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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE [redacted] J.S.C. PART 12

Justice

Index Number : 402261/2011
CINTRON, DIANA
vs.
NYC DEP. OF TRANSPORTATION
SEQUENCE NUMBER : 002
ARTICLE 78

INDEX NO. 402261/11

MOTION DATE

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, [redacted] AND JUDGMENT.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/17/13

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 12

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In the Matter of the Application of:

DIANA CINTRON,

Petitioner, self-represented,

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION FERRY DIVISION, ALLIEDBARTON SECURITY SERVICES LLC, and MARGARET GORDON,

Respondents.

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Index No. 402261/11

Motion Seq. Nos.: 002, 003
Subm.: 9/19/12

DECISION AND JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
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By notice of petition and petition dated February 8, 2012, petitioner brings this Article 78 proceeding seeking an order vacating and reversing the July 19, 2011 determination and order of the City of New York Commission on Human Rights (Commission). Respondents oppose.

By notice of motion, dated February 15, 2012, respondent AlliedBarton Security Services LLC (AlliedBarton) moves, pursuant to CPLR 3211(a)(7), for an order dismissing the petition. Petitioner opposes.

By notice of cross motion, dated March 23, 2012, New York City Department of Transportation Ferry Division (City) and Margaret Gordon cross-move pursuant to CPLR 3211

(a)(5) and (10), and section 8-123 (h) of the New York City Administrative Code for an order dismissing the petition. Petitioner opposes.

Motion sequence numbers 002 and 003 are consolidated for disposition.

I. FACTUAL BACKGROUND

Petitioner, a security employee of AlliedBarton who was assigned to work at the Staten Island's St. George's Terminal, alleges that she was sexually harassed by Staten Island ferry employees during the summer and fall of 2007. (Verified Complaint Before the Commission). According to petitioner, although she had reported the alleged harassment to City, it failed to take remedial action. (*Id.*). In November 2007, after petitioner complained to AlliedBarton about the alleged harassment, her employer reassigned her to work in Manhattan. (*Id.*).

Petitioner alleges that the harassment began again in May 2009, after she established residency on Staten Island and began commuting by bus to Manhattan in order to avoid the ferry. However, given the lengthy commute, in February and April 2010, petitioner sought the help of Gordon, City's Executive Director of Security, to end the harassment. (*Id.*)

It is undisputed that in April 2010, after AlliedBarton was made aware of petitioner's complaints to Gordon, petitioner's supervisors instructed her not to contact Gordon either by telephone or letter. Nonetheless, petitioner contacted Gordon shortly thereafter. Almost immediately after petitioner's last contact with Gordon in April 2010, AlliedBarton terminated her employment. (*Id.*)

There is no question that petitioner followed the procedures set forth in her union collective bargaining agreement (CBA), which required her to submit any employment-related discrimination claim to binding arbitration (May 6, 2011 Determination and Order After

Investigation), and that, on November 19, 2010, petitioner attended a hearing before the arbitrator. On February 28, 2011, the arbitrator ruled that AlliedBarton had cause for terminating petitioner's employment. (*Id.*)

Petitioner then filed a Verified Complaint with the Commission on September 28, 2010. (Complaint No. M-E-SO-10-1023981-E). By Determination and Order After Investigation, dated May 6, 2011, the Commission found insufficient evidence to sustain petitioner's allegations of sexual harassment, and dismissed her complaint. Specifically, the Commission found that, under the CBA, petitioner's binding arbitration was not subject to review by that body, and that she did not in any event demonstrate by the preponderance of the evidence that City employees had subjected her to sexual harassment. (*Id.*)

Petitioner applied for review of the Determination and Order After Investigation, based on her allegation that the Commission failed to view videos that would have served as evidence of the harassment. (Notice of Petition). However, the Determination and Order After Investigation was affirmed on July 19, 2011 and mailed to petitioner on July 26, 2011.

II. PERTINENT PROCEDURAL BACKGROUND

Petitioner filed a petition in this matter on August 19, 2011. On September 20, 2011, respondent AlliedBarton filed a Notice of Filing of a Notice of Removal (Notice of Filing) to the United States District Court for the Southern District of New York (US SDNY). Following AlliedBarton's Notice of Filing, by order dated October 20, 2011, the justice previously assigned to this case ordered that "[t]he petition is deemed disposed unless the matter is remanded back to State Court, at which time the petitioner may have it restored to active status."

By memorandum and order dated December 13, 2011, the matter was remanded to state

court, however, instead of moving to restore the proceeding to active status, by notice of petition and petition dated February 8, 2012, petitioner filed a new petition under the same index number. The instant motion was made on February 15, 2012.

III. ARTICLE 78

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

IV. MOTION TO DISMISS

AlliedBarton contends that it is not a proper party to this proceeding, as it is a private entity and thus cannot be the subject of an Article 78 proceeding. It also asserts that by failing to

name the Commission as a respondent, petitioner has failed to join a necessary party. (AlliedBarton Mem. of Law).

In considering a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), a court must look at the four corners of the complaint to determine whether or not the factual allegations, when taken together, "manifest any cause of action cognizable at law." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

While Article 78 proceedings are generally brought against governmental agencies (*De Petris v Union Settlement Assn., Inc.*, 86 NY2d 406 [1995]; *In the Matter of the Application of Okslen Acupuncture P.C. v Dinallo*, 25 Misc 3d 637, 641–642 [Sup Ct, NY County 2009]), courts of this State have occasionally permitted such proceedings against private corporations (*eg*, *Staten Is. Physician Practice, P.C. v Carecore Natl., LLC*, 32 Misc 3d 1218[A], 1218 [Sup Ct, Richmond County 2011]), particularly where it is alleged that private employers have violated their own employment rules and regulations (*Mitchell v Dowdell*, 172 AD2d 1032 ([4th Dept 1991]; *De Petris v Union Settlement Assn., Inc.*, 209 AD2d 180 [1st Dept 1994], *affd* 86 NY2d 406 [1995] [not-for-profit private corporation]).

Here, however, petitioner does not dispute that her union CBA required that she submit any employment-related discrimination claim to binding arbitration. As the CBA limits her remedies for employment-related discrimination claims to arbitration, and because the arbitrator's decision is not reviewable by the Commission or by this court (*Allen v Jayne*, 279 AD 444 [1st Dept 1952]), her claims against AlliedBarton do not lie. Given this result, I need not address AlliedBarton's motion to dismiss for failure to name the Commission as a respondent.

V. CROSS MOTION

City and Gordon contend that the instant proceeding must be dismissed on the ground that petitioner failed to name as a respondent the Commission, a necessary party (CPLR 3211[a][5]), and that the statute of limitations has run on petitioner's opportunity to do so (CPLR 3211[a][10]).

A petitioner must name as a respondent in her Article 78 proceeding the governmental entity that issued the challenged determination. (*Johnson v Scholastic Inc.*, 52 AD3d 375 [1st Dept 2008]; *Jeanty v New York State Dept. of Corr. Servs.*, 36 AD3d 811 [2d Dept 2007]; *Solid Waste Servs., Inc. v New York City Dept. of Envtl. Protection*, 29 AD3d 318 [1st Dept 2006], *lv denied* 7 NY3d 710). And although a petitioner generally has four months to name a necessary party as a respondent in an Article 78 proceeding (CPLR 217[1]; 7802[a]; *Roberts v Gavin*, 96 AD3d 669 [1st Dept 2012]; *Matter of Sines v Opportunities for Broome*, 156 AD2d 878 [3d Dept 1989]), when a complainant seeks to vacate and reverse a determination of the Commission, such "proceeding . . . must be instituted within thirty days after the service of the order of the [C]ommission" (Administrative Code of the City of New York § 8-123[h]; *Okoumou v Community Agency for Senior Citizens, Inc.*, 17 Misc 3d 827 [Sup Ct, Richmond County 2007]).

Although petitioner commenced this proceeding within 30 days of the issuance of the order, she failed to name the Commission, the agency that issued the determination she challenges. Pursuant to CPLR 203, an assertion of a claim against a "necessary party" will relate back to the date of the commencement of a proceeding, when

> (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will

> not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against him or her as well.

(*Murphy v Kirkland*, 88 AD3d 267, 275-276 [2d Dept 2011] [quoting *Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [2d Dept 2009]; *Buran v Coupal*, 87 NY2d 173 [1995]).

Parties are generally not held to be united in interest unless they have the same jural relationship and/or are vicariously liable for the acts of the other. (2B Carmody-Wait 2d § 13:402 [2012] [unity of interest generally found when one party vicariously liable for conduct of other]; *LeBlanc v Skinner*; 2012 NY Slip Op 08494 [2d Dept 2012] [parties united in interest when there is jural or legal relationship giving rise to potential vicarious liability]; *Mercer v 203 E. 72nd St. Corp.*, 300 AD2d 105 [1st Dept 2002] ["unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other"]).

It has been held, albeit in different procedural contexts, that City and other City entities are distinct jural entities. (*See eg Brown v City of New York*, 60 NY2d 897 [1983] [City and District Attorney separate entities]; *Leftenant v City of New York*, 70 AD3d 596 [1st Dept 2010] [City could not be held liable for actions of District Attorney as they were entirely different entities]; *Bailey v City of New York*, 55 AD3d 426 [1st Dept 2008] [City not proper party to action involving injury at public school as City not liable for actions of City Department/Board of Education]; *Perez v City of New York*, 41 AD3d 378 [1st Dept 2007] [City and City Board of Education are separate legal entities]).

Thus, in *Miner v City of New York*, the plaintiff was denied leave to amend the pleadings

to add the New York City Board of Education as a defendant based on the relation-back doctrine as the City and the Board were not united in interest. (78 AD3d 669 [2d Dept 2010]; *see also Mahinda v Bd. of Collective Bargaining*, 91 AD3d 564 [1st Dept 2012] [City and City Board of Collective Bargaining not united in interest as Board was neutral administrative agency and acted as adjudicatory body and is not liable for any improper acts by City]; *Goldman v City of New York*, 287 AD2d 689 [2d Dept 2001] [relation-back doctrine did not apply as City and Board of Education not united in interest]; *Steward v New York City Hous. Auth.*, 205 AD2d 606 [2d Dept 1994] [City and City Housing Authority not united in interest]; *Gagliardi v New York City Hous. Auth.*, 88 AD2d 610 [2d Dept 1982] [same]; *see also Wilson v City of Buffalo*, 298 AD2d 994 [4th Dept 2002], *lv denied* 99 NY2d 505 [2003] [City of Buffalo and Buffalo Sewer Authority not united in interest as they were not vicariously liable for other's acts]).

Here, absent any evidence or caselaw establishing that City and the Commission have the same jural relationship or are vicariously liable for each other's actions, plaintiff has not shown that there exists unity of interest between them. Thus, petitioner's claims against the Commission do not relate back to her claims against City and Gordon, and consequently, the statute of limitations has run on petitioner's claims against the Commission, a necessary party to this proceeding.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ORDERED and ADJUDGED, that respondent AlliedBarton Security Service LLC's

motion to dismiss is granted; and it is further

ORDERED and ADJUDGED, that respondents New York City Department of Transportation Ferry Division and Margaret Gordon's cross motion to dismiss is granted.

ENTER:

Barbara Jaffe, JSC

DATED: January 15, 2013
New York, New York

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).