

Russell v Walsh

2020 NY Slip Op 30047(U)

January 6, 2019

Supreme Court, New York County

Docket Number: 156687/2019

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

INDEX NO. 156687/2019
MOTION DATE 08/08/2019
MOTION SEQ. NO. 001

STEPHEN RUSSELL

Plaintiff,

- v -

TARA WALSH,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29 were read on this motion to/for DISMISSAL

In this action to recover damages for personal injuries from defendant's alleged surreptitious administration of drugs to plaintiff on January 30, 2018, in the city, state, and county of New York, plaintiff asserts causes of action for negligence, gross negligence, and negligent infliction of emotional distress. The self-represented defendant, Tara Walsh, moves pre-answer pursuant to CPLR 3211(a)(2), (5) and (7) and § 327 to dismiss plaintiff Stephen Russell's complaint and for sanctions.

FACTS

According to the complaint, plaintiff and defendant met in 2015 (NYSCEF # 1, complaint at ¶8). The two began a relationship and lived together in San Francisco, California, from late 2016 through mid-2017 (id. at ¶9). In January 2018, the parties were in New York where defendant gave birth to their child at Columbia Presbyterian Hospital (id. at ¶12). Plaintiff alleges that on January 30, 2018, while at the hospital after the birth of their child, defendant surreptitiously drugged plaintiff with a "potent, antipsychotic, prescription medication, without his knowledge or consent" (id. at ¶ 16). Plaintiff claims that as a result of consuming the drugs, plaintiff became confused, paranoid, delusional, irrational, distressed and suffer from hallucinations or float feelings, and lose consciousness (id. at ¶17).

DISCUSSION

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired (Benn v Benn, 82 AD3d 548 [1st Dept 2011]).

It is well settled that when considering a motion to dismiss under CPLR 3211(a)(7), the court must evaluate “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Generally, the court must accept the facts in plaintiff’s complaint as being true, and “accord plaintiffs the benefit of every possible favorable inference” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]).

At the outset, the court notes that defendant’s “affirmation” is not notarized, and thus serves no probative value. However, on a motion to dismiss for failure to state a claim, the court may dispense with the need for an affidavit, and the movant may rely solely on a memorandum of law (Patrick M. Connors, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C2214:22). While the document in question is labeled an “affirmation”, the contents of it include legal analysis that would normally be included in a memorandum of law. The court does not rely on plaintiff’s submission for statements of the fact.

In support of the branch of defendant’s motion to dismiss plaintiff’s negligence and gross negligence claims, defendant contends that the complaint fails to allege that defendant had a duty to plaintiff, that defendant breached the duty, and that any breach caused plaintiff harm. Defendant further contends that plaintiff’s claims are premised on an intentional act, and are barred by the statute of limitations for intentional torts (NYSCEF # 22, ¶¶ 24-25, 27-28).

In order to state a claim for negligence, plaintiff must allege a duty owed by defendant to plaintiff, breach thereof and injury proximately resulting therefrom (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 821 [2016]). “To constitute gross negligence, a party’s conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others’” (*J. Petrocelli Contr., Inc. v Morganti Group, Inc.*, 137 AD3d 1082 [2d Dept 2016] [internal citations omitted]). “A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff’s physical safety, or causes the plaintiff to fear for his or her own safety” (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]).

If, upon the reading of the factual allegations, the essence of a cause of action is assault or battery, a plaintiff may not “exalt form over substance by labeling the action as one to recover damages for negligence” (*Borrero v Haks Grp., Inc.*, 165 AD3d 1216, 1218 [2d Dept 2018], quoting *Schetzen v Robotsis*, 273 AD2d 220, 220-

221 [2d Dept 2000]). An “allegation of intentional conduct cannot form the basis of a claim founded in negligence” (*Dunn v Brown*, 261 AD2d 432 [2d Dept 1999]).

The branch of defendant’s motion to dismiss the negligence, gross negligence, and negligent infliction of emotional distress claims is granted. The factual basis of plaintiff’s negligence related claims in fact allege intentional conduct on behalf of defendant. Indeed, plaintiff fails to allege any unintentional conduct that form the underpinning of his negligence claims. Plaintiff’s allegation that defendant “breached her duty of care to [plaintiff] and failed to act as a reasonably prudent person under the circumstances” does not transform plaintiff’s claim alleging assault and/or battery into a cause of action for negligence (*see Johnson v City of New York*, 148 AD3d 1126, 1127 [2d Dept 2017]; *Messina v Matarasso*, 284 AD2d 32, 36 [1st Dept 2001]; *see also Trayvilla v Japan Airlines*, 111 NYS3d 224, 225 [2d Dept 2019] [causes of action to recover on theories of negligence and NIED may not be premised on intentional conduct]). Moreover, New York does not recognize a cause of action for negligent assault or negligent battery (*Borrerro*, 165 AD3d at 1217; *Babikian v Nikki Midtown, LLC*, 60 AD3d 470, 471 [1st Dept 2009]).

Pursuant to CPLR § 215(3), all claims for assault, battery and intentional infliction of emotional distress must be commenced within one year. Plaintiff commenced this action on July 9, 2019, over five months after the date he was required to under the statute of limitations. Accordingly, plaintiff’s complaint is dismissed.

Counsel for plaintiff argues that plaintiff alleges an unintentional, rather than an intentional, tort is without basis. Indeed, counsel’s contention that “defendant has maintained that she drugged [p]laintiff to help him calm down and sleep and that she never intended to harm him” is not supported by the record (NYSCEF # 29, opposition at 15).

Sanctions

The branch of defendant’s motion seeking sanctions under 22 NYCRR 130-1.1A, which governs the signing of papers, is denied. If defendant was seeking sanctions under 22 NYCRR 130-1.1(a), her request would be still be denied as the basis for her request, that another action is pending in California, is insufficient to warrant fees since that action differs in nature from the instant claims alleged herein (*see* NYSCEF # 23, California complaint).


Accordingly, it is hereby

ORDERED that defendant’s pre-answer motion to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that defendant shall serve a copy of this order upon plaintiff with notice of entry within 21 days of entry.

This constitutes the Decision and Order of the court.

1/06/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: