

Sola v Swan

2006 NY Slip Op 30468(U)

October 13, 2006

Supreme Court, New York County

Docket Number: 100004/03

Judge: Doris Ling-Cohan

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

PRESENT: *Hon. Doris Ling-Cohan*

PART 36

Index Number : 100004/2003

SOLA, ANA

vs

SWAN, WILLIAM S., DR.

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for *summary judgment*

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment*
is denied in accordance with the attached
memorandum decision.

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

FILED
OCT 24 2006
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 10/13/06

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
ANA SOLA,

Plaintiff,

Index No. 100004/03

-against-

Motion Seq. No.: 004

DR. WILLIAM S. SWAN and SWAN
CONSULTANTS, INC.,

Defendants.

-----X
LING-COHAN, J.:

Defendants Dr. William S. Swan and Swan Consultants, Inc. (Swan Consultants) move for summary judgment pursuant to CPLR 3212 to dismiss the complaint.

Defendant Swan is a licensed psychologist in the State of New York and he is the sole shareholder and officer of co-defendant Swan Consultants. Swan Consultants trains personnel at companies to conduct hiring interviews and performance appraisals. It promotes assertiveness and enhanced communication for corporate personnel through workshops and various seminars.

In 2002, defendants created a new program entitled "Assertiveness Training: the Relaxation Method." It was marketed to the general public in an effort to help increase assertiveness following traumatic or fearful events. Defendants placed an advertisement in the New York Times on June 30, 2002, to hire a trainer for the new program. The advertisement (the wording of which appears somewhat unclear) read:

"Part-time. Work with psychologist. Deliver individualized assertiveness training program background helpful; bilingual a +. \$100/ session. Must be available daytime hours.
Fax 212-517-9817 or email: info@swanconsultants.com."

(Exhibit C to Affidavit of Dr. William Swan sworn to November 21, 2005 [Swan Affidavit]).

Plaintiff Ana Sola submitted a resume for the position and Swan contacted her to schedule an interview.

On July 24, 2002, the parties met at the offices of Swan Consultants to discuss plaintiff's possible employment. During that interview, Swan informed plaintiff that he specialized in training companies and their managers to be more successful. Swan explained that he was looking to hire a co-trainer to provide training services for people who were looking to be more assertive but who were limited by inhibitions brought about by past trauma such as an accident, loss of a loved one, or by physical or sexual abuse. Following her initial interview, plaintiff was asked to return to defendants' offices for a second training session.

Swan alleges that, on July 30, 2002, he and plaintiff met at the offices of Swan Consultants for a training session that lasted ten minutes. Swan avers that during that meeting, he revealed his approach to his new program but the process involved no touching or physical contact. According to Swan, the sole purpose of the program was to promote relaxation.

Swan claims that plaintiff insisted that no one would pay for such a service and recommended that Swan offer a service that had the trappings of a self-help training program but was actually a "spiced up" experience for women. According to Swan, plaintiff suggested that they could make more money if they made the program more personal with a sexy massage that left room for a "squiggly," described as a form of more intimate touching for clients who seem interested. When he expressed disinterest in plaintiff's idea, plaintiff lectured him about his timidity. Swan then paid plaintiff the agreed upon fee of \$100 and concluded the session.

Plaintiff alleges that shortly after her arrival to Swan's office on July 30, 2002, he asked plaintiff to change into a bathrobe in order for him to instruct her on the proper technique in

applying a “therapeutic massage” (Exhibit C to Swan Affidavit ¶¶ 18-23). Perplexed by this request, plaintiff inquired as to why Swan wanted her to disrobe (*id.*). Swan indicated that this was necessary so that plaintiff could understand how the clients would feel during the massage process (*id.*). Swan reassured plaintiff that she was involved in a professional training program and based upon these representations, she complied with Swan’s request. However, she did not remove any of her undergarments (*id.*). Plaintiff alleges that Swan instructed her to lie on her stomach on towels that he had placed on the floor (*id.* ¶ 24).

Plaintiff alleges that throughout the course of the massage, Swan touched her inappropriately. When she expressed her discomfort at being touched in such a manner, Swan attempted to assuage plaintiff’s fears and concern by utilizing professional jargon (*id.*). Swan explained that he was teaching plaintiff how the subconscious mind works and he assured plaintiff that this type of action was necessary to encourage clients to remove “blocks” caused by previous acts of sexual abuse (*id.* ¶¶ 33-35). Plaintiff avers that as a result of Swan’s continued fondling, she subsequently vacated the premises (*id.*). This action ensued.

The complaint in this action originally contained five causes of action for: (1) professional malpractice, (2) battery, (3) assault, (4) intentional infliction of emotional distress, and (5) sexual harassment.

The answer contains a counterclaim for malicious prosecution and abuse of process. Defendants argue that plaintiff’s lawsuit has exhausted defendants’ financial resources through the generation of exorbitant legal fees, and it has caused defendants to abandon the assertiveness training program. Accordingly, defendants are also seeking damages for the loss of business revenue, profits, and professional goodwill.

On a prior motion, the Honorable Marilyn Shafer dismissed the causes of action for: (1) professional malpractice, (2) intentional infliction of emotional distress, and (3) sexual harassment. Defendants now move for dismissal of the two remaining causes of action for assault and battery.

Defendants argue that they are entitled to summary judgment because plaintiff's allegations of assault and battery are not supported by evidence contained in the record. Defendants also argue that plaintiff should not prevail here because she has not sustained any provable damage, nor can she present any evidence to show proximate cause.

The motion is denied. Defendants have not made a prima facie showing of their entitlement to judgment as a matter of law because they have failed to tender sufficient evidence to eliminate any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A valid claim for battery exists where a person intentionally touches another without that person's consent (*Wende C. v United Methodist Church, N.Y.W. Area*, 4 NY3d 293, 298, *cert denied* _ US _, 126 S Ct 346 [2005]). The intent required for battery is "intent to cause a bodily contact that a reasonable person would find offensive" (*Cerilli v Kezis*, 16 AD3d 363, 364 [2d Dept 2005]). The Pattern Jury Instructions, as quoted by the Court of Appeals in *Jeffreys v Griffin* (1 NY3d 34, 43 [2003]), states:

"a person who intentionally touches another person, without that person's consent, and causes an offensive bodily contact commits a battery and is liable for all damages resulting from (his, her) act. Intent involves the state of mind with which an act is done. The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive. An offensive

bodily contact is one that is done for the purpose of harming another or one that offends a reasonable sense of personal dignity, or one that is otherwise wrongful” (PJ12d 3:3 2003)]”

Here, the complaint sets forth a valid cause of action for battery (*Wende C. v United Methodist Church, N.Y.W. Area*, 4 NY3d 293, *supra*). The complaint alleges that plaintiff was subjected to unwanted touching during the course of her training session on July 30, 2002, at defendant’s office (Exhibit C to Swan Affidavit ¶¶ 42-50).

The conflicting testimony as to whether a battery took place in Swan’s office on July 30, 2002, presents credibility issues not appropriate for summary judgment (*Reichle v Mayeri*, 110 AD2d 694 [2d Dept 1985]). Although Swan claims that his meeting with plaintiff on July 30, 2002, involved no touching or physical contact, plaintiff disputes that fact alleging that, on the day in question, Swan in fact gave plaintiff a massage (Sola Examination Before Trial, pages 38-96 [Sola EBT]). Moreover, plaintiff avers that during the course of the massage, Swan touched her in an inappropriate manner. (Exhibit C to Swan Affidavit, ¶¶ 30-50).

Defendants argue that even if the court believes plaintiff’s accusations regarding the alleged physical contact between her and Swan, plaintiff still has not made a case for battery because such touching was not offensive and was not without plaintiff’s consent.

In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*see Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). In opposition, plaintiff has come forward with admissible evidence to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, *supra*). While plaintiff did consent to the training session involving therapeutic massage, she alleges that she did not consent

to the touching or caressing of her intimate body parts (*Sola EBT*, pages 90-96). Plaintiff avers that Swan, without warning, attempted to remove her underpants, an act to which plaintiff vigorously objected (*id.*, pages 90-97). Plaintiff also testified that she found Swan's conduct to be offensive (*id.*).

Defendants also argue that plaintiff has not substantiated a valid claim for assault.

To sustain a claim for assault, there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact (*Hassan v Marriott Corp.*, 243 AD2d 406, 407 [1st Dept 1997]).

Plaintiff validly stated a cause of action for assault (*id.*). She alleges that during her training, Swan made several attempts to move his hands over her body (Exhibit C, ¶¶ 38-42 to Swan Affidavit). In the complaint, plaintiff alleges that she expressed her feeling of trepidation to Swan. She informed him that his actions made her feel very uncomfortable (*id.*). Plaintiff claims that Swan responded by stating that his massages were not only meant to help women remove blocks but they could also encourage women in the program to further explore their sexuality (*id.* ¶¶ 43-50). Plaintiff further alleges that while she tried to clarify her understanding of Swan's methods, without warning, he attempted to grope her lower torso. At that point, plaintiff jumped up off the floor and quickly exited the room (*id.*).

Defendants further argue that even if the court believes plaintiff's accusations regarding the alleged physical contact, plaintiff admitted in her deposition that she never had any fear of harm during the course of her training.

Plaintiff has submitted controverting testimony which raises a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, *supra*). The record reveals that after her meeting

with Swan on July 24, 2002, plaintiff had no fear that he would harm her or that she would be taken advantage of (Sola EBT, pages 78-79). Notwithstanding, allegedly plaintiff's comfort level changed during her training session on July 30, 2002, after she was subjected to several instances of unwanted touching (Sola EBT, pages 94-96). Plaintiff alleges further that while Swan was explaining his methods of therapeutic massage, "his eyes got kind of like lust, like not professional anymore. His eyes were like very intense and it was a different look" (Sola EBT, page 97). Therefore, it is clear from plaintiff's testimony that her allegations demonstrate the existence of an issue of fact as to whether Swan's complained of conduct engendered in plaintiff the requisite imminent apprehension of physical contact (*Hassan v Marriott Corporation*, 243 AD2d 406, *supra*).

Consequently, material issues of fact exist as to plaintiff's assault and battery claims, and thus they are not subject to dismissal.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

Dated:

10/13/06



 Hon. Doris Ling-Cohan, J.S.C.

HON. DORIS LING-COHAN
FILED
 OCT 24 2006
 NEW YORK
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