SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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ALEXIS MARQUEZ,

Plaintiff,

- v -

JANET DIFIORE, LAWRENCE MARKS, GEORGE SILVER, DOUGLAS HOFFMAN, SALIANN SCARPULLA, LORI SATTLER, JOHN MCCONNELL, LAUREN DESOLE, KAY-ANN PORTER, LISA EVANS, DENIS REO, LUCIAN CHALFEN, EUGENE FAHEY, PAUL FEINMAN, MICHAEL GARCIA, JENNY RIVERA, LESLIE STEIN, ROWAN WILSON, JANET DIFIORE, THE NEW YORK STATE UNIFIED COURT SYSTEM, THE STATE OF NEW YORK,

Defendant.

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INDEX NO. 159136/2020

MOTION DATE 01/12/2022

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 172, 173, 174, 175, 176, 177, 178, 181, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Plaintiff seeks, inter alia, to vacate the Court's decision and order dismissing this matter. Defendants oppose.

CPLR § 5015 governs applications for relief from prior order, including vacatur, upon: excusable default, newly-discovered evidence, fraud/misconduct, lack of jurisdiction, or modification/reversal of a prior order upon which it is based. The Court may also vacate its own orders for sufficient reason in the interest of justice (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [2003]).

Plaintiff's instant motion attempts to repeat those arguments previously raised in this matter and rejected by the Court, including difficulties arising from simultaneous state and federal litigation. Plaintiff again contends there is impropriety in a Justice of this Court hearing this matter against other Justices of this Court. Such claim is perplexing given that plaintiff brought suit in the same forum she now complains is improper. In any event, this claim of impropriety is baseless, entirely without merit, and has been previously rejected by this Court (*see e.g.* Decision and Order, Mot. Seq. 003, NYSCEF Doc. No. 108). The Court notes that plaintiff's claims of impropriety were raised only after denial of her motion – further supporting that such claims are pretextual (*Ctr. For Judicial Accountability, Inc., v. Cuomo*, 167 AD3d 1406 [3d Dept 2018]). As the Court has repeatedly found, plaintiff's status as a pro-se litigant does not permit her to deprive defendants of their right to speedy resolution of this matter (*see e.g.* Decision and Order in mot. seq. 004, citing *Stewart v. ARC Dev., LLC*, 138 AD3d 413 [1st Dept 2016] and *Brooks v. Inn at Saratoga Ass'n*, 188 AD2d 921 [3d Dept 1992]).

To the extent plaintiff alleges excusable default, as grounds for vacatur due to the simultaneous state and federal litigation, this claim has been continually proffered by plaintiff and consistently rejected by this Court from

the outset of these proceedings (*see* Decision and Order in mot. seqs. 001, 003, 004, 006, and 007, NYSCEF Doc. Nos. 68, 108, 127, 165, and 166). "Plaintiff, by filing the instant complaint while her federal action remains pending has charted her own course of simultaneous state and federal action; she cannot now be heard that her own litigation strategy is too burdensome" (Decision and Order in mot. seqs. 006 and 007, NYSCEF Doc Nos. 165 and 166). Plaintiff did not default on the underlying motion, instead she submitted opposition, which took umbrage with the Court's prior denial of her stay request predicated upon her simultaneous federal action, and advised that she would not submit substantive opposition (*see* NYSCEF Doc. No. 147). The Court finds this does not amount to excusable default under CPLR § 5015 or in the interest of justice.

Turning to plaintiff's request for an extension of time under CPLR § 306-b to serve defendants *nunc pro tunc*, same is untimely. Plaintiff, having waited until after dismissal of her action, may not now seek, for the first time, an extension to serve under CPLR § 306-b; "once the action was dismissed, plaintiff could no longer seek an extension of time to effect service" (*Jimenez v. City of New York*, 13 AD3d 107 [1st Dept 2004] *citing Sottile v. Islandia Home for Adults*, 278 AD2d 482 [2d Dept 2000]).

Finally, to the extent that plaintiff seeks leave to replead, same is denied. CPLR § 3025 provides that leave shall be freely given to amend a pleading on terms which may be just. However, "the matter of allowing an amendment is committed almost entirely to the court's discretion to be determined on a *sui generis* basis" (*Murray v. City of New York*, 43 NY2d 400 [1977] *citing* Siegel, Practice Commentaries [internal quotations omitted]).

Throughout the pendency of this litigation, and indeed from its inception by plaintiff, plaintiff has unequivocally stated she lacks the ability to prosecute this matter, comply with any court order directing that this matter proceed, or engage in further motion practice (Plaintiff's Letter to Judge, NYSCEF Doc. No. 125 "[t]he Court's decision does not change the reality that I am unable to litigate in both federal and state court simultaneously"; Plaintiff's Opposition, NYSCEF Doc. No. 163 "The Court expects me to engage in multi-track litigation in two forums against numerous attorneys over identical legal and factual issues – something I am unable to do. As I have informed the Court, I do not have the resources to do so"). Given plaintiff's unequivocal statements of her unwillingness to proceed, and failure to meaningfully engage in this action, leave to replead is an exercise in futility.

Assuming, *arguendo*, that plaintiff was willing to proceed and comply with orders of this Court, plaintiff has failed to annex the proposed amended complaint to her motion, in violation of CPLR § 3025(b) ("Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading"; *see e.g. Mendoza v. Enchante Accessories, Inc.*, 185 AD3d 675 [2d Dept 2020]). The Court must "examine the sufficiency of the merits of the proposed amendment when considering such motion;" however, when a party has failed to provide the proposed amended pleading the Court cannot perform its required examination (*Zabas v. Kard*, 784 [2d Dept. 1993] *c.f. e.g. Heller v. Louis Provenzano. Inc.*, 303 AD2d 20 [1st Dept 2003] proposed amended pleading provided).

Accordingly, it is

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that any requested relief not expressly addressed herein has nevertheless been considered and is hereby denied.

2/9/2022
DATE

FRANK NERVO, J.S.C.

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