Jane Doe v Young
2021 NY Slip Op 31925(U)
February 11, 2021
Supreme Court, Queens County
Docket Number: 704816/2020
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 704816/2020
"JANE DOE",

Plaintiff,

Motion
Date: January 27, 2021

-against-

Motion Cal. No.:8

AUSTIN YOUNG,

Motion Sequence No.: 3

Defendant.
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The following e-file papers numbered EF 21-26 and 2-6 submitted and/or considered on this motion by defendant AUSTIN YOUNG (hereinafter referred to as "Defendant") seeking an Order pursuant to Civil Practice Law & Rules (hereinafter referred to as "CPLR") 3211 dismissing all claims contained in plaintiff's "JANE DOE" (hereinafter referred to as "Plaintiff") Verified Complaint together with such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Aff.-Exhibits.....	EF 21-25
Opposition.....	EF 26
Exhibits.....	EF 2-6

Plaintiff and Defendant entered into an exclusive and consensual romantic relationship in December of 2016 which lasted until March of 2018. Plaintiff had her annual examination, testing for sexually transmitted diseases on January 24, 2017 and her results came back negative. Plaintiff and Defendant commenced a physical relationship on or around January of 2017. Plaintiff contends that prior to the commencement of their physical relationship the Defendant did not disclose that he was infected with a sexually transmitted disease. The parties engaged in both protected and unprotected sex. On or about March 21, 2017, Plaintiff noticed a sore developing on her labia so she visited her gynecologist where she was examined and tested for sexually transmitted diseases. While awaiting the results the parties exchanged text messages.

The test messages stated in part:

Defendant: "So the culture test I had a year ago did come up with hsv-2 but they

never uploaded it on the planned parenthood portal. So when they told me I had it I looked on the portal and assumed it was just hsv-1"
Plaintiff: Ok
Defendant: [attached a screen shot of his test results] “Only thing that shows up on my results”.
Plaintiff: They’re incompetent.
Defendant: “I’d like to pay whatever yu [sic] need today. Whether it’s what your visit costs, or whatever yu [sic] would have made going to work.”
Plaintiff: “I’m sorry you had to deal with them. Doctors are not always trustworthy”.
Defendant:“I’m sorry that I let you down. I need to do better.”
Plaintiff: “It’s ok, they didn’t tell you adequately”.
Defendant: “True, but I still should’ve been honest and more responsible. Offer still stands, just let me know what I owe yu [sic]”.
Plaintiff: I’m just upset that we didn’t know and that now I probably have it. My getting it probably wouldn’t have been prevented but it sucks...”

Thereafter, on March 27, 2017 Plaintiff was notified by her doctor that she was infected with Herpes Simplex Virus Type II (“ HPV-2") which is permanent in nature and has no known cure.

The parties exchanged test messages the following day. The text messages stated in part:
Plaintiff: “Yu [sic] gave me an infection on the sneak.”
Defendant: “... Yes I did. Wasn’t my intention, but I was negligent. You are correct. And I’m doing my best to show you that I’m heartbroken over it and am trying to do everything I can to help you out however I can...”
Plaintiff: “Your intention was that yu [sic] knew and deliberately did not tell me.”
Defendant: “That’s true. I am still very sorry for thay [sic]”.
Plaintiff: “I trusted yu [sic] and yu [sic] took that and crushed me with it instead. Like a bug that yu [sic] don’t give a phxck [sic] abt.”
Defendant: “And you have no idea how much I truly do care about you. I know I completely destroyed your trust. I was irresponsible. And I’m so sorry for it. And I’m going to be here to help you through everything no matter what. And I hope that you provide me the opportunity to rebuild it, no matter what or how long it takes.”...
Plaintiff: “HOW. HOW HAVE YU [sic] SHOWN ME YU [sic] APPRECIATE THAT”
Defendant: “I was insecure, and therefore I was negligent and made poor decisions”.

Plaintiff further alleges, that Defendant admitted he did not think Plaintiff would have sex with him had he disclosed that he was infected with HPV-2. Plaintiff claims she continued with the relationship because she loved the Defendant and that nobody else would love her because she contracted the incurable HPV-2 and for those reasons she remained with the Defendant until March of 2018.

Procedural History

Plaintiff commenced this action by filing the Summons and Verified Complaint on or about March 19, 2019. Defendant joined issue shortly thereafter and filed an Answer on or about June 4, 2020.

Plaintiff's causes of action are battery, negligent infliction of emotional distress, fraud, gross negligence and future medical expenses arising from a tort.

Law and Application

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez,* 84 NY2d 83 [1994]).

First Cause of Action- battery

Defendant alleges the statute of limitations has run on Plaintiff's battery claim. Defendant points to CPLR 215 (3) which states:

> The following actions shall be commenced withing one year:
> (3) 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 or the civil rights law;

Plaintiff received her positive test results on or about March 27, 2017. Plaintiff commenced this action on or about March 19, 2019. The battery claim is time barred.

Second and Fourth Causes of Action- negligent infliction of emotional distress and negligence

In *John Doe v Mary Roe* (157 Misc2d 690, 691 [Rock. County, Just Ct 1993]) plaintiff sued defendant alleging that defendant caused him bodily injury by infecting him with Chlamydia. "New York recognizes a cause of action for intentional or negligent communication of a venereal disease

under either (1) the general prima facie tort theory; or (2)an action for intentional or negligent infliction of emotional distress; or (3) fraud, deceit and misrepresentation" (*id* at 692). The court held there was insufficient proof to establish intentional infliction of emotional harm because there was no proof that the defendant knew of her condition and intentionally transmitted the same to plaintiff. In fact, according to the court there is not enough proof to determine which of the parties transmitted Chlamydia to the other (*id* at 693).As to negligence, where there is a special relationship between the parties "one of the parties can be held negligent by not disclosing to the other party that one was infected with a sexually transmitted disease or by failing to take precautions, such as the use of a condom, to prevent transmission of the disease" (*id*). Once again, the court held the negligence claim could not survive because it was unclear who transmitted the Chlamydia to the other (*id* at 694).

Duplicative

Defendant argues both the second and fourth causes of action are duplicative therefore, one of the claims should be dismissed. Defendant cites *Diane Wolkstein v Mark Morgenstern* (275 AD.2d 635, 637 [1st Dept 2000]) where the court held "[g]enerally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action".

"A cause of action for negligent infliction of emotional distress must be based on allegations of conduct 'so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community'" (*id, quoting Naturman v Crain Communications,* 216 AD2d 150 [1st dept 2005]). The claim "generally must be premised upon the breach of a duty owed to the plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Travis Santana v William Leith,* 117 AD3d 711, 712 [2d Dept 2014])

A prima facie case for negligence is made if the defendant had a duty, the defendant breached that duty and defendant's breach was the actual and proximate cause of plaintiff's injuries. Absent a duty of care, there is no breach and no liability (*Bernstein v. Starrett City*, 303 A.D.2d 530, 532 [2d Dept 2003]).

Claims are duplicative if the claims "arise from the same operative facts and seeks the same damages" (*New York State Workers' Compensation Board v Program Risk Management, Inc. et al,* 155 AD3d 1484, 1488 [3d Dept 2017] [citations omitted]).

In the Summons and Verified Complaint Plaintiff claims that the act of engaging in unprotected sex in order to give her a permanent lifelong disease was the conduct that gave rise to her negligent infliction of emotional distress claim. By contrast, Plaintiff claims Defendant's failure to notify her that he has HPV-2 was the conduct that gave rise to her gross negligence claim. Therefore, the operative facts that fuel both claims are distinguishable.

3211(a)(1) and 3211(a)(7)

Defendant argues that Plaintiff's second and fourth causes of action must be dismissed because documentary evidence establishes that the Defendant was unaware of his diagnosis with HPV -2 prior to infecting the Plaintiff. Plaintiff contends that the Defendant's own statements in the text messages establish that Defendant was aware of his diagnosis prior to infecting the Plaintiff.

The Summons and Verified Complaint states a causes of action for negligence and negligent infliction of emotional distress. This Court holds the documentary evidence that was submitted is not dispositive of the issues of fact surrounding whether Defendant was aware of his diagnosis. While it is true that the test results submitted in support of Defendant's position fails to indicate that Defendant was infected with HPV-2, the text messages that Defendant sent to Plaintiff call into question his actual knowledge regarding his diagnosis.

Third Cause of Action- Fraud

"A cause of action sounding in actual fraud must state that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment" (*Seymon Levin et al. v Oscar Kitsis et al.,* 83 AD3d 1051,1054 [2d Dept 2011]).

Plaintiff's Verified Complaint states a cause of action for fraud.

Defendant contends what is essential to a claim for fraud is that the Defendant "knowingly conceal[ed]" (*Levin* at 1054). Once again Defendant argues, he lacked knowledge of his own diagnosis. As stated earlier the documentary evidence is not dispositive.

Pseudonym

Defendant moves this Court for an Order to allow him to proceed anonymously. This Court has allowed the Plaintiff to proceed anonymously, Defendant argues for the same reasons he should be allowed to appear anonymously as well. Plaintiff argues allowing Defendant to proceed anonymously "would create a shield for the Defendant to continue with his deceitful and unconscionable conduct".

Notably, all of the case law cited by the parties relate to the ability of a Plaintiff to proceed under a pseudonym. Uniquely, this is a motion for the Defendant to proceed anonymously as well. To aid in its decision this Court will now refer to prior decisions that have dealt with the issue of allowing a defendant to proceed anonymously.

In *John Doe v Diocese Corp. et al.* (43 Conn. Supp. 152, 153 [Conn. Super. Ct.1996]) plaintiff and defendants filed a motion for a protective order seeking to use a pseudonym for pretrial proceedings. Plaintiff brought this action alleging that he was a victim of sexual abuse for a period

of seven years beginning when he was twelve years old at the hands of the defendants' clergymen (*id*). Plaintiff sought to proceed via pseudonym because he wanted to protect the names of his brothers, wife, child and parents. He claims he has either never discussed it or discussed it at varying degrees with his family. Furthermore, plaintiff was worried that his job would be jeopardized if the information was disclosed. Plaintiff claimed he paid out of pocket for his therapy session and did not report it to his insurance company so that his employer will not find out (*id* at 154). Plaintiff presented the testimony of a therapist who stated that public exposure would have traumatizing effects on the plaintiff personally and professionally. In support of their application, the defendants argued that they are engaged in a variety of programs and activities that provide professional social, counseling, instructional and other support services to fill the needs of many. That, public disclosure would "undermine and harm the trust placed by the public" in their institution (*id* at 155). According to defendants, such trust is necessary for them to fulfill their efforts and deliver the aforementioned services. Furthermore, the disclosure would affect fundraising efforts and undermine the schools operated by the defendants (*id*). The court acknowledged that there is a recognized common law right of access to civil as well as criminal proceedings, the privilege of proceeding fictitiously shall only be granted "in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest" (*id* at 158 [quoting *Lee Buxton et al. v Abraham Ullman et al.,*147 Conn. 48, 60 [1959]) According to the court, the test is whether plaintiff possesses a substantial privacy right that outweighs the customary and constitutionally embedded presumption of open judicial proceedings (*Diocese* at 159). The court held plaintiff could proceed anonymously, reasoning "one's sexual history and practices are among the most intimate aspects of a person's life. When one has a sexual history falling outside the realm of the 'conventional' that privacy interest is enhanced greatly, whether one has created this history voluntarily or it is forced upon a person as a result of abuse" (*id* at 160). The court noted that beyond the general privacy interest the court must examine the particular circumstance of this plaintiff. The court placed emphasis on the lengths that plaintiff has gone too, to keep the matter private and the psychological implications of disclosure. The court makes clear that the granting of anonymity for plaintiff does not mean that defendant should be granted the same anonymous status. Rather, the court must apply the test to the defendants. The court held that the defendants' arguments were unpersuasive (*id* at 165). The court reasoned "that the public has an interest in the functioning and operation of large religious or charitable institutions whose activities in some cases, such as here, affect the lives of thousands of people" (*id* at 166)

In *Anonymous v Lerner* (124 AD3d 487 [4th Dept 2015]) the court acknowledged that "plaintiff's allegations concerning the negligent and fraudulent transmission of genital herpes, a sexually transmitted disease, implicates a substantial privacy right" (*id, citing Jane Doe.1 v CBS Broadcasting, Inc.,* 24AD3d 215 [1st Dept 2005]). However the court noted, the court should exercise is discretion to limit the public nature of proceedings sparingly and only when unusual circumstances necessitate it. The court affirmed the trial courts decision to decline to allow the plaintiff to proceed anonymously stating "[c]laims of public humiliation and embarrassment... are not sufficient grounds for allowing a plaintiff... to proceed anonymously" (*Lerner* at 488).

As stated in *Lerner* the courts recognizes there is a substantial privacy right surrounding the negligent and fraudulent transmission of a sexually transmitted disease (*id* at 487). In fact, in *Diocese* the court recognizes a substantial privacy right in "one's sexual history" (*Diocese* at 160). However, the test is whether the substantial privacy right that one possess outweighs the customarily and constitutionally embedded presumption of open judicial proceedings (*id* at 159). Here, Defendant states "[g]iven that this Court had issued an Order allowing Plaintiff to proceed anonymously, Defendant now cross-moves for an order allowing him to proceed using a psuedonym as well". To clarify, the test does not require this Court to issue the right to proceed via psuedonym to one party because it was previously granted to another party in the action. The Defendant further states "the instant matter stems from sensitive deeply personal matters which not only implicate Defendant's privacy rights, but also opens Defendant to potential social stigmatization for the very same reasons Plaintiff asserts in her moving papers". Defendant further alleges "there is no public interest in knowing the Defendant's identity as this is a private matter that has no bearing on the public interest or any governmental entity". This Court disagrees the openness of judicial proceedings are constitutionally sanctioned, which is why the test is not whether a public interest exists but whether the substantial privacy right outweighs the public interest. Defendant fashions his request after the Plaintiff's asserting the same grievances . However, the facts are not exactly the same and therefore this Court will not render the same decision. In its prior decision, this Court considered that Plaintiff shared the most intimate details of her condition i.e. having a bump on her labia and experiencing discomfort in her vaginal area. These facts were necessary for Plaintiff to share to contrast her condition prior to sexual intercourse with the Defendant and after. The Defendant has not and will not need to express such graphic details about his genitals as they are irrelevant to the case. Therefore, this Court finds Defendant's substantial privacy interest does not outweigh the customary and constitutionally embedded presumption of open judicial proceedings (*Diocese* at 159).

Request to seal the records

22 NYCRR§ 216.1 states as follows:

> a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.
>
> (b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

Defendant requests that this Court either grant his request to seal the records or in the alternative, short of sealing the record, this Court could order the sealing and redaction of certain

documents which contain Defendant's personal information and medical issues. Therefore it is,

ORDERED, that Plaintiff's First Cause of Action for battery is dismissed as it is time barred; and it is further

ORDERED, that the branch of Defendant's motion seeking to strike Plaintiff's remaining causes of action pursuant to CPLR 3211(a)(1) and/or (7) is denied; and it is further

ORDERED, that the branch of Defendant's motion seeking to proceed under a pseudonym is denied; and it is further

ORDERED, that the branch of Defendant's motion seeking relief pursuant to 22 NYCRR§ 216.1 is granted to the extent that all of the parties medical records shall be sealed. Otherwise the motion is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: February 11, 2021

Hon. Chereé A. Buggs, JSC