Kinloch v City of New York
2021 NY Slip Op 32494(U)
November 29, 2021
Supreme Court, New York County
Docket Number: Index No. 152029/2021
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

--X

CHRISTOPHER KINLOCH, JASMINE JONAS, MARCHELE FRANKLIN, MICHAEL NELSON, SABREEN TAYLOR, RUTHSANNA LEE, CHERRELLE DAVIS, and DIANE PRADE,

Plaintiffs,

- v -

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF CORRECTION,

Defendants.

--X

INDEX NO. 152029/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL .

In this action sounding, inter alia, in negligence, defendants the City of New York ("the City") and the New York City Department of Correction ("the DOC") move, pursuant to CPLR 3211(a)(5), to dismiss the plaintiffs' first amended complaint. Plaintiffs oppose the motion. After consideration of the motion papers, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from allegations that plaintiffs Christopher Kinloch, Jasmine Jonas, Marchelle Franklin, Michael Nelson, Sabreen Taylor, Ruthsanna Lee, Cherrelle Davis, and Diane Prade, employees of the DOC, were injured due to the negligent, reckless and intentional conduct of the defendants. Plaintiffs Kinloch, Jonas, Franklin, and Nelson commenced this action against defendants by filing a summons and complaint on February 27, 2021. Docs. 1 and

2. On March 26, 2021, plaintiffs amended their first amended complaint, naming Taylor, Lee, Davis and Prade as additional plaintiffs. Doc. 8.[1]

In the first amended complaint, plaintiffs alleged that they were "recklessly and wantonly subjected" to the COVID-19 virus by being forced to work unlawfully excessive overtime without meals and breaks. Doc. 8 at par. 2. They further alleged that the DOC did not mandate the wearing of masks until October 2020 and that, even at the time the amended complaint was filed, there was still "no enforcement of inmates [sic] and staff's wearing of masks and washing hands." Doc. 8 at par. 13.

As a result of the foregoing, Kinloch and Franklin, who worked for the DOC at an unspecified location, allegedly contracted COVID-19. Doc. 8 at pars. 14, 16.

Davis alleged that she contracted COVID-19 while working for the DOC at the Manhattan Detention Complex ("MDC"). Doc. 8 at pars. 18-22.

Taylor alleged that she worked in a women's prison on Rikers Island and was neither properly trained regarding COVID-19 protocols nor provided with proper protective equipment. Doc. 8 at pars. 23-28.

Nelson and Franklin alleged that they were forced to work in the presence of inmates at an unspecified location and that, although the DOC intentionally misdiagnosed the said inmates as asymptomatic, they were infected with COVID-19. Doc. 8 at par. 32.

Jonas alleged that, while pregnant, she was forced to work at the MDC without any personal protection. Doc. 8 at par. 33.

Lee alleged that, because she was forced to work overtime and was refused a break, she "was unable to access and take needed medication." Doc. 8 at par. 40.

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[1] Although plaintiffs filed a second amended complaint adding plaintiffs Joel Correa and Carlos Dias (Doc. 29), this pleading will not be considered since it was filed without leave of court (See CPLR 3025 [a], [b]).

Prade claimed that, although she notified the DOC that she had been exposed to someone with COVID-19, she was directed to report to work unless she had symptoms of the virus. Doc. 8 at par. 48.

Plaintiffs claim that defendants' reckless and intentional conduct in failing to take steps to mitigate the virus in their workplaces has caused them "distress as to their wellbeing." Doc. 8 at 36. They further claimed that, as a result of defendants' actions, they were "placing their immune systems under undue duress." Doc. 8 at par. 39.

According to plaintiffs, defendants were concerned only about reducing the number of corrections officers, regardless of the consequences, which included forcing those officers on duty to work an excessive number of hours. Doc. 8 at par. 44.

As a first cause of action, plaintiffs alleged negligence *per se* based on defendants' violation of Labor Law § 27-a (3), claiming that defendants failed to implement safety protocols such as mask wearing and hand washing, and that this caused Kinloch and Franklin to contract COVID-19. Doc. 8 at pars. 57-60.

As a second cause of action, plaintiffs claimed that defendants had a duty, pursuant to Labor Law § 27-a (3), to prevent the virus in the workplace, and that they negligently failed to do so. Doc. 8 at pars. 62-66.

As a third cause of action, plaintiffs alleged intentional infliction of emotional distress. Doc. 8 at pars. 68-70.

As a fourth cause of action, plaintiffs alleged that defendants violated Article XVII, Section III of the New York State Constitution by recklessly and wantonly contributing to the spread of COVID-19 by, inter alia, forcing plaintiffs to work excessive overtime without breaks.

Defendants now move:

1. To dismiss the first, second and third causes of action pursuant to CPLR 3211(a)(5) on the ground that plaintiffs are barred by the Workers' Compensation Law ("WCL") from suing their employer;

2. To dismiss the third cause of action pursuant to CPLR 3211(a)(5) because a municipality cannot be sued for the intentional infliction of emotional distress, as well as on the ground that plaintiffs have failed to adequately plead this cause of action;

3. To dismiss the fourth cause of action pursuant to CPLR 3211(a)(5) on the ground that it involves a nonjusticiable matter and because plaintiffs have no private cause of action pursuant to Labor Law § 27-a (3); and

4. For such other relief as this Court deems just and proper.

Doc. 22.

In opposition, plaintiffs argue that the motion must be denied since they have a Constitutional right to a safe workplace and, since defendants' acts were intentional, the claims asserted are not barred by the WCL. Doc. 28.

LEGAL CONCLUSIONS

On a motion to dismiss pursuant to CPLR 3211, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*See 219 Broadway Corp, v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The complaint must also be construed liberally and all reasonable inferences must be drawn in favor of the plaintiffs (*See Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).[2]

The first and second causes of action are based on Labor Law § 27-a (3), which creates a general duty for an employer to provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death

[2] Although defendants move to dismiss based on CPLR 3211(a)(5), that section relates to dismissals based on the statute of limitations, collateral estoppel, and other grounds inapplicable herein. However, since the motion also seeks "such other and further relief as this Court may deem just and proper" (Doc. 21), this Court will address the sufficiency of the complaint pursuant to CPLR 3211(a)(7).

or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees" (Labor Law § 27-a [3] [a] [1]; *see Stolowski v 234 E. 178th St. LLC*, 129 AD3d 512, 513 [1st Dept 2015]). Although Labor Law § 27-a (3) may serve as a predicate for a violation of other statutes, such as General Municipal Law §205-e, it does not create a private right of action (*See Gammons v City of New York*, 109 AD3d 189, 191 [2d Dept 2013] *affd* 24 NY3d 562 [2014]). Therefore, the first two causes of action fail to state a claim and must be dismissed.

Even assuming, arguendo, that Labor Law § 27-a (3) gave rise to a private cause of action, plaintiffs' claims would still be barred by WCL §§ 11 and 29, which prohibit them from suing their employers. Although plaintiffs maintain that an exception to the WCL exists where, as here, there are allegations of intentional conduct by the employer, this is not a completely accurate statement of the law. Rather, "[w]hile an intentional tort may give rise to a cause of action outside of the ambit of the [WCL], the complaint must allege an intentional or deliberate act by the employer directed at causing harm to [a] particular employee" *(Zaborowski v R.C. Diocese of Brooklyn*, 195 AD3d 884, 885 [2d Dept 2021] [citation omitted]). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury … A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" (*Acevedo v Consol. Edison Co.*, 189 AD2d 497, 500-501 [1st Dept 1993] [citation omitted]). Here, although plaintiffs allege intentional conduct by defendants, they do not claim that such conduct was directed at any particular employee or that defendants were substantially certain that

plaintiffs would be affected in a particular way by their conduct. Thus, the first and second causes of action are dismissed.

The third cause of action, for intentional infliction of emotional distress, must also be dismissed. Initially, as defendants argue, this claim cannot be brought against the City of New York (*See Price v City of New York,* 172 AD3d 625, 629 [1st Dept 2019] citing *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]). The claim is also barred by the WCL since there is no allegation that such conduct was directed at a particular individual (*Zaborowski*, 195 AD3d at 885). Additionally, plaintiffs fail to plead a causal connection between defendants' conduct and any severe emotional distress they suffered (*Scollar v City of New York*, 160 AD3d 140, 145-146 [1st Dept 2018] citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Indeed, although plaintiffs claim that they sustained "distress as to their wellbeing" (Doc. 8 at par. 36), they do not claim that such distress was "severe." Nor do they allege that defendants' "conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell*, 81 NY2d at 122 [citations omitted]).

Finally, the fourth cause of action, alleging a violation of plaintiffs' rights pursuant to Article XVII, Section III of the New York State Constitution, must be dismissed. That provision, effective January 1, 1939, reads as follows:

> The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

The Revised Record of the 1938 Constitutional Convention provides, at page 2133, that it was this section was intended to validate the police power as then "practiced in the State of New York" and, when applied to public health, such police power is not merely the power to restrain

and regulate the use of property, but is rather "a constructive program for the promotion of positive health" (*Paduano v New York*, 45 Misc 2d 718, 721 [Sup Ct, NY County 1965]). Although this section clearly establishes that the protection and promotion of the health of the inhabitants of New York State are matters of public concern (*State of New York v Joint Bd., Nursing Home & Hosp. Empls. Div*., 56 AD2d 310, 323 [2d Dept 1977]), and this constitutional provision authorizes the Legislature to enact statutes to promote public health (*see Western New York Water Co. v Erie County Water Authority*, 279 AD2d 1132 [4th Dept 1952]), plaintiffs do not cite, and this Court is unable to locate, any legal authority recognizing a civil cause of action arising from this provision. This finding does not preclude plaintiffs from pursuing any remedies pursuant to any applicable public health statutes.

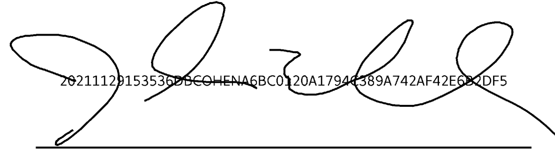
The remainder of the parties' claims are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion of defendants the City of New York and the New York City Department of Correction to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the movants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), and such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*

(accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].



11/29/2021	DAVID B. COHEN, J.S.C.
DATE	

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