevertheless, problematic to this Court's finding that plaintiff is estopped from litigating this action based upon the ground of res judicata, is the unsettling fact that although the issues were decided against plaintiff in the prior action, the Second Circuit modified the District Court's Order to the extent of dismissing the state claims without prejudice. Interestingly enough, the modification was not based upon a finding that plaintiff's claims were potentially meritorious, as the Court specifically determined that such claims were without merit, but the modification was based upon the federal court declining to exercise jurisdiction over the remaining state-law claims. Consequently, although this Court finds that res judicata should bar the instant action, it is constrained to find that res judicata is inapplicable as the matter has not been brought to its final conclusion, and therefore, not decisive in the present action. As such, that branch of defendants' cross-motion for dismissal based upon issue preclusion is denied.

Defendants further seek dismissal of the action upon the ground that the causes of action are barred based upon expiration of the statute of limitations. Plaintiff's complaint states that it is an

employment discrimination action based upon thirty-five claims.[5] From the outset, it must be noted that as the federal courts precluded plaintiff from bringing additional claims, as detailed in District Court Judge Casey's Order, these newly-added claims will not be considered. As such, this Court will only address the claims for employment discrimination (causes of action 1- 4), retaliation (cause of action 6), sexual harassment (cause of action 7),[6] intentional infliction of emotional distress (causes of action 14) and hostile work environment (cause of action 20); the remaining claims hereby are dismissed and stricken from the complaint.

"When a party moves to dismiss a cause of action on the ground that it is barred by the statute of limitations, the movant bears the initial burden of establishing the affirmative defense by prima facie proof that the time in which to sue has expired." Assad v. City of New York, 238 A.D.2d 456 (2nd Dept.1997); see, also, Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept. 2004); Siegel v. Wank, 183 A.D.2d 158 (3rd Dept.1992). "The burden then shift[s] to the plaintiff to 'aver evidentiary facts establishing that the case falls within an exception to the statute of limitations' (citations omitted)." Rosenfeld v. Schlecker, 5 A.D.3d 461 (2nd Dept.2004).

In the case at bar, defendants contend, inter alia, that plaintiff's action is time-barred as she has failed to file the instant action within the statutorily prescribed time period pursuant to CPLR § 205. The relevant statutory provision states, in pertinent part, the following:

If an action is timely commenced and is terminated in any other

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[5]The thirty-five causes of action are the following: 1) discriminatory discharge based upon race; 2) discriminatory discharge based upon national origin/citizenship; 3) discriminatory discharge based upon gender; 4) discriminatory discharge based upon color; 5) discriminatory discharge based upon disability (pregnancy); 6) discriminatory discharge based upon retaliation; 7) verbal, psychological, physical, sexual harassment; 8) violation of NYFS' personnel policies and procedures; 9) filing a false police report; 10) defamation; 11) intimidation; 12) humiliation; 13) unequal terms and conditions of employment; 14) intentional infliction of emotional distress; 15) belittlement; 16) unfair critique/scrutiny of job performance; 17) tampering of personnel file; 18) denial of due process of law/grievance procedure; 19) exclusion from re-organizational changes; 20) hostile work environment; 21) perjury; 22) negligence; 23) conspiracy to violate civil rights; 24) concealment of evidence; 25) obstruction of justice; 26) confiscation of plaintiff's support letter from NYFS employees; 27) confiscation of subpoenas of NYFS' employees; 28) withholding of deposition transcripts of NYFS' employees; 29) failure to produce evidence against plaintiff; 30) abuse of power; 31) excessive scrutiny of job performance; 32) violation of the United States Constitution/Bill of Rights and Fourteen [sic] Amendment; 33) confiscation of subpoenas; 34) confiscation of deposition transcripts; 35) violation of the Code of Ethics of the National Association of Social Workers.

[6] Cause of action 7 alleges verbal, psychological, physical and sexual harassment. However, the only portion of the this claim that will be considered by this Court is the sexual harassment claim. The balance hereby is stricken.

> manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, [] may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

"Prerequisite to the availability of the benefits of CPLR § 205, an earlier action must have been commenced, and timely so." Parker v. Mack, 61 N.Y.2d 114, 117 (1984); see, MacIntosh v. Bronzo, 302 A.D.2d 434 (2nd Dept. 2003). Although plaintiff timely commenced the underlying federal action, which was dismissed without prejudice as to the state claims by Summary Order of the Second Circuit issued on August 14, 2006, she failed to avail herself of the six month extension afforded by CPLR §205, by commencing the instant action on or before August 15, 2007. Equally problematic to plaintiff's failure to commence this action within six months of the aforementioned dismissal is her failure to obtain in personam jurisdiction over defendants. See, MacIntosh v. Bronzo, 302 A.D.2d 434 (2nd Dept. 2003). Thus, as defendants have conclusively demonstrated that the instant action was commenced outside of the statutory limitations, and plaintiff has failed to offer sufficient proof in opposition, defendants are entitled to dismissal of the complaint on the ground that it is barred by the statute of limitations.

Arguendo, even if the complaint is not time-barred, which this Court has found that it is, defendants are still entitled to dismissal of the complaint, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action.[7] In applying this statutory provision, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Leon v. Martinez, 84 N.Y.2d 83 (1994); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd

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[7] Although the defendants do not specify this particular provision in seeking 3211 dismissal under section three, and dismissal of harassing, vexatious, abusive, frivolous and meritless litigation under section four, of the memorandum of law in opposition to motion and in support of the cross-motion, this Court presumes that dismissal is sought based upon this ground as well, based upon the language employed in the memorandum.

Dept.2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, supra, 84 N.Y.2d at 88; International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). Here, in viewing the instant complaint in its most favorable light as asserted against defendants, this Court finds that there are no potentially viable claims asserted.

The New York State Human Rights Law, Executive Law § 296, entitled "Unlawful discriminatory practices," makes it unlawful for an employer to discriminate in their employment practices. The statute states, in relevant part:

> 1. It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
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> 7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

Here, the first through fourth causes of action assert discriminatory discharge based upon race, national origin/citizenship, gender and color, respectively. "The standards for recovery under the New York State Human Rights Law (see Executive Law § 296) are the same as the federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000-e[2], et seq)[]." Nelson v. HSBC Bank USA, 41 A.D.3d 445, 446 (2nd Dept. 2007). "A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (citation omitted)." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305 (2004); see, Ferrante v. American Lung Assn., 90 N.Y.2d 623 (1997). In order to carry his or her ultimate burden in a race discrimination case, a plaintiff must show that the adverse employment decision was motivated in some part by an "impermissible reason" (citation omitted)." Nelson v. HSBC Bank USA, 41 A.D.3d 445, 446 (2nd Dept. 2007); see, Ferrante v. American Lung Assn., 90 N.Y.2d 623 (1997); Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO, 6 N.Y.3d 265, 270 (2006); Johnson v. NYU Hospitals Center, 39 A.D.3d 817 (2nd Dept. 2007). As plaintiff has failed to establish that the circumstances of her termination gives rise to an inference of discrimination, the complaint does not state claims for discriminatory discharge based upon race, national origin/citizenship, gender or color. Therefore, those claims must be

dismissed.

The sixth cause of action alleges, in effect, that defendants engaged in unlawful retaliation against plaintiff, in violation of Executive Law § 296 (7). "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices [see Executive Law § 296 (7); Administrative Code of City of N.Y. § 8-107 (7)]. In order to establish that claim, plaintiff must show that "(1) she has engaged in a protected activity, (2) her employer was aware that she participated in that activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312-313 (2004); see also, Beharry v. Guzman, 33 A.D.3d 742, 743 (2nd Dept.2006); see, Thompson v. Lamprecht Transport, 39 A.D.3d 846 (2nd Dept. 2007); Rastogi v. New York State Office of Mental Health, 21 A.D.3d 886 (2nd Dept. 2005); Martinez v. Triangle Maintenance Corp., 293 A.D.2d 721 (2nd Dept. 2002). Here, dismissal of this claim is warranted as the complaint fails to allege a causal connection between any allegedly protected activity engaged in by plaintiff, and her subsequent termination.

Moreover, the seventh and twentieth causes of action for hostile work environment and sexual harassment, respectively, are not supported by the extensive record of this litigation. A hostile work environment exists "'[w]hen 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' (citations omitted)." Beharry v. Guzman, 33 A.D.3d 742, 743 (2nd Dept.2006); State Div. of Human Rights v. Stoute, 36 A.D.3d 257, 258 (2nd Dept. 2006). "Whether a workplace may be viewed as hostile or abusive can be determined only by considering the totality of the circumstances (citations omitted). 'Isolated remarks or occasional episodes of harassment will not support a finding of a hostile or abusive work environment'(citations omitted)." Macksel v. Riverhead Central School Dist., 2 A.D.3d 731, 731-732 (2nd Dept. 2003); Thompson v. Lamprecht Transport, 39 A.D.3d 846, 847 (2nd Dept. 2007); State Div. of Human Rights v. Stoute, 36 A.D.3d 257, 258 (2nd Dept. 2006).

To be actionable, the alleged conduct must be both objectively and subjectively offensive, such that a reasonable person would find the behavior hostile or abusive, and such that the plaintiff herself did, in fact, perceive it to be so (citations omitted). San Juan v. Leach, 278 A.D.2d 299, 300 (2nd Dept. 2000). "To recover against an employer for the discriminatory acts of its employee, the plaintiff must demonstrate that the employer became a party to such conduct by encouraging, condoning, or approving it (citations omitted)." Beharry v. Guzman, 33 A.D.3d 742, 743 (2nd Dept.2006); see, Schenkman v. New York College of Health Professionals, 29 A.D.3d 671 (2nd Dept. 2006); Ellis v. Child Development Support Corp., 5 A.D.3d 430 (2nd Dept. 2004); Martinez v. Triangle Maintenance Corp., 293 A.D.2d 721 (2nd Dept. 2002); Pascal v. Amscan, Inc., 290 A.D.2d 426 (2nd Dept. 2002). Here, the "sexual harassment claim based on a hostile work environment must fail as a matter of law because there is no evidence that [plaintiff's] coworker's isolated remarks and offensive conduct were so severe or pervasive as to permeate the workplace and alter the conditions of her employment." Thompson v. Lamprecht Transport, 39 A.D.3d 846, 847 (2nd Dept. 2007); see, Macksel v. Riverhead Central School Dist., 2 A.D.3d 731(2nd Dept. 2003).

Likewise, the fourteenth cause of action sounding in intentional infliction of emotional distress does not lie. "It is well established that the tort of intentional infliction of emotional distress consists of four elements: '(1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress' (citations omitted). 'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' (citations omitted)." Andrews v. Bruk, 220 A.D.2d 376 (2nd Dept. 1995); see, Howell v. New York Post Co., Inc., 81 N.Y.2d 115 (1993); Scarfone v. Village of Ossining, 23 A.D.3d 540 (2nd Dept. 2005); Melnik v. Saks & Co., 292 A.D.2d 430 (2nd Dept. 2002). The record here is devoid of conduct that would remotely rise to the level of outrageousness required to sustain a claim for intentional infliction of emotional distress. Thus, dismissal of this cause of action also is warranted.

Further, as plaintiff has filed two administrative complaints, five complaints and three actions based upon the same transactions, and asserting essentially the same claims, that branch of the cross-motion prohibiting plaintiff from filing another lawsuit against defendants for any claim related to the claims that she brought on three separate occasions is granted to the extent that plaintiff hereby is barred from commencing any additional actions in any New York state court against defendants arising from or relating to the claims asserted and subsequently dismissed by the state and federal courts. Any further actions commenced upon the same transaction or series of transactions, through plaintiff or those in privity thereto, shall be deemed vexatious litigation and will merit appropriate sanctions by this Court.

Conclusion

Based upon the foregoing, the motion by pro se plaintiff Aura Quinones for an order granting an extension of time to serve defendants Neighborhood Youth and Family Services, Inc., Nancy Mamis-King, Lizette Tait and Jacinto Flores with the summons and complaint, directing defendants' counsel to accept such service, and allowing plaintiff to conduct a people's search on all named defendants is denied in its entirety. The further motion by pro se plaintiff for a default judgment against the aforementioned defendants is denied as academic in light of this Court's determination that jurisdiction was not obtained over defendants and an extension of time to serve was not warranted. Defendants' cross-motion for an order dismissing the action and an order prohibiting plaintiff from filing additional motions or another lawsuit against defendants for any claim related to the instant action is granted in its entirety. The complaint hereby is dismissed with prejudice as against defendants Neighborhood Youth and Family Services, Inc., Nancy Mamis-King, Lizette Tait and Jacinto Flores.

Dated: April 21, 2008

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J.S.C.