

DeJesus v Moshiashvili
2017 NY Slip Op 30712(U)
April 14, 2017
Supreme Court, New York County
Docket Number: 153314/2012
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

-----X
FAUSTO DEJESUS,

Plaintiff,

-against-

DECISION & ORDER
Index No. 153314/2012

Motion Seq: 006 & 007

TATIANA MOSHIASHVILI, MICHAEL MOSHIASHVILI,

Defendants.

-----X
TATIANA MOSHIASHVILI,

Counterclaim Plaintiff,

-against-

FAUSTO DEJESUS,

Counterclaim-Defendants.

-----X
TATIANA MOSHIASHVILI,

Third-Party Plaintiff

-against-

ROSE ASSOCIATES, INC., THE BOARD OF MANAGERS OF THE
CORINTHIAN CONDOMINIUMS,

Third-Party Defendants.

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Motion Sequence Numbers 006 and 007 are consolidated for disposition. The motion by third-party defendants (006) for summary judgment dismissing the third-party complaint is granted. The motion (007) by Tatiana and Michael Moshiasvili (defendants) for summary

judgment dismissing plaintiff's complaint granted only to the extent that plaintiff's claim for prima facie tort is severed and dismissed.

Background

This action arises out of an alleged sexual assault committed by plaintiff against defendant Tatiana Moshiashvili in her apartment on July 4, 2011. Plaintiff works as a handyman at the Corinthian Condominiums located at 330 East 38th Street, New York, New York. Plaintiff was arrested and charged with forcible touching and sexual abuse based on Mrs. Moshiashvili's statements to the police. Nine months later the charges against plaintiff were dropped by the District Attorney.

During the pending prosecution, plaintiff was suspended from work. Plaintiff denies that he touched Mrs. Moshiashvili and was at the apartment responding to a complaint about pipes making noise. Plaintiff insists he was at the apartment for about twenty minutes and subsequently left.

Plaintiff contends that Mrs. Moshiashvili, a former auxiliary police officer, had made many previous requests for work to be done in her condo only to refuse to pay after the work was completed. Plaintiff also characterizes Mrs. Moshiashvili's claims as incredible, including her deposition testimony that the alleged sexual assault caused her to develop diabetes, chronic problems with her spine, a worsening of her Grave's Disease and obesity.

Plaintiff asserts causes of action for defamation, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Mrs. Moshiashvili asserts counter-claims against plaintiff for assault, battery, sexual assault, sexual battery, and grossly negligent infliction of emotional distress. Mrs. Moshiashvili claims that third-party defendants were vicariously liable

for the alleged actions of plaintiff and insists they are liable for negligent hiring/supervision and negligent retention.

Defendants characterize plaintiff as a habitual offender and point to another purported sexual assault committed by plaintiff on another resident at the Corinthian. Defendants insist that plaintiff should be removed from his employment at the building.

Third-party defendants claim they cannot be held vicariously liable as a matter of law because plaintiff's alleged conduct was not in furtherance of the business nor within the scope of his employment.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or

can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Vicarious Liability

“As a general rule, employers are held vicariously liable for their employees’ torts only to the extent that the underlying acts were within the scope of the employment (*Adams v New York City Tr. Auth.*, 88 NY2d 116, 119, 643 NYS2d 511 [1996]).

Here, third-party defendants claim that even if all of Mrs. Moshiashvili’s claims against plaintiff are proved true, there is no basis for vicarious liability because the alleged assault was not within the scope of his employment.

In opposition, Mrs. Moshiashvili claims that the third-party defendants failed to meet their burden to show that plaintiff’s alleged assault was outside the scope of his employment.

In reply, third-party defendants claim that courts have held that sexual assault cannot be characterized as an act in furtherance of the business.

The Court dismisses this cause of action because Mrs. Moshiashvili failed to raise an issue of fact. It is undisputed that plaintiff worked as a handyman for Corinthian Condominiums (plaintiff’s tr at 11). Plaintiff testified that he was called to the Moshiashvili’s apartment on July 4, 2011 to investigate complaints about pipes making noises (*id.* at 97-99). This deposition testimony makes clear that plaintiff was instructed to go to the Moshiashvilis’ apartment in his capacity as a handyman. The Court finds that the alleged sexual assault, if it took place, was not in the scope of plaintiff’s employment and, therefore, third-party defendants cannot be held liable on this cause of action as a matter of law.

Causes of Action for Negligent Hiring, Supervision and Retention

“Recovery on a negligent hiring or retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee” (*Coffey v City of New York*, 49 AD3d 449, 450, 853 NYS2d 551 [1st Dept 2008] [citation omitted]). “[I]t is well settled law that a necessary element of a negligent supervision claim requires a showing that the defendant knew of the employee’s propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure” (*N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 42, 719 NYS2d 60 [1st Dept 2001]).”The failure to establish this element renders the tortious conduct unforeseeable as a matter of law” (*id.*).

Third-party defendants claim that plaintiff had never been arrested prior to the July 4, 2011 incident (which was later dismissed) and there is no evidence to suggest plaintiff had a propensity for assault or that third party defendants had notice of these alleged propensities. Third-party defendants contend that although plaintiff was reprimanded for doing side projects, that misconduct does not translate into a propensity to commit assault. Third-party defendants also argue that references to another alleged assault committed by plaintiff are inadmissible because the alleged victim (Ms. Welk) has failed to appear for depositions despite multiple Court orders. Third-party defendants insist that the alleged incident involving Ms. Welk is mere speculation.

Mrs. Moshiashvili fails to raise an issue of fact in opposition. She claims that the testimony of Jose Batista (another employee at the Corinthian) demonstrates that third-party defendants were aware of a sexual assault incident involving plaintiff and Ms. Welk. But Mr. Batista’s testimony makes clear that these were just rumors spread by employees at the

Corinthian Condominiums (Batista Tr at 161-165). In fact, earlier in his testimony Batista testified that Ms. Welk never discussed with him anything about the alleged incident between her and plaintiff (*id.* at 129). Despite Mrs. Moshiasvili's efforts to turn this rumor into a fact, an issue of fact cannot be raised through unsubstantiated rumors and innuendo passed along through hearsay statements. A proclivity to commit assault cannot be derived from rumors.

Mrs. Moshiasvili's attempt to characterize plaintiff's performance of private side jobs in contravention of the condo's rules also does not create an issue of fact. It is a giant leap to go from plaintiff doing side jobs for tenants to raising an issue of fact on the negligent supervision claim. Obviously, the private side jobs, although not allowed, were not a critical infraction because plaintiff remained employed.

With respect to the negligent hiring, there is no indication that third-party defendants had notice of plaintiff's alleged propensity to commit assault when they hired him back in 1988. Mrs. Moshiasvili claims that third-party defendants' failure to conduct a background check in 1988 compels this Court to retain this cause of action. But this argument fails because Mrs. Moshiasvili did not point to anything that a background check, conducted in 1988, would have revealed. There is nothing that would have put third-party defendants on notice.

To the extent that Mrs. Moshiasvili relies upon the investigation report (Israel affirmation, exh 8) to prove that plaintiff did, in fact, assault Ms. Welk, that evidence is inadmissible hearsay as the report details statements made by others. Also, plaintiff's relationship with Ms. Marquez-Sterling (a former resident) does not show a propensity to committed assault as Ms. Marquez-Sterling did not testify that plaintiff assaulted her. In fact, she

described their relationship as a friendship (Marquez-Sterling tr at 10). A consensual relationship does not evidence a propensity to assault.

Therefore, the Court finds that third-party defendants had no notice of plaintiff's alleged propensity prior to the alleged incident and these causes of action are severed and dismissed.

Negligence

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825, 37 NYS3d 750 [2016] [internal quotations and citation omitted]).

The court also dismisses Mrs. Moshiashvili's negligence cause of action against third-party defendants because it is duplicative of the negligent hiring, supervision and retention causes of action. The third-party complaint alleges that third-party defendants breached their duty of reasonable care by allowing plaintiff to interact with residents and failing to take steps to limit plaintiff's interaction with female residents. These allegations rely on the notion that third-party defendants had notice of plaintiff's alleged propensity to commit assault, which overlap with plaintiff's claims of negligent supervision and retention.

Even if it were not duplicative, Mrs. Moshiashvili failed to raise an issue of fact preventing dismissal because there is no evidence that third-party defendants breached any alleged duty of reasonable care. As stated above, third-party defendants had no notice of plaintiff's alleged propensity and, therefore, they cannot be held liable on a theory of negligence for an unexpected act committed outside the scope of plaintiff's employment as a handyman.

Permanent Injunctive Relief

Mrs. Moshiashvili's last cause of action seeks permanent injunctive relief removing plaintiff from the building. "Injunctive relief will be afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury" (*Chicago Research and Trading v New York Futures Exchange, Inc.*, 84 AD2d 413, 416, 446 NYS2d 280 [1st Dept 1982]). "It is only in exceptional cases that a court will enter into or interfere with the internal affairs of a corporation by . . . injunction" (*id.* [internal quotations and citation omitted]).

Third-party defendants claim that Mrs. Moshiashvili can be fully compensated by a monetary award and there is no evidence to suggest otherwise.

Mrs. Moshiashvili contends that there is a continued and ongoing threat of harm that constitutes irreparable injury that cannot be adequately compensated by money damages. Mrs. Moshiashvili cites to alleged stress and anxiety stemming from her proximity to plaintiff because he continues to work in the building.

The Court finds that third-party defendants are entitled to summary judgment dismissing this cause of action because there is no evidence that monetary damages would not compensate Mrs. Moshiashvili. As she admits, the sexual assault charges brought against plaintiff were dropped and this Court does not believe that the extraordinary remedy of injunctive relief is necessary in this matter. Mrs. Moshiashvili has not demonstrated continuing or ongoing threats from plaintiff besides his mere presence in the building. Injunctive relief is not warranted where, as here, the District Attorney dropped the criminal charges against plaintiff.

Defendants' Motion (Motion Sequence 007)

Defendants (the Moshiashvilis) move for summary judgment dismissing plaintiff's causes of action for false arrest, malicious prosecution, intentional infliction of emotional distress, defamation, and prima facie tort.

False Arrest/Malicious Prosecution

"It is well settled in this State's jurisprudence that a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" (*Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131, 688 NYS2d 12 [1st Dept 1999]).

To establish a claim of malicious prosecution, a plaintiff must show "the (1) initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice" (*id.*). The mere reporting of crime is not enough to demonstrate the initiation of a proceeding (*id.*). To show malice, "plaintiff had to demonstrate that defendant commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (*id.* at 132).

"A person can also be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to make an arrest" (*Moorhouse v Standard, N.Y.*, 124 AD3d 1, 8, 997 NYS2d 127 [1st Dept 2014]).

Defendants claim that Mrs. Moshiashvili merely called the police, who made a determination to arrest plaintiff. Defendants insist she did not take an active role in plaintiff's arrest. Defendants also insist that plaintiff cannot show that the proceeding was terminated

favorably in favor of plaintiff because charges were dropped and a determination in plaintiff's favor was not made on the merits.

In opposition, plaintiff claims that Mrs. Moshiashvili knew her allegations were false and this led to plaintiff's prosecution and false arrest.

Here, the Court finds that plaintiff has raised an issue of fact regarding the malicious prosecution claim. If a jury believes that Mrs. Moshiashvili knowingly gave false testimony, then they could find her liable for malicious prosecution because she was the *only* source of information that led to plaintiff's arrest. At the time Mrs. Moshiashvili lodged her complaint with the police, she knew whether or not it was false. This is not a case where a witness or complainant makes allegations that later turn out to be false, but were not knowingly false (such as an incorrect identification). Mr. Moshiashvili admitted that he called the District Attorney's office between two and ten times after plaintiff was arrested to inquire about the status of the case and he reviewed the accusatory instrument with Mrs. Moshiashvili (Mr. Moshiashvili tr at 57-58). This raises an issue of fact with respect to both defendants.

Plaintiff has also raised issues of fact relating to the other elements. A determination was made in his favor on the merits – the District Attorney made its own motion to dismiss– and the dismissal was not inconsistent with plaintiff's innocence (*see Cantalino v Danner*, 96 NY2d 391, 395, 729 NYS2d 405 [2001]). Plaintiff also raised an issue of fact with respect to the third and fourth causes of action for lack of probable cause and actual malice. If the jury credits plaintiff's version, that Mrs. Moshiashvili supplied false information to the police, then there was a lack of probable cause because Mrs. Moshiashvili's complaint was the only evidence leading to plaintiff's arrest. Further, if the jury finds that Mrs. Moshiashvili intentionally made a false claim

in order to have plaintiff arrested for sexual assault, they could find that both she and her husband (assuming he was aware of the false claim) acted with malice.

To prevail on his claim of false imprisonment plaintiff must prove that “(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged. It is not enough that the defendant’s words or actions caused a police officer to confine him; plaintiff must show that the defendant directed an officer to take him into custody” (*Du Chateau*, 253 AD3d at 132). “In order to hold a civilian defendant liable for false arrest, the plaintiff must establish that the defendant did not merely report a crime to the police or participate in the prosecution, but actively importuned the police to make an arrest without reasonable cause to believe in the plaintiff’s culpability” (*Rivera v County of Nassau*, 83 AD3d 1032, 1033, 922 NYS2d 168 [2d Dept 2011] [internal quotations and citations omitted]).

Similar to the malicious prosecution claim, plaintiff has raised issues of fact. According to plaintiff, the Moshiashvilis did more than merely report information to the police. Plaintiff insists that Mrs. Moshiashvili provided knowingly false information to the police in the hopes that the police would arrest him and that Mr. Moshiashvili actively participated in pursuing the charges against plaintiff. A jury must decide which account to believe.

Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are “(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 NY2d 115, 121, 596 NYS2d 350 [1993]).

Here, plaintiff has raised an issue of fact. Once again, if the jury believes Mrs. Moshiashvili created a false story and Mr. Moshiashvili pressured the District Attorney to pursue charges, they could find defendants liable for this cause of action. Although merely accusing someone of a crime is not enough to state a cause of action for intentional infliction of emotional distress (*see Kaye v Trump*, 58 AD3d 579, 579, 873 NYS2d 5 [1st Dept 2009]), falsely accusing someone of sexual assault goes beyond simply filing a criminal complaint. A conviction, or even an arrest, for sexual assault is a serious offense with a myriad of consequences. A conviction might force plaintiff to register as a sex offender, lead to incarceration and the mere accusation is typically accompanied by an incredibly negative social stigma.

Plaintiff claims he has suffered severe emotional distress and attaches records from his therapist (*see* Silvin affirmation exh 6). Although these records are not certified, plaintiff testified the he has sought psychological treatment after his arrest and that he had never seen a psychologist before (plaintiff tr at 115-19). Plaintiff further claimed that he spoke with the psychologist about being afraid to be around people after the incident and that he saw the psychologist about four times a month until she went on maternity leave (*id.* at 118-120). Based on these issues of fact, this Court cannot dismiss this cause of action as a matter of law.

Prima Facie Tort

Plaintiff does not oppose the branch of defendants’ motion seeking to dismiss this cause of action and, therefore, this claim is severed and dismissed.

Defamation

“Defamation has long been recognized to arise from the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Dillon v City of New York*, 261 AD2d 34, 37-38, 704 NYS2d 1 [1st Dept 1999] [internal quotations and citations omitted]). “The elements 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” (*id.* at 38).

Defendants claim that the allegedly defamatory statements made to the Corinthian Condominium and to the police – that plaintiff committed sexual assault– are protected by a qualified privilege. “Under New York law, communications protected by a qualified privilege do not provide the communicant with an immunity against the imposition of liability in a defamation action. Rather, good faith communications by a party having an interest in a subject, or a moral or societal duty to speak are protected by a qualified privilege if made to a party having a corresponding interest” (*Herlihy v Metro. Museum of Art*, 214 AD2d 250, 258, 633 NYS2d 106 [1st Dept 1995] [internal quotations and citations omitted]). “The underlying rationale behind a qualified privilege is that so long as the privilege is not abused, the flow of information between parties sharing a common interest should not be impeded” (*id.* at 259 [internal quotations and citation omitted]). “A qualified privilege, however, is conditioned on its proper exercise and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity” (*id.* [internal quotations and citations omitted]).

Here, plaintiff has raised an issue of fact. If the jury believes that the statements were made with knowledge of their falsity, then the qualified privilege would not apply.

Summary

As stated throughout this decision, this case turns on whether the jury credits the accounts offered by plaintiff or defendants.

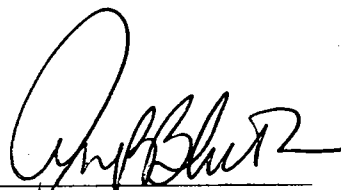
Accordingly, it is hereby

ORDERED that the motion by third-party defendants (motion sequence 006) for summary judgment dismissing the third-party complaint is granted and all claims against the third-party defendants are dismissed; and it is further

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted only to the extent that plaintiff's claim for prima facie tort is severed and dismissed.

.This is the Decision and Order of the Court.

Dated: April ¹⁴ 2017
New York, New York



HON. ARLENE P. BLUTH, JSC