Pellegrino v Allen Dalton Prods.
2004 NY Slip Op 30383(U)
June 28, 2004
Supreme Court, New York County
Docket Number: 102353/2004
Judge: Carol R. Edmead

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

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LAUREN PELLEGRINO AND NATASHA TABANDERA

Plaintiffs, Index No. 102353/2004

-against-

ALLEN DALTON PRODUCTIONS AND ALLEN DALTON,

Defendants.

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MEMORANDUM DECISION

Defendants, Allen Dalton Productions ("Dalton Productions") and Allen Dalton ("Dalton") (collectively "defendants") move pursuant to CPLR §3211 [a] [7] to dismiss plaintiffs' fourth, fifth, and sixth causes of action, which allege assault, battery, and intentional infliction of emotional distress, respectively.

Dalton is the founder, owner, and President of Dalton Productions, which is an event planning business. According to the complaint, plaintiff Lauren Pellegrino ("Pellegrino") was employed at Dalton Productions from approximately August 2003 through December 5, 2003 when defendants unlawfully discharged her. Plaintiff Natasha Tabandera ("Tabandera") was employed at defendant Dalton Productions from approximately May 2002 through January 14, 2004, when defendants constructively discharged her employment. The complaint alleges that defendant Dalton "repeatedly made sexual statements and advances" to plaintiff Pellegrino, such as "you like it rough" and "you're a bad girl" (complaint ¶32), and to plaintiff Tabandera, such as "Natasha let me know when you can go back upstairs to f___?" (complaint ¶33). Plaintiffs also allege that defendant Dalton repeatedly rubbed their neck and shoulders (complaint ¶34),

repeatedly displayed sexual and pornographic material on his computer (complaint ¶35), and repeatedly sexually harassed one or more other female employees of the company (complaint ¶36).[1]

In support of their assault claim, plaintiffs further allege, *inter alia*, that "Mr. Dalton, by his conduct herein, intended to place Plaintiffs in apprehension of imminent harm or offensive contact and attempted to do injury" to plaintiffs. Plaintiffs further allege that as a result, plaintiffs "were placed in apprehension of imminent harm or offensive conduct, and have incurred damages thereby."

In support of their battery claim, plaintiffs allege that by his conduct, Dalton "intentionally and wrongfully made offensive and harmful bodily contact with plaintiffs, against their will and over their objections." It is further claimed that as a result of Dalton's conduct, plaintiffs "have been unreasonably harmed, and incurred damages thereby."

With respect to their intentional infliction of emotional distress claim, plaintiffs allege that by his conduct, Dalton intentionally or recklessly engaged in extreme and outrageous conduct toward plaintiffs that exceeded all possible bounds of decency. Plaintiffs further assert, *inter alia*, that Dalton intentionally caused, or knew or disregarded the substantial probability that such conduct would cause plaintiffs to suffer severe emotional distress and incur damages, which caused plaintiffs to suffer severe emotional distress and incur damages.

Defendants argue that the sole act of "rubbing [plaintiffs'] necks and shoulders" would

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[1]In addition to the aforementioned claims, plaintiffs allege two causes of action for unlawful discrimination and harassment based on sex, unlawful employment practices, and unlawful retaliation under New York State Human Rights Law and New York City Human Rights Law.

not offend a person of reasonable sensibilities under current social custom and thus, is not sufficiently offensive or wrongful so as to sustain a claim for battery or assault. Defendants further argue that the allegations of rubbing plaintiffs' neck and shoulders, coupled with isolated incidents of allegedly sexual conduct, do not rise to the level of outrageous or extreme conduct, or represent a longstanding campaign of deliberate, systematic and malicious harassment necessary to state a claim for intentional infliction of emotional distress. Moreover, plaintiffs' claim for intentional infliction of emotional distress should be dismissed since they seek relief under the New York City and New York State Human Rights law.

In opposition, plaintiffs argue that a claim of sexual harassment can support claims of assault, battery, and intentional infliction of emotional distress, and that the three latter claims are properly brought together with claims of sexual harassment/sex discrimination under New York State and New York City Human Rights laws. Furthermore, plaintiffs assert that the complaint alleges sufficient facts to support the three claims. Plaintiffs also argue that the cases upon which defendants rely are distinguishable, and do not warrant dismissal.

Expounding on their earlier arguments, defendants reply that the alleged sexual statements and advances, display of sexually explicit material on Dalton's computer, and sexual harassment of other employees are irrelevant to plaintiffs' assault claim, and that the rubbing of plaintiffs' neck and shoulders, whether once or repeatedly, is not objectively "offensive contact" under the circumstances. Defendants also claim that plaintiffs fail to allege that they were put in imminent apprehension of harmful or offensive contact to support their assault cause of action. Moreover, according to defendants, the cases upon which plaintiffs rely underscore the difference between the pleadings here and the outrageous conduct required to sustain a claim for intentional

infliction of emotional distress.

Analysis

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). Thus, the standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Mfg. Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

An assault is the intentional placing of another in apprehension of imminent harmful or offensive contact (*Tom v Lenox Hill Hosp.*,165 Misc 2d 313 [Supreme Court New York County 1995]; *Bunker v Testa,* 234 AD2d 1004 [4th Dept 1996]; *see Hayes v Schultz*, 150 AD2d 522 [2d Dept 1989]).

A claim for battery is stated if plaintiffs allege bodily contact which is offensive and is made with intent without plaintiffs' consent (*Tom v Lenox Hill Hosp.*, 165 Misc 2d 313

[Supreme Court New York County 1995] *citing* NY PJI 3:3, 1995 cumulative supp., comment, p. 18; *see also Roe v Barad*, 230 AD2d 839 [2d Dept 1996] ["To recover damages for battery founded on bodily contact, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact']). The necessary intent is the intent to make contact, not to do injury (*Tom v Lenox Hill Hosp.*, 165 Misc 2d 313 *citing Villanueva v Comparetto*, 180 AD2d 627, 629 [2d Dept 1992]), and the contact must be proven to be wrongful under the circumstances (*see Zgraggen v Wilsey,* 230 AD2d 839 [3d Dept 1994]).

The elements of a cause of action for intentional infliction of emotional distress are (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress (*Graupner v Roth*, 293 AD2d 408 [1st Dept 2002] citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978]). This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [citations omitted]). Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff (*Seltzer v Bayer*, 272 AD2d 263 [1st Dept 2000]; *see, e.g., Shannon v MTA Metro-North R. R.*, 269 AD2d 218, 219 [1st Dept 2000] ["a pattern of harassment, intimidation,

humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 AD2d 2, 3 [1st Dept 1999] ["through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant"]; *Harvey v Cramer*, 235 AD2d 315 [1st Dept 1997] [misdiagnosis of HIV status is sufficiently outrageous if intentional, as to which an issue of fact was raised by evidence that doctor also told plaintiff's long-term partner the diagnosis and provided free medical care to the partner in exchange for sexual favors]).

Viewing the complaint liberally and accepting as true the allegations in the complaint as this Court must, plaintiffs' allegations that defendant Dalton repeatedly and intentionally rubbed plaintiffs' neck and shoulders, and made sexual statements, advances, and invitations over a period of at least four months are sufficient to sustain the claims for assault, battery, and intentional infliction of emotional distress. The Court notes that the complaint alleges each of the required elements necessary to appraise defendants of the assault, battery, and intentional infliction of emotional distress.

Specifically as to the assault claim, it is alleged that defendant Dalton's conduct placed plaintiffs in apprehension of imminent harmful or offensive contact. With respect to the battery claim, plaintiffs have alleged that the "repeated" contacts by defendant Dalton were made "against their will and over their objections," and thus without their consent. Plaintiffs have also alleged that such contacts were offensive. Thus, it cannot be said, as a matter of law, that such contacts were unoffensive under the circumstances in which they were made (*cf. Zgraggen v Wilsey,* 230 AD2d 839 [3d Dept 1994] [pushing plaintiff into pool not offensive as a matter of

law]; *Lucas v South Nassau Communities Hosp.*, 54 F Supp2d 141 [EDNY 1998] [dismissing on summary judgment assault and battery claims upon finding that on two occasions, defendant's touching of plaintiff was momentary in duration and innocuous in nature, and that every employee must accept the occasional touching that arises in the normal workday environment, where plaintiff and defendant were both large individuals working in a department with narrow aisles]).

Further, defendants' argument concerning the intentional infliction of emotional distress ("IIED") claim that plaintiffs' allegations of rubbing plaintiffs' neck and shoulders, coupled with isolated incidents of allegedly sexual conduct ignores the fact that these purportedly "isolated" incidents were expressly identified as "example[s]" of what was otherwise "repeated" over a period of time (*see O'Reilly v Executone of Albany, Inc.*, 121 Ad2d 772 [3d Dept 1986] [declining to dismiss complaint for IIED which alleged that plaintiff was "repeatedly, intentionally, and maliciously harassed by certain male co-workers and defendant" including, but not limited to sexual jokes, comments, inquiries, sexually oriented contact, posting of pornographic pictures]; *Salvatore v KLM Royal Dutch Airlines*, 1999 WL 796172 [SDNY 1999] [declining to dismiss complaint for IIED where one plaintiff alleged "frequent" massages, drop of pencil between her breasts, and push to floor on two separate occasions during a ten month period sufficient to state claim for IIED; rubbing crotch against other plaintiff's arm on "numerous occasions" while calling plaintiff cute sufficient to state claim for IIED]). Thus, the alleged acts of defendants, coupled with the separate and distinct allegations pertaining to intent, causation, and damages resulting therefrom for these three causes of actions have been pleaded.

The cases cited by defendants in support of dismissal of plaintiffs' intentional infliction

of emotional distress claim are distinguishable in several critical respects, as they either involved determinations for summary judgment, which calls for analysis under a standard different from that under a CPLR 3211 [a] [7] motion to dismiss, and/or involved acts of a noncontinuous or different nature (*see Seltzer v Bayer*, 272 AD2d 263 [1st Dept 2000] [three specified incidents of *littering on plaintiff's property* and *one* nasty remark insufficiently outrageous and did not represent deliberate and malicious campaign of harassment so as to survive summary judgment]; *Jane Doe v Community Health Plan*, 268 AD2d 183 [3d Dept 2000] [*disclosure of medical information* contained in plaintiff's medical file insufficient]; *Howell v New York Post Co.*, 81 NY2d 115 [1993] [defendant's *trespass onto property* to take an outdoor and distant photograph of plaintiff with famed person was not extreme or outrageous]; *Baliva v State Farm Mutual Automobile Ins. Co.*, 286 AD2d 953 [4th Dept 2001] [that defendant *may* have *touched* plaintiff's shoulder several times, screamed at her, invaded her personal space, and made *one comment* regarding her sexual orientation and glanced at her in a sexual manner, during a period of *ten days*, insufficient to overcome *summary judgment* in defendant's favor] [emphasis added]; *Fama v American International Group, Inc.*, 306 AD2d 310 [2d Dept 2003] [failing to hire secretary for plaintiff, countermanding plaintiff's instructions to her assistant, lying to her supervisors, making sexually offensive remarks and suggesting plaintiff make sexual favors were insufficient to defeat *summary judgment* for defendant]; *Leibowitz v Bank Leumi Trust Company of New York*, 152 AD2d 169 [2d Dept 1989] [use of religious and ethnic slurs did not rise to the level of extreme or outrageous conduct to make sustain complaint for intentional infliction of emotional distress]; *Lucas v South Nassau Communities Hosp.*, 54 F Supp2d 141 [EDNY 1998] [summary judgment dismissing intentional infliction of emotional distress claim warranted where evidence

demonstrated that defendant touched plaintiff's shoulder and hand for a "split second", seven occasions of a brief touch of plaintiff's back or shoulder and absence of evidence of intent to cause severe emotional distress]).

Particularly, in *Zephir v Inemer* (305 AD2d 170 [1st Dept 2003]) also cited by defendants, the First Department upheld the dismissal of the complaint for intentional inflection of emotional distress where plaintiff alleged that defendant attempted to kiss plaintiff in the elevator on one occasion, and at an office party tried to force his tongue into her mouth as he hugged her and wished her a happy holiday. Plaintiff in *Zephir* also alleged that the same defendant frequently and unnecessarily interrupted her as she worked, refused her access to office supplies she needed to do her job, falsely maligned her work performance, made inappropriate comments to her about her clothing and his feelings for her, and otherwise interfered with her work performance. However, two isolated incidents of attempts to kiss plaintiff in *Zephir* and inconveniences created at work are different from the allegations herein of a "repeated" course of sexually offensive conduct, to wit: rubbing plaintiffs' back and shoulders and "repeated" sexual advances and invitations, and "repeated" displays of pornographic material on a computer.

Furthermore, contrary to defendants' contentions, plaintiff may allege violations of New York City and State Human Rights laws and intentional infliction of emotional distress simultaneously. In *Acosta v Loews Corp.* (276 AD2d 214 [1st Dept 2000]), the Court upheld the administrative board's dismissal of plaintiff's discrimination claims for "administrative convenience" and expressly stated that plaintiff may join his intentional infliction of emotional distress claim with the New York City and State Human Rights violations claims in the State civil action (*see also Murphy v ERA United Realty,* 251 469 [2d Dept 1998] [upholding trial

court's denial of summary judgment to dismiss plaintiff's State and City sexual discrimination claims and claims for intentional infliction of emotional distress]).

Furthermore, defendants' reliance on *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.* (256 AD2d 269 [1st Dept 1998]) and *Baliva v State Farm Mut. Auto. Ins.* Co. (286 AD2d 953 (4th Dept 2001]) for the proposition that plaintiffs' claims under the New York State and New York City Human Rights laws bar plaintiffs' claim for intentional infliction of emotional distress is misplaced.

In *McIntyre*, the jury, *inter alia*, awarded plaintiff damages for intentional infliction of emotional distress, as well as damages for New York City and State Humans laws violations. The First Department noted that emotional damages available under the theories of sexual harassment and retaliatory discharge pursuant to the New York City Human Rights Law is precluded where the offending conduct is embraced by a traditional tort remedy. Under this theory, the Court found that the award for emotional suffering as the result of intentional infliction of emotional distress to be duplicative of the awards for emotional suffering for sexual harassment and for retaliatory discharge. Although *McIntyre* precludes a party from obtaining monetary awards for emotional damages under both theories of intentional infliction of emotional distress and violations of New York City and State Human Rights laws, it does not appear to preclude a party from alleging such causes of action simultaneously in the complaint.

In *Baliva v State Farm Mut. Auto Ins. Co. (supra)*, the court dismissed, upon a motion for summary judgment, plaintiff's intentional infliction of emotional distress upon the ground that the allegations were insufficient as a matter of law to support such claim. The Court then added, summarily, that such cause of action "does not lie where, as here, 'the conduct complained of

falls well within the ambit of other traditional tort liability." However, this Court declines to extend *Baliva* to the matter before it.

Unlike *Baliva*, this Court is not faced with a motion for summary judgment, which entails analysis different from one applied to a motion to dismiss for failure to state a cause of action. Moreover, upon a reading of the cases upon which the court in *Baliva* relied, it is noted that such cases do not support dismissal herein. For example, in *Rozanski v Fitch* (113 AD2d 10102d Dept 1985]), the Fourth Department previously held that it was "doubtful" that an action for intentional infliction of emotional distress should be entertained "where the conduct complained of falls within the ambit of other traditional tort liability" of defamation, reasoning that "If the latter fail, the former must also fail." The Court continued: "If the words spoken by the defendant are true, the defendant had a right to say them, and that right cannot be subverted by allowing an action for intentional infliction of emotional distress" (*see also Sweeney v Prisoners' Legal Servs. of New York*, 146 AD2d 1 [3d Dept 1989] [finding that defendants' conduct complained of in plaintiff's cause of action for intentional infliction of emotional distress falls entirely within the scope of his more traditional tort claim for defamation], cited by the Fourth Department in *Baliva*). It cannot be said at this juncture that plaintiffs' cause of action for intentional infliction of emotional distress herein claim falls *well within* the ambit of their claims under New York State and City Human Rights laws.

For example, to establish a prima facie case of retaliation, an employee must show that (1) she was engaged in a protected activity; (2) the employer was aware of the activity; (3) the employer thereafter took some adverse employment action against her; and (4) a causal connection exists between her participation in the protected activity and the adverse employment

action (*Manoharan v Columbia Univ. College of Physicians & Surgeons*, 842 F2d 590 [2d Cir 1988]; *see also Hollander v American Cyanamid Co.*, 895 F2d 80 [2d Cir 1990]; *Grant v Bethlehem Steel Corp.*, 622 F2d 43 [2d Cir 1980]). The elements of a claim for intentional infliction of emotional distress are far different from those elements necessary to establish the retaliation claim.

Although defendants may ultimately be able to demonstrate that the alleged acts did not rise to the level of extreme and outrageous conduct, the absence of any apprehension of imminent harm, or the unoffensive nature of the contacts under the circumstances, these issues cannot be decided on this instant motion to dismiss. Such facts must be borne through the course of discovery.

Based on the foregoing, defendants' motion to dismiss the complaint pursuant to CPLR 3211 [a][7] for failure to state a cause of action is denied, in its entirety; the parties shall appear for a Preliminary Conference in Part 35, on July 27, 2004, 2:15 p.m.; and counsel for defendants shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the court.

Dated: June 28, 2004

Hon. Carol R. Edmead, J.S.C.