

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

IA-19A
10-12-11
-----X
NAFISSATOU DIALLO,

Plaintiff,

v.

DOMINIQUE STRAUSS-KAHN,

Defendant.
-----X

: Index No. 307065/2011

: **NOTICE OF MOTION**
: **TO STRIKE**

: Part IA-19A

: Hon. Douglas E. McKeon, J.S.C.

: Return Date: October 12, 2011

PLEASE TAKE NOTICE that, upon the accompanying memorandum of law, and upon all prior pleadings had herein, Defendant Dominique Strauss-Kahn will move this Court at the Motion Support Office, Room 217, of the Supreme Court of the State of New York, County of Bronx, 851 Grand Concourse, Bronx, New York, on the 12th day of October 2011, at 9:30 in the forenoon, or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR § 3024(b) striking the allegations in paragraphs 10, 11, 24, 30 and 37 of the Complaint.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR § 2214(b), answering papers, if any, shall be served on the undersigned counsel at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
September 26, 2011

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

ELLEN STINES, being duly sworn, deposes and says:

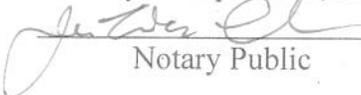
1. I am not a party to this action and am 18 years of age or older.
2. I am an administrative assistance employed by the law firm of Zuckerman Spaeder LLP, attorneys for Defendant Dominique Strauss-Kahn in the above-referenced matter.
3. That on this 26th day of September, 2011, I caused to be served a true and accurate copy of Defendant Dominique Strauss-Kahn's Notice of Motion to Strike and Memorandum of Law in Support of Defendant Dominique Strauss-Kahn's Motion to Strike Allegations in Paragraphs 10, 11, 24, 30, and 37 of the Complaint via personal delivery by Roland David of EPS Judicial Process Service, Inc., to the following:

Kenneth P. Thompson
Douglas H. Wigdor
THOMPSON WIGDOR LLP
85 Fifth Avenue
New York, New York 10003
Tel: (212) 257-6800
Attorneys for Plaintiff



Ellen Stines

Sworn to before me this
26th day of September, 2011.



Notary Public

JER WEI CHEN
Notary Public, State of New York
No. 01CH6174210
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires 09/17/2015

ARGUMENT

I. The Legal Standards Governing a Motion to Strike.

Pursuant to N.Y. CPLR 3024(b), “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” An allegation is scandalous if it is both immaterial and reproachful or capable of producing harm without justification. *See Dong Wook Park v. Michael Parke Dori Group, Inc.*, 824 N.Y.S.2d 761 (N.Y.Sup. 2006) (citing *Hurley v. Hurley*, 266 App. Div. 701 (3d Dep’t. 1943)). An allegation is prejudicial when it impairs a substantial right of a party or causes harm to the party and is not necessary to the party’s pleading. *See JC Manufacturing, Inc. v. NPI Electric, Inc.*, 178 A.D.2d 505, 577 N.Y.S.2d 145, 146 (2d Dep’t 1991); *Schachter v. Mass. Protective Ass’n*, 30 A.D.2d 540, 291 N.Y.S.2d 128 (2d Dep’t 1968).

“In reviewing a motion pursuant to CPLR 3024(b), the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action.” *Soumayah v. Minnelli*, 41 A.D.3d 390, 392-93, 839 N.Y.S.2d 79, 82-3 (1st Dep’t 2007) (granting motion to strike based on determination that allegations were “not necessary for the sufficiency of plaintiff’s causes of action” and “may instill undue prejudice in the jury”). “Relevancy is still the best key to whether matter is ‘unnecessarily’ pleaded, *and the best key to relevancy is whether it would be admissible in evidence at the trial.*” Siegel, N.Y. Prac. § 230, at 380 (4th ed.) (emphasis added). Professor Siegel has emphasized: “In general, we may conclude that ‘unnecessarily’ means ‘irrelevant.’ We should test this by the rules of evidence and draw the rule accordingly. Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b).” Siegel, Practice Commentaries, McKinney’s Cons. Laws of NY, Book

7B, CPLR C:3024:4, at 323; *see also Bristol Harbour Assoc. v. Home Ins. Co.*, 244 A.D.2d 885, 886 (4th Dep't 1997).

Moreover, even where allegations may lead to admissible evidence at trial, New York courts routinely strike allegations that are prejudicial and irrelevant to plaintiff's causes of action. *See JC Manufacturing, Inc.*, 178 A.D.2d at 506, 577 N.Y.S.2d at 146 (affirming decision granting motion to strike based on determination that "[w]hile the matter contained in those paragraphs may be admissible at trial, it is not necessary for the sufficiency of the appellant's pleading, and it would cause undue prejudice"); *Wegman v. Dairylea Cooperative*, 50 A.D.2d 108, 111, 376 N.Y.S.2d 728, 733 (4th Dep't 1975) (affirming decision granting motion to strike and stating: "[a]lthough it is conceivable that the issue of milk adulteration will come forth in the ensuing trial, to insert that issue in the pleading stage is not necessary for the sufficiency of plaintiff's cause of action and may instill undue prejudice in the jury"); *Schachter*, 30 A.D.2d 540, 291 N.Y.S.2d 128 ("[O]n balance, it would be more in keeping with sound discretion and the interests of justice to preserve defendant's right to a fair trial by not permitting plaintiff to invoke the liberal rule with respect to pleadings and allege the aforesaid prejudicial unnecessary matter under the guise of relevancy, which we do not find at this posture of the proceedings. We make no determination as to the relevancy or irrelevancy of such evidentiary matter at the trial, predicated on what may be adduced thereat.").

These decisions are based on the recognition, articulated by the Fourth Department in *Wegman*, that striking such allegations causes "no prejudice to plaintiff . . . whereas if these allegations [are] not stricken prejudice may result to defendant." *Wegman*, 50 A.D.2d at 111, N.Y.S.2d at 733.

II. The Baseless Allegations in Paragraphs 24 and 37 Regarding Other Crimes Allegedly Committed By Mr. Strauss-Kahn Must be Stricken.

A. The complaint's allegations concerning other alleged sexual assaults must be stricken because evidence relating to such allegations would be inadmissible at trial.

In paragraph 37 of the complaint, Plaintiff alleges in a conclusory manner, without any factual support, that Mr. Strauss-Kahn has engaged in other improper sexual acts. Further, in paragraph 24 of the complaint, Plaintiff alleges that, in connection with the alleged assault in this case, Mr. Strauss-Kahn acted with “the confidence of sexually assaulting other women in the past who did not immediately come forward.” Compl. ¶ 24.

These allegations must be stricken, because they are irrelevant to Plaintiff's causes of action and evidence as to these allegations would be inadmissible at trial in this matter. “A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion.” *Coopersmith v. Gold*, 223 A.D.2d 572, 636 N.Y.S.2d 399 (2d Dep't 1996) (citing Richardson, Evidence §§ 170, 184 (10th ed.); *Matter of Brandon*, 55 N.Y.2d 206, 210-211, 448 N.Y.S.2d 436, 438; *Kourtalis v. City of New York*, 191 A.D.2d 480, 594 N.Y.S.2d 325)). Evidence of previous similar conduct may be admissible in a given case only upon proof that one of the narrow exceptions to the foregoing general rule applies. In *People v. Molineux*, 168 N.Y. 264, 289- 61 N.E. 286, 293-94, the Court of Appeals held that evidence of prior bad acts may only be admitted if it is relevant to show (i) motive; (ii) intent; (iii) the absence of mistake or accident; (iv) a common scheme or plan so related to each other that proof of one tends to establish the others, or (v) identify of the person charged with the commission of the crime or act at issue.

New York courts apply the *Molineux* exceptions narrowly in cases alleging sexual assault and infrequently admit such evidence under any of the *Molineux* exceptions. Indeed, New York courts typically conclude that prior bad acts evidence in a sexual assault case is inadmissible as improper “propensity” evidence to commit a similar offense, which is the precise reason Plaintiff has made such allegations here. See *People v. Vargas*, 666 N.E.2d 1357 (N.Y. 1996) (evidence of defendant’s prior sexual misconduct with four other women was inadmissible in rape case where evidence served no purpose but to suggest only that defendant “was likely to have committed the acts charged”); *People v. Lewis*, 506 N.E.2d 915 (N.Y. 1987) (evidence of defendant’s prior sexual contact with same victim, admitted under the rubric of “amorous design,” was nothing more than propensity evidence and should not be permitted); *People v. Walker*, 59 A.D.2d 666 (1st Dept. 1977) (prosecutor committed reversible error in questioning defendant with regard to prior rape case, where such evidence served no purpose but to “show a propensity on the part of the defendant to commit the crime of rape”). Furthermore, the Court of Appeals has expressly rejected the use of prior sexual misconduct or similar bad acts on the part of a defendant to bolster the credibility of a complaining witness. As the Court of Appeals recognized in *Hudy*, such line of reasoning is nothing more than “a form of propensity evidence hiding behind an assumed name.” 535 N.E.2d at 259.

Here, Plaintiff does not allege *any* specific facts demonstrating that evidence of the alleged crimes referenced in the complaint would be admissible at trial under the *Molineux* exceptions, as narrowly applied by New York courts in alleged sex assault cases. Indeed, Plaintiff’s complaint is devoid of any fact allegations setting forth what the purported evidence of these alleged crimes would show. Plaintiff’s mere recitation of the *Molineux* exceptions (Compl. ¶ 37) is not a substitute for well-pleaded facts demonstrating the relevance of Plaintiff’s

allegations. Mr. Strauss-Kahn should not be required to respond to these baseless and irrelevant claims, which are designed solely to prejudice him in the eyes of the jury.

B. The allegations of other sexual assaults must be stricken as unfairly prejudicial.

Even if evidence of any alleged other crimes was admissible at trial, the allegations still must be stricken under well-established New York law because the allegations are “not necessary for the sufficiency of [Plaintiff’s] pleading” and will “cause undue prejudice” to Mr. Strauss-Kahn. *JC Manufacturing, Inc.*, 178 A.D.2d at 506, 577 N.Y.S.2d at 146; *Wegman v. Dairylea Cooperative*, 50 A.D.2d at 111, 376 N.Y.S.2d at 733. The allegations of other sexual activity are unnecessary to pleading Plaintiff’s claims of battery, assault, false imprisonment, intentional infliction of emotional distress, and prima facie tort. In fact, Plaintiff chose to describe the alleged assault in prurient, gratuitous detail, plainly demonstrating that her only purpose in alleging other sexual conduct at the pleading stage is to embarrass Mr. Strauss-Kahn and to unfairly prejudice the potential jury pool.

III. The Baseless Allegations in Paragraphs 10 and 11 Regarding Alleged Efforts by Mr. Strauss-Kahn to “Smear” the Plaintiff Must be Stricken.

In paragraph 10 of the complaint, Plaintiff alleges that Mr. Strauss-Kahn’s “attack on [Plaintiff] and the defamatory news articles about her that were published in the *New York Post*, that were no doubt instigated by Mr. Strauss-Kahn’s defense team, have subjected [Plaintiff] to public humiliation, shame, scorn, and disdain throughout the world and caused great pain in her family.” Compl. ¶ 10. Paragraph 11 alleges that Plaintiff “refuses to be covered into silence by [Mr.] Strauss-Kahn, his multitude of criminal defense lawyers, investigators, public relations experts and powerful friends who have smeared [Plaintiff’s] character, by, among other things, falsely claiming that the violent sex acts [Mr.] Strauss-Kahn committed against her were

consensual, as well as by some members of the media who have further denigrated her character and even called her a prostitute.” Compl. ¶ 11.

These passages must be stricken. Here again, Plaintiff’s allegations are nothing more than wholly conclusory assertions that are not supported by any specific facts. These allegations contain scandalous and prejudicial matter which is irrelevant to Plaintiff’s causes of action and evidence as to those allegations would not be admissible at trial. *See Soumayah*, 41 A.D.3d at 390, 839 N.Y.S.2d at 82-3. Indeed, published media articles and their contents concerning Plaintiff have nothing whatsoever to do with any of the five causes of action brought by Plaintiff. Furthermore, Mr. Strauss-Kahn’s hiring of lawyers and investigators – in proper exercise of his constitutional rights – is irrelevant to Plaintiff’s claims and would not produce admissible evidence at trial.

IV. The Baseless Allegations in Paragraph 30 Are Irrelevant and Must Be Stricken.

Paragraph 30 of the complaint purports to recount an alleged incident in which Mr. Strauss-Kahn made an inappropriate comment to an Air France Flight attendant. Compl. ¶ 30. The paragraph further alleges that the purported incident “was not the first time Mr. Strauss-Kahn disrespected a female Air France employee while on board a plan and/or in a VIP airport lounge.” *Id.* These allegations were formally denied by Air France and the employees’ unions at the airline. The allegations are prejudicial and plainly irrelevant to the causes of action asserted in the complaint. They, too, must be stricken. *See Soumayah*, 41 A.D.3d at 390, 839 N.Y.S.2d at 82-3.

CONCLUSION

For the foregoing reasons, Defendant Dominique Strauss-Kahn respectfully requests that the Court grant his motion and strike the allegations referenced herein set forth in paragraphs 10, 11, 24, 30, and 37 of the complaint.

Dated: New York, New York
September 26, 2011

Respectfully submitted,

ZUCKERMAN SPAEDER LLP

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