

**Louissaint-Tasco v Brookdale Univ. Hosp. & Med.
Ctr.**

2017 NY Slip Op 30768(U)

April 17, 2017

Supreme Court, Kings County

Docket Number: 510807/16

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of April, 2017.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

GINA LOUISSAINT-TASCO

Plaintiff,

- against -

BROOKDALE UNIVERSITY HOSPITAL &
MEDICAL CENTER

Defendant.

-----X

DECISION / ORDER

Index No. 510807/16
Mot. Seq. # 1

The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers Memoranda of Law _____

_____ 1-2
_____ 3

_____ 4, 5, 6

Upon the foregoing papers, the defendant, The Brookdale Hospital Medical Center (incorrectly named in this action as “Brookdale University Hospital and Medical Center”) (Brookdale) moves for an order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing several of the causes of action asserted in plaintiff Gina Louissaint-Tasco’s complaint.

Facts and Procedural Background

Plaintiff, a 52-year-old, African-American female, was employed by Brookdale since 1990 as a hospital administrator. In early 2011, Dr. Sunil Abrol was appointed as Chair of the Department of Surgery. Plaintiff claims that Dr. Abrol routinely made disparaging and

discriminatory comments to her based on her gender, race and age, making clear his bias and hostility toward her. Specifically, plaintiff's complaint alleges that Dr. Abrol told her to "remove the wax between [her] black ears," and that he "need[s] to get rid of the old people in the department." In addition, she claims that Dr. Abrol would inappropriately assign her many tasks and functions that were well outside her job description, thereby compelling her to work an extraordinary number of hours without being compensated for the additional work. Plaintiff spoke to her supervisor, Vito Buccellato, regarding Dr. Abrol's actions and comments, but she asserts that no corrective action was taken in response.

On or about November 17, 2011, plaintiff was seriously injured in a motor vehicle accident, which resulted in her absence from work for approximately five months. Plaintiff returned to work at Brookdale on May 14, 2012 and needed to utilize a cane for over a year thereafter. Plaintiff maintains that when she returned to work, Dr. Abrol's hostility toward her intensified, as he repeatedly interrogated her about her medical condition. She claims he made disparaging comments concerning her disability and her need to use the cane, and complained that she walked too slowly. Shortly thereafter, plaintiff was directed to report to someone named Chuck Salvo. Plaintiff claims that Salvo, along with his assistant Garry Morrison, also subjected her to discriminatory treatment and created a hostile work environment, targeted at plaintiff, an older woman of color with some post-accident physical challenges. She asserts that they insulted her and publicly berated her during meetings and blatantly ignored her at other times. Further, she contends that Salvo made discriminatory comments based on her age and medical condition, such as telling her that she was "old school," that "Brookdale needs to eliminate the people who have been here too long," and that "Brookdale needs people who are not hobbling to meetings" referring to her use of a cane. Moreover, plaintiff claims that Salvo would often state that Brookdale "needs to change the face of the institution" because the

current staff "resembles the face of this community," referring to the fact that Brookdale is located in a predominantly African-American neighborhood.

Plaintiff claims that when she returned to Brookdale following her accident, her compensation was decreased, which resulted in her salary being lower than that of all of the other Brookdale administrators, despite the fact that she was the most senior. She submitted a written complaint regarding this disparate treatment, but Brookdale failed to address her concerns. Plaintiff states that she made several verbal and written complaints to her immediate supervisor, Suzanne Pennacchio, R.N., about the discriminatory treatment she received and requested a transfer, specifically citing the relentless, rude and discriminatory behavior which she was subjected to. She was transferred in February 2013, but was still required to report to Salvo, so she claims that the adverse actions against her continued unabated. On two occasions in 2013, plaintiff met with Barbara Piascik, Brookdale's Chief Compliance Officer, to discuss the ongoing discriminatory and harassing behavior that she was subjected to by Salvo. She claims that Piascik acknowledged that there were several other complaints against Salvo, but informed plaintiff that there was nothing that could be done, as Salvo was "not to be touched," given his high status at Brookdale. Plaintiff alleges that another female employee over the age of fifty was summarily terminated as a result of her complaints against Salvo.

On August 14, 2014, plaintiff came to work during her vacation to run a seminar and discovered that a flood had caused significant water damage to her office. In the days immediately following this flooding incident, she began to experience debilitating medical symptoms. She claims that when she returned from vacation approximately two weeks later, Brookdale had not taken any meaningful steps to decontaminate her office following the flood, and she was still experiencing the same medical problems. Plaintiff sought medical treatment in September 2014 and visited the emergency room in October 2014 related to her symptoms. She claims that her physicians informed her that her serious symptomatology was caused by

the flood, which had exposed her to poisonous chemical waste from an overflowing drain in the radiology department, which was located on the floor directly above her office. Plaintiff further maintains that she had previously lodged several formal complaints as a result of illnesses that she had suffered from exposure to mold spores and mildew while working in her previous workspace, which she had occupied for more than 15 years. She further claims that there was airborne asbestos which was a contributing factor to her various medical problems in the previous workspace.

On October 22, 2014, plaintiff suffered a stroke and experienced chronic hypertension, neurological deficits and inexplicable pulmonary problems. Following her stroke, plaintiff was on disability leave for approximately six months. She claims that upon her return to Brookdale on April 20, 2015, she once again began experiencing symptoms associated with her illness, causing her to visit Brookdale's emergency room that very day. She maintains that her health continued to deteriorate. As a result, on April 30, 2015, plaintiff requested additional time to recuperate as a reasonable accommodation for her ongoing medical challenges.

Plaintiff claims that Brookdale rejected her accommodation request and instead, in a May 2015 letter, characterized her illness and disability leave as unauthorized and unpaid, and directed her to immediately submit another doctor's note and request. She asserts that she complied with this direction by facsimile in June 2015. Plaintiff maintains that Brookdale failed to engage in any kind of required interactive process with her to consider the appropriate accommodation for her medical condition. On or about May 25, 2015, plaintiff submitted a letter to the Brookdale Senior VP of Human Resources, Margaret Brubaker, in which she formally complained of illegal discriminatory and retaliatory treatment. Plaintiff met with Brubaker on July 1, 2015 and provided documentation demonstrating all of the accrued vacation and sick time that Brookdale had precluded her from utilizing. She contends that she

also provided medical documentation concerning her disability to Benefits Manager Melanie Caraballo on this date. During this meeting, plaintiff advised Brubaker that her physician indicated that she should be able to return to work in September or October of 2015. Plaintiff also requested to be assigned to a new office, due to her recurring medical issues resulting from the chemical spill, and she further discussed her need for a reasonable accommodation in the form of being permitted to use a cane. Plaintiff then scheduled a meeting for the week of August 10, 2015 with Labor Relations Manager Alejandra Rosales, to discuss her discrimination complaints. Finally, plaintiff claims that while she was out due to her medical condition, she nonetheless communicated regularly with her immediate supervisor, Chairwoman Kusum Viswanathan, M.D., concerning a project she was scheduled to begin upon her return and states that she had actually started working on the project from home.

Plaintiff received a letter of termination dated August 7, 2015, signed by Ms. Rosales, informing her that Brookdale considered her to have voluntarily resigned from her employment effective June 30, 2015, which was actually the day before her July 1, 2015 meeting with Brubaker. Plaintiff claims that her health insurance was also cancelled as of that date, retroactively.

On or about December 14, 2015, plaintiff filed a complaint with the United States Equal Employment Opportunity Commission (EEOC). On or about June 24, 2016, she commenced the instant action by filing a summons and complaint seeking damages related to Brookdale's unlawful discriminatory conduct in violation of the New York City Human Rights Law (NYCHRL) and Administrative Code of the City of New York § 8-107. Plaintiff asserted claims of discrimination based on her gender, race, color, age, disability and/or perceived disability, and retaliation. On October 6, 2016, the EEOC issued a dismissal and notice of suit rights terminating its processing of plaintiff's claims on the ground that she had filed this action in state court on the same issues which were before the EEOC.

Brookdale's Motion

Brookdale moves for an order, pursuant to CPLR 3211 (a) (5) and (a) (7), dismissing several of the causes of action asserted in plaintiff's complaint on the grounds that the statute of limitations has expired and/or that her complaint fails to state a cause of action.

CPLR (a) (7)

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP*, 144 AD3d 1099, 1101 [2016]). A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. "Therefore, whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss" (*Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 [2016] quoting *Lieberman v Green*, 139 AD3d 815, 816 [2016]; see *Tooma v Grossbarth*, 121 AD3d 1093, 1095-1096 [2014]; *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2014]; *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

"[I]n addition to the standards generally applicable to a motion to dismiss for failure to state a cause of action, stated above, 'employment discrimination cases are themselves generally reviewed under notice pleading standards,' such that a plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination, but need only give fair notice of the nature of the claim and its grounds'" (*Baldwin v Bank of America, N.A.*, 42 Misc 3d 1203[A], 2013 NY Slip Op 52194, *7 [Sup Ct, Kings County

2013], quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [2009] [internal quotation marks, brackets, and citations omitted]).

“To establish a gender discrimination claim under the NYCHRL, the plaintiff need only demonstrate ‘by a preponderance of the evidence that she has been treated less well than other employees because of her gender’” (*Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 715 F3d 102,110 [2d Cir 2013] quoting *Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [2009], *lv denied* 13 NY3d 702 [2009]). Here, plaintiff has not alleged any specific discriminatory comments or treatment based upon her gender. Accordingly, plaintiff’s fifth cause of action alleging discrimination based upon gender is dismissed.

Conversely, the court finds that plaintiff has sufficiently pled a cause of action alleging a violation of the NYCHRL based upon discrimination related to her age, race, color and disability, as well as a cause of action sounding in retaliation. Accordingly, those claims are not dismissed for failure to state a cause of action.

CPLR 3211 (a) (5)

The court now turns to that branch of Brookdale’s motion which seeks to dismiss plaintiff’s claims on the ground that such claims are barred by the statute of limitations.

“In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period” (*Matteawan On Main, Inc. v City of Beacon*, 109 AD3d 590, 590 [2013] [internal citations omitted]; *Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2014]).

The statute of limitations under the State and City Human Rights Laws is three years (*see* CPLR 214[2]; Administrative Code § 8-502 [d]; *Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [2016]). Plaintiff filed her complaint in this action on June 24, 2016,

alleging discrimination based upon her age, race, color, disability, gender and retaliation in violation of NYCHRL. Thus, Brookdale argues that any allegedly discriminatory acts committed before June 24, 2013 are facially untimely (*see Jeudy v City of New York*, 142 AD3d 821, 822 [2016]; *Stembridge v New York City Dept. of Educ.*, 88 AD3d 611, 611 [2011], *lv denied* 19 NY3d 802 [2012], *rearg denied* 19NY3d993 [2012]).

Specifically, Brookdale contends that plaintiff's first, second, third and fifth causes of action, which assert claims of age, race, color and gender discrimination, respectively, contain no factual allegation of incidents occurring on, or after June 24, 2013, and are thus untimely. Brookdale maintains that plaintiff alleges instances of discrimination based upon her age, race and color beginning in "early 2011," but makes no further allegations that such instances continued beyond February 2013. Specifically, Brookdale maintains that plaintiff's time-barred claims include allegations based upon the following events: (1) Dr. Abrol's alleged discriminatory comments based on her age, race/color and age in early 2011; (2) the alleged discriminatory assignment of work by Dr. Abrol; (3) the alleged discriminatory treatment she received on the basis of her race and color by Messrs. Salvo and Morrison in 2012; (4) Mr. Salvo's alleged discriminatory comments based on her age, race and color; (5) the alleged reduction in her compensation; and (6) any further alleged conduct by Mr. Salvo in February 2013.

Brookdale maintains that plaintiff's complaint is devoid of any allegations regarding age, race, color and/or gender discrimination, or any allegations to support a hostile work environment claim, at any time after February 2013. Brookdale further contends that none of the allegations which took place after April 2015 relate to discrimination based on age, race/color or gender. Thus, Brookdale argues that plaintiff cannot maintain a hostile work environment claim based upon a continuous violation theory and each of these causes of action should be dismissed as untimely.

With regard to plaintiff's fourth and sixth causes of action sounding in disability discrimination and retaliation, Brookdale argues that the court must dismiss any claims that accrued on or before June 24, 2013, including her claims of disability discrimination and retaliation based on the following events: (1) plaintiff's complaints to Mr. Buccellato about Dr. Abrol's alleged discriminatory treatment on the basis of her age, race/color and age in early 2011; (2) the alleged discriminatory treatment by Dr. Abrol on the basis of her disability; (3) the alleged discriminatory treatment she received on the basis of her disability by Messrs. Salvo and Morrison in 2012; (4) Mr. Salvo's alleged discriminatory comments based on her disability; (5) the alleged reduction in her compensation (6) plaintiff's complaints to Ms. Pennacchio; (7) any further alleged conduct by Mr. Salvo in February 2013; and (8) plaintiff's complaint to Ms. Piascik on two occasions in 2013.

Plaintiff's Opposition

Plaintiff opposes Brookdale's motion and argues that while it is true that claims under the NYCHRL have a three-year statute of limitations, here, this three-year period is legally extended by approximately six-and-one-half months, representing the time plaintiff's charges were pending at the EEOC prior to the filing of the instant case. Moreover, since she has alleged a continuous violation of the law during her employment, she contends that the statute of limitations is tolled for each alleged violation up to and including the final adverse employment action, her termination. Plaintiff points out that, on December 14, 2015, she filed a complaint with the EEOC in relation to her claims of discrimination and retaliation. Thus, she notes that her EEOC claims were pending for six-and-one-half months prior to her filing the instant complaint, thus tolling the statute of limitations on her NYCHRL claims.

In support of this position, plaintiff points to several judicial decisions. Specifically, she contends that the Southern District of New York recently addressed this issue in *Johnson v DCM Erectors, Inc.*, 2016 WL 407293, *2, 2016 US Dist LEXIS 11930, *6 [SD NY Feb. 2,

2016, No. 15-CV-5415 (PKC)] which involved a plaintiff who had filed a charge with the EEOC on August 2, 2012 that had not been acted upon at the time plaintiff filed his complaint. The *Johnson* court held that since plaintiff had “yet to receive a response from the EEOC, the three-year statute of limitations may have been tolled from August 2, 2012 to the present. On that basis, this Court cannot say at this stage of the litigation that plaintiff’s NYSHRL and NYCHRL claims are, as a matter of law, barred by the statute limitations.” The *Johnson* court cited to numerous other courts in its circuit that have held that “the three-year statute of limitations applicable to claims under NYSHRL and NYCHRL ‘is tolled during the period in which a complaint is filed . . . with the EEOC’” (*Esposito v Deutsche Bank AG*, 2008 WL 5233590, *5, 2008 US Dist LEXIS 101460, *15 (SD NY, Dec. 16, 2008, No. 07-Civ-6722 [RJS]) quoting *Lee v Overseas Shipping Corp.*, 2001 WL 849747, *8, 2001 US Dist LEXIS 10622, **27, 28 (SD NY, July 30, 2001, No. 00-Civ-9682 [DLC]); see also *Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 445 (ED NY 2013); *DeNigris v New York City Health & Hosps. Corp.*, 861 F Supp 2d 185, 192 (SD NY 2012); *Butler v New York Health & Racquet Club*, 768 F Supp 2d 516, 536 (SD NY 2011). Plaintiff also points to *Leavy v New York City Tr. Auth.* (11 Misc 3d 1052[A], 2006 NY Slip Op 50177 [U], *5) [Sup Ct, Kings County 2006]), a case involving a New York State Human Rights Law claim in which the court held that “[i]t is well-settled that the three-year Statute of Limitations for a claim under Executive Law § 296 is tolled during the pendency of a complaint filed with the EEOC . . . ”

Plaintiff points out that she filed a complaint with the EEOC on December 14, 2015 concerning her claims of discrimination and retaliation, which were not terminated by that agency until October 6, 2016, which was after the June 24, 2016 filing of her complaint herein. Therefore, she argues that the three-year statute of limitations on her NYCHRL claims is extended for the six-month-and-ten-day period from her EEOC filing on December 14, 2015 to her Kings County filing on June 24, 2016. As such, plaintiff argues that the cutoff-date for

viable claims is extended for all acts that occurred in the three years before the December 14, 2015 date, which would be December 14, 2012, and not June 24, 2013, the date cited by Brookdale.

In addition, plaintiff argues that her complaint alleges both hostile work environment claims and a series of independent illegal acts of disparate treatment, which constitute a continuing violation which commenced prior to December 2012 and continued through her entire tenure at Brookdale. Thus, she avers that she has alleged a series of continuing discriminatory acts that constituted a hostile work environment, which began more than three years before filing her complaint herein. She further maintains that the claims in her complaint that occurred more than three years before she filed this action should not be dismissed as they form the predicate factual basis for claims that fall within the limitations period.

Brookdale's Reply

In reply, Brookdale argues that the plain language of the NYCHRL § 8-502 (d) does not permit tolling for the filing of an EEOC charge of discrimination. Section 8-502 (d) of the NYCHRL provides that:

A civil action commenced under this section must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title occurred. Upon the filing of a complaint with the city commission on human rights or the state division of human rights and during the pendency of such complaint and any court proceeding for review of the dismissal of such complaint, such three year limitations period shall be tolled.

Brookdale notes that pursuant to this section, the statute of limitations is tolled only when administrative complaints are filed with either the New York State Division of Human Rights or the New York City Commission on Human Rights. Brookdale points out that another section of the statute, § 8-502 (a), which concerns the election of remedies, makes specific reference to the filing of a complaint with the EEOC. Thus, Brookdale argues that when the New York City Council enacted the NYCHRL and explicitly referenced filing with

a "federal agency" (i.e., the EEOC) in § 8-502 (a), but omitted any reference to filing with a federal agency/EEOC in the tolling provision of § 8-502 (d), it is clear that such omission was intentional. In support, Brookdale points to a basic principle of statutory construction that it claims applies here: *expression unius est exclusio alterius*, which is interpreted to mean that when one or more items are expressly included in a statute, others in the same class that are not mentioned are properly deemed excluded. Therefore, Brookdale argues that the New York City Council did not intend for the tolling provision to apply to charges of discrimination filed with the EEOC as it only included state and city administrative filings, and specifically did not include federal filings, in this tolling provision.

In addition, Brookdale argues that plaintiff cannot rescue her time-barred claims by relying on the continuing violation doctrine. Brookdale notes that plaintiff's complaint pleads only that her third, fourth and fifth causes of action, based upon her color, disability and gender, concern an alleged pattern of discrimination. Thus, Brookdale argues that she cannot take advantage of the continuing violation doctrine on her first, second and sixth causes of action, which are based upon her age, race and retaliation. Further, Brookdale claims that plaintiff has failed to demonstrate a pattern of discrimination sufficient to take advantage of the continuing violation doctrine. Brookdale maintains that plaintiff has not alleged any instance of age, race, color or gender discrimination after February 2013 when she was transferred to a different department. Moreover, Brookdale contends that her opposition papers fail to address the two-year gap between her February 2013 transfer and April 2015, when she alleges Brookdale failed to reasonably accommodate her disability. Finally, Brookdale maintains that plaintiff's fourth and sixth causes of action, which sound in disability discrimination and retaliation which occurred prior to June 24, 2013, cannot be rescued by the continuing violation doctrine because plaintiff fails to connect the individuals she claims

subjected her to disability discrimination and retaliation prior to June 23, 2013 to the alleged denial of a reasonable accommodation and her ultimate termination in 2015.

Initially, the court notes that the cases cited by plaintiff in her opposition papers refer to the State and the City Human Rights Laws, collectively, when discussing the tolling provisions relating to employment discrimination claims, and fail to distinguish between the tolling provisions which are contained in each of the two statutes. Moreover, the plaintiff in the *Leavy* case only asserted claims under the NYSHRL and thus, that case did not even involve claims under NYCHRL § 8-502 (d), the sole statute implicated in the instant case.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature” (*Pines v State of New York*, 115 AD3d 80, 91 [2014], *appeal dismissed* 23 NY3d 892 [2014] quoting *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; see *State of New York v Patricia II.*, 6 NY3d 160, 162 [2006]). “Since ‘the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof’” (*Matter of T-Mobile Northeast, LLC v DeBellis*, 143 AD3d 992, 994 [2016] quoting *Matter of Shannon*, 25 NY3d 345, 351 [2015]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; see *Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 290 [2009]).

The court finds that, based upon the plain language of § 8-507 (d), the statute of limitations was not tolled by plaintiff’s filing of charges with the EEOC, a federal agency. Accordingly, any claims based upon actions that occurred prior to June 23, 2013 are barred under the statute of limitations. However, plaintiff correctly points out that her complaint alleges a hostile work environment as well as a series of separate acts of disparate treatment, which purportedly constitute a continuing violation of the NYCHRL.

While it is true that claims filed under NYCHRL § 8507 (d) must be filed within three years of the prohibited conduct, where, however, there is "a continuous practice and policy of discrimination . . . the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it" (*Cornwell v Robinson*, 23 F3d 694, 703-704 [2d Cir 1994]). A continuous practice and policy of discrimination may be shown by "proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" (*id.* at 704; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 80-81 [2009]; *Clark v State of New York*, 302 AD2d 942, 945 [2003]).

***Plaintiff's Second and Third Causes of Action Alleging Discrimination
Based Upon Race and Color***

As discussed in detail above, plaintiff's complaint alleges the following with regard to her claims of discriminatory conduct based upon race and color: in early 2011, Dr. Abrol told plaintiff to "remove the wax between [her] black ears." At some point in 2012- early 2013, Salvo told plaintiff that Brookdale "needs to change the face of the institution" because the current staff "resembles the face of this community," referring to the fact that Brookdale is located in a predominantly African-American neighborhood. There are no other specific allegations in plaintiff's complaint regarding race or color.

Plaintiff's First Cause of Action Alleging Discrimination Based Upon Age

In regard to plaintiff's claims of discrimination based upon her age, her complaint alleges: that in early 2011 Dr. Abrol stated that Brookdale "need[s] to get rid of the old people in the department" and that in 2012-early 2013, Salvo made discriminatory comments based on plaintiff's age, such as telling her that she was "old school," and that "Brookdale needs to eliminate the people who have been here too long." Plaintiff's complaint does not contain any

specific allegations of discriminatory comments or conduct based upon her age after February 2013.

The court finds that, prior to the limitations period, the record does reflect discriminatory remarks and actions by Dr. Abrol and Messrs. Salvo and Morrison based upon her race, color and her age. However, these pre-limitations period comments were not joined to actionable conduct within the limitations period; thus, the continuing violation doctrine does not render her claims based upon age, race or color as timely made (*see National R.R. Passenger Corp. v Morgan*, 536 US 101, 105, 117 [2002] [requiring “that an act contributing to the claim occurs within the filing period”]; *Williams*, 61 AD3d at 80-81; *Walsh v Covenant House*, 244 AD2d 214, 215 [1997]). Accordingly, the court finds that plaintiff has failed to allege in factual detail a series of actions based on race, color, or age that was joined to actionable conduct within the limitations period that could be considered the basis of a continuing policy that was discriminatory or that constituted a hostile work environment. Accordingly, plaintiff’s first, second, and third causes of action are time-barred under the statute of limitations.

Plaintiff’s Fourth Cause of Action Alleging Discrimination Based Upon Her Disability

With regard to plaintiff’s claims of discriminatory conduct based upon her disability, she alleges in her complaint that: when she returned to work on May 14, 2012 following a car accident, Dr. Abrol repeatedly interrogated her about her medical condition and made disparaging comments concerning her disability and need for a cane as a reasonable accommodation, and that he complained that she walked too slowly; in 2012-early 2013 Salvo made discriminatory comments based on plaintiff’s medical condition including “Brookdale needs people who are not hobbling to meetings”; which she claims he uttered in response to her use of a cane. Plaintiff further alleges that her request for additional medical leave following her stroke was denied in May 2015, and she was informed that her illness and

disability leave were unauthorized and unpaid and she was instructed to submit a doctor's note, which she claims she did in June 2015. She claims Brookdale failed to engage in any interactive process with her to consider the appropriate accommodation of her medical challenges.

Plaintiff's Sixth Cause of Action Alleging Retaliation

With regards to plaintiff's claims that she was retaliated against based upon the complaints she made regarding the discriminatory treatment she received, she alleges that: her salary was decreased, and when she complained she was told that she should just be "happy to have a job."¹ She alleges that her salary was lower than all the other administrators, due to the disparate treatment she received at Brookdale. In addition, plaintiff claims she was retaliated against by being made to continue reporting to Salvo despite her complaints about him. She met with Chief Compliance Officer Piascik on two occasions in 2013 to discuss the ongoing discriminatory harassment that she was suffering, and claims she was told there was nothing that could be done, as Salvo was "not to be touched," given his high status at Brookdale. Plaintiff alleges that she had a meeting scheduled for the week of August 10, 2015 with Labor Relations Manager Alejandra Rosales to discuss her discrimination complaints. Instead, plaintiff claims that Brookdale retaliated against her by terminating her employment, cancelling her health insurance and refusing to acknowledge that she had accrued vacation days.

The court finds that the fourth cause of action in plaintiff's complaint alleging discrimination based upon her disability and the sixth cause of action therein containing her retaliation claim are not barred by the statute of limitations as plaintiff has alleged a continuing pattern of discrimination by Brookdale employees based upon her disability and has alleged retaliatory actions taken by Brookdale against her. Here, plaintiff's complaint alleges

¹The complaint fails to indicate who said this to plaintiff.

discriminatory conduct and retaliation within the limitations period that is sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a continuing discriminatory practice, and thus plaintiff's claim of discrimination based upon her disability and her retaliation claim are timely in their entirety under the continuing violation doctrine (*see Williams*, 61 AD3d at 80-81; *Clark*, 302 AD2d at 945; *Walsh*, 244 AD2d at 215). Accordingly, that branch of Brookdale's motion seeking to dismiss the allegedly untimely allegations and claims sounding in discrimination based upon disability and retaliation is denied.

Conclusion

That branch of Brookdale's motion, pursuant to CPLR 3211 (a) (5), which seeks to dismiss plaintiff's complaint is granted to the extent that the court finds that plaintiff's first, second and third causes of action are time-barred and are therefore dismissed. In addition, plaintiff has failed to state a cause of action alleging gender-based discrimination; thus her fifth cause of action is also dismissed, without prejudice. Plaintiff is granted leave to amend her complaint with regard to these claims (regarding gender-based discrimination) within 30 days after service of this order with notice of entry. As Brookdale has not as yet answered the complaint, Brookdale is directed to submit an answer within 60 days of receipt of any amended complaint, or if none, within 60 days of service of this order with notice of entry. The parties are directed to appear for a preliminary conference in the Intake Courtroom at 9:30 a.m. on August 14, 2017. All other requested relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**