SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

----------X

BINTOU JAITEH,

Plaintiff,

- v -

WHOLE FOODS MARKET GROUP, INC., AMAZON.COM, INC., and ELITE INVESTIGATIONS LTD,

Defendants.

----------X

INDEX NO. 154251/2021

MOTION SEQ. NO. 002 005 007 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 49, 50, 51

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 52, 53, 54, 55

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 73, 74, 75, 76, 77, 78, 79, 87

were read on this motion to/for DISMISS.

In this employment discrimination and negligence action, defendant Elite Investigations, Ltd. (Elite) moves for an order, pursuant to CPLR 3211(a) (7), dismissing the complaint (motion seq. No. 002). Defendant Whole Foods Market Group, Inc. (Whole Foods) also moves for dismissal of the complaint and the proposed amended complaint, pursuant to CPLR 3211(a)(7), and to strike irrelevant allegations, pursuant to CPLR 3024(b) (motion seq. Nos. 005 and 009). Plaintiff moves for leave to amend her complaint pursuant to CPLR 3025(b) (motion seq. No. 007).

Plaintiff, a black woman, alleges that she was fired from her job at defendant Whole Food during the height of the Covid pandemic, when an unmasked customer came into the store, spat on her, and she made an "air-kick gesture" to the customer. She claims that her firing was discriminatory because a white male employee who sexually harassed a co-employee was not fired. Defendants contend that the complaint fails to satisfy the pleading requirements for a discrimination claim against defendant Whole Foods and for a negligence claim against defendant Elite, which provided security guards at the premises. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, plaintiff's motion to amend is granted to the limited extent indicated below, Whole Food's motion to dismiss is granted, and Elite's motion to dismiss is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began working as a cashier at Whole Foods' Columbus Circle grocery store in Manhattan prior to 2017 (NYSCEF Doc. No. 58, amended complaint, ¶¶ 6, 7). Elite provided security and order maintenance services to Whole Foods pursuant to a security agreement entered into between the parties (*id.* at ¶ 3).

In May 2020, during the Covid pandemic, Whole Foods required all employees and customers to wear a mask and enforced store entrance rules to comply with CDC regulations and state and local government orders. Under those rules, Elite's security guard would ensure that all customers wore a mask in order to enter the store, and a Whole Foods employee would enforce occupancy limits at the store entrance by allowing only a certain number of customers into the store as others left (*id.*, ¶¶ 8-9).

On May 6, 2020, plaintiff was at the store entrance when a customer, Nune Melikyan, walked in unmasked. Plaintiff asked her to wear a mask and stand behind a social distancing

line, but Melikyan refused, insisting that she be allowed to enter mask-free. Plaintiff insisted that she follow the rules, but Melikyan, who was recording plaintiff with her phone, demanded to speak to a manager and spat on plaintiff. Plaintiff, "alarmed that she might get infected [with Covid-19]" tried to protect herself with an "air-kick gesture of self defense" (*id.*, ¶¶ 12, 16).[1] Elite's security guard did not assist plaintiff and, although plaintiff called Whole Foods' manager for assistance, nobody responded (*id.*, ¶¶ 13-14). The police removed Melikyan from the store (*id.*, ¶ 15).

Shortly after the incident, plaintiff was put on administrative leave (*id.*, ¶ 17). On May 12, 2020, plaintiff was fired (*id.*, ¶ 18).

Plaintiff claims that, prior to the May 6, 2020 incident, a white male co-worker, John Doe, sexually harassed a Hispanic female co-worker but was not fired or put on administrative leave. Plaintiff was told that the female co-worker had suffered several instances of "unwanted and inappropriate" sexual advances from John Doe and was "scared" of him because he kept pestering her even though she repeatedly told him she had no romantic interest in him (*id.*, ¶¶ 19-20). John Doe also handed a note to the female co-worker, who told him to stop bothering her and reported him to the managers of the store (*id.*, ¶ 21). John Doe allegedly works at the same store and at the same level as plaintiff, answered to the same supervisors, and was subject to the same performance and disciplinary standards (*id.*, ¶ 23).

Plaintiff commenced this action by filing a summons and complaint on April 30, 2021 (NYSCEF Doc. No. 1). In her initial complaint, plaintiff asserted nine causes of action: (1) negligence against Whole Foods; (2) negligence against Elite; (3) racial discrimination against Whole Foods under the New York City Human Rights Law (NYCHRL); (4) racial

[1] The complaint asserts only that plaintiff made a kicking gesture and does not specify whether she made any contact with Melikyan.

discrimination against Whole Foods under the New York State Human Rights Law (NYSHRL); (5) gender discrimination under the NYCHRL; (6) gender discrimination under the NYSHRL; (7) respondeat superior liability against Elite; (8) vicarious liability against defendant Amazon.com, Inc.; and (9) negligent hiring and retention of Elite (NYSCEF Doc. No. 2, complaint).

Whole Foods now moves to dismiss plaintiff's complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) and/or pursuant to CPLR 3024 (b) to strike certain portions thereof (motion seq. No. 005). In motion sequence 009, Whole Foods also seeks to dismiss the proposed amended complaint plaintiff seeks to file in motion sequence 007. The proposed amended complaint asserts five causes of action: (1) racial discrimination against Whole Foods under the NYCHRL; (2) racial discrimination under the NYSHRL; (3) gender discrimination under the NYCHRL; (4) gender discrimination under the NYSHRL; and (5) negligence against Elite (NYSCEF Doc. No. 58).

Elite also moves to dismiss the complaint pursuant to CPLR 3211(a)(7) (motion seq. No. 002).

LEGAL CONCLUSIONS

Plaintiff's motion for leave to amend is granted only to the extent of allowing her to amend her claim against Elite and is otherwise denied. Whole Foods' motion to dismiss is granted and Elite's motion to dismiss is denied.

Although leave to amend shall be freely granted, the amendment must not be plainly lacking in merit and must not cause prejudice or surprise to the non-moving parties (*See,* CPLR 3025 [b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]).

Since the motions by Elite and Whole Foods address the allegations in plaintiff's complaint and proposed amended complaint, despite the fact that her motion for leave to amend the complaint had not yet been resolved, the motions will be decided based on both pleadings since the parties are permitted to chart their own procedural course (*See generally Lex 33 Assocs., L.P. v Grasso*, 283 AD2d 272, 273 [1st Dept 2001]).

On a motion to dismiss, pursuant to CPLR 3211(a)(7), the court must accept as true the facts alleged in the complaint, accord the plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory (*See Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "[A]llegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Garber v Board of Trustees of State Univ. of N.Y.,* 38 AD3d 833, 834 [2d Dept 2007], *quoting Maas v Cornell Univ.,* 94 NY2d 87, 91 [1999]). Dismissal under CPLR 3211 (a) (1) is only appropriate if the "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], *citing Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Employment discrimination cases such as this are "generally reviewed under notice pleading standards" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). Thus, a plaintiff need not plead specific facts to establish a prima facie case of discrimination, but must only give fair notice to the defendant of the nature of the claim and its grounds (*id.*).

Race and Gender Discrimination Claims Under The NYSHRL (Second and Fourth Causes of Action)

Plaintiff fails to state cognizable claims of disparate treatment under the NYSHRL based on her race (second cause of action) and gender (fourth cause of action). The NYSHRL, as set forth in Executive Law § 296 (1) (a), makes it "an unlawful discriminatory practice" for an employer to discriminate against an individual "in compensation or in terms, conditions or privileges of employment," because of "age, race, creed, color, national origin, . . . sex . . ." (Executive Law § 296[1][a]; *see also Krause v Lancer & Loader Group, LLC*, 40 Misc 3d 385, 391-392 [Sup Ct, NY County 2013]).

A plaintiff alleging racial or gender discrimination under the NYSHRL has the initial burden of establishing a prima facie case of discrimination. To meet her prima facie burden, plaintiff must show that: (1) she is a member of a protected class; (2) she was competent to perform the job in question, or was performing the job duties satisfactorily; (3) she suffered a materially adverse employment action or was terminated from employment; and (4) the action occurred under circumstances that gave rise to an inference of discrimination (*See, Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Torre v Charter Communications, Inc.*, 493 F Supp 3d 276, 285 [SD NY 2020]). "An inference of discrimination can arise from circumstances including, but not limited to, . . . the more favorable treatment of employees not in the protected group" (*Littlejohn v City of New York*, 795 F3d 297, 312 [2d Cir 2015]; *see also Mandala v NTT Data, Inc.*, 975 F3d 202, 209 [2d Cir 2020] [plaintiff must plead enough facts to plausibly support a disparate treatment claim]).

To support an assertion of such disparate treatment, the plaintiff must compare herself to employees who are "similarly situated in all material respects" (*Shah v Wilco Sys., Inc.*, 27 AD3d

169, 177 [1st Dept 2005] [internal quotation marks and citations omitted]). "While the circumstances do not have to be identical, there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects" (*id.* [internal quotation marks and citations omitted]; *see also Mandell v County of Suffolk*, 316 F3d 368, 379 [2d Cir 2003]; *Graham v Long Is. R.R.*, 230 F3d 34, 39 [2d Cir 2000]; *Shumway v United Parcel Serv.*, 118 F3d 60, 64 [2d Cir 1997]; *Henry v New York City Health & Hosp. Corp.*, 18 F Supp 3d 396, 408 [SD NY 2014] [plaintiff must assert allegations that support at least a plausible inference of discriminatory intent]).

In assessing whether a plaintiff and a comparator are similarly situated, a court must examine relevant factors such as whether they are subject to the same standards governing performance evaluation and discipline and whether the conduct was similar and of comparable severity (*Dooley v JetBlue Airways Corp.*, 636 Fed Appx 16, 20 [2d Cir 2015] [allegations must cross line from conceivable to plausible]; *Graham v Long Is. R.R.*, 230 F3d at 40 [plaintiff must show a reasonably close resemblance of the facts and circumstances of plaintiff's and the comparator's cases]; *Shumway v United Parcel Serv., Inc.*, 118 F3d at 64 [where no evidence of similar infractions by comparator, plaintiff found not to be similarly situated]; *see Opoku v Brega*, 2016 WL 5720807, * 8-9, 2016 US Dist LEXIS 136038 [SD NY 2016]). "[T]here should be an objectively identifiable basis for comparability" (*Graham v Long Is. R.R.*, 230 F3d at 40 [internal quotation marks and citation omitted]; *see also Opoku v Brega*, 2016 WL 5720807, * 8-9, 2016 US Dist LEXIS 136038). A lack of detail about the comparator's conduct makes it impossible for the court to conclude that the incident is at all comparable to the conduct for which plaintiff was disciplined (*see Blige v City Univ. of N.Y.*, 2017 WL 498580, at * 9, 2017 US Dist LEXIS 8354 [SD NY], *report and recommendation adopted by* 2017 WL 1064716, 2017

US Dist LEXIS 40928 [SD NY 2017] [numerous courts have dismissed disparate treatment claims where a complaint was devoid of detail regarding the comparators and how their conduct compared to plaintiff's or how they were treated differently]; *Mesias v Cravath, Swaine & Moore LLP*, 106 F Supp 3d 431, 437 [SD NY 2015]). To determine whether a comparator's offenses were similar and of comparable seriousness, not only must the acts be examined but the context and surrounding circumstances in which those acts are evaluated must be considered (*see Graham v Long Is. R.R.*, 230 F3d at 40).

Although plaintiff has met her burden of alleging that she was in a protected class based on her gender and her race, that she was performing her job duties as a cashier satisfactorily, and was terminated from employment, she fails to sufficiently plead that her discharge occurred under circumstances giving rise to an inference of unlawful discrimination. In pleading disparate treatment, she is required to identify a comparator with facts and circumstances reasonably similar to her own. However, the complaint is deficient insofar as plaintiff fails to provide detail about the nature of the comparator's conduct and how it was similar to hers. It was incumbent upon plaintiff to plead that she and John Doe engaged in similar misconduct. However, in her complaint, plaintiff merely alleges, based on hearsay from another co-worker, that John Doe engaged in several instances of "unwanted and inappropriate sexual advances" to another co-worker, that he was "pestering" the co-worker, and handed her a note to open later, but that he was not fired (NYSCEF Doc. No. 58, amended complaint, ¶¶ 20-21). There are no details other than these bare allegations about what this co-worker allegedly told her. It is impossible to infer from these conclusory allegations what acts John Doe purportedly engaged in, the context and circumstances of such acts, and whether he admitted that he committed them. In contrast, plaintiff's conduct involved an altercation, possibly physical, with a customer at the front

entrance to the store, which resulted in the police being called to the premises. Her admitted conduct of giving an "air-kick gesture" was clearly of a different nature and seriousness, and involved a different context and surrounding circumstances, than the hearsay allegations of her co-worker about John Doe's conduct towards another co-worker. The dissimilarity of these purported events is apparent and warrants dismissal (*see Graham v Long Is. R.R.*, 230 F3d at 40; *Dooley v JetBlue Airways Corp.*, 636 Fed Appx at 20 [dismissal of discrimination claim where conduct not comparable]; *Richards v Department of Educ. of City of N.Y.*, 2022 WL 329226, * 11-12, 2022 US Dist LEXIS 19674 [SD NY 2022] [dismissal granted where allegations fail to reflect circumstances that bear reasonably close resemblance; plaintiff raised issue in staff meeting and had an actual incident with hospital staff, whereas comparator just raised same issue in staff meeting]; *Williams v New York City Dept. of Corrections*, 2020 WL 509180, * 4 [SD NY 2020] [dismissal granted where no allegations of similarly situated comparators]; *Blige v City Univ. of N.Y.*, 2017 WL 498580, at * 8-10, 2017 US Dist LEXIS 8354; *Osborne v Moody's Investors Serv., Inc.*, 2018 WL 1441392, * 5 [SD NY 2018] [motion to dismiss gender discrimination claim granted where complaint lacks specificity regarding comparators]; *Mesias v Cravath, Swaine & Moore LLP*, 106 F Supp 3d at 437 [conclusory allegations that fail to describe similar errors of colleagues dismissed for failure to state claim]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013] [NYSHRL claim dismissed for lack of concrete factual allegations]). Here, plaintiff fails to allege any "objectively identifiable basis for comparability" (*Graham v Long Is. R.R.*, 230 F3d at 40 [internal quotation marks and citation omitted]). Therefore, her claims for race and gender discrimination under the NYSHRL are dismissed.

Race and Gender Discrimination Claims Under the NYCHRL (First and Third Causes of Action)

Plaintiff also fails to state cognizable claims of disparate treatment under the NYCHRL based on her race (first cause of action) and gender (third cause of action). Subsection 1 of New York City Administrative Code (Admin Code) § 8-107 provides, in relevant part, that:

> "[i]t shall be an unlawful discriminatory practice:
>
> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person . . .
>
> (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment"

(Admin Code § 8-107[1][a][3]). The NYCHRL offers broader protections than the NYSHRL (*see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 884 [2013]). "Unlike the NYSHRL, the NYCHRL does not require that an employment action taken against a plaintiff be "materially adverse" in order for the plaintiff to establish a prima facie case of discrimination (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 70-71 [1st Dept 2009] [holding that there is no material adversity requirement for a claim under the NYCHRL]; *accord Varughese v Mount Sinai Med. Ctr.*, 2015 WL 1499618, at *39, 2015 US Dist LEXIS 43758 [SD NY 2015]). Instead, to establish an adverse action under the NYCHRL, a plaintiff must simply show that she was treated differently from others in a way that was more than a "petty slights or trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d at 80; *see Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 [2d Cir. 2013] [under NYCHRL, plaintiff need only show she was treated less well than other employees because of discriminatory intent];

Farmer v Shake Shack Enterprises, Inc., 473 F Supp 3d 309, 327-328 [SD NY 2020]). The final prong of the prima facie case "is satisfied if a member of a protected class was treated differently than a worker who was not a member of that protected class" (*Gorman v Covidien, LLC*, 146 F Supp 3d 509, 530 [SD NY 2015] [internal quotation marks and citation omitted; *see Leon v Columbia Univ. Med. Ctr.*, 2013 WL 6669415, * 11, 2013 US Dist LEXIS 177728 [SD NY 2013], *affd* 597 Fed Appx 30 [2d Cir 2015] [plaintiff must still be able to link the adverse employment action to a discriminatory motivation]). Despite the more relaxed burden under the NYCHRL, dismissal is appropriate if a plaintiff fails to allege that discrimination played a role in the defendant's actions (*see Montgomery v New York City Trans. Auth.*, 806 Fed Appx 27, 31 [2d Cir 2020] [despite less stringent standard for NYCHRL claim, no proof plaintiff was treated less well or that discrimination played any role]; *Lulo v OTG Mgt., LLC*, 2022 WL 409224, * 11, 2022 US Dist LEXIS 24298 [SD NY 2022]; *Farmer v Shake Shack Enterprises, Inc.*, 473 F Supp 3d at 329 [dismissal granted where sparse allegations of disparate treatment]; *Leon v Columbia Univ. Med. Ctr.*, 2013 WL 6669415, * 11, 2013 US Dist LEXIS 177728).

In order for a plaintiff to establish a prima facie case of discrimination under the NYCHRL, it must show that (1) she is a member of a protected class; (2) she was qualified to hold the employment position; (3) she was terminated from employment or suffered an adverse employment action; and (4) the termination or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]; *see also Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009]).

In this action, plaintiff has adequately pleaded that she was a member of protected race and gender classes, that she was qualified for her position, and that she suffered an adverse employment action. However, her allegations of race and gender discrimination under the

NYCHRL fail for the same reasons that those same claims failed under the NYSHRL – she does not adequately plead disparate treatment. Plaintiff merely asserts bare legal conclusions without factual specificity (*see, Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177 [1st Dept 2005] [disparate treatment claim dismissed where plaintiff failed to establish comparators were similarly situated in all material respects]; *see also Pappas v Moody's Inv. Serv.*, 202 AD3d 630, 630 [1st Dept 2022] [NYCHRL claim dismissed where plaintiff failed to allege facts that co-workers who engaged in similar behavior were treated differently]; *Matter of Russell v New York State Ins. Fund*, 181 AD3d 497, 498 [1st Dept 2020] [conclusory allegations of another employee's poor performance insufficient to show discriminatory treatment]; *Thomas v Mintz*, 182 AD3d 490, 490 [1st Dept 2020] [NYCHRL claim dismissed for failure to allege facts that similarly situated persons not in protected class were treated more favorably than plaintiff]; *Johnson v Department of Educ. of City of N.Y.*, 158 AD3d 744,746-747 [2d Dept 2018] [NYCHRL claim dismissed where disparate treatment allegations conclusory]; *Matter of England v New York City Dept. of Envtl. Protection*, 150 AD3d 996, 997 [2d Dept 2017] [dismissal granted where speculation and bare legal conclusions without factual support]; *Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014] [NYCHRL claim dismissed for lack of factual allegations that similarly situated employees who did not share plaintiff's protected characteristics were treated better than plaintiff]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d at 622 [NYCHRL claim dismissed for failure to state claim because of lack of concrete factual allegations]).

Plaintiff's only allegations supporting her claims about John Doe's alleged "unwanted and inappropriate sexual advances," and that he was "pestering" another employee, are based on hearsay from another co-worker. Since plaintiff fails to allege any details about John Doe's

conduct, this Court cannot determine the nature of the same or how similar, if at all, his conduct was to plaintiff's at the time of her altercation with Melikyan. Her conclusory allegations fail to establish, or even suggest, circumstances that bear reasonably close resemblance between herself and her comparator. Therefore, her pleading of this claim is deficient (*see, Pappas v Moody's Inv. Serv.*, 202 AD3d 630; *Brown v City of New York*, 188 AD3d 518, 519 [1st Dept 2020] [complaint failed to allege facts giving rise to inference of discriminatory intent]; *Wolfe-Santos v NYS Gaming Commn.*, 188 AD3d 622, 622 [1st Dept 2020] [NYCHRL claim failed to allege facts to establish plaintiff was treated less well than similarly situated employees]; *Johnson v Department of Educ. of City of N.Y.*, 158 AD3d at 746-747; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d at 622; *Fawcett v Fox News Network, LLC*, 2022 WL 635418, * 5, 2022 NY Slip Op 30691[U] [Sup Ct, NY County 2022]).

Despite the fact that the NYCHRL is to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]), the pleadings as a whole are simply insufficient here for plaintiff to show that she was disparately treated based on her protected traits in comparison to persons outside her protected class who engaged in similar conduct (*see Rommage v MTA Long Is. R.R.*, 452 Fed Appx 70, 71 [2d Cir 2012] [dismissed where no reasonably close resemblance of facts and circumstances of plaintiff's and comparator's cases under Title VII or NYCHRL]). Therefore, the first and third causes of action also are dismissed.

Fifth Cause of Action (Negligence)

Plaintiff's proposed amended complaint sufficiently alleges a claim for negligence against Elite (the fifth cause of action).

To plead a claim for negligence, the plaintiff must allege that the defendant owed her a duty of care, it breached that duty, and that breach proximately caused the plaintiff's injury. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept. 2001]). This Court determines in the first instance the legal question of the existence and scope of the duty (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585 [1994]; *Kuti v Sera Sec. Servs.*, 182 AD3d 401, 402 [1st Dept 2020]). While a security company does not owe a duty of care to all persons on the premises by virtue of its security agreement (*see Coon v Hotel Gansevoort Group, LLC*, 150 AD3d 519, 520 [1st Dept 2017]), there is an exception for a third-party beneficiary to the agreement based on whether the provisions of that agreement, or the course of conduct between Elite and Whole Foods, evince a clear intent to confer a direct benefit on the alleged third-party beneficiary to protect her from physical injury (*see Mitchell v Long Acre* Hotel, 147 AD3d 567, 567 [1st Dept 2017]; *Perez v Hunts Point I Assoc., Inc.*, 129 AD3d 498, 499 [1st Dept 2015]; *Clark v City of New York*, 130 AD3d 964, 964 [2d Dept 2015]; *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013]; *cf. Johnson v McLane Assoc.*, 201 AD2d 436, 437 [1st Dept 1994] [security agreement did not indicate that parties intended to confer a direct benefit on supermarket manager]). A security company may also be liable where it assumes a duty to protect those on the premises in a manner beyond that called for under the terms of its contract, and it fails to carry out that duty correctly (*see Sukhlal v American Home Prods. Corp.*, 163 AD2d 160 [1st Dept 1990]; *see also Lee v Chelsea Piers*, 11 AD3d 257, 257 [1st Dept 2004]).

Here, Elite may have a duty to plaintiff as an intended third-party beneficiary of its security agreement with Whole Foods. Plaintiff has not yet had the opportunity to review defendant Elite's security contract with Whole Foods, and Elite has not submitted it in support of

its contention that plaintiff is not an intended third-party beneficiary. In addition, plaintiff alleges that Elite assumed a duty to protect her from customers like Ms. Melikyan. Thus, Elite's argument that it owes no duty fails as basis to dismiss at this early stage (*see Flynn v Niagara Univ.*, 198 AD2d 262, 264 [2d Dept 1993] [summary judgment denied to security company where no contract language specifying duties of security guards and no language limiting their duties to protection of property and not students]; *Kelly v Norgate Business Assocs.*, 25 Misc 3d 1203[A], 2009 NY Slip Op 51961[U] [Sup Ct, Bronx County 2009]; *cf. Rahim v Sottile Sec. Co.*, 32 AD3d 77, 79-80 [1st Dept 2006] [security agreement expressly excluded any third-party beneficiaries, and no basis for liability under exceptions in *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

Elite's assertion that plaintiff cannot demonstrate foreseeability is unavailing. While plaintiff must allege that the acts of the customer assailant were reasonably foreseeable (*see Haire v Bonelli*, 57 AD3d 1354, 1356 [3d Dept 2008]), she did allege this in her proposed amended complaint (NYSCEF Doc. No. 58, amended compl, ¶ 52). Moreover, foreseeability will not be determined on this CPLR 3211 pleading motion because plaintiff is entitled to the benefit of every favorable inference (*Haire v Bonelli*, 57 AD3d at 1356; *see Kuti v Sera Serc. Servs.*, 182 AD3d at 402 [foreseeability and causation "are issues generally more suitably entrusted to fact finder adjudication"]). Elite's contention that the intervening acts of Ms. Melikyan and plaintiff broke any causal connection to its own acts also is rejected. A third party's conduct may break the causal connection between a defendant's negligence and a plaintiff's injury, superceding a defendant's liability, where it "is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant." (*Kush v City of Buffalo*, 59 NY2d 26, 33

[1983]). However, "[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980]; *see Mazella v Beals*, 27 NY3d 694, 708 [2016]). The risk of a person coming into the store without a mask, violating the law and potentially assaulting or subjecting other patrons and employees to their unlawful conduct, may be the type of risk the security company was hired to prevent. Plaintiff's pleading that Elite's negligence was a substantial cause of the events that produced her injury satisfies her burden on this motion to dismiss (*Derdiarian v Felix Contr. Corp.*, 51 NY2d at 315).

With respect to damages, Elite asserts that it did nothing to cause plaintiff to lose her employment. Although plaintiff alleged in her initial complaint that she sustained a loss of pay as well as other non-economic damages due to Elite's negligence (NYSCEF Doc. No. 25, complaint, ¶ 44), the proposed amended complaint seeks damages only for "pain and suffering, insomnia, body aches, anxiety and severe emotional distress" (NYSCEF Doc. No. 58, amended complaint, ¶ 54). Elite's request for the dismissal of any future claims against it is premature. Therefore, Elite's motion to dismiss is denied in its entirety.

Accordingly, it is hereby:

ORDERED that the motions to dismiss by defendant Whole Foods Market Group, Inc. (motion seq. Nos. 005 and 009) are granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant Elite Investigations Ltd.; and it is further

ORDERED that the caption be amended to reflect the dismissal of Whole Foods Market Group, Inc., and all future papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for defendant Whole Foods Market Group, Inc. shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

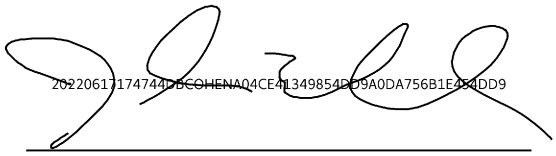
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion of defendant Elite Investigations, Ltd. (motion seq. No. 002) to dismiss the complaint and proposed amended complaint against it is denied; and it is further

ORDERED that the motion of plaintiff for leave to amend the complaint (motion seq. No. 007) is granted in part, as follows: leave is granted to amend the fifth cause of action (negligence) against defendant Elite Investigations, Ltd. as set forth in the proposed amended complaint in the form annexed to the moving papers as NYSCEF Doc. No. 58, but leave is denied as to the proposed first through fourth causes of action set forth in the proposed amended complaint; and it is further

ORDERED that within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint with the amended caption in conformity herewith; and it is further

ORDERED that defendant Elite Investigations, Ltd. shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service.



6/17/2022
DATE

DAVID B. COHEN, J.S.C.

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