

Schmitt v Artforum Intl. Mag., Inc.

2020 NY Slip Op 30629(U)

March 3, 2020

Supreme Court, New York County

Docket Number: 159496/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SCHMITT, AMANDA

Plaintiff,

-against-

ARTFORUM INTERNATIONAL MAGAZINE, INC.

Defendant.

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FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

159496/2017

Plaintiff appealed from this Court’s December 24, 2018 order which, inter alia, dismissed her action. The Appellate Division, First Department modified this Court’s order, reinstating plaintiff’s retaliation and promissory estoppel claims as against Artforum International Magazine (hereinafter “Artforum”), and otherwise affirmed (*Schmitt v. Artforum Intl. Mag., Inc.*, 178 AD3d 578 [1st Dept 2019]). This Court’s order did not address that portion of the motion seeking to strike portions of the complaint, as that relief was rendered moot by the dismissal of plaintiff’s action. Defendant Artforum, in essence, renews that portion of their prior motion seeking to strike various portions of plaintiff’s complaint, specifically paragraphs 10 through 33 and 49 through 67. Plaintiff opposes, contending that these paragraphs provide factual and legal basis for her reinstated retaliation and estoppel claims.

It is beyond cavil that scandalous or prejudicial material unnecessarily contained in a complaint should be stricken (CPLR 3024[b]). Relevancy is the benchmark by which the Court will measure the necessity of prejudicial or scandalous material contained in a pleading (*Breest v. Haggis*, 180 AD3d 83 [1st Dept 2019]; *Soumayah v. Minnelli*, 41 AD3d 390 [1st Dept 2007]; see also Siegel, N.Y. Prac. § 230 [5th ed 2011]). Where material is admissible at trial, it may generally be included in a pleading (*id.*). However, even a determination that scandalous material is not necessary to a plaintiff’s claim, or is only tangentially relevant thereto, and therefore properly stricken, does not preclude such material from being presented at the time of trial if the material becomes

relevant during the course of trial, despite not appearing in the complaint (*Schachter v. Mass. Protective Ass'n*, 30 AD2d 540 [2d Dept 1968]).

The Appellate Division, in reviewing plaintiff's claims, found various allegedly harassing emails to be "of a kind with history of prior emails, the explicit details of which are not necessary to reiterate in this decision" (*Schmitt v. Artforum*, 178 AD3d at 580). Correspondingly, the Appellate Division limited discussion of explicit details of the harassment alleged in the complaint and contained in the record. However, defendant, having claimed that various portions of the complaint should be stricken, has now placed the details of the alleged harassment in issue, and as such, this Court must address the allegations in each paragraph of plaintiff's complaint defendant seeks to strike.

As an initial matter, the Appellate Division considered the allegations in paragraphs (hereinafter abbreviated "¶") 11, 12, 13, 14, 15, 23, 25, 27, 29, 30, 31, 32, and 33 of the complaint in reaching its determination. The Appellate Division's decision further quoted the "teacher/student" language from ¶ 23 and ¶ 25, and plaintiff's assertion that Kinght Landesman (hereinafter "Landesman") directed he and plaintiff "get on the same page" contained in ¶ 33. Also discussed in some depth were: the "explicit videos" Landesman is alleged to have sent plaintiff, including the spanking video alleged in ¶ 31; Landesman's shoeless rubbing of plaintiff's leg with his foot after she implored him to stop the harassment in ¶ 32; plaintiff's request that Landesman not appear at her subsequent place of employment in ¶ 28; plaintiff's claim that the harassment caused her emotional distress sufficient to require therapy as alleged in ¶ 29; plaintiff's claims in ¶ 18 and ¶ 21 of nonconsensual/forcible sexual touching of her by Landesman; plaintiff's claim in ¶ 12, 13, 14 and 15 that she could ill afford to make an enemy of Landesman and Artforum as it would damage her ability to find employment; plaintiff's claims that Landesman repeatedly discussed sexual acts with her, including those acts he wished to perform on/with her, in ¶ 16, 17, 19, 20, 22, 26, and 27; and plaintiff's claim that she repeatedly asked Landesman to stop the harassing behavior, as alleged in ¶ 11, 24, 32 and 33.

Paragraph 10 of the complaint sets forth a general description of plaintiff's employment with Artforum and identifies Landesman as one of her supervisors, providing basic information about Landesman. The allegations in ¶ 10 are relevant to plaintiff's claim of retaliation and collateral estoppel, and in any event are not prejudicial or scandalous.

While the explicit details of Landesman's proposed explorations of anilingus and inquiries with respect to sexual climaxing are not expressly discussed by the Appellate Division's decision, such claims, contained in ¶ 16, 26, and 30, among others, are relevant to plaintiff's retaliation claims. Plaintiff claims that because she reported this conduct to Artforum she was, in essence, frozen out of the art field in which she worked. Further, plaintiff claims that due to this conduct she requested a meeting with Artforum and relied upon Artforum's assertion that the behavior would stop, forming a basis for plaintiff's estoppel claim.

This Court finds the allegations above relevant to plaintiff's retaliation and estoppel claims. As those claims have been reinstated by the Appellate Division, the Court will not strike paragraphs 10 through 33. Further, by relying on the factual allegations contained in these claims, the Appellate Division implicitly found them to be relevant and not scandalous or prejudicial.

The claims contained in ¶ 49 through 67 address alleged prior harassment of others, including Artforum employees, by Landesman in addition to attempts to silence these prior harassment claims. Although claims of prior harassment may prove relevant at trial, for the purposes of striking pursuant CPLR § 3024(b), these claims are not relevant to the plaintiff's claims of retaliation. Plaintiff claims that Artforum retaliated against her due to, inter alia, her reporting the harassment she experienced, not due to the harassment of others. Nor do claims of prior harassment of others form a basis for plaintiff's estoppel claim, where she claims that she relied on Artforum's representations that it would take measures to prevent further harassment to her detriment. Consequently, the claims contained in ¶ 49 through 67 are not relevant and should be stricken as a scandalous matter pursuant to CPLR § 3024[b]. Of note, this material was

not discussed in the Appellate Division decision reinstating plaintiff's retaliation or estoppel claims. Notwithstanding, the striking of these paragraphs alone does not preclude plaintiff from introducing this evidence at trial should this material become relevant during the course of trial, despite not appearing in the complaint (*Schachter v. Mass. Protective Ass'n*, 30 AD2d 540).

Accordingly, it is

ORDERED that the motion for an order striking scandalous matter is granted and plaintiff shall, within 10 days from service of a copy of this order with notice of entry, serve an amended complaint that shall not include the scandalous matter set forth in the original complaint (i.e., paragraphs 49 through and including 67); and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of service of such pleading; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 4 (80 Centre Street, room 327 New York, New York) on April 24, 2020 at 10:00am.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 3, 2020

ENTER:



J.S.C.
HON. FRANK P. NERVO