UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YAN PING XU, Plaintiff,	08 Civ. 11339 (DLC)
-v-	OPINION AND ORDER
THE CITY OF NEW YORK s/h/a THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, DR. JANE R. ZUCKER, DENNIS J. KING, BRENDA M. MCINTYRE, Defendants.	

Appearances:

For the plaintiff:
Yan Ping Xu, pro se
12 Mallar Avenue
Bay Shore, NY 11706

For defendants Jane R. Zucker and Dennis J. King:
Bertrand Madsen
United States Attorney's Office
86 Chambers Street, 5th Floor
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DENISE COTE, District Judge:

The plaintiff has moved for reconsideration of the August 2, 2010 Opinion and Order granting the motion for judgment on the pleadings filed by defendants Jane Zucker ("Zucker") and Dennis King ("King," and together, the "Federal Defendants").

Xu v. City of New York, No. 08 Civ. 11339(DLC), 2010 WL 3060815

(S.D.N.Y. Aug. 3, 2010) ("the August 2 Opinion").[1] For the following reasons, the motion is granted in part.

BACKGROUND

The pro se plaintiff, Yan Ping Xu ("Xu") was employed at the New York City Department of Health and Mental Hygiene ("DOHMH") doing data analysis and other computer database work from June 4, 2007 to March 13, 2008, when she was fired. On July 14, 2008, Xu commenced an Article 78 proceeding in New York Supreme Court, alleging that she was given a negative performance review and was fired in retaliation for speaking out about alleged data discrepancies in a DOHMH survey that was sent to the Centers for Disease Control and Prevention ("CDC") over Xu's objection. In the proceeding, she alleged that her employer's actions violated the state whistleblower statute, New York Civil Service Law § 75-b ("§ 75-b"). Pursuant to § 75-b, public employees cannot be fired

> because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

[1] Familiarity with the August 2 Opinion is assumed.

N.Y. Civ. Serv. Law § 75-b(2)(a). In order to avail oneself of the protections of § 75-b,

> [p]rior to disclosing information . . ., an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body . . . .

Id. § 75-b(2)(b).

On January 29, 2009, the Hon. Paul G. Feinman dismissed the Article 78 proceeding "on its merits." Xu v. N.Y.C. Dep't of Health, No. 109543/09, 2009 WL 222096, at *1 (N.Y. Sup. Ct. Jan. 23, 2009) (the "Article 78 Decision"). The court held that Xu failed to state a claim for retaliation under § 75-b because she "did not sufficiently disclose to the agency that the wrong data were being used nor provide it time to correct the error" and because she had failed to establish that the violation created a substantial or specific danger to the public. Id. at *4. Although the court found that there were unresolved questions of fact concerning whether Xu was a probationary employee at the time she was fired and whether her firing was procedurally proper, it held that her petition for relief was premature because she had failed to exhaust her administrative remedies.

Id. Additionally, the court denied Xu's motion to file a late notice of claim, a prerequisite for maintaining her suit. Id. Xu appealed that decision on February 19, 2009.

On March 13, 2009, Xu filed a complaint in the New York Supreme Court against the City of New York and the DOHMH (the "Plenary Action"), alleging the same claims as she had made in the Article 78 proceeding: that she was given a negative performance evaluation and was fired in retaliation for speaking out about the erroneous data. On October 14, 2009, the Hon. Eileen A. Rakower dismissed Xu's § 75-b claim as barred by collateral estoppel and denied Xu's motion to amend the complaint as futile. Xu v. City of New York, No. 103544/09, slip op. at 4 (N.Y. Sup. Ct. Oct. 14, 2009) (the "Plenary Action Decision"). Xu's appeal of the Plenary Action Decision is pending.

Meanwhile, Xu commenced this action on December 30, 2008 ("the Federal Action"). In the Federal Action, Xu brings two sets of claims against the City of New York, DOHMH, and the three individual defendants. The first set of claims alleges employment discrimination based on Xu's national origin, race, color, and gender. The second consists of claims for retaliation for speech and violations of due process. The August 2 Opinion granted the Federal Defendants' motion to dismiss all the claims against them. On October 4, discovery on

the claims against the remaining defendants (the "Municipal Defendants") in the Federal Action was stayed pending a decision on Xu's motion for reconsideration.

Xu's employment discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); 42 U.S.C. §§ 1981, 1983, 1985(3); the Equal Protection Clause; and under New York City and New York State laws were dismissed for lack of subject matter jurisdiction and failure to state a claim. August 2 Opinion, at *2-3. Xu's remaining claims -- a First Amendment retaliation claim, a Due Process Clause claim, and claims under state and local collective bargaining and retaliation statutes (including § 75-b) -- were dismissed on the ground that Xu was precluded from litigating issues that had previously been resolved against her or that she could have litigated in the two state court proceedings. Id. at *3-4. Specifically, the August 2 Opinion found that "the state court [in the Article 78 proceeding] necessarily decided two issues essential to Xu's § 75-b claim against her: the disclosure to a 'governmental body,' and the existence of a 'substantial and specific danger.'" Id. at *3. On that basis, Xu was barred by the doctrine of issue preclusion from re-litigating the § 75-b claim. The August 2 Opinion also found that Xu could have raised her "retaliation, deprivation of due process, and violation of the collective bargaining statute"

claims in the Plenary Action, the result being that "the doctrine of claim preclusion bars litigation of the remaining claims here." Thus, all of Xu's non-discrimination claims were dismissed on claim preclusion grounds; issue preclusion provided an additional reason to dismiss the § 75-b claim only.

On August 3, 2010, the New York Supreme Court, Appellate Division decided Xu's appeal of the Article 78 Decision. Xu v. N.Y.C. Dep't of Health, 906 N.Y.S.2d 222 (App. Div. 1st Dep't 2010) (the "Appellate Division Opinion"). The Appellate Division remanded the Article 78 petition for three reasons. First, the Appellate Division held that "it cannot be concluded . . . that petitioner failed to exhaust her administrative remedies." Id. at 226. Second, with respect to the § 75-b claim, the Appellate Division held that "there is no basis for concluding that petitioner's notification [of the data errors] to her supervisor, who apparently then discussed the matter with his superior . . . was insufficient" to state a claim. The court held that, on remand, a hearing should determine "what other persons petitioner should have contacted, and whether her failure to do so precluded the assertion of this lawsuit." Id. at 227. Finally, based on a letter Xu sent to the Department of Investigation advising it of her whistleblower claim within ninety days after she was fired, the Appellate Division ordered that the "directed hearing should also inquire into whether, at

least, the letter to the Department of Investigation gave the requisite notice" that might justify Xu's request to file a late notice of claim. Id. at 229.

On August 13, Xu filed a timely motion for reconsideration of the August 2 Opinion pursuant to Fed. R. Civ. P. 59(e) and Local Rule 6.3. Xu's principal argument is that the Appellate Division Opinion requires this Court to reconsider the August 2 Opinion's holdings regarding preclusion. The motion was fully submitted on September 17.

DISCUSSION

The standard for reconsideration is strict. "Generally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." In re BDC 56 LLC, 330 F.3d 111, 123 (2d Cir. 2003) (citation omitted). A motion for reconsideration is not an occasion to repeat arguments previously considered by a court and rejected. See Zoll v. Jordache Enters. Inc., No. 01 Civ. 1339(CSH), 2003 WL 1964054, at *2 (S.D.N.Y. Apr. 24, 2003) ("[Local Rule 6.3] is to be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." (citation

omitted)). Likewise, a party moving for reconsideration may not "advance new facts, issues, or arguments not previously presented to the Court." Nat'l Union Fire Ins. Co. v. Stroh Cos., Inc., 265 F.3d 97, 115 (2d Cir. 2001) (citation omitted). The decision to grant or deny the motion for reconsideration is within "the sound discretion of the district court." Aczel, 584 F.3d at 61 (citation omitted).

I. Reconsideration

Xu argues that the Appellate Division Opinion requires the Court to reconsider the August 2 Opinion's holding that she is precluded from litigating all of her non-discrimination claims. The August 2 Opinion relied on the Article 78 Decision's holding that Xu had failed to state a claim under § 75-b to find that issue preclusion barred Xu from alleging a § 75-b claim in the Federal Action. August 2 Opinion, 2010 WL 3060815, at *3. Now that the Appellate Division has reinstated the petition and required the Article 78 court to consider, among other things, whether Xu has stated a claim under § 75-b, that holding in the August 2 Opinion should be vacated.

The fact that the August 2 Opinion held that Xu additionally was barred from bringing a § 75-b claim on claim preclusion grounds does not require a different result. The Plenary Action Decision had also relied on issue preclusion to dismiss the § 75-b claim.

Reinstating Xu's § 75-b claim does not change the preclusive effect of the Plenary Action Decision on any of her other claims. There has been no showing that any other holding in the Plenary Action Decision is likely to be overturned on appeal. Matter of Amica Mut. Ins. Co., 445 N.Y.S.2d 820, 822 (App. Div. 2d Dep't 1981). And, despite her arguments to the contrary, Xu did not establish in her submissions to this Court that preceded the August 2 Opinion that she was not provided a full and fair opportunity to litigate the Plenary Action to a final judgment. Thus, the general rule that a case on appeal is final for purposes of preclusion will be followed. See Petrella v. Siegel, 843 F.2d 87, 90 (2d Cir. 1988). Therefore, Xu is barred from asserting claims that she brought or could have brought in the Plenary Action.

The Federal Defendants argue that the Plenary Action Decision, even if erroneous, precludes Xu from litigating the § 75-b claim in the Federal Action. It is true that "[t]he policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts." Reilly v. Reid, 379 N.E.2d 172, 175 (N.Y. 1978). The policy grounds for claim preclusion, however, "if applied too rigidly," can work "considerable

injustice." Id. The traditional arguments in favor of finality and repose, id., should give way because Xu has succeeded in having the predicate Article 78 proceeding reinstated.

II. Staying the Federal Action

The Federal Defendants argue that, at the very least, the Court should abstain from hearing this case in light of Xu's parallel state and federal proceedings. They seek either dismissal or a stay of the Federal Action, relying on the abstention principles announced in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). "The abstention doctrine comprises a few extraordinary and narrow exceptions to a federal court's duty to exercise its jurisdiction." Woodford v. Cmty. Action Agency of Greene Cnty., 239 F.3d 517, 522 (2d Cir. 2001) (citation omitted). Colorado River and its progeny "set forth the standards governing abstention when state and federal courts exercise concurrent jurisdiction simultaneously." Gregory v. Daly, 243 F.3d 687, 702 (2d Cir. 2001) (citation omitted). "These cases hold that the mere fact that parallel proceedings are pending in state court is insufficient to justify abdicating the 'virtually unflagging obligation' to exercise federal jurisdiction." Id. (quoting Colorado River, 424 U.S. at 817).[2]

[2] "Federal and state proceedings are 'concurrent' or 'parallel' for purposes of abstention when the two proceedings are

"The decision as to whether to stay a federal action on the ground that there is a related action pending in a state court is committed to the sound discretion of the district court." United States v. Pikna, 880 F.2d 1578, 1582 (2d Cir. 1989). When considering whether to grant such a stay, a federal court should consider

> (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Woodford, 239 F.3d at 522 (citation omitted). In considering the factors, "[n]o one factor is necessarily determinative," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983) (quoting Colorado River, 424 U.S. at 818-19), and "the balance is heavily weighted in favor of the exercise of

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essentially the same; that is, there is an identity of parties, and the issues and relief sought are the same." Nat'l Union Fire Ins. Co. v. Karp, 108 F.3d 17, 22 (2d Cir. 1997). The Federal Action is broader in scope than Xu's two state court proceedings, in that Xu has alleged employment discrimination claims only in federal court and has sued individual employees in the Federal Action that are not sued in the state court actions. The cases are parallel, however, because every claim in the state court actions also has been brought in the Federal Action and because each defendant sued in the state court actions is also sued on the same claims in the Federal Action.

jurisdiction. Thus, the facial neutrality of a factor is a basis for retaining jurisdiction, not for yielding it." Woodford, 239 F.3d at 522 (citation omitted).

A stay is warranted in this case. Staying the Federal Action pending the resolution of Xu's appeal of the Plenary Action and the conclusion of the reinstated Article 78 proceeding will avoid piecemeal litigation and the wasteful duplication of efforts by multiple courts. This factor weighs strongly in favor of a stay. Additionally, the timing of the suits weighs in favor of granting the stay. Xu commenced the Article 78 proceeding before the Federal Action. Although all of the defendants filed an answer in the Federal Action, and have not done so in the Article 78 proceeding or the Plenary Action, the Federal Action is not more advanced than either of the state actions. The Appellate Division Opinion, requiring a fact-finding hearing before the Article 78 court, represents at least as much advancement in the state court actions as has occurred in the Federal Action, where discovery has been scheduled but stayed for much of 2010. With respect to the fifth factor, federal law does not provide the rule of decision in any of the claims that Xu has brought in state court. Finally, there is no question, as to the sixth factor, that state procedures are adequate to protect Xu's federal rights during the pendency of the stay. The remaining factors, being

neutral, slightly favor the retention of federal jurisdiction, but do not outweigh the benefits of a stay with respect to avoidance of piecemeal litigation.

The remainder of Xu's arguments for reconsideration do not show that the August 2 Opinion overlooked any factual matter or legal argument that she had previously presented. The August 2 Opinion considered and rejected all of the remaining arguments Xu presents in her motion for reconsideration.

III. Section 1291(b)

To the extent that her motion for reconsideration is not granted, Xu moves to certify an immediate appeal from the August 2 Opinion pursuant to 28 U.S.C. § 1292(b). Section 1292(b) provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b) (emphasis supplied); Casey v. Long Island R.R. Co., 406 F.3d 142, 146 (2d Cir. 2005). This statute is to

be narrowly construed, as "the power to grant an interlocutory appeal must be strictly limited to the precise conditions stated in the law." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990) (citation omitted). It, therefore, "continues to be true that only 'exceptional circumstances'" warrant certification. Id. (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)).

Xu states that the August 2 Opinion "has violated [her] federally guaranteed civil rights and there is a controlling question of law as to which there is substantial ground for difference of opinion." Xu does not identify what controlling question of law presents a substantial ground for difference of opinion or show how certifying the appeal would advance the ultimate termination of the litigation. To the extent she argues that there is a difference of opinion with respect to whether she may maintain a Title VII claim against an individual in his or her individual capacity, that argument is rejected for the reasons stated in the August 2 Opinion. Xu has failed to make the showing required to justify certifying an appeal pursuant to 28 U.S.C. § 1292(b). See Noble Shipping, Inc. v. Euro-Maritime Chartering, Ltd., No. 03 Civ. 6039(DLC), 2004 WL 741285 (S.D.N.Y. Apr. 7, 2004).

CONCLUSION

Xu's August 13 motion for reconsideration is granted only to the extent that Xu is not barred from bringing a claim pursuant to § 75-b against the Federal Defendants. The Federal Action in its entirety, including claims against the Municipal Defendants, is stayed pending the resolution of Xu's appeal of the Plenary Action and the conclusion of the reinstated Article 78 proceeding.

SO ORDERED:

Dated: New York, New York
December 1, 2010

DENISE COTE
United States District Judge