

Gora v M&T Bank

2023 NY Slip Op 31094(U)

April 3, 2023

Supreme Court, New York County

Docket Number: Index No. 155680/2022

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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ALYSSE GORA	INDEX NO. <u>155680/2022</u>
Plaintiff,	MOTION DATE <u>09/28/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

M & T BANK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

JUDGMENT - DEFAULT

Plaintiff, Alysse Gora (plaintiff), commenced this action for disability and gender discrimination, retaliation, and hostile work environment pursuant to the Labor Law and New York City and State Human Rights Law, and for intentional and negligent infliction of emotional distress against her former employer defendant, M&T Bank (defendant). Plaintiff now moves pursuant to CPLR 3215 for a default judgment against defendant. Defendant opposes the motion and cross-moves for leave to respond to the complaint and pursuant to CPLR 3211 to dismiss the complaint.¹ Both motions are opposed. For the following reasons, plaintiff's motion for a default judgment is denied, and defendants' motion to dismiss is granted.

Plaintiff, a 63-year-old Jewish woman, who has diabetes, began working for defendant on or about July 19, 2019. Plaintiff alleges that when she was hired, she was supposed to work on "jumbo loans" based on her experience (NYSCEF doc. no. 17). Plaintiff thereafter brought in clients "handling jumbo loans," but at some point defendant indicated that it no longer wanted to do these types of loans, and instead wanted "units" (*id.* at ¶ 7). According to plaintiff, she procured \$6 million in business for defendant in under three months. Plaintiff alleges that "she began receiving letters of complaints" for failing to obtain the same unit loans as she was bringing in jumbo loans (*id.* at ¶ 9). Plaintiff further alleges that male employees did not receive the same complaints. Plaintiff further alleges that at defendant's training in Long Island, plaintiff was treated differently than male employees, because she was not given a hotel room for the training, whereas male employees were. Plaintiff alleges that at some point, she informed defendant that she has diabetes and that she needed to get medications, but was told by "staff members" that "they did not and 'too bad'" (*id.* at ¶ 12). Plaintiff further alleges that she was

¹ Defendant first filed its cross-motion to dismiss on October 6, 2022 (NYSCEF doc. no. 26). On the same day, defendant filed a second memorandum of law opposing plaintiff's motion and a purported notice of cross-motion, seeking leave to file a late response to the summons and complaint (NYSCEF doc. no. 31). Defendant also submits three memorandums of law on October 6, 2022 (NYSCEF doc. nos. 29, 38, and 40).

treated less than her white male coworkers, despite the fact that she procured more loans. Plaintiff alleges that defendant terminated her on March 5, 2021.

On April 20, 2021, prior to filing the summons and complaint, plaintiff filed a complaint with the New York State Division of Human Rights (NYSDHR). In her NYSDHR complaint, plaintiff alleged largely the same allegations as alleged in the instant complaint, to wit: plaintiff was treated less well than her white male counterparts.

The NYSDHR investigated plaintiff's allegations, and subsequently determined that there was no probable cause to believe defendant had engaged in an unlawful discriminatory practice and that there was insufficient evidence to support plaintiff's claims of discrimination based on age, creed, gender, and disability. Notably, the NYSDHR determined that:

“The information gathered during the course of the investigation of the Complaint is insufficient to support Complainant's allegations of unlawful discrimination. Complainant alleged due to her age, creed, gender, and disability Respondent treated her unfairly and ultimately terminated her employment.”

(NYSCEF doc. no. 24 at 1).

In support of their cross-motion, defendant submits the affidavit of William Mariani, II (Mariani), a Senior Vice President and Associate General Counsel for defendant. Marini states that defendant's headquarters, including its legal department, is located at One M&T Plaza, Buffalo, New York. Marini explains that the location where the summons and complaint was served, 626 Commerce Drive, Amherst New York, does not include any legal personnel responsible for responding to civil actions. Mariani further explains that the location where plaintiff served the summons and complaint is not listed as defendant's address for service of process on the New York Department of State website. Mariani states that he learned that plaintiff served the summons and complaint when he received plaintiff's motion for a default judgment on Friday, September 30, 2022, which was served at defendant's headquarters. Plaintiff did not serve defendant with an affidavit of service for the summons and complaint until she served the motion for default on September 28, 2022.

Pursuant to CPLR § 3215, a plaintiff moving for a default judgment must submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts constituting the claim; and (3) an affidavit showing the default in answering or appearing. To oppose a motion for a default judgment, a defendant must demonstrate a reasonable excuse for the default (*see Smoke v Windermere Owners, LLC*, 109 A.D.3d 742 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]).

Plaintiff's motion is denied, as she fails to establish the facts constituting her claim establishing her to relief. Plaintiff's affidavit simply states that “as a result of the discriminatory treatment I suffered at M & T BANK I have suffered mentally, physically, and financially” (NYSCEF doc. no. 20 at ¶4). The complaint, verified by plaintiff's attorney, is insufficient to establish the merits of plaintiff's claims (*see DLJ Mortg. Cap., Inc. v United Gen. Title Ins. Co.*,

128 AD3d 760, 761 [2d Dept 2015] [a pleading verified by an attorney pursuant to CPLR 3020(d)(3) is insufficient to establish its merits]).

Plaintiff's motion is denied on the additional basis that defendant demonstrates a reasonable excuse for failing to answer the complaint (*Peg Bandwidth, LLC v Optical Commens*, 150 AD3d 625, 626 [1st Dept 2017] ["While plaintiff satisfied the requirements of CPLR 3215(f) for a default judgment, we decline to disturb the motion court's exercise of its broad discretion in finding that defendant's excuse for its delay in answering the complaint, i.e., law office failure, was reasonable"]). As discussed above, defendant clearly intends to participate in this action and has made reasonable efforts to do so. Defendant's cross-motion was made in response to plaintiff's motion, and made less than three months after the commencement of this action. In addition, plaintiff fails to demonstrate any prejudice as a result of the delay, and "there is a strong preference that matters be decided on the merits" (*id.*).

In light of the above, the Court denies plaintiff's motion for a default judgment, and grants defendant's motion for leave to respond (CPLR 3012 ["Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served,"]). The Court next addresses the merits of defendant's motion to dismiss.

Defendant argues that the complaint should be dismissed based on the election of remedies doctrine, since the complaint in this action and in the NYSDHR are nearly identical. "[B]y the terms of the statute and code, respectively, the NYHRL and CHRL claims, once brought before the [New York State Department of Human Rights], may not be brought again as a plenary action in another court" (*York v Association of the Bar of the City of New York*, 286 F3d 122, 127 [2d Cir 2002]). "Pursuant to the election of remedies doctrine, the filing of a complaint with [the Division] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts" (*Luckie v Northern Adult Day Health Care Ctr.*, 161 AD3d 845, 846 [2d Dept 2018] [internal quotation marks and citations omitted]).

Here, the election of remedies doctrine bars plaintiff's claims in the instant complaint concerning the alleged discrimination, hostile work environment and retaliation claims, as they are based on the same allegedly discriminatory conduct asserted in the proceedings before the NYSDHR. In opposition, plaintiff argues that the election of remedies doctrine should not preclude plaintiff's claim premised on her diabetes, because the NYSDHR decision "[m]ade very passive reference to plaintiff's diabetes condition" (NYSCEF doc. no. 41). Plaintiff's argument lacks merit, since the plaintiff alleged, albeit speciously, that she was discriminated against based on her diabetes, and the NYSDHR decision references that allegation, and clearly finds that there was no probable cause of discrimination.

Defendant argues that plaintiff's claims sounding in IIED and NIED, which are not covered by the NYSDHR determination, should be dismissed because they fail to state a claim. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations . . . that

consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration” (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

To state a claim for IIED, a plaintiff must allege: (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress (*see Howell v New York Post Co., Inc.*, 81 NY2d 115 [1993]). A plaintiff alleging a claim for NIED must also “[s]et forth conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*Kornicki v Shur*, 132 AD3d 403, 403 [1st Dept 2015], citing *Howell*, 81 NY2d at 122). Here, none of the allegations in the complaint can serve as the basis for plaintiff’s claims for IIED and NIED. The alleged conduct by defendant, including plaintiff’s termination, are not so extreme, outrageous, utterly reprehensible, and intolerable in a civilized society so as to sustain a cause of action for either IIED or NIED (*see id.*).

Plaintiff’s claims under the Labor Law are also dismissed. The complaint does not cite to any specific provision of the Labor Law in which she relies, and plaintiff does not oppose this branch of defendant’s motion.

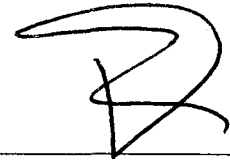
Plaintiff also requests that the Court “search[] the record” to find that plaintiff has plead a prima fact tort. The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful (*Epifani v Johnson*, 65 AD3d 224, 232 [2d Dept 2009]). To state a claim sounding in prima facie tort, plaintiff must allege “that disinterested malevolence was the sole motivation for the conduct of which they complain” (*R.I. Island House, LLC v N. Town Phase II Houses, Inc.*, 51 AD3d 890, 896 [2d Dept 2008]). Here, plaintiff barely makes an effort to apply the allegations to the law for prima facie tort. In any event, “[w]hile [plaintiff] alleges that [defendant] intentionally inflicted harm upon her without justification, she failed to plead that [defendant’s] actions were motivated solely by disinterested malevolence” (*Epifani*, 65 AD3d at 232). Accordingly, the Court finds that plaintiff has failed to state a claim for prima face tort.

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



4/3/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE