

Foster v City of New York
2021 NY Slip Op 30175(U)
January 20, 2021
Supreme Court, New York County
Docket Number: 157448/2019
Judge: Lyle E. Frank
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(4) against Maddrey, negligence.¹ Plaintiff and Maddrey had, for some years, what the City refers to as “a volatile relationship.”

Plaintiff commenced this action after moving to withdraw her complaint in a federal lawsuit. On June 20, 2019, the federal court granted her motion and dismissed the federal claims that plaintiff had brought, with prejudice, while dismissing the pendant state law claims without prejudice.

Plaintiff moves, pursuant to CPLR 3211 (a) (7), motion sequence no. 002, to dismiss Maddrey’s first counterclaim, which alleges slander and libel per se. In motion sequence no. 003, Maddrey moves, pursuant to CPLR 3211 (a) (7) and 3212 (a), for an order dismissing the first two causes of action in the complaint for failure to file a notice of claim, and the third and fourth for failure to state a cause of action. In motion sequence no. 004, the City moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. These motions a consolidated for disposition.

Motion Sequence 2

Plaintiff’s motion to dismiss Maddrey’s first counterclaim, which alleges defamation, is granted, because the counterclaim fails to disclose any of the statements upon which it is based, much less “the particular words complained of,” as required by CPLR 3016 (a). See *Garza v Nunz Realty, LLC*, 187 AD3d 467, 467 [1st Dept 2020].

Motion Sequence 3 and 4

Maddrey’s motion to dismiss causes of action for failure to file a notice of claim is denied. Maddrey contends that in plaintiff is required to file a notice of claim since in the first two causes of action, she seeks to hold him liable in his official capacity. That argument fails,

¹ The Court would like to thank Sam Cherniak, Esq. for his assistance in this matter.

because “Assistant Chief Maddrey” is merely the way that the complaint names “Jeffrey R. Maddrey” in the first paragraph, and thereafter refers to him. That is no different from his being defined in the first paragraph of this opinion, and thereafter referred to, as “Maddrey,” and Tabatha Foster as “plaintiff.” As the caption and the first paragraph of the complaint make clear, Maddrey is sued here, in his individual capacity, not in his official capacity as a police officer of the City of New York. The court notes that, in her federal complaint, plaintiff sued Maddrey, as well as three other then- and former officials of the NYPD, in both their individual and official capacities. See NYSCEF Doc. No. 49 at 1. In this action, the only person sued is Maddrey, and he is sued solely in his personal capacity. Accordingly, the first two causes of action will be discussed below on the merits.

The complaint alleges that on several occasions, Maddrey assaulted plaintiff. However, plaintiff’s claim for damages resulting from an alleged assault in late April 2016, does not appear in her federal complaint, and it is plainly time-barred. Her argument that the complaint in this action is “effectively an amended pleading of [her] Federal Complaint” and, therefore, relates back to the date of the latter (NYSCEF Doc. No. 101 at 3), fails, because, in fact, the complaint in this action is not an amended pleading authorized by CPLR 3025 (b).

The motion to dismiss plaintiff’s cause of action for defamation is denied. A claim for defamation must allege a false statement made to a third party. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]. The complaint alleges, among other things, that Maddrey falsely told a Daily News reporter that plaintiff’s Facebook posts, which claimed that plaintiff and Maddrey engaged in sexual relations, were false. See also complaint at ¶ 59. A defendant’s denial of a plaintiff’s allegations of sexual misconduct is capable of being proved true or false, and a denial “coupled with the claim that the accuser is or will be proven a liar,

impugns a person's character as dishonest" *Zervos v Trump*, 171 AD3d 110, 128-129 [1st Dept 2019]. The court notes that, although the complaint states that it alleges a claim of defamation per se (NYSCEF Doc. No. 29 at 8), the factual allegations of the complaint make out a claim for defamation.

Plaintiff's claim of negligence is dismissed, because the complaint does not allege any negligent act, or failure to act, on Maddrey's part.

The City's motion, and Maddrey's motion, insofar as it bears upon plaintiff's first cause of action, is granted for the following reason. Under the NYCHRL, "[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than [subdivisions that are inapplicable here]." N.Y.C. Admin. Code § 8-107 (13) (a).

Plaintiff and Maddrey had a consensual, years-long sexual relationship. While the complaint alleges that plaintiff felt that she had no choice but to engage in that relationship, because of Maddrey's "position of authority over [her]" (NYSCEF Doc. No. 29, ¶ 38), it acknowledges that plaintiff continued the relationship for eight months after she retired (see *id.*, ¶¶ 39 and 53), and it does not contend that, even then, she, rather than he, ended it. Moreover, at her June 27, 2016 deposition, taken pursuant to General Municipal Law § 50-h, plaintiff described in some detail, her multi-year, consensual relationship with Maddrey, explicitly attributing it to "love" on her part. See NYSCEF Doc. No. 56 at 32, 37-38, 86-92.

Plaintiff alleges a hostile work environment and discrimination based on her gender. Notably, plaintiff has not presented any evidence that she was treated less favorably than similarly-situated male police officers with regard to her transfers nor has she alleged or established any lost salary, or alleged being demoted. See *Abdul Hakeem v Parkinson*, 523 Fed.

Appx. 19, 21 [2d Cir. Conn. 2013] (matter dismissed where plaintiff failed to establish circumstances giving rise to an inference of discrimination on the basis of her race in the absence of any evidence that she was treated differently than similarly situated individuals who were not members of her protected class).

Under the NYCHRL, the question of the severity of a hostile work environment goes to the issue of damages, not that of liability. *Hernandez v Kaisman*, 103 AD3d 106, 113-114 [1st Dept 2012]. Here, there can be no liability, because, while plaintiff retired in August 2015, “[u]ntil April of 2016 [she] was seeing him the whole time.” NYSCEF Doc. No. 56 at 98. Moreover, it is undisputed that after 2012 Maddrey did not have any supervisory authority or plaintiff.

Accordingly, it is hereby

ORDERED that motion sequence no. 002, motion by plaintiff Tabatha Foster to dismiss the first counterclaim of defendant Jeffrey B. Maddrey is granted and said counterclaim is dismissed; and it is further

ORDERED that motion sequence no. 003, motion by defendant Jeffrey B. Maddrey to dismiss the complaint is granted to the extent that the first and the fourth causes of action alleged against said defendant are dismissed and the motion is otherwise denied; and it is further

ORDERED that motion sequence no. 004, motion by the City of New York to dismiss the complaint is granted and the complaint is dismissed against said defendant; and it is further

ORDERED that the remainder of this action shall continue.

1/20/2021
DATE


LYLE E. FRANK, J.S.C.

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CASE DISPOSED

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SETTLE ORDER

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

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