

<b>Laguerre v City of New York</b>
2021 NY Slip Op 31810(U)
May 27, 2021
Supreme Court, New York County
Docket Number: 153958/2020
Judge: Lyle E. Frank
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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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MENDEL LAGUERRE,

Plaintiff,

- v -

THE CITY OF NEW YORK, KIMBERLY DARGA, LISA TALMA, JOY-ANN MARSHALL, NELSY SANTANA, CHRISTINE O'CONNELL, HUIYUAN NELSON CHAN, JOHN AND JANE DOE

Defendant.

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INDEX NO. 153958/2020
MOTION DATE 05/12/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL.

This action arises out of allegations that defendants, The City of New York, Kimberly Darga, Lisa Talma, Joy-Ann Marshall, Nelsy Santana, Christine O'Connell, Huiyuan Nelson Chan, ( collectively 'defendants'), discriminated and retaliated against plaintiff on the basis of his race, age and national origin. Defendants move for partial dismissal of the amended complaint focusing for the most part on the alleged racial discrimination. Plaintiff opposes the instant motion. For the reasons set forth below, defendants' motion is granted in part.

There are portions of this motion that are undisputed. Preliminarily, defendants Joy-Ann Marshall and Nelsy Santana are dismissed from this action without opposition. Second, any allegations that were the subject matter of plaintiff's complaint to the State Division of Human Rights (SDHR) are not being alleged in this action, rather are included as background.

Background and Factual Allegations

Plaintiff, is a black male born in Haiti and now 60 years of age, has been an employee with the New York City Department of Housing Preservation and Development (HPD) since 1986. Plaintiff is currently a project manager and has maintained that title since 1998.

On April 27, 2018, plaintiff filed a complaint with the SDHR alleging discrimination. On October 31, 2018, the SDHR issued a determination and order finding that there was no probable cause. After the SDHR complaint was filed, plaintiff alleges to have been passed over for promotion 4 times. The promotional positions and dates are as follows: Senior Project Manager in August 2018, Senior Project Manager in December 2018, PDF Deputy Director during the “Summer of 2018”, and Deputy Director of In Rem in September 2019; these allegations were not part of the SDHR complaint.

Plaintiff claims that three of these promotional opportunities were not posted, and the only position that was posted plaintiff did not receive an interview. Of the 4 individuals who received the promotions, instead of plaintiff, two were not Black, while it would appear that all 4 were younger than plaintiff and all were of different national origins than plaintiff. In addition, plaintiff claims that defendant Chan revoked his 30-minute lunch in November 2018, following the disposition of the SDHR complaint.

### **Legal Standard**

On a motion to dismiss pursuant to CPLR 3211 (a) (7), “the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference,” and the court must determine simply “whether the facts as alleged fit within any cognizable legal theory.” *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]. It is well settled that a plaintiff may submit an affidavit in opposition to a 3211 motion “to remedy defects in the complaint, and the allegations contained therein, like the allegations contained in the

complaint, are deemed to be true for purposes of the motion.” *Anderson v Pinn*, 185 AD3d 534, 535 [2d Dept 2020]. However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 [2d Dept 2013] (internal quotation marks and citation omitted).

Pursuant to the NYCHRL, it is an unlawful discriminatory practice for an employer or an employee or agent thereof, to discriminate against an individual in the terms, conditions or privileges of employment because of the individual’s actual or perceived age, race, color or national origin. See Administrative Code of the City of NY (Administrative Code) § 8-107 (1) (a).

To establish a prima facie discrimination claim under the NYCHRL, a plaintiff must allege, “(1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) . . . [that] he/she was treated differently or worse than other employees . . . , and (4) that the . . . different treatment occurred under circumstances giving rise to an inference of discrimination.” *Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]. With respect to age discrimination, if plaintiff “does not produce direct or statistical evidence that would logically support an inference of discrimination, [he] must show [his] position was subsequently filled by a younger person or held open for a younger person.” *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; see also *Littlejohn v City of New York*, 795 F3d 297, 312-313 (2d Cir 2015) (“an inference of discrimination also arises when an employer replaces a terminated or demoted employee with an individual outside the employee’s protected class”).

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Administrative Code § 8-107 (7). Under the broader

interpretation of the NYCHRL, “[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity.” Administrative Code § 8-107 (7). For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: “(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action.” *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]. Protected activity under the NYCHRL refers to “opposing or complaining about unlawful discrimination.” *Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010] (internal quotation marks and citations omitted). When pleading a causal connection by temporal proximity alone, a plaintiff will survive a motion to dismiss only where a short window of time exists between the alleged protected activity and the alleged adverse act. *See Brown v City of N.Y.*, 185 AD3d 410, 410-11 [1st Dept 2020].

In addition, on a motion to dismiss, employment discrimination cases are “generally reviewed under notice pleading standards . . . [I]t has been held that a plaintiff alleging employment discrimination ‘need not plead [specific facts establishing] a prima facie case of discrimination’ but need only give ‘fair notice’ of the nature of the claim and its grounds.” *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009] (internal citation omitted).

### **Discussion**

This Court finds that in the light most favorable to the plaintiff, the defendant’s motion must be denied in its entirety, except for the undisputed part discussed above. While defendants contend, relying on *Brown*, that there may not be temporal proximity because plaintiff filed the complaint in April 2018 and alleges discrimination and retaliation beginning in August of 2018,

the facts in *Brown* were distinguishable from the instant action (*Brown* 185 AD3d 410). In *Brown*, the plaintiff's complaints were resolved two months before the alleged retaliatory conduct. *Id.* Here plaintiff's SDHR complaint was not resolved until October of 2018, thus arguably the protected activity was ongoing as the SDHR complaint was not yet resolved.

As to the issue of race discrimination, if it is true that on two of the occasions the plaintiff was passed over for promotion for someone who was not of the same race and less qualified, then the plaintiff also could have a viable claim for race discrimination. Judging this case by the liberal notice pleading standards that this Court must, the Court finds that the claim for race discrimination is sufficiently pled. As there are allegedly 2 instances where less qualified people of a different race received a promotion over plaintiff. Accordingly, it is hereby

ORDERED that all claims as against defendants, Joy-Ann Marshall and Nelsy Santana, are dismissed; 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

ADJUDGED that the remainder of defendant's motion is denied.

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LYLE E. FRANK, J.S.C.

5/27/2021  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: