SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **21**

Justice

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PARTI STARKS

Plaintiff

- v -

METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant

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INDEX NO. 155317/2022

MOTION DATE 01/09/2023

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISS.

In this employment discrimination action, Defendant moves to dismiss the complaint on the basis that the action is barred under election of remedies, and that the action is untimely. For the reasons that follow, the motion is denied.

Plaintiff Parti Starks (Plaintiff) brings this action against her former employer Metropolitan Transportation Authority Police Department (Defendant or MTA) alleging that she was discriminated against based on her race and her gender, in violation of New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL). Plaintiff seeks to recover damages, injunctive, equitable and declaratory relief for the injuries she sustained as a result of the alleged employment discrimination.

Defendant now pre-answer, moves pursuant to CPLR 3211(a)(1) to dismiss the complaint on the basis that it is time-barred under the election of remedy doctrine pursuant to Executive Law § 297 [9] or alternatively, time-barred pursuant to New York Executive Law § 298. Plaintiff opposes.

BACKGROUND

Plaintiff, an African American female, was employed by Defendant as a police officer. In order to be promoted to the position of sergeant at the MTA, a police officer must take a written promotional exam and score high enough to be placed on the "Promotional List," which ranks officers in descending order based on their final scores on the exam. Defendant then makes promotions to sergeant off the Promotional List by issuing personnel orders. The Promotional List remains in effect until a new promotional list is established. Defendant may keep a list in effect until it is exhausted and has discretion on when to provide a new promotional exam.

In 2014, Plaintiff took the sergeant's exam and ranked number 72 on the list. Defendant issued Personnel Order #14-75, which listed the results of the exam. Defendant then promoted eligible officers who ranked 62nd and up on the list. In February of 2018, a new sergeant's promotional exam was given, which Plaintiff did not take. Plaintiff alleges that Defendant administered another exam in 2018 and stopped promoting officers from the 2014 List after December 2017 in order to avoid promoting more African American female officers because there were fewer African American females in the top half of the 2014 List than in the bottom half of the List. As result, Plaintiff alleges that Defendant discriminated against her based on her race and gender by failing to promote her to sergeant.

Plaintiff alleges that as a result, she suffered economic loss, including past and future income, compensation and benefits, was made emotionally ill, suffered and continues to suffer damage to her reputation among her peers and suffered embarrassment and humiliation.

On April 16, 2019, Plaintiff filed a Charge of Discrimination against Defendant with the US Equal Employment Opportunity Commission (EEOC) alleging discriminatory practices, relating to her employment based on race and sex. Subsequently, the NY State Division of Human

Rights (NYSDHR) sent Plaintiff and her counsel a letter informing them that her original complaint filed with EEOC was transferred to NYSDHR for complaint filing, and further processing and investigation. The same letter informed Plaintiff that NYSDHR could not proceed with the investigation or the EEOC charge until it received a notarized complaint from Plaintiff. Plaintiff then filed a complaint with the NYSDHR, "on behalf of EEOC", authorizing NHSDHR to accept the complaint by EEOC and containing the same allegations as in her EEOC charge.

On April 23, 2020, NYSDHR issued a "Determination and Order After Investigation," finding that there was no probable cause to believe that Defendant had engaged in discriminatory practices against Plaintiff and dismissed Plaintiff's complaint. In its Determination and Order After Investigation, NYSDHR informed Plaintiff that she may appeal NYSDHR's determination to the NY State Supreme Court in the county in which the alleged discrimination took place within 60 days after its determination.

On August 31, 2020, EEOC adopted NYSDHR's findings and also dismissed Plaintiff's charge. EEOC also informed Plaintiff that if she wished to file a lawsuit against Defendant in federal court, she had to do so within 90 days.

On November 13, 2020, Plaintiff filed a lawsuit against Defendant in federal court in the Southern District of NY alleging violations of Title VII, 42 USC §§ 1981 and 1983, the NYSHRL, and the NYCHRL, making the same discrimination allegations against Defendant (Starks v Metropolitan Transportation Authority, SDNY, case No:1:20-CV-09569). On March 17, 2022, the federal court dismissed Plaintiff's claims, and declined to exercise supplemental jurisdiction over her state law claims. Plaintiff then filed the instant action on June 24, 2022, making the same allegations against Defendant.

DISCUSSION

CPLR 3211 was enacted primarily to address pleading defects (*see CPLR 3211; Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). When a party moves pursuant to CPLR 3211(a)(1), seeking dismissal on the grounds that the action is barred by documentary evidence, the motion may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations and conclusively establishes a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]; *see also Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014]). Further, the documents relied on must definitively dispose of plaintiff's claim (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]).

Executive Law § 297 governs the procedure in which NYSHRL claims are filed. Under the NYSHRL, "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages. . . unless such person had filed a complaint hereunder or with any local commission on human rights" (Executive Law § 297 [9]); *see also Marine Midland Bank v New York State Div. of Human Rights*, 75 NY2d 240 [1989]). Executive Law § 297 [9] "expressly precludes administrative review after the commencement of an action in a judicial forum. Similarly, once a complainant elects the administrative forum by filing a complaint with the Division of Human Rights, a subsequent judicial action on the same complaint is generally barred" (*Marine Midland Bank,* 75 NY2d at 245; *see also Hirsch v Morgan Stanley & Co.*, 239 AD2d 466 [2d Dept 1997]; *Klaper v Cypress Hills Cemetery*, 184 AD3d 813 [2d Dept 2020]).

Executive Law § 297 [9], however, provides exceptions to the mutually exclusive nature of elective remedies. Executive Law § 297 [9] reads, in pertinent part, "where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of

untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division."

Another exception applies when a complainant files a charge with the EEOC that is then referred by the EEOC to the NYSDHR (*Hirsch* 239 AD2d at 466; *see also Barr v BJ's Wholesale Club, Inc.*, 62 AD3d 820 [2d Dept 2009]). The purpose of this exception is to preserve the complainant's right to sue in a court even though the complaint had been filed with NYSDHR by the EEOC (*Hirsch*, 239 AD2d at 467).

Similarly, the NYCHRL provides in pertinent part:

> "'[e]xcept as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice . . . or by an act of discriminatory harassment or violence . . . shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, *unless such person has filed a complaint with the city commission on human rights or with the state division of human rights*'"

(*Acosta v Loews Corp.*, 276 AD2d 214 [1st Dept 2000], quoting Administrative Code of the City of NY § 8-502 [a]).

Administrative Code § 8-502 [b] also makes an exception for mutually exclusive nature of elective remedies when a:

> "complaint filed with the city commission on human rights or state division of human rights is dismissed by the city commission on human rights pursuant to subdivisions a, b, or c of section 8-113, or by state division of human rights pursuant to subdivision 9 of section 297 of the executive law either for administrative convenience or on the grounds that such person's election of an administrative remedy is annulled."

Section "8-502 [b],[thus,] provides a loophole, in the event that the administrative complaint is, under specified circumstances, dismissed by the agency on grounds not going to the merits" (*Acosta*, 276 AD2d at 218).

The exceptions set under Executive Law § 297 [9] and Administrative Code § 8-502, however, do not apply in situations where a complainant specifically requests that the complaint

be filed with the state department of human rights upon filing the charge with the EEOC (*see e.g. Barr*, 62 AD3d at 821).

Election of Remedies

In this motion, Defendant relies on the *Hernandez* case to argue that Plaintiff's case is barred by the election of remedies doctrine because Plaintiff dually filed her charge of discrimination with EEOC and NYSDHR when she signed below the section stating: "We want this charge filed with both the EEOC and the State or local Agency."

Upon review, this Court finds that Plaintiff's claim is not barred by the election of remedies doctrine. The documents submitted show that Plaintiff originally filed her discrimination claim directly and only with the EEOC. It was the EEOC that transferred Plaintiff's charge to the NYSDHR for filing and further processing and investigation. Then, NYSDHR informed Plaintiff of the transfer. Further, the "annexed rider" that Plaintiff attached to the "Charge of Discrimination" form (charge form) originally filed with EEOC did not mention that Plaintiff wished to dually file her complaint with NYSHDR. The language in the charge form states, "we want this charge filed with both EEOC and the State or local Agency, if any," which appears to be standard language included in the form. In addition, in the charge form, Plaintiff only checked EEOC as the agency with which she wished to file her discrimination claim.

Additionally, the portion of the charge form that allows the complainant to add and specify a "State or local Agency, if any" with which they would wish to dually file their charge of discrimination, in addition to the EEOC, was left blank by the Plaintiff (*see e.g. Bawa v Brookhaven Natl. Lab., Associated Universities, Inc.*, 968 F Supp 865, 870 [ED NY 1997] Thus, it is more than apparent that Plaintiff did not elect to file her charge of with NYSDHR. Rather NYSDHR was involved only at EEOC's request. This Court further finds that since Plaintiff did

not have a choice in the matter, it cannot be deemed that she made a meaningful election of remedies (see *Bawa*, 968 F Supp at 870).

In *Bawa*, the court was clear that "Section 297(9) cannot be read to allow the EEOC to make such an election for an individual merely by satisfying the EEOC's filing prerequisites" (*id.*). The documents submitted show that once EEOC transferred Plaintiff's complaint to NYSDHR for filing and processing, she received a letter from NYSDHR stating: "Your complaint, originally filed with the Equal Employment Opportunity Commission (EEOC), has been transferred to the New York State Division of Human Rights for complaint filing and further processing and investigation…[t]he Division cannot proceed with the investigation of the EEOC charge until it receives the signed and notarized Division complaint." NYSDHR's letter did not at any point state that such a transfer was made at Plaintiff's request. Per the instruction of NYSHDR, Plaintiff then forwarded the complaint that she filed with the EEOC to NYSDHR and explicitly stated that she authorizes NYSDHR to accept her verified complaint *on behalf of EEOC*. Thus, the facts here fall within the exception of Executive Law § 297 [9] because the filing a complaint with EEOC "which is ultimately referred to the NYSDHR does not constitute an election of remedies" (*Bovell v City of Mount Vernon, New York*, 2023 WL 3559544, *4, 2023 US Dist LEXIS 87445,*12 [SD NY, May 18, 2023, No. 23CV1621; Executive Law § 297 [9] ["A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c). . . shall not constitute the filing of a complaint within the meaning of this subdivision"]).

Defendant also cites numerous cases for the proposition that New York courts have pointed toward the NYSDHR opening and investigating a claim as support that an individual intended for a claim to also be filed with NYSDHR. However, those cases are distinguishable because the complainants in those cases either explicitly indicated that they wish to dually file with NYSDHR,

there was no transfer of the charge from EEOC to NYSDHR, or the plaintiff did not show that the charge was referred to the NYSDHR from EEOC. Additionally, adopting Defendant's proposition would make the referral exception under Executive Law § 297 [9] and Administrative Code § 8-502 meaningless in situations where complainants do not elect an administrative forum for filing their discrimination claims.

Timeliness

This Court further finds that the 60-day statute of limitations to appeal a NYSDHR determination pursuant to NY Executive Law § 298 does not apply. Here, Plaintiff did not elect to file her discrimination claim with NYSDHR and did not elect to have the state agency consider her claim when she chose not to appeal its determination. Instead, she brought the current judicial action (New York Executive Law § 298; *Bawa*, 968 F Supp at 867). Further, the 60-day statute of limitations to appeal a NYSDHR determination does not preclude a complainant from bringing the same discrimination claims in court under these circumstances. Thus, the applicable statute of limitations that applies to Plaintiff's claims is the three-year statute of limitations for NYSHRL and NYCHRL claims (CPLR 214[2]; *Gabin v Greenwich House, Inc.*, 210 AD3d 497, 497 [1st Dept 2022]). Additionally, the three-year statute of limitations in this case was tolled from April 16, 2019 to August 31, 2020 by "her filing of a charge of discrimination with the Equal Employment Opportunity Commission" (*Gabin*, 210 AD3d at 497).

Plaintiff's current action asserting employment discrimination under the NYSHRL and the NYCHRL thus was timely commenced. Her complaint and her charge form appear to allege that Defendant's alleged discriminatory acts and policies have affected her from 2014 to the present because she alleges that Defendant's discriminatory policy is systemic and ongoing. Thus, Plaintiff's allegations construed liberally and in the light most favorable to Plaintiff, at the

minimum alleges discrimination based on a single pattern of unlawful conduct "permitting consideration under the continuing violations doctrine of all actions relevant to that claim, including those that would otherwise be time-barred" (*James v City of New York*, 144 AD3d 466 [1st Dept 2016]; *St. Jean Jeudy v City of New York*, 142 AD3d 821 [1st Dept 2016]; Further, "by virtue of the NYCHRL's mandate that it 'be construed liberally for the accomplishment of [its] uniquely broad and remedial' purposes (Administrative Code § 8-130[a]), the reach of the continuous violation doctrine under NYCHRL is broader than under either federal or state law" (*Center for Independence of Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 201 [1st Dept 2020]).

Accordingly, it is

ORDERED that the motion by Defendant Metropolitan Transportation Authority to dismiss the complaint is denied; it is further

ORDERED that Defendant is to file and serve a notice of entry of this order within 20 days; it is further

ORDERED that Defendant are to serve an answer to the complaint within 20 days after service of a copy of this order with written notice of entry.

11/17/2023
DATE

HON. DENISE M. DOMINGUEZ
J.S.C.

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