SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

CYNTHIA S. KERN
J.S.C.

PRESENT: _____ **PART** _____
Justice

Index Number : 153557/2012
HARDWICK, KELLEY D.F.
vs
AURIEMMA, GENO
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 4/11/13

_____, **J.S.C.**

CYNTHIA S. KERN

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KELLEY D. F. HARDWICK,

Plaintiff,

Index No. 153557/2012

-against-

DECISION/ORDER

GENO AURIEMMA, individually and as an employee of USA BASKETBALL, INC., USA BASKETBALL, INC. THE NATIONAL BASKETBALL ASSOCIATION, JAMES TOOLEY, individually and as an employee of USA BASKETBALL and JAMES CAWLEY, individually and as an employee of NATIONAL BASKETBALL ASSOCIATION,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action asserting claims for employment discrimination and assault against the various defendants. Defendant Geno Auriemma ("Auriemma") now moves for an order pursuant to CPLR § 3211(a)(7) and (8) dismissing plaintiff's amended complaint. Upon a separate motion, defendants USA Basketball, Inc. ("USAB") and James Tooley ("Tooley") have also moved for an order pursuant to CPLR § 3211 (a)(2), (7) and (8)

dismissing plaintiff's amended complaint against said defendants with prejudice. These motions are hereby consolidated for disposition purposes. For the reasons set forth below, both motions to dismiss are granted.

The relevant facts are as follows. Plaintiff Kelley D.F. Hardwick ("Hardwick") is employed by defendant National Basketball Association (the "NBA") as a director in the NBA's Security Department. During her tenure with the NBA, plaintiff has been assigned by the NBA to provide security at events involving the USA Women's National Team (the "National Team"), a team sponsored by defendant USAB that is comprised, in part, of players from the Women's National Basketball Association ("WNBA"). USAB is an Illinois corporation that maintains its principal place of business in Colorado. Defendant James Tooley ("Tooley"), a resident of Colorado, is the Executive Director of USAB.

In or around October 2009, plaintiff was providing security oversight for the WNBA players who were traveling with the National Team to Russia. It was at this time that plaintiff first met defendant Auriemma, who was serving as the head coach of the National Team. Plaintiff alleges that during this trip, Auriemma followed her to her hotel room and forcibly tired to kiss her on the mouth (the "2009 incident"). Plaintiff further alleges that she thwarted Auriemma's advances and he walked away. Auriemma denies these allegations.

Thereafter, plaintiff alleges that during subsequent trips with Auriemma he continued to harass her because she spurned his advances. Specifically, during a subsequent trip in October 2010, plaintiff alleges that Auriemma told a colleague that he did not want plaintiff wearing a USA Basketball Insignia baseball cap. Additionally, plaintiff alleges that in October 2011, she was told that Auriemma wanted her to stop encouraging the players while they were playing.

Plaintiff asserts that this all culminated with Auriemma telling Tooley that he did not want plaintiff to attend the London Olympic Games and provide security for the National Team. Plaintiff then asserts that Tooley relayed this to plaintiff's direct supervisor defendant James Cawley ("Cawley"), an NBA employee.

On or about March 24, 2012, plaintiff alleges that she was informed that she would no longer oversee security for the National Team at the London Olympics due to "reassignments." Thereafter, plaintiff allegedly confronted Cawley about the reassignment and told Cawley about the 2009 incident with Auriemma. It is unclear what exactly happened after this, but plaintiff alleges that on or about March 29, 2012, she received a call from Neal Stern, NBA Senior Vice President and General Counsel to discuss the 2009 incident with Auriemma. According to plaintiff, Stern conducted an investigation and concluded that the decision to take her off the London Olympics assignment had nothing to do with the 2009 incident.

Thereafter, on June 11, 2012, plaintiff filed the instant action wherein she alleges that defendants, based on the above actions, have violated the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). Plaintiff alleges that as a result of her bringing this action, the NBA decided to send her to the London Olympics. However, plaintiff alleges that in retaliation for having brought this lawsuit, she was provided "significantly diminished material responsibilities" in London. Yet, plaintiff acknowledges that while in London she was assigned to provide security for the National Team. During that assignment, Auriemma allegedly "walked over to plaintiff, and in full view and earshot of the players and others, screamed at plaintiff." According to plaintiff, "he pointed his finger at her and yelled that she needed to move from her seat." Plaintiff's amended complaint includes a

claim for assault based on this incident. Accordingly, plaintiff's amended complaint asserts three causes of action: (1) violation of NYSHRL; (2) violation of NYCHRL; and (3) assault against Auriemma and USAB.

As an initial matter, plaintiff's claims under the New York State and City Human Rights Laws against the moving defendants must be dismissed as this court lacks subject matter jurisdiction over said claims. A complaint should be dismissed pursuant to CPLR § 3211(a)(2) for want of subject matter jurisdiction where statutory claims are asserted under statutes that do not apply to the alleged conduct. *See Hoffman v. Parade Publs.*, 15 N.Y.3d 285, 290-92 (2010). The First Department has consistently held that the New York State and City Human Rights Laws do "not provide a private cause of action to New York residents discriminated against outside of New York by foreign corporations." *Sorrentino v. Citicorp*, 302 A.D.2d 240 (1st Dept 2003); *see also Esposito v. Altria Group, Inc.*, 67 A.D.3d 499, 500 (1st Dept 2009) ("[P]laintiff, a New York resident, has no right to bring a proceeding under [the New York State and City Human Rights Laws] against a foreign corporation for discrimination that allegedly occurred outside New York."). Additionally, even when the defendant is a New York resident or corporation, a claim under the NYSHRL or NYCHRL can only be maintained when "the alleged discriminatory conduct had an impact in New York." *Hoffman*, 15 N.Y.3d at 290-92; *see also Robles v. Cox and Co., Inc.*, 841 F. Supp. 2d 615, 624-25 (E.D.N.Y. 2012) (applying the *Hoffman* rational, which considered claims brought by a non-New York resident plaintiff against New York defendants, to suits brought by New York residents).

In the present case, plaintiff's complaint contains allegations of discrimination which took place outside of New York by foreign corporations or non-residents. It is undisputed that defendant USAB is a foreign corporation and neither Auriemma or Tooley reside within New

York State. Plaintiff acknowledges in her complaint that "USAB is an Illinois Corporation with its principal place of businesses in Colorado Springs, Colorado." While plaintiff's amended complaint is silent as to Auriemma or Tooley's citizenship, both defendants have established by affidavit that they do not reside in New York and plaintiff has not challenged the validity of these statements.

Moreover, based on this court's assessment of the case, this court finds that the alleged discriminatory conduct or retaliation had no impact in New York. Even if the initial decision to remove plaintiff from the London Olympic's work detail was made in New York, the impact of such a decision was felt in London, not New York. Indeed, plaintiff did eventually provide security for the National Team at the London Olympics and it was there in London that she claims, in retaliation for filing this suit, she received "significantly diminished material responsibilities." These "diminished material responsibilities" were felt in London and were not part of her New York employment.

Plaintiff's reliance on the court's holding in *Robles* that "the relevant location of the injury for purpose of the impact analysis is not the Plaintiff's residence, but the Plaintiff's place of employment," is misplaced. The Court in *Robles* dismissed a NYCHRL claim brought by a New York City resident against a Long Island employer, holding that regardless of whether the decision to terminate the plaintiff was made in New York City, the NYCHRL did not apply because the impact of termination was felt at the work place where plaintiff was actually working when the termination decision was made–i.e. Long Island, not New York City. *Robles*, 841 F. Supp. 2d at 623-24. Here, while plaintiff was employed by a NYC-based corporation, she was not working at its New York City office when she felt the impact of the alleged retaliation or

discrimination. The workplace at which plaintiff felt the impact was London. Accordingly, plaintiff's NYSHRL and NYCHRL claims against the moving defendants are hereby dismissed for want of subject matter jurisdiction.

The court now turns to plaintiff's remaining assault claim against Auriemma and USAB. The moving defendants argue that this claim cannot stand as this court lacks personal jurisdiction over said defendants as they are not domiciled within New York State. While plaintiff's complaint need not allege that the court has a basis for personal jurisdiction, *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007), when personal jurisdiction is challenged, the plaintiff has the burden of proving a basis of personal jurisdiction. *See, e.g.*, *Arroyo v. Mountain School*, 68 A.D.3d 603 (1st Dept 2009). In the instant action, plaintiff does not dispute that Auriemma and USAB are non-domiciliary defendants but argues that this court nonetheless has personal jurisdiction over said defendants pursuant to New York's long-arm statute, CPLR § 302(a).

Pursuant to CPLR § 302(a), "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: (2) commits a tortious act within the state . . . or (3) commits a tortious action without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Thus, the threshold questions in determining whether the court has personal jurisdiction over non-domiciliary defendants under CPLR § 302(a)(2) or (3) is whether the allegations of the complaint concern: (1) a claim of tort; and (2) whether the act occurred or

caused injury within the state of New York. *See Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317 (1980).

In the instant action, the alleged tort–i.e. plaintiff's assault claim–neither occurred nor caused injury within the state of New York to afford this court with personal jurisdiction over Auriemma and USAB. Plaintiff's assault claim is based upon the August 2012 incident that took place between plaintiff and Auriemma at the London Olympics. As it is undisputed that this incident occurred in London, plaintiff cannot establish that this was a tortious act that occurred within New York. Moreover, any injuries stemming from the alleged assault were felt in London, not New York. Accordingly, even assuming, *arguendo*, that plaintiffs's amended complaint sufficiently states a cause of action for assault against either Auriemma or USAB, such a claim for tort would be insufficient as a matter of law to grant this court personal jurisdiction over said defendants pursuant to New York's long-arm statute.

Plaintiff's contention that moving defendants' motions should be denied to allow for jurisdictional discovery is without merit. CPLR § 3211(d) authorizes the court to order discovery upon a showing that facts favoring jurisdiction "may exist but cannot then be stated." *See Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463 (1974). Here, plaintiff has failed to identify any discovery that would establish that the "impact" of the alleged discrimination and retaliation by the moving defendants was felt within New York. Additionally, no additional discovery could change the undisputed fact that the alleged assault occurred in London, not New York.

As the court has found that it lacks subject matter jurisdiction over plaintiff's New York State and City Human Rights Laws' claims and personal jurisdiction over USAB and Auriemma for the alleged assault claim, it need not address the parties' arguments going to the merits of this

action.

Based on the foregoing, plaintiff's amended complaint is hereby dismissed in its entirety as against defendants Auriemma, Tooley and USAB. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 4/11/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.