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

PRESENT: KAREN S. SMITH PART 44
Justice

LYNIS ANDERSON

INDEX NO. 101042/2004

MOTION DATE 05/02/05

- v -

MOTION SEQ. NO. 006

SHIMELLA "STAR" ABODEEN, LOUIS DESPORTES and ALLIED SECURITY

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for summary judgment or to dismiss the complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memorandum	
Answering Affidavits — Exhibits _Memorandum of Law	
Replying Affidavits _Memorandum of Law	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ORDERED that this motion for summary judgment or to dismiss the plaintiff's complaint is granted in accordance with the annexed Decision and Order.

The foregoing constitutes the decision and order of the court.

FILED
JUL 08 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6-30-05

Karen S. Smith, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

----------X

LYNIS ANDERSON,

Plaintiff,

-against-

SHIMELLA "STAR" ABODEEN, LOUIS DESPORTES, and ALLIED SECURITY

Defendants.

----------X

Index no.: 101042/2004
Motion seq.: 006
Motion date: May 2, 2005

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants Louis Desportes and Spectaguard Acquisitions, LLC i/s/h as Allied Security's motion, pursuant to CPLR §§ 3211 and 3212, for an order either dismissing plaintiff's causes of action or granting summary judgment to defendant is granted as to all three of plaintiff's causes of action.

In this action, plaintiff Lynis Anderson seeks damages for intentional infliction of emotional distress, defamation of character, and injuries caused by sexual harassment and a hostile work environment. Defendant Desportes and Spectaguard Acquisitions, LLC i/s/h as Allied Security (Allied) answered the complaint on August 19, 2004. It is not clear to the court whether defendant Shimella "Star" Abodeen has joined the action. Defendants Desportes and Allied now move to dismiss, or alternatively seek summary judgment on, all the causes of action on the grounds that the complaint either fails to state a cause of action as a matter of law, or that no factual issue exists.

Except as otherwise noted, the relevant facts are not in dispute. During the relevant period of time, plaintiff was employed by defendant Allied as a security supervisor and was assigned to work at Deutsche Bank, located at 280 Park Avenue, New York, New York. Sometime during April of 2003, plaintiff met defendant Abodeen over the internet. Plaintiff and defendant Abodeen shared a mutual interest in modeling and networking. They spoke numerous times on the telephone for a period of approximately two weeks. Apparently at defendant Abodeen's prompting, plaintiff sent defendant Abodeen two photographs of himself, one semi-nude and one completely nude. Plaintiff used the semi-nude photograph as a sample for modeling auditions and initially submitted it to Playgirl for publication. Playgirl rejected that photograph and requested a fully nude one. The fully

nude photograph was taken by plaintiff's girlfriend in anticipation of submission to Playgirl Magazine. After taking the picture, plaintiff moral misgivings concerning its publication and elected not to submit it.

Shortly after plaintiff sent defendant Abodeen the photographs, plaintiff cut off communication with her as a result of threatening communications plaintiff received from someone claiming to be defendant Abodeen's boyfriend.

Sometime thereafter, defendant Abodeen contacted Deutsche Bank and alleged that plaintiff had placed harassing telephone calls to her from Deutsche Bank and had sent her photographs over Deutsche Bank's computer system. Defendant Abodeen provided copies of the photographs that plaintiff sent her to Deutsche Bank to substantiate her claim. Defendant Desportes, plaintiff's supervisor, received the photographs on May 1, 2003. Defendant Desportes immediately commenced an investigation of defendant Abodeen's claims. During the course of his investigation, defendant Desportes showed the pictures to four male employees of defendant Allied. On October 12, 2003, plaintiff learned he had been investigated by his supervisor, defendant Desportes, concerning the claims by defendant Abodeen. He also learned that defendant Desportes had shown the pictures to the four Allied employees.

On October 13, plaintiff filed a complaint with defendant Allied's Human Resources Department. On October 27, plaintiff filed a complaint with the New York City Commission on Human Rights. However, the paperwork on his complaint was apparently lost and, when he was informed as such by the Commission, he chose not to pursue his complaint.

On November 7, 2003, Tracie Vincent, an employee of defendant Allied in the Human Resources Department sent plaintiff a letter, outlining her investigation of plaintiff's complaint. She concluded that defendant Desportes acted in good faith in conducting his investigation of defendant Abodeen's claims, that defendant Desportes showed the pictures two other employees of defendant Allied for purposes of the investigation only. Ms. Vincent concluded that defendant Desportes acted without any malicious intent. She proposed reassigning plaintiff to a different location if plaintiff felt uncomfortable remaining at the Deutsche Bank site. On November 10, 2003, plaintiff resigned his position with defendant Allied.

On January 22, 2004, plaintiff commenced this action by filing a summons and complaint

with the county clerk. On February 23, 2004, plaintiff amended his complaint. In his amended complaint, plaintiff alleges that defendant Desportes used defendant's Abodeen's complaint to "get even" with plaintiff for a complaint plaintiff and other employees had filed concerning defendant Desportes's conduct as a supervisor. Plaintiff stated causes of action for intentional infliction of emotional distress, defamation of character, and "hostile-environment sexual harassment".

Defendants Desportes and Allied now move to dismiss all causes of action, or alternatively for summary judgment in their favor. Defendants raise a variety of arguments in their favor. Defendants contend that plaintiff has failed to state a cause of action for defamation, as he has failed to plead defamation with the requisite specificity. Defendants contend that plaintiff's claim for intentional infliction of emotional distress is duplicative of his claim for defamation, and that the conduct plaintiff alleges, does not rise to the standard necessary to support a claim for intentional infliction of emotional distress. Defendants also contend that the conduct alleged by plaintiff falls short of the necessary level to maintain a claim for sexual harassment-hostile workplace. Defendants contend that plaintiff's action is barred by the election of remedies, to the extent that plaintiff initially pursued a claim with the New York City Commission on Human Rights. Defendants contend that any communication between defendant Desportes and other Allied employees is privileged, that plaintiff's claims are barred by workers' compensation, and that defendant Allied had a readily accessible and effective procedure for resolving sexual harassment claims.

Plaintiff responds by contending that defendants' conduct was so outrageous as to satisfy the standard necessary for intentional infliction of emotional distress. Plaintiff contends that defendants' conduct was so severe and pervasive as to cause plaintiff to resign and seek psychiatric treatment. Plaintiff contends that he has not elected an alternative remedy, as he has not pursued his claim with the New York City Commission on Human Rights. Plaintiff contends that defendant Desportes communications with other Allied employees were not privileged in that the other employees had no legitimate interest in viewing nude and semi-nude pictures of plaintiff. Plaintiff contends that his claims are not barred by Workers' Compensation Law, as they concern the intentional acts of an employer. Finally, plaintiff contends that defendant Allied did not have an effective procedure in place for resolving sexual harassment claims in that defendant failed to effectively deal with plaintiff's sexual harassment claim against defendant Desportes.

The proponent of a motion for summary judgment under CPLR § 3212 must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Guiffrida v. Citibank* 100 NY2d 72, 81 [2003]). Once the movant has made such a showing the burden shifts to the party opposing the motion to produce evidence in an admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Id.*)

The court will consider each cause of action in turn and determine whether defendants are entitled to an order dismissing that cause of action or, in the alternative, to an order granting summary judgment in their favor.

Turning first to the defamation claim, defendant has shown, and plaintiff concedes, that plaintiff has not stated a cause of action for defamation. CPLR § 3016(a) states that, in pleading a claim of libel or slander, the specific words alleged must be set forth in the complaint. Plaintiff concedes that he has failed to set forth any specific words to establish defamation in his pleading. Accordingly, defendants are entitled to summary judgment on this cause of action as a matter of law.

Turning next to plaintiff's claim of intentional infliction of emotional distress, defendant has demonstrated that the conduct plaintiff alleges does not, as a matter of law, support a claim for intentional infliction of emotional distress, and plaintiff has failed to raise a material issue of fact on the question. To maintain a cause of action for intentional infliction of emotional distress, plaintiff must plead conduct "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 society." *(Seltzer v. Bayer*, 272 AD2d 263, 264 [1st Dept. 2000][internal citations omitted]). In *Seltzer*, the Appellate Division, First Department affirmed an order dismissing a claim of intentional infliction of emotional distress where the complaint alleged the defendant dumped cement in front of plaintiff's house, threw eggs and lit cigarettes on plaintiff's property, and threatened to paint a swastika on plaintiff's house. (*Id.*) In its decision, the Appellate Division noted that the few cases in which the Appellate Division, First Department affirmed a lower court's finding of intentional infliction of emotional distress only when the plaintiffs supported their claims with detailed pleadings of "a longstanding campaign of deliberate, systematic, and malicious harassment of the plaintiff." (*Id, citing Shannon v. MTA MetroNorth R.R.*, 269 AD2d 216, 218 [1st Dept. 200]; *Warner*

v. Drukier, 266 AD2d 2, 3 [1st Dept. 1999]; *Harvey v. Cramer*, 235 AD2d 315, [1st Dept. 1997].) The Appellate Division held that the conduct plaintiff alleged, throwing lit cigarettes and eggs, dumping cement, and , while deplorable, did not rise to the level of outrageousness sufficient to maintain a cause of action.

The same can be said for the conduct alleged here. Plaintiff has cited only one incident, which he admits he did not become aware of until several months after it happened. While defendant Desportes may have been motivated by malice in showing the photograph to other Allied employees, that act alone does not constitute a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff. Plaintiff does contend that he and other Allied employees had previously complained about defendant Desportes' verbally abusive behavior, but the pleadings contain no specifics concerning that behavior, and plaintiff does not allege that that behavior was a contributing factor to his injury. Finally, plaintiff himself showed the pictures in question to a woman he had met over the internet, had never seen in person, and had known for only two weeks. While this is not dispositive of the matter, plaintiff's willingness to share naked pictures of himself with a relative stranger certainly undermines plaintiff's claims that defendant Desportes's conduct was outrageous. Since the conduct alleged by plaintiff does not rise to the requisite standard, defendants are entitled to judgment as a matter of law in their favor on plaintiff's cause of action for intentional infliction of emotional distress.

Turning finally to plaintiff's claim for sexual harassment-hostile work environment, defendants Desportes and Allied have made a *prima facie* showing of entitlement to judgment as a matter of law, and plaintiff has failed to raise a material issue of fact. "A hostile work environment exists when, as judged by a reasonable person, it is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the circumstances of plaintiff's employment." (*McIntyre v. Manhattan Ford, Lincoln-Mercury*, 175 Misc2d 795, 802 [Sup. Ct., N. Y. County, 1997][*citing Harris v. Forklift Sys.* 510 US 17, 21 [1993]]). "Generally, isolated remarks or occasional episodes of harassment will not support a finding of a hostile work environment; in order to be actionable, the offensive conduct must be pervasive." (*Father Belle Community Centre v. New York State Division on Human Rights*, 221 AD2d 44, 51 [4th Dept., 1996] appeal denied 89 NY2d 809 [1997]). Here, plaintiff has only alleged a single, isolated incident to support his claim,

namely defendant Desportes's showing the pictures to plaintiff's co-workers. Moreover, plaintiff has failed to allege any facts sufficient to establish that his work place became permeated with discriminatory intimidation, ridicule, and insult. In fact, plaintiff has admitted in his deposition that he was not aware of the incident until October 12, 2003, although the incident allegedly occurred in May of 2003. He has also admitted that he was not aware that he was the target of any other form of ridicule and that, when he did become aware of the incident, defendant Allied's Human Resources Department offered to relocate him to a different work site. As such, defendants have made *prima facie* showing that plaintiff's workplace was not hostile. Plaintiff has failed to establish a material issue of fact on this issue. Plaintiff, in his opposition, makes no claims concerning the his work place environment after the incident. While he does claim that his humiliation triggered feelings of depression and led him to resign, he does not attribute these incidents to any change in his workplace as a result of defendant Desportes's conduct. Since plaintiff has not raised a material issue of fact on his claim for sexual harassment, defendants are entitled to summary judgment on plaintiff's third cause of action.

Since defendants Desportes and Allied have established that they are entitled to judgment on all the causes of action for the reasons set forth above, the court need not address the remaining arguments raised in their moving papers.

Accordingly, it is hereby :

ORDERED that defendants Desportes and Allied's motion is granted in its entirety, and it is further

ORDERED that plaintiff's causes of action for defamation, intentional infliction of emotional distress, and sexual harassment-hostile work place are severed and dismissed as against defendants Desportes and Allied, and it is further

ORDERED that all remaining parties shall appear for a conference in this case on July 19, 2005 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: June 30, 2005
New York, New York

FILED
JUL 08 2005
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Karen S. Smith, J.S.C.