UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SOKHNA GUEYE, Plaintiff, -against- PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION, Defendant.	:	MEMORANDUM & ORDER 18-cv-5961 (ENV) (RER)

VITALIANO, D.J.

On October 24, 2018, Sokhna Gueye filed this action against People's United Bank, National Association ("PUB"). It is brought pursuant to 42 U.S.C. § 1981, the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), alleging that defendant unlawfully discriminated against her on the basis of race, religion and national origin when closing her bank accounts and refusing to open new ones.[1] Defendant has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). For the reasons set forth below, defendant's motion is granted.

Background[2]

[1] Gueye has dropped her claims against PUB employee Patricia Hoffman, as well as her aiding and abetting claims against both parties. *See* Stipulation of Dismissal, Dkt. 48.

[2] The Court resolves all ambiguities and draws all reasonable inferences in favor of plaintiff, as the non-moving party. *See Security Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). The facts are derived from the complaint, to the extent it is supported by the record, and the parties' submissions, including their Rule 56.1 statements. In addition to the undisputed facts in the Rule 56.1 statements, plaintiff is deemed to have admitted any fact alleged in the moving party's Rule 56.1 statement that is supported by the record and not specifically contradicted by properly supported allegations in her own Rule 56.1 statement. *See* Local Civ. R. 56.1; *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003). Additionally, the Court will not consider legal arguments contained in defendant's reply Rule 56.1 statement. *See Sattar v. U.S. Dep't of Homeland Sec.*, 669 F. App'x 1, 3 (2d Cir. 2016)

Gueye is a Black, Muslim, Senegalese woman who, in 2009, co-founded the Mumin Foundation—a nonprofit focused on childhood anti-poverty and educational initiatives in Senegal. *See* Joint 56.1, Dkt. 65, ¶¶ 23, 25; Gueye Tr., Dkts. 53-4, 57-3, at 91:22–92:11, 123:11–21. Mumin is registered in Connecticut as a limited liability and non-stock corporation. Joint 56.1 ¶¶ 26–28. It received tax-exempt status from the Internal Revenue Service in 2015. *Id.* ¶ 29.

Gueye opened personal checking and savings accounts with PUB in July 2012 and a custodial bank account at PUB on behalf of her minor son in May 2013. *Id.* ¶¶ 33–34, 98–99; Dkts. 53-11, 53-12. Beginning in 2013, she used her personal account while traveling in Africa and the Middle East. Joint 56.1 ¶ 37; Dkt. 53-14. On January 14, 2016, Gueye went to the PUB branch in Forest Hills, Queens to open an account for Mumin with an initial $50 deposit. Joint 56.1 ¶ 38; Dkt. 53-15. She presented documentation reflecting Mumin's tax-exempt status. Joint 56.1 ¶ 40. The bank incorrectly, it later admitted, opened an account type that incurred monthly service charges. *Id.* ¶¶ 105–07; Hoffman Tr., Dkts. 53-3, 57-5, at 76:6–79:7; Dkt. 53-27.

The day after opening the Mumin account, Gueye flew to Senegal and did not return to the United States until December 2016. Joint 56.1 ¶¶ 43–44; Dkt. 53-17; Gueye Tr. at 178:15–19. She says she traveled to continue Mumin's work, attend a humanitarian conference and care for her daughter. Gueye Decl., Dkt. 57-4, ¶ 11. Before leaving, Gueye claims that she notified

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("Rule 56.1 statements are statements of fact rather than legal arguments." (internal citation and quotations omitted)); *Cap. Recs., LLC v. Vimeo, LLC*, No. 09-CV-10101 (RA), 2018 WL 4659475, at *1 (S.D.N.Y. Sept. 7, 2018) (noting that Rule 56.1 does not provide for, but also does not prohibit, replies in further support of party's initial statement); *G.S. v. Pleasantville Union Free Sch. Dist.*, No. 19-CV-6508 (CS), 2020 WL 4586895, at *1 n.2 (S.D.N.Y. Aug. 10, 2020) ("The Court is capable of determining whether Plaintiffs improperly disputed a fact without needing Defendant to file a procedurally improper document explaining as much.").

PUB of her travels by calling the toll-free number on the back of her card, though PUB disputes this contention as it lacks a record of her call. Gueye Tr. at 177:21–178:4, 184:6–25; Wilbur Tr., Dkts. 53-1, 57-6, at 186:8–188:13; Joint 56.1 ¶¶ 47–48. While abroad, Gueye also traveled to Kuwait, Bahrain, the United Arab Emirates and Morocco. Gueye Decl. ¶ 12; Gueye Tr. at 126:16–23. Her three children, who were overseas with her, remained in Senegal in the care of family members and a nanny. Gueye Tr. at 189:9–190:6.

During Gueye's trip, on May 17, 2016, the Mumin account became overdrawn because of the bank's erroneously charged service fees. Joint 56.1 ¶¶ 109, 136. The initial $50 deposit turned into a $30.60 overdraft by June. *Id.* ¶ 129; Dkts. 53-18, 57-8. PUB was unaware at the time that its mistake had caused the overdraft. Wilbur Tr. at 194:21–23. PUB began sending letters to Mumin's address in Norwalk, Connecticut to notify it of the overdraft and request payment, with the first letter in the record dated May 26, 2016. Joint 56.1 ¶¶ 53–56; Dkt. 53-18. Consistent with bank procedure, PUB automatically sent follow-up letters every ten days: on June 3, June 15, June 24, July 5 and July 13. Joint 56.1 ¶¶ 20, 54; Dkts. 53-18, 57-8. The letters warned that PUB would close the Mumin account and had the right to close all of Gueye's accounts if the overdraft was not corrected. Joint 56.1 ¶¶ 129–31; Dkts. 53-18, 57-8. Gueye did not receive the letters until she returned to the United States months later. Gueye Tr. at 352:4–10, 353:4–354:8. Although others retrieved Mumin's mail while Gueye was away, including a cousin who co-founded Mumin and employees of a cosmetology business that shared the office space, they typically held the mail instead of forwarding it, which is what happened with PUB's letters. *Id.* at 86:13–87:6, 138:18–139:19; Joint 56.1 ¶¶ 57–58. Per bank policy, PUB closed the Mumin account on July 15 because it had been in overdraft for nearly 60 days and reported Mumin to ChexSystems, a company banks use to flag unsatisfactory customers. Joint 56.1 ¶¶

21, 59; Wilbur Tr. at 177:7–10, 205:13–25, 213:19–214:4; Dkt. 53-19.

Meanwhile, Gueye's international use of her personal accounts had been generating alerts in PUB's system. Joint 56.1 ¶¶ 61–62; FIU Record, Dkt. 62-2, at 2. PUB used a software program to review all customer transactions and flag those that might be of concern, such as those in high-risk jurisdictions. Joint 56.1 ¶¶ 1–4; Wilbur Tr. at 13:22–14:14. PUB used this software, and maintained a review process for the alerts it generated, as part of its efforts to comply with its obligations under the Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311 *et seq*.[3] Joint 56.1 ¶ 1. Countries with a greater incidence of money laundering, terrorist financing and other crimes were designated as high-risk jurisdictions and placed on a list, updated quarterly in the program. *Id.* ¶ 3; Wilbur Tr. at 63:13–64:23. Examples include China, Iran, Kuwait, North Korea, Russia, Senegal, Turkey and the United Arab Emirates—a list that overlapped, in part, with Gueye's travels. Joint 56.1 ¶¶ 3, 63, 93. Beginning in 2013, PUB's system flagged Gueye's ATM withdrawals from her personal account while in Senegal, Kuwait and the United Arab Emirates. *Id.* ¶¶ 61–63; FIU Record at 2; Wilbur Tr. at 270:11–20. The system also picked up on her high-velocity activity, defined as money frequently coming in and out, including funds being deposited in Gueye's account from the United States and quickly withdrawn in high-risk jurisdictions. Joint 56.1 ¶¶ 5, 61–63, 69; Wilbur Tr. at 75:19–76:22, 271:13–272:4.

[3] BSA and its implementing regulations require financial institutions to implement internal controls "to guard against money laundering" and terrorist financing and "to report any suspicious transaction relevant to a possible violation of law or regulation" to the relevant federal authorities. 31 U.S.C. § 5318(g), (h). This is done by filing a Suspicious Activity Report ("SAR"). 12 C.F.R. § 21.11. Banks may not "disclose a SAR or any information that would reveal the existence of a SAR," *id.*, as defendant noted many times during discovery, but "supporting documentation" is discoverable, *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001).

These alerts sent Gueye into PUB's internal review process, which, as a general matter, proceeds as follows. Wilbur Tr. at 299:6–300:18. When PUB receives multiple alerts on an account, it assigns a Financial Investigations Unit analyst to determine whether to clear the alerts or escalate them to a case, which may require the bank to file a Suspicious Activity Report ("SAR") pursuant to the BSA. Joint 56.1 ¶ 7. If the alerts have been escalated to a case, an analyst researches the customer on Google, reviews their transaction history and can ask branch employees to contact customers for information on the flagged transactions. *Id.* ¶¶ 8–9, 116; Lofton Tr., Dkts. 53-2, 62-1, at 81:6–25. If a customer does not reply with the requested information, the analyst must decide whether to recommend filing a SAR based on the available information. Joint 56.1 ¶ 10; Lofton Tr. at 92:6–93:8. The analyst's managers then review the recommendation and decide whether to file a SAR. Lofton Tr. at 107:15–24. If three SARs have been filed on an account, a PUB working group reviews whether the bank wishes to continue its relationship with that customer, or whether doing so would be outside its risk tolerance. Joint 56.1 ¶ 14; Wilbur Tr. 346:14–347:7. If the working group decides to close a customer's accounts, it places a note in the bank's system that prevents its employees from opening accounts for that customer in the future. Joint 56.1 ¶ 15.

Following this path, an analyst began investigating the alerts on Gueye's personal account sometime in early 2016 and, after an initial review was inconclusive, elevated the case to SAR Analyst Sonia Lofton. *Id.* ¶¶ 7, 64–65; Wilbur Tr. at 315:21–25. On May 20, 2016, Lofton emailed a PUB branch employee for help understanding Gueye's flagged transactions, requesting that she ask Gueye her occupation, the source of her funds and who had made the foreign transactions. Joint 56.1 ¶¶ 65–66; Dkt. 53-20 at 2–3. That employee was unable to reach Gueye, who was abroad, as her phone numbers were not accepting calls. Joint 56.1 ¶ 68; Dkt. 53-20 at

2. In the absence of clarifying information, PUB remained concerned with Gueye's high-velocity activity in high-risk jurisdictions, noting 528 foreign ATM withdrawals totaling around $130,000 between 2013 and 2016. Joint 56.1 ¶ 69; FIU Record at 2. PUB's investigation led to additional concerns, such as the fact that multiple people appeared to be accessing Gueye's personal account in multiple locations, that Mumin's account only had one deposit, that Gueye had bought prepaid phones, that she used her personal account for Mumin activity and that Mumin shared an address with other businesses. FIU Record at 2–4. Although Gueye would later offer explanations for many of these concerns—e.g., that she made frequent ATM withdrawals abroad because businesses often refused U.S. bank cards, that Mumin donations went into and out of Gueye's account to fund ongoing charitable initiatives, that she was a landlord and tenants deposited rent while she was away and that Mumin shared offices with a cosmetology business she owned—PUB made its decisions based on the information it had at the time. Joint 56.1 ¶ 69; Lofton Tr. 184:20–25; Gueye Decl. ¶¶ 8, 18–21.

In September 2016, the internal working group at PUB's Bridgeport, Connecticut headquarters decided that continuing its relationship with Gueye would be too risky. Joint 56.1 ¶¶ 69–70, 72; Wilbur Tr. at 314:18–315:3, 316:2–6. Gueye's personal and custodial accounts were closed on September 16, 2016, as PUB notified her in a letter on that date—a letter that also said the accounts would remain open another month to allow her to make alternative arrangements. Joint 56.1 ¶ 72; Dkt. 53-21. Gueye posits that the Mumin account's overdraft led to the closures, while PUB describes both the overdraft and its risk tolerance as contributing factors. Joint 56.1 ¶ 70; Wilbur Tr. at 320:24–322:7. When PUB closed Gueye's accounts, it placed a notation in her file barring PUB employees from opening accounts for her in the future. Joint 56.1 ¶ 73; Wilbur Tr. at 339:5–340:1.

After Gueye returned to the United States in December 2016—a return she said was delayed by the closure of her bank accounts—she went to PUB's Forest Hills branch to reopen an account, where she spoke with employee Shamecca Andrews. Joint 56.1 ¶¶ 78–79; Gueye Decl. ¶¶ 13, 25. Andrews discovered that the Mumin account's overdraft was caused by PUB's error in opening an account that charged service fees, so she arranged for Gueye to receive a $30.60 refund and for Mumin's report to be removed from Chex Systems. Joint 56.1 ¶¶ 85–86, 108; Andrews Tr., Dkts. 53-31, 57-7, at 118:24–119:7; Dkt. 53-25. She also discovered the notation in Gueye's file and, after consulting with Customer Experience Manager Patty Hoffman, told Gueye she was unable to reopen or open a new account for her. Joint 56.1 ¶¶ 80–84; Andrews Tr. at 101:3–8; Dkts. 53-25, 52-26. Her business turned away by PUB, Gueye opened accounts for herself and Mumin at Webster Bank and CitiBank within a few days of returning to the United States. Joint 56.1 ¶¶ 74–77.

In February 2017, Gueye filed a report with the New York State Division of Human Rights ("NYSDHR") alleging discrimination based on her religion—in particular, claiming that PUB closed her accounts because she is Muslim and traveled to Muslim countries on behalf of her Muslim charity. *See* NYSDHR File, Dkt. 57-9, at 12–15, 18, 87–88. In August 2017, NYSDHR determined that there was probable cause for a hearing, citing factual disputes over why PUB closed Gueye's accounts, whether Gueye's travels played a role and why PUB would not reopen them after discovering the overdraft was an error. *Id.* at 21–22; Joint 56.1 ¶¶ 159–66. On June 1, 2018, days before the hearing was set to take place, Gueye asked NYSDHR to dismiss her complaint and annul her election of remedies, which it did. Windholz Aff., Dkt. 53, ¶ 35. She filed the instant action on October 24, 2018. *See* Compl., Dkt. 1.

Standard of Review

Summary judgment is warranted if the "movant shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law," and an issue of fact is genuine if it can be reasonably resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 253, 106 S. Ct. 2505, 2511, 2512, 91 L. Ed. 2d. 202 (1986). The motion court's responsibility "is not to weigh the evidence." *Gen. Star Indem. Co. v. Driven Sports, Inc.*, 80 F. Supp. 3d 442, 449 (E.D.N.Y. 2015) (quoting *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004)). Rather, "in determining if a genuine dispute of material fact exists, 'the court must resolve all ambiguities and draw all justifiable factual inferences in favor of the party against whom summary judgment is sought.'" *Fletcher v. Standard Fire Ins. Co.*, 80 F. Supp. 3d 386, 390 (E.D.N.Y. 2015) (quoting *Buckley v. Deloitte & Touche USA LLP*, 888 F. Supp. 2d 404, 415 (S.D.N.Y. 2012), *aff'd*, 541 Fed. App'x 62 (2d Cir. 2013)).

"Once the moving party has met its burden . . . '[t]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.'" *Gen. Star Indem. Co.*, 80 F. Supp. 3d at 449 (quoting *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002)). If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper. *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997).

Where a plaintiff brings discrimination claims, however, the Second Circuit has "repeatedly expressed the need for caution about granting summary judgment" for defendants in discrimination cases where "the merits turn on a dispute as to the [defendant's] intent." *Holcomb*

v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008). In such cases, "direct evidence of [discriminatory] intent will only rarely be available, so that 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Id*. (citing quoting *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1224 (2d Cir. 1994)). Notwithstanding, "[t]hough caution must be exercised in granting summary judgment where motive is genuinely in issue, summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact." *McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir. 1997) (internal citations omitted); *see also Abdu-Brisson v. Delta Air Lines*, 239 F.3d 456, 466 (2d Cir. 2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases.").

Discussion

I. Section 1981 and NYSHRL

Gueye's first claim arises under 42 U.S.C. § 1981, which, in relevant part, proscribes racial discrimination in private contractual relationships, providing that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a); Compl. ¶¶ 39–45. The right to "make and enforce contracts" encompasses "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The statute covers only discrimination based on race. *Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988). Gueye contends that PUB's termination of their contractual relationship was racially discriminatory. Compl. ¶¶ 30, 41–42; *see also* Dkts. 53-11 at 9, 53-12 at 4, 53-15 at 8 (account opening documents creating contractual relationship between parties).

Her second claim is brought pursuant to NYSHRL, which bars discrimination in public accommodations, providing that:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation . . . because of the race, creed, color, [or] national origin . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof. . . .

N.Y. Exec. Law § 296(2)(a). Gueye argues that PUB is a place of public accommodation, which refused her access to its banking services because of her race, religion and national origin. Compl. ¶¶ 46–48; Pl.'s Opp'n Mem., Dkt. 58, at 13–14 (quoting *Jadama v. Keycorp*, No. 10-CV-1586 (DNH), 2011 WL 2432931, at *5 (N.D.N.Y. June 14, 2011) (holding that defendant bank was place of public accommodation as it "provides services to the public" and "is open to anyone who walks through its doors during business hours")).

While there are some definitional differences between the two statutes, those differences are not at issue here. The parties do not dispute that the bank is a place of public accommodation, that PUB and Gueye had a contractual relationship, and that, as a Black, Muslim, Senegalese woman, Gueye is a member of a racial minority and other protected classes. The disputed issue is whether PUB intentionally discriminated against Gueye based on her race and, with respect to the NYSHRL claim, her religion and national origin. Therefore, the Court analyzes both claims together, as "[i]t is well established that '[t]he standards governing claims pursuant to section 1981 and the NYHRL are identical.'" *Grant v. Cty. of Suffolk*, No. 15-CV-4781 (DRH) (GRB), 2018 WL 816242, at *12 (E.D.N.Y. Feb. 9, 2018) (quoting *Perez Rivera v. Hertz Corp.*, 990 F. Supp. 234, 236 (S.D.N.Y. 1997)).

"To establish a claim under section 1981 or the NYHRL, plaintiffs must prove that (1) they are members of a racial minority, (2) the defendant intended to discriminate on the basis of

race, and (3) the discrimination concerned one or more of the activities enumerated in the statute, which include making and enforcing contracts." *Perez Rivera*, 990 F. Supp. at 236. "With regard to the intent element, plaintiff must show that defendant's actions were purposefully discriminatory and racially motivated." *Id.* at 236–37 (citing *Albert*, 851 F.2d at 571). On this key point, a plaintiff can show defendant's discriminatory intent with direct or circumstantial evidence. *See Whitehurst v. 230 Fifth, Inc.*, 998 F. Supp. 2d 233, 244 (S.D.N.Y. 2014); *Aboeid v. Saudi Arabian Airlines Corp.*, 959 F. Supp. 2d 300, 309 (E.D.N.Y. 2013), *aff'd* (2d Cir. 2014).

Where, as here, a plaintiff relies on indirect evidence of discriminatory intent, courts proceed under the familiar *McDonnell Douglas* burden-shifting framework. *See Jenkins v. NYC Transit Auth.*, 201 F. App'x 44, 45–46 (2d Cir. 2006) ("A plaintiff's efforts to establish the second element of a § 1981 claim are subject to the [] burden-shifting analysis"); *Whitehurst*, 998 F. Supp. 2d at 244; *Aboeid*, 959 F. Supp. 2d at 309. "Under this framework, a plaintiff must first establish a *prima facie* case of discrimination." *Ruiz v. Cty. of Rockland*, 609 F.3d 486, 491 (2d Cir. 2010). Then, "once a plaintiff establishes a *prima facie* case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019, 206 L. Ed. 2d 356 (2020). Importantly, though, the plaintiff maintains the ultimate burden of persuading the trier of fact that race was a but-for cause of defendant's acts. *See id.*; *Patterson v. County of Oneida*, 375 F.3d 206, 221 (2d Cir. 2004).[4]

[4] The Supreme Court's recent holding in *Comcast Corp.* that § 1981 plaintiffs must prove but-for causation does not displace the *McDonnell Douglas* framework, which continues to serve as a useful "tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination." *Comcast Corp.*, 140 S. Ct. at 1019; *see also, e.g.*, *Gary v. Facebook, Inc.*, 822 F. App'x 175, 180 (4th Cir. 2020); *Brown v. King Cty.*, 823 F. App'x 478,

Seeking to build her *prima facie* case, Gueye contends that PUB knew that she was Black and Muslim, that she operated a Muslim and Senegalese charity and traveled to Muslim countries. *See* Pl.'s Opp'n Mem. at 15–16. Ticking off the proffered evidence, she catalogs that she opened her accounts in person at PUB's Forest Hills branch, that she notified the bank of her travels, that her account records reflected international transactions and that PUB analysts ran Google searches on her and Mumin during their investigation. *See* Gueye Decl. ¶¶ 14, 17, 35; Gueye Tr. at 131:4–22 (stating that she wore a hijab when opening the Mumin account), 166:4–10 (branch employees "probably noticed" her race), 358:3–25. PUB counters that its Connecticut-based working group made the decision to Gueye's personal and custodial accounts, and that there is no evidence its members were aware of her protected characteristics. *See* Def.'s Mem., Dkt. 52, at 26–27.

Yet even if Gueye is correct that PUB was aware of her protected characteristics, her case soon falters when she attempts to link PUB's purported awareness to its termination of their banking relationship. Gueye says she "could imagine no other reason why her account could have been closed except that PUB did not want to bank with a Muslim, Senegalese, Black woman who was now travelling overseas to Muslim countries for her Muslim/Senegalese charity." Pl.'s Opp'n Mem. at 22; *see also* Gueye Decl. ¶ 29 ("I had to assume the reason PUB refused to reopen my accounts was because I am a Muslim woman who was operating a Muslim not-for-profit and who was travelling to Muslim countries."); Gueye Tr. at 129:5–16 (asserting closure was discriminatory "[b]ecause it happened while I was traveling to Muslim countries"

480 (9th Cir. 2020); *Mann v. XPO Logistics Freight, Inc.*, 819 F. App'x 585, 594 (10th Cir. 2020); *Howard v. Consol. Edison Co. of New York, Inc.*, No. 17-CV-364 (ENV) (LB), 2021 WL 395868, at *8 (E.D.N.Y. Feb. 4, 2021) (applying *McDonnell Douglas* to § 1981 and NYSHRL claims).

and "I'm also Muslim"), 166:1–3 ("[T]hey discriminated against me because of who I am and my race is part of who I am."). While Gueye had previously traveled to the same "Muslim countries" without facing account closures, she says that the difference this time was that "she was also managing a Muslim/Senegalese charity in connection with her travels," which led to her "[i]ntuiting discrimination" behind the closures. Pl.'s Opp'n Mem. at 22–23.

In addition to this speculation, Gueye relies heavily on the NYSDHR report, homing in on Andrews's statement to NYSDHR that she "was not certain, but she believes that it was the BSA department that told her that the accounts were closed 'due to something about the countries [plaintiff] had travelled to.'" *See* NYSDHR File at 20–21; Pl.'s Opp'n Mem. at 8–9, 16–17. The parties contest the admissibility of the report and this statement. Def.'s Mem. at 16 n.14; Pl.'s Opp'n Mem. at 16–17, 23. Inadmissible hearsay is an insufficient basis for opposing summary judgment. *Capobianco v. City of New York*, 422 F.3d 47, 55 (2d Cir. 2005). The NYSDHR report is admissible as a public record, though within the Court's discretion to exclude based on a danger of unfair prejudice. *See Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 64 (2d Cir. 1998) (citing Fed. R. Evid. 403, 803(8)(C)). The Court will consider the NYSDHR report, but notes that its conclusions carry little weight in a summary judgment proceeding given NYSDHR's lower evidentiary standards and abbreviated procedures. *See id.*; *Dollman v. Mast Indus., Inc.*, No. 08-CV-10184 (WHP), 2011 WL 3911035, at *1 (S.D.N.Y. Sept. 6, 2011) (noting that NYSDHR addressed only the question of probable cause to grant a hearing, "a far more lenient standard than [plaintiff's] burden at trial"); *Robles v. Cox & Co.*, 987 F. Supp. 2d 199, 209 (E.D.N.Y. 2013) (considering NYSDHR report, but finding it "unavailing").

As to Andrews's statement, because she is relaying others' out-of-court statements, two levels of hearsay must be examined. *See* Fed. R. Evid. 805 (hearsay within hearsay is admissible

if each part falls within an exception). The relevant rule is Fed. R. Evid. 801(d)(2)(D), which deems admissible non-hearsay a statement "offered against an opposing party" that "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." In general, "admissibility under this rule should be granted freely." *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 537 (2d Cir. 1992). At the first level of hearsay is the statement by the "BSA department" to Andrews. Where a speaker's identity is unknown, the employment relationship and scope may be established by circumstantial evidence. *See Farganis v. Town of Montgomery*, 397 F. App'x 666, 668 (2d Cir. 2010). The record shows that the BSA department consisted of PUB employees tasked with investigating suspicious account activity, and who investigated Gueye's accounts based on her foreign transactions. *See* Hoffman Tr. at 160:3–7 ("It's my understanding that [Gueye's] accounts were closed by a back office by [PUB's] BSA group."); Wilbur Tr. at 134:2–136:25 (describing unit that investigates BSA violations); 270:8–271:24, 299:6–300:18, 315:21–25; FIU Record at 2–3 (listing Gueye's suspected BSA violations). This statement was, therefore, made by an employee within the scope of the employment relationship. *Cf. Pappas*, 963 F.2d at 537–38 (finding unnamed speaker's statement admissible given circumstantial evidence of employment and authority to speak on the subject); *In re Great Atl. & Pac. Tea Co., Inc.*, No. 14-CV-4170 (NSR), 2015 WL 6395967, at *4 (S.D.N.Y. Oct. 21, 2015) (conversely, unidentified employee's statements on internal investigation inadmissible where proponent "[did] not introduce any evidence to substantiate this internal investigation besides the statements themselves").

At the second level of hearsay, Andrews was a PUB branch employee who participated in the relevant processes. While she did not decide whether to terminate a customer's banking relationship, she opened accounts for eligible customers and conveyed PUB's account closure

decisions, including in Gueye's case. *See* Joint 56.1 ¶¶ 78–85; Andrews Tr. at 100:6–17; Dkt. 53-26 (Andrews emailing Hoffman, "when I called BSA the[y] told me I had to reach out to you"); Dkt. 53-25 (Andrews telling Gueye why her accounts were closed). Her statement is, therefore, admissible for the same reasons. *See Walsh v. New York City Hous. Auth.*, 828 F.3d 70, 79 (2d Cir. 2016) (declarant "need only be an advisor or other significant participant in the decision-making process that is the subject matter of the statement" for it "to be deemed within the scope of his agency," such that statement by human resources representative who participated in hiring process and informed candidates of hiring decisions fell within scope of relationship (quoting *United States v. Rioux*, 97 F.3d 648, 660 (2d Cir. 1996))).

The fact that the statement is admissible, however, does not mean it is helpful to Gueye's case. Andrews's equivocal statement mentioning "something about the countries [Gueye] had traveled to," NYSDHR File at 20–21, is equally consistent with PUB's contention that it closed Gueye's accounts due, in part, to her numerous flagged transactions in high-risk jurisdictions. *Cf.* Def's Mem. at 20–21. Indeed, without a healthy dose of impermissible speculation, it is not possible to draw a reasonable inference either way. Nor does the report address racial discrimination, which is all § 1981 covers. *Albert*, 851 F.2d at 571. For all of Gueye's focus on the NYSDHR report and its contents, and for all of PUB's focus on their admissibility, the report is, ultimately, unavailing. It simply does not show that PUB intentionally discriminated against Gueye.

Nor does the rest of the record. At bottom, Gueye offers only assumptions and conclusory statements, which cannot support a *prima facie* case of discrimination. Where "[p]laintiffs have done little more than cite to their [purported] mistreatment and ask the court to conclude that it must have been related to their race," summary judgment is appropriate, since "a

jury cannot infer discrimination from thin air." *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001); *see also, e.g.*, *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (on summary judgment, nonmoving party "may not rely on conclusory allegations or unsubstantiated speculation" and "must offer some hard evidence showing that its version of the events is not wholly fanciful" (internal citations and quotation marks omitted)); *Brannon v. Delta Airlines, Inc.*, 434 F. Supp. 3d 124, 133–34 (S.D.N.Y. 2020) (plaintiff failed to make *prima facie* case where "[o]ther than his own speculation, however, there is simply nothing in the record to support these bald assertions" of discrimination); *Whethers v. Nassau Health Care Corp.,* 956 F. Supp. 2d 364, 379 (E.D.N.Y. 2013) ("'A plaintiff's speculations, generalities, and gut feelings, however genuine, when they are not supported by specific facts, do not allow for an inference of discrimination to be drawn.'" (quoting *Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005))). As Gueye fails make out a *prima facie* case of intentional discrimination under § 1981 and NYSHRL, summary judgment for PUB is warranted.

Even if Gueye had made out a *prima facie* case, undisputed evidence shows PUB had legitimate non-discriminatory reasons for terminating their banking relationship: the Mumin account's overdraft and the personal account's flagged transactions. The Mumin account was closed in accordance with bank policy because it had been in overdraft for nearly 60 days, after which the bank reserved the right to close her other accounts. *See* Joint 56.1 ¶¶ 129–31; Dkts. 53-18, 57-8. While that overdraft was admittedly caused by PUB opening the wrong type of account, neither party suggests that this error was intentionally discriminatory. *Cf. Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998) (explaining that anti-discrimination law "does not make [defendants] liable for doing stupid or even wicked things; it makes them liable for *discriminating*"); *McLee*, 109 F.3d at 136 (affirming summary judgment to defendant where "the

inferences urged by [plaintiff] are foreclosed by facts he does not dispute"). Additionally, PUB's software flagged Gueye's foreign transactions because they occurred in high-risk jurisdictions and at a high velocity, ultimately leading PUB's working group to close her accounts. Joint 56.1 ¶¶ 5, 61–63, 69; Wilbur Tr. at 75:19–76:22, 270:11–272:4. In a sense, then, Gueye guessed correctly that opening the Mumin account and travelling internationally led PUB to discontinue their relationship—but for the non-discriminatory reasons that this caused an overdraft and flags in the bank's risk-assessment system. Gueye fails to show these reasons are pretextual, and that PUB's true motive was intentional discrimination.[5] Her admission that the overdraft was a cause of her account closures is "particularly self-defeating in light of the Supreme Court's recent decision establishing 'but-for' causation as a necessary element of § 1981 suits," which makes a plaintiff's "affirmative acknowledgement of sufficient, non-discriminatory reasons . . . determinative." *Rubert v. King*, No. 19-CV-2781 (KMK), 2020 WL 5751513, at *7 (S.D.N.Y. Sept. 25, 2020) (citing *Comcast*, 140 S. Ct. at 1019)); *see also, e.g.*, Pl.'s 56.1, Dkt. 59, ¶¶ 59, 69, 135–36 ("Due to the Bank's Error which caused the Overdraft and ultimately the closure of the

[5] In evaluating whether defendant's reasons were pretextual, courts "need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable," but instead examine "whether the articulated purpose is the actual purpose," asking factual questions such as whether "the asserted reason for the challenged action comports with the defendant's policies and rules." *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170–71 (2d Cir. 1993). Gueye takes issue with the fact that PUB proffers two reasons for her account closures, and that it only discussed the overdraft during the NYSDHR proceeding. *See* Pl.'s Opp'n Mem. at 19–23. Yet the record on this motion, developed after extensive discovery, shows that both were contributing factors. *See* Joint 56.1 ¶¶ 129–31; Wilbur Tr. at 320:24–322:7; Dkts. 53-18, 57-8; FIU Record at 2–3. Gueye also says she could have explained the flagged transactions if given the chance. *See* Pl.'s Opp'n Mem. at 20–21; Gueye Decl. ¶¶ 17–29. Yet the record clearly shows that PUB attempted to contact her about the overdraft and flagged transactions, and that the bank's procedures called for it to make investigation decisions based on the available information if customers did not respond. *See* Joint 56.1 ¶¶ 53–56, 65–69, 129–31; Lofton Tr. at 92:6–93:8; Dkts. 53-18, 53-20, 57-8. These arguments fall far short of establishing that PUB's reasons for terminating their relationship were pretextual.

Mumin Account, Plaintiff's Personal Accounts were closed."). Defendant's motion for summary judgment is, therefore, granted with respect to plaintiff's § 1981 and NYSHRL claims.

II. NYCHRL

Gueye's NYCHRL claim, arising under the code's prohibition against discrimination in public accommodations, likewise fails at the first step. *See* Compl. ¶¶ 52–56; N.Y.C. Admin. Code § 8-107(4). This is so even keeping faith with a court's obligation to analyze NYCHRL claims separately, and more liberally, given the ordinance's expanded protections. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc*., 715 F.3d 102, 109 (2d Cir. 2013). Hence, applying the City code liberally, to prevail on her NYCHRL discrimination claim, "a plaintiff must only show differential treatment of any degree based on a discriminatory motive." *Gorokhovsky v. New York City Hous. Auth*., 552 F. App'x 100, 102 (2d Cir. 2014) (citing *id.* at 114). Nonetheless, "[a]s under state and federal law, causation is an essential element of an NYCHRL claim: 'a defendant is not liable if the plaintiff fails to prove the conduct is caused at least in part by discriminatory or retaliatory motives.'" *Goonewardena v. New York Workers Comp. Bd*., 258 F. Supp. 3d 326, 343 (S.D.N.Y. 2017), *aff'd*, 788 F. App'x 779 (2d Cir. 2019) (quoting *Mihalik*, 715 F.3d at 113). In such cases, summary judgment remains "an appropriate mechanism for resolving NYCHRL claims." *Mihalik*, 715 F.3d at 111.

Gueye has not demonstrated that she received differential treatment from PUB because of her race, religion or national origin. Looking past her speculations and bare assertions, the record reveals no evidence that PUB's decision to close her accounts had a discriminatory motive. Instead, undisputed evidence shows PUB closed Gueye's accounts and prevented her from opening new ones because of the overdraft and flagged transactions. *Cf. Simmons v. Akin Gump Strauss Hauer & Feld, LLP*, 508 F. App'x 10, 14 (2d Cir. 2013) (affirming summary

judgment on NYCHRL claim where plaintiff "failed to raise a triable issue as to whether she was treated less well . . . based in whole or in part on discrimination, and not because of the non-discriminatory reasons proffered by [defendant]"); *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 131, 946 N.Y.S.2d 27 (1st Dep't 2012) ("[N]ot every plaintiff asserting a discrimination claim [under NYCHRL] will be entitled to reach a jury."). Therefore, even under municipal law's more expansive protections, Gueye has failed to raise a genuine issue of material fact and the Court grants summary judgment for PUB on her NYCHRL claim.

Conclusion

For the reasons set forth above, defendant's motion for summary judgment is granted and plaintiff's claims are dismissed in their entirety with prejudice.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York
March 25, 2021

/s/ Eric N. Vitaliano
ERIC N. VITALIANO
United States District Judge