STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHIRLEY MORTON,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7659-09
RJI NO. 01-09-98819

KEVIN McKENNA, PETER NOONAN,
JAMES TUFFEY and THE CITY OF ALBANY,

Defendants.

Supreme Court Albany County All Purpose Term, January 29, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiff commenced this action, in part, against Defendants Peter Noonan (hereinafter "Noonan"), James Tuffey (hereinafter "Tuffey") and The City of Albany (hereinafter "Albany") alleging a cause of action sounding in negligent ownership, operation, maintenance, control and possession of a particular handgun on a specific date. Plaintiff also set forth causes of action

against Tuffey and Albany alleging negligent hiring, retention and supervision of police officers and gross negligent supervision and training of police officers. Defendant Kevin McKenna (hereinafter "McKenna"), by his answer, also sets forth a cross claim against Noonan, Tuffey and Albany for indemnification and contribution. Issue was joined by Noonan, Tuffey and Albany (hereinafter collectively referred to as "moving Defendants"), who now move to strike two of the complaint's allegations, to dismiss the Plaintiff's complaint and to dismiss McKenna's cross claim. Both Plaintiff and McKenna oppose the motion. Because Tuffey and Albany failed to demonstrate their entitlement to dismissal, their motions to dismiss are denied. However, Noonan's motion to dismiss and the moving Defendant's motion to strike allegations of the complaint were properly supported, and are granted.

Plaintiff's complaint, which is deemed true and afforded the benefit of every possible favorable inference in this procedural context, alleges the following facts. (Leon v. Martinez, 84 NY2d 83, 87-88 [1994], Abele v. Dimitriadis, 53 AD3d 969 [3d Dept. 2008]). On January 2, 2008, Plaintiff was employed by the City of Albany Police Department as a civilian employee Clerk Typist. McKenna, an Albany police officer, was her supervisor on that day. When Police officer Noonan provided McKenna with a loaded handgun, McKenna pointed it at Plaintiff who was approximately six feet away from him. Although Noonan lowered McKenna's hand, McKennan pointed the weapon at Plaintiff a second time.

The moving Defendants first move to dismiss Plaintiff's complaint and McKenna's cross claim pursuant to CPLR §3211(a)(5)'s "collateral estoppel" provision[1]. "The essential

[1] Contrary to Plaintiff's contention, the moving Defendant's motion is timely as they preserved their right to bring this CPLR §3211(a)(5) motion by asserting it as an affirmative defense in their answer. (See CPLR §3211[e]).

ingredients of collateral estoppel are [f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." (Alaimo v. McGeorge, __ AD3d__ [3d Dept. 2010] quoting Juan C. v. Cortines, 89 NY2d 659 [1997][internal quotations omitted]). Additionally, "[w]hen [the prior] decision rests on two independent grounds, either of which could support it alone, the general rule, according to the Restatement (Second) of Judgments, is that neither holding is binding for collateral estoppel purposes." (Tydings v. Greenfield, Stein & Senior, LLP, 11 NY3d 195 [2008] citing Restatement [Second] of Judgments § 27, Comment i). Moreover, the moving Defendants have the burden of proving collateral estoppel. (Alaimo, supra).

Here, the moving Defendants failed to demonstrate the applicability of collateral estoppel. On August 19, 2009, the Hon. Thomas J. McAvoy, Senior United States District Judge, issued a Decision and Order (hereinafter "McAvoy Decision") dismissing Plaintiff's claims against the moving Defendants and McKenna in a substantially similar Federal Court action. The McAvoy decision dismissed Plaintiff's complaint because it set forth no Constitutional violation upon which her §1983 claim could rest. Additionally, the McAvoy decision's second independent ground for dismissal was its finding that McKenna was not acting under color of state law. The McAvoy decision specifically states that "although not raised by Defendants, the allegations of the Complaint... do not support the proposition that McKenna's action on January 2, 2008 was... taken under color of state law." The moving Defendant's collateral estoppel argument relies wholly upon the implications stemming from Judge McAvoy's "color of state law" holding. However, because this holding is a secondary independent ground it has no collateral estoppel

effect. (Tydings, supra [while certain exceptions to the general rule exist, none are applicable here]). Moreover, in light of the McAvoy decision's statement that the "color of state law" argument was "not raised by Defendants", the moving Defendants' did not demonstrate that such issue was "actually litigated and determined." (Kaufman v. Eli Lilly and Co., 65 NY2d 449, 456 [1985] quoting Restatement [Second] of Judgments § 27, quoted in Koch v Consolidated Edison Co., 62 NY2d 548 [1984]). As such, the moving Defendants' collateral estoppel motion to dismiss Plaintiff's complaint and McKenna's cross claim, is denied.

Similarly unavailing is the moving Defendant's motion to dismiss based upon their assertion that this negligence action cannot be maintained against them because Plaintiff's claim against McKenna alleges only an intentional tort. While it is well recognized that "once intentional offensive conduct has been established, the aggressor is liable for assault, not negligence" (Locke v. North Gateway Restaurant Inc., 233 AD2d 578 [3d Dept. 1996] quoting Sanchez by Hernandez v. Wallkill Cent. School Dist., 221 AD2d 857 [3d Dept. 1995]); in the proper case a "[p]laintiff may recover damages for negligent infliction of emotional distress for injuries, physical or mental, incurred by fright negligently induced." (Allinger v. City of Utica, 226 AD2d 1118, 1120 [4th Dept. 1996] quoting Battalla v. State, 10 NY2d 237 [1961]). These inconsistent "causes of action... may be stated alternatively." (CPLR §3014).

On this record, Plaintiff's complaint alleges, in the alternative, that McKenna's conduct was both intentional and negligent. While the complaint's allegations specify McKenna's intentional conduct far more clearly than its negligence claims, the negligence claim has been asserted. The relevant inquiry on this motion to dismiss "is whether the proponent of the pleading has a cause of action" and on the facts alleged, and accepted as true, Plaintiff has stated

viable alternative claims sounding in either negligence or intentional tort. (Schmidt & Schmidt, Inc. v. Town of Charlton, 68 AD3d 1314 [3d Dept. 2009] quoting Leon v. Martinez, 84 NY2d 83 [1994]). Accordingly, the moving Defendants' motion to dismiss on this ground is denied.

Tuffey and Albany also failed to demonstrate their entitlement to dismissal of Plaintiff's respondeat superior claim against them. "Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." (N.X. v. Cabrini Med. Ctr., 97 NY2d 247 [2002]). "For an employee to be regarded as acting within the scope of his employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected...where the element of general foreseeability exists, even intentional tort situations have been found to fall within the scope of employment." (Riviello v. Waldron, 47 NY2d 297, 304 [1979]).

The moving Defendants allege that because Plaintiff claims that McKenna's conduct was intentional, it could not have been within the scope of his employment. However, the alleged intentional nature of McKenna's action does not end the inquiry. Rather, the un-foreseeability of the act must be proven. As the moving Defendants failed to address or prove un-foreseeability, this portion of their motion to dismiss is denied.

Noonan, however, has demonstrated his entitlement to dismissal of Plaintiff's claim against him. On this record, the only claim Plaintiff's complaint arguably set forth against Noonan is based upon a negligent entrustment theory. "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others." (Hamilton v. Beretta U.S.A. Corp., 96 NY2d 222 [2001]).

This tort "is based on the degree of knowledge the supplier had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion." (Splawnik v. DiCaprio, 146 AD2d 333, 335 [3d Dept. 1989]). On this record it is undisputed that Noonan entrusted his personal loaded handgun, a per se dangerous instrument, to McKenna. However, the Complaint makes no allegation that Noonan knew or should have known that McKennan would use the weapon in an improper or dangerous fashion. Nor, on this record, has Plaintiff offered any additional proof to satisfy this element of a negligent entrustment cause of action, requiring its dismissal.

Nor, as alleged in Plaintiff's opposition papers on this motion, did Plaintiff set forth an "assumed duty" cause of action against Noonan. To assume a duty "the putative wrongdoer['s action must have] advanced to such a point as to have launched a force or instrument of harm, [merely stopping] where inaction is at most a refusal to become an instrument for good" is not actionable. (Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 522 [1980] quoting Moch Co. v. Rensselaer Water Co., 247 NY 160 [1928]). Here, as set forth above, Plaintiff's "assumed duty" cause of action cannot be based upon Noonan's negligently entrusting his handgun to McKenna. Rather, the "assumed duty" must be premised upon Noonan's walking away from McKenna after lowering his hand one time. Neither Plaintiff's complaint, nor any other evidence submitted by Plaintiff, allege that Plaintiff was in a more vulnerable position than she would have been in had Noonan not lowered McKenna's hand the one time. The complaint, at most, insufficiently alleges Noonan's "refusal to become an instrument for good" after lowering McKenna's hand. Accordingly, because Plaintiff's complaint set forth no cognizable cause of action against Noonan, Plaintiff's claim against him is dismissed.

Turning next to the moving Defendant's motion to strike two paragraphs of Plaintiff's complaint, they properly demonstrated their entitlement to such relief.[2] CPLR §3024(b) states that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "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 AD3d 390, 392 [1st Dept. 2007]). The allegations the moving Defendants' seek to strike are:

> "Upon information and belief, prior to January 2, 2008, James Tuffey carried an unlicensed handgun." and
> "Upon information and belief, James Tuffey and officers of the Albany Police Department were involved in the illegal purchase and use of firearms. The City of Albany failed to institute any policies or procedures in order to discourage the unauthorized and improper purchase and use of firearms."

Such allegations are not only prejudicial but wholly irrelevant to Plaintiff's intentional tort and negligence claims. As set forth above, Plaintiff's complaint is premised upon McKenna's negligent or intentional mishandling of a handgun on January 2, 2008. Her claims against Albany and Tuffey stem from such incident upon theories of respondeat superior liability and negligent hiring, retention and supervision of McKenna. The prejudicial, generalized and speculative claims set forth above have no relevance to McKenna's handling of a handgun on a specific date. Nor are they at all relevant to McKenna's hiring, retention or supervision. Accordingly, paragraphs 34 and 35 or Plaintiff's complaint are stricken.

The parties' remaining contentions have been examined and found to be lacking in merit.

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[2] Although not timely made pursuant to CPLR §3024(c), "[f]lexibility on the time question is especially appropriate for the motion to strike under CPLR §3024(b)." (Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3024:5).

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 11, 2010
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 2, 2009, Affidavit of Stephen Rehfuss, dated December 2, 2009, with Attached Exhibits A-O.
2. Affirmation of Mark Greenberg, dated January 22, 2010, with attached Exhibit A.