[* 1]

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

PRESENT : DONNA M. MILLS _____ **PART** 58

Justice

INGRID LACOURT,

Plaintiff,

-v-

SHENANIGANS KNITS, LTD., et al.,

Defendants.

INDEX NO. 102391/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 3, 7, 8
Answering Affidavits– Exhibits	2, 4, 5
Replying Affidavits	6, 9

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

Dated: 10/6/11

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 58

INGRID LaCOURT,
Plaintiff,

- against -

SHENANIGANS KNITS, LTD., KATHY DAL PIAZ, a/k/a KATARINA DAL PIAZ LIEBOWITZ, SML SPORT LTD., a/k/a WYANDOTTE CIRCLE CORP., and LAUREN HANSEN, INC., *All Named Defendants Constituting an Integrated Enterprise and Single Employer*, and KATHY DAL PIAZ, a/k/a KATARINA DAL PIAZ LIEBOWITZ, *Individually, as Aider and Abettor*,
Defendants.

Index No.: 102391/11

DECISION/ORDER

MILLS, DONNA, J.:

In this action, plaintiff Ingrid LaCourt sues to recover damages, and for injunctive relief, alleging that defendants unlawfully terminated her employment based on disability, subjected her to race and national origin discrimination, and denied her medical leave, in violation of the New York State Human Rights Law (Executive Law § 290 et seq.) (NYSHRL), the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-101 et seq.)(NYCHRL), Civil Rights Law § 40-c, and the Family and Medical Leave Act of 1993 (29 USC § 2601 et seq.) (FMLA). The complaint asserts nine causes of action: disability discrimination under the NYSHRL and the NYCHRL (first and second); race and national origin discrimination under the NYSHRL and the NYCHRL (third and

fourth); aiding and abetting discrimination, as against defendant Kathy Dal Piaz individually (fifth); race, national origin, and disability discrimination under Civil Rights Law § 40-c (sixth); intentional infliction of emotional distress (seventh); violation of the FMLA (eighth); and for reinstatement (ninth). Defendants Kathy Dal Piaz (Dal Piaz), SML Sport Ltd., a/k/a Wyandotte Circle Corp. (SML), and Lauren Hansen, Inc. (LHI) (collectively, defendants)[1] move for partial summary judgment dismissing the cause of action alleging violation of the FMLA and dismissing the complaint in its entirety as against LHI. They also move to dismiss, pursuant to CPLR 3211 (a) (7), the causes of action alleging race and national origin discrimination, and intentional infliction of emotional distress.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment dismissing the eighth cause of action, alleging a violation of the FMLA ,on the grounds that plaintiff is not an "eligible" employee under the statute, because she was not employed for 12 months prior to requesting leave, and because SML does not have 50 or more employees and, therefore, is not a covered employer under the statute. Defendants also seek summary judgment dismissing the complaint against LHI on the grounds that it was dissolved in 2004, and it

[1]Defendant Shenanigans Knits, Ltd. has not answered or otherwise appeared in this action.

never employed plaintiff.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of its entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. *See* CPLR 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing has been made, to defeat summary judgment, the opposing party must "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact ... or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form." *Zuckerman*, 49 NY2d at 562. While the evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), the opponent "must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and "the issue must be shown to be real, not feigned...." *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562; *see William Iselin & Co. v Mann Judd Landau*, 71 NY2d 420, 425-426 (1988); *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714 (1st

Dept 2005).

The FMLA entitles an eligible employee of a covered employer "to a total of 12 workweeks of leave during any 12-month period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC § 2612 (a) (1) (D). It further entitles an employee to restoration to her previous position or an equivalent one when she returns to work. 29 USC § 2614 (a) (1) (A) and (B). *See Ghaffar v Willoughby 99 Cent, Inc.*, 2010 WL 3420642, *2, 2010 US Dist LEXIS 88888, *5 (ED NY 2010); *Pierce v HSBC Mortg. Corp. (USA)*, 19 AD3d 244, 245 (1st Dept 2005). An "eligible employee" is one who has been employed by the employer for at least 12 months and has at least 1,250 hours of service with such employer during the previous 12-month period (29 USC § 2611 [2] [A] [i] and [ii]; 29 CFR § 825.110 [a] [1] and [2]), and who is employed at a worksite where 50 or more employees are employed by that employer within 75 miles of that worksite. 29 USC § 2611 (2) (B) (ii); 29 CFR § 825.110 (a) (3).

The FMLA applies only to employers with "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 USC § 2611 (4) (A) (i); 29 CFR § 825.104 (a); *see Strohl v Brite Adventure Ctr., Inc.*, 2009 WL 2824585, *2, 2009 US Dist LEXIS 78145, *5-8 (ED NY 2009). Although "[n]ormally the legal entity

which employs the employee is the employer under FMLA" (29 CFR § 825.104 [c]), two or more entities may be deemed a single employer, and all of their employees counted to determine whether the combined entity is subject to the FMLA, if they meet the "integrated employer" test. *Id.*, § 825.104 (c) (2).

"A 'single employer' situation exists 'where two nominally separate entities are actually part of a single integrated enterprise....' In such circumstances, of which examples may be parent and wholly-owned subsidiary corporations, or separate corporations under common ownership and management, the nominally distinct entities can be deemed to constitute a single enterprise." *Arculeo v On-Site Sales & Mktg., L.L.C.*, 425 F3d 193, 198 (2d Cir 2005) (internal citations omitted). Generally, courts consider four factors to determine whether two or more companies are sufficiently interrelated to constitute a single employer: 1) common management; 2) interrelation between operations; 3) centralized control of labor relations; and 4) degree of common ownership/financial control. *Id.*; *see Ghaffar*, 2010 WL 3420642 at *2, 2010 US Dist LEXIS 88888 at *5-7; *Strohl*, 2009 WL 2824585 at *2-3, 2009 US Dist LEXIS 78145 at * 5-8; *see also Matter of Argyle Realty Assocs. v New York State Div. of Human Rights*, 65 AD3d 273, 278-279 (2d Dept 2009) (applying "single employer doctrine" in context of state human rights law).

Defendants contend that SML has fewer than 50 employees,

that it has no relationship with Shenanigans Knits, Ltd. (Shenanigans), and that LHI is a dissolved corporation. Therefore, they argue, the FMLA does not apply to them. In support of their motion, defendants submit an affidavit of Dal Piaz, who attests that she is President of SML, that SML employed plaintiff from May 13, 2009 to May 7, 2010, and that during the time that plaintiff was employed by SML, it had 43 employees, including herself and the other principal of the company, Christopher Dal Piaz. Dal Piaz Aff. in Support of Defendants' Motion, ¶¶ 1, 16, 19. Defendants submit payroll records to show that SML had 43 employees at the time that plaintiff was terminated. *See* Payroll Summary, Ex. 7 to Dal Piaz Aff. Dal Piaz also attests that while SML designs, manufactures, markets and sells fashion garments under several lines/labels, including a line known as "Lauren Hansen," Lauren Hansen, Inc. does not exist, having been dissolved in 2004. Dal Piaz Aff., ¶¶ 7, 20; *see* NYS Dept. of State Division of Corporations printout, Ex. 8 to Dal Piaz Aff. Dal Piaz further avers that she is not familiar with Shenanigans, and neither she nor any of the moving defendants has ever been affiliated with or has had any interest in or dealings with Shenanigans. Dal Piaz Aff., ¶ 23. Defendants submit a printout from the NYS Dept. of State Division of Corporations identifying Shenanigans as a domestic corporation whose status is "Inactive - Merged Out (Dec. 05, 1986)." *See*

Printout, Ex. 8 to Dal Piaz Aff. Defendants thus have made a prima facie showing that SML was plaintiff's employer, and LHI and Shenanigans were not.

In opposition to defendants' motion, plaintiff does not dispute that SML employed fewer than 50 people. *See* Nohavicka Aff. in Opp., ¶ 55. Plaintiff argues, however, that defendants constitute a single entity under the FMLA, and that they, in the aggregate, employ more than 50 employees.

With respect to LHI, plaintiff offers nothing to refute the evidence that LHI is a non-existent corporation, having been dissolved in 2004. Although plaintiff submits a copy of a memo, from plaintiff, with a "Lauren Hansen" letterhead, which apparently informs clients about the requirements for placing orders (*see* Ex. K to Nohavicka Aff. in Opp.), plaintiff shows no more than that, as Dal Piaz attests, Lauren Hansen is a division of SML. *See also* Aff. of Jane Keaveney.

As to Shenanigans, plaintiff fails to submit any admissible evidence to raise a triable issue of fact about whether SML and Shenanigans had common management, interrelated operations, centralized control of employees of both entities, and any common ownership or financial control. The conclusory assertions of plaintiff's attorney that defendants' employees share offices, phone lines, insurance policies, and hold office and social functions together, and that plaintiff interacted with, and

worked for Shenanigans (*see* Nohavicka Aff., ¶¶ 86, 19), are not based on personal knowledge and, in any event, are completely void of specific facts and unsupported by any admissible evidence. As plaintiff's counsel recognizes, the affirmation of a party's attorney, who lacks personal knowledge of the facts, is of no probative value.[2] *See Zuckerman*, 49 NY2d at 563; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317 (1st Dept 2002). Nor has plaintiff submitted an affidavit based on personal knowledge to support the claims of her attorney, or otherwise to oppose the motion. *See S.J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 342 (1974). Notably, plaintiff has not identified a single employee of Shenanigans, much less one with whom she interacted.

To the extent that plaintiff relies on the verified complaint to oppose the motion, the complaint sets forth no facts sufficient to support the allegations that Dal Piaz owned, controlled, and was in charge of managing all the corporate defendants, or that the defendants otherwise were an "integrated enterprise." Verified Complaint, ¶¶ 9-21. As to Shenanigans, the complaint alleges only that, "upon information and belief," it exists and meets the definition of an employer under the FMLA.

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[2]Plaintiff argues this in objecting to the affirmation of defendants' counsel (Nohavicka Aff., ¶ 12), although defendants' attorney did not submit an affirmation. Plaintiff's other "specific objections" (*see id.*, ¶¶ 6-11) are rejected: The affidavit of Dal Piaz submitted with the motion was signed and sworn to, and any initial objections to defendants' business records have been remedied by Dal Piaz's reply affidavit.

Id., ¶ 6. Representations made "upon information and belief," with no evidentiary support whatsoever, are insufficient to raise a triable issue of fact. *See Wood v Nourse*, 124 AD2d 1020, 1021, (4th Dept 1986); *Onondaga Soil Testing, Inc. v Barton, Brown, Clyde & Loguidice, P.C.*, 69 AD2d 984, 984 (4th Dept 1979). "'The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified.'" *Marinelli v Shifrin*, 260 AD2d 227, 229 (1st Dept 1999), quoting *Indig v Finkelstein*, 23 NY2d 728, 729 (1968).

Plaintiff's argument, that the interrelatedness of defendants is evidenced by articles from fashion industry publications, about SML buying up brands such as Shenanigans, is unavailing. Other documents related to the chain of, and changes in, ownership of "Shenanigans" as a trademark, including documents which indicate that the Shenanigans trademark is held by a company owned by Christopher Dal Piaz, the son of Dal Piaz, and an officer of SML, also fail to warrant denial of summary judgment. Consistent with plaintiff's evidence, Christopher Dal Piaz attests that SML uses the Shenanigans trademark as a label for a line of clothing, and the trademark was purchased by a company he owns, but the trademark is no more than a label, and is not the same as the legal entity known as Shenanigans Knits,

Ltd.

While a party opposing summary judgment may be permitted to demonstrate acceptable excuse for failure to meet the strict requirements of tender of evidence in admissible form, no such explanation has been given here. Zuckerman, 49 NY2d at 562, 563. Further, to the extent that plaintiff maintains that summary judgment is premature, "[a] party who claims ignorance of critical facts to defeat a motion for summary judgment (*see* CPLR 3212 [f]) must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue." *Cruz v Otis El. Co.*, 238 AD2d 540, 540 (2d Dept 1997); *see Rothbort v S.L.S. Mgt. Corp.*, 185 AD2d 806, 806 (2d Dept 1992). Plaintiff makes no claim that she attempted to discover facts about Shenanigans, such as information about its management, employees, labor relations, financial control, current status, or its principal place of business.

Defendants accordingly are entitled to summary judgment dismissing the cause of action for violation of the FMLA. In view of this finding, the court does not reach the issue of whether plaintiff was employed for the 12-month period required to be considered an "eligible employee." The court notes, however, that, contrary to defendants' argument, the FMLA regulations provide that a referring temporary employment agency

may be considered a "joint employer," and time spent working for the agency can be counted together with time spent working for the second employer. *See* 29 CFR § 825.106 (b) (1) and (d); *Mackey v Unity Health Sys.*, 2004 WL 1056066, 2004 US Dist LEXIS 8830, *10 (WD NY 2004).

In any event, on this record, there appear to be unresolved questions as to the length of plaintiff's employment for purposes of the FMLA. Although plaintiff claims that she began working for SML, through a temporary agency, on May 6, 2009, records submitted by defendants demonstrate that she started on May 13, 2009. Under FMLA regulations, when an employee is maintained on the payroll for any part of a week, the entire week may count as a week of employment. *See* 29 CFR § 825.110 (b) (3). As defendants assert that plaintiff began work on a Wednesday (*see* Keaveney Aff., ¶ 6), that provision may apply here. Defendants assert that, even considering May 13, 2009, as plaintiff's start date, plaintiff began a medical leave on May 5, 2010, and was terminated on May 7, 2010, and, therefore, was employed by defendants for less than 12 months. There is, however, some evidence that plaintiff requested FMLA leave commencing on May 14, 2010, more than 12 months after she started.

Turning to the branch of defendants' motion that seeks summary judgment dismissing the complaint as against LHI, in the absence of any proof that LHI is an existing corporation, as

noted above, the motion is granted.

DEFENDANTS' CPLR 3211 (a) (7) MOTION TO DISMISS

Defendants also move, pursuant to CPLR 3211 (a) (7), to dismiss the third and fourth causes of action, alleging race and national origin discrimination under the NYSHRL and NYCHRL, as well as the seventh cause of action for intentional infliction of emotional distress, for failure to state a cause of action.

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction. *See* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). The court is not required, however, to accept as true "legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]), or "'factual claims either inherently incredible or flatly contradicted by documentary evidence.'" *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999)(citation omitted), *affd* 94 NY2d 659 (2000); *see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 (1st Dept 2009); *Tal v Malekan*, 305 AD2d 281, 281 (1st Dept 2003).

RACE/NATIONAL ORIGIN DISCRIMINATION CLAIMS

The NYSHRL and the NYCHRL provide, in pertinent part, that it is an unlawful discriminatory practice for an employer, because of an individual's race or national origin, "to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). A plaintiff alleging employment discrimination has the initial burden of establishing a prima facie case of discrimination by demonstrating that: (1) she is a member of a protected class; (2) she was qualified to hold her position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004); *see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009).

Both the NYSHRL and NYCHRL require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990);

Williams v New York City Hous. Auth., 61 AD3d 62, 65 (1st Dept 2009). The NYCHRL further requires "an independent liberal construction analysis ... targeted to understanding and fulfilling ... the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights law." *Williams*, 61 AD3d at 66; *see* Admin. Code § 8-130; *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Phillips v City of New York*, 66 AD3d 170, 172 (1st Dept 2009). Courts have, nonetheless, continued to recognize that the law cannot operate as a "'general civility code'" (*Williams*, 61 AD3d at 79 [citation omitted]), and that conduct which is "nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences'" is not actionable. *Id.* at 80; *see Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 506 (1st Dept 2010).

Here, plaintiff, a Latina/Afro-Caribbean woman (Verified Complaint, ¶ 4), rests her claim of race and national origin discrimination on one comment allegedly made by Dal Piaz in April 2010, during a conversation with plaintiff about genetic testing for breast cancer. According to the complaint, after plaintiff was diagnosed with breast cancer, she had a conversation with Dal Piaz in which Dal Piaz asked her whether she had taken the gene test, and then remarked to plaintiff that "I must be the luckiest white woman in America; I tested negative and I have a daughter."

Verified Complaint, ¶ 57. Plaintiff alleges that she was "shocked and offended by this remark." *Id.* at 58.

Plaintiff does not, however, allege that she suffered any adverse employment actions, either before or after Dal Piaz's comment, based on her race and national origin. The complaint alleges that plaintiff began working for defendants in May 2009, as a freelance designer, and was offered a full-time position, with a salary increase, in August 2009. Verified Complaint, ¶¶ 26, 29. It further alleges that plaintiff performed her job well, and her performance was recognized with a bonus at the end of 2009. *Id.*, ¶ 31. Plaintiff does not claim that she was treated unfairly until after she notified defendants that she was diagnosed with breast cancer, and according to the complaint, "she lost her job because of cancer." *Id.*, ¶ 65. The complaint, therefore, sets forth no facts from which the court can infer that plaintiff was terminated, or subjected to any other adverse employment action, based upon her race or national origin.

Plaintiff does not plead that she was subjected to a hostile work environment on the basis of race or national origin. To the extent that she now seeks to assert such a claim, the one comment made by Dal Piaz, even accepting that it was offensive to plaintiff, and even when viewed under the more protective standard of the NYCHRL, "could only be reasonably interpreted by a trier of fact as representing no more than 'petty slights or

trivial inconveniences,'" and is not actionable. *Williams*, 61 AD3d at 80; *see Zhao v Time, Inc.*, 2010 WL 3377498, *23, 2010 US Dist LEXIS 87586, *68 (SD NY 2010); *Kaur v New York City Health & Hosps. Corp.*, 688 F Supp 2d 317, 340 (SD NY 2010); *Middleton v Metropolitan College of N.Y.*, 545 F Supp 2d 369, 375 (SD NY 2008); *Chin v New York City Hous. Auth.*, 2011 WL 2790609, 2011 NY Misc LEXIS 3444, **33, 2011 NY Slip Op 31900(U), *29 (Sup Ct, NY County 2011); *see also Mete v New York State Ofc. of Mental Retardation & Developmental Disabilities*, 21 AD3d 288, 294 (1st Dept 2005) ("a decision maker's stray remark, without more, does not constitute evidence of discrimination").

The allegation, made for the first time by plaintiff's attorney in opposition papers, that there were other conversations "which were discriminatory in nature" (Nohavicka Aff. in Opp., ¶ 100), is patently insufficient to support such a claim. While a court, "[i]n assessing a motion under CPLR 3211 (a) (7), ... may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon*, 84 NY2d at 88, citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), plaintiff submits no affidavit based on personal knowledge to attempt to remedy the pleadings. It is axiomatic that the affirmation of counsel alone, unsupported by any documentary or testimonial evidence, is of no probative value. *See Hasbrouck v City of Gloversville*, 63 NY2d 916, 916 (1984);

Zuckerman, 49 NY2d at 563; *Farragut Gardens No. 5 v Milrot*, 23 AD2d 889 (2d Dept 1965).

Thus, under either the NYSHRL or the NYCHRL standards, and giving plaintiff the benefit of every favorable inference to be drawn from the complaint, plaintiff's allegations are insufficient to sustain a claim for discrimination based on race or national origin, and the third and fourth causes of action are dismissed.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege 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." *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 (1983)(internal quotation marks and citation omitted); *see Howell v New York Post Co.*, 81 NY2d 115, 122 (1993); *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 (1st Dept. 2008). "[T]he 'requirements of the rule are rigorous, and difficult to satisfy.'" *Howell*, 81 NY2d at 122 (citation omitted). The claims that have been upheld by the courts "were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v Bayer*, 272 AD2d 263, 264-265 (1st Dept 2000); *see Nader v General*

Motors Corp., 25 NY2d 560, 569 (1970).

Plaintiff's allegations of defendants' conduct, even if true, do not meet the standard of "extreme and outrageous" conduct necessary to state a cause of action for intentional infliction of emotional distress. In addition, "intentional infliction of emotional distress is a theory of recovery that is to be invoked only as a last resort." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 256 AD2d 269, 270 (1st Dept 1998); *see Conde v Yeshiva Univ.*, 16 AD3d 185, 187 (1st Dept 2005). Where, as here, another avenue of recovery of emotional distress damages is available under the NYSHRL and NYCHRL, "there is no reason to apply the theory." *McIntyre*, 256 AD2d at 270.

Plaintiff's cause of action for intentional infliction of emotional distress, therefore, is dismissed.

Accordingly, it is

ORDERED that the motion of defendants KATHY DAL PIAZ, a/k/a KATARINA DAL PIAZ LIEBOWITZ, SML SPORT LTD., a/k/a WYANDOTTE CIRCLE CORP., and LAUREN HANSEN, INC., is granted and the third, fourth, seventh, and eighth causes of action are dismissed; and it is further

ORDERED that, as against LAUREN HANSEN, INC., the complaint is dismissed in its entirety; and it is further

ORDERED that the remaining claims are severed and shall continue.

Dated: 10/6/11

FILED

OCT 12 2011

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

HON. DONNA MILLS, J.S.C.