

<b>Sciammetta v Reiff &amp; Assoc., LLC</b>
2019 NY Slip Op 30348(U)
February 14, 2019
Supreme Court, Kings County
Docket Number: 508533/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14<sup>th</sup> day of February, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X  
EVAMARIE SCIAMMETTA,

Index No.: 508533/2018

*Plaintiff,*

- against -

DECISION AND ORDER

REIFF & ASSOCIATES, LLC and ROSS MILLER

jointly, severally, and/or individually

Motion Sequence #1

*Defendants.*

-----X  
**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

Notice of Motion/Cross Motion and

Papers Numbered

Affidavits (Affirmations) Annexed.....

1/2,

Opposing Affidavits (Affirmations).....

3,

Reply Affidavits (Affirmations).....

4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The Plaintiff Evamarie Sciammetta (hereinafter “the Plaintiff”) alleges ten causes of action against Defendants Reiff & Associates, LLC and Ross Miller (hereinafter collectively “the Defendants”), jointly, severally and/or individually in her complaint. Those causes of action allege the violation of the New York City Human Rights Law, the violation of the New York State Human Rights Law, the violation of New York Labor Law (retaliation), liability for aiding and abetting discrimination and harassment, negligence, constructive discharge, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation.<sup>1</sup> The Plaintiff alleges in her complaint, *inter alia*, that she was subject to sexual harrassment, assault and other related actions while in the employ of the Defendants.

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<sup>1</sup> The pleading refers to the causes of action as counts. However, they will be treated and referred to as causes of action for the purposes of this motion.

The Defendants now move (motion sequence #1) for, *inter alia*, an order pursuant to, CPLR 3211(a)(2) to dismiss the fifth and ninth causes of action, CPLR 3211(a)(5) to dismiss the seventh and eighth causes of action and CPLR 3211(a)(7) to dismiss the fourth and eighth causes of action on the respective grounds that 1) the claims lack subject matter jurisdiction, 2) the claims are time barred and 3) the claims fail to state a cause of action. More specifically, the Defendants contend that the fourth cause of action for aiding and abetting and the eighth cause of action for intentional infliction of emotional distress should be dismissed since the Plaintiff fails to state a cause of action. The Defendants argue that the fifth cause of action for negligence and the ninth cause of action for negligent infliction of emotional distress should be dismissed for lack of subject matter jurisdiction, as the claims are barred by the exclusivity provisions of the New York State Workers' Compensation Law. The Defendants also contend that the Plaintiffs' seventh cause of action for assault and battery and the eighth cause of action for intentional infliction of emotional distress, should be dismissed as time barred.

The Plaintiff opposes the motion by the Defendants and argues that it should be denied in its entirety. The Plaintiff argues that the fifth cause of action for negligence and the ninth cause of action for negligent infliction of emotional distress are not barred by the New York State Workers' Compensation Law, since these claims fall within the exception relating to intentional torts allegedly perpetrated by a person's employer or under their direction. The Plaintiff also contends that the seventh and eighth causes of action are timely, since the facts relating to both these claims, assault and battery and intentional infliction of emotional distress, as alleged, bring the causes of action within the relevant time period pursuant to the "continuous tort doctrine." Finally, the Plaintiff alleges that both the eighth cause of action for intentional infliction of emotional distress and the fourth cause of action for aiding and abetting are sufficiently pled and that each state a cause of action.

Defendants' application made pursuant to 3211(a)(7)

In order to prevail on a motion to dismiss pursuant to CPLR §3211(a)(7), “the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2<sup>nd</sup> Dept]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S. 2d 121. Moreover, a Court must “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” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511.

Turning to the merits of the Defendants' application, as it relates to the Plaintiff's fourth cause of action for Aiding and Abetting, the Court finds that the application is granted solely to the extent that it relates to Defendant Ross Miller individually. An individual cannot be found liable for aiding and abetting their own alleged violations of the Human Rights Laws. See *Med. Exp. Ambulance Corp. v. Kirkland*, 79 A.D.3d 886, 888, 913 N.Y.S.2d 296, 299 [2<sup>nd</sup> Dept, 2010]. However, the Plaintiff does sufficiently plead a cause of action for aiding and abetting as it relates to Defendant Reiff & Associates. “It is the employer's participation in the discriminatory practice which serves as the predicate for the imposition of liability on others for aiding and abetting.” *Murphy v. ERA United Realty*, 251 A.D.2d 469, 472, 674 N.Y.S.2d 415, 417 [2<sup>nd</sup> Dept, 1998]. Plaintiff alleges in pertinent part at Paragraph 73 of the Complaint that the “[d]efendants by their action and inactions, condone and ratified...” “...and substantially encouraged and/or assisted...” the alleged improper conduct.

The application of CPLR 3211(a)(7) to the eighth cause of action of Intentional Infliction of Emotional Distress will be addressed below together with the application of CPLR 3211(a)(5) to that cause of action.

Defendants' application made pursuant to 3211(a)(2)

As to the Defendants' application to dismiss the Plaintiff's fifth and ninth causes of action for negligence and negligent infliction of emotional distress, respectively, the Court finds that these causes of action are not barred by the Court's lack of subject matter jurisdiction. The Defendants' application regarding the fifth and ninth causes of action were made pursuant to CPLR 3211(a)(2). In that context "the exclusivity provisions of the Workers' Compensation Law do not implicate the subject matter jurisdiction of the court, but rather deprive a plaintiff of a cause of action." *Rodriguez v. Dickard Widder Indus.*, 150 A.D.3d 1169, 1170–71, 56 N.Y.S.3d 328, 330–31 [2<sup>nd</sup> Dept, 2017]. Such motions, if any, are properly be made pursuant to CPLR 3211(a)(7).

Generally, "[a]llegations that an employer negligently exposed an employee to a substantial risk of injury have therefore been held insufficient to circumvent the exclusivity of the remedy provided by the Workers' Compensation Law." *Miller v. Huntington Hosp.*, 15 A.D.3d 548, 550, 792 N.Y.S.2d 88, 89 [1<sup>st</sup> Dept, 2005]. However, Courts have held that a Plaintiff can bring a lawsuit against his or her employer for common-law negligence where an intentional tort is perpetrated by the employer or at the employer's direction. *See Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 A.D.3d 274, 275, 795 N.Y.S.2d 16, 17–18 [2<sup>nd</sup> Dept, 2005]. As a result, the Court finds that these causes of action are not barred by a lack of subject matter jurisdiction.

Further, and in any event, the fifth cause of action sounds in negligence which is based upon the allegation that the Defendants (including Defendant Reiff) allegedly permitted, "encouraged and/or assisted" Defendant Miller to, *inter alia*, perpetrate intentional tortious acts upon the Plaintiff (see Verified Complaint Paragraph 85). The claim, if accepted as true, is not barred by the exclusivity provisions of the Workers Compensation Law. *See Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 A.D.3d 274, 275, 795 N.Y.S.2d 16, 17 [2<sup>nd</sup> Dept, 2005].

The ninth cause of action alleges the negligent infliction of emotional distress by both Defendants. Although the cause of action is not barred by the lack of subject matter jurisdiction, it does otherwise fail to state a cause of action as against Defendant Reiff, as it is barred by the exclusivity provisions of the Workers Compensation Law, §§11 and 29(6). Accordingly, the ninth cause of action as against Defendant Reiff is dismissed pursuant to CPLR 3211(a)(7) “...as the issues were fully argued, and there was no prejudice to the Plaintiff, the Court should have disregarded the Defendant’s failure to assert the correct subsection...” See *Rodriguez v. Dickard Widder Indus.*, 150 A.D.3d 1169, 56 N.Y.S.3d 328 [2<sup>nd</sup> Dept, 2017]. While the Plaintiff does plead that both Defendants, which would include Defendant Reiff, encouraged and assisted Defendant Miller in his actions constituting Negligent Infliction of Emotional Distress (see Complaint Paragraph 85 in conjunction with Paragraph 103), such actions by Defendant Reiff would arguably constitute the direction and perpetration by Defendant Reiff of negligent acts, not intentional tortious acts. As such these alleged actions on the part of Defendant Reiff, in relation to this ninth cause of action, fall within the exclusivity provision of the New York State Workers Compensation Law. See *Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 A.D.3d 274, 275, 795 N.Y.S.2d 16, 17 [2<sup>nd</sup> Dept, 2005] Workers’ Compensation Law §§11 and 29(6). Accordingly, the ninth cause of action for the negligent infliction of emotional distress as against Defendant Reiff is dismissed.

Both the fifth and ninth causes of action as against Defendant Miller **individually** are viable at this stage. Paragraph 8 of the Complaint alleges that Miller is “...**an owner, officer, agent, consultant, and/or employee** of Defendant Reiff.” (emphasis added). It would be premature to dismiss such claims in that it is not clear as a matter of law whether all of the acts alleged to have been perpetuated by Defendant Miller, in relation to these claims, occurred “... from and connected with their employment.” *Mesa v. Violante*, 204 A.D.2d 610, 614 N.Y.S.2d

224, 225 [2<sup>nd</sup> Dept, 1994], *quoting Heritage v. Van Patten*, 59 N.Y.2d 1017, 453 N.E.2d 1247 [1983]. It has not been established whether Miller was acting wholly within the roles of owner and/or employee.

Defendants' application made pursuant to 3211(a)(5)

Pursuant to CPLR 215(3) a one year statute of limitation exists for “an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law.” “In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired.” *QK Healthcare, Inc. v. InSource, Inc.*, 108 A.D.3d 56, 965 N.Y.S.2d 133 [2<sup>nd</sup> Dept, 2013], *quoting A.F. Rockland Plumbing Supply Corp. v. Hudson Shore Associated Ltd. P'ship*, 96 A.D.3d 885, 948 N.Y.S.2d 79 [2<sup>nd</sup> Dept, 2012]. “In determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties.” *McDonald v. Riccuiti*, 126 A.D.3d 954, 954, 6 N.Y.S.3d 134, 134 [2<sup>nd</sup> Dept, 2015].

Turning to the merits of the Defendants' application related to the Plaintiff's seventh cause of action for assault and battery and the eighth cause of action for intentional infliction of emotional distress, the Court finds that while the claim for assault and battery is time barred, the claim for intentional infliction of emotional distress benefits from the “continuing tort” doctrine and is not time barred.

A review of the Plaintiff's complaint shows that the last referenced instance of alleged assault and battery by Defendant Miller was on or about December 2016, more than a year prior to the date that the instant action was commenced, April 26, 2018 (see Verified Complaint Paragraph

19(e)). “The continuing violation doctrine ‘may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct.’” *Peckham v. Island Park Union Free Sch. Dist.*, 167 A.D.3d 641, 87 N.Y.S.3d 480, 481 [2<sup>nd</sup> Dept, 2018], quoting *Selkirk v. State*, 249 A.D.2d 818, 819, 671 N.Y.S.2d 824, 825 [3<sup>rd</sup> Dept, 1998].

A review of the Plaintiff’s Complaint as it relates to the eighth cause of action for intentional infliction of emotional distress alleges continuing unlawful acts so as to satisfy the one year statute of limitations for intentional torts (see Verified Complaint, Paragraph 19). What is more, the Court finds that accepting the allegations in the Complaint as true, which is required in relation to an application made pursuant to either CPR 3211(a)(5) or (a)(7), the Plaintiff, at this juncture and stage of the litigation, has set forth a claim for intentional infliction of emotional distress. *See Nigro v. Pickett*, 39 A.D.3d 720, 721–22, 833 N.Y.S.2d 655, 656 [2<sup>nd</sup> Dept, 2007].


Based on the foregoing, it is hereby ORDERED as follows:

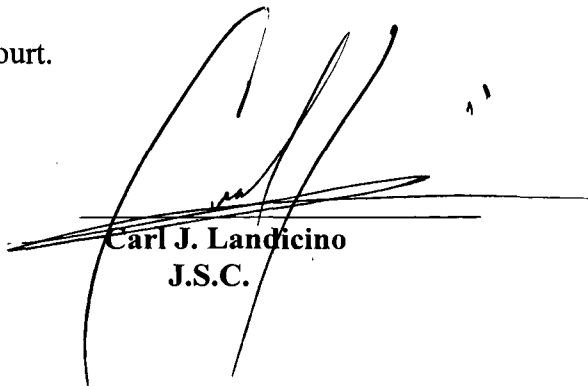
Defendant’s motion (motion sequence #1) is granted solely to the extent that 1) the fourth cause of action for aiding and abetting is dismissed as against Defendant Miller, 2) the seventh cause of action for assault and battery is dismissed as against both Defendant Miller and Defendant Reiff & Associates, as time barred and 3) the ninth cause of action for negligent infliction of emotional distress is dismissed as against Defendant Reiff & Associates LLC. The motion is otherwise denied.

The Defendants shall have thirty (30) days from the date of this Decision and Order to interpose an answer.

This constitutes the Decision and Order of the Court.

ENTER:

 **FILED**  
FEB 15 2019  
KINGS COUNTY CLERK'S OFFICE

  
Carl J. Landicino  
J.S.C.