At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of June, 2023.

PRESENT: HON. CARL J. LANDICINO,
Justice.

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KENYA WILLIAMS,

Plaintiff,

-against-

GIGMY BISTA and JADE EATERY & LOUNGE, LLC,

Defendants.

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Index No. 517649/2018

DECISION AND ORDER

Motion Sequence #4

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	78-93,
Opposing Affidavits (Affirmations)	94-101,
Reply Affidavits (Affirmations)	102-103.

After a review of the papers and oral argument, the Court finds as follows:

The Plaintiff, Kenya Williams (hereinafter the "Plaintiff") commenced this action alleging personal injuries as a result of an incident that occurred on August 3, 2018 at 1 Station Square, Forest Hills, New York. The Plaintiff contends that she was injured after she was assaulted by Defendant Gigmy Bista ("Bista"). Both Plaintiff and Bista were employees of Defendant Jade Eatery & Lounge, LLC ("Jade") at the time of the incident.

Bista and Jade (collectively the "Defendants") now move (motion sequence #4) pursuant to CPLR 3212 for summary judgment dismissing the action against them. The Defendants contend that the Plaintiff's claims for assault and battery should be dismissed against the Defendants since Bista did not make sufficient contact with the Plaintiff to support such a claim. Specifically, the Defendants contend that many of the Plaintiff's allegations do not constitute assault or battery and that a review of the evidence

shows that any limited physical contact was not such as to qualify it as either. The Defendants also argue that the Plaintiff's claims for intentional infliction of emotional distress should be dismissed as the conduct alleged, in conjunction with the evidence presented, does not exhibit conduct that is so outrageous and extreme as to support such a claim. The Defendants further contend that the Plaintiff's claim for negligent hiring, retention or supervision should be dismissed as the evidence does not show that Jade knew or should have known of the Bista's propensity for the alleged conduct which caused the purported injury. The Defendants also argue that any claim for vicarious liability should be dismissed given that, as argued above, the alleged conduct was not otherwise actionable, and alternatively, that the purported assaults are not within an employee's scope of employment. The Defendants also seek dismissal of the Plaintiff's breach of contract claim and argue that the Plaintiff was an "at will" employee and no contract between the parties existed and therefore there can be no breach. The Defendants also seek sanctions pursuant to Section 130-1.1 of the Rules of the Chief Administrator.

The Plaintiff opposes the motion. The Plaintiff argues that the motion should be denied as the Plaintiff contends that she was struck at work by Defendant Bista and that this conduct should be understood in terms of a pattern of abusive behavior that the Plaintiff suffered during her employment with Jade. The Plaintiff also argues that there is at least an issue of fact regarding whether the physical contact and interaction between Defendant Bista and the Plaintiff constituted assault and battery. As it relates to the Plaintiff's breach of contract claims, the Plaintiff argues that the Plaintiff was not treated in accordance with the Employee Handbook. She asserts that she was not fairly assigned to work and was not afforded military duty accommodation.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie*

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

The Plaintiff sat for her deposition on May 7, 2021 (NYSCEF Doc. 53). When asked when she was initially hired by Jade, the Plaintiff stated, "[t]o my recollection, April of 2018." (Page 14). When asked what her position was, the Plaintiff stated, "I was a server, hired as a server." (Page 14). When asked what her responsibilities were, the Plaintiff stated that, "I waited tables. I made sure that the patrons paid their tab. If they needed anything besides food orders, I would try to help them to the best of my ability." (Page 14). When asked if she had signed an employment contract when she was hired, the Plaintiff stated "[n]o, sir." (Page 14).

First Cause of Action (Assault)

> To plead a cause of action to recover damages for assault, a plaintiff must allege intentional "physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Bastein v. Sotto,* 299 A.D.2d 432, 433, 749 N.Y.S.2d 538; *see Flamer v. City of Yonkers,* 309 N.Y. 114, 127 N.E.2d 838; *Marilyn S. v. Independent Group Home Living Program, Inc.,* 73 A.D.3d 892, 894, 903 N.Y.S.2d 403; *Fugazy v. Corbetta,* 34 A.D.3d 728, 729, 825 N.Y.S.2d 120; *Cotter v. Summit Sec. Servs., Inc.,* 14 A.D.3d 475, 475, 788 N.Y.S.2d 153). While "[a]n action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff" (*Di Gilio v. Burns Intl. Detective Agency,* 46 A.D.2d 650, 650, 359 N.Y.S.2d 688; *see Reichle v. Mayeri,* 110 A.D.2d 694, 488 N.Y.S.2d 15), words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault (*see Carroll v. New York Prop. Ins. Underwriting Assn.,* 88 A.D.2d 527, 527, 450 N.Y.S. 2d21).

-*Gould v. Rempel*, 99 AD3d 759, 760, 951 N.Y.S.2d 677, 678 (Mem), 2012 N.Y. Slip Op. 06779 [2d Dept 2012]. *See* also *Holtz v. Wildenstein & Co.*, 261 AD2d 336, 693 N.Y.S.2d 516, 1999 N.Y. Slip Op. 05405 [1st Dept 1999].

Defendants rely on video surveillance footage that captured the alleged incident. Defendants contend, as indicated in the video, that the alleged physical conduct between Defendant Bista and Plaintiff does not amount to the type of menacing conduct that would cause Plaintiff to have a reasonable apprehension of imminent harmful contact. Although the video does not provide audio, the interaction between Defendant Bista and Plaintiff does not reflect a reaction of apprehension or fear from the Plaintiff. After this contact, Defendant Bista and Plaintiff continue their conversation, apparently near an exit door, during which time two additional employees walk by them.

Plaintiff contends that Defendants have failed to establish a *prima facie* showing for purposes of dismissal of Plaintiff's assault claim. Plaintiff points to the fact that the video shows physical contact made by Defendant Bista without Plaintiff's consent, and Plaintiff also contends that the video's lack of audio does not provide the context in which the contact was made. Plaintiff points to Defendant Bista's admission that, at the time of the alleged incident, he was loud. Aside from these contentions, Plaintiff does not point to any evidence that creates a genuine dispute of material fact as to whether the conduct depicted in the video constitutes an assault on Plaintiff. The nature of the physical conduct Defendant

Bista made with Plaintiff did not place her in an imminent apprehension of harmful contact. Accordingly, the Defendants' motion for summary judgment dismissing the claim for assault is granted.

Second Cause of Action (Battery)

"The elements of a cause of action [to recover damages] for battery are bodily contact, made with intent, and offensive in nature (*Tillman v. Nordon,* 4 A.D.3d 467, 468, 771 N.Y.S.2d 670; *see Zgraggen v. Wilsey,* 200 A.D.2d 818, 819, 606 N.Y.S.2d 444)." *Fugazy v. Corbetta*, 34 AD3d 728, 729, 825 N.Y.S.2d 120, 122, 2006 N.Y. Slip Op. 08918 [2d Dept 2006]. The case of *Higgins v. Hamilton*, 18 AD3d 436, 794 N.Y.S.2d 421, 2005 N.Y. Slip Op. 03641 [2d Dept 2005] notes that offensive contact is contact that is "wrongful under all of the circumstances." However, "there is no requirement that the conduct be intended to cause harm." *Cerilli v. Kezis*, 16 AD3d 363, 364, 790 N.Y.S.2d 714, 2005 N.Y. Slip Op. 01670 [2d Dept 2005], quoting *Meyers v. Epstein,* 232 F Supp 2d 192, 198 [2002]. *See* also *Dimisa v. Oceanside Union Free Sch. Dist.*, 140 AD3d 692, 32 N.Y.S.3d 617, 2016 N.Y. Slip Op. 04172 [2d Dept 2016]. Defendants contend that Bista's physical contact with Plaintiff was not offensive or wrongful under the circumstances because such contact was intended to move her away from the rotating kitchen doors that the restaurant runners used. In support of this contention, Bista, during his deposition, stated, "[y]ou see where we're standing, there's a rotating door? That's where all the people coming in and out and can push the door. So I'm telling her move towards this side and to stay clear of the – of the rotating door so nobody getting hurt…I was pushing her towards the – the other side of the place away from the door so she won't get hurt, and that's that. She went out, and I came inside." (Pages 40-41).

Plaintiff argues that the video depicting Defendant Bista's physical contact with Plaintiff creates an issue of fact as to whether that contact constitutes a battery. Plaintiff sat for deposition on May 7, 2021. Plaintiff stated that Defendant Bista slapped her arm. "He continued to slap my arm like this." Plaintiff also stated that Bista slapped her arm three times. (Page 35). Plaintiff described Bista as a "bigger guy.

He's heavy handed, he has big hands, so he hit me pretty hard." (Page 36). When asked whether she would describe the force of that contact being like a punch or a slap, Plaintiff stated, "[n]o. There was no need to." (Pages 52, 55). During his deposition, Sam Kandhorov, the purported co-owner of Jade, stated that he and Irina (his business partner) met with Plaintiff to discuss what occurred on the date of the alleged incident. After reviewing the video, Mr. Kandhorov stated, "[w]e confirmed that there was the exact incident that she was talking about at the same day and the same time, and that was that. And she said I'm sorry, it felt like he grabbed me." (Pages 25-26). Despite Defendants' contentions that Defendant Bista's intended physical contact was not offensive in nature, Plaintiff has raised an issue of fact by contending that she found such contact to be offensive and unnecessary. There is no audio to confirm the nature of the conversation. There is an issue of material fact as to whether a reasonable person would find the conduct to be intentional and offensive. *See Thaw v. North Shore Univ. Hosp.*, 129 AD3d 937, 12 N.Y.S.3d 152, 2015 N.Y. Slip Op. 05173 [2d Dept 2015]. That is a question that the Court cannot answer on this record. Accordingly, Defendants' motion for summary judgment dismissing the battery claim is denied.

Third Cause of Action (Intentional Infliction of Emotional Distress)

"To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so 'as to be regarded as atrocious and intolerable in a civilized society.'" *Leonard v. Reinhardt*, 20 AD3d 510, 510, 799 N.Y.S.2d 118, 119 [2d Dept 2005], quoting *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 480 N.E.2d 349 [1985]. Although the Court in *Leonard v. Reinhardt* dismissed the intentional infliction of emotional distress claim as duplicative of the assault claim, it also held that "[i]n any event, the complaint fails to allege extreme or outrageous conduct necessary to support such a claim." Similarly, in *Raymond v. Marchand,* the Court held that in a matter alleging assault, "[a]s to the cause of action alleging the intentional infliction of emotional distress, the acts committed by the defendant did not rise

to the level of extreme and outrageous conduct required to sustain that cause of action." *Raymond v. Marchand*, 125 AD3d 835, 836, 4 N.Y.S.3d 107, 108 [2d Dept 2015]. During her deposition, Plaintiff stated that "[she] sustained emotional and mental injuries." (Page 36). Beyond making this assertion, Plaintiff fails to raise an issue of fact that would prevent the Court from granting summary judgment dismissing this claim. Additionally, Defendant Bista's conduct depicted in the video does not amount to conduct that is outrageous and extreme. As a result, Defendants' motion for summary judgment dismissing the claim for intentional infliction of emotional distress is granted.

Fourth & Fifth Causes of Action (Negligence and Negligent Infliction of Emotional Distress)

The Defendants do not explicitly address these causes of action in their papers. Therefore, the Defendants have not established a *prima facie* showing of entitlement to summary judgment. Accordingly, Defendants' motion in relation to these negligence claims is denied.[1]

Sixth & Seventh Causes of Action (Negligent Hiring and Supervision)

In order to establish a cause of action based on negligent hiring and supervision, it must be shown that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Jackson v. New York Univ. Downtown Hosp.*, 69 A.D.3d 801, 801, 893 N.Y.S.2d 235, 236 [2d Dept 2010], *quoting Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229 AD2d 159, 161, 654 N.Y.S.2d 791, 793 [2d Dept 1997]. "The employer's negligence lies in his having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his

[1] The parties have not addressed and therefore the Court will not address the issue of a barred claim pursuant to the Worker's Compensation Law. *See Pereira v. St. Joseph's Cemetery*, 54 AD3d 835, 864 N.Y.S.2d 491, 2008 N.Y. Slip Op. 06974 [2d Dept 2008] and *Buchanan v. Law Offs. Of Sheldon E. Green, P.C.*, 215 AD3d 793, 187 N.Y.S.3d 711, 2023 N.Y. Slip Op. 01980 [2d Dept 2023].

employees." *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 878-79, 823 N.Y.S.2d 463, 2006 N.Y. Slip Op. 07712 [2d Dept 2006], *quoting Detone v. Bullit Courier Serv.*, 140 A.D.2d 278, 279, 528 N.Y.S.2d 575. Defendant Jade contends that it had no notice of Defendant Bista's allegedly violent propensities. During his deposition, Mr. Kandhorov stated that "[Defendant Bista] was one of our top servers. And then he left to manage a different restaurant. And when I found out he had management experience in the other restaurant, I basically begged him to come work for us because he had an intimate relationship with all our clients and all of our employees as well." (Page 47). Mr. Kandhorov further stated that "[Defendant Bista] is a professional when it comes to management, and I never had a reason to tell him otherwise." (Page 75). Mr. Kandhorov also stated that his friend, who managed the other restaurant, highly recommended Defendant Bista for the general manager role.

In opposition, Plaintiff argues that Defendant Jade had a duty and failed to conduct an investigation on Defendant Bista prior to hiring him. Plaintiff cites Mr. Kandhorov's deposition, wherein he stated, "[n]o", when asked whether any type of background investigation into Defendant Bista was conducted at the time he was hired. (Page 47). "[T]he duty to investigate a prospective employee, or to "institute specific procedures for hiring employees," is triggered only when the employer "knows of facts that would lead a reasonably prudent person to investigate the prospective employee" (*Kenneth R. v. Roman Catholic Diocese of Brooklyn,* 229 A.D.2d 159, 163, 654 N.Y.S.2d 791, *cert. denied* 522 U.S. 967, 118 S.Ct. 413, 139 L.Ed.2d 316; *see Carnegie v. J.P. Phillips, supra* at 600, 815 N.Y.S.2d 107; *T.W. v. City of New York,* 286 A.D.2d 243, 245, 729 N.Y.S.2d 96)." *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 879, 823 N.Y.S.2d 463, 467-468, 2006 N.Y. Slip Op. 07712 [2d Dept 2006]. During his deposition, and when asked if he had ever been sued for assault and battery, Defendant Bista stated, "[n]ever." (Page 14). When asked if he had ever been disciplined by other employers for any reason, he stated, "[n]o." When asked whether he had ever been fired from a job, he stated, "[n]o, I've never." When asked if anyone had ever made a complaint for assault or battery against him at a job, he stated, "[n]o". Plaintiff has failed to

make a *prima facie* showing that Defendant Jade negligently hired and supervised Defendant Bista. Additionally, Plaintiff's contention that Defendant Jade failed to conduct a background check of Defendant Bista prior to hiring him is insufficient as the evidence indicates that no such investigatory measures were necessary based upon the information Jade had at the time.

In any event, Plaintiff asserts a claim against Jade for vicarious liability under a theory of *respondeat superior*. That claim serves to bar Plaintiff's claim for negligent hiring and supervision. Although Plaintiff's complaint demands judgment "...together with punitive damages...", the allegations do not assert gross negligence in hiring or retention and no such claim, on this record, is supported. *See Farquharson v. United Parcel Serv.*, 202 AD3d 923, 163 N.Y.S.3d 544, 2022 N.Y. Slip Op. 01007 [2d Dept 2022], *Eckardt v. City of White Plains*, 87 AD3d 1049, 930 N.Y.S.2d 22, 2011 N.Y. Slip Op. 06548 [2d Dept 2011], and *Karoon v. New York City Tr. Auth.*, 241 AD2d 323, 659 N.Y.S.2d 27 [1st Dept 1997]. Accordingly, the Defendants' motion for dismissal of the negligent hiring and supervision claims are granted.[2]

Eighth Cause of Action (Vicarious Liability)

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of *respondeat superior* and no claim may proceed against the employer for negligent hiring, retention, supervision or training." *Quiroz v. Zottola*, 96 AD3d 1035, 1037, 948 N.Y.S.2d 87, 89 [2d Dept 2012], *quoting Talavera v. Arbit*, 18 AD3d 738, 738, 795 N.Y.S.2d 708, 709 [2d Dept 2005]. "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment." *Davis v. Larhette*, 39 A.D.3d 693, 694, 834 N.Y.S.2d 280, 283 [2d Dept 2007]. Defendants contend that Defendant Bista's conduct at the

[2] *See* Footnote 1.

time of the alleged incident was not made within the scope of his employment as the general manager of the restaurant. However, the deposition testimony of Defendant Bista and the video seem to suggest that his physical contact with Plaintiff was, in fact, within the scope of his managerial role. In his deposition, Defendant Bista clarified that he made physical contact with Plaintiff in order to have Plaintiff move away from the rotating door and the runners coming in and out of the kitchen. He also explained the restaurant "had a notice saying, like I said, no servers was allowed in the back…So [Plaintiff] came storming in the kitchen…So I told her that the policy is you come to me or tell Judith up front, and she's gonna tell me so we bring it out." (Page 38). Additionally, the video depicts the physical interaction between Plaintiff and Defendant Bista. Based on his own testimony, Defendant Bista's contact with Plaintiff was based upon what he understood was his duty as the manager to ensure the runner pathway was clear and servers did not enter the kitchen, pursuant to Jade's notices. Defendant Bista's conduct was arguably within the scope of his employment at the time of the incident. *See Lepore v. Town of Greenburgh*, 120 AD3d 1202, 992 N.Y.S.2d 329, 2014 N.Y. Slip Op. 06063 [2d Dept 2014], and *Montalvo v. Episcopal Health Servs., Inc.*, 172 AD3d 1357, 102 N.Y.S.3d 74, 2019 N.Y. Slip Op. 04158 [2d Dept 2019]. As a result, Defendants' motion for dismissal of Plaintiff's vicarious liability claim is denied in that Defendants have failed to make a *prima facie* showing of entitlement to summary judgment. As such it, it is unnecessary to address Plaintiff's opposition papers. "When the defendant fails to establish entitlement to judgment as a matter of law, the sufficiency of the plaintiff's opposition papers need not be considered (*see Junco v. Ranzi*, 288 AD2d 440, 733 N.Y.S.2d 897 (Mem), 2001 N.Y. Slip Op. 09530 [2d Dept 2001]." *Gamberg v. Romeo*, 289 AD2d 525, 736 N.Y.S.2d 64, 2001 N.Y. Slip Op. 10974 [2d Dept 2001].

Ninth Cause of Action (Breach of Contract)

In relation to Plaintiff's contention that Defendant Jade failed to tender payment to her and Jade was thereby unjustly enriched, Defendants rely upon the deposition testimony of Defendant Bista. During

his deposition, Defendant Bista stated, "I recall one time the whole restaurant, like half the employees got their check bounced, yes, including mine…Everybody – everybody's check got bounced, so the owners offered to pay all the check again. And if there was any fee involved from the bank, they even paid that." (Page 59). Defendant also rely on Mr. Kandhorov's deposition testimony. During his deposition, Mr. Kandhorov stated that checks bouncing at the restaurant was a "normal occurrence" because "the account was with insufficient funds." (Page 63). When asked whether he knew, in Plaintiff's case, if the checks were stopped or dishonored for insufficient funds, Mr. Kandhorov stated, "[t]hey clearly state on the checks for NSF, nonsufficient funds, and all of [their] employees were reimbursed the nonsufficient funds fees that their bank incurred. In which case, [he] believe[d] [Plaintiff's] was $25 per check or $12 per week." (Pages 63-64). Additionally, Defendants rely upon copies of checks and bank statements that indicate overdraft fees and the check reimbursement fees. (NYSCEF Doc. No. 92).

Plaintiff relies on her deposition testimony to make her *prima facie* showing that she was not tendered payment. During her deposition, when asked whether Defendant Jade owed her any money for the work she did, Plaintiff stated, "[f]or the work that I did, no." (Page 76). Subsequently, when asked whether Defendant Jade owed her money for return check fees, Plaintiff stated, "[t]hey didn't implement or give me the money for the fee." (Page 80). Plaintiff does not acknowledge or deny the existence or accuracy of the copies of checks and bank statements that Defendants proffer in support of their motion. Plaintiff has failed to raise a material issue of fact as to this claim. Moreover, Plaintiff denied during her deposition that she signed an employment contract and Plaintiff does not state in her pleading or bill of particulars that she was not afforded a military duty accommodation. Accordingly, Defendants' motion for dismissal of the breach of contract claim is granted.

Defendants' Motion for Sanctions

In addition to their motion for summary judgment, Defendants move for sanctions against Plaintiff and her attorneys on the basis that the instant action has been brought to harass or injure the Defendants. The Court finds that the Defendants' motion for sanctions should be denied.

> " "A court, 'in its discretion, may award to any party or attorney in any civil action or proceeding before the court ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct' " (*Stone Mtn. Holdings, LLC v. Spitzer,* 119 A.D.3d 548, 550, 990 N.Y.S.2d 39, quoting 22 NYCRR 130–1.1 [a]). "Although the advancement of a meritless position may serve as the basis for a finding of frivolity, the standard for such a showing is high: the rule provides that a position will be deemed frivolous only where it is 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law' " (*Stone Mtn. Holdings, LLC v. Spitzer,* 119 A.D.3d at 550, 990 N.Y.S.2d 39, quoting 22 NYCRR 130–1.1[a]; *see Mascia v. Maresco,* 39 A.D.3d 504, 505, 833 N.Y.S.2d 207; *Kucker v. Kaminsky & Rich,* 7 A.D.3d 491, 492, 776 N.Y.S.2d 72). "The party seeking sanctions has the burden to demonstrate that its opponent's conduct was frivolous within the meaning of 22 NYCRR 130–1.1(c)" (*Stone Mtn. Holdings, LLC v. Spitzer,* 119 A.D.3d at 550, 990 N.Y.S.2d 39)."

-*West Hempstead Water Dist. v. Buckeye Pipeline Co., L.P.*, 152 AD3d 558, 558-559, 58 N.Y.S.3d 121, 122, 2017 N.Y. Slip Op. 05473 [2d Dept 2017].

This Court finds that the Defendants have failed to establish that the Plaintiff's contentions are completely without merit in law. Issues of fact remain with respect to Plaintiff's claims as discussed herein.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendants' motion (motion sequence #4) for summary judgment is granted as to the Plaintiff's first, third, sixth, seventh, and ninth causes of action and these causes of action are dismissed. Defendants' motion is denied in relation to Plaintiff's second, fourth, fifth, and eighth causes of action, which shall continue. Defendants application for sanctions as against Plaintiff and her attorneys is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.