Morton v McKenna
2011 NY Slip Op 30909(U)
April 14, 2011
Supreme Court, Albany County
Docket Number: 7659-09
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHIRLEY MORTON,

Plaintiff,

-against-

KEVIN McKENNA,

Defendant.

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

Supreme Court Albany County All Purpose Term, April 5, 2011
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Following this Court's denial of Defendant Kevin McKenna's (hereinafter "McKenna") summary judgment motion, he now moves to reargue and renew. Plaintiff does not oppose the motion to reargue and renew, instead relying on her opposition to the merits of McKenna's prior summary judgment motion. Because, according to Welton v. Drobnicki (298 AD2d 757 [3d Dept. 2002]), McKenna's prior motion was "denied without prejudice to renewal" and his current motion to renew is unopposed, McKenna's motion for renewal is granted.

[* 2]

Considering McKenna's summary judgment motion on its merits, he failed to demonstrate his entitlement to judgment pursuant to the Worker's Compensation Law. Nor did he establish his entitlement to judgment dismissing Plaintiff's assault and wrongful imprisonment causes of action. McKenna did establish, however, his entitlement to judgment dismissing Plaintiff's intentional infliction of emotional distress claim.

As is well established, on this motion "for summary judgment, [McKenna bears] the initial burden of mak[ing] a prima facie showing of entitlement to judgment as a matter of law" (Lewiarz v. Travco Ins. Co., __AD3d__ [3d Dept. 2011], quoting Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]), "by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]). Only if McKenna meets his initial burden will "the burden shift[] to the nonmoving party to raise any triable issues of material fact." (Town of Kirkwood v. Ritter, 80 AD3d 944 [3d Dept. 2011]).

In support of his motion, McKenna submits the unsigned deposition transcripts of Plaintiff, Peter Noonan (hereinafter "Noonan") and William Warner. Because not one of these transcripts is signed, nor admissible pursuant to CPLR §3116(a)'s 60 day exchange provision, they are of no evidentiary support. (Marmer v. IF USA Exp., Inc., 73 AD3d 868 [2 Dept. 2010]; McDonald v. Mauss, 38 AD3d 727 [2d Dept. 2007]; Pina v. Flik Intern. Corp., 25 AD3d 772 [2 Dept. 2006]; Scotto v. Marra, 23 AD3d 543 [2 Dept. 2005]; Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2 Dept. 2008]). Similarly, because McKenna did not demonstrate the admissibility, pursuant to CPLR §4517, of Noonan, Philip Faranda, Ardiana Vardhami and Catherine Schleicher's prior trail testimony, it too is of no evidentiary support.

McKenna has properly submitted his own deposition and affidavit along with an

admissible transcript of Plaintiff's 50-H deposition, her affidavit and medical records. Additionally, McKenna also properly supported his motion with Leonard Crouch[1] and Noonan's interrogatories. Considering such evidence, the competing versions of events vary widely.

McKenna alleged that, on January 2, 2008, he was standing about eight feet away from Plaintiff when Noonan handed him his personal handgun. He held the handgun for approximately ten seconds in total, never pointing it directly at Plaintiff. He states that Plaintiff was not scared by his holding the handgun in front of her. Instead, after he gave Noonan his handgun back, Plaintiff's demeanor was perfectly fine.

Noonan's interrogatory partly corroborates McKenna's version of events. Noonan confirms that he handed McKenna his personal handgun, then McKenna twice "swung his arm [holding the handgun] across his body." While McKenna was swinging the handgun back and forth "the barrel of the gun [never] point[ed] at a level higher than [Plaintiff's] knees." After the incident, Plaintiff and McKenna "continued to seem friendly."

Plaintiff, on the other hand, alleged that as McKenna received the handgun Noonan told him that it was loaded. Plaintiff recalled McKenna standing approximately six feet in front of her, and twice pointing the handgun directly at her for a "couple of seconds." Out of fright, she froze. While she acknowledged that McKenna had "crack[ed] jokes" at her expense in the past, she did not believe that McKenna was being playful or joking around when he pointed a handgun directly at her. She was scared to death.

Considering these facts "in a light most favorable to plaintiff[] and affording [her] the benefit of all reasonable inferences" (Barrett v. Watkins, __AD3d__ [3d Dept. 2011]), McKenna

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[1] Although properly submitted, this interrogatory response is of limited relevance.

failed to demonstrate his entitlement to judgment dismissing Plaintiff's complaint in its entirety due to the exclusivity provision of the Worker's Compensation Law.

As McKenna acknowledges, "a defendant, to have the protection of the exclusivity provision [of the Worker's Compensation Law], must himself have been acting within the scope of his employment and not have been engaged in a willful or intentional tort." (Hanaford v. Plaza Packaging Corp., 2 NY3d 348, 350-51 [2004], quoting Maines v Cronomer Val. Fire Dept., 50 NY2d 535 [1980]). As an exception to this general rule, "frivolous activities or horseplay although involving intentional acts, are natural diversions between coemployees during lulls in work activities and injuries sustained during them are compensable [under the provisions of the Workers' Compensation Law] as an incident of the work." (Briger v. Toys R Us, 236 AD2d 683 [3d Dept. 1997], quoting Christey v. Gelyon, 88 AD2d 769 [4th Dept. 1982][internal quotation marks omitted]).

Here, because Plaintiff's causes of action are premised upon her allegation of McKenna's intentional conduct, they are not generally afforded the protections of the Worker's Compensation Law. Moreover, on this record, Mckenna failed to demonstrate that his actions were "horseplay" as a matter of law. Neither McKenna's deposition nor affidavit characterize his actions as such. Instead, he consistently denies pointing a handgun at Plaintiff. Moreover, considering Plaintiff's deposition and affidavit in a light most favorable to her (notwithstanding Plaintiff's Complaint, Bill of Particulars and unexplained medical records) her allegations of McKenna's actions do not set forth an atmosphere of "horseplay." Rather, she specifically states that she did not "see McKenna's act of pointing a gun at me as playful or friendly." On this record, McKenna simply failed to demonstrate, as a matter of law, that his alleged act of pointing

a handgun at Plaintiff constituted either "no more than horseplay" (LeDoux v. City of Rochester, 162 AD2d 1049 [3d Dept. 1990]; Shumway v. Kelley, 60 AD3d 1457 [3d Dept. 2009]) or coemployees "acting within the scope of their employment." (Macchirole v. Giamboi, 97 N.Y.2d 147, 150 [2001]).

Turning to that portion of McKenna's motion for summary judgment of Plaintiff's Assault and Wrongful Imprisonment causes of action, again he failed to demonstrate his entitlement to judgment as a matter of law.

To succeed on his motion for summary judgment of Plaintiff's Assault claim, McKenna was "required to demonstrate... [, as a matter of law, that he] did not intentionally place plaintiff in apprerehension of imminent harmful or offensive contact." (Guntlow v. Barbera, 76 AD3d 760 [3d Dept. 2010]; Marilyn S. v. Independent Group Home Living Program, Inc., 73 AD3d 892 [2d Dept. 2010]). Additionally, to demonstrate his entitlement to judgment dismissing Plaintiff's false imprisonment claim, McKenna must disprove an element of such cause of action. "The elements of a cause of action for false... imprisonment are (1) an intentional confinement (2) of which plaintiff was conscious and (3) to which plaintiff did not consent, and (4) that was not otherwise privileged." (Guntlow v. Barbera, supra at 762; Barrett v. Watkins, supra).

Here, McKenna fell far short of demonstrating his entitlement to judgment on either cause of action. As detailed above, numerous issues of fact still exist concerning McKenna's conduct toward Plaintiff on January 2, 2008. Moreover, considering Plaintiff's testimony and affidavit in a light most favorable to her and drawing all reasonable inferences therefrom, McKenna failed to demonstrate that he did not point a loaded handgun directly at Plaintiff or that Plaintiff was not thereby placed in fear of imminent harmful contact. (People v. Wood, 10 AD2d

231 [3d Dept. 1960]; Allinger v. City of Utica, 226 AD2d 1118 [3d Dept. 1996]). Similarly, McKenna failed to proffer sufficient proof that he did not "intentionally confine" Plaintiff or that Plaintiff was not conscious of such confinement.[2] Plaintiff testified that she was clearly aware of McKenna's pointing a handgun at her, which show of force could constitute confinement. (McLoughlin v. New York Edison Co., 252 NY 202 [1929]). While it is uncontested that Plaintiff's alleged confinement was quite limited, its duration is not dispositive. (Jacques v. Sears, Roebuck & Co., Inc., 30 NY2d 466 [1972]). Moreover, McKenna proffered no admissible allegations specifically denying that he intended to confine Plaintiff. Nor did he demonstrate that Plaintiff believed she was free to leave despite his alleged show of force, unlike the Plaintiff's admission in Gordon v. May Dep't Stores, Inc. (254 AD2d 327 [2d Dept. 1998]).

Lastly, McKenna demonstrated his entitlement to judgment dismissing Plaintiff's intentional infliction of emotional distress claim.

"[A] cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." (Doin v. Dame, __AD3d__, 918 NYS2d 253, 254 [3d Dept. 2011], quoting Sweeney v. Prisoners' Legal Servs. of N.Y., 146 AD2d 1 [1989], lv. dismissed 74 NY2d 842 [1989] [internal quotation marks omitted]).

Here, as set forth above, Plaintiff's claims sound in the traditional torts of assault and false imprisonment. As such, her "cause of action for intentional infliction of emotional distress cannot lie." (Doin v. Dame, supra at 254).

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[2] Only these two elements of a false imprisonment claim (elements 1 and 2) are addressed, as McKenna proffers no arguments or facts to dispute the remaining two elements.

[* 7]

Accordingly, McKenna's motion for summary judgment is granted only to the extent that Plaintiff's intentional infliction of emotional distress cause of action is dismissed. Otherwise, McKenna's motion for summary judgment is denied.

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: April 13, 2011
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 28, 2011; Affirmation of Paul DerOhannesian, dated March 28, 2011, with attached Exhibits A-J.
2. Affirmation of Mark Greenberg, dated April 1, 2011, with attached Exhibits A-C.