SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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TERESITA LOPEZ,

Plaintiff,

- v -

DR. RUSSELL F. TRAHAN, D.P.M., P.C.,DR. RUSSELL F. TRAHAN, INDIVIDUALLY

Defendant.

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INDEX NO. 155637/2020

MOTION DATE 02/10/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, Defendants Dr. Russel F. Trahan, D.P.M., P.C. ("Trahan P.C.") and Dr. Russel F. Trahan, individually ("Dr. Trahan") (collectively "Defendants") motion for summary judgment dismissing Plaintiff Teresita Lopez ("Plaintiff")'s Complaint is granted in part and denied in part. Defendants' motion pursuant to CPLR § 3126 seeking an order issuing sanctions for spoliation of evidence is likewise denied. Defendants' motion pursuant to CPLR § 3042(c) is denied.

A. Background

1. Pertinent Facts

This is an action seeking damages for alleged employment discrimination in violation of the New York State Human Rights Law ("NYSHRL"), New York City Human Rights Law ("NYCHRL"), and assault, battery, and intentional infliction of emotional distress (NYSCEF Doc. 1). Plaintiff is a 68-year-old Puerto Rican woman (NYSCEF Doc. 18 at ¶¶ 2-4; *see also* NYSCEF Doc. 28 at 34:4-6). Dr. Trahan is a podiatrist who owns his own medical office, Trahan P.C.

Plaintiff was hired to be Dr. Trahan's office manager sometime in 2011 (NYSCEF Doc. 28 at 37:10-16).

Plaintiff testified that she was a good employee, but Dr. Trahan would at time start yelling, tell Plaintiff that she was slow, that she was old, and that she was an old hag in front of other co-workers (*id.* at 112:2-9). Plaintiff also testified that on August 23, 2017 Dr. Tahan had an uncontrolled temper tantrum where he yelled and cursed at Plaintiff, violently shoved her and pinched her right arm which caused her to be hospitalized for bruises and neck pain (*id.* at 113:5-25; 114-115). Plaintiff also testified that Dr. Trahan made fun of her Puerto Rican accent in front of patients and say "Puerto Ricans don't know how they talk because they talk so quickly." (*id.* at 143:13-23). She also testified that Dr. Trahan threw a chart at her face on April 22, 2018 while screaming at the Plaintiff because there were no patients (*id.* at 232:15-25). Plaintiff testified she left to file a police report when Dr. Trahan apparently grabbed her and dragged her back into the office (*id.* at 233:5-16).

Yolanda Lebron, a patient who treated with Dr. Trahan once a week beginning in 2017 provided an affidavit stating that Plaintiff was always pleasant and that she found Plaintiff to be hardworking, caring, compassionate, and helpful (NYSCEF Doc. 42 at ¶¶ 1-4). Ms. Lebron also stated that she witnessed Dr. Trahan in the summer of 2019 yelling at the Plaintiff repeatedly saying "you're too old for this." (*id.* at ¶ 6). Devon Grant, a former employee, also provided an affidavit swearing that Plaintiff was efficient and a necessary addition to Dr. Trahan's practice, but that Dr. Trahan regularly berated Plaintiff and made inappropriate remarks about her age and national origin, including calling her an old lady and telling her that she is "too old." (NYSCEF Doc. 43 at ¶¶ 1-7). Devon Grant also stated that Dr. Trahan regularly mocked Plaintiff's pronounced accent (*id.* at ¶ 10).Another employee, Brenda Feliciano, likewise stated that Plaintiff

was a hardworking and loyal employee who was well liked by employees and patients (NYSCEF Doc. 44 at ¶¶ 9-10). Ms. Feliciano testified that Dr. Trahan regularly referred to Plaintiff as an "old hag." Ms. Feliciano stated she witnessed on at least five occasions Dr. Trahan stand in front of the door and shove Plaintiff back in as she tried to leave the office (*id.* at ¶ 20).

2. Defendants' Motion

Defendants have filed the instant motion seeking dismissal of Plaintiff's complaint on various grounds. First, Defendants ask this Court to strike Plaintiff's Complaint as a spoliation sanction. Defendants specifically seek spoliation because Plaintiff deleted text messages between herself and Dr. Trahan. Defendants also seek an order of preclusion because Plaintiff did not provide a bill of particulars.

Finally, Defendants argue they are entitled to summary judgment dismissing Plaintiff's NYCHRL and NYSHRL causes of action because Plaintiff cannot establish a prima facie case of discrimination based on age, gender or national origin. Defendants also argue they are entitled to a same actor inference because Defendants hired and promoted Plaintiff knowing her age, national origin and gender, which warrants dismissal. Finally, Defendants seek dismissal of Plaintiff's intentional infliction of emotional distress claims.

In opposition, Plaintiff argues that she has made a prima facie case of discrimination and has suffered adverse employment actions when Dr. Trahan took away her managerial responsibilities and constructively discharged Plaintiff. Plaintiff argues the numerous fact affidavits produced substantiate her version of events and create a triable issue of fact. Moreover, Plaintiff points to the lack of any performance evaluations indicating substandard employment performance. Plaintiff further argues that intolerable working conditions, including alleged physical abuse, create an issue of fact as to her constructive discharge claim. Plaintiff also argues

Defendants are not entitled to a same actor inference due to the passage of time between the negative employment actions and Plaintiff's hiring. As for Defendants' spoliation argument, Plaintiff argues the facts surrounding the deletion of text messages do not rise to the level of striking Plaintiff's Complaint. Finally, Plaintiff produced a bill of particulars.

In reply, Defendants argue that spoliation sanctions are appropriate due to the prejudice they are facing. Defendants further that there is no evidence in the record that Plaintiff was demoted or that her working conditions were intolerable. Finally, Defendants argue there are no circumstances which give rise to an inference of discrimination.

B. Discussion

1. Plaintiff's Motion to Preclude

The branch of Plaintiff's motion seeking an order of preclusion pursuant to CPLR § 3042(c) is denied. As a preliminary matter, Plaintiff served a response to Defendant's demand for a bill of particulars on November 10, 2023 (NYSCEF Doc. 39). Although it is not verified, the Court does not find non-compliance to be so willful as to issue an order as drastic as precluding Plaintiff from presenting certain evidence. The record indicates that at prior discovery conferences, the parties represented to the Court that discovery was largely complete and had never raised the failure to provide a bill of particulars as an issue (NYSCEF Docs. 9-15; *see also* NYSCEF Doc. 31). In fact, it seems that it was Defendants' own oversight in failing to follow up on a demand for a bill of particulars until after the note of issue had been filed (NYSCEF Doc. 31). Based on these representations to the Court, Defendants' own apparent oversight, and the fact that a bill of particulars has since been served, the Court denies Plaintiff's motion to preclude. The Court does order Plaintiff to provide a **verified** bill of particulars within fifteen days of entry of this Decision

and Order, and should any further issues arise with compliance the parties are directed to e-mail the part-clerk to set up a conference to resolve said issues.

2. Spoliation

This branch of Plaintiff's motion is likewise denied, without prejudice, with leave to renew at the time of trial. To succeed on a motion for spoliation, the moving party must show (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind;' and (3) the destroyed evidence was relevant to the party's claim or defense (*Pegasus Aviation I, Inc. v VarigLogistica S.A.*, 26 NY3d 543, 547 [2015]). A Plaintiff comes under a duty to preserve evidence once it reasonably anticipates litigation (*Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 41 [1st Dept 2013]). A spoliation finding is not appropriate where a party is not the sole source of the information and documents (*Peters v Peters*, 146 AD3d 503, 503-4 [1st Dept 2017]). Even where spoliation is found to have occurred, dismissal of a pleading is considered an extreme sanction, especially where a Plaintiff was not in sole possession of certain documents and those documents are not the sole means by which to establish a defense (*Alleva v United Parcel Service*, 112 AD3d 543, 544 [1st Dept 2013]). In such a circumstance, a lesser sanction, such as an adverse inference charge sought at trial, is more appropriate (*id.*).

Here, Plaintiff testified that she deleted her text messages with Dr. Trahan on September of 2019 but testified she did not contemplate a lawsuit until November of 2019. Although the deposition testimony of Plaintiff was unclear whether she contemplated the lawsuit in September of 2019 and November of 2019, the fact of the matter is that Dr. Trahan produced years worth of text messages between Plaintiff and himself and his counsel extensively questioned Plaintiff on the numerous text messages. In fact, the text messages are used as exhibits in support of

Defendants' motion for summary judgment. Curiously, neither party appears to have text messages from 2019. As the record at this time is unclear if Plaintiff deleted her text messages when she anticipated litigation, Defendants are in possession of the vast majority of text messages, the Court denies Defendants' request to strike Plaintiff's Complaint. Therefore, the motion is denied without prejudice. Should this case go to trial, Defendants may renew their application and seek an adverse inference charge.

3. Summary Judgment

i. Standard

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To establish a claim for discrimination under the NYSHRL and NYCHRL, a plaintiff must prove that she was (a) a member of a protected class; (b) was qualified for the position; (c) suffered an adverse employment action; and (d) establish that the adverse action occurred under circumstances giving rise to an inference of discrimination (*Hribovsek v United erebral Palsy of*

NYC, 223 AD3d 618, 619 [1st Dept 2024]). The standard for determining liability for discrimination-based claims under the NYCHRL is to ensure that discrimination plays no role in the disparate treatment of similarly situated individuals in the workplace (*Williams v New York City Housing Authority*, 61 AD3d 62, 76 [1st Dept 2009]). The NYSHRL, which was amended in 2019, mirrors the "play no-role" standard under the NYCHRL (*Hosking v Mem'l Sloan-Kettering Cancer Ctr.*, 186 AD3d 68, 64 n.1 [1st Dept 2020] ["this amendment is remarkably similar to the City HRL's Restoration Act"]; *Golston-Green v City of New York*, 184 AD3d 24, 35 [2d Dept 2020]). Courts are instructed to interpret the NYCHRL independently of state and federal anti-discrimination laws to create an independent body of jurisprudence that is maximally protective of civil rights (*see* New York Local Law 35 § 1). Repeated mocking of a plaintiff's accent can give rise to a hostile work environment claim (*Kwong v City of New York*, 204 AD3d 442, 445 [1st Dept 2022]).

ii. NYSHRL and NYCHRL Claims

Here, it is not in dispute that Plaintiff is a member of a protected class based on (a) age; (b) race; and (c) gender. Defendants cannot seriously argue they are entitled to summary judgment on the second element, which requires a showing that Plaintiff was qualified for her job. There are numerous fact affidavits from colleagues and a patient detailing that Plaintiff was a diligent and loyal worker. Moreover, there are no negative performance reviews in the record. At a minimum, this creates an issue of fact.

Under the NYSHRL, an adverse employment action includes (a) being demoted in title and (b) subjected to abusive and derogatory remarks about an accent or age (*Demir v Sandoz Inc.*, 155 AD3d 464, 466 [1st Dept 2017]; *Krebaum v Capital One, N.A.*, 138 AD3d 528 [1st Dept 2016]). Likewise, verbal abuse in the presence of co-workers and physical violence may give rise to a

discrimination and hostile work environment claim under the NYSHRL (*Walker v Triborough Bridge and Tunnel Authority*, 220 AD3d 554, 555 [1st Dept 2023]). Here, Defendants ask this Court to find that Plaintiff did not suffer an adverse employment action when there are non-party fact witness affidavits who state they witnessed Dr. Trahan physically push and grab Plaintiff, throw patient charts at Plaintiff, regularly mock Plaintiff's Puerto Rican accent, yell at Plaintiff, regularly call Plaintiff an "old hag," repeatedly yell at Plaintiff "you're too old for this," prevent Plaintiff from scheduling meetings with employees and even cancelling meetings Plaintiff had scheduled with employees despite Plaintiff being the "office manager." (NYSCEF Docs. 42-44). Viewing the facts in the light most favorable to Plaintiff, as this Court must on Defendants' motion for summary judgment, the Court finds there to be at a minimum triable issue of fact as to whether the above constitutes an adverse employment action.

Finally, the Court finds there to be sufficient evidence to create a triable issue of fact as to whether the adverse employment actions occurred under circumstances giving rise to an inference of discrimination as it relates to Plaintiff's age and race. The record is rife with numerous witnesses testifying that Dr. Trahan made disparaging remarks about Plaintiff's age and her Puerto Rican accent in front of patients and employees. Viewing the facts in the light most favorable to Plaintiff, these repeated disparaging remarks, made in front of multiple witnesses who have come forth with affidavits, creates a triable issue of fact as to whether adverse employment actions suffered by Plaintiff occurred under circumstances giving rise to an inference of discrimination.[1] (*see Rollins v Fencers Club, Inc.*, 128 AD3d 401 [1st Dept 2015] [board member's alleged statements to executive director that "you're at that age where you need more rest. You look tired" directly reflected age based discriminatory bias and raised inference of age-related bias]).

[1] There is no evidence in the record of any gender related comments and therefore this portion of Plaintiff's Complaint is dismissed.

Because there are triable issues of fact which prevent granting Defendants' motion for summary judgment dismissing the NYSHRL claims, the NYCHRL claims must necessarily survive as the NYCHRL is to be interpreted even more liberally and provide even more expansive protections than the NYSHRL (*see* New York Local Law 35 § 1). For the aforementioned reasons, the Court finds that Dr. Trahan's purported derogatory remarks coupled with physical intimidation and violence, attested to by multiple witnesses, prevents this Court from dismissing the hostile work environment portion of Plaintiff's Complaint.

Dr. Trahan's argument that he was close to Plaintiff in age does not eliminate the triable issue of fact regarding his possible discriminatory animus (*Rollins, supra* citing *O'Connor v Consolidated Coin Caterers Corp.*, 517 US 308, 312 [1996]). Likewise, although Dr. Trahan submits text messages which purportedly show a friendly relationship between himself and Plaintiff, this ignores Plaintiff's deposition testimony wherein she stated she sent these texts to "sweeten him up" to avoid any hostile behavior in the workplace. The text messages are therefore insufficient to dispel of triable issues of facts. Likewise, Defendants' "same actor inference" argument is insufficient to grant summary judgment due to the lapse in time from Plaintiff's hiring to the allegedly discriminatory acts (*Tirschwell v TCW Group, Inc.*, 194 AD3d 665, 666 [1st Dept 2021] [1 ½ year passage between hiring and discriminatory act warranted denying summary judgment motion made on same actor inference argument]). The passage of time between Plaintiff's hiring and the allegedly discriminatory acts far exceed the passage of time in *Tirschwell*, and therefore the Court is unable to grant Defendants summary judgment on this argument.

iii. Intentional Infliction of Emotional Distress (IIED)

To establish a claim for intentional infliction of emotional distress, a Plaintiff must show (1) extreme and outrageous conduct (2) intent to cause, or disregard of a substantial probability of

causing severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. For conduct to be extreme and outrageous, it must be 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 (*164 Mulberry Street corp. v Columbia University*, 4 AD3d 49 [1st Dept 2004]). A deliberate and prolonged campaign of physical harassment in a relationship with uneven power dynamics may give rise to a claim for intentional infliction of emotional distress (*Petty v Law Office of Robert P. Santoriella, P.C.*, 200 AD3d 621 [1st Dept 2021]).

Here, there is evidence in the record that Plaintiff was the "bread winner" for the household which included her son and disabled granddaughter. There is corroborated record evidence that Dr. Trahan, on multiple occasions, pushed and grabbed Plaintiff preventing her from leaving the office, and would intimidate her by slamming files in front of her face or even throwing patient files at her. There is likewise corroborated evidence that he would repeatedly yell at her in front of patients and make disparaging remarks, including calling her an "old hag." There are multiple hospital records and a police report related to the instances of alleged physical abuse, and Plaintiff now claims she suffers from post-traumatic stress disorder. Similar to the facts of *Petty*, the evidence in the record also supports an inference that there is an uneven power dynamic as Dr. Trahan was Plaintiff's boss and knew that Plaintiff was taking care of a disabled granddaughter. Viewing the facts in the light most favorable to the non-movant, as this Court must, the Court finds that a reasonable jury could find Dr. Trahan's behavior, as Plaintiff's boss, could give rise to an intentional infliction of emotional distress claim. If a jury credits Plaintiff and her witnesses testimony, they may find Dr. Trahan's behavior extreme and outrageous and that he disregarded the substantial probability that his actions may cause Plaintiff severe emotional distress. These are issues of fact which the Court is unable to resolve on a motion to dismiss (*Birnbaum v Hyman*, 43

AD3d 374, 375 [1st Dept 2007] [issue finding, rather than issue-determination, is Court's role in ruling on summary judgment motion]).

Accordingly, it is hereby,

ORDERED that the branch of Defendants' motion seeking an order of preclusion due to Plaintiff's failure to provide a verified bill of particulars is conditionally denied, and Plaintiff is directed to provide a verified bill of particulars within fifteen days of entry of this Decision and Order; and it is further

ORDERED that the branch of Defendants' motion seeking spoliation sanctions is denied without prejudice, with leave to renew at the time of trial should Defendants' seek an adverse inference charge; and it is further

ORDERED that Defendants' motion for partial summary judgment is granted in part and denied in part; and it is further

ORDERED that Defendants' motion for partial summary judgment is granted solely to the extent that any claims related to gender based discrimination are dismissed; and it is further

ORDERED that Defendants' motion for summary judgment is otherwise denied; and it is further

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ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

6/20/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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