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

PRESENT: HON. MARILYN SHAFER, JSC Justice

PART 8

Index Number : 406695/2007

PENA, VIVIAN

VS.

N.Y.S.HUMAN RIGHTS DIVISION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion decided pursuant to attached Decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/3/08

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8
----------X

In the Matter of the Application of VIVIAN PENA,

Petitioner,

-against-

Index No. 406695/07

FORDHAM UNIVERSITY and NYS HUMAN RIGHTS DIVISION,

Respondent.

MARILYN SHAFER, J.:

This Article 78 action is an appeal from a determination and order after investigation by respondent, the NYS Division of Human Rights (NYSDHR). NYSDHR, Pena v Fordham University, Case No. 10115168, dated August 8, 2007, hereinafter, the "Order."

In 2003, petitioner, Ms. Vivian Peña was admitted to the Graduate School of Arts and Sciences of respondent Fordham University (Fordham). That admission, according to the admissions letter, was based upon the condition that Peña maintain a "B" average in each semester of study - it is uncontested that a "B" average translates into a grade point average (GPA) of 3.0. The Academic Policies and Procedures Guidebook of Fordham also contains that condition.

From the fall of 2003, through the spring of 2006, Peña's cumulative GPA remained below the required average, starting at

2.0, and reaching a high of 2.75. In that post-matriculation period, Peña was forced to take time off from Fordham to be treated for recurrent cervical cancer and post surgical cysts (an uncontested disability under NYS Human Rights Law) that caused her great pain, and, at times, inability to continue her regular course work. In April of 2006, Fordham conducted an overhaul of its academic regulations. In the aftermath, Peña was disenrolled.

Peña filed a complaint against Fordham with the NYSDHR on or about December 11, 2006, alleging that Fordham discriminated against her on the basis of disability, and that on or about March 2006, she withdrew from her classes for medical reasons, requesting that her student-loan lender be credited. Peña alleges that her dismissal from the Fordham's graduate program was a pretext for disability discrimination because in 2003 she had a 2.0 average, and she was not disenrolled until 2006.

After an investigation and examination of evidence, the NYSDHR determined that there is "no probable cause to believe that [Fordham] engaged in or is engaging in the unlawful discriminatory practice complained of ... [because i]t is unreasonable for [Peña] to expect [Fordham] to modify its academic standards because of her disability[, and Peña] has not demonstrated that her status as a disabled person led to her disenrollement." Order at 1-2.

Fordham cross-moves to dismiss the petition on the bases that: (i) the petition was not timely filed, as required under Executive Law § 298 ("[a] proceeding [for judicial review and enforcement] must be instituted within sixty days after the service of [a final] order"); (ii) this court lacks jurisdiction due to operation of Executive Law § 298 ("proceeding shall be brought in the supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs ... ."") and New York Ct Rules § 202.57 (judicial review of order from NYSDHR to be commenced "within 60 days ... in the Supreme Court in the county where the alleged discriminatory practice which is the subject of the order occurred ... ."); and (iii) the Order issued by NYSDHR was accurate and appropriate.

Having reviewed the Order, the court is satisfied that the NYSDHR's determination was not affected by an error of law, arbitrary or capricious, or an abuse of discretion (CPLR 7803). However, it is Fordham's first argument that presents a threshold issue of compliance with the applicable statute of limitations.

It is undisputed that the petition was filed some nine days after expiration of the applicable limitations period had expired. Petitioner argues that this court has discretion to relax the limitations period via CPLR 2004, which provides that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing

any act, upon such terms as may be just and upon good cause shown ... ."

The plain meaning of the language "[e]xcept where otherwise expressly prescribed by law" is that this discretion would not be applicable to the matter at hand, in which both Executive Law § 298 and New York Ct Rules § 202.57, by law, prescribe the 60-day limitations period for appeal of the NYSDHR Order. See e.g. Rybka v New York City Health and Hosps. Corp., 263 AD2d 403 (1st Dept 1999) ("[u]nlike other time periods contained in the CPLR, the broad discretion courts generally are afforded [in CPLR 2004] does not apply to Statutes of Limitations. ... '[T]he statute of limitations is not subject to a discretionary judicial extension of time no matter how good the reasons for delay may be'"), quoting Siegel, NY Prac § 33, at 38 (2d ed).

The court is cognizant that the petitioner is appearing pro se, and suffers from a statutorily included disability, but the occurrence of apparently harsh results cannot change black letter law. Compare Cochran v New York City Employees Retirement Sys., 131 AD2d 351, 353 (1st Dept 1987) (strict application of the statutory filing requirement leading to an apparently harsh result does not obviate the only safe and sure way to proceed, which is to follow the law and its prescribed limitations).

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is

dismissed. This constitutes the decision and judgment of the Court.

Dated: 11/3/08

Enter:

MARILYN SHAFER

J.S.C.