Perry v Lighting Group, LLC
2019 NY Slip Op 30494(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 154923/2018
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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CLEONE PERRY,

Plaintiff,

- v -

LIGHTING GROUP, LLC, JACK TRENTACOSTA, DAVID BRUMM, PHOTONICS LABORATORIES, and AL HEYER

Defendants.

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INDEX NO. 154923/2018

MOTION DATE 07/20/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISSAL.

In this action to recover damages for assault, battery, intentional infliction of emotional distress, and sex discrimination in employment in violation of the New York City Human Rights Law (Admin. Code of City of NY, § 8-101, *et seq.*; hereinafter the HRL), the defendants Lighting Group, LLC (LG), Jack Trentacosta, and David Brumm (collectively the LG defendants) together move pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted to the extent that the causes of action seeking to recover in tort against LG and Trentacosta are dismissed, and the motion is otherwise denied.

The plaintiff alleges that LG and the defendant Photonics Laboratories (Photonics) were her joint employers, that Brumm and Trentacosta were the principals of LG, and that the defendant Al Heyer was the principal of Photonics. She asserts that, during working hours, Brumm sexually harassed her on a continual basis and ultimately committed sexual assault against her after meeting her at a restaurant for a business lunch meeting. She further alleges that Trentacosta and Heyer were aware of the harassment but did nothing to stop it, that LG had actual knowledge of the harassment and did not intervene, and that her employment was

terminated after she complained about the harassment. She asserts that criminal charges were lodged against Brumm in connection with the alleged assault, and that the criminal case against him was disposed of in September 2017. The plaintiff asserts the common-law tort causes of action and direct HRL claims against all of the defendants, and HRL aiding-and-abetting causes of action against Trentacosta and Heyer.

The LG defendants assert that the entirety of the action against them is barred by release, and that all the causes of action are otherwise time-barred. They also argue that the plaintiff failed to allege facts sufficient to impose vicarious liability against LG and Trentacosta in connection with the common-law torts of assault, battery, and intentional infliction of emotional distress, inasmuch as any offensive conduct engaged in by Brumm was not undertaken in the scope of his employment.

The causes of action asserted against the LG defendants are not barred by release. The release upon which they rely was contained in a proposed settlement agreement, pursuant to which LG promised to pay the plaintiff severance benefits equal to six months of her salary and benefits. "[A] general release is governed by principles of contract law" (*Mangini v McClurg*, 24 NY2d 556, 562 [1969]). "[I]t is essential in any bilateral contract that the fact of acceptance be communicated to the offeror" (*Gyabaah v Rivlab Transp. Corp.*, 102 AD3d 451, 451–52 [1st Dept 2013]; *Agricultural Ins. Co. v Matthews*, 301 AD2d 257, 259 [1st Dept 2002]; *see also D'Agostino Gen. Contrs. v Steve Gen. Contr.*, 267 AD2d 1059 [4th Dept 1999]). It is well settled that "[t]o establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 59 [1st Dept 2015] [citation and internal quotation marks omitted]; *see Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Here, the plaintiff not only declined to sign the proposed settlement agreement that contained the release, but in fact formally rejected it in writing on July 21, 2016, less than one month after LG sent it to her.

There is no merit to the defendants' contention that the plaintiff ratified the release by accepting continued wages after her employment was terminated because she was not given an opportunity to reject the payments; rather, the payments were direct-deposited into her bank account. "Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it" (*Allen v Riese Organization, Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). The doctrine is applicable to releases (*see id.*). Although LG purportedly relieved the plaintiff of her duties and responsibilities as of June 29, 2016, and tendered her the proposed settlement agreement and release on the next day, the plaintiff alleges that it continued to make direct-deposit payments of wages into her bank account before it even learned of her intentions with respect to the agreement. Moreover, although the plaintiff expressly rejected the proposed settlement agreement and release only three weeks later, LG continued to make direct-deposit payments into her bank account after her rejection. LG did not provide the plaintiff with an opportunity to reject further payments by attempting to pay her with a physical check or draft, which could have been physically returned or left undeposited. In addition, the proposed release, by its terms, applies only to LG, and not to any of its officers, directors, members, agents, or employees.

Hence, the defendants have not shown, at the pleading stage, that the release bars the action or that the plaintiff ratified the release as a matter of law.

Contrary to the LG defendants' contention, the causes of action sounding in intentional tort are not barred by the one-year limitations period set forth in CPLR 215(3). CPLR 215(8)(b) provides that:

> "Whenever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises, the plaintiff shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedure law in which to commence the civil action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining."

Moreover, in an "action for assault against both the wrongdoer and the wrongdoer's alleged employee brought within a year after the dismissal of criminal proceedings against the wrongdoer . . . CPLR 215(8) applies to extend the Statute of Limitations against the employer as well as the wrongdoer" (*Alford v St. Nicholas Holding Corp.*, 218 AD2d 622, 622 [1st Dept 1995]). Here, a criminal action was commenced against Brumm "with respect to the event or occurrence" from which the causes of action sounding in tort arose, and the plaintiff commenced this action within one year after that criminal action was terminated. Hence, the causes of action sounding in intentional tort are not time-barred.

All of the HRL causes of action were timely asserted against the LG defendants, as the action was commenced within three years of the date the allegedly discriminatory acts were committed (see CPLR 214 [2]; Admin. Code of City of NY § 8-502[d]; *Jeudy v City of New York*, 142 AD3d 821 [1st Dept 2016]; *Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]).

Nonetheless, the causes of action seeking to recover for assault, battery, and intentional infliction of emotional distress must be dismissed against Trentacosta for failure to state a cause of action, as there are no allegations that Trentacosta personally engaged in any tortious conduct. "[T]he doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment" (*Riviello v Waldron*, 47 NY2d 297, 302 [1979]). "An employee's actions fall within the scope of employment where the purpose in performing such actions is 'to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business'" (*Beauchamp v City of New York*, 3 AD3d 465, 466 [2d Dept 2004], quoting *Stavitz v City of New York*, 98 AD2d 529, 531 [1st Dept 1984]; *see Riviello v Waldron*, 47 NY2d at 302; *Rodriguez v Judge*, 132 AD3d 966, 967 [2d Dept 2015]). "A sexual assault perpetrated by a[n]. . . employee is not in furtherance of [the employer's] business and is a clear departure from the scope of employment, having been committed for wholly personal motives" (*N. X. v Cabrini Med. Ctr.*, 97 NY2d 247,

251 [2002]; *see KM v Fencers Club, Inc.*, 164 AD3d 891, 892 [2d Dept 2018]; *Berardi v Niagara County*, 147 AD3d 1400, 1401 [4th Dept 2017]; *Doe v New York City Dept. of Educ.*, 126 AD3d 612 [1st Dept 2015]; *Acosta-Rodriguez v City of New York*, 77 AD3d 503, 504 [1st Dept 2010]). Hence, LG may not be held liable for assault, battery, or intentional infliction of emotional distress under the theory of respondeat superior, as those causes of action arise from Brumm's alleged sexual assault.

The LG defendants' remaining contentions are without merit.

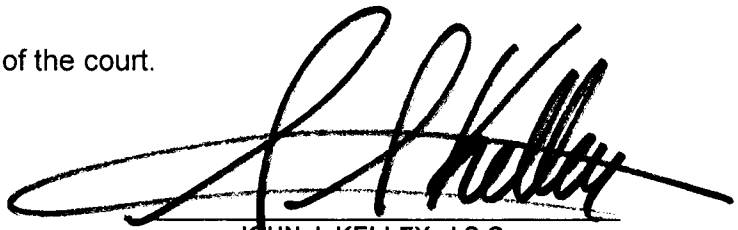
Accordingly, it is

ORDERED that the motion of the defendants Lighting Group, LLC, Jack Trentacosta, and David Brumm to dismiss the complaint insofar as asserted against them is granted to the extent that fifth cause of action, which is to recover for assault, the seventh cause of action, which is to recover for battery, and the eighth cause of action, which is to recover for intentional infliction of emotional distress, are dismissed as against the defendants Lighting Group, LLC, and Jack Trentacosta, and the motion is otherwise denied; and it is further,

ORDERED that the defendants Lighting Group, LLC, Jack Trentacosta, and David Brumm shall serve an answer upon the plaintiff and all other parties within 10 days of service upon them of a copy of this order with notice of entry (see CPLR 3211[f]); and it is further,

ORDERED that the parties shall appear for a preliminary conference on April 16, 2019, at 10:30 a.m.

This constitutes the Decision and Order of the court.



2/27/2019
DATE

JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE