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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANGELICA CECORA,
Plaintiff,

- against -

OSCAR DE LA HOYA,
Defendant.

INDEX NO. 112787/11

MOTION SEQ. 002

The following papers were read on this motion by defendant to dismiss and for the imposition of sanctions, and the motion by plaintiff's to disqualify defendant's counsel.

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

Cross-Motion: ☐ Yes ■ No

Motion sequences 002 and 003 are hereby consolidated for purposes of disposition.

Angelica Cecora (plaintiff) brings this tort action and asserts claims for battery, assault, false imprisonment, and intentional infliction of emotional distress against Oscar De La Hoya (defendant). Defendant moves pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action and for the imposition of sanctions against plaintiff and her attorney, pursuant to Section 130-1.1 of the Rules of the Chief Administrator (Mot. Seq. 002). Plaintiff is in opposition to defendant's motion, and separately moves to disqualify defendant's counsel (Mot. Seq. 003).[1]

BACKGROUND

The complaint alleges that plaintiff went to defendant's hotel on March 15, 2011, at 6:00 P.M., at his request (*see* Mot. Seq. 002, exhibit A). Plaintiff claims that she had dinner with

[1] The Court notes that it is in receipt of letter correspondence from both parties. However, as such correspondence was not authorized by the Court and was received after these motions were marked fully submitted, said correspondence was not considered by the Court in deciding the herein motions.

defendant, went to his suite and stayed in the hotel until 12:45 P.M. the next day. While in the hotel suite plaintiff alleges that they had sexual intercourse, engaged in other sexual activities, and defendant had drugs delivered to him, which he used. Plaintiff summoned her roommate to join them, at defendant's request, and her roommate allegedly also had sexual contact with defendant. After both women went to sleep in the suite's bedroom, plaintiff allegedly rebuffed four attempts by defendant to resume sexual contact with her.

When plaintiff awoke around 10:30 A.M. the following morning, defendant was absent. Plaintiff avers that she decided to use the hotel's spa, which defendant allegedly gave her permission to charge to his hotel room. When plaintiff returned to defendant's suite from the spa, hotel personnel told her to leave. Defendant had allegedly checked out at 8:30 A.M. without authorizing any other charges to his room. At 12:45 P.M., when plaintiff and her roommate were leaving the hotel, they were stopped by hotel security and hotel managers, escorted outside of the hotel, and informed that plaintiff would be responsible for paying the charges she incurred that morning. The two women eventually left the hotel without further incident.

On November 9, 2011, plaintiff commenced the instant action, asserting causes of action for battery (first), assault (second), false imprisonment (third) and intentional infliction of emotional distress (fourth).

STANDARD

CPLR 3211(a)(7), provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> [7] The pleading fails to state a cause of action; . . ."

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*,

96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414). The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency" (*O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory *(see Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]).

Defendant's Motion to Dismiss - Mot. Seq. 002

Based on the facts provided by plaintiff, the complaint summarizes the four causes of action as follows:

- Battery – "Defendant touched or contacted the Plaintiff without the Plaintiff's consent . . . [and] Defendant's touching of the Plaintiff was harmful and offensive to the Plaintiff" (Complaint, ¶¶ 41, 43).
- Assault – "Defendant's physical conduct put the Plaintiff in imminent apprehension of harmful contact" (*id.*, ¶ 48).
- False imprisonment – "Defendant confined the Plaintiff in an area where she could not leave . . . [without] any privilege to allow him to confine the Plaintiff" (*id.*, ¶¶ 50, 53).
- Intentional infliction of emotional distress – "Defendant was responsible for conduct toward the Plaintiff that was extreme and outrageous" (*id.*, ¶ 55).

Defendant's four attempts to resume sexual contact with plaintiff are the alleged battery.

In the complaint, plaintiff alleges that defendant "began touching the Plaintiff and pulling her out of bed in order to have sex with the Plaintiff" (*id.*, ¶¶ 26-29).

"'An action for battery may be sustained without a showing that the actor intended to cause injury as a result of the intended contact, but it is necessary to show that the intended contact was itself 'offensive', i.e., wrongful under all the circumstances'" (*Messina v Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 35 [1st Dept 2001], quoting *Zgraggen v Wilsey*, 200 AD2d 818, 819 [3rd Dept 1994]).

Defendant argues that plaintiff's claim for battery is inherently incredible in light of the other allegations in the complaint and in viewing the totality of the circumstances surrounding the alleged offensive conduct. These allegations include: plaintiff engaging in consensual sexual intercourse with defendant, also involving unusual sexual activities; plaintiff inviting her roommate to the hotel suite to engage in sexual activity with the defendant; and plaintiff remaining in the hotel while waiting for the defendant to return the following morning after the alleged battery occurred. Defendant proffers that his touching of plaintiff, a prostitute, in the context of a night of sexual activity, cannot be deemed offensive, thus plaintiff's claim for battery against the defendant should be dismissed.

In opposition, plaintiff asserts that the material elements of all the causes of action, including battery, are clearly stated within the complaint. Plaintiff does not specifically respond, on the merits, to defendant's argument that under the factual scenario presented in this case his touching of the plaintiff was not offensive.

The Court finds defendant's arguments to be availing and concludes that the allegation that defendant's touching of plaintiff was offensive, meaning wrongful under all the circumstances, a necessary condition to sustain a charge of battery, is not supported by the complaint. Even affording the plaintiff the benefit of every favorable inference (*see Leon*, 84 NY2d at 87-88), a review of all the allegations in the complaint and in light of the circumstances of the entire encounter, plaintiff's allegations that defendant's conduct in "touching the Plaintiff

and pulling her out of bed in order to have sex with the Plaintiff" (complaint, ¶¶ 26-29), are insufficient to state a cause of action for battery. Since plaintiff's allegations about defendant's conduct do not present a cognizable legal theory, the first cause of action for battery shall be dismissed.

"To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact" (*Holtz v Wildenstein & Co.*, 261 AD2d 336, 336 [1st Dept 1999]). Plaintiff's account of her encounter with defendant contradicts any claim of imminent apprehension of harmful contact. Throughout her time with defendant, she never claims that he threatened her with force. Her claim that she "was afraid to leave the hotel room because she feared that the Defendant would attempt to have sex with her again against her will," is belied by her voluntary conduct from evening through the following morning of staying in the hotel suite and, notably, she voluntarily "wait[ed] for the Defendant to return" rather than leaving the hotel when she awoke and found him gone (complaint, ¶¶ 30, 32). Her claim of assault, in her own words, is contradicted and not supported by the allegations in the complaint, and hence, the second cause of action for assault shall be dismissed.

"A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]). While plaintiff claims that "Defendant confined the Plaintiff in an area where she could not leave" her entire description of the setting and events of the encounter with defendant never suggests confinement (Complaint, ¶ 50). Accordingly, the third cause of action for false imprisonment shall be dismissed.

"The tort [of intentional infliction of emotional distress] has four elements: (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.*, 81 NY2d 115, 121 [1993]). The first

element, extreme and outrageous conduct is a "strict standard" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). "Liability has been found only where the 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" (Restatement (Second) of Torts § 46, Comment *d*). Even ignoring her own voluntary role in the events, plaintiff alleges conduct that might be illegal or, at least, offend some community standards, but does approach the level of outrageousness or extremity necessary for liability (*see Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15 [2008] [Where a rabbi initiated a three-and-a-half year sexual relationship with a congregant who sought him out for counseling on a variety of personal, legal and financial problems, the dismissal of her cause of action for intentional infliction of emotional distress was affirmed]; *Suarez v Bakalchuk*, 66 AD3d 419, 419 [1st Dept 2009] [Where a physician used vulgar language on an emergency room discharge form submitted to plaintiff's employer, the conduct was "extremely offensive and bizarre, [but it] does not satisfy the requirement of outrageous conduct . . ."]). Therefore, plaintiff's fourth cause of action for intentional infliction of emotional distress is dismissed.

Sanctions

The Court now turns to the portion of defendant's motion pursuant to 22 NYCRR §130-1.1, seeking the imposition of sanctions against plaintiff and her attorney on the ground that plaintiff's third and fourth causes of action were brought primarily to harass or injure him. Part 130 of the Rules of the Chief Administrator permits courts to sanction an attorney and/or a party for engaging in frivolous conduct, and such conduct is frivolous if it is: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Defendant points to, *inter alia*, plaintiff's conduct: (1) of leaking an unsigned version of the complaint to the New York Post before filing it; (2) the

salacious descriptions of the defendant in the complaint; (3) plaintiff's various interviews and press conferences, as evidence of plaintiff and her attorney's bad faith. Moreover, the complaint's request for a minimum of $5,000,000 in compensatory damages, defendant avers, also evidences plaintiff's intent to sensationalize this case in an effort to harass defendant.

Defendant is only seeking sanctions against plaintiff and her attorney for the causes of action for intentional infliction of emotional distress and false imprisonment. At this time, the Court exercises its discretion to impose sanctions on the plaintiff and her attorney for bringing the aforementioned causes of action because they are completely without merit in law and were undertaken primarily to harass or maliciously injure the defendant (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]), and as a policy, frivolous and baseless causes of action will not be tolerated by this Court. The Court notes that plaintiff and her attorney's intentional appeal to the media, including a press conference on the steps of the Supreme Court building on the date of the court appearance, and plaintiff's attorney's attempt to embarrass the defendant in front of the media in the courtroom by making an issue of defendant's absence from the Court on the date of oral argument, knowing that it is common practice in civil cases for only attorneys to appear, is further evidence that plaintiff's motivation for maintaining two frivolous causes of action was to harass and maliciously injure the defendant. Moreover, both the defendant, prior to the court appearance, and the Court, at the appearance, gave the plaintiff, who was present in court, an opportunity to withdraw the complaint or any of the causes of action therein, but plaintiff's counsel declined to do so, and vehemently insisted that the complaint properly pleaded the causes of action for intentional infliction of emotional distress and false imprisonment. The conduct of plaintiff is sanctionable for asserting and maintaining two frivolous causes of action, and the conduct of her attorney has crossed the line from zealous advocacy to that which is sanctionable under 22 NYCRR § 130-1.1. Accordingly, plaintiff Angelica Cecora and her attorney Mr. Robert Anthony Evans, Jr.,

Esq. are each hereby sanctioned in the amount of $500.00 and plaintiff is also responsible for compensating the defendant for his reasonable attorneys fees and costs incurred in the herein matter.

Plaintiff's Motion to Disqualify – Mot. Seq. 003

"The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383 [2d Dept 2005]). "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted . . . ." (*Campolongo v Campolongo*, 2 AD3d 476, 476 [2d Dept 2003]).

Plaintiff claims that, after communicating with a company associated with defendant, she was directed to a California lawyer, who, in turn, directed her to Judd Burstein (Burstein), defendant's New York counsel. In her conversation with Burstein, he allegedly offered her money "for any inconvenience that the Defendant caused" (Cecora Aff., ¶ 6). Later, she claims that she received money in an envelope bearing the name of Burstein's firm. Defendant then called her, apologized for his behavior and "asked if he could continue a relationship with me" (*id.*, ¶ 9). Since "Mr. Burstein was attempting to pay me off in order to keep me quiet about the Defendant's inappropriate behavior . . . [he] has injected himself into this litigation and will be a likely witness on my behalf" (*id.*, ¶ 14).

Plaintiff confuses the issue by briefly discussing whether Burstein has a conflict of interest because of a prior relationship with defendant, an irrelevant question, when the issue is the lawyer's prospective role as a witness. According to Rule 3.7 (a) of the Rules of Professional Conduct (22 NYCRR § 1200.0), "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact," with certain exceptions. Disqualification is proper where:

"defendant's counsel played a vital role in the final settlement

> negotiations flowing from a settlement offer that plaintiff had allegedly previously procured and that defendant client later accepted, that the negotiations were an important part of the underlying dispute, that defendant's counsel was likely to be a key witness at trial, and that his proposed testimony would be adverse to his client's interests" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 82 AD3d 586, 586 [1st Dept 2011]).

Burstein contends that his client will not be calling him as a witness, failing to note that plaintiff asserts that she will. More significantly, he claims that "the proposed testimony concerns confidential settlement discussions; and/or [] the proposed testimony concerns factual matters that are not in dispute and the truth of which can be stipulated to, e.g., the existence and amount of any alleged payment to the Plaintiff" (Burstein Affirm., ¶ 4).

Plaintiff identifies counsel as "Defendant's New York Attorney Judd Burstein" (Cecora Aff., ¶ 3). Their conversation, the result of her seeking "to address an incident of improper conduct from the Defendant toward me on March 15, 2011," took the form of negotiation (*id.*, ¶ 2). Burstein thanked her and offered her money, which she accepted (*id.*, ¶¶ 7-8). Defendant then called plaintiff to apologize for his conduct (*id.*, ¶ 9). Plaintiff's choice to pursue defendant after receiving his money and his apology, does not alter the character of Burstein's initial role. Burstein, after being sought out by plaintiff, tried bargaining with her. He cannot be made to testify about those discussions (*see* CPLR 4547 ["Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible"]). Therefore, plaintiff's motion to disqualify defendant's counsel is denied.

CONCLUSION

Accordingly, it is

ORDERED that the portion of defendant's motion to dismiss the complaint, pursuant to

CPLR 3211(a)(7), is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion to disqualify defendant's counsel is denied (Mot. Seq. 003); and it is further;

ORDERED that the portion of defendant's motion to award sanctions, pursuant to Section 130-1.1 of the Rules of the Chief Administrator, is granted, and plaintiff Angelica Cecora and her attorney Robert Anthony Evans, Jr., Esq are each hereby sanctioned in the amount of $500.00 and defendant's reasonable attorneys fees are imposed on the plaintiff; and it is further

ORDERED that the issue of defendant's reasonable attorneys fees incurred in the herein action is referred to a Special Referee to hear and determine; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee, and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court, who is directed to enter judgment accordingly, within 30 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 3-30-12

Enter:

PAUL WOOTEN J.S.C.

FILED

APR 04 2012

NEW YORK COUNTY CLERK'S OFFICE

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**