SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05

Justice

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DR. KAREN COHEN AMES,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD CARRANZA, CHERYL WATSON-HARRIS, DAVID HAY, URSULINA RAMIREZ, RAHESHA AMON, JOHN DOES, JANE DOES

Defendants.

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INDEX NO. 151743/2021

MOTION DATE 11/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to DISMISS.

Upon the foregoing documents, defendants' motion to dismiss this action is granted and it is hereby dismissed with prejudice.

Plaintiff brings this action against the New York City Department of Education ("DOE") for employment discrimination and against Richard Carranza, Cheryl Watson-Harris, David Hay, Ursulina Ramirez, and Rahesha Amon (the "Individual Defendants") for aiding and abetting this discrimination. Plaintiff seeks $10 million in punitive damages (Administrative Code §8-502[a]).

Plaintiff is a Caucasian Jewish woman "over 40 years of age" (NYSCEF Doc. No. 1 [Complaint at ¶2]). She began her career at the DOE in 1985 (Id. at ¶3). In 2014 she was appointed as the Community Superintendent of District 8, Bronx, New York (Id. at ¶24). Plaintiff alleges that beginning around March 2018, when defendant Richard Carranza became Chancellor of the DOE, a discriminatory and hostile environment was created in the DOE in which DOE employees were targeted based on their ethnicity and race (Id. at ¶54). As evidence of this, plaintiff alleges

that only the birthdays of Black superintendents were celebrated at superintendent meetings and that, at the end of many of these meetings, attendees were asked to perform the Wakandan salute from the Marvel movie "Black Panther" and that she was "admonished" when she refused to do so (Id. at ¶¶9, 83, 86). She also claims she was yelled at for sharing the story of her grandparents' experience in the Holocaust during a DOE implicit bias training in February 2018 (Id. at ¶¶91-93). Plaintiff further asserts that women who were Caucasian and over forty were systematically forced out of senior leadership, particularly over the summer of 2018 (Id. at ¶¶57, 129-135).

On August 31, 2018, the DOE terminated plaintiff from her position as Community Superintendent, with her last date of employment set for September 28, 2018 (Id. at ¶109, 115). This termination was subsequently rescinded on or about September 25, 2018, however (Id. at ¶148). This rescission was memorialized in a stipulation between plaintiff and DOE dated October 18, 2018 (the "First Stipulation") which provided, in relevant part, that:

> As part of the Department's leadership reorganization, Ms. Ames agrees to resign from her position as Community Superintendent of Community School District 8. Ms. Ames will be assigned to work as an Administrative Assistant Superintendent on the staff of Randy Asher at an annual salary of $161,586.
>
> Ms. Ames agrees not to initiate legal proceedings or administrative hearings of any kind against the Department or the City of New York, and to release and discharge the Department and the City of New York and any present or former officials, employees, representatives, or agents of the Department or the City of New York (the "Released Parties") from any and all liability, claims, or rights of actions, whether known or that were or could have been asserted against the Released Parties from the beginning of time until the execution of this Agreement relating to or arising out of her employment with the Department, except to enforce the terms of this Agreement. Ms. Ames further agrees to withdraw any claims or actions that may have been commenced in any forum whatsoever arising out of her employment with the Department

(NYSCEF Doc. No. 15 [First Stipulation at ¶¶1, 4]).

According to plaintiff, her new position as Administrative Assistant Superintendent was a significant demotion (Id. at ¶26). In this new position, plaintiff was not provided with a desk, an

office phone, or a laptop, and was assigned to job sites that were more than a ninety-minute commute each way without the benefit of a DOT parking permit (Id. at ¶¶175-177). Plaintiff alleges that, from the date of her "termination" through August 2019, she applied to a variety of jobs within the DOE, "the majority of which she was over-qualified for" but was interviewed for very few of these positions and not hired for any of them[1] (Id. at ¶¶136, 177).

On January 31, 2020, plaintiff filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC") against the DOE (the "EEOC Complaint"). The EEOC Complaint stated:

> I have worked for the above-name entity for over 20 years until I was wrongfully terminated, reinstated, and denied assignment to my former position as a superintendent in retaliation for having complained about race (white), religion (Judaism) and age (52) bias in violation of Title VII of the Civil Rights Act of 1964, as amended, as well as, the Age Discrimination in Employment Act of 1967, as amended. After my wrongful termination on August 31, 2018, I was forced to sign a stipulation with a significant reduction in salary reinstating me on September 25, 2018. I was marginalized to an excess staffing management position assigned to Randy Asher in an offer letter dated September 21, 2018. Since then, I have made multiple applications and was passed over for consideration repeatedly in retaliation for having complained about anti-Semitic comments made by Superintendent, Rasheeda Amon in early 2018 who is friends with First Deputy Chancellor, Ms. Watson. Later, Ms. Watson became my supervisor and orchestrated the campaign of reprisals against me. In June 2019, there were negotiation to offer me a position with the office of Sch. Health which would purportedly cure my reduced pay. In August 2019, my employer denied my waiver to be a school principal. I believe I am being forced to retire early at 55 in violation of Federal, State and local laws.

(NYSCEF Doc. No. 25 [EEOC Complaint]).

In February 2020, plaintiff and the DOE entered into another Stipulation of Settlement dated February 14, 2020 (the "Second Stipulation") which provided, in relevant part, that "[e]ffective February 17, 2020, Dr. Ames will be assigned to work as an Administrative Assistant

[1] In opposition to the instant motion, plaintiff submits a list of jobs within the DOE to which she applied, with the last application as of April 4, 2019 (See NYSCEF Doc. No. 29).

Superintendent in the title of "Director of Special Projects" on the staff of Senior Advisor to the Office of School Health Christopher Groll at an annual salary of $182,566" (NYSCEF Doc. No. 16 [Second Stipulation at ¶1]). The Second Stipulation further provided that

> Dr. Ames agrees not to initiate legal proceedings or administrative hearings of any kind against the Department or the City of New York, and to release and discharge the Department and the City of New York and any present or former officials, employees, representatives, or agents of the Department or the City of New York (the "Released Parties") from any and all liability, claims, or rights of actions, whether known or unknown, that were or could have been asserted against the Released Parties from the beginning of time until the execution of this Agreement relating to or arising out of her employment with the Department, except to enforce the terms of this Agreement. Dr. Ames further agrees to withdraw any claims or actions that may have been commenced in any forum whatsoever arising out of her employment with the Department

(Id. at ¶5).

Plaintiff states that she was forced to sign the Second Stipulation (NYSCEF Doc. No. 1 [Complaint at ¶179]). Plaintiff was marginalized and demoralized in this new role and, as a result, requested a leave of absence from the DOE commencing July 1, 2020 (Id.). When that request was denied, plaintiff "separated from service" in July 2020 (Id. at ¶¶179-181) and commenced the instant action on February 19, 2021.

Defendants now move to dismiss this action, pursuant to CPLR §3211(a)(5), on the grounds that: it is barred by the releases contained in the First Stipulation and Second Stipulation (collectively, the "Stipulations"); plaintiff has failed to timely file a notice of claim; and plaintiff has failed to timely commence this action. Defendants also move to dismiss this action pursuant to CPLR §3211(a)(7) on the grounds that the complaint fails to state a cause of action.

DISCUSSION

That branch of defendants' motion to dismiss this action pursuant to CPLR §3211(a)(5) is granted[2].

This action is barred by the releases in the Stipulations, in which plaintiff agreed not to initiate legal proceedings or administrative hearings of any kind against the DOE and to release and discharge the DOE and any present or former officials or employees "from any and all liability, claims, or rights of actions, whether known or that were or could have been asserted against the Released Parties from the beginning of time until the execution of this Agreement relating to or arising out of her employment with the Department" (See NYSCEF Doc. Nos. 15 [First Stipulation at ¶1] and 16 [Second Stipulation at ¶1]). Where, as here, "the language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed" and the release will "be set aside … only for duress, illegality, fraud, or mutual mistake" (Cramer v Newburgh Molded Products, Inc., 228 AD2d 541, 541 [2d Dept 1996] [internal citations omitted]; see also Devlin v 645 First Ave. Manhattan Co., 233 AD2d 183, 183 [1st Dept 1996]).

Plaintiff contends that the releases in the Stipulations are invalid because she entered into the Stipulations under duress. Specifically, plaintiff maintains that she "was not advised that [she] could speak to an attorney about the Stipulation [and] …was told point blank that if [she] wanted to stay on the DOE payroll [she] had no choice, but to sign the Stipulation" and executed both Stipulations because she "had to remain on the DOE payroll, not only for the salary, which [she] relied upon to support myself and my daughter and fulfill my Court-ordered obligations, but also

[2] The Court declines to grant plaintiff's request to strike plaintiff's affidavit in opposition due to her failure to comply with the limits set forth in Rule 202.8-b of the Court's Uniform Civil Rules. Plaintiff's affidavit in opposition largely reiterates the facts alleged in her complaint and therefore its consideration results in no prejudice to defendants.

for the health insurance and pension benefits that [she] had already taken loans against" (NYSCEF Doc. No. 1 [Complaint at ¶¶89-90, 92]).

In support of this argument, plaintiff relies on a federal case, Bormann v AT & T Communications, Inc., 875 F2d 399 (2d Cir 1989) setting forth a six-factor analysis to determine duress, i.e.:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

(Bormann v AT & T Communications, Inc., 875 F2d 399, 403 [2d Cir 1989]).

Plaintiff contends that under this Bormann analysis it is clear that the Stipulations were the product of duress. However, Bormann is a federal decision that is not binding on this Court (See e.g., Alorna Coat Corp. v Lumbermens Mut. Cas. Co., 167 AD2d 329, 330 [1st Dept 1990]). While it has been cited in New York State courts – albeit infrequently[3] – Bormann's six-factor analysis has not been adopted in this State (See e.g., Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc., 167 AD3d 100, 105 [1st Dept 2018] ["[t]he relative sophistication of the parties is not a factor to be considered in assessing a claim of economic duress"]). Rather, under New York law "[e]conomic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will" (Id. citing 805 Third Ave. Co. v. M.W. Realty Assoc., 58 N.Y.2d 447, 451 [1983]). The facts alleged here do not fit within this framework.

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[3] See Nelson v Lattner Enterprises of N.Y., 108 AD3d 970, 972 [3d Dept 2013] (citing to Bormann without further elaboration); see also Skluth v United Merchants & Mfrs., Inc., 163 AD2d 104 [1st Dept 1990] (citing to Bormann in its dissent).

In any event, the Stipulations have been ratified by plaintiff through her subsequent course of conduct. "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it. Thus, a plaintiff cannot claim that he or she was compelled to execute an agreement under duress while simultaneously accepting the benefits of the agreement" (Allen v Riese Org., Inc., 106 AD3d 514, 516-18 [1st Dept 2013] [internal citations omitted]). Here, plaintiff's acceptance, without objection, of her wages at the salary set forth in the Stipulations from the date of their execution until her departure from the DOE precludes her from now, years later, asserting that these Stipulations were executed under economic duress (Id.; see also Napolitano v City of New York, 12 AD3d 194 [1st Dept 2004]). Finally, plaintiff argues that she did not receive adequate consideration under the Second Stipulation because she was not given the work of Director of Special Projects, but this argument is unavailing. The Stipulations provide the title and salary plaintiff would receive (See NYSCEF Doc. No. 15 [First Stipulation at ¶1]; NYSCEF Doc. No. 16 [Second Stipulation at ¶1]) – and it is undisputed that she received both – but neither Stipulation detailed the work she would perform in these roles.

Plaintiff's complaint must also be dismissed for her failure to comply with the requirements of Education Law §§3813(2-b) and 3813(1). Education Law §3813(2-b) provides that an action against the DOE must be commenced within a year after that cause of action arose (Education Law §3813[2-b]; see also Amorosi v S. Colonie Ind. Cent. School Dist., 9 NY3d 367, 373 [2007]). A plaintiff's failure to do so constitutes a "fatal defect" mandating dismissal of the claim (Parochial Bus Sys. v Board of Educ. of City of New York, 60 NY2d 539, 547 [1983]). Plaintiff commenced this action on February 19, 2021 and therefore, under normal circumstances, all of her claims based upon adverse employment actions by DOE which occurred on or before February 19, 2020 would be time-barred. However, this action was filed during the tolling period put in place by Executive

Order 202.8 which, as extended by subsequent executive orders, tolled the time for filing any "legal action, notice, motion, or other process or proceeding" from March 20, 2020 through November 3, 2020 (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8] et seq). In light of Executive Order 202.8, only plaintiff's claims stemming from adverse employment actions taken on or after March 20, 2019 are timely. Accordingly, those allegations in her complaint relating to events before this date – i.e., plaintiff's "termination" and demotion in 2018 – must be dismissed as untimely (See e.g., Stembridge v New York City Dept. of Educ., 88 AD3d 611 [1st Dept 2011] lv. denied 19 NY3d 802 [2012]).

Plaintiff argues that the continuous wrong doctrine brings all her claims within the one-year statute of limitations. This doctrine permits otherwise time-barred acts to be considered by the Court when these acts are "part of a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the complaint" (Petit v Dept. of Educ. of City of New York, 177 AD3d 402, 403-04 [1st Dept 2019] quoting Ferraro v New York City Dept. of Educ., 115 AD3d 497, 497-498 [1st Dept 2014]). However, this doctrine does not apply here where all of the allegations of adverse employment actions set out in plaintiff's complaint – i.e, "termination, failure to promote, denial of transfer, or refusal to hire,' as well as demotions, transfers, job assignments, negative performance evaluations, and promotion with a diminution of pay" – are discrete discriminatory acts, and "the continuing violation exception does not extend to 'discrete discriminatory acts' that occur outside the limitations period" (Williams v Deutsche Bank Group, 2013 NY Slip Op 34190[U], 10-11 [Sup Ct, NY County 2013] quoting Natl. R.R. Passenger Corp. v Morgan, 536 US 101, 114 [2002]). Accordingly, the one-year statute of limitations set out in Education Law §3813(2-b) bars all of plaintiff's claims based on events prior to March 20, 2019, leaving only plaintiff's allegations that: (1) she was blacklisted from jobs she

applied to between July 2019 and August 2019; (2) she was improperly demoted in February 17, 2020; and (3) she was improperly denied a leave of absence in July 2020 (collectively, the "Remaining Claims").

However, the Remaining Claims are barred by her failure to file a notice of claim within three months of these events as required by Education Law §3813(1). That provision states, as relevant here, that

> No action or special proceeding … shall be prosecuted or maintained against any school district, board of education … or any officer of a school district, board of education … unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim

(Education Law § 3813[1]).

Education Law §3813(1) is intended "to give a school district prompt notice of claims so that investigation may be made before it is too late for investigation to be efficient" (Parochial Bus Sys., Inc. v Bd. of Educ. of City of New York, 60 NY2d 539, 547 [1983] [internal citations and quotations omitted]). "The essential elements to be included in the notice are the nature of the claim, the time when, the place where and the manner in which the claim arose and, where an action in contract is involved, the monetary demand and some explanation of its computation" (Id.). "[F]ailure to present a claim within the statutory time limitation or to notify the correct party, is a fatal defect" (Id.).

Plaintiff asserts that the EEOC Complaint she filed on January 31, 2020 was a valid substitute for a notice of claim. It is undisputed that "[a] paper which is not denominated a notice of claim may satisfy that requirement if it provides the necessary information as to the nature of the claim, the time when, the place where, and the manner in which the claim arose" (Matter of Mennella v Uniondale Union Free School Dist., 287 AD2d 636, 636-637 [2d Dept 2001] [internal

citations and quotations omitted]). However, even accepting the filing on January 31, 2020 as sufficient service under the statute, the EEOC Complaint cannot serve as a notice of claim for plaintiff's claim that she was blacklisted from jobs. The last job she allegedly applied to – and was rejected from – was in August 2019, more than three months before the filing of the EEOC Complaint. In addition, the EEOC Complaint was filed before plaintiff's alleged demotion on February 17, 2020 and the July 2020 denial of her request for a leave of absence. As a result, it did not provide defendants with notice of plaintiff's claims arising out of these events (See Varsity Tr., Inc. v Bd. of Educ. of City of New York, 5 NY3d 532, 537 [2005]; see also Agostinello v Great Neck Union Free School Dist., 102 AD3d 638, 639 [2d Dept 2013] [notice of claim did not notify defendant school district of "allegedly discriminatory acts which took place subsequent to the date of the notice"]).

As this action is barred by the Stipulations and by Education Law §3813, defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(5) is granted in its entirety. In light of the foregoing, that branch of defendants' motion which seeks to dismiss this action pursuant to CPLR §3211(a)(7) is moot and will not be addressed (See e.g., Craft EM CLO 2006-1, Ltd. v Deutsche Bank AG, 56 Misc 3d 1216(A) [Sup Ct, NY County 2017], affd, 178 AD3d 552 [1st Dept 2019]; 1840 Concourse Assoc., LP v Praetorian Ins. Co., 89 AD3d 592 [1st Dept 2011]).

Accordingly, it is

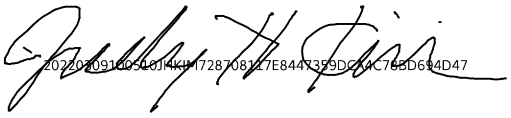
ORDERED that defendants' motion to dismiss this action pursuant to CPLR §3211(a)(5) is granted and plaintiff's complaint is hereby dismissed with prejudice; and it is further

ORDERED that defendant the New York City Department of Education is directed to serve a copy of this decision and order, with notice of entry, on plaintiff within ten days of filing; and it is further

ORDERED that defendant the New York City Department of Education shall serve a copy of this decision and 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 enter judgment accordingly; 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 this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



3/9/2022
DATE

JUDY H. KIM, J.S.C.

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