SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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AMANDA DIAZ, ASHLEY FERMIN, JOANNA MACELLARO

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION, THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 154597/2019

MOTION DATE *11/25/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

This action arises out of plaintiffs Amanda Diaz (Diaz), Ashley Fermin (Fermin) and Joanna Macellaro's claims that they were subject to a hostile work environment based on their gender in violation of the New York City Human Rights Law (NYCHRL), while working for defendants New York City Department of Education (DOE), New York City Board of Education and the City of New York (collectively, defendants). Defendants move, pursuant to CPLR §3211 (a) (7), for an order dismissing all claims against the City of New York on the grounds that it is not a proper party to this action. Defendants further move, pursuant to CPLR §3211 (a) (5), for an order dismissing Fermin and Macellaro's claims for failure to timely file a notice of claim in compliance with Education Law § 3813 and General Municipal Law (GML) § 50-e. In the alternative, defendants move, pursuant to CPLR 3211 (a) (5), for an order dismissing Fermin and Macellaro's claims for failing to timely file a summons and complaint.

Plaintiffs oppose defendants' motion. However, they informally request leave to amend the complaint.

For the reasons set forth below, defendants' motion to dismiss is granted in its entirety[1].

BACKGROUND AND FACTUAL ALLEGATIONS

All three plaintiffs are currently employed by the DOE and are assigned to P186X Walter J. Damrosch School (P186X), a school designated for children with special needs. Diaz and Fermin are paraprofessionals, while Macellaro is a teacher. According to plaintiffs, Teddy Dukes (Dukes), another employee at P186X, subjected them to an intolerable workplace based on sexual harassment. Although plaintiffs complained about Dukes' conduct, the DOE did not take any corrective actions.[2]

Fermin alleges that in December 2016, Dukes "physically assaulted Fermin by tightly holding to [sic] Fermin and kissing Fermin on the lips against Fermin's will." *Id.*, ¶ 19. The complaint sets forth that, after Fermin filed a notice of claim, Dukes verbally harassed her. The complaint continues that, on March 8, 2019, Dukes followed her "from the main office telling her that he doesn't care if Fermin ignores him, he will keep bothering her." *Id.*, ¶ 21. Although Fermin reported this conduct to Kaplan and to Sarah Templeman (Templeman), an assistant principal, no corrective actions were taken. Fermin also filed a complaint with the OEO office "alleging Dukes had been verbally harassing her following the filing of her notice of claim." *Id.*, ¶ 20.

According to Macellaro, in December 2015, Dukes "physically assaulted [her] while in her classroom." *Id.*, ¶ 26. Dukes blocked Macellaro from leaving, asked her questions about her sexuality, attempted to kiss her on the face and kissed her on the neck. Macellaro reported this

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[1] The Court thanks Beth Pocius, Esq., for her assistance in this matter.
[2] Defendants are not moving to dismiss Diaz's claims at this time, accordingly neither her notice of claim nor complaint allegations will be addressed.

conduct to Kaplan and to Dyna Smith (Smith), an assistant principal. Although the DOE responded by prohibiting Dukes from going on the same floor as Macellaro, "Dukes did not obey the order, nor did Defendants enforce it." *Id.*, ¶ 31. Dukes allegedly continued to hover close to Macellaro to try and intimidate her, stared at her, insulted her and spoke to her in a demeaning manner in front of the students. Although Macellaro reported this behavior to Smith, no action was taken.

The record indicates that plaintiffs served defendants, Dukes and Kaplan with notices of claim on December 6, 2018. Fermin's notice of claim states that, in 2016, Dukes forced himself on Fermin and inappropriately grabbed and kissed her, and that the hostile work environment continues to this day. Although the DOE was made aware of Dukes' previous misconduct, it failed to take appropriate actions. "Thereafter, Claimant was subjected to and continues to be subjected to a hostile work environment . . . ." NYSCEF Doc. No. 13, Fermin notice of claim at 2.[3] Macellaro's notice of claim states that, in 2015 Dukes subjected her to a hostile work environment by touching and speaking to her inappropriately and that the hostile work environment continues to this day. After Macellaro reported this behavior, the DOE failed to remedy the situation. Dukes continues to engage in a campaign of harassment against Macellaro.

Plaintiffs filed a complaint on May 3, 2019, alleging one cause of action for sexual harassment and hostile workplace. According to plaintiffs, they were subjected to a hostile work environment due to the pervasive misconduct of a DOE employee. Although they reported the

[3] Fermin submitted a supplemental notice of claim on January 10, 2019 alleging that, after submitting the initial notice of claim, the DOE retaliated against her by transferring her to a floor where she would be required to interact with Dukes, "with no legitimate reasons for her transfer." NYSCEF Doc. No. 13, Fermin supplemental notice of claim at 2. Plaintiffs do not address this supplemental notice of claim, nor does the complaint allege a cause of action for retaliation in violation of the NYCHRL.

behavior to their employer, the DOE, it did not take any corrective action against Dukes. Further, plaintiffs allege that by not taking any corrective measures against Dukes, the DOE condoned Dukes' behavior and are liable for his actions. Plaintiffs claim that, "[a]s a direct and proximate result of the maltreatment and hostile work environment, Plaintiffs have suffered and continue to suffer harm for which they are entitled to an award of compensatory damages . . . ." Complaint, ¶ 41.

Among other things, plaintiffs are seeking a declaratory judgment stating that the DOE's practices failed to protect plaintiffs from sexual harassment. Plaintiffs are seeking damages, including punitive damages, to compensate them for their emotional distress.

The Instant Action

Defendants argue that, pursuant to CPLR 3211 (a) (7), the complaint should be dismissed in its entirety as against the City of New York. Defendants explain that the City of New York is a distinct legal entity from the DOE and is not a proper party to the action.

Plaintiffs do not oppose this part of defendants' dismissal motion.

Next, defendants argue that Fermin and Macellaro's claims must be dismissed for failing to comply with the notice of claim requirements. As set forth in Education Law § 3813 (1), to commence an action against the DOE alleging violations of the NYCHRL, a notice of claim must be served on the DOE within three months of the accrual of such claim. Fermin and Macellaro allege that, in December 2016 and December 2015 respectively, they were subject to a hostile work environment. However, as the notices of claim were not served until December 2018, more than three months from the accrual of these claims, the notices are untimely.

Although a plaintiff may make an application to serve a late notice of claim, the extension may not exceed the time limit for the commencement of the action against the DOE.

Here, as claims made against the DOE alleging violations of the NYCHRL have a one-year statute of limitations, plaintiffs would only be able to seek leave to serve a late notice of claim within one year of the date of the alleged unlawful conduct. Plaintiffs testified that, even if any allegedly actionable conduct occurred after 2016, it ceased by 2017. As a result, defendants argue that Fermin and Macellaro may not seek leave to serve a late notice of claim as the statute of limitations has expired.

Defendants further argue that, as Fermin and Macellaro's claims stem from conduct that occurred more than one year before filing the complaint on May 3, 2019, these claims are barred by the applicable one-year statute of limitations.

In opposition, plaintiffs do not address either the timeliness of the December 2018 notice of claim or the possibility of serving a late notice of claim. Instead, they argue that the requirement to file a timely notice of claim should be waived where, as here, the public interest exception applies. According to plaintiffs, this litigation addresses the DOE's failure to protect its employees from recurring and longstanding sexual harassment that occurred on school grounds. "Not only would the litigation of this matter affect most, if not all, of DOE employees, the prosecution of this matter serves a significant public interest." See plaintiffs' memorandum of law, ¶ 19. Plaintiffs claim that the majority of the claims relate to the DOE's policies and practices and that this action seeks "to remedy the catastrophic failures of DOE's policies and practices that placed the Plaintiffs in harm's way." *Id.*, ¶ 25.

Plaintiffs reference pages from the GML § 50-h hearing transcripts to substantiate their notices of claim. With respect to Fermin, plaintiffs claim that Dukes' harassing behavior continued up to the GML § 50-h hearing. Specifically, on March 8, 2019, when Fermin and Dukes arrived at the main office at the same time and signed in, Fermin testified that Dukes

"followed behind me and I put on my headphones to ignore him but I heard him tell me that he doesn't care if I ignore him, he's going to continue bothering me." NYSCEF Doc. No. 29, Fermin tr at 33.

Plaintiffs point to Macellaro's transcript where she testified that, after the initial incident in 2015, Dukes continues to bother her by standing near her. In the spring of 2017, Dukes was "very loudly talking about me, about how I don't know how to talk to people and how I'm a bad example to the children." NYSCEF Doc. No. 28, second Macellaro tr at 25.

Comparing their circumstances to *Bray v New York City Dept. of Educ.* (2018 NY Slip Op 50643 (U) [Sup Ct, NY County 2018]), plaintiffs argue that the continuation violation doctrine should apply to toll the one year statute of limitations because the episodes constituting the hostile work environment continued up until the filing of the notice of claim and within one year of the filing of the complaint. They state the following:

> "After Macellaro and Fermin each rejected the advances of the colleague and reported such conduct, they were subject to episodes, patterns, and scheme of harassments and hostility that rise to the level of a sexual harassment and/or hostile work environment, with the most recent episode having occurred within the statutory period for the filing of the notice of claim and the filing of the instant lawsuit with the most recent incident Fermin in May 2019 and Macellaro's remains ongoing and continuing."

Plaintiffs' memorandum of law, ¶ 39.

Plaintiffs informally request that, "[s]hould the Court find any merit in [defendants'] motion as to claims made by [Fermin] and [Macellaro], Plaintiffs request leave to amend the complaint to conform to the Court's finding." NYSCEF Doc. No. 24, Spasojevich affirmation in opposition, ¶ 3.

DISCUSSION

City of New York

The City of New York is a distinct legal entity from the DOE and is not a proper party to the action. *See e.g. Seifullah v City of New York*, 161 AD3d 1206, 1207 (2d Dept 2018) ("[S]ince this action relates to the plaintiff's employment with the Department of Education, the plaintiff failed to state a cause of action against the City, which is a legal entity distinct from the Department of Education"). Accordingly, the branch of defendants' motion to dismiss the complaint as against the City of New York, is granted without opposition.

Notice of Claim

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is time-barred, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Cimino v Dembeck*, 61 AD3d 802, 803 [2d Dept 2009] (citations omitted). In relevant part, defendants move for dismissal pursuant to CPLR 3211 (a) (5) on the grounds that Fermin and Macellaro failed to timely comply with the notice of claim requirements in Education Law § 3813 (1).

In general, pursuant to Education Law § 3813 (1), prior to maintaining an action against the DOE, a plaintiff must file a notice of claim within three months of the accrual of the claim. *See e.g. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547 [1983] ("Satisfaction of these [notice of claim] requirements is a condition precedent to bringing an action against a school district or a board of education . . ."); *see also Munro v Ossining Union Free School Dist.*, 55 AD3d 697, 698 [2d Dept 2008] (claimant seeking to commence an action against a school district for violations of the Human Rights Law must file a notice of claim within three months of the claim's accrual).

There are exceptions to the notice of claim requirement when the relief sought is equitable in nature or when the litigant "commences a proceeding to vindicate a public interest."

Matter of Fotopoulos v Board of Fire Commrs. of the Hicksville Fire Dist., 161 AD3d 733, 734 [2d Dept 2018]. Here, plaintiffs argue that the notice of claim requirement should be waived as they initiated litigation to vindicate a public interest. According to plaintiffs, the DOE's policies and practices failed to protect them from sexual harassment occurring during the course of their employment. Plaintiffs believe that the outcome of the litigation would affect most other DOE employees and that it serves a significant public interest.

However, courts have found that employment discrimination actions alleged against the DOE, like the one asserted by plaintiffs, seek to enforce private rights and require compliance with the notice of claim requirement. For example, in *Mills v County of Monroe* (59 NY2d 307 [1983]), the Court of Appeals considered, and rejected, the plaintiff's argument that her employment discrimination claim alleged against a New York county was brought to vindicate a public interest and was exempt from the notice of claim requirements. The Court held the following, in relevant part:

> "it is clear that plaintiff's action was not brought to vindicate a public interest, insofar as that principle would entitle her to a complete waiver of the notice requirement. Her allegations of actionable conduct on the part of the county refers only to conduct that relates to her. Although plaintiff does aver that the county had engaged generally in unlawful discriminatory practices, her action seeks relief only for *her* termination, which she alleges resulted from her opposition to the county's discriminatory practices and her race and national origin. The relief she seeks is money damages for *her* loss of wages and damage to her reputation. Inasmuch as the disposition of plaintiff's claim was not intended to nor could it directly affect or vindicate the rights of others, her action is properly characterized as one seeking the enforcement of private rights."

Id. at 312.

Plaintiffs herein are requesting a declaratory judgment stating that the DOE's practices failed to protect plaintiffs from a hostile work environment. However, the allegations in the complaint only relate to the hostile work environment experienced by these specific plaintiffs and the DOE's alleged response to their individual claims. The Court finds that plaintiffs'

attempt to incorporate their own claims with a "widespread failure to take any real and meaningful remedial action" is unsupported. Plaintiffs' memorandum of law, ¶ 26. Moreover, plaintiffs are also requesting compensatory and other damages in the amount of two million dollars. Accordingly, similar to *Mills v County of Monroe*, *supra,* and other cases, plaintiffs' action seeks private relief and still requires the timely service of a notice of claim on the DOE prior to commencement. *See e.g. Savvis v New York City Dept. of Educ.*, 142 AD3d 545, 546 [2d Dept 2016] (Court dismissed plaintiff's employment discrimination complaint for failing to serve a timely notice of claim on the DOE and held that she "was not relieved of the notice of claim requirement on the basis that her action was brought to vindicate a public interest").

As noted, pursuant to Education Law § 3813 (1), a notice of claim must be served on the DOE within three months of the accrual of a claim. "Plaintiff was required to allege in her complaint compliance with the notice of claim condition precedents to suit." *Reaves v City of New York*, 177 AD2d 437, 437 [1st Dept 1991]. The complaint in this action did not indicate that plaintiffs complied with the notice of claim requirement.

Setting aside this procedural deficiency, the notices of claim dated December 6, 2018 indicate that, in 2015 or 2016, Dukes sexually harassed Fermin and Macellaro and subjected them to a hostile work environment. When Fermin and Macellaro notified the DOE, the DOE did not adequately respond. Although they allege that the hostile work environment continues to this day, the notices of claim do not provide any specific dates and incidents except for the initial occurrences.

As previously mentioned, Fermin referenced her GML § 50-h hearing testimony to substantiate her notice of notice of claim. However, Fermin testified that she was not subjected to a hostile work environment in the three months preceding December 6, 2018. She testified

that she did not have any interaction with Dukes between the fall of 2017 and the spring of 2018. Specifically, Fermin testified that the 2017 to 2018 school year was "uneventful." NYSCEF Doc. No. 16, second Fermin tr at 16. Fermin did not see Dukes again until January 2019 and reported an incident that occurred on March 8, 2019, when he followed her out of the main office. The complaint also describes the March 8, 2019 incident. Similarly, Macellaro testified that, in 2017, Dukes spoke disparagingly about her in front of students. Without providing any specific dates, she claims that, after the initial incident in 2015, Dukes continued to bother her by hovering close to her.

"A complaint which fails to allege compliance with Education Law 3813 is fatally defective . . . ." *Stoetzel v Wappingers Cent. School Dist.*, 166 AD2d 643, 643 [2d Dept 1990]; *see also Cassidy v Riverhead Cent. Sch. Dist.*, 128 AD3d 996, 997 [2d Dept 2015] ("Thus, the plaintiff's notice of claim was a nullity, since it was served late, without leave of the Supreme Court"). By serving notices of claim on December 6, 2018, Fermin and Macellaro have failed to timely notify the DOE within three months of any incidents that occurred 2015, 2016 or 2017. As a result, the notices of claim were untimely and are a nullity.

Pursuant to Education Law § 3813 (2-a), upon application, courts have discretion to extend the time to serve a notice of claim. However, "[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against any district or any such school." Education Law § 3813 (2-a). There is a one-year statute of limitations for a claim brought against the DOE alleging a hostile work environment in violation of the NYCHRL. *See e.g. Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 369 [2007] ("the clear and unambiguous language of Education Law § 3813 (2-b) provides that the statute of

limitations on such a claim [alleging illegal workplace discrimination brought under Executive Law § 296 against a school district] is one year").

As plaintiffs failed to request leave to serve a late notice of claim for any claims that occurred in 2017, it is now too late to do so. *Clarke-St. John v City of New York*, 164 AD3d 743, 744 [2d Dept 2018] (Court dismissed claims asserted against the DOE for failure to serve a timely notice of claim, holding that "the notice of claim was not served until . . . more than 90 days after the accrual date, and the plaintiffs failed to seek leave to serve a late notice of claim or to deem the notice of claim served nunc pro tunc within [the statute of limitations for] the date that the claims accrued").

Plaintiffs refer to incidents that occurred after the initial notice of claim dated December 6, 2018, but before the filing of the complaint on May 3, 2019, as a way demonstrate that the hostile work environment was ongoing. However, although some of the incidents may be timely under the one-year statute of limitations, plaintiffs are still required to serve a notice of claim on the DOE within three months after the accrual of each claim. Courts have found that incidents occurring after an initial notice of claim still require their own timely notice of claim. *See e.g. Agostinello v Great Neck Union Free Sch. Dist.*, 102 AD3d 638, 639 [2d Dept 2013] (Court dismissed the cause of action based on acts occurring after the notice of claim dated February 4, 2003 and held, "[s]ince the plaintiff had served a notice of claim dated February 4, 2003, that notice of claim did not satisfy the statutory requirement of placing the school district on notice of those allegedly discriminatory acts which took place subsequent to the date of the notice").

Plaintiffs have not moved pursuant to Education Law § 3813 (2-a) to file a late notice of claim for any claims occurring after the December 6, 2018 notice of claim. Accordingly, claims

that post-date the December 6, 2018 notice of claim are dismissed for failure to satisfy a condition precedent to suit.

Accordingly, in light of the above, defendants' motion pursuant to CPLR 3211 (a) (5), for an order dismissing Fermin and Macellaro's claims for failure to timely file a notice of claim in compliance with Education Law § 3813, is granted.

Statute of Limitations

Plaintiffs' arguments are unclear. At first, plaintiffs effectively concede that their notice of claim was untimely but request that the court forego the notice of claim requirement due to the public interest exception. However, they subsequently argue that the continuing violation doctrine should apply to toll both the one year statute of limitations on their claims and the notice of claim requirements because they were subject to continued harassment by Dukes up to the filing of the notice of claim and within one year of the filing of the complaint.

Plaintiffs argue that the "claims in Bray are strikingly similar to those of Macellaro and Fermin." Plaintiffs' memorandum of Law, ¶ 37. The plaintiff in *Bray v New York City Dept. of Educ.*, *supra*, alleged, among other things, that while working for the DOE, she was subjected to a hostile work environment in violation of the NYCHRL. The plaintiff filed a notice of claim on October 13, 2009 for an incident that occurred on July 15, 2009. Except for this July 15, 2009 incident, as many of plaintiff's allegations of harassment occurred in 2008, the DOE had argued that plaintiff's claim for hostile work environment should be barred because she did not file a timely notice of claim. The DOE had also argued that the allegations prior to July 15, 2009 did not meet the threshold for a continuing violation.

The court noted that "a claim for hostile work environment will not be time-barred if all of the acts complained of are part of the same unlawful practice, and at least one discriminatory

act falls within the statute of limitations." *Bray v New York City Dept. of Educ.* (2018 NY Slip Op 50643 [U] at *5) (citation omitted). It found that the hostile work environment claims were not barred because the timely incident, coupled with the other incidents occurring prior to this three-month period, collectively constituted an unlawful employment practice.

Contrary to plaintiffs' contention, *Bray v New York City Dept. of Educ.* is not analogous. As previously mentioned, there are no documented incidents within the three months prior to the notices of claim dated December 6, 2018. Thus, while the plaintiff in *Bray* timely filed a notice of claim for an incident that occurred within three months of its accrual, Fermin and Macellaro did not. Furthermore, the continuing violation doctrine applied to claims made prior to the one cited in her timely notice of claim. Here, it appears that plaintiffs are attempting to apply the doctrine to connect recent incidents to ones occurring in 2016 and 2017. Again, even if there were incidents that occurred after December 3, 2018, there was no notice of claim filed for these incidents. While these incidents may be timely, as plaintiffs did not fulfill the statutory requirement of filing a notice of claim for these incidents, the court will not consider whether they meet the threshold to establish a continuing violation for statute of limitations purposes.

Leave to Amend

Although the nature of the requested relief is unclear, plaintiffs informally request that, if the court finds merit in defendants' motion, they should be allowed to amend the complaint to conform with the findings of the court. However, this request is denied. Plaintiffs did not move or cross-move for this relief, nor did they attach a proposed amended complaint pursuant to CPLR 3025 (b). Moreover, plaintiffs have not moved pursuant to Education Law § 3813 (2-a) to file a late notice of claim for any claims occurring after the December 6, 2018 notice of claim.

A complaint may not be "deemed an application for late notice of claim." *Kellogg v Office of Chief Med. Examiner of City of NY*, 24 AD3d 376, 379 [1st Dept 2005].

CONCLUSION

Accordingly, it is

ORDERED that defendants the New York City Department of Education, New York City Board of Education and the City of New York's motion to dismiss Ashley Fermin and Joanna Macellaro's claims is granted; and it is further

ORDERED that defendants the New York City Department of Education, New York City Board of Education and the City of New York's motion to dismiss the complaint as against the City of New York is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-

Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining claims shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

2/6/2020
DATE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE