Vitti v Macy's Inc.
2018 NY Slip Op 32809(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 152875/2018
Judge: William Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM
Justice

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ANGELA VITTI,

Plaintiff,

- v -

MACY'S INCORPORATED, CLINIQUE LABORATORIES LLC,

Defendant.

INDEX NO. 152875/2018

MOTION DATE 09/06/2018, 09/06/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

Upon the foregoing documents, the defendants' motions to dismiss, Motion Sequence No. 001 and 002, are consolidated for decision and are granted and the complaint is dismissed.

BACKGROUND

In this action, plaintiff alleges that she was wrongfully terminated from her employment and asserts four causes of action against the defendants, Macy's Retail Holdings, Inc., (sued incorrectly herein as Macy's Incorporated, hereinafter, Macy's and/or defendant) and Clinique Laboratories LLC, (hereinafter Clinique and/or defendant), whom she alleges jointly employed her. (NYSCEF Doc. No. 2). Plaintiff claims she was terminated on April 4, 2013, as a skin care technician and make-up artist for Clinique's make-up department within defendant Macy's Department Store. (NYSCEF Doc. No. 2, ¶¶ 64 and 157). Specifically, plaintiff alleges claims for employment disability discrimination and retaliation in violation of the New York State

Human Rights Law ("NYSHRL"), and alleges employment disability discrimination and retaliation claims in violation of New York City Human Rights Law ("NYCHRL"). (NYSCEF Doc. No. 2).

Plaintiff asserted these same claims and claims alleging violations of the Americans with Disabilities Act ("ADA") in the Southern District of New York in an action commenced on July 9, 2014. (NYSCEF Doc. Nos. 9 and 10). In a 14-page Memorandum Decision, the United States District Judge granted summary judgment to Macy's and Clinique on September 29, 2017, and dismissed the ADA claims, however, he declined to exercise supplemental jurisdiction over plaintiff's NYSHRL and NYCHRL claims and accordingly dismissed the state law claims without prejudice. (NYSCEF Doc. No. 11). The District Court judge entered judgment on the same day in favor of Macy's and Clinique and dismissed, without prejudice, plaintiff's remaining state and city law claims. (NYSCEF Doc. No. 12). Plaintiff appealed the judgment to the Second Circuit Court of Appeals but did not include in the issues to be reviewed the dismissal without prejudice of the state law claims. (NYSCEF Doc. Nos.13 and 14).

Plaintiff commenced this action on March 29, 2018, six months after the dismissal of her federal lawsuit, however, plaintiff did not serve Macy's and Clinique's registered agent in accordance with section 306 of the Business Corporation Law with the complaint, until May 3, 2018, a full five weeks following commencement of the action. (NYSCEF Doc. Nos. 8 and 37).

Defendants now move to dismiss the complaint claiming that the motion to dismiss is unopposed as plaintiff failed to timely file opposition to the motion and on the grounds that plaintiff's failure to properly serve the complaint pursuant to CPLR §205(a), requires dismissal of the complaint as the claims are time barred. For the reasons that follow, defendants' motions to dismiss are granted and the complaint is dismissed.

STANDARD OF REVIEW/ANALYSIS

As an initial matter, defendants correctly point out that plaintiff's opposition to the motions to dismiss was untimely. Defendants are correct that the court cannot consider plaintiff's opposition to the motion to dismiss, because the papers were not timely filed in accordance with the provisions of CPLR 2214 (NYSCEF Doc. Nos. 24; 25; 36; and 39). A notice of motion that is served at least 16 days before the return day, as was the case here, may demand that "[a]nswering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before" that return day (CPLR 2214 [b]). (see generally Siegel, NY Prac §247 [4th ed]). Moreover, this court's Part rules reiterate the importance of compliance with the time limits set forth in the CPLR, noting that "Timely interposition of all papers in accordance with the CPLR is required, as the Court will not consider the merits of any papers, including opposition, . . . which appear to have been interposed in an untimely or otherwise inappropriate manner." See, New York County Supreme Court Civil Branch, Rules of the Justices, p. 56.

Not only did plaintiff fail to comply with the time limits set forth in CPLR 2214 (b) and this court's Part rules, she failed to offer a valid excuse for the untimely service of her opposition to defendant Macy's motion to dismiss, simply glossing over the fact that she served her opposition not seven days before the return date, but one day before the return date of the motion, on the same day that Macy's reply papers were due to be served. (NYSCEF Doc. No. 26). Defendant Clinique's motion to dismiss was served through the NYSCEF system on June 19, 2018 and noticed July 6, 2018 as the return date. Plaintiff did not serve her opposition to Clinique's motion until July 9, 2018 claiming that she did not realize that Clinique had also moved to dismiss. Accordingly, plaintiff failed to comply with the time limits set forth in the

CPLR, however, in the case of the opposition served to defendant Clinique's motion to dismiss, she has offered an explanation for her delay in serving late opposition papers.

On this record, plaintiff has failed to offer a valid excuse for her delay, requiring rejection of her opposition papers and the granting of defendants' motions to dismiss. See, *Nakollofski v. Kingsway Properties, LLC,* 157 A.D.3d 960, 70 N.Y.S.3d 230 (2d Dep't 2018) ("The Supreme Court providently exercised its discretion in declining to consider the plaintiff's opposition to [defendant's] motion to vacate the default, despite no showing of prejudice to [defendant], as the plaintiff failed to provide a valid excuse for the late service of its opposition papers."); *Leser v Penido*, 2013 NY Slip Op 30352[U], *4 (Sup. Ct., NY County 2013) (denying untimely cross-motion pursuant to CPLR 2214(b) where "[n]o excuse, let alone a valid one, has been offered here."); *Risucci v. Zeal Mgmt. Corp.*, 258 A.D.2d 512, 685 N.Y.S.2d 280, 281 (2d Dep't 1999) ("The Supreme Court did not improvidently exercise its discretion by refusing to consider the plaintiff's opposition papers, despite no showing of prejudice to the respondents, as she failed to provide a valid excuse for the late service."); *Bush v. Hayward,* 156 A.D.2d 899, 901 (3d Dep't 1989) ("Without a valid excuse, plaintiffs late papers could not properly be considered.").

Even if plaintiff's opposition to the defendants' motions to dismiss were considered by the court, the claims alleged in the complaint are time barred and must be dismissed. Defendants correctly argue that the three-year statute of limitations on plaintiff's claims has expired as more than six months had passed between the date that the federal action was dismissed and this state court action was commenced. Plaintiff's contention that there are two and a half years remaining on the statute of limitations, ignores the plain language of CPLR 205(a) and the case law interpreting that section.

CPLR § 205 (a) provides:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Defendants contend that the federal court's refusal to exercise jurisdiction over plaintiff's state law claims triggers CPLR 205(a) because plaintiff appealed only the dismissal of her federal claims and not her state law claims, citing *Cook v. Deloitte & Touche USA,* 824 N.Y.S.2d 753, 2006 N.Y. Misc. LEXIS 2310 (Sup. Ct. N.Y. County, 2006). In *Cook*, as in this case, the federal claims were dismissed in federal court and the state claims were dismissed without prejudice because the federal court declined to exercise supplemental jurisdiction. See *id.* The court determined that even though an appeal was taken from the dismissal of the federal claims, because the plaintiff did not appeal the dismissal of the state claims, those state law claims were "terminated" under section 205(a). *Id.*

CPLR 205(a) only applies to extend the statute of limitations, if the subsequent action has been commenced within six months of the termination of the prior action and the defendants were served within such six-month period. For the purposes of CPLR 205, "'termination' of the prior action occurs when appeals as of right are exhausted." *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.,* 5 N.Y.3d 514, 519, 840 N.E.2d 565, 806 N.Y.S.2d 453, 455 (2005).

Here, plaintiff only appealed the dismissal of the ADA claim, she did not appeal the District Court's decision declining to exercise supplemental jurisdiction and dismissing the state law claims without prejudice, and her claim that her appeal to the Second Circuit seeks reversal

of the District Court's judgment in its entirety, does not alter this fact. (NYSCEF Doc. Nos. 13 and 14). Just as in *Cook*, here plaintiff's state claims were terminated by the dismissal order of the District Court, and the period within which plaintiff had to bring her claims in State court began upon the entry of the order dismissing such claims, *i.e.*, September 29, 2017.

The record demonstrates that plaintiff filed this action on March 29, 2018 but she did not serve the defendants until May 3, 2018, a full five weeks later. The six-month period within which plaintiff must have served defendants in this action under CPLR section 205(a) began to run on September 29, 2017, upon the entry of the order dismissing the prior federal court action. As the affidavits of service make clear, plaintiff did not serve defendants until May 3, 2018, five weeks after the six-month extension period allowed by CPLR 205(a), and as such, her claims are time barred. See, *Quinones v. Neighborhood Youth & Family Servs., Inc.*, 71 A.D.3d 1106, 1106 (2d Dep't 2010), leave to appeal dismissed, 15 N.Y.3d 917 (2010), cert. denied, 565 U.S. 822 (2011); *Silber v. Stein*, 287 A.D.2d 494,495 (2d Dep't 2001) ("Since service of the new complaint was not properly effected within six months after the dismissal of the original complaint, the Supreme Court properly dismissed the new complaint.") (citation omitted); *Moscata v. Kelly*, No. 1:15-CV-04641, 2016 U.S. Dist. LEXIS 69533 at *22 (S.D.N.Y. May 26, 2016) (dismissing counts as untimely because even though plaintiffs filed their complaint in federal court within six months of termination of state court action, they did not serve defendants until more than six months after the termination of the state court suit). Accordingly, it is,

ORDERED that the motions of defendant Macy's Incorporated and Clinique Laboratories LLC, Motion Sequence Nos. 001 and 002, to dismiss the complaint herein, is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to

said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

11/2/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE