

**Silverthorn v City of New York**

2024 NY Slip Op 32273(U)

June 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 507047/2023

Judge: Gina Abadi

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26<sup>th</sup> day of June, 2024.

PRESENT:

HON. GINA ABADI,  
J.S.C.

CATHY ANN SILVERTHORNE,

Plaintiff,

Index No: 507047/2023

-against-

Motion Seq: 3

THE CITY OF NEW YORK,  
NEW YORK CITY FIRE DEPARTMENT, and  
KEVIN BARWICK,

Defendants.

DECISION, ORDER,  
AND JUDGMENT

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed .....	<u>25-27</u>
Opposing Affidavits (Affirmations) .....	<u>30-31</u>
Reply Affidavits (Affirmations) .....	<u>32</u>

Upon a careful review of the entirety of the foregoing cited papers, the Decision, Order, and Judgment on this motion is as follows:

Defendants City of New York and New York City Fire Department (“FDNY” and collectively with “FDNY,” the “City defendants”)<sup>1</sup> move, pre-answer, for an order dismissing the entirety of the First Amended Complaint, dated June 26, 2023 (“FAC”), of

<sup>1</sup>According to the Corporation Counsel (in footnote 1 of its Notice of Motion), the remaining defendant, Kevin Barwick, has not been served process in this action pursuant to CPLR § 306 and, accordingly, the instant motion does not encompass him. NYSCEF Doc No. 25.

plaintiff Cathy Ann Silverthorne (“plaintiff”), for failure to state a claim under CPLR § 3211(a) (7) as against them. Plaintiff opposes to the extent the City defendants seek dismissal of her first cause of action under the New York State Human Rights Law (Executive Law § 290 et seq.) (“NYSHRL”) and the New York City Human Rights Law (Administrative Code of City of NY § 8-101 et seq.) (“NYCHRL”), but does not oppose dismissal of her second (and the other) cause of action for defamation per se.<sup>2</sup>

### Background

Plaintiff is (and, for the past ten years, has been) an emergency medical specialist or technician with the FDNY. FAC, ¶¶ 4, 8. Plaintiff is a Black female who has been assigned (at her request) to the FDNY’s reasonable accommodation unit (the “Unit”). FAC, ¶¶ 4, 9. Plaintiff’s immediate supervisor at the Unit is Captain Barwick who is a Caucasian male. FAC, ¶¶ 5, 9. According to the FAC, Barwick is, was, or has been “telling the [FDNY]’s employees working in the Unit that [plaintiff] is ‘an angry Black Woman.’” FAC, ¶ 11. In addition, Barwick, on one occasion, allegedly “accus[ed] [plaintiff] of being responsible for [the] missing EMS emergency equipment.” FAC, ¶ 12. Plaintiff, as a result, “felt forced to consider her eligibility [for] retirement.” FAC, ¶ 14. Plaintiff’s attempt to resolve the matter within the FDNY was unsuccessful because the FDNY offered her to work outside the Unit, which option was not acceptable to her. Plaintiff, to date, has not retired and remains working in the Unit. FAC, ¶ 16.

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<sup>2</sup> See Plaintiff’s Memorandum of Law in Opposition, dated May 22, 2024, at 2 (“Plaintiff withdraws her claim for defamation. . .”). NYSCEF Doc No. 30.

In March 2023, plaintiff commenced this action to recover (as relevant herein) “compensatory damages for emotional distress (*i.e.*, mental anguish) as a proximate cause of the [d]efendants’ [alleged] discrimination based on race and gender.” FAC, First Cause of Action, ¶¶ 25-30. In lieu of an answer, the City defendants served a motion to dismiss (the prior motion), which was denied by Decision/Order, dated January 31, 2024, for their failure to appear for the calendar call on the return date of the prior motion. NYSCEF Doc No. 15. The City defendants now move to vacate their default in appearing on the calendar call for the prior motion and, upon vacatur of such default, to dismiss this action as against them for failure to state a claim. On June 18, 2024, the Court reserved decision on the instant motion.

#### Discussion

As an initial matter, the City defendants’ default for failure to appear for the calendar call on the prior motion is vacated in the Court’s discretion. “A party seeking to vacate a default in appearing on the return date of a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious motion or opposition to the motion.” *Santiago v City of New York*, 206 AD3d 948, 949 (2d Dept 2022), citing CPLR § 5015(a)(1); *see Kim v Xin Chen*, 189 AD3d 1061, 1062 (2d Dept 2020). “The determination of what constitutes a reasonable excuse lies within the Supreme Court’s discretion, and the court has discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation of the default at issue.” *Kim v Xin Chen*, 189 AD3d at 1062. Here, the City defendants demonstrated a reasonable excuse for their

default in appearing at the calendar call,<sup>3</sup> and (for the reasons stated below) the prior motion is meritorious.

This action must be dismissed as against the FDNY because, as a department of the City, it is not a separate legal entity amenable to being sued. *See* NY City Charter § 396; *Matter of Carpenter v New York City Hous. Auth.*, 146 AD3d 674 (1<sup>st</sup> Dept 2017), *lv denied* 29 NY3d 911 (2017); *Khela v City of NY*, 91 AD3d 912, 913 (2d Dept 2012); *Barerra v City of NY*, 47 Misc 3d 1028, 1030 (Sup Ct, Queens County 2015).

Accepting the facts alleged in the FAC as true, and according plaintiff the benefit of every possible favorable inference, the FAC fails to allege circumstances giving rise to an inference of discrimination on the basis of race and/or gender. *See Acala v Mintz Levin Cohn Ferris Glovsky & Popeo, P.C.*, 222 AD3d 706 (2d Dept 2023); *Ayers v Bloomberg, L.P.*, 203 AD3d 872, 874 (2d Dept 2022); *Cahill v State*, 139 AD3d 779, 781 (2d Dept 2016); *Askin v Department of Educ. of City of NY*, 110 AD3d 621, 622 (1st Dept 2013). “[S]tray derogatory remarks, without more [as is the case here], do not constitute evidence of discrimination.” *Wecker v City of NY*, 134 AD3d 474, 475 (1st Dept 2015); *see also Aykac v City of NY*, 221 AD3d 494, 495 (1st Dept 2023) (the individual defendant’s “few comments regarding plaintiff’s weight and his ‘malingering’ . . . constitute petty slights and trivial inconveniences”); *Adolph v Hill-Kirby*, 217 AD3d 436, 436 (1st Dept 2023) (“the few alleged remarks made by defendant . . . are insufficient to state a claim for harassment on the basis of plaintiff’s disability”); *accord Thelwell v City of NY*, 2015 WL

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<sup>3</sup> See Corporation Counsel’s Opening Affirmation, dated March 29, 2024, NYSCEF Doc No. 26, ¶ 9.

4545881, \*10 (SDNY July 28, 2015) (absent evidence that the use of words “angry” or “abrasive” was racially charged, or that a racial epithet was used to describe plaintiff, her subjective interpretation of words as constituting a racially discriminatory stereotype was insufficient), *affd* 733 Fed Appx 561 (2d Cir 2018).<sup>4</sup>

Further, the vague and ambiguous allegations underpinning the FAC – that plaintiff was called “an angry Black woman” (without specifying as to when, where, and how many times she was so called<sup>5</sup>) and that she was once blamed for some missing EMS equipment (again, without providing any accompanying detail) – are insufficient to provide the City defendants with adequate notice of<sup>6</sup> – nor, more fundamentally, are capable of establishing a sufficient basis for – her claims for racial/gender discrimination and hostile work environment. *See Oluwo v Sutton*, 206 AD3d 750, 753 (2d Dept 2022); *Polite v Marquis Marriot Hotel*, 195 AD3d 965, 967 (2d Dept 2021); *Mira v Harder (Evans)*, 177 AD3d 426, 426-427 (1st Dept 2019); *Lent v City of NY*, 2021 NY Slip Op 31805(U) (Sup Ct, NY County 2021), *affd* 209 AD3d 494 (1st Dept 2022), *lv dismissed* 39 NY3d 1118 (2023).

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<sup>4</sup> Compare *Walker v Triborough Bridge & Tunnel Auth.*, 220 AD3d 554, 555 (1st Dept 2023) (“Defendant Victor Muallem allegedly subjected [plaintiff] to verbal abuse, in the presence of co-workers, clients, opposing counsel and arbitrators on several occasions, and even struck her during an arbitration hearing while she was cross-examining a witness. Plaintiff alleges that this behavior stemmed from discriminatory animus, as Muallem directed it towards only plaintiff and other Black female employees.”); *Kirby v Carlo’s Bakery 42nd & 8th LLC*, 212 AD3d 441, 442 (1st Dept 2023) (“Specifically, plaintiff, a Black woman, alleges that her supervisor, defendant John Pernini, irritated that she had telephoned Human Resources for advice, allegedly stated to her the night before her termination, ‘Why did you call HR? Blacks . . . I should have never hired her.’”).

<sup>5</sup> *See Belle v Zelmanowicz*, 305 AD2d 272, 273 (1st Dept 2003) (“the allegations concerning the [racial] epithets do not show who did it, when and how often it occurred, how it affected plaintiff’s ability to do his job and whether he ever complained about it”).

<sup>6</sup> *See* CPLR § 3013 (“Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”).

Accordingly, it is

**ORDERED** that the initial branch of the City defendants' motion which is for dismissal of the *first* cause of action in the First Amended Complaint for failure to state a claim under CPLR § 3211 (a) (7), as against them, is *granted*; and it is further

**ORDERED** that the remaining branch of the City defendants' motion which is for dismissal of the *second* cause of action in the First Amended Complaint for failure to state a claim under CPLR § 3211 (a) (7), as against them, is *granted without opposition*; and it is further

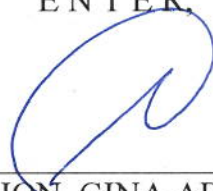
**ORDERED** that the First Amended Complaint is dismissed in its entirety as against the City defendants without costs or disbursements; and it is further

**ORDERED** that the action is severed and continued against the remaining defendant Kevin Barwick, the action (as severed) is transferred to the Non-City Part, and the caption is amended accordingly; and it is further

**ORDERED** that the Corporation Counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on plaintiff's counsel and to electronically file an affidavit of service with the Kings County Clerk.

The foregoing constitutes the Decision, Order, and Judgment of this Court.

ENTER,



HON. GINA ABADI  
J. S. C.

KINGS COUNTY CLERK  
FILED  
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