Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

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ELIZABETH BELLMUND,	Index No: 33097/07
Plaintiff,	Motion Date: 5/28/10
- against-	Motion Cal. No: 4
EDISON HOTEL, JOHN CANAVAN, and CATHERINE HEINLEIN,	Motion Seq. No.: 1
Defendants.	

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The following papers numbered 1 to 5 read on this motion by defendants Edison Hotel, John Canavan and Catherine Heinlein, for an order dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Memorandum of Law.....	5

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action commenced by plaintiff Elizabeth Bellmund ("plaintiff"), employed as a switchboard operator by defendant Hotel Edison ("Edison") against defendant Edison, defendant John Canavan ("Canavan"), defendant Edison's general manager, and defendant Catherine Heinlein ("Heinlein"), also a switchboard operator for defendant Edison, for damages based upon three causes of action: (1) slander per se; (2) libel; and (3) infliction of emotional and psychological harm. These causes of action arise from disciplinary action taken against plaintiff based upon her alleged violation of Edison's cleanliness policy, and the defendant Heinlein's alleged telling other employees that plaintiff had a communicable disease known as methicillin resistant staphylococcus aureus (MRSA). Defendants now move to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7).

Relevant Facts

Plaintiff is a switchboard operator at defendant Edison, and had been so employed for twenty one years at the time this action was commenced. On December 22, 2008, defendant Canavan took disciplinary action against plaintiff based upon complaints made by plaintiff's co-workers of her

"[s]oiling of ladies room, soiling of floor area of ladies room and PBX [i.e., Private Branch Xchange, or Switchboard] office, [and] [s]oiling of operator's chairs." These alleged complaints constituted violations of the Employee Handbook issued to all employees and which plaintiff acknowledge receipt of in January 2001, pertaining to Appearance, Dress and Grooming Standards, and which specifically requires that employees practice "[g]ood personal hygiene," and "keep [t]heir work area, property equipment and property facilities (including rest room) clean as [their] co-workers will be sharing/utilizing such equipment facilities." The handbook further provides that "any conduct, which, in [the Hotel's] view, interferes with or adversely affects the Hotel's business, the employment environment and/or otherwise reflects poorly upon the Hotel, is grounds for disciplinary action, ranging from verbal counseling to immediate discharge," and also set forth that "[v]iolating any Hotel Edison policy, procedure, practice or rule" will subject employees to corrective action or discipline.

The Record of Disciplinary Action following plaintiff's meeting on December 22, 2008, which was convened by defendant Canavan and participated in by plaintiff, her union delegate, defendant Edison's Director of Housekeeping Front Officer Manager, and at which witnesses were identified, set forth that the meeting resulted in the second verbal notice given to plaintiff concerning unsanitary behavior, and details prior discussions or warnings, as follows:

> Employee was spoken with in September of '08. Employee was offered FMLA and was asked if there was anything I, John Canavan or the hotel can do to accommodate her condition.

Defendant Canavan documented plaintiff's response, as follows:

> In both discussions/warnings employee refused to admit or accept that any medical condition existed. Employee refused FMLA on both occasions refusing to accept any responsibility and dismissing Complaints of co-workers and other staff.

As set forth above, plaintiff was issued a second verbal warning to discontinue her unsanitary behavior.

Alleging that defendant Heinlein slandered her by telling others that plaintiff had MRSA, that defendant Canavan libeled her with statements contained in the Record of Disciplinary Action, and that defendant Edison and its employees, and defendants Heinlein and Canavan have caused emotional and psychological injury to her, plaintiff commenced the instant action seeking three million dollars in damages. Defendant now moves to dismiss the complaint, pursuant to section 3211(a)(7) of the CPLR, on the ground that the causes of action fail to state a cause of action; and, to the extent plaintiff alleges a cause of action based upon claims of negligence, the claim is barred by the exclusivity provision of the Worker's Compensation Law.

Discussion

Pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2nd Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2nd Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496, (2nd Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept. 2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept. 2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept. 2000). "The court must accept the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Kempf v. Magida, 37 A.D.3d 763 (2nd Dept. 2007), citing, Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303, (2001); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Gallagher. Kucker & Bruh, 34 AD3d 419, 419 (2nd Dept. 2006). The determination to be made is whether plaintiff has a cause of action, not whether one was stated. See, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept. 2000). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. See, Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005).

"'The elements of a cause of action [to recover damages] for defamation are a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (Salvatore v. Kumar, 45 A.D.3d 560, 563, 845 N.Y.S.2d 384, quoting Dillon v. City of New York, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1). The complaint must set forth the particular words allegedly constituting defamation (see CPLR 3016[a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made (see Dillon v. City of New York, 261 A.D.2d at 38, 704 N.Y.S.2d 1).'" Epifani, v. Johnson, 65 A.D.3d 224, 233 (2nd Dept. 2009). A "cause of action sounding in defamation which fails to comply with the special pleading requirements contained in CPLR 3016(a) that the complaint set forth "the particular words complained of," mandates dismissal (citations omitted). Failure to state the particular person or persons to whom the allegedly defamatory statements were made also warrants dismissal (citations omitted)." Simpson v. Cook Pony Farm Real Estate, Inc., 12 A.D.3d 496 (2nd Dept. 2004). The complaint not only must set forth the particular words allegedly constituting defamation, but "it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made." Epifani v. Johnson, supra. As the complaint at issue fails to satisfy the particularization requirements, a cause of action based upon

defamation cannot stand. See, Lesesne v. Lesesne, 292 A.D.2d 507 (2nd Dept. 2002)[the Supreme Court correctly dismissed the cause of action alleging defamation, as the complaint failed to allege the time, place, and manner of the allegedly false statements and to whom such statements were made].

Even assuming the requisite particularization, the result would be the same. The Appellate Division, Second Department, in Epifani, v. Johnson, recently stated [65 A.D.3d at 233-234]:

> "'Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value' " (Rufeh v. Schwartz, 50 A.D.3d 1002, 1003, 858 N.Y.S.2d 194, quoting Liberman v. Gelstein, 80 N.Y.2d 429, 434-435, 590 N.Y.S.2d 857, 605 N.E.2d 344). "A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se" (Rufeh v. Schwartz, 50 A.D.3d at 1003, 858 N.Y.S.2d 194). The four exceptions which constitute "slander per se" are statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman (see Liberman v. Gelstein, 80 N.Y.2d at 435, 590 N.Y.S.2d 857, 605 N.E.2d 344). When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (id.).

Plaintiff alleges slander per se, claiming that defendant Heinlein slandered her by telling others that plaintiff had MRSA.

There, however is no authority for classifying MRSA among the diseases of which false imputations are defamatory. See, Cruz v. Latin News Impacto Newspaper, 216 A.D.2d 50 (1st Dept. 1995). Moreover, even if it was so classified, it is well-recognized that "[p]rotection from defamation is afforded where the person making the statements does so fairly in the discharge of a public or private duty in which the person has an interest and where the statement is made to a person or persons with a corresponding interest or duty." Simpson v. Cook Pony Farm Real Estate, Inc., 12 A.D.3d 496 (2nd Dept. 2004). Here, the statements alleged were subject to a qualified privilege as all parties and involved employees had an interest in the alleged defamatory communications. To overcome that privilege, it must be alleged that the statements were made maliciously; "plaintiff failed to allege any facts from which malice could be inferred and [any] conclusory allegations of malice were insufficient to overcome the privilege. Hame v. Lawson, 70 A.D.3d 640 (2nd Dept. 2010). The same analysis applies to her claim that defendant Canavan libeled her with statements contained in the Record of Disciplinary Action.

Finally, the tort of intentional infliction of emotional distress "has four elements: (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 injury; and (iv) severe emotional distress." Howell v. New York Post Co., Inc., 81 N.Y.2d 115 (1993). Aside from her

allegation that defendant Edison and its employees, and defendants Heinlein and Canavan have caused her emotional distress, the remaining requisite elements to establish the tort of intentional infliction of emotional distress are lacking. And, to the extent plaintiff alleges the negligent infliction of emotional distress, the exclusivity provisions of the Workers' Compensation Law is a bar to that claim. See, Macchirole v. Giamboi, 97 N.Y.2d 147 (2001); Burlew v. American Mut. Ins. Co., 63 N.Y.2d 412 (1984).

Conclusion

Based upon the foregoing, defendants' motion is granted, without opposition, as the causes of action fail to state a cause of action, and the complaint hereby is dismissed.

Dated: October 12, 2010

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J.S.C.