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

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART _____

Index Number : 106717/2011

CLARK, DEIDRE HOLMES

VS

ALLEN & OVERY LLP

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1a, 1b
Answering Affidavits — Exhibits	2, 2a
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined as per accompanying decision/order dated 4/3/12.

FILED

APR 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/3/12.

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

DIEDRE HOLMES CLARK,

Plaintiff,

- against -

ALLEN & OVERY LLP,

Defendant.

Index No.: 106717/11

DECISION/ORDER

PRESENT: Hon. Marcy S. Friedman, JSC

Defendant Allen and Overy LLP (A&O) is an international law firm with offices in New York, London, Singapore, and Moscow. Plaintiff, an attorney and former employee, sues defendant for sexual harassment and discrimination she allegedly suffered while working in A&O's Moscow office. She further charges A&O with wrongful termination of her employment, retaliation, breach of contract, intentional infliction of emotional distress, negligent retention and supervision of the attorney who allegedly harassed her, defamation, and conspiracy.

Defendant moves to dismiss the complaint in its entirety, pursuant to CPLR 3211(a), asserting in relevant part that the court lacks subject matter jurisdiction over plaintiff's claims under the New York State Human Rights Law (Executive Law §290 et seq).[1] Defendant also argues that plaintiff's wrongful termination claim should be dismissed for failure to state a cause

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[1]Plaintiff is a transactional attorney who is acting pro se in this matter. The complaint does not reflect the statutory bases for the causes of action asserted. Plaintiff has clarified, however, in response to defendant's motion, that she seeks the protection of the New York State Human Rights Law and unspecified English and/or Russian laws. She asserts no claims under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) or the New York City Human Rights Law (Administrative Code of City of N.Y. §8-101 et seq).

of action. Defendant seeks dismissal of all of plaintiff's other claims pursuant to CPLR 327(a), the codification of the forum non conveniens doctrine.

In their papers on this motion, both plaintiff and defendant submit statements filed by the parties in a proceeding brought by plaintiff, after her termination by A&O, before the UK Employment Tribunal, alleging unfair dismissal and sex discrimination. The parties also rely on findings of fact made in the Judgment of that Tribunal, dated April 18, 2011 (UK Judgment). Neither party claims that the Judgment has collateral estoppel effect. However, as each party cites such findings, the court will consider them here.

Plaintiff is a United States citizen currently residing in Jamesville, New York and a member of the New York State bar. She was born in New York City, where she lived and attended school, receiving a law degree from Columbia in 1989. After graduation she worked at Simpson Thatcher & Bartlett in New York until 1994, left New York for two years to work for a firm in North Carolina, then returned to another New York firm. Plaintiff again left New York in 2002 "to travel and work abroad after the traumatizing events of 9/11." (Clark Aff. in Opp., ¶4.)

In June 2006 defendant offered plaintiff a position in defendant's London office. (Clark's Witness Statement to UK Tribunal, ¶6 [Aff. of Mark Mansell [A&O member], Ex. C].) After accepting the offer, plaintiff obtained a five year residence/work permit sponsored by A&O from the UK immigration authorities. (Id., ¶10.) She began work at A&O in London, but as there was not enough work, accepted an assignment to A&O's Singapore office in late July or early August, 2007. (Id., ¶¶21-27.) Plaintiff subsequently accepted a two year assignment at the A&O Moscow office, to commence on March 11, 2008. (A&O Letter to Plaintiff [P's Ex. P].) According to the letter assigning her to the Moscow office, she was to continue to report to a

partner located in London, with day to day supervision by Tony Humphrey, a partner at the Moscow office. (UK Judgment, ¶50 [P's Ex. B].)

Plaintiff alleges that she was subjected to sexual harassment and discrimination during the period from July 18, 2009 until her services were terminated on January 30, 2009. More particularly, plaintiff alleges in the complaint that on July 19, 2008, she engaged in sexual activity with Tony Humphrey, the partner supervising her work in Moscow, while she was intoxicated at a party in the home of a colleague. (Compl., ¶13 [Aff. Of Kathleen McKenna, Esq., Ex. A].) After this incident, the partner made inappropriate comments, "sought to engage Clark in sexual conversations," and ceased to give plaintiff work assignments. (Id., ¶¶ 17-19, 23.) On December 8, 2008, the partner advised plaintiff that her employment was terminated. On December 10, 2008, plaintiff filed a grievance with the firm's human resources department in London. (Id., ¶¶ 27-28.) The firm responded on December 13, 2008 that they were taking disciplinary action against her for a serialized novel that she was posting on her website. (Id., ¶¶29, 20.) The firm subsequently notified plaintiff that her grievance had been determined to be unfounded. (Id., ¶31.) On January 21, 2009, plaintiff was placed on disciplinary suspension, allegedly for publishing the novel, a reason that plaintiff asserts is pretextual. (Id., ¶ 32.) Plaintiff's employment was terminated on January 30, 2009. (Id.)

As indicated above, after her termination, plaintiff filed a complaint with the UK Employment Tribunal for unfair dismissal and sex discrimination. On December 13 and 14, 2010, the tribunal conducted a pre-hearing review to determine whether plaintiff's employment in Moscow was subject to the Employment Rights Act, whether she was employed "at an establishment in Great Britain" and, if so, whether the tribunal had jurisdiction to hear her

complaint. (UK Judgment, ¶6 [P's Ex. B].) After the hearing, the Tribunal dismissed plaintiff's complaint, finding that she did not work wholly or partly in the UK, that defendant's Moscow office does not carry on work in the UK, and that claimant was not ordinarily resident in Great Britain at any time during the course of her employment. (UK Judgment, ¶85.1.) Appeal of that determination was subsequently denied. (Letter of Employment Appeal Tribunal dated July 11, 2011 [P's Ex. C].) Thereafter, plaintiff, who had already returned to the United States and who currently lives in New York State, commenced the instant action.

It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994] [internal citations omitted]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88 [internal citation omitted]; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003] [internal citations omitted]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], appeal denied 6 NY3d 706 [2006].)

The New York State Human Rights Law provides in pertinent part: "The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state, if such act would constitute an unlawful discriminatory practice if committed within this state." (Executive Law §298-a[1].) By its terms, this provision extends the State Human Rights Law to acts committed outside this state against New York residents. The issue before the court is thus whether plaintiff is a "resident" within the meaning of the statute.

Defendant moves to dismiss plaintiff's claim under the New York State Human Rights Law, contending that because plaintiff was not physically present in New York at the time of the complained of events, she was not a resident of New York at such time. Defendant further contends that as a non-resident, she is required, but is unable, to show that the alleged discrimination had an impact in New York. Plaintiff counters that New York has been and continues to be her domicile and that, as a New York domiciliary, she qualifies as a resident within the meaning of Executive Law §298-a. She accordingly claims that she is entitled to protection against discriminatory acts committed outside the state, without any showing of impact in the state. Defendant responds that even if the New York State Human Rights Law applies to New York domiciliaries, plaintiff's statements to the UK Employment Tribunal are inconsistent with her claim that she remained a New York domiciliary.

The term "residence" is used in many statutes. It has long been held that statutory construction of this term "depend[s] upon the nature of the subject-matter of the statute as well as the context in which the words are used." (Rawstorne v Maguire, 265 NY 204, 208 [1934]; see also Antone v General Motors Corp., 64 NY2d 20, 29 [1984].) Whether a statutory requirement

of residence refers to bodily presence or to domicile depends upon "the nature of the object sought to be achieved." (Matter of Mahoney v Lewis, 199 AD2d 734, 735 [3d Dept 1993].) The term residence is appropriately interpreted to mean domicile where it is "a qualification for a privilege or the enjoyment of a benefit. . . ." (State of New York v Collins, 78 AD2d 295, 297 [3rd Dept 1981]; see also People v Platt, 117 NY 159, 167 [1889].)

Torrico v Intl. Bus. Machines Corp. (213 F Supp 2d 390, 407-409 [SD NY 2002], later proceeding 319 F Supp 2d 390 [SD NY 2004]) is the only reported decision cited by the parties or found by this court that directly addresses the statutory construction of the term residence as used in Executive Law §298-a(1). It concludes that because residence is a qualification under this statute for the enjoyment of a benefit, plaintiff's allegation that he was domiciled in New York fulfilled the statutory requirement that he be a resident of the state.

Statutory use of the term residence has also been construed by the courts as equivalent to domicile under the Public Officers Law (Matter of Hosley v Curry, 85 NY2d 447, 451 [1995] [residence requirement for purposes of holding office]); Tax Law (Matter of Mercer v State Tax Commission, 92 AD2d 636 [3rd Dept 1983] [residence for state income tax purposes]); Education Law (Collins, 78 AD2d at 297 [residence for purposes of entitlement to scholar incentive award]); Social Services Law (Matter of Ruiz v Lavine, 49 AD2d 1, 4-5 [4th Dept 1975] [residence for purposes of medical assistance benefits]); and Penal Law (Mahoney, 199 AD2d at 735 [residence for purposes of receipt of pistol permit].) In contrast, residence has been treated as distinct from domicile under New York's borrowing statute (Antone, 64 NY2d at 27-29 [residence under CPLR 202 turns on whether plaintiff lives in New York for some length of time during the year, rather than domicile, as purpose of statute is to prevent forum shopping by

nonresident seeking a more favorable statute of limitations in New York]; and for venue purposes (Siegfried v Siegfried, 92 AD2d 916 [2nd Dept 1983] [for purposes of venue, at the time action is commenced, plaintiff must have stayed at residence for some time and have the bona fide intent to retain the place as a residence for some length of time and with some degree of permanence]; Santulli v Santulli, 228 AD2d 247 [1st Dept 1996] [same].)

The protections afforded New Yorkers under the State Human Rights Law clearly confer a significant benefit on their recipients. The court is therefore persuaded that proof of domicile would satisfy the requirement of New York State residence contained in Executive Law §298-a(1).

Defendant's contention that this reasoning is undermined by the Court of Appeals' decision in Hoffman v Parade Publications (15 NY3d 285 [2010]) is unpersuasive. Hoffman holds that nonresidents who suffer discrimination outside of New York must plead and prove that the discriminatory conduct had an impact in New York. This case does not consider whether a resident must be a domiciliary and, indeed, does not address the extensive authorities, discussed above, that equate domicile with residence where the statutory requirement of residence is a qualification for a privilege or the enjoyment of a benefit.

The question of plaintiff's domicile is disputed. As discussed above (supra at 2), plaintiff avers that she was born and raised in New York, that she attended law school here, and that, until she left the United States for work and travel, she resided almost exclusively in New York State. She describes a period of travel and employment in Australia, Singapore, London, and Moscow. Plaintiff submits documentary evidence that, while out of the United States, she paid United States taxes (P's Ex.V) and maintained a New York driver's license (P's Ex. R) and New York

voter registration. (P's Ex. Q.) She is also a member of the New York bar, the only jurisdiction where she is qualified as an attorney. She concludes that she "is a New Yorker and consider[s] New York home" (Clark Aff. In Opp., ¶12), never having relinquished her status as a New York domiciliary. Defendant emphasizes that plaintiff made a statement to the UK Employment Tribunal, even after she moved to New York, that "[t]he only reason I am not in London now is that I cannot afford it and have no visa. I continue planning on moving to London when this ordeal is over." (Clark's Witness Statement to UK Tribunal, ¶ 53 [Mansell Aff., Ex. C].) Defendant concludes that because of her statement to the UK Tribunal, plaintiff cannot establish New York domicile.

"Domicile requires bodily presence in a place with an intent to make it a fixed and permanent home." (Longwood Cent. School Dist. v Springs Union Free School Dist., 1 NY3d 385, 388 [2004].) "An existing domicile is assumed to continue until a new one is acquired . . . ." (Id.; Matter of Hosley, 85 NY2d at 451.) To relinquish one's domicile, "[t]here must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration." (Matter of Newcomb v Dixon, 192 NY 238, 251 [1908].) "A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged . . . ." (Id.)

The question of plaintiff's domicile is one of fact, dependent in part upon a finding as to whether she had "'an absolute and fixed intention' to abandon [her] former [domicile] and make the new locality a fixed and permanent home." (Hosley, 85 NY2d at 451, quoting Newcomb 192 NY at 250-51.) The party alleging a change in domicile has the burden to prove that change by clear and convincing evidence. (Hosley, 85 NY2d at 451.) "The presumption against a foreign

domicile is stronger than the general presumption against a change of domicile." (Matter of Bodfish v Gallman, 50 AD2d 457, 458 [3d Dept 1976]; Newcomb, 192 NY at 250.)

On this motion, accepting the facts as stated by plaintiff as true and according her every favorable inference, it cannot be determined as a matter of law that, upon leaving New York, plaintiff exhibited an intention to relinquish her old domicile or to establish a new one. Plaintiff's statement to the UK Tribunal that she intended to return to London was conditional and did not effect a change in her domicile. (See Torrico, 319 F Supp 2d at 409 [acceptance of temporary assignment in foreign country does not establish change of domicile].)

Plaintiff alleges, and defendant does not dispute, that plaintiff's domicile was New York until 2002 when she traveled abroad. Plaintiff has submitted documentation such as voter registration and tax records (see supra at 7) which evidences an intention on plaintiff's part to maintain New York as her domicile. Although this documentation is not complete for all of the years between 2002 and 2010, plaintiff's travels and temporary work assignments in Australia, London, Singapore, and Moscow are consistent with a peripatetic interlude in plaintiff's life in which she pursued travel and employment opportunities, often on limited or temporary visas, without any intention of establishing a new domicile. While plaintiff stated, before the UK Tribunal, that she planned to move to London, this statement of subjective intent is patently insufficient to establish an intent to change her domicile, given the undisputed fact that she only had a temporary visa to work in London.

For the foregoing reasons, defendant's motion is denied with respect to plaintiff's claims of sexual harassment, discrimination, and retaliation, alleged in the first, second, and fourth causes of action. To the extent that defendant's third cause of action states that her dismissal

constituted a wrongful termination as a result of her charge of sexual harassment, it is duplicative of the claim set forth in the fourth cause of action. In addition, insofar as plaintiff's third cause of action alleges that defendant wrongly terminated her employment for writing fiction, it fails to state a claim upon which relief may be granted. Plaintiff does not dispute that she was an at will employee at the time she was discharged. Each of the parties therefore had the right to terminate the employment relationship for any reason or no reason, other than one that is unconstitutional or statutorily proscribed. (See Smalley v The Dreyfus Corp., 10 NY3d 55, 58, rearg denied 10 NY3d 852 [2008].) Defendant's motion is therefore granted with respect to plaintiff's third cause of action.

With respect to the claims asserted in the fifth through eighth causes of action sounding in tort and breach of contract, defendant contends that they should be dismissed in the court's discretion, pursuant to CPLR 327, on forum non conveniens grounds. Defendant contends that because there is no nexus between the alleged acts and this jurisdiction, the action would be better adjudicated in Moscow.

New York courts are not compelled to retain jurisdiction over a case that lacks a substantial nexus to New York. (Wentzel v Allen Mach., Inc., 277 AD2d 446, 447 [2d Dept 2000] citing Silver v Great Am. Ins. Co., 29 NY2d 356, 361 [1972].) The issue is addressed to the court's discretion and the factors to be considered include the burden that a particular action would place on the New York courts, the unavailability of an alternate forum, and the potential hardship to defendant. (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985].) The court may also consider the location of the transaction at issue and the residence of the parties. (Id.) The standard is a flexible one, based upon the facts and

presence in this state, coupled with the fact that claims under the New York State Human Rights Law provide a nexus with this jurisdiction, defendant has failed to demonstrate that the balance of the claims raised in this proceeding should not be entertained or would be more appropriately brought in Moscow.

For the foregoing reasons, it is

ORDERED that defendant's motion to dismiss the complaint for failure to state a claim and/or pursuant to CPLR 327 is denied with respect to the first and second and fourth through eighth causes of action set forth in the complaint; and it is further

ORDERED that the claim set forth in the third cause of action is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
April 3, 2012

MARCY FRIEDMAN, J.S.C.