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

SHAKERA GORDON,

Plaintiff,

Index No.: 21378-2014E

-against-

DECISION/ORDER

BAYROCK SAPIR ORGANIZATION, LLC d/b/a TRUMP SOHO, JOHN NEUENDORF and DANA SHOLL,

Defendants.

GONZALEZ, D.

Upon: 1) the motion for Summary Judgement and the dismissal of the plaintiff's complaint, and its' attachments, Memorandum of Law and affidavits of Orla J. McCabe, Esq., by Jackson Lewis, PC, the attorneys for the defendants, dated January 7, 2016; 2) the Affirmation in Opposition by Leopold Raic, Esq., on behalf of the plaintiff, dated February 3, 2016; 3) the Reply Memorandum of Law by Jackson Lewis, PC, dated February 26, 2016.

4) The defendants move for Summary Judgement, pursuant to CPLR R 3212, seeking the Court to dismiss plaintiff Shakera Gordon's complaint in its' entirety with prejudice.

5) The plaintiff opposes the motion on the grounds that she was discriminated and retaliated based on her race, creating a hostile work environment in violation of the New York State Executive Law and New York City Administrative Code.

FACTUAL BACKGROUND

The plaintiff is a current employee of Trump Soho. She alleges that defendants discriminated against her because of her African American race, in violation of the New York State Human Rights Law, NY Exec. Law §§ 296 et seq, and the New York City Human Rights Law, NYC Administrative Code §§ 8-107 et seq. The plaintiff further alleges that defendants retaliated against her for engaging in protected activity in violation of the NYSHRL and

NYCHRL. The plaintiff also alleges claims for intentional infliction of emotional distress and assault and battery.

DISCUSSION OF LAW

Where a party seeking summary judgement tenders sufficient evidence to demonstrate the absence of any material issues of fact, that party is entitled to judgement as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986), citing *Winegrad v NYU Medical Center*, 64 NY2d 851 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once the initial showing of entitlement to summary judgement has been made, the burden then shifts to the party opposing the motion to produce admissible evidence sufficient to establish an issue of fact requiring a trial of the action. *See Zuckerman v City of New York*, 49 NY2d 557 (1980). " Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgement. *Id.* at 598.

Plaintiff is still employed with Trump Soho as a mini bar attendant and has suffered no adverse action. Plaintiff has not identified any circumstances which give rise to an inference of race discrimination. Plaintiff's conclusory allegations are not supported by any evidence in admissible form. Plaintiff has not presented any admissible evidence of African-American employees being subjected to less favorable treatment than Caucasian employees.

Plaintiff cannot present sufficient evidence to establish a *prima facie* claim for race discrimination and accordingly, her claims of race discrimination under the NYSHRL and NYCHRL are dismissed. Further, plaintiff's claim under the broader NYCHRL similarly fails as a matter of law. " Under the *McDonnell Douglas* framework applied in New York, a plaintiff alleging employment discrimination in violation of the NYCHRL has the initial burden to establish a prima facie case of discrimination." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107,

112 (1st Dept. 2012). To meet this burden, plaintiff must show the same four elements required to make out a prima facie case under the NYSHRL, and has not done so.

The plaintiff has not shown that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.

Under the NYSHRL, a plaintiff asserting a hostile work environment claim must demonstrate her workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment." *See, Brennan v Metro Opera Ass'n.*, 192 F3d 310, 318 (2nd Cir. 1999) (citations omitted); *Phillip v City of New York,* 09 Civ 442, 2012 WL 1356604 (EDNY April 19, 2012) claim dismissed, 09 Civ 442, 2012 WL 1598082 (EDNY May 7, 2012).

To establish that the alleged harassment is sufficiently severe or pervasive, a plaintiff must establish that either an isolated incident was extraordinarily severe or that a series of incidents were continuous and concentrated such that they altered the conditions of her employment. *See eg., Deters v Lafuente*, 368 F3d 185, 189 (2d Cir. 2004); *Alfano v Costello,* 294 F3d 365, 374 (2d Cir. 2002).

The plaintiff asserts the following allegations in support of her claim for a racially hostile work environment: i) Clara Cruz and Dana Sholl showed favoritism towards Latino employees over African American employees; ii) Mr. Neuendorf was not terminated for the February 14, 2012 incident; and iii) Mr. Neuendorf's co-workers in the engineering department made rude comments to her after the February 14, 2012 incident.

Plaintiff's affidavit does not support a claim the defendant's conduct was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the

conditions of the victim's employment". Accordingly, plaintiff's claims fail as a matter of law. *Brennan v Metro Opera Ass'n.*, 192 F3d 310, 318 (2nd Cir. 1999).

"To prevail on a retaliation claim under the NYCHRL, the plaintiff must show that she took an action opposing her employer's discrimination...and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 112 (2d Cir. 2013). In order to state a prima facie claim of retaliation, under the NYCHRL, a plaintiff must demonstrate she engaged in a protected activity, and that there was a causal connection between the protected activity and the employers' subsequent action. *See, eg, Milne v Navigant*, 08 Civ. 8964 (PAE), 2012 WL 3283454 (SDNY August 13, 2012).

In addition, the plaintiff has not rebutted defendant's legitimate, non-retaliatory and non-discriminatory business reasons for the issuance of the corrective action against her. On April 1, 2013, plaintiff received a warning from her manager, Clara Cruz, for using all her sick days and being late to work on several occasions.

The warning she was given specifically identified the days on which plaintiff was up to an hour late to work, and plaintiff acknowledged on several of the dates she was late because she simply overslept. Plaintiff has not presented and cannot present evidence that the proffered reasons for the warning were false and/or a pretext for unlawful discrimination or retaliation.

Plaintiff's intentional infliction of emotional distress claim is dismissed. The plaintiff has not pled the requisite elements for stating a *prima facie* claim of intentional infliction of emotional distress. Second, the relief sought in this cause of action is duplicative of the relief sought in the statutory discrimination and retaliation causes of action, and it is time barred. Accordingly, the intentional infliction of emotional distress fails.

Plaintiff's assault and battery claim arises from an incident in February of 2012 with Mr. Neuendorf, and her action was filed on March 28, 2014. It is time barred since the statute of limitations is one year from the alleged assault and battery. Clearly that time had passed by March of 2014.

CONCLUSION

Plaintiff is still employed with Trump Soho as a mini bar attendant and thus, has suffered no adverse action. Moreover, plaintiff has not identified any circumstances whatsoever which give rise to an inference of race discrimination. Plaintiff's conclusory allegations about race discrimination are not supported by any record evidence. Plaintiff has not presented any admissible evidence of African-American employees being subjected to less favorable treatment than Caucasian employees.

The movant has sustained their burden in establishing their entitlement to summary judgement. The plaintiff failed to submit any evidence in admissible form to show there are any issues of fact to be tried by a jury. The plaintiff's allegations are merely conclusory and not supported by the evidence.

Accordingly, due to the foregoing, a review of the Court file; and due deliberation; it is hereby

ORDERED, that the complaint is dismissed with prejudice.

This is the decision and order of this Court.

Date: June 13, 2016
Bronx, New York

Hon. DORIS M. GONZALEZ, A.J.S.C.