

Elco v Aguiar
2022 NY Slip Op 35256(U)
January 18, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 614414/2020
Judge: Vincent J. Martorana
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Short Form Order

INDEX NO: 614414/2020

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

MELISSA BREITENBACH ELCO,

Plaintiff,

- against-

YVETTE AGUIAR Individually and as Police
Commissioner and Supervisor of the Town of
Riverhead, THE TOWN OF RIVERHEAD,
DAVID HEGERMILLER, Individually and as
Chief of Police of the Town of Riverhead, THE
RIVERHEAD POLICE DEPARTMENT and
RICHARD FREEBORN,

Defendant.

ORIG. RETURN DATE: 05/14/21

ADJOURNED DATE: 10/28/21

MOTION SEQ. NO.: 004 - MotD

PLTF'S/PET'S ATTY:

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New York, New York 10177

DEFT'S/RESP'S ATTY:

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Upon efiled documents numbered 72-80, 89-100; it is

ORDERED that Defendant Richard Freeborn's motion seeking dismissal or summary judgment with respect to Plaintiff's claims against him is granted to the extent that Plaintiff's second, third, fourth, fifth and sixth causes of action as alleged against him are dismissed pursuant to CPLR 3211(a)(7). The portion of Defendant's motion seeking summary judgment is denied. The portion of Defendant's motion seeking dismissal of Plaintiff's first cause of action is denied; it is further

ORDERED that the parties shall complete a compliance conference stipulation scheduling the production of outstanding discovery and shall submit same via NYSCEF to be "so ordered" in advance of the next conference date.

The within action seeks compensatory and punitive damages as a result of alleged workplace discrimination. Claims are alleged under state and federal law. Upon motion of several defendants seeking dismissal pursuant to CPLR 3211 and the resulting order of the Honorable William G. Ford dated April 26, 2021, Plaintiff's claims as against Yvette Aguiar, individually and as Police Commissioner and Town Supervisor were dismissed, as were claims against the Town of Riverhead and The Riverhead Police Department. Claims against David Hegermiller as Riverhead Chief of

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Police were dismissed but the claims against him individually remain. Plaintiff also alleges

negligent and intentional infliction of emotional distress. Such claims as against the "Town defendants" were also dismissed by the April 26, 2021 order.

In sum, Justice Ford's order held that:

Plaintiff's "causes of action seeking recovery for disability, and gender/sex disparate treatment under the ADA and Title VII and hostile work environment under either ground" were dismissed due to failure to meet the administrative exhaustion condition precedent.

Plaintiff's state law discrimination claims arising under New York State Human Rights Law "which mostly mirror her federal claims of disparate treatment and hostile work environment" were dismissed as against "all of the Town defendants" due to "plaintiff's failure to plead and prove compliance with the notice of claim requirement and condition precedent set out in Town Law § 67."

"Defendants' motion to dismiss plaintiff's official capacity claims against individual defendants Aguiar and Hegermiller [was] granted and those claims [were] also dismissed" because "federal law makes clear that official capacity suits against individual defendants under Title VII are legally indistinct from suits against the municipality."

Plaintiff's claims against the Riverhead Town Police Department were dismissed because "suits against an administrative arm or department of municipal government also do not differ from the claim against the municipality" and "courts have held that the administrative arm or department is not itself a legally distinct entity capable of being sued."

Plaintiff's claims against Aguiar in her individual capacity were insufficiently stated and therefore dismissed but "since the Court must construe plaintiff's pleadings in a light most favorable to her as the non-movant, the NYSHRL claims of disparate treatment and/or hostile work environment against Hegermiller in his individual capacity [were permitted to] survive for now and defendants' motion in that regard [was] denied."

"[P]laintiff [with respect to claims asserted on or after July 2019] has stated a viable claim concerning a hostile work environment regarding the denial of overtime, loss of interviewing privileges and insurance buyback forms. Thus as regards Hegermiller as her ultimate supervisor, those claims shall remain for now and defendants' motion to dismiss for failure to state a cause of action plaintiff's hostile work environment claims is denied."

"The tort claims are subject to Gen. Mun L. §§ 50-e & 50-I. Accordingly, as regards the Town defendants, their motion to dismiss those claims is granted and the claims for intentional and negligent infliction of emotional distress are dismissed for plaintiff's failure to plead and prove compliance with the municipal notice of claim condition precedent."

Therefore the only remaining defendants are David Hegermiller in his individual capacity and Richard Freeborn ("Freeborn"). Issue has been joined as to both defendants. Richard Freeborn now moves seeking dismissal pursuant to CPLR 3211 or summary judgment pursuant to CPLR

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3212.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 52, 49 NE3d 1171, 1175 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 774 N.E.2d 1190 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Bare legal conclusions; however, are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (*Chanko, supra*; *Leon supra*). "If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]). "Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR § 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action'" (*Sokol, supra*; *Porat, supra*). The analysis goes to whether or not a colorable cause of action exists, not whether or not such claim is ultimately likely to prevail on the merits. Although the Court may consider evidentiary material in support of a motion to dismiss on this basis, consideration of whether or not Plaintiff might survive a summary judgment motion is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 768–69, 97 NYS3d 203, 205–06 [2d Dept. 2019]). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe, supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190, 192 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 372 NE2d 17 [1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Stonehill Capital Mgmt., LLC v. Bank of the West*, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016] (quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572)). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

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The alleged facts underlying Plaintiff's claim are that she is a Riverhead Town Police Dispatcher and that the father of her eldest child is Defendant Richard Freeborn who is a Riverhead Police Officer. The romantic relationship between Plaintiff and Freeborn ended in December 2009. Plaintiff alleges that Freeborn harassed her and sent harassing texts, spread rumors about her sexual relationships, showed private photographs of her to male coworkers, complicated child visitation and stalked her beginning in 2010 and that Freeborn also harassed her ex-husband. Plaintiff states that she advised her supervisors about these behaviors but they refused to intervene. She describes many incidents, most of them related to child visitation issues which sometimes resulted in Domestic Incident Reports being filed; however some incidents involved more general subject matter. Plaintiff claims that numerous times she attempted to make domestic incident complaints against Freeborn but was turned down by various Riverhead Police Department Lieutenants and other senior officers. She asserts that further action should have been taken against Freeborn but that the Police Department covered up for Freeborn. Plaintiff claims that Defendants restricted her role in the workplace and denied her overtime and advancement, along with other alleged administrative retaliation for her complaints. She further states that she was questioned by superior officers about her personal life and custody issues.

Freeborn asserts that the parties engaged in extensive litigation in New York State Family Court, Suffolk County, regarding custody of their daughter and that the vast majority of allegations in the complaint pertain to a domestic dispute unrelated to their status as co-workers and that such claims fail to provide a basis for a claim under state or federal law. Freeborn's counsel asserts that Plaintiff has sued him in his capacity as a police officer, rather than individually because Aguiar and Hegermiller were both specified as having been sued in both capacities and Freeborn was not. As there is nothing in the caption that would indicate that Freeborn is being sued only as a police officer rather than as an individual, this argument is unavailing. Freeborn is described in the complaint as being an individual who is employed by the Riverhead Police Department.

Freeborn's motion to dismiss is predicated upon the arguments that, "(1) plaintiff failed to comply with conditions precedent to suit, (2) plaintiff failed to file a notice of claim, (3) plaintiff's claims are barred by the statute of limitations, and (4) plaintiff has failed to state a claim for any federal or state claim alleged in the complaint." Freeborn seeks summary judgment in the alternative.

Freeborn argues that Plaintiff's federal claims under Title VII and the Americans with Disabilities Act require exhaustion of administrative remedies by filing with the EEOC and receiving a right to sue letter from the EEOC. This is in accord with the ruling by Justice Ford in his order dated April 26, 2021, which dismissed these claims against all other defendants herein on this basis. Based upon Justice Ford's prior findings, Plaintiff's Title VII and ADA claims as against Defendant Freeborn are dismissed. Plaintiff's claims under Title VII, 42 USC §2000e-2(a)(1) may also be dismissed on the basis that Title VII is inapplicable to individual defendants (*Patterson v. Cty. of Oneida, N.Y.*, 375 F3d 206, 221 [2d Cir. 2004]; *Wrighten v. Glowski*, 232 F3d 119, 120 [2d Cir. 2000]; *Pietri v. N.Y.S. Off. of Ct. Admin.*, 936 FSupp 2d 120, 132-33 [EDNY 2013]; *Bernstein v. Seeman*, 593 FSupp 2d 630, 633-34 [SDNY 2009]). In light of the foregoing, Freeborn's statute of limitations argument with respect to these claims and assertion that Plaintiff has failed to plead actionable harassment or actionable discrimination based upon a disability need not be considered. However, it is noted that Plaintiff's complaint seems to be silent as to the nature of any qualifying

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disability that she may have or accommodation that she may need. Plaintiff's second and third causes of action as against Freeborn are dismissed.

Freeborn also asserts that all state law claims against him are barred by failure to file a timely notice of claim. This is inconsistent with the ruling of Justice Ford in his April 26, 2021, which found that claims of disparate treatment and/or hostile work environment against Hegermiller in his individual capacity survived his motion seeking dismissal on that ground. Freeborn has not made a colorable argument as to why the claims against him should be dismissed on this basis while those against Hegermiller stand. Accordingly, the state law claims against Freeborn shall not be dismissed based upon failure to timely file a notice of claim.

It is further argued by Freeborn that Plaintiff has failed to alleged the required elements to assert a claim under New York State Human Rights Law.

A claim under NYS Human Rights Law, Executive Law §296 requires the following elements: "(1) [the claimant] is a member of a protected class; (2) [the claimant] was qualified to hold the position; (3)[the claimant] was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305, 786 N.Y.S.2d 382 [2004]; *Bilitch v. New York City Health & Hosps. Corp.*, 194 AD3d 999, 148 NYS3d 238, 243 [2d Dept. 2021]). On this record, giving the pleading every possible favorable inference (*Chanko v. Am. Broad. Companies Inc.*, *supra*) and in consideration of Justice Ford's prior findings, the Court finds that Plaintiff has met the bare pleading requirements of a cognizable claim under Human Rights Law as against Freeborn as an aider or abettor (Executive Law §296(6); *Ananiadis v. Mediterranean Gyros Prod., Inc.*, 151 AD3d 915, 917, 54 NYS3d 155 [2d Dept. 2017]; *McIlwain v. Korbean Int'l Inv. Corp.*, 896 FSupp 1373, 1382-83 [SDNY 1995]; *Pellegrini v. Sovereign Hotels, Inc.*, 740 FSupp2d 344, 355-57 [NDNY 2010]). The portion of Freeborn's motion seeking dismissal of Plaintiff's first cause of action as against him is denied.

Plaintiff also alleges a cause of action for intentional infliction of emotional distress. The elements of such a claim are: (1) extreme and outrageous conduct that goes beyond the bounds of decency (2) intent to cause or disregard of the likelihood of causing severe emotional distress (3) a causal connection between the conduct and injury and (4) severe emotional distress (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 56-57, 29 NYS3d 879 [2016]; *Ruggiero v. Contemporary Shells, Inc.*, 160 AD2d 986, 554 NYS2d 708 [2d Dept. 1990]; *Tartaro v. Allstate Indem. Co.*, 56 AD3d 758, 868 NYS2d 281 [2d Dept. 2008]). In order to state a claim for intentional infliction of emotional distress, the conduct alleged must be so extreme as to "...go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Taggart v. Costabile*, 131 AD3d 243, 250, 14 NYS3d 388, 393 [2d Dept. 2015] (*quoting Murphy v. American Home Prods. Corp.*, 58 NY2d at 303, *quoting* Second Restatement § 46, Comment d); see also *Ajie Chen v. Deliso*, 169 AD3d 761, 91 NYS3d 895 [2d Dept. 2019]; *Scialdone v. Derosa*, 148 AD3d 741, 742-43, 48 NYS3d 471, 473 [2d Dept. 2017]).

Freeborn asserts that Plaintiff's claims as asserted fail to articulate extreme and outrageous conduct sufficient to meet the standard required for an intentional infliction of emotional distress claim. Such conduct must be atrociously intolerable and go beyond all bounds of decency expected

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in a civilized society (*Taggart v. Costabile, supra*). Although this court makes no judgment that the conduct alleged is proper and decent, it does not rise to the level of egregiousness required to state a claim of intentional infliction of emotional distress. Plaintiff's fourth cause of action against Freeborn is dismissed.

Plaintiff's fifth cause of action alleges negligent infliction of emotional distress. A negligent infliction of emotional distress claim must arise from a breach of duty of care. "[A] breach of a duty of care "resulting directly in emotional harm is compensable even though no physical injury occurred." However, the mental injury must be "a direct, rather than a consequential, result of the breach", and the claim must possess "some guarantee of genuineness" (*Taggart v. Costabile*, 131 AD3d 243, 249, 14 NYS3d 388, 393 [2d Dept. 2015] (*internal citations omitted*); see also *Ornstein v. New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 852 NYS2d 1 [2008]; *Derago v. Ko*, 189 AD3d 1352, 1354–55, 134 NYS3d 801, 802 [2d Dept. 2020]).

Here, Plaintiff fails to clearly articulate any duty owed to her by Freeborn and the breach of such duty. To the extent that the stated duty is intended to be a failure to provide her with a safe work environment, there is no basis stated for imputing such a duty to Freeborn as a co-worker. Accordingly, Plaintiff has failed to state a cause of action against Freeborn for negligent infliction of emotional distress. Plaintiff's fifth cause of action against Freeborn is dismissed.

Plaintiff also asserts abuse of process against Freeborn, claiming that he brought frivolous claims and misrepresented facts in Family Court and that he sought a contempt order without basis which was granted by Family Court and reversed on appeal. In that appellate decision, *Matter of Freeborn v Elco*, 188 AD3d 677, 134 NYS3d 389 [2d Dept. 2020], the court upheld the trial court's decision to award sole legal and physical custody of the parties' child to Freeborn but slightly modified the trial court's visitation schedule in Elco's favor and reversed a finding of contempt against Elco because Freeborn failed to establish by clear and convincing evidence that Elco had willfully violated a court order by permitting her ex-husband to contact the child on her personal cell phone, as there was no evidence that Elco was aware of such contact. Plaintiff claims that Freeborn's filings in Family Court were undertaken with an intent to do harm without justification and that such filings constituted a perversion of process to intimidate and retaliate against Plaintiff because she complained about him at work.

Freeborn asserts that the abuse of process claim should be dismissed because the mere bringing of a civil suit is insufficient basis for an assertion of abuse of process. He further argues that his actions were not frivolous, but if they had been they should have been addressed in Family Court, and that Plaintiff has failed to allege sufficient facts to state a claim of abuse of process.

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v. Suozzi*, 63 NY2d 113, 117–18, 469 NE2d 1324, 1327 [1984]; see also *McMahan v. McMahan*, 164 AD3d 1486, 84 NYS3d 510 [2d Dept. 2018]; *Perini v. Leo*, 147 AD3d 877, 47 NYS3d 101 [2d Dept. 2017]; *Bd. of Ed. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFTAFI-CIO*, 38 NY2d 397, 403–04, 380 NYS2d 635 [1975]). The process at issue must involve an unlawful interference with one's person or property (*Lynn v. McCormick*, 153 AD3d 688,

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688–89, 60 NYS3d 316, 317–18 [2d Dept. 2017]; *Curiano, supra*; *Perini, supra*). Filing of a summons and complaint to commence a civil action is not considered abuse of process even if an ulterior motive is alleged in bringing suit (*Curiano, supra*; *Perini, supra*).

Here, Plaintiff has failed to allege facts sufficient to state a claim of abuse of process. The foundation of her claim is an allegation that a portion of a Family Court order finding contempt against her was reversed on appeal (the order also upheld a custody award to Freeborn and modified Elco's visitation) along with conclusory assertions that Freeborn's actions in Family Court were in retaliation for her complaints about him at work. Such allegations are insufficient to meet the requisite showing that Freeborn used process in a perverted manner to obtain a collateral objective and that he did so without excuse or justification (*McMahan v. McMahan, supra*). Plaintiff's sixth cause of action against Freeborn is dismissed.

The portion of Freeborn's motion seeking summary judgment is denied. Such motion is rendered academic as to the claims which are dismissed. As to the remaining claim, Freeborn submits no evidence from any party with personal knowledge of the facts here at issue and has failed to tender sufficient evidence to demonstrate the absence of any material issues of fact. Freeborn has failed to make a prima facie case of entitlement to judgment as a matter of law.

Based upon the foregoing, Freeborn's motion is granted to the extent that Plaintiff's second through sixth causes of action as alleged against him are dismissed and the portion of his motion seeking summary judgment is denied. Freeborn's motion seeking dismissal or summary judgment with respect to Plaintiff's first cause of action is denied in all respects.

Dated: January 18, 2022
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: _____ FINAL DISPOSITION X NON-FINAL DISPOSITION