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

**PRESENT:** HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

*Justice*

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GENEVAH CHOW-TAI,

Plaintiff,

- v -

FULVIO & ASSOCIATES, LLP, JOHN FULVIO

Defendants.

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**INDEX NO.** 158939/2018

**MOTION DATE** 04/30/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, Defendants' motion to dismiss Plaintiff's complaint pursuant to CPLR §3211[a][5] and [7] is determined as follows:

In her verified complaint, Plaintiff avers she was employed by Defendant Fulvio & Associates, LLP ("Fulvio, LLP") as a bookkeeper from 2008 until December 2015. Plaintiff claims her supervisor Defendant John Fulvio ("Fulvio") throughout the course of her employment subjected her to "a continuous pattern of sexual harassment, unlawful discrimination and unlawful practices based upon her sex". Further, it is alleged that Fulvio created a "hostile work environment" with his "discriminatory" and "offensive" conduct. By the court's count, Plaintiff alleged some eleven instances of specific hostile conduct by Fulvio in her complaint. Of those, seven contained allegations of overtly sexually suggestive conduct by Fulvio. Only two of the allegations as to Fulvio's conduct specified when it occurred. Plaintiff alleges she was forced to quit her employment in December 2015 as a result of Fulvio's conduct.

In the complaint, Plaintiff asserts five causes of action: [1] discrimination under New York State law, [2] discrimination under the New York City Administrative Code, [3] constructive discharge in violation of NYSHRL, [4] constructive discharge in violation of NYCHRL and [5] hostile work environment.

Defendants move to dismiss on the basis that the sex/gender discrimination and harassment claims are barred by the statute of limitations and that the cause of action for constructive discharge fails to state a claim as a matter of law.

On a motion to dismiss a cause of action claiming it is barred by the statute of limitations, the movant bears the initial burden of making a *prima facie* showing that the time in which to sue has expired (*see* CPLR §3211[a][5]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued"

(*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). In evaluating such a motion, "the Court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]). As well, a plaintiff's opposition to a CPLR §3211 motion "must be given [its] most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). Where the movant demonstrates preliminarily that a claim is barred by the statute of limitations, the plaintiff must establish that a toll or stay is applicable or that an issue of fact exists (*see Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

Plaintiff's claims of discrimination and harassment in her first, second and fifth causes of action are based upon alleged violations of Executive Law §296 and New York City Human Rights Law §8-107 [Administrative Code of City of NY] and, therefore, are governed by a three-year statute of limitations (*see* Executive Law § 297[9]; CPLR §214[2]; NYC Admin Code §8-502[d]; *see also Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]). As the complaint in this matter was filed on September 26, 2018, discrete discriminatory acts which occurred before September 26, 2015 are facially untimely (*see Jeudy v City of New York*, 142 AD3d 821, 822 [1st Dept 2016]).

Defendant demonstrated *prima facie* that Plaintiff's harassment and discrimination claims are time barred as none of the conduct attributed to Fulvio is explicitly alleged to have occurred before September 26, 2015 (*see Peckham v Island Park Union Free Sch. Dist.*, 167 AD3d 641 [2d Dept 2018]; *Stembridge v New York City Dept. of Educ.*, 88 AD3d 611 [1st Dept 2011]).

In opposition, Plaintiff asserts the existence of a toll based upon an alleged hostile work environment constituting a "continuing violation" such that acts occurring outside the limitations period remain actionable. Since a hostile work environment claim is predicated on a constellation of separate acts, a single act of harassment within the limitations period can render associated untimely acts actionable (*see Strauss v New York State Dept. of Educ.*, 26 AD3d 67 [3d Dept 2005]; *Salgado v The City of New York*, ____ F Supp ___, 2001 US Dist LEXIS 3196 [SDNY 2001]; *see also Cornwell v Robinson*, 23 F3d 694, 703-04 [2d Cir 1994]). However, application of the continuous violation doctrine requires not only proof of ongoing harassment, but also factual allegations of a specific instance of discrimination or harassment within the actionable period, which in the present case is after September 26, 2015 (*see Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860 [2d Dept 2017]; *Kimmel v State of New York*, 49 AD3d 1210 [4th Dept 2008]; *see also Harris v City of New York*, 186 F3d 243, 250 [2d Cir 1999]).

Here, contrary to Plaintiff's arguments, the complaint and affidavits submitted in opposition do not establish the existence of any specific discriminatory or harassing action by Fulvio after September 26, 2015 (*see Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, supra; *compare Harris v City of New York*, supra). At most, Plaintiff insufficiently alleges in conclusory fashion that Fulvio's objectionable conduct continued throughout her employment without identifying a particular act which occurred between September 26, 2015 and her resignation some two to three months later (*see D'Angelo v City of New York*, ___ Misc3d ___,

2018 NY Slip Op 33292[U][Sup Ct, NY County 2018]; *compare Hughes v United Parcel Serv., Inc.*, 4 Misc. 3d 1023[A][Sup Ct, NY County 2004]).

Plaintiff's argument the motion must be denied based upon a lack of discovery from the Defendants (*see* CPLR 3211[d]) is unavailing. Here, since Plaintiff herself was present when all the harassing conduct occurred, she is in the best position to identify the nature of the offending conduct and when it occurred (*see Greenstein v Sol S. Stolzenberg, D.M.D., P.C.*, 156 AD3d 465 [1st Dept 2017]).

As to Defendants' motion to dismiss Plaintiff's third and fourth causes of action alleging constructive discharge, on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 [2d Dept 2002]; *Schulman v Chase Manhattan Bank*, 268 AD2d 174 [2d Dept 2000]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In evaluating a pleading in this procedural context, not only must the facts and allegations contained therein presumed to be true (*see 219 Broadway Corp. v. Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]), but "whatever may be implied from its statements by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

While permitted to submit affidavits and evidence in support of its motion (*see* CPLR 3211[c]["either party may submit any evidence that could properly be considered on a motion for summary judgment"]; *see also also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), movant eschewed this option and only attacked the pleading as insufficient on its face.

To establish a constructive discharge, Plaintiff must demonstrate "deliberate and intentional" acts of the employer created an "intolerable workplace condition" which would compel a "reasonable person to leave" their employment (*Morris v Schroder Capital Mgmt. Int'l*, 7 NY3d 616, 622 [2006]; *see also Polidori v Societe Generale Groupe*, 39 AD3d 404 [1st Dept 2007]). In the present case, Fulvio, the principal of Fulvio, LLC, is alleged to be the perpetrator of multiple purposeful, harassing gender based discriminatory acts towards Plaintiff both through physical contact and oral statements. Plaintiff also alleges several instances when Fulvio threatened to terminate Plaintiff's employment and, in one instance alleged in Plaintiff's affidavit in opposition, Fulvio derided Plaintiff in the presence of another employee. These acts are alleged to have caused both psychological and physical distress, including affecting Plaintiff both during and after her pregnancy, and compelled her to resign. Contrary to Defendant's

assertions, these allegations, viewed most favorably, sufficiently state a claim of constructive discharge for pleading purposes (*see Imperial Diner, Inc. v State Human Rights Appeal Bd.*, 52 NY2d 72 [1980]; *Mariotti v Alitalia-Linee Aeree Italiane Societa Per Azioni*, ___ Misc3d ___, 2008 NY Slip Op 32160[U][Sup Ct, NY County 2008]; *Attea v Helmsley Enters., Inc.*, Misc3d ___, 2014 NY Slip Op 31107[U] [Sup Ct, NY County 2014]).

Accordingly, based on the foregoing, it is

ORDERED that the branch of Defendant's motion is granted to the extent that Plaintiff's first, second and fifth causes of action are dismissed pursuant to CPLR 3211[a][5] and it is

ORDERED that the branch of Defendant's motion to dismiss Plaintiff's third and fourth causes of action is denied and it is

ORDERED that Defendants shall serve and answer within the time accorded in CPLR 3211[f] and the parties are directed to appear for a preliminary conference on **October 1, 2019 at 9:30 a.m.**, at 111 Center Street, IAS Part 14, courtroom 1045.

8/23/2019
DATE

FRANCIS A. KAHN, III, J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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