Aguilar v Struhl-Nasjletti
2018 NY Slip Op 32410(U)
May 18, 2018
Supreme Court, Bronx County
Docket Number: 0023250/2016
Judge: Norma Ruiz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22

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ADA M. AGUILAR Index No. 0023250/2016

Plaintiff,

- against - DECISION/ ORDER

MEREDITH STRUHL-NASJLETTI

Defendants.

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Hon. Norma Ruiz

Upon the foregoing papers defendant seeks dismissal pursuant to CPLR 3211 (a)(5) and (a)(7). After careful review and due deliberation of the motion and respective opposition thereto, the motion is granted only as outlined herein.

According to plaintiff's summons and complaint, in May of 2012, plaintiff, a guidance counselor, commenced suit against the Department of Education alleging the instant defendant, the principal of PS 91X where plaintiff worked, had discriminated against her on the basis of her race and national origin when defendant reassigned plaintiff to a different school despite her seniority over another guidance counselor. That litigation reached a settlement that included plaintiff being reinstated to PS 91X for the 2012-2013 school year. The events that transpired when plaintiff resumed her work at PS 91X form the basis for the instant suit.

Plaintiff alleges that when she resumed work at PS 91X, defendant immediately took actions against her in retaliation for the earlier suit. Plaintiff alleges, *inter alia*, that defendant took photographs of her just to harass and annoy her; defendant assigned plaintiff tasks outside her job duties; refused to approve time for plaintiff's missed lunch periods despite doing so for other employees; refused to approve time for plaintiff to attend her own child's parent-teacher

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conferences while approving the same request for other staff; refused to allow plaintiff to leave early on days of inclement weather while affording that courtesy to other staff; denied plaintiff work supplies; assigned plaintiff to a less desirable office space despite other available accommodations; authored erroneous, negative reviews about plaintiff's work performance; and ultimately physically assaulted plaintiff and lied to police in an effort to have plaintiff arrested.

Plaintiff commenced this suit alleging retaliation in violation of the New York City Human Rights Law ("NYCHRL"); malicious prosecution; abuse of process; intentional infliction of emotional distress; and loss of consortium. On this pre-discovery motion, defendant contends that plaintiff failed to meet the condition precedent of filing a notice of claim pursuant to Education Law § 3813; that plaintiff fails to state a claim for any of the relief requested; and that several claims are barred by the applicable statute of limitations period.

As a threshold matter, the court finds that Education Law § 3813 has no application here. Based on the plain language of the statute, Education Law § 3813 (1) applies only to "any officer of a school district," which defendant, the principal of PS 91X, is not. Further, Education Law § 3813 (2) does not apply where defendant is being sued for intentional wrongdoing outside the scope of her employment. Section 3813 (2) provides:

> no action or special proceeding founded upon tort shall be prosecuted or maintained against any . . . member of the supervisory or administrative staff . . . acting in the discharge of his duties within the scope of his employment and/or under the direction of the board of education . . . unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law.

The Appellate Division has observed the purpose of this provision is "to accord a school district the opportunity to promptly investigate claims which, if established, will obligate it to indemnify an

employee" (*Radvany v. Jones*, 184 AD2d 349, 350 [1992], citing *Parochial Bus Sys. v. Board of Educ.*, 91 AD2d 13 [1st Dept. 1983], *affd* 60 NY2d 539 [1983]). The municipality's "duty to indemnify and save harmless shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee, [t]hus, it is only where the municipal entity has an obligation to reimburse its employee for the offending conduct that it must receive notice of the claim" (*Radvany*, 184 AD2d at 350 [internal citation, emphasis, quotation marks and ellipses omitted]). Accepting plaintiff's allegations as true, defendant's conduct was intentional and wholly outside the scope of her employment as a school principal. As such, defendant's intentional wrongdoing obviates the need for a notice of claim.

Turning first to defendant's contentions under CPLR 3211 (a)(5), this action was commenced May 12, 2016. Outside the ambit of the Education Law and notice of claim requirement, the applicable statute of limitations period for a retaliation claim under the New York City Human Rights Law is three (3) years. Accordingly, any alleged acts of retaliation occurring within three years of the commencement of this suit is actionable. However, plaintiff's claims for abuse of process and intentional infliction of emotional distress are plainly time barred by the one-year limitations period (*see* CPLR 215).

The remaining inquiry is whether the malicious prosecution, retaliation and loss of consortium claims are inadequate as a matter of law. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Cortlandt St. Recovery Corp. v. Bonderman*, No. 14, 2018 WL 942335, at *8 [N.Y. Feb. 20, 2018] [Rivera, J.] [internal

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citations, quotation marks and brackets omitted]). Affording the complaint a liberal construction and accepting plaintiff's allegations as true, plaintiff has stated a claim for retaliation, malicious prosecution and loss of consortium.

Under the NYCHRL, it is unlawful to retaliate against an employee for opposing discriminatory practices (Administrative Code of City of N.Y. § 8–107 [7]). "In order to make out the claim, plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312–13 [2004]). Plaintiff certainly need not prove her claim at this stage, nor should she be expected to devoid of discovery. The court is satisfied that the facts pled in the complaint adequately make out a claim for unlawful retaliation under the NYCHRL. To wit: plaintiff filed a lawsuit in 2012 publicly accusing the instant defendant of discrimination. Thereafter, plaintiff received a favorable settlement that placed her back under defendant's immediate supervision. Upon resuming work, plaintiff was subjected to malicious, intentional and unfair differential treatment which – based on the facts alleged – any reasonable person can infer was perpetrated in retaliation for plaintiff having commenced the 2012 action.

To prevail on a malicious prosecution claim, the plaintiff must show "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice" (*Mendez v. City of New York*, 137 AD3d 468, 471 [1st Dept. 2016] [citations omitted]). Significantly, although it is well settled "that a civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are

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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-N. Commuter R. Co.*, 253 A.D.2d 128, 131 [1999]), the law will not insulate defendants whom, as alleged here, "knowingly provided false information to the police" in a deliberate attempt to have plaintiff wrongfully arrested (*Matthaus v. Hadjedj*, 148 AD3d 425 [1st Dept.2017]). Plaintiff's complaint sufficiently pleads facts that, accepted as true, cause defendant to be liable for malicious prosecution.

Finally, defendant's argument in support of dismissing plaintiff Arnold Aguilar's loss of consortium claim is rooted in the contention that all of plaintiff's other claims warrant dismissal. As plaintiff has stated a claim for retaliation under the NYCHRL and malicious prosecution, there is no cause to dismiss the loss of consortium claim. Further, upon review of that claim, the court is satisfied it states a valid claim for relief.

Accordingly, it is hereby:

ORDERED, that branch of defendant's motion to dismiss plaintiff's claims for retaliation, malicious prosecution and loss of consortium is denied; and it is further

ORDERED, that plaintiff's claims for abuse of process and intentional infliction of emotional distress are dismissed.

Dated: 5/18/18

ENTER,

Norma Ruiz, J.S.C.