SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 114214/2011
MASSARO, YVONNE HANRATTY
vs.
DEPT OF EDUCATION OF THE CITY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 10 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/7/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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YVONE HANRATTY MASSARO,

Plaintiff,

-against- Index No. 114214/11

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ANTHONY LODICO individually and as principal on behalf of the NYC DOE and SPY KONTARINIS, individually as assistant principal on behalf of the NYC DOE,

Defendants.

----------X

ANIL C. SINGH, J.S.C.:

Defendants New York City Department of Education (DOE), Anthony Lodico, and Spy Kontarinis move, pursuant to CPLR 3211(a)(2), (5), (7) and (8), for a judgment dismissing the second amended complaint (Complaint).

Plaintiff Yvone Hanratty Massaro is a tenured art teacher at Edward R. Murrow High School (School) in Midwood, Brooklyn. From 1993 until the television studio in the School was closed, in or about June 2008, plaintiff was in charge of its operation. During those years, she also taught art. Defendants Anthony Lodico and Spy Kontarinis are, respectively, the principal of the School and the assistant principal of art.

The Complaint alleges that plaintiff has been retaliated against for having commenced a previous action, and for having given interviews, in 2010, to the New York Times, the New York

Post, and other publications, and that the retaliation was also based on her age, in violation of the State Human Rights Law (Executive Law § 296) and the New York City Human Rights Law (Administrative Code of City of New York § 8-107). Finally, the Complaint alleges that the discriminatorily-based retaliatory harassment violated plaintiff's right to equal protection of the laws, as guaranteed by Article 1, Section 11 of the State constitution.

In November 2008, plaintiff commenced an action in the Supreme Court, New York County, against DOE, alleging that DOE violated her rights under the First Amendment by retaliating against her for complaining about filthy and dangerous conditions in her art classroom. DOE removed the case to the Federal District Court for the Southern District of New York. By decision dated June 3, 2011, the court granted DOE's motion for summary judgment. Citing *Weintraub v Board of Educ. of City School Dist. of City of New York* (593 F3d 196, 201 [2d Cir 2010]), the court noted that, in order to be constitutionally protected, the speech of a public employee must have been spoken by the employee as a citizen, rather than in pursuit of the employee's duties, and it must be about a matter of public concern. The court held that plaintiff's complaints were made in pursuit of her duties as a teacher, and that she had spoken solely about her personal dissatisfaction with her working conditions. *Massaro v Dept. of Educ. of City of New York*, 2011 WL 2207556, 2011 US Dist LEXIS 60319 (SD NY June 3, 2011, 08 Civ

10678 [LTS] [FM]. By decision dated May 31, 2012, the United States Court of Appeals for the Second Circuit affirmed the District Court's opinion. *Massaro v Dept. of Educ. of City of New York*, 481 Fed Appx 653 (2d Cir 2012).

The court turns first to the question of whether that action bars the instant action under the principles of res judicata or collateral estoppel.

> "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior action."

Barbieri v Bridge Funding, 5 AD3d 414, 415 (2d Dept 2004). "[O]nce 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." *Anderson v New York City Dept. of Educ.*, 93 AD3d 538, 538 (1st Dept 2012), quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 (1981). Although much of the Complaint repeats the claim in plaintiff's first action, that Lodico terminated the television studio elective in retaliation against plaintiff's complaints about her classroom, plaintiff could not have litigated, in that action, her claims that she was retaliated against because she commenced the first action and because she gave interviews to the press. At the time of the first action, those alleged events had not yet occurred. At the very least, retaliation against her for bringing the first lawsuit was not a transaction out of which a cause of action was

or could have been raised in the first action.

Relying principally on *Joshua A. Becker & Assoc. v State of New York* (79 AD2d 599 [2d Dept 1980]), defendants contend, nonetheless, that neither a different legal theory (plaintiff now alleges that she was retaliated against, in part, because of her age), nor a longer time period, can protect plaintiff's claims. In *Joshua A. Becker & Assoc*, the plaintiff had previously sued for breach of contract, and the court dismissed the complaint on the grounds that the New York State Comptroller did not approve the contract at issue. In the second action, nothing was alleged to have changed, other than the incurring of further damages. Here, by contrast, plaintiff is alleging retaliation on the basis of events that had not occurred at the time of the first action. Thus, plaintiff's current claim of retaliation does not arise out of the transactions that gave rise to her claim in the prior action.

Collateral estoppel bars a party from "relitigating ... an issue clearly raised in a prior action or proceeding and decided against that party ...." *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984). In order for collateral estoppel to apply, the identical issue must have been litigated and necessarily decided in a prior action and be decisive in the subsequent action; and the party to be barred from relitigating must have had a full and fair opportunity to litigate the issue in the prior action. *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 (1985). Defendants' limited argument on this score is that plaintiff is estopped from

relitigating her contention that defendants retaliated against her because of her complaints about the condition of her art room, a contention that she does not seek to relitigate here. Accordingly, the Complaint is not barred by collateral estoppel.

However, for the reasons that follow, plaintiff fails to state a cause of action. Plaintiff has attached copies of the articles in the New York Times and the New York Post as exhibit A to her affidavit, and she argues that, because she made the statements that are reported in those articles publicly to newspapers, rather than privately within the School, those statements are constitutionally protected. The Times article discusses the closing of the television studio at the School in the context of the School's difficulty in maintaining elective courses in a time of budget cuts, and in the context of the increasing rarity of functioning television studios in New York City high schools. The article notes that, in addition to budgetary problems at the School,

> "[t]here were also personal tensions. Ms. Massaro's relationship with her supervisors soured after the 2004 retirement of the [S]chool's founding principal.... In 2005, she claimed she had gotten scabies from a dirty art room infested with rodents."

Massaro affidavit, exhibit A, at 2. The article also notes that plaintiff had filed a lawsuit "claiming that the closing of the studio was an example of a campaign of harassment against her, along with assigning her packed classes with high percentages of special education students." *Id.* The Post article quotes plaintiff as saying "[w]e're moving away from our roots. They

are not offering high-tech television courses, they don't have advanced courses in digital filmmaking or video." Massaro affidavit, exhibit A at (unnumbered) 3. The Post article then reports that plaintiff filed a lawsuit "charging that the closing of the studio is part of a harassment campaign against her." *Id.*

As the Times article makes clear, although the closing of the television studio at the School was a matter of public concern, plaintiff spoke of it almost exclusively as a personal matter. According to plaintiff, the importance of the closing of the studio was that it was a part of the campaign of harassment that the School directed at her. Her statements to the press voiced that private grievance almost exclusively, to the exclusion of any statements of wider concern. Accordingly, they are not constitutionally protected speech. *See Connick v Myers*, 461 US 138, 146 (1983); *Lewis v Cowen*, 165 F3d 154, 163-164 (2d Cir 1999). Nor was her first action -- a lawsuit brought solely to advance a private concern -- constitutionally protected as free speech. *McNaughton v City of New York*, 234 AD2d 83, 84 (1st Dept 1996), citing *Ezekwo v New York City Health & Hosps. Corp.*, 940 F2d 775, 781 (2d Cir 1991). Accordingly, she has no viable claim that she was retaliated against either for her statements to the press, or for her first action. *Ruotolo v Mussman & Northey*, __AD3d__, 2013 NY Slip Op 02678 (1st Dept 2013); *McNaughton v City of New York*, 234 AD2d 83.

As plaintiff argues, the protection of free speech provided by Article 1, Section 8 of the State constitution is broader in

certain respects than that provided by the First Amendment. *See e.g. People ex rel. Arcara v Cloud Books*, 68 NY2d 553, 558 (1986); *Times Sq. Books v City of Rochester*, 223 AD2d 270, 273-276 (4th Dept 1996). However, plaintiff has adduced no case -- and this court knows of none -- in which a court has held that, in relation to a claim of retaliation, speech that either is made in pursuit of a public employee's duties, or fails to address a matter of public concern, is protected under the State constitutional guaranty of free expression.

Plaintiff's claim, that she was discriminated against on the basis of her age, borders on the frivolous. The Complaint alleges that: (1) younger teachers in the art department "have the best schedules, students, access to computers, printers, books, materials, supplies"; (2) [t]hey often miss departmental meeting[s]"; and (3) [m]any members of the staff have asked [p]laintiff when she is going to retire." Complaint, ¶ 80. In addition, the Complaint alleges that plaintiff was harassed at work in ways that "younger teachers" were not. Complaint, ¶¶ 85-86, 97, 99-102. However, the Complaint does not divulge the ages of those "younger teachers."

It is elementary that, when deciding a motion to dismiss for failure to state a claim, the court must assume that the facts alleged in the complaint are true and "`accord plaintiffs the benefit of every possible favorable inference.'" *Nonnon v City of New York*, 9 NY3d 825, 827 (2007), quoting *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). The court is not required, however, to

assume facts that are not alleged.

Plaintiff was 51 years old at the time she commenced this action. For all the court can glean from the Complaint, the "younger" teachers, to whom plaintiff compares herself, may all have been no more than two or three years younger than her. The complaint fails to allege a single fact to support the conclusion that any of the work conditions about which plaintiff complains were imposed on her because of her age.

Finally, to the extent that plaintiff's equal protection claim may differ from her age discrimination claim, it raises a "class of one" claim of discriminatory treatment. *See generally Village of Willowbrook v Olech*, 528 US 562, 564 (2000). The United States Supreme Court has held, however, that a "class of one" claim is not available to public employees who complain of discrimination in their employment. *Enquist v Oregon Dept. of Agric.*, 553 US 591, 598 (2008). Moreover, plaintiff does not oppose the dismissal of her equal protection claim.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/2/13

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE