

**Poulard v Northwell Health, Inc.**

2024 NY Slip Op 31714(U)

May 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 500789/2023

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF KINGS: PART 73

Index No.: 500789/2023  
 Motion Date: 4/1/24  
 Mot. Seq. No.: 2

-----X  
 KENCES POULARD,

Plaintiff,

-against-

NORTHWELL HEALTH, INC., and  
 NORTHWELL HEALTHCARE, INC.,

**DECISION/ORDER**

Defendants.  
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Upon the following e-filed documents, listed by NYSCEF as item numbers 18-24, 28-30, and 31-33, the pre-answer motion of defendants NORTHWELL HEALTH, INC. and NORTHWELL HEALTHCARE, INC. (collectively, "defendants") for an order dismissing the amended complaint, dated April 23, 2023, of plaintiff KENCES POULARD ("plaintiff") is decided as follows:<sup>1</sup>

The first branch of defendants' motion which is for an order, under CPLR 3211 (a) (1), dismissing the entirety of the amended complaint as barred by documentary evidence, is *denied*. Defendants' proffered documents – the affidavit of Megan Curran, a Manager in the Human Resources Department (NYSCEF Doc No. 20), the affidavit of Amanda W. Elbayar, a Director of Talent Acquisition, On-boarding, and Compliance in the Human Resources Department (NYSCEF Doc No. 31), and the respective attachments to those affidavits (NYSCEF Doc Nos. 21 and 32) – are not "documentary" in nature under CPLR 3211 (a) (1), and, in any event, are incapable

<sup>1</sup> In the interest of brevity, the Court assumes the parties' familiarity with the underlying facts, procedural history, and the issues presented, to which the Court refers only as necessary to explain its determination (*see e.g. Longe v. City of NY*, 802 Fed. Appx 635, 636 [2d Cir 2020]).

(either individually or collectively) of establishing a defense to plaintiff's claims as a matter of law (*see Pergament v Government Empls. Ins. Co.*, 225 AD3d 799 [2d Dept 2024]; *Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 795 [2d Dept 2013]).

The second branch of defendants' motion which is for an order, under CPLR 3211 (a) (2), dismissing the first and second causes of action of the amended complaint (as pleaded in ¶¶ 57 through 64) under the New York City Human Rights Law is *granted*, and such causes of action are dismissed. The alleged incidents, as pleaded in the amended complaint, took place in Long Island, New York, outside the boundaries of New York City, and caused no impact within New York City (*see Hoffman v Parade Publications*, 15 NY3d 285, 291 [2010]; *Hardwick v Auriemma*, 116 AD3d 465, 466-467 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]; *Fernandez v POP Displays*, 2017 NY Slip Op 30012(U), \*3 [Sup Ct. NY County 2017]; *Ortiz v Haier Am. Trading, LLC*, 2011 NY Slip Op 31414(U), \*5 [Sup Ct. NY County 2011]).<sup>2</sup>

The third branch of defendants' motion which is for an order, under CPLR 3211 (a) (5), dismissing (as relevant herein) the third and fourth causes of action of the amended complaint (as pleaded in ¶¶ 65 through 72) under the New York State Human Rights Law as time-barred is *granted to the extent* that such causes of action, insofar as predicated on the alleged incidents which took place prior to January 9, 2020,

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<sup>2</sup> See also *Mejia v White Plains Self-Storage Corp.*, 2020 WL 247995, \*3-4 (SD NY 2020); *McKinney v Tannier*, 2019 WL 3067116, \*2 (SD NY 2019); *Kearse v ATC Healthcare Servs.*, 2013 WL 1496951, \*2 (SD NY 2013); *Wahlstrom v Metro-North Commuter R.R. Co.*, 89 F Supp 2d 506, 527 (SD NY 2000); *Accord Meyers v Medco Health Sols., Inc.*, 2012 WL 4747173, \*4-55 (SD NY 2012), *modified on reconsideration on other grounds* 2015 WL 1500217, \*5 (SD NY 2015).

are dismissed. It is true, as plaintiff asserts, that the continuing violation doctrine permits consideration of all acts relevant to a claim, including those that would otherwise be time-barred, so long as such acts are part of “a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint” (*James v City of NY*, 144 AD3d 466, 467 [1st Dept 2016] [internal quotation and citation omitted]). Nevertheless, “[t]he continuing violation doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct” (*Peckham v Island Park Union Free School Dist.*, 167 AD3d 641, 642 [2d Dept 2018] [internal quotation marks omitted]). “The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs” (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks omitted]). Here, the continuing violation doctrine does not apply because the amended complaint fails to allege facts comprising a single continuing pattern of unlawful conduct extending into the limitations period immediately preceding the initiation of this action, but rather alleges discrete events, involving different actors, and occurring months to years apart (*see Campbell v New York City Dept. of Educ.*, 200 AD3d 488, 489 [1st Dept 2021]; *Mira v Harder [Evans]*, 177 AD3d 426 [1st Dept 2019]; *James*, 144 AD3d at 467; *Llanos v City of NY*, 129 AD3d 620 [1st Dept 2015]).<sup>3</sup>

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<sup>3</sup> Compare *Crawford v American Broadcasting Co., Inc.*, 216 AD3d 507, 508 (1st Dept 2023); *Long v Aerotek, Inc.*, 202 AD3d 1216, 1218-1219 (3d Dept 2022); *Judy v City of NY*, 142 AD3d 821, 823 (1st Dept 2016); *Kimmel v State*, 49 AD3d 1210, 1210-1211 (4th Dept 2008), *lv dismissed* 11 NY3d 729 (2008).

The fourth and final branch of defendants' motion which is for an order, under CPLR 3211 (a) (7), dismissing the extant (*i.e.*, the non-time-barred) portions of the third and fourth causes of action of the amended complaint under the New York State Human Rights Law (as pleaded in ¶¶ 65 through 72) for failure to state a claim is *denied* as to the third cause of action (*i.e.*, hostile work environment) with the exception of plaintiff's demand for punitive damages, and is *granted* as to the fourth cause of action (*i.e.*, failure to promote/hire).

The amended complaint (in ¶¶ 66-68 as predicated on ¶¶ 38-50) adequately alleges, as and for its third cause of action, a timely claim for hostile work environment under the New York State Human Rights Law for the period from "mid-late January 2020" to "November . . . 2022." Defendants' contention that the complained-of conduct at issue was "a petty slight or trivial inconvenience" (while a potentially valid argument at the summary judgment stage<sup>4</sup>) constitutes, at the pre-answer motion to dismiss stage, an affirmative defense to be raised in an answer (*see Kassapian v City of NY*, 155 AD3d 851, 853 [2d Dept 2017]; *Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 [2d Dept 2016]; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

However, the allegations in the amended complaint do not support the demand for punitive damages against defendants (in ¶ 67 and in "Wherefore" clause, ¶ D) (*see Del*

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<sup>4</sup> *See e.g. DeAngelo v MAXIMUS/NY Medicaid Choice*, 2022 WL 3043665, \*26 (SD NY 2022); *Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 453 (ED NY 2013) (collecting authorities).

*Vecchio v Gangi*, 225 AD3d 666, 671 [2d Dept 2024]; *Dash Windows of L.I., Inc. v Bivona*, 216 AD3d 915, 916 [2d Dept 2023]).

Conversely, plaintiff's fourth cause of action for failure to promote/hire under the New York State Human Rights Law fails to allege (in ¶¶ 69-72 as predicated on ¶¶ 53-56) that she was not promoted (or hired) to a supervisor position in the summer of 2022 in retaliation for (or as a quid pro quo for her failure to accede to) the alleged sexual innuendos by one of the three individuals who interviewed her for the position.<sup>5</sup> Further, the amended complaint fails to allege that plaintiff and the promoted individual were "similarly situated in all material respects" (*Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177 [1st Dept 2005] [internal quotation marks omitted], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]). Rather, the amended complaint simply alleges (in ¶ 56) that "[t]he individual selected for this promotion was a relatively new employee with 5+ years less tenure than [plaintiff]." The amended complaint is, thus, bereft of key allegations that the promoted individual had the same job title as plaintiff, had the same responsibilities or job requirements as plaintiff, reported to the same supervisors, or was employed in the same unit as plaintiff (*see Etienne v MTA New York City Tr. Auth.*, 223 AD3d 612, 612-613 [1st Dept 2024]).<sup>6</sup>

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<sup>5</sup> In that regard, the amended complaint alleges (in ¶¶ 54-55) that "[a named individual] was one of the three managers who interviewed [plaintiff] for this position," and that "[plaintiff] was informed she did not get the job by [such individual], who was a (or the) decision-maker as to who would be promoted into this position." The skimpy allegations are inadequate to establish a cause-and-effect relationship between the lack of promotion and the named individual's participation in the interview.

<sup>6</sup> *Cf. Pelepelin v City of NY*, 189 AD3d 450, 452 (1st Dept 2020).

Accordingly, it is

ORDERED that defendants' pre-answer motion to dismiss is *granted to the extent* that:

(1) the first and second causes of action under the New York City Human Rights Law are *dismissed* for lack of subject matter jurisdiction under CPLR 3211 (a) (2);

(2) the portions of the third and fourth causes of action under the New York State Human Rights Law, insofar as predicated on the alleged incidents which took place prior to January 9, 2020, are *dismissed* as time-barred under CPLR 3211 (a) (5);

(3) the balance of the fourth cause of action under the New York State Human Rights Law (*i.e.*, failure to promote/hire) is *dismissed* for failure to state a claim under CPLR 3211 (a) (7); and

(4) plaintiff's demand for punitive damages (in ¶ 67 and in "Wherefore" clause. ¶ D) as to the surviving third cause of action under the New York State Human Rights Law for the alleged hostile work environment for the period from "mid-late January 2020" to "November . . . 2022" (¶¶ 66-68 as predicated on ¶¶ 38-50), is *stricken*; and the remainder of defendants' motion is denied; and it is further

ORDERED that for the avoidance of doubt, this action shall proceed solely on plaintiff's third cause of action under the New York State Human Rights Law (*i.e.*, hostile-work environment claim), insofar as such claim is predicated on the alleged incidents which took place from "mid-late January 2020" to "November . . . 2022" as pleaded in the amended complaint (specifically, ¶¶ 66-68 as predicated on ¶¶ 38-50, with the exception of the stricken demand for punitive damages); and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision/Order with notice of entry on defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that, in accordance with CPLR 3211 (f), defendants shall interpose an answer to the extant portions of the amended complaint within ten days after the aforementioned electronic service of this Decision/Order with notice of entry by plaintiff's counsel on defendants' counsel.

*This constitutes the Decision/Order of the Court.*

Dated: May 8, 2024

*P.P.S.*

PETER P. SWEENEY, J.S.C.

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