

Kosowski v Kim

2007 NY Slip Op 32440(U)

August 2, 2007

Supreme Court, Richmond County

Docket Number: 0101079/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 101079/2006
Motion No.: 5 & 6**

RACHELLE KOSOWSKI,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**ROBERT KIM, NEW YORK INSTITUTE OF MARTIAL
INC., d/b/a DRAGON KIM'S KARATE USA, DRAGON KIM'S
KARATE USA, INC. and JHONG UHK KIM,**

Defendants

The following items were considered in the review of these various motions

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3, 4
Replying Papers	5
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants all move for an order pursuant to CPLR § 3211 (a)(7) dismissing all claims against New York Institute of Martial Arts, Inc. d/b/a/ Dragon Kim's Karate USA, Dragon Kim's Karate USA, Inc. [hereinafter "Karate USA"], Jhong Uhk Kim and Robert Kim for failure to state a cause of action against the defendant that would entitle the plaintiff to recover punitive damages. The defendants also move pursuant to CPLR § 3024 (b) seeking an order striking the plaintiff's reference in Paragraph "82" of the Complaint and Amended Complaint to the defendant, Robert Kim as a "sexual predator" as such reference is scandalous and prejudicial and improperly inserted into the Complaint and Amended Complaint. Karate USA also moves for leave to file an Amended Verified Answer asserting an additional defense based upon waiver and release. The plaintiff opposes these motions.

In this action, the plaintiff alleges that while she was a student and an instructor at Karate USA, she was sexually assaulted by the defendant Robert Kim. Specifically, the plaintiff claims that she was touched, groped, hugged and kissed by Robert Kim on her neck, lips, buttocks, breasts and upper thigh. Prior to the commencement of this action, the defendant Robert Kim had been charged criminally in connection with the plaintiff's allegations. However, Robert Kim pled guilty to Disorderly Conduct, a violation of Penal Law Section 240.20 and received a one year conditional discharge.

In New York, punitive damages in civil actions may be awarded only where the actions of the alleged tort-feasor constitutes gross recklessness or intentional, wanton, or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives (*Giblin v. Murphy* 73 NY2d 769 [1988]). The Court of Appeals has held that a "very high threshold of moral culpability" must be satisfied in order to justify an award of punitive damages. The Appellate Division, Second Department has held that an award for punitive damages must be based upon "quasi criminal conduct or of such utterly reckless behavior" or a demonstrated malicious intent" to injure the plaintiff, or gross wanton or willful fraud, or other morally culpable conduct. (*Maitrejean v. Levor Prof. Corp.* 87 AD2d 605 [2d Dept YEAR].)

With respect to the Karate USA defendants, the plaintiff cannot meet the requisite standard to sustain punitive damages. The action, as brought against the Karate USA defendants, is based upon a theory of vicarious liability. The plaintiff's complaint alleges no intentional conduct or wrongdoing against Karate USA with the exception of being co-defendant Robert Kim's employer. A punitive damage claim against an employer for the wrongdoing of an employee must be determined by examining the allegations made in the original complaint. (*Walker v. Stroh* 192 AD2d 775 [3rd Dept 1997].) Reviewing the plaintiff's claims against Karate USA, as set forth in the plaintiff's pleadings, they are insufficient to support an award for punitive damages against the Karate USA defendants. (*MSR Associates, LTD. v. Consolidate Mutual Ins. Co.* 58 AD2d 858 [2d Dept 1977].)

The Appellate Division, Second Department, affirmed by the Court of Appeals, has held that an award of punitive damages must be based on “quasi-criminal conduct or of such utterly reckless behavior” or a demonstrated “malicious intent” to injure the plaintiff, or gross wanton or wilful fraud or other morally culpable conduct (*Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52 [2d Dept.1990] aff'd 77 N.Y.2d 981[1991]). This case expanded punitive damages in civil sexual abuse cases to include betrayal of a child's trust by a close family member, from previous cases that involved betrayal of a professional relationship such as a teacher and a student (*Micari v. Mann* 126 Misc.2d 422 [NY Sup Ct 1984]). Here, Robert Kim was the plaintiff's martial arts teacher at the time when at least one of the alleged inappropriate acts had taken place. Although the defendant argues that there were no aggravating circumstances such as rape (*Debora S. v. Dorio* 160 Misc.2d 210) or multiple plaintiffs coerced into performing explicit sexual acts for the defendant (*Micari*, supra), the very basis of the student-teacher relationship is based upon one of trust which a jury may find that the defendant violated. Punitive damages may be awarded where the wrong complained of is morally culpable or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him as well as others who might otherwise be so prompted from indulging in similar conduct in the future; the award is to serve as a warning to others and as punishment for gross behavior for good of the public. (*H & R Hats and Novelties, Inc. v. Citibank, N.A.* 102 A.D.2d 742 [1st Dept1984].) Accordingly, defendant Robert Kim's motion to strike the claim for punitive damages is denied.

All of the defendants move pursuant to CPLR § 3024 (b) seeking an order striking the plaintiff's reference in Paragraph “82” of the Complaint and Amended Complaint to the defendant Robert Kim as a “sexual predator,” as such reference is scandalous and prejudicial and improperly inserted into the Complaint and Amended Complaint. The plaintiff in their affirmation in opposition states that they have no objection for striking the phrase and as such, that part of the defendants' motion is granted. The plaintiff shall refrain from using the term sexual predator as an adjective to describe the defendant Robert Kin in this action. Furthermore, the plaintiff's suggestion to substitute “sexual predator” with the phrase “a person with an appetite for unlawful sexual contact with children” is denied, and the plaintiff shall refrain from using that phrase as well.

The defendant Karate USA moves for leave to amend their answer to assert a defense based upon waiver as the plaintiff had entered into a student enrollment agreement. Absent prejudice to the non-movant, the Court shall liberally grant leave to amend pleadings. (*Bellini v. Gersalle Realty Corp.* 120 AD2d 345 [1st Dept 1986].) As discovery in this action is still in infancy stages, the plaintiff shows prejudice and leave to amend their answer is granted to the Karate USA defendants.

Accordingly, it is hereby:

ORDERED, that the motion of defendants, New York Institute of Martial Arts, Inc. d/b/a Dragon Kim's Karate USA, Dragon Kim Karate USA, Inc. and Jhong Uhk Kim, to strike the punitive damage claim as against them is granted; and it is further

ORDERED, that the motion of defendant, Robert Kim, to strike the punitive damage claim as against him is denied; and it is further

ORDERED, that the defendants' motion to strike the term "sexual predator" from the pleadings in this action is granted; and it is further

ORDERED that the motion of defendants, New York Institute of Martial Arts, Inc. d/b/a Dragon Kim's Karate USA, Dragon Kim Karate USA, Inc. and Jhong Uhk Kim, to amend their answer is granted; and it is further

ORDERED, that all parties are to return to DCM 3 at 9:30AM on **August 9, 2007** for a compliance conference.

ENTER,

DATED: August 2, 2007

Joseph J. Maltese
Justice of the Supreme Court