Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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LIDIA M. ORREGO,

Plaintiff(s),

- against -

KEVIN KNIPFING a/k/a KEVIN JAMES, REBECCA UZCATEGUI a/k/a REBECCA LUGO, and CHRISTINA SELGA a/k/a CRISTINA COIMBRA,

Defendant(s).

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Index No.: 706324/21

Motion Date: 7/13/21

Motion Cal. No.: 23, 24

Motion Seq. No.: 01, 02

The following papers numbered 1 - 20 read on these motions by defendants, pursuant to CPLR 3211 (a) (4) and (a) (7), to dismiss the complaint, and by plaintiff, pursuant to CPLR 3215 for a default judgment against defendants.

	PAPERS NUMBERED
Motion Seq. #01	
Notice of Motion-Affirmation-Exhibits-Service	1 - 4
Memorandum of Law in Support	5
Affirmation in Opposition-Exhibits-Service	6 - 8
Memorandum of Law in Opposition	9
Reply Affirmation-Service	10 - 11
Motion Seq. #02	
Notice of Motion-Affirmation-Exhibits-Service	12 - 15
Affirmation in Opposition-Service	16 - 17
Reply Affirmation-Exhibits-Service	18 - 20

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

It is undisputed that the *pro se* plaintiff worked as a nanny in the home of defendant Kevin Knipfing, a/k/a/ Kevin James, from on or about January 31, 2018 to November 27, 2018. According to plaintiff, almost immediately after being hired, she and defendant Rebecca Uzcategui, a/k/a Rebecca Lugo, another nanny employed in Knipfing's home, were continuously subjected to racially-charged statements and other harassing and abusive behavior from their supervisor, non-party Teresa A. Zantua, who is also Knipfing's

sister-in-law.[1] Plaintiff further alleges that Uzcategui abused and/or mistreated the children, that plaintiff complained about the alleged child abuse and workplace discrimination, and that she had been cooperating in an investigation conducted by Knipfing, during the course of which, plaintiff made recordings of certain conversations with the various persons involved in these events. According to plaintiff, Knipfing fraudulently induced her to turn over her evidence supporting her allegations and to actively participate in his investigation of same by promising that nothing bad would happen to her. Her employment was terminated 25 days after she submitted her written complaint.

Prior to commencing the instant action, plaintiff commenced an employment discrimination action in the United States District Court for the Eastern District of New York ("EDNY") against defendant Knipfing, as well as non-parties Zantua, Stephanieanna James-Knipfing, a/k/a Steffiana de la Cruz, Old Westbury EDDIE, LLC, Old Westbury, LLC, and Steve Savitsky. Plaintiff acknowledges in the paragraph "54" of the instant complaint that "this [federal] lawsuit includes all the facts that are named in this [the instant, State] lawsuit." Plaintiff alleges that during the course of the proceedings before the EDNY, including recent motion practice in that court, she learned that the instant defendants made certain statements about her, which she finds to be harmful to her personal and professional reputations, and which have caused her to suffer emotional distress. Hence, in her prayer for relief, plaintiff requests that the defendants be made to retract the allegedly injurious statements.

Defendants, now move to dismiss the instant complaint, and plaintiff separately moves for a default judgment on the ground that defendants have failed to timely answer the summons and complaint. Initially, the court denies plaintiff's motion, since defendants' pre-answer motion to dismiss was made within the time to serve the responsive pleading, which automatically extends their time to answer until 10 days after service of notice of entry of the order deciding the motion (*see* CPLR 3211 [e] and [f]).

The first ground upon which defendants seek dismissal is that there is another, similar action pending between the parties, having appended a copy of plaintiff's amended complaint filed in the EDNY. The Second Department instructs as follows:

> "Pursuant to CPLR 3211 (a) (4), a court has broad discretion as to the disposition of an action when another action is pending, and may dismiss one of the actions where there is a substantial identity of the parties and causes of action. To warrant dismissal, the two actions must be sufficiently similar and the relief

[1]Plaintiff asserts that she and defendant Uzcategui are, both, Hispanic.

> sought must be the same or substantially the same. It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding. Rather, it is necessary that both suits arise out of the same subject matter or series of alleged wrongs"

(*Simonetti v Larson*, 44 AD3d 1028, 1028-1029 [2d Dept 2007] [internal quotation marks and citations omitted]). Here, although Mr. Knipfing is the only party named as a defendant in the instant action and the federal action, there is still a substantial identity of parties, since both actions have the same plaintiff, and arise from the same series of events and transactions, namely, plaintiff's employment as a nanny in Mr. Knipfing's home. However, it cannot be said that there is a substantial identity of causes of action, as the federal lawsuit sounds in employment discrimination, whereas, as discussed below, the instant matter appears to assert causes of action for defamation and negligent infliction of emotional distress. The court, thus, declines to dismiss this action pursuant to CPLR 3211 (a) (4).

Defendants also move to dismiss on the ground that the instant complaint fails to state a cause of action (*see* CPLR 3211 [a][7]). "On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint, the allegations in the complaint are accepted as true and accorded the benefit of every possible favorable inference to determine if the facts, as alleged, fit within any cognizable legal theory" (*Datena v JP Morgan Chase Bank*, 73 AD3d 683, 684 [2d Dept 2010], *lv denied* 17 NY3d 704 [2011]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [instructing that the challenged pleading "is to be afforded a liberal construction"]). In addition,

> "[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, dismissal should not eventuate"

(*Doe v Ascend Charter Schs.*, 181 AD3d 648, 650 [2d Dept 2020]). Defendants first contend that the *pro se* complaint is rambling and unintelligible, and, thus, that it necessarily fails to state a cause of action to which they can reasonably be expected to respond. The court disagrees, and finds that despite the inartful drafting by a *pro se* litigant who does not appear to have the firmest grasp of English, the complaint sets forth sufficient factual allegations from which causes of action for defamation and negligent infliction of emotional distress may be gleaned.

Nonetheless, defendants argue that the complaint must be dismissed because the statements of which plaintiff complains are not actionable, as a matter of law. It is well-settled that

> "[s]tatements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding"

(*Bisogno v Borsa*, 101 AD3d 780, 781 [2d Dept 2012], *quoting Kilkenny v Law Off. of Cushner & Garvey, LLP*, 76 AD3d 512, 513 [2d Dept 2010]). In the complaint, plaintiff alleges that the instant defendants made the disparaging statements about her during the course of their involvement in the proceedings for her federal employment discrimination action. In particular, she focuses on statements she learned of for the first time when she read the papers submitted on the federal defendants' motion to dismiss that complaint, which is currently *sub judice* in the EDNY. Since these statements were made in the course of the federal action, they are absolutely privileged, and, thus, cannot serve as the basis for plaintiff's causes of action against the instant defendants for defamation or negligent infliction of emotional distress. The court, therefore, finds that, even assuming the truth of all of the factual allegations set forth in the complaint, plaintiff does not have a viable cause of action (*see Doe*, 181 AD3d at 650), and the complaint must be dismissed.

Accordingly, the above-referenced motions are decided to the extent that defendants' motion to dismiss the complaint (motion sequence no. 1) is **GRANTED**, and plaintiff's motion for a default judgment (motion sequence no. 2) is **DENIED**.

The foregoing shall constitute the decision and order of this court.

Dated: July 29, 2021

JANICE A. TAYLOR, J.S.C.

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