UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANESSA JORDAN-ROWELL,

Plaintiff,

-against-

FAIRWAY SUPERMARKET,

Defendant.

18cv01938 (VEC) (DF)

REPORT AND RECOMMENDATION

TO THE HONORABLE VALERIE E. CAPRONI, U.S.D.J.:

In this employment discrimination case, which has been referred to this Court for general pretrial supervision and to report and recommend on dispositive motions (Dkt. 14), *pro se* plaintiff Janessa Jordan-Rowell ("Plaintiff") claims that the defendant named herein as Fairway Supermarket[1] ("Defendant") created a hostile work environment and terminated her employment based on her race, color, and sex, in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII") (*see* Second Amended Complaint for Employment Discrimination, dated May 17, 2018 ("2d Am. Compl.") (Dkt. 11)).

Currently before this Court is a motion by Defendant, made pursuant to Rules 12(b)(1), 12(b)(5), and/or 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiff's Second Amended Complaint or, alternatively, to compel arbitration of Plaintiff's claims and to stay these proceedings pending the outcome of the arbitration. (Notice of Motion to Dismiss, or Alternatively to Compel Arbitration, dated Aug. 17, 2018 ("Notice of Motion") (Dkt. 27); *see also* Defendant's Memorandum of Law in Support of Motion to Dismiss or, Alternatively,

[1] According to Defendant's Rule 7.1 Corporate Disclosure Statement (Dkt. 24), the correct name of the entity identified by Plaintiff as "Fairway Supermarket" is Fairway East 86th Street LLC.

Compel Arbitration, filed Aug. 17, 2018 ("Def. Mem.") (Dkt. 28); Defendant's Reply Memorandum of Law in Further Support of Motion to Dismiss or, Alternatively, Compel Arbitration ("Def. Reply") (Dkt. 41).)[2] For the reasons discussed below, I recommend that Defendant's motion (Dkt. 27) be granted and Plaintiff's claims be dismissed.

BACKGROUND

A. Plaintiff's Factual Allegations

In her Second Amended Complaint, Plaintiff states that she was employed by Defendant as a cashier from March 6, 2016 until August 25, 2017. (2d Am. Compl., at 8.) Plaintiff alleges that, during the course of her employment, her then-supervisor, a Hispanic woman, harassed her and other black employees on a daily basis and regularly gave Hispanic employees preferential treatment in work assignments. (*Id.*) Plaintiff asserts that her supervisor's unequal treatment has forced other black employees to leave their employment with Defendant. (*Id.*) Plaintiff further asserts that Defendant "hires more Hispanics than Blacks and finds way[s] to terminate the few Black employees that work there." (*Id.*)

Plaintiff alleges that she was terminated on August 25, 2017 after she was "falsely accused and held accountable" for a customer complaint. (*Id.*; *see also id.* § IV(B).) According to Plaintiff, at some point prior to her termination, a customer lodged a complaint with Defendant regarding the conduct of an unidentified cashier. (*Id.*, at 8.) Plaintiff asserts that her supervisor, despite being unable to identify the cashier about whom the complaint was made,

[2] While Defendant's Notice of Motion does not explicitly request that, if the Court should decide to compel arbitration, it should also stay these proceedings (*see* Notice of Motion (seeking, as an alternative to dismissal, an order "compel[ling] arbitration of all of Plaintiff's claims, together with any other and further relief as the court deems just and proper")), Defendant clarifies in its moving and reply memoranda that, as an alternative to dismissal, it is, in fact, seeking an order both compelling arbitration and staying the action pending the outcome of the arbitration (*see* Def. Mem., at 16; Def. Reply, at 8).

gave Plaintiff, and asked her to sign, a "write up" for the complaint. (*Id.*) After Plaintiff refused to sign the write up, Plaintiff was suspended from work without pay for one week. (*Id.*; *see also id.* § IV(A) (alleging that Defendant "refuse[d] to let [Plaintiff] work [her] shift due to unlawful complaints").) Plaintiff alleges that Defendant subsequently terminated her employment. (*Id.*, at 8.)

B. The Relevant Arbitration Agreements

Apart from disputing Plaintiff's factual allegations (*see* Def. Mem., at 4-5 (relying on Affirmation of Micala Campbell Robinson in Support of Defendant's Motion to Dismiss or, Alternatively, Compel Arbitration, dated Aug. 17, 2018 ("Robinson Aff.") (Dkt. 29), ¶¶ 6, 7 & Exs. 4, 5)), Defendant asserts that Plaintiff is a party to two separate arbitration agreements that require her to submit any claims arising from her employment with Defendant to binding arbitration (*see* Def. Mem., at 3-4 (relying on Robinson Aff. ¶¶ 4, 5 & Exs. 2, 3)).

1. The Fairway Arbitration Agreement

The first agreement, a copy of which Defendant has submitted to the Court through its counsel's Affirmation, is an "Acknowledgement and Agreement to Arbitrate Employment Claims" (hereinafter referred to as the "Fairway Arbitration Agreement"), which appears to have been provided to Plaintiff by Defendant around the beginning of her employment, and which bears Plaintiff's electronic signature, dated April 12, 2016. (Robinson Aff., Ex. 2.) That agreement specifically contains the following language:

> . . . I agree that, except with respect to unemployment insurance and workers' compensation claims, if I desire to file a claim involving a violation of law by Fairway arising out of my employment based on statutorily prohibited sexual harassment or discrimination under any federal, state, or local law, including but not limited to, the Civil Rights Act of 1964, as amended (Title VII) . . . against Fairway or any of its employees, officers, directors, or affiliates, that to the extent not resolved through direct

> discussion with Fairway management, I shall only submit such unresolved claim(s), including claims against co-employees, to final and binding arbitration before the American Arbitration Association ("AAA") . . . .
>
> I am aware that by agreeing to arbitrate any employment claim I may have, that I am waiving my right to make such claim in a court of law or administrative agency and that any such claim shall be governed by the Federal Arbitration Act and to any other extent, the laws of the State of New York. This Agreement survives my employment with Fairway which means that even after I am no longer employed by Fairway I am obligated to arbitrate any employment dispute.
>
> I am signing the Agreement voluntarily, knowing and understanding that I am waiving any right to resolve all employment claims in a court of law or administrative agency, that I retain all my substantive rights, and that only an arbitrator, not a judge or jury, will decide my dispute which shall be binding on me and Fairway. I understand that if I refuse to submit a case to the arbitration under this Agreement I may be forced to arbitrate my claim under federal or state law. . . .

(*Id.*)

2. <u>The CBA Arbitration Agreement</u>

Defendant also alleges that Plaintiff, by virtue of her membership in a grocery workers union, UFCW Local 1500 (the "Union"), is subject to an arbitration provision contained in a collective bargaining agreement by and between Defendant and the Union, dated May 11, 2015 (the "CBA"). (*See* Def. Mem., at 4; Robinson Aff., Ex. 3.) The CBA has also been provided to the Court through counsel's Affirmation (*see* Robinson Aff., Ex. 3), and the relevant provision (hereinafter referred to as the "CBA Arbitration Agreement") states, in pertinent part:

> ARTICLE XVII –
> GRIEVANCE PROCEDURE AND ARBITRATION
>
> All disputes, differences or grievances arising out of interpretation, application, breach or claim of breach of the provisions of this Agreement shall be settled in the following manner:

> A. Within two (2) calendar weeks of the occurrence of such dispute, difference or grievance, authorized representatives of the Union and the Employer shall, in good faith, endeavor to adjust such dispute, difference or grievance.
>
> B. In the event that the matter is not adjusted in the above step, a representative of the Employer charged with the responsibility for labor relations and a duly designated representative of the Union shall attempt to adjust the same.
>
> C. In the event the dispute, difference or grievance still remains unadjusted after compliance with the above steps, then such dispute, difference or grievance may be submitted to arbitration by either party not later than thirty (30) days after the occurrence to an arbitrator mutually selected by the parties, for an expedited arbitration or to the American Arbitration Association for its designation of an arbitrator, in accordance with its rules, to hear and determine the matter. The decision of the arbitrator shall be final and binding upon the parties. The expenses of the arbitration shall be borne equally between the parties.
>
> . . .

(*Id.*, at 5.)[3]

C. Procedural History

Plaintiff commenced this action by filing a Complaint with the Court on March 2, 2018. (Dkt. 1.) By Order dated April 20, 2018, the Honorable Colleen McMahon, Chief U.S.D.J., found Plaintiff's pleading to be deficient, granted her leave to amend, and directed her to file an amended complaint within 60 days, setting out facts sufficient to allege an employment-discrimination claim under Title VII and to show exhaustion of her administrative remedies. (Dkt. 5.) Although Plaintiff then filed an Amended Complaint on April 23, 2018 (Dkt. 6), it merely repeated her original allegations (*see* Dkt. 7 (Court noting that the amended pleading only

[3] At Article XLI, the CBA also includes a provision entitled "NO DISCRIMINATION CLAUSE," under which Fairway and the Union agreed not to discriminate against any employee based on, *inter alia*, the employee's "race, color, . . . [or] sex . . . ." (*Id.*, at 18.)

attached additional documents relating to Plaintiff's application for unemployment insurance benefits with the New York State Department of Labor ("DOL"))), and thus, by Order dated May 17, 2018, Chief Judge McMahon dismissed the Amended Complaint *sua sponte*, on the ground that Plaintiff had still failed to plead facts sufficient to make out a viable employment-discrimination claim (*id.*). By Order dated May 22, 2018, however, Chief Judge McMahon vacated the Court's order of dismissal and re-opened this action, based on the fact that, on the same day as the Court's dismissal order, Plaintiff had filed a further pleading (initially docketed by the Clerk of Court as an initial pleading in a new civil action) that was apparently intended to comply with the pleading directives that had been set out by Chief Judge McMahon in her April 20 Order. (Dkt. 10.) Plaintiff's further pleading was then accepted for filing in this case, as her Second Amended Complaint. (Dkt. 11.)[4]

At that point, this case was reassigned to the Honorable Valerie E. Caproni, U.S.D.J., who, on June 6, 2018, issued an Order of Service. (Dkt. 13.) On June 8, 2018, Plaintiff filed an Affirmation of Service, declaring under penalty of perjury that, on June 6, 2018, she had served the "Compl[ai]nt and all documents attached" on Defendant, by "[p]ostal mail," addressed to the location of the store where she had worked. (Dkt. 16; *see also* 2d Am. Compl. § II (specifying Plaintiff's place of employment).) According to Defendant, though, it received by mail, on

[4] With her Second Amended Complaint, Plaintiff again attached documents relating to her unemployment insurance claim filed with the DOL. (*See* 2d Am. Compl., at 12-33.) In addition, although not relevant here, this Court notes that, on or about May 15, 2018, in an apparent effort to comply with the Court's instruction to set out facts showing administrative exhaustion, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), setting out the same factual allegations as she now pleads in her Second Amended Complaint. (*See* 2d Am. Compl., at 10-11 (referencing this administrative filing).) On June 29, 2018 (*i.e.*, after the date of Plaintiff's filing here), the EEOC issued Plaintiff a Notice of Right to Sue, which authorized Plaintiff to pursue her employment discrimination claims in federal court. (*See* Dkt. 22, at 2-3.)

June 18, 2108, a copy of the *original* Complaint that Plaintiff had filed in this action (not the Second Amended Complaint), with no attached summons. (*See* Robinson Aff. ¶ 3 & Ex. 1; *see also* Def. Mem., at 2.) On June 28, 2018, Plaintiff then filed further proof of service, declaring under penalty of perjury that, on June 26, 2018, she had "personally served the summons" on Defendant, again by "[p]ostal mail," addressed to the location where Plaintiff had worked. (Dkt. 20.)

D. Defendant's Motion

On August 17, 2016, Defendant filed its motion to dismiss the Second Amended Complaint, or alternatively to compel arbitration of all of Plaintiff's claims and to stay these proceedings. (Dkt. 27; *see supra*, at n.2.) In its motion, Defendant first argues that Plaintiff did not properly effect service of process, under the applicable rules for service. (Def. Mem., at 2, 5-7.) Second, Defendant contends that Plaintiff's Second Amended Complaint fails to plead facts sufficient to state either a disparate-treatment claim or a hostile-work-environment claim under Title VII. (*Id*., at 7-11). Finally, Defendant asserts that the Court lacks subject matter jurisdiction over Plaintiff's claims, as those claims are subject to arbitration under the Fairway Arbitration Agreement and the CBA Arbitration Agreement. (*Id.*, at 11-16.)

On October 17, 2018, Plaintiff filed her opposition to Defendant's motion. (*See* Plaintiff's Affidavit/Affirmation in Opposition to Defendant's Motion, dated Oct. 12, 2018 ("Pl. Opp.") (Dkt. 40).) In her opposition, made under penalty of perjury, Plaintiff generally restates the facts alleged in the Second Amended Complaint, but also alleges some additional facts concerning the customer complaint, Plaintiff's employment history, and hearings held before the DOL's Unemployment Insurance Appeal Board. (*Id.*, at 1-4.)

On November 2, 2018, Defendant filed a reply, arguing that Plaintiff's opposition failed to address Defendant's arguments concerning Plaintiff's improper service of process and her obligation to arbitrate her claims, and, further, that her conclusory and speculative assertions of discrimination and harassment were substantively insufficient to enable her pleading to survive Defendant's motion. (*See generally* Def. Reply.)

DISCUSSION

As noted above, Defendant advances three grounds on which it contends it is entitled to dismissal of this action: (1) that it was not properly served with process; (2) that the Second Amended Complaint fails to state a Title VII claim upon which relief may be granted; and (3) that Plaintiff is bound by her agreements with both Defendant and the Union to arbitrate the claims raised in this action. As jurisdiction is a threshold issue, this Court will first address Defendant's first and third contentions, both of which implicate jurisdictional concerns. As, for the reasons discussed below, Defendant's arguments are persuasive on both of those points, this Court will not go on to address whether Plaintiff has adequately pleaded a Title VII claim.

I. SUFFICIENCY OF SERVICE OF PROCESS

Defendant first contends that dismissal of the Second Amended Complaint is warranted because Plaintiff did not comply with the rules that govern how service of process may be effectuated in a federal action. Based on Defendant's evidentiary showing that it did not receive proper service and Plaintiff's failure to rebut that showing, this Court agrees that Plaintiff's attempt to serve process on Defendant in this case was insufficient.

A. Applicable Legal Standards

Under Rule 12(b)(5) of the Federal Rules of Civil Procedure, a complaint may be dismissed, upon motion, for "insufficient service of process." Adequate service of a summons

must take place "[b]efore a federal court may exercise personal jurisdiction over a defendant." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Although *pro se* litigants are afforded a certain amount of leniency with respect to service of process, "they are still required to attempt to comply with procedural rules, especially when they can be understood without legal training and experience." *Yadav v. Brookhaven Nat. Lab.*, 487 F. App'x 671 (2d Cir. 2012) (Summary Order).

"In deciding a Rule 12(b)(5) motion, a Court must look to Rule 4," *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 64 (S.D.N.Y. 2010), which, as relevant here, governs how a summons may be served upon a corporate defendant. In particular, Rule 4(h) provides that service may be effected upon a corporation by a non-party "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(h)(1)(B); *see also* Fed. R. Civ. P. 4(c) (requiring service be made by a "person who is at least 18 years old and not a party"). When read in conjunction with Rule 4(e)(1), Rule 4(h)(1)(A) also authorizes a party to complete service of a summons upon a corporation by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1) (setting out permissible means for service on an individual); *see* Fed. R. Civ. P. 4(h)(1)(A) (stating that a corporation may be served "in the manner prescribed by Rule 4(e)(1) for serving an individual").

Under New York law, pursuant to Section 311 of the New York Civil Practice Law and Rules ("CPLR"), personal service of process upon a corporation may be made by a non-party's delivery of the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

N.Y. C.P.L.R. 311; *see* N.Y. C.P.L.R. 2103(a) (requiring papers be served "by any person not a party of the age of eighteen years or over"). The CPLR also provides, however, that, as an alternative to personal service of process, a plaintiff may mail to the defendant "by first class mail, postage prepaid, a copy of the summons and complaint . . ., together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in . . . this section, with a return envelope, postage prepaid, addressed to the sender." N.Y. C.P.L.R. 312-a.

Where a defendant challenges the adequacy of a plaintiff's service of process under Rule 12(b)(5), "the plaintiff bears the burden of proving its adequacy." *Mende v. Milestone Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003); *see Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010). In determining whether the plaintiff has met her burden, the Court "may look beyond the pleadings, including to affidavits and supporting materials, to determine whether it has jurisdiction and service was proper." *Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, No. 14cv1112 (VSB), 2018 WL 4757939, at *3 (S.D.N.Y. Sept. 30, 2018); *see Tolliver v. Lilley*, No. 12cv971, 2014 WL 6455752, at *4 (S.D.N.Y. Oct. 24, 2014).

B. Plaintiff Has Not Refuted Defendant's Showing of Improper Service.

In support of Defendant's motion to dismiss, Defendant's counsel has submitted an Affirmation, made under penalty of perjury, attaching a "true and accurate" copy of the Complaint that Defendant received by mail from Plaintiff. (*See* Robinson Aff. ¶ 3 & Ex. 1.) A comparison of that Complaint to the various pleadings that Plaintiff has filed in this case reveals that it is, in fact, the original Complaint that Plaintiff filed on March 2, 2018 (*compare* Robinson Aff., Ex. 1, *with* Dkt. 1) and that the Court rejected *sua sponte* as insufficient (Dkt. 5). Further, Defendant's statement that it received this superseded pleading by regular mail accords with the Affirmation of Service that Plaintiff filed on June 8, 2018, stating that she had served the

"Complaint" by "[p]ostal mail." (Dkt. 16.) In her opposition, Plaintiff does not contest that she only sent an outdated pleading to Defendant, that she sent that pleading to Defendant by mail, or that she did not include a summons as part of that mailing. (*See generally* Pl. Opp.)

Based on the record before the Court, as described above, Plaintiff has not met her burden of demonstrating that she effected adequate service of process upon Defendant. Plaintiff has not shown that she satisfied the requirements of Rule 4(h)(1)(B), given that she has offered no evidence that a non-party delivered a copy of the summons and operative complaint to an agent authorized by Defendant, or by statute, to receive service of process. *See* Fed. R. Civ. P. 4(h)(1)(B). Nor has Plaintiff shown that she served Defendant adequately under New York law, as permitted by Rule 4(h)(1)(A). Again, she has not shown that the summons was delivered to an authorized agent of Defendant by a non-party, as required by N.Y. C.P.L.R. 311. Moreover, although Plaintiff would have been authorized under the CPLR to effect service of process by first class mail, the record before the Court reflects that she mailed to Defendant only a copy of the original Complaint (*see* Robinson Aff., Ex. 1), rather than the items – the summons, the operative complaint, copies of the statement of service of mail and acknowledgment of receipt, and a return envelope with prepaid postage – specified by N.Y. C.P.L.R. 312-a. As Plaintiff has therefore failed to show that she effected service of process in accordance with the applicable federal or state rules, the Court cannot exercise personal jurisdiction over Defendant.

Under Rule 4(m), the Court must dismiss the action without prejudice where the defendant has not been properly served within 90 days after the complaint is filed, unless the plaintiff shows good cause for her failure, in which case the Court must extend the time for service for an appropriate period. Fed. R. Civ. P. 4(m); *see Fleming v. City of New York*, No. 10cv3345 (AT) (RLE), 2014 WL 6769618, at *6 (S.D.N.Y. Nov. 26, 2014). Courts generally

weigh a plaintiff's *pro se* status in favor of granting an extension, *see, e.g.*, *Jones v. Westchester Cty.*, 182 F. Supp. 3d 134, 145 (S.D.N.Y. 2016), but, in this case, Plaintiff has not made any showing of good cause for her failure to effect adequate service of process. In any event, as discussed below, Plaintiff's claims are covered by an arbitration agreement and subject to dismissal on that ground, as well, and it would therefore be futile to grant Plaintiff an extension of time to serve Defendant properly. *See Koulkina v. City of New York*, No. 06cv11357 (SHS), 2009 WL 210727, at *4, n.10 (S.D.N.Y. Jan. 29, 2009) (noting that a showing of good cause by *pro se* plaintiffs, so to avoid dismissal for insufficient service of process, would be futile where plaintiff's claims would not survive a motion to dismiss under Rule 12(b)(6)).

Accordingly, I recommend that Plaintiff's claims be dismissed without prejudice, pursuant to Rule 12(b)(5).

II. EFFECT OF ARBITRATION AGREEMENTS

Defendant also argues that both the Fairway Arbitration Agreement and the CBA Arbitration Agreement require Plaintiff to arbitrate her Title VII claims, and that, as a result, either the Second Amended Complaint should be dismissed, or, alternatively, arbitration should be compelled and the action stayed pending the outcome of the arbitration. (Def. Mem., at 11-12.) For the reasons discussed below, this Court finds that, while the CBA Arbitration Agreement is not specific enough to justify the relief sought by Defendant, the Fairway Arbitration Agreement is, and that – if the Court were to reach the issue – dismissal, without a stay, would be the appropriate outcome.

A. Applicable Legal Standards

Although the end result "would be the same under nearly any of the available mechanisms," *Veliz v. Collins Bldg. Servs., Inc.*, No. 10cv06615 (RJH), 2011 WL 4444498,

at *3 (S.D.N.Y. Sept. 26, 2011), it is unsettled, in this Circuit, whether a motion to dismiss a complaint based on the existence of a binding arbitration agreement should be made under Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure, or under the Federal Arbitration Act ("FAA"), *see Fed. Ins. Co. v. Metro. Transportation Auth.*, No. 17cv3425 (JFK), 2018 WL 5298387, at *3 (S.D.N.Y. Oct. 25, 2018); *see also Tyler v. City of New York*, No. 05 Civ. 3620, 2006 WL 1329753, at *2 (E.D.N.Y. May 16, 2006) (collecting cases variously dismissed under Rules 12(b)(1), 12(b)(6), and the FAA). The standards for each are set out below:

1. Rule 12(b)(1)

An action should be dismissed pursuant to Rule 12(b)(1) where it is apparent that the court lacks subject matter jurisdiction to hear the case. *S*ee Fed. R. Civ. P. 12(b)(1); *Thomas v. Metro. Correction Ctr.*, No. 09cv1769 (PGG), 2010 WL 2507041, at *1 (S.D.N.Y. June 21, 2010) ("A claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." (citation omitted)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). While, on a Rule 12(b)(1) motion, a court should accept all material factual allegations in the complaint as true, the court is "not to draw inferences from the complaint favorable to plaintiffs" on such a motion. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004).

Further, in reviewing a motion under Rule 12(b)(1), a court may consider evidence outside of the pleadings to resolve disputed factual issues relating to jurisdiction. *See Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996) (citing *Zappia Middle E. Constr. Co. Ltd. v. Emirate*

of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000)); *see also Martinez v. Riverbay Corp.*, No. 16cv547 (KPF), 2016 WL 5818594, at *3 (S.D.N.Y. Oct. 4, 2016) ("where subject matter jurisdiction is contested, a district court is permitted to consider evidence outside the pleadings, such as affidavits and exhibits").

Some courts in this District have held that the existence of an arbitration agreement requiring the plaintiff to submit her claims to arbitration deprives the Court of subject matter jurisdiction over the dispute. *See Goldberg v. Sovereign Bancorp, Inc.*, No. 10cv6263 (DAB), 2011 WL 13261837, at *2 (S.D.N.Y. Aug. 19, 2011) ("When an enforceable arbitration agreement covers the claims asserted in a lawsuit, the court lacks subject-matter jurisdiction over the dispute . . . ."); *Hong v. Belleville Dev. Grp.*, LLC, No. 15cv5890 (RJS), 2016 WL 4481071, at *3 (S.D.N.Y. Aug. 17, 2016); *Sinnett v. Friendly Ice Cream Corp.*, 319 F. Supp. 2d 439, 445 (S.D.N.Y. 2004); *but see Acevedo v. Tishman Speyer Properties L.P.*, No. 12cv1624 (LTS), 2013 WL 1234953, at *2 (S.D.N.Y. Mar. 26, 2013) (stating that mandatory arbitration clauses do not "deprive courts of subject-matter jurisdiction of claims sounding in federal law"); *Salzano v. Lace Entm't Inc.*, No. 13cv5600 (LGS), 2014 WL 3583195, at *1 (S.D.N.Y. July 18, 2014) (same (citing *Acevedo*, 2013 WL 1234953, at *2)).

2. Rule 12(b)(6)

A complaint may be dismissed pursuant to Rule 12(b)(6) where it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss under Rule 12(b)(6), a court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007) (citation omitted); *accord Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997). The issue is not whether the

plaintiff will ultimately prevail, but whether her claim, as pleaded, is sufficient to afford her the opportunity to proceed on the evidence. *See Chance v. Armstrong*, 143 F.3d 698, 701 (2d Cir. 1998).

Even plaintiffs who are proceeding *pro se* must comply with relevant procedural and substantive rules, and, accordingly, to survive a motion to dismiss, a *pro se* complaint must "state[] a plausible claim for relief." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). It is, however, "well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (collecting cases); *see also Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (noting that a *pro se* party's pleadings must be liberally construed in his or her favor and are held to a less stringent standard than the pleadings drafted by lawyers); *Harris*, 572 F.3d at 72 ("Even after *Twombly*, . . . we remain obligated to construe a *pro se* complaint liberally." (citations omitted)).

Although a court must normally confine its analysis of a 12(b)(6) motion to the facts alleged in the plaintiff's complaint, the court may take judicial notice of facts outside of the pleadings, provided that those facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Cox v. Perfect Bldg. Maint. Corp.*, No. 16cv7474 (VEC), 2017 WL 3049547, at *3 (S.D.N.Y. July 18, 2017) (quoting Fed. R. Evid. 201(b)) (noting that "courts have regularly taken judicial notice of arbitration awards and collective bargaining agreements in considering a motion to dismiss or to compel arbitration").

3. The Federal Arbitration Act

The Federal Arbitration Act (the "FAA") provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of [the] contract . . . shall

be valid, irrevocable, and enforceable." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 228 (2d Cir. 2016) (quoting 9 U.S.C. § 2). The FAA enunciates "a strong federal policy favoring arbitration as an alternative means of dispute resolution." *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004). Under the FAA, federal courts must "uphold and enforce 'privately made agreements to arbitrate' as they would any other contract." *Cole v. Pearson Educ., Inc.*, No. 10cv7523 (JFK) (RLE), 2011 WL 4483760, at *1 (S.D.N.Y. Sept. 28, 2011) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

In determining whether a plaintiff's claims fall within the scope of an arbitration agreement on a motion to dismiss or to compel arbitration under the FAA, a court should apply the same standard as would be applicable to a motion for summary judgment. *See, e.g.*, *Begonja v. Vornado Realty Tr.*, 159 F. Supp. 3d 402, 409 (S.D.N.Y. 2016); *Restea v. Brown Harris Stevens LLC*, No. 17cv4801 (VEC) (GWG), 2018 WL 1449183, at *3 (S.D.N.Y. Mar. 23, 2018) (citing *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) ("the summary judgment standard is appropriate in cases where the District Court is required to determine arbitrability")), *report and recommendation adopted as modified*, 2018 WL 3435060 (July 16, 2018). Thus, "where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, [the Court] may rule on the basis of that legal issue and avoid the need for further court proceedings." *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 172 (2d Cir. 2011) (internal quotation marks omitted), *see also* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.")[5]

If a court determines that the parties before it have entered into an agreement to arbitrate certain (but not all) presented claims, then, in accordance with the FAA, the court must compel arbitration and "stay [the] action that is subject to arbitration until the arbitration is complete." *Borrero v. Ruppert Housing Co., Inc.*, No. 08cv5869 (HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009). Further, even if all claims in the case are subject to arbitration, the Court should still stay the proceedings pursuant to the FAA, upon the request of any of the parties. *See Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015) (holding that the FAA mandates that a district court order "a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay [has been] requested").

Where, however, a court determines that all of the claims raised in the action are subject to a binding arbitration agreement, and where no party has sought a stay, the court may opt to dismiss, rather than to stay, the action. *See Borrero*, 2009 WL 1748060, at *2 *id*. (citing *Milgrim v. Backroads, Inc.*, 142 F. Supp. 2d 471, 476 (S.D.N.Y. 2001)); *see also Benzemann v. Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (Summary Order) (holding that dismissal of arbitrable claims is appropriate where moving defendant requests dismissal of the claims and plaintiff does not request a stay); *Fed. Ins. Co.*, 2018 WL 5298387, at *5 (same); *Restea*, 2018 WL 1449183, at *5 (remarking that the FAA "refers to a stay being granted 'on application of one of the parties'" (citing 9 U.S.C. § 3)). In these circumstances, the decision whether to stay the action under the FAA or to dismiss the plaintiff's complaint lies within the court's discretion.

[5] Where, however, as in this case, "there is no dispute as to the relevant facts" as to the arbitrability of the plaintiff's claims, "the standard of review is of no significance." *Restea*, 2018 WL 1449183, at *3.

See Mahe v. Tzell Travel, LLC, No. 16cv9478 (RWS), 2017 WL 2493136, at *4 (S.D.N.Y. June 8, 2017).

B. All of Plaintiff's Claims Are Subject to Mandatory Arbitration Under the Fairway Arbitration Agreement.

All of the claims that Plaintiff is seeking to assert in this case are statutory claims, arising under Title VII. In determining whether those claims are subject to an arbitration agreement, and thereby subject to dismissal under either Rule 12(b)(1), Rule 12(b)(6), or the FAA, this Court has, in accordance with the authority set out above, reviewed both of the agreements that Defendant has submitted – the CBA Arbitration Agreement and the Fairway Arbitration Agreement. *See Goldberg*, 2011 WL 13261837, at *1; *Cox*, 2017 WL 3049547, at *3; *Restea*, 2018 WL 1449183, at *3.

For a collective bargaining agreement to deprive a plaintiff of the right to pursue such claims in federal court, the agreement must "contain[] a clear and unmistakable waiver" of the plaintiff's right to do so. *Lawrence v. Sol G. Atlas Realty Co.*, 841 F.3d 81, 83 (2d Cir. 2016) (quotation marks omitted); *cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009) (holding that employees' ADEA claims were subject to mandatory arbitration where a provision in their collective bargaining agreement "clearly and unmistakably" required union members to arbitrate ADEA claims). Thus, courts will only find a collective bargaining agreement to require mandatory arbitration of an employee's Title VII claims where the agreement *expressly* provides that those specific statutory rights are subject to arbitration. *See, e.g.*, *Lawrence*, 841 F.3d at 85-86; *Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016); *Viruet v. Port Jervis City Sch. Dist.*, No. 11cv1211 (ER), 2013 WL 4083229, at *6 (S.D.N.Y. Aug. 13, 2013).

Here, even though Plaintiff appears to be bound by the CBA, that agreement does not "clearly and unmistakably" require that she submit her Title VII claims to arbitration. The CBA Arbitration Agreement makes no reference to Title VII, or, for that matter, to any statute under which a claim by a Union member may arise, based on events occurring in the course of the Union member's employment. While the CBA's "No Discrimination Clause" (*see supra*, at n.3) may create a contractual right of Union members to be free from discrimination, "a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive." *Lawrence*, 841 F.3d at 85. Far from satisfying the "exacting standard" required to effect an employee's waiver of his or right to pursue a Title VII claim in federal court, the CBA Arbitration Agreement may plausibly be read to require arbitration of contractual disputes only, and not statutory discrimination claims. *Id.*, at 85. Therefore, despite Defendant's argument to the contrary (*see* Def. Mem., at 11-12), Plaintiff could not be compelled by the Court to arbitrate her Title VII claims under the procedures outlined in the CBA Arbitration Agreement.

On the other hand, Defendant's argument regarding the applicability of the Fairway Arbitration Agreement to Plaintiff's claims in this case is persuasive. In the Second Amended Complaint, Plaintiff claims that Defendant violated Title VII by allegedly creating a hostile work environment and then terminating her employment on the basis of her race, color, and sex. (2d Am. Compl. § III(A).) Under its terms, as set out above, the Fairway Arbitration Agreement requires Plaintiff to submit to "final and binding arbitration" all claims against Defendant "arising out of [her] employment based on statutorily prohibited sexual harassment or discrimination under any federal, state, or local law, including but not limited to, the Civil Rights Act of 1964, as amended (Title VII) . . . ." (Robinson Aff., Ex. 2.) Further, the agreement expressly provides that Plaintiff may only pursue such claims in arbitration, even if she seeks to

pursue the claims after the termination of her employment. (*Id.*) Moreover, the agreement explicitly sets out Plaintiff's acknowledgment that, under the agreement, she was "waiving any right to resolve all employment claims in a court of law," and that "only an arbitrator, not a judge or jury, [would] decide [her] dispute . . . ." (*Id.*)

As noted in Defendant's Reply, Plaintiff does not, in her opposition, dispute the existence or the validity of the Fairway Arbitration Agreement. (*See* Def. Reply, at 3.) Nor does Plaintiff dispute that she signed the agreement, by affixing her electronic signature to the acknowledgment form attached thereto, or that, by doing so, she knowingly and voluntarily agreed to the agreement's terms. (*See* Robinson Aff., Ex. 2.) Accordingly, based on this Court's review of the Fairway Arbitration Agreement and the parties' submissions, this Court finds that there is no genuine dispute that Plaintiff agreed to submit to binding arbitration all employment-discrimination claims, including those brought under Title VII, arising from her employment with Defendant. Plaintiff's Title VII claims fall squarely within the scope of the Fairway Arbitration Agreement and are therefore subject to mandatory arbitration.

C. Even If Plaintiff Were Able To Cure the Defects in Her Service of Process, It Would Be Appropriate For the Court To Dismiss Her Claims.

As set out above, where all of a plaintiff's claims are subject to an arbitration agreement and no party has requested a stay of the action, the Court may, in its discretion, dismiss the action, rather than order a stay. *See Benzemann*, 622 F. App'x at 18; *Fed. Ins. Co.*, 2018 WL 5298387, at *5. In this instance, it is evident that all of Plaintiff's claims are subject to arbitration pursuant to the Fairway Arbitration Agreement. Further, while Defendant has requested a stay of this action, it has made this request only in the alternative to the primary relief it seeks, which is dismissal. (*See* Def. Mem., at 16; Def. Reply, at 8.)

Under these circumstances, even if the Court were to give Plaintiff an extension of time to effect service of process upon Defendant, and even if Plaintiff were then to effect service under the applicable rules, it would nonetheless be appropriate for the Court, in its discretion, to grant Defendant's request for dismissal of the Second Amended Complaint, in lieu of granting Defendant's alternative request for an order compelling arbitration and staying these proceedings.

CONCLUSION

Based on the foregoing, I respectfully recommend that Defendant's motion to dismiss the Second Amended Complaint (Dkt. 27) be granted, and that Plaintiff's claims be dismissed without prejudice, pursuant to Rule 12(b)(5). More specifically, I recommend that the Court find (1) that Plaintiff has not properly effected service of process on Defendant, and (2) that affording Plaintiff an extension of time to serve Defendant in accordance with the applicable rules would be futile, given that her claims would, in any event, be subject to dismissal under Rule 12(b)(1), Rule 12(b)(6), and/or the FAA, as the claims are covered by a mandatory arbitration agreement.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Valerie E. Caproni, United States Courthouse, 40 Foley Square, Room 240, New York, New York, 10007, and to the Chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 1660, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Caproni. FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND

WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
January 16, 2019

Respectfully submitted,

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

All parties (via ECF)