

Rodriquez v The Oak Room

2012 NY Slip Op 33639(U)

April 4, 2012

Supreme Court, New York County

Docket Number: 107961/2011

Judge: Richard F. Braun

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

HON. RICHARD F. BRAUN

J.S.C.

PART 23

Index Number : 107961/2011

RODRIGUEZ, MELISSA

vs

OAK ROOM, et al.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

2/9/12

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

12

5

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is granted to the extent

of dismissing the first cause of action as against defendants The Oak Room and CPS Hospitality, LLC, and the second cause of action as against all defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and the remaining claim is severed and shall continue.

This constitutes the decision and order of the Court. See separate Opinions.

FILED

APR 09 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: New York, New York April 3, 2012 ESER. R J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

-----X
MELISSA RODRIGUEZ,

Index No. 107961/11

Plaintiff,

OPINION

-against-

THE OAK ROOM, ERIC HARA, and CPS
HOSPITALITY, LLC.

FILED

Defendants.

APR 09 2012

-----X
RICHARD F. BRAUN, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

This is an action for intentional infliction of emotional distress and prima facie tort. Defendants move to dismiss plaintiff's complaint for failure to state a cause of action (CPLR 3211 [a] [7]). On a motion pursuant to CPLR 3211 (a) (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Plaintiff was hired to work as a pastry cook. Plaintiff alleges that her supervisor defendant Eric Hara (Hara) physically picked her up and threw her in a garbage can, and also in a mixer unit or demanded that she put herself in the latter; that he would put food in her hair and forced her to break eggs within her shirt, and compelled her to continue to work that way; that he used derogatory language toward her; that he did not allow plaintiff to say no when replying to demands; and that he made threats, such as that plaintiff would be fired.

The elements of a claim for intentional infliction of emotional distress are “(i) extreme and outrageous conduct, (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.” (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]; accord *Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010].) The conduct must be so outrageous as to be intolerable in a civilized community (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004]). The alleged actions of defendant Hara were more than petty and, if true, constituted a campaign of despicable harassment, and are arguably actionable under this tort (*see Nader v General Motors Corp.*, 25 NY2d 560, 569 [1970]; *Shannon v MTA Metro-N. R.R.*, 269 AD2d 218, 219 [1st Dept 2000]; *Vasarhelyi v New School for Social Research*, 230 AD2d 658, 661 [1st Dept 1996]; *cf. Ferguson v City of New York*, 273 AD2d 103 [1st Dept], *lv dismissed* 95 NY2d 902 [2000], *lv denied* 96 NY2d 704 [2001] [where the allegations of the plaintiff were held to be inadequate to constitute the tort]). The first cause of action was dismissed as to defendants The Oak Room and CPS Hospitality, LLC, as the allegations against those entities are conclusory and thus insufficient to plead a claim of intentional infliction of emotional distress (*see Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]; *Millan v City of New York*, 16 AD3d 290 [1st Dept 2005]).

The elements of a prima facie tort are intentional infliction of harm, causing special damages, without justification or excuse, by an act or series of acts that would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). Plaintiff’s allegations do not specify the claim of a prima facie tort.


Plaintiff speculates that discovery will elucidate her claims, which is inadequate to deny the motion under CPLR 3211 (d) (*see de Capriles v Lugo*, 293 AD2d 405, 406 [1st Dept 2002]; *Gladliz*,

* 4]

Inc. v Castiron Ct. Corp., 177 Misc 2d 392, 398-399 [Sup Ct, NY County 1998]; *cf. Amigo Foods Corp. v Marine Midland Bank-N.Y.*, 39 NY2d 391, 395 [1976] [where the Court permitted the opposing party discovery because it was demonstrated that facts may have existed in opposition to the motion to dismiss]).

Therefore, by the separate April 3, 2012 decision and order of this court, the motion was granted to the extent of dismissing the first cause of action against defendants The Oak Room and CPS Hospitality, LLC, and the second cause of action against all defendants. The remaining claim against defendant Hara was severed and shall continue.

Dated: New York, New York
April 4, 2012



RICHARD F. BRAUN, J.S.C.

FILED

APR 09 2012

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