| **Pupiales v Bldg Mgt. Co., Inc.** |
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| 2014 NY Slip Op 30178(U) |
| January 22, 2014 |
| Sup Ct, New York County |
| Docket Number: 158098/12 |
| Judge: Anil C. Singh |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

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

PART 61

Index Number : 158098/2012
PUPIALES, DORIS
vs.
BLDG MANAGEMENT CO., INC.
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

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

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

Dated: 1/22/14

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

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

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DORIS PUPIALES,

Plaintiff,

-against-

Index № 158098/12

BLDG MANAGEMENT CO., INC. and RISHI PATRAJU,

Defendants.

----------X

**HON. ANIL C. SINGH, J.:**

Defendants BLDG Management Co., Inc. (BLDG) and Rishi Patraju (Patraju) jointly move, under motion sequence 001, for an order, pursuant to CPLR 7503 (a), compelling arbitration of the claims set forth in the complaint and staying this action pending arbitration, or in the alternative, for an order, pursuant to CPLR 3211 (a) (7), dismissing the claims for failure to state a cause of action. Plaintiff opposes the motion and moves, under motion sequence 002, for an order, pursuant to CPLR 3101 (a), compelling Patraju to submit to DNA testing. Defendants cross-move for a protective order. The motions, under motion sequence numbers 001 and 002, are consolidated for disposition.

The plaintiff, Doris Pupiales (Pupiales), has been employed as a porter by building management company BLDG since 2004. She was assigned to work at a residential apartment house, located at 247 West 87th Street, New York, New York (the apartment house), performing cleaning and maintaining of apartment units after tenants move out. Patraju was also employed at BLDG, and at all relevant times, was assigned to work as a superintendent and/or supervisor of porters, including Pupiales, at the apartment house.

According to her complaint, filed on or about November 16, 2012, Pupiales began having

problems with Patraju back in 2009, when in August of that year, he inexplicably suspended her for two days after a building elevator was scratched by a delivery person. Shortly thereafter, in September 2009, Patraju forcibly raped and sexually assaulted her while she was working in one of the apartments he had assigned her to clean. Then, in May 2010, during the summer of 2010, and again, on or about September 23, 2011, Patraju repeatedly raped and/or sexually assaulted her in various locations in the apartment house.

The complaint contains eleven causes of action, five against BLDG and six against Patraju. BLDG is charged with: discriminating against her on the basis of her sex, in violation of NYSHRL/Executive Law § 296 *et seq*., and Administrative Code of City of NY NYCHRL/section § 8-107 *et seq*., by permitting acts that unreasonably interfered with her work performance and/or by creating an intimidating, hostile and offensive work environment that adversely affected the terms, conditions and privileges of her employment (first and second causes of action); negligence in its failure to provide adequate supervision of Pupiales, in that it allowed Patraju to supervise her despite being aware that Patraju was acting inappropriately toward her, and in forcing her to continue working in the same apartment house where she was under Patraju's supervision (ninth cause of action); negligence in its hiring of Patraju, in that BLDG failed to adequately investigate his background and failed to properly evaluate him for the position of supervisor (tenth cause of action); and failing to adequately supervise, train, control and discipline Patraju, or to take any preventive or remedial actions when it became apparent that Patraju was conducting an inappropriate relationship with his supervisee, Pupiales (eleventh cause of action).

Patraju is charged with: aiding, abetting, inciting, compelling and/or coercing a hostile

work environment and/or discriminating against Pupiales in the terms and conditions of her employment on the basis of sex in violation of NYSHRL/Executive Law § 296 *et seq.*, and Administrative Code NYCHRL/section § 8-107 *et seq.* (third and fourth causes of action); and with using his authority and position as superintendent, and acting within the scope of his employment, when he forcibly raped and/or sexually assaulted Pupiales in or about September 2009, May 2010, the summer of 2010, and on or about September 23, 2011, (fifth, sixth, seventh and eighth causes of action). The complaint also provides that the reason Pupiales did not make contemporaneous complaints about the sexual attacks was because of threats Patraju made to her about losing her job if she told anyone about his conduct.

Both Pupiales's and Patraju's employment was pursuant to the terms and conditions of a collective bargaining agreement, as amended and extended, between their union Service Employees International Union Local 32BJ (Union) and BLDG (the CBA). It is based on this agreement that defendants seek to arbitrate this matter, claiming that Pupiales's sole remedy is to pursue arbitration because the terms and conditions of the CBA require the parties to arbitrate employment related disputes (*see* CBA articles V and X [23]).

In opposing defendants' motion, Pupiales details the claimed attacks, asserts that Patraju repeatedly threatened her job security if she told anyone about their inappropriate encounters, and she provides a procedural history of the actions she took, and/or were taken by the Union on her behalf, to address the problems she was having with Patraju, prior to commencing this action. She explains that her earlier attempt to obtain help from BLDG's Department of Human Resources (HR) to deal with certain other (non-sexual) problems she was having with Patraju, had an unexpected result. Instead of helping Pupiales, HR issued to her a written warning,

advising her that she had a poor attitude, was disrespectful of Patraju, and, among other things, that she was being placed on a five-day suspension without pay.

Thereafter, on or about November 15, 2011, Pupiales filed a complaint with the New York State Division of Human Rights (NYSDHR), under NYSDHR case No. 10151814, charging BLDG and Patraju with "an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York (Human Rights Law) because of sex," and with violating Title VII of the Civil Right Act of 1964 as amended. In her complaint, she described being forcibly raped and/or sexually assaulted by Patraju at the workplace, being repeatedly threatened about losing her job if she reported his sexual attacks, and about other incidents of unfair treatment by Patraju. After she filed her complaint with NYSDHR, she was again suspended without pay.

A month later, on December 20, 2011, the Union filed an arbitration request with the Office of the Contract Arbitrator (OCA), requesting arbitration of Pupiales's three claims "which the Employer has failed and refused to adjust." The claims were for: (1) gender discrimination and sexual harassment; (2) an unjust one-day suspension without pay; and (3) unjustly transferring her to another building in retaliation for filing the NYSDHR complaint (*see* Pupiales's exhibit H). By notice of hearing dated February 8, 2012, the OCA scheduled the matter, identified as case No. 500421/500482, for a hearing on March 2, 2012. The subject of the hearing was the Union's "alleg[ations] that a dispute has arisen under the [CBA] between the parties concerning Doris Pupiales'" three claims (*id.* exhibit I).

By Spring of 2012, NYSDHR responded to Pupiales's November 15, 2011 complaint. On May 15, 2012, NYSDHR issued its Determination After Investigation, based upon the

findings set forth in the Final Investigation Report and Basis of Determination, dated May 11, 2012. The Determination After Investigation states, in relevant part:

> "Pupiales filed a verified complaint with [NYSCHR] charging [BLDG and Patraju] with an unlawful discriminatory practice relating to employment because of sex in violation of N.Y. Exec. Law, art. 15 ('Human Rights Law').
>
> After investigation, [NYSDHR] has determined that it has jurisdiction in this matter and that PROBABLE CAUSE exists to believe that [BLDG and Patraju] have engaged in or are engaging in the unlawful discriminatory practice complained of.
>
> Pursuant to the Human Rights Law, this matter is recommended for public hearing."

(Pupiales's exhibit K, emphasis in the original). Then, by notice dated June 10, 2012, NYSDHR notified all parties (to NYSDHR case No. 10151814), that a Pre-Hearing Settlement Conference would be held before Administrative Law Judge (A.L.J.) Thomas J. Marlow of the State Division of Human Rights on June 28, 2012 (Pupiales's exhibit L).

However, on June 26, 2012, just prior to the scheduled hearing, Pupiales's counsel sent out two letters on her behalf. One was a letter to NYSDHR requesting a dismissal of the matter in order to pursue an action in court, and the second was a letter to the Equal Employment Opportunity Commission (EEOC) requesting a Notice of Right to Sue based on the same allegations underlying NYSDHR Case No. 1015184 (Pupiales's exhibit M). By order dated June 28, 2012, A.L.J. Marlow granted the request and ordered that the case be dismissed for administrative convenience, which was then adopted, issued and ordered by the Honorable Galen D. Kirkland, Commissioner, NYSDHR, on July 3, 2012. On October 4, 2012, the EEOC issued a Right to Sue letter, advising Pupiales that, based on her stated preference, it was closing its file and permitting her to file a lawsuit in either federal or state court within 90 days (Pupiales's exhibit O).

Following receipt of the Right to Sue letter, Pupiales timely commenced the instant action, by filing on November 16, 2012. On or about January 17, 2013, the parties stipulated and agreed to extend the time for defendants to answer, or otherwise respond to, the complaint, from January 22, 2013, to February 21, 2013.

In a letter dated February 20, 2013, BLDG's Director of HR Charles J. Priolo (Priolo) notified the Union's grievance representative Frank Monaco that BLDG and Patraju had grievances and disputes with Pupiales. Specifically, BLDG and Patraju were jointly grieving and disputing the allegations set forth in the complaint pending in New York County, and in her OCA arbitration request of December 20, 2011. BLDG and Patraju were seeking to arbitrate their grievance pursuant to article V, the arbitration clause, and article X (23), the no discrimination clause, of the CBA.

The next day, February 21, 2013, defendants served the instant motion. The parties stipulated to adjourn the return date on this motion from March 21, 2013, to April 11, 2013, and then again to May 10, 2013. An interim mediation session conducted between the parties on April 16, 2013, failed to resolve the issues, and Union's associate general counsel, Lyle D. Rowen, Esq. (Rowen) sent a letter dated March 20, 2013, to Priolo advising him that under the CBA, neither BLDG, as her employer, nor Patraju as her supervisor, could file a grievance against an individual bargaining unit employee, such as Pupiales. This letter set off a series of written exchanges by and between counsel for defendants and the Union in which they offered their different legal perspectives as to whether BLDG and Patraju are entitled, under the CBA, to grieve their dispute with Pupiales, despite her decision to pursue an action in court.

Central to defendants' motion to compel arbitration is their explanation as to why

arbitration is Pupiales's sole remedy in this matter. Defendants explain that, because Pupiales's discrimination claims as well has her tort claims are all based on conduct which allegedly occurred at the workplace and related to the terms and conditions of her employment, they fall within the scope of the CBA (specifically, articles V and X [23]), and must be arbitrated.

Pupiales offers five basic arguments in opposition. The first argument is that she never agreed to arbitrate her rape and sexual harassment claims. Quoting *TMP Worldwide v Franzino* (269 AD2d 332, 332 [1st Dept 2000]) and citing *Marek v Laufer & Son* (257 AD2d 363, 364 [1st Dept 1999]), *Thomas Crimmins Contr. Co. v City of New York* (74 NY2d 166, 171 [1989], and *Matter of Waldron (Goddess)* (61 NY2d 181, 183 [1984]), Pupiales contends that, since she never signed an arbitration agreement with either defendant, she cannot be compelled to arbitrate her claims against them because, "absent a clear, explicit, and unequivocal agreement to arbitrate," she cannot be deemed to have "surrender[ed] the right to resort to the courts" (*TMP Worldwide v Franzino,* 269 AD2d at 332). She asserts that it was the Union, and not herself, that submitted a notice of intent to arbitrate, and that it is unfair for her to be deemed to have waived her rights to sue her attacker in court without her knowledge and without her explicit permission.

Pupiales's second argument is that her sexual assault allegations fall outside the scope of the CBA, which only governs matters relating to employment such as wages, hours, working conditions, management rights and strikes, and that the CBA does not contain terms or provisions which cover intentional torts. Pupiales references BLDG's workplace Sexual Harassment Policy which, according to her, suggests that the court is the proper venue for her to obtain relief against a person who commits intentional torts (*see* Finger aff exhibit 5, exhibit c).

Next, Pupiales makes two procedural arguments in opposition to the motion – namely,

that defendants failed to comply with the CBA's grievance procedures, and that the OCA failed to schedule a hearing within the required time. The first argument is based on Pupiales's contention, like that of Rowen, that defendants improperly initiated a grievance procedure against her in contravention of the CBA, which only provides for the Union to bring a grievance on behalf of, and not against, an individual bargaining unit employee such as herself. This disagreement abated somewhat when counsel for the Union notified counsel for defendants by letter dated September 10, 2013, that the Union has agreed to proceed to arbitration, but only with respect to the three claims previously identified in its December 20, 2011, written arbitration request to the OCA (*see* Witkin supp aff, exhibit 1, Rowen letter). It is noted that the Union did not concede the issue with respect to the balance of defendants' grievances which relate to the portions of the instant complaint which are not covered by the three claims.

Pupiales's second procedural argument is based on the OCA's failure to timely schedule a hearing pursuant to article V, ¶ 2 of the CBA, which requires that disputes or grievances between BLDG and the Union be submitted to the OCA in a timely manner, and that the OCA must then schedule a hearing within 2 to 15 days. She also references paragraph 3 of the same article, which provides, in relevant part, that "any grievance, except as otherwise provided herein . . . shall be presented to the Employer [BLDG] in writing within one hundred and twenty (120) days of its occurrence." Pupiales points out that, since her grievances based on the sexual attacks occurring in September 2009, in or about May 2010, and during the summer of 2010, were not submitted within 120 days of December 20, 2011, they cannot be arbitrated, and that only her grievance based on the September 23, 2011 sexual attack was timely submitted to BLDG within 120 days of its occurrence. However, because the OCA did not then schedule a hearing within

the required 2 to 15 day period, in that a hearing was not scheduled until February 8, 2012, the conditions precedent to arbitration have not been met, even with respect to the final sexual attack.

Lastly, Pupiales contends that public policy dictates that she be entitled to pursue her claims through the courts.

In response, defendants argue that: both public policy and New York law favors arbitration as a means of resolving disputes (citing *Board of Educ. of Bloomfield Cent. School Dist. v Christa Constr.*, 80 NY2d 1031, 1032 [1992]; CPLR 7501); any doubts about the scope of arbitrable issues should be resolved in favor of arbitration (citing *Matter of League of Am. Theatres & Producers v Cohen*, 270 AD2d 43, 43 [1st Dept 2000]); and defendants are not precluded from arbitrating the dispute merely because plaintiff has decided to seek resolution through the courts (citing CPLR 7503 [a]). Moreover, they assert that it was Pupiales, and not they, who failed to comply with the mandatory terms of the CBA's arbitration provision (citing article V), and that she should be compelled to proceed to arbitration, as all 11 of her claims are encompassed under the CBA (citing article X [23]).

In resolving a motion to compel arbitration, the court must determine whether: (1) the parties made a valid agreement to arbitrate; (2) there has been compliance with the agreement; and (3) the claim or claims would be time-barred if pursued through the courts (*Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358, 363 [1978]). Upon consideration of these requirements in the context of the pleadings, the documentary submissions and the parties' arguments, the motion to compel arbitration must be granted.

Pupiales is incorrect in arguing that she is not obligated to arbitrate the instant matter

because she never signed an arbitration agreement with either defendant. The parties did enter into a valid agreement to arbitrate. As noted above, Pupiales's employment with BLDG, like Patraju's, was subject to the terms and conditions of the CBA. Therefore, "having designated the union as [her] collective bargaining agent, [she] is bound by the terms of the agreement negotiated for and made on [her] behalf" (*Matter of Plummer v Klepak*, 48 NY2d 486, 489 [1979], *cert denied* 445 US 952 [1980]), including the mandates set forth in the CBA's arbitration clause. "[S]he may not reject certain acts of her bargaining representative and accept others" (*Schact v City of New York*, 39 NY2d 28, 32 [1976]).

Pupiales is also incorrect in her assertion that public policy favors allowing her to pursue her claims through the courts, rather than through arbitration. New York's longstanding preference for arbitration was expressed in *Matter of Long Is. Lbr. Co. [Martin]* (15 NY2d 380, 385 [1965]). The Court of Appeals stated:

> "arbitrations are the result of agreements between the parties and they draw their essence from those agreements. It is only where the parties have employed language which clearly rebuts the presumption of arbitrability, e.g., by stating that an issue either as to procedure or as to substance is *not* to be determined by arbitration, that the matter may be determined by the courts. In the absence of such unmistakably clear language . . . the matter is sent to the arbitrator for his determination on the merits."

In *Matter of Smith Barney Shearson v Sacharow* (91 NY2d 39, 49 [1997]), the Court of Appeals again acknowledged the preference for arbitration, stating that New York "favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties," and that the courts should "interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (*id.* at 49, 49-50 [internal quotation marks and citations omitted], *see also Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66

[2007]). This preference is also recognized in CPLR 7501 and 7503 [a] which provide:

> CPLR 7501: "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."
>
> CPLR 7503 (a): "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision [b] of section 7502, the court shall direct the parties to arbitrate."

Moreover, "[a]s a policy matter, arbitrators are deemed to be in a better position than courts to interpret the terms of a CBA" (*Velasquez v 40 Cent. Park S. Inc.*, 2008 NY Slip Op 32799[U] [Sup Ct, NY County 2008], citing *Wright v Universal Mar. Serv. Corp.*, 525 US 70, 78 [1998]).

While a party cannot be compelled to arbitrate a dispute unless there is a clear, explicit and unequivocal agreement to do so (*see Matter of Waldron [Goddess]*, 61 NY2d at 183-184, *see also Conde v Yeshiva Univ.*, 16 AD3d 185, 186 [1st Dept 2005]), where a CBA contains a broad arbitration clause, which does not exclude the type of claim at issue, the dispute must be resolved through arbitration. It is well settled that:

> "[a] court confronted with a contest of this kind should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. If there is none, the issue, as a matter of law, is not arbitrable. If there is, the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them."

(*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143 [1999]).

The arbitration clause, set forth in Article V of the CBA provides, in relevant part:

> "[a] grievance shall first be taken up directly between the Employer and the Union. Grievances shall be resolved, if possible, within 72 hours after they are initiated, and if not so resolved, shall be promptly submitted to the Office of the Contract Arbitrator....
>
> Any dispute or grievance between the Employer and the Union which cannot be settled directly by them shall be submitted to the Office of the Contract Arbitrator, including issues initiated by the Trustees pursuant to General Clause 40. The Office of the Contract Arbitrator shall initially schedule a hearing within two (2) to fifteen (15) days after either party has served written notice upon the Office of the Contract Arbitrator with copy to the other party of any issue to be submitted....
>
> Any grievance, except as otherwise provided herein and except a grievance involving basic wage violations including Pension, Health, Training . . . as set forth in General Clause 40, shall be presented to the Employer in writing within one hundred and twenty (120) days of its occurrence, except for grievances involving suspension without pay or discharge which shall be presented within forty-five (45) days, unless the Employer agrees to an extension. The Arbitrator shall have the authority to extend the above time limitations for good cause shown.
>
> * * *
>
> The procedure herein with respect to matters over which a Contract Arbitrator has jurisdiction shall be the sole and exclusive method for the determination of all such issues, and the Arbitrator shall have the power to award appropriate remedies, the award being final and binding upon the parties and the employee(s) or Employer(s) involved. Nothing herein shall be construed to forbid either party from resorting to court for relief from or to enforce rights under, any award."

Furthermore, included, under article X of the CBA, at subsection 23, is a prohibition against discrimination at the workplace. Article X [23] provides:

> "[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex, sexual orientation, union membership, or any characteristic protected by law. Any disputes under this provision shall be subject to the grievance and arbitration procedure (Article V)."

The CBA's broad arbitration clause, covering "[a]ny dispute or grievance between the Employer and the Union which cannot be settled directly by them" (CBA article V ¶ 2), covers

the allegations against defendants which relate to, and/or stem from, the alleged rapes and sexual harassment at the workplace by Pupiales's supervisor which, in conjunction with suspensions, threats of firing, and BLDG's failure to take appropriate steps, created a hostile work environment that unreasonably interfered with her job performance. Pupiales's allegations detailing multiple incidents of improper conduct and negligence at the workplace over a period of time, are factually intertwined with her allegations of discriminatory conduct based on her sex. Accordingly, there is a reasonable relationship between the subject matter of the parties' dispute and the general subject matter of the CBA (*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d at 143), and Pupiales has not pointed to any language in the CBA which either carves out these issues from coverage or clearly rebuts the presumption of their arbitrability (*Matter of Long Is. Libr. Co. [Martin]*, 13 NY2d at 385).

Furthermore, despite Pupiales current disinclination to arbitrate her claims, under CPLR 7503 (a), defendants, as the "part[ies] aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." Any further objections to arbitration, including those aspects of the complaint to which the Union has not consented to arbitrate, must, at this juncture, be referred to the arbitrator because "if the matter in dispute bears a 'reasonable relationship' to some general subject matter of the CBA, it will be for the arbitrator and not the courts to decide whether the disputed matter falls within the CBA" (*Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 694 [2000] [internal citation omitted]). The "arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA" (*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn]*, 93 NY2d at 143).

With respect to the Pupiales's contention that the OCA failed to schedule a hearing within the required time period, her argument is unavailing. Once Pupiales reported the allegations, on or about November 15 and 16, 2011, the Union filed a grievance and demand for arbitration on December 20, 2011, well within the 120 day period. The scheduled hearing appears to have been adjourned, by email agreement of counsel (*see* Finger reply aff, exhibit A), and plaintiff neither addresses the consensual adjournment, nor does she point to any prohibition to an adjournment, by agreement or otherwise, in the CBA.

The terms of the CBA, having been agreed to by all parties, and ultimately complied with, the last question is whether any of the claims are time-barred (*Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d at 363). As to this issue, defendants only question whether Pupiales's NYSHRL and NYCHRL discrimination claims based on allegations of rape or sexual assault occurring in September 2009, are time-barred. They explain that these claims have a three-year statute of limitations, and that because the complaint was not filed until November 16, 2012, the discrimination claims stemming from the events of September 2009, are outside the statutory period and cannot be pursued through the courts (*id.*). Plaintiff does not meaningfully dispute defendants' calculation of time, or the fact that a plaintiff ordinarily cannot recover for acts occurring outside a statute of limitations period. However, "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . [that] occurs over a series of days or perhaps years" (*National R.R. Passenger Corp. v Morgan*, 536 US 101, 115 [2002]). Inasmuch as "[a] hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice" (*id.* at 117 [internal quotation marks and citations omitted]), it is possible, with plaintiff

alleging objectionable conduct of a continuous nature – which started in or about September 2009, and continued until September 23, 2011 – that some of the conduct occurred outside the statutory filing period. Therefore, the issue of whether plaintiff's allegations based on events occurring in September 2009 are time-barred is resolved in the following manner.

Ordinarily, evidence of either defendant's improper act occurring prior to November 16, 2009, would be time-barred (CPLR 214). However, where the alleged conduct contributing to plaintiff's claims of hostile work environment can be shown to have been continuing in nature and to have continued during the statutory filing period, "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability" (*National R.R. Passenger Corp. v Morgan*, 536 US at 117). The arbitrator, likewise, may consider the entire time period for the purpose of determining liability.

Because the CBA mandates arbitration, defendants' motion is granted to the extent that the action is stayed pending the outcome of arbitration, pursuant to CPLR 7503 (a), and is otherwise, denied. In view of this decision, plaintiff's motion to compel Patraju to submit to DNA testing is denied as moot, as is defendants' cross motion for a protective order.

Accordingly, it is

ORDERED that the motion of defendants BLDG Management Co., Inc. and Rashi Patraju for an order compelling arbitration and to stay this action is granted; and it is further

ORDERED that the action is stayed pending the outcome of the arbitration proceedings; and it is further

ORDERED that plaintiff Doris Pupiales shall arbitrate her claims against defendants BLDG Management Co., Inc. and Rashi Patraju in accordance with the Collective Bargaining

Agreement; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that that aspect of defendants' motion that seeks, in the alternative, an order dismissing the claims for failure to state a cause of action is denied as moot; and it is further

ORDERED that the motion for plaintiff Doris Pupiales for an order compelling defendant Rashi Patraju to submit to DNA testing is denied as moot; and it is further

ORDERED that the cross motion for a protective order is denied as moot; and it is further

ORDERED that all other relief not expressly granted, is denied.

Dated: JAN 22 14

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE