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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 100255/2012
STEVENS, CHRIS
vs.
BROWN, MICHAEL GLYN
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/2/12

LBY
LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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CHRIS STEVENS,

Plaintiff,

-against-

MICHAEL GLYN BROWN,

Defendant.

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In this pre-answer motion to dismiss under C.P.L.R. § 3211(a)(7), defendant seeks to dismiss plaintiff's first, second, seventh, and eighth causes of action. In addition, defendant moves under C.P.L.R. § 2101(c) to compel plaintiff to proceed under her legal name rather than a pseudonym. Plaintiff opposes the motion and cross-moves to (1) permit plaintiff to proceed under a pseudonym and to (2) redact plaintiff's legal name in plaintiff's affidavit and accompanying medical reports. For the reasons set forth below, the court grants defendant's motion to the extent of dismissing the second cause of action and otherwise denies the motion, and grants plaintiff's cross-motion to the extent of allowing plaintiff to proceed under a pseudonym and otherwise denies the cross-motion.

FACTS

The court draws the following facts from the complaint; the court accepts these facts as true for the purposes of this motion. *See Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 975 (1998). Plaintiff and defendant met in Aspen, Colorado, in April 2009. They spent a few days together in 2009, and then did not see each other again until 2011. In July 2011, plaintiff and defendant began living together,

apparently splitting their time among three New York apartments for which defendant paid. Before they moved in together, plaintiff and defendant agreed to be tested for sexually transmitted diseases (STDs). Plaintiff's tests were negative, and defendant claimed that he too was disease-free. However, in December 2011, plaintiff tested positive for genital and anal herpes; plaintiff's doctor informed plaintiff that she contracted the disease recently. Plaintiff claims that defendant forcibly had anal sex with her, which led to plaintiff's contraction of anal herpes. In addition, plaintiff claims that she found herpes medication in defendant's possession, and learned that defendant had been taking the medication for some time. Plaintiff and defendant have not seen each other since December 26, 2011.

Plaintiff commenced this action on January 9, 2012, for, inter alia, negligence per se via defendant's alleged violation of Public Health Law § 2307, nuisance, fraud and material misrepresentation, and fraud by concealment. Plaintiff proceeded under the pseudonym "Chris Stevens" because of the sensitive, personal, and embarrassing nature of the allegations.

PUBLIC HEALTH LAW § 2307

In her first cause of action, plaintiff claims that defendant's alleged violation of Public Health Law § 2307 constitutes negligence per se. The statute provides, "Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." N.Y. Pub. Health Law § 2307 (McKinney 2012). Defendant moves to dismiss this cause of action

on the ground that Public Health Law § 2307 is a criminal statute and does not provide for civil remedies or the recovery of damages.

Plaintiff's affidavit in opposition to defendant's motion to dismiss asserts that defendant's violation of Public Health Law § 2307 constitutes negligence per se. Although the complaint appears to assert a private cause of action for defendant's violation of the statute, "[i]n opposition to . . . a motion [to dismiss], a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims." *Cron*, 91 N.Y.2d at 366, 670 N.Y.S.2d at 975 (citation and internal quotation marks omitted). Plaintiff's affidavit cites *Maharam v. Maharam*, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1st Dep't 1986) for the proposition that violation of Public Health Law § 2307 constitutes negligence per se. In *Maharam*, a wife sued her husband for negligently infecting her with genital herpes. 123 A.D.2d at 167, 510 N.Y.S.2d at 105. The First Department held that the wife's negligence claim was "a legally cognizable claim inasmuch as the husband's alleged conduct violates section 2307, a statute enacted for public health and safety, and may therefore constitute negligence per se." *Maharam*, 123 A.D.2d at 171, 510 N.Y.S.2d at 107. Therefore, plaintiff has asserted a legally cognizable negligence per se claim. The court accordingly denies defendant's motion to dismiss the first cause of action.

NUISANCE

In the affidavit in opposition to defendant's motion to dismiss, plaintiff predicates the nuisance claim on Penal Law § 240.45(1). The statute provides, "A person is guilty of criminal nuisance in the second degree when: 1. By conduct either unlawful in itself or

unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons." N.Y. Penal Law § 240.45(1) (McKinney 2012). Defendant argues (1) that Penal Law § 240.45(1) does not provide for a private cause of action and (2) that even if it did, the statute is not applicable to this case.

Plaintiff cites two cases in support of the proposition that Penal Law § 240.45(1) provides for a private cause of action: *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) and *Long v. Beneficial Fin. Co. of N.Y.*, 39 A.D.2d 11, 330 N.Y.S.2d 664 (4th Dep't 1972). As defendant points out, *Gallela* and *Long* both concern Penal Law § 240.25, which criminalizes harassment. *See Galella*, 487 F.2d at 994; *Long*, 39 A.D.2d at 12–13, 330 N.Y.S.2d at 666. Citing *Long*, the court in *Galella* noted that "[c]onduct sufficient to invoke criminal liability for harassment may be the basis for private action." 487 F.2d at 994 n.11. This means only that conduct in violation of Penal Law § 240.25 might also provide the basis for civil recovery in tort; this does not mean, as plaintiff contends, that a private citizen may sue for relief under the criminal statute.[1] In the absence of case law indicating otherwise, the court finds that the same is true for Penal Law § 240.45(1).

Even if Penal Law § 240.45 provided for a private cause of action, it is not applicable to the facts of this case. The statute "is essentially a criminal codification of the common law doctrine of public nuisance." *City of N.Y. v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 271 (E.D.N.Y. 2005), *aff'd in part, rev'd in part on other grounds*, 524 F.3d 384 (2d Cir. 2008); *see also Sabater v. Lead Indus. Ass'n*, 183 Misc. 2d 759, 767, 704 N.Y.S.2d 800, 806 (Sup. Ct. Bronx Cnty. 2000) (noting that Penal Law § 240.45

[1] Moreover, plaintiff does not bring any other viable civil claim relating to nuisance.

constitutes "statutory definition of a public nuisance"). The courts have defined public nuisance as the interference with or infringement upon a public right shared by all. *See, e.g., Copart Ind. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977) ("A public . . . nuisance . . . consists of conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all . . . in a manner such as to . . . endanger or injure the property, health, safety, or comfort of a considerable number of persons."); *Haire v. Bonelli*, 57 A.D.3d 1354, 1358, 870 N.Y.S.2d 591, 595 (3d Dep't 2008) ("To constitute a public nuisance, the offending party's actions must damage or infringe upon the exercise of rights common to all people, such as interfering with the public's right to use a public place.")

Defendant's conduct is not a public nuisance in violation of Penal Law § 240.45(1). Plaintiff has provided no case law or other authority indicating that negligently or intentionally infecting others with an STD constitutes a public nuisance under the common law or the statute. In addition, as defendant points out, plaintiff's vague assertion that defendant has infected others with the herpes virus does not indicate that defendant endangered the health or safety of a considerable number of people or infringed upon a public right. *See also Matter of Elizabeth G.*, 280 A.D.2d 478, 721 N.Y.S.2d 65 (2d Dep't 2001) (holding that an alleged criminal nuisance affecting an "unspecified, but apparently small, number" of people did not violate Penal Law § 240.45); *People v. Griswald*, 170 Misc. 2d 38, 41, 648 N.Y.S.2d 901, 903 (Yates Cnty. Ct. 1996) (holding that a Penal Law § 240.45 claim is not cognizable if "those injured

constitute a distinct and finite group" rather than the general public). Accordingly, the court grants defendant's motion to dismiss the second cause of action.

FRAUD AND MATERIAL MISREPRESENTATION AND FRAUD BY CONCEALMENT

The allegations constituting plaintiff's fraud and material misrepresentation and fraud by concealment claims are summarized as follows: (1) defendant told plaintiff that he (defendant) did not have any STDs; (2) defendant knew that he was infected with the herpes virus; (3) defendant's misrepresentation or concealment of the truth caused plaintiff to engage in unprotected sex with him; (4) defendant infected plaintiff with genital and anal herpes via unprotected sex.

Defendant argues that the above allegations amount to a seduction claim, which is barred by New York Civil Rights Law § 80-a. Section 80-a provides, in relevant part, "The right[] of action to recover sums of money as damages for . . . seduction . . . [is] abolished. No act done within this state shall operate to give rise, either within or without this state, to any such right of action." N.Y. Civ. Rights Law § 80-a (McKinney 2009). Seduction includes "any conduct on the part of a man, without the use of force, in wrongfully inducing a woman to surrender to his sexual desires." *Marmelstein v. Kehillat New Hempstead*, 45 A.D.3d 33, 35, 841 N.Y.S.2d 493, 495 (1st Dep't 2007) (citation and internal quotation marks omitted), *aff'd*, 11 N.Y.3d 15, 892 N.E.2d 375, 862 N.Y.S.2d 311 (2008). Seduction claims couched as other, viable claims are not actionable. *Id.*, 45 A.D.3d at 36, 841 N.Y.S.2d at 496.

Plaintiff correctly asserts that the seventh and eighth causes of action are not seduction claims. Plaintiff does not claim that defendant wrongfully induced plaintiff into sexual intercourse; rather, plaintiff claims that defendant knew or should have known that he had the herpes virus, lied about or concealed his condition, and infected her (plaintiff) via unprotected sex. This is a valid cause of action. *See Plaza v. Estate of Wisser*, 211 A.D.2d 111, 118–19, 626 N.Y.S.2d 446, 451–52 (1st Dep't 1995); *Maharam*, 123 A.D.2d at 170, 510 N.Y.S.2d at 107. Because plaintiff's valid fraud claims clearly are not seduction claims in disguise, the court denies defendant's motion to dismiss the seventh and eighth causes of action.

PLAINTIFF'S USE OF PSEUDONYM

Plaintiff cross-moves to proceed under the pseudonym "Chris Stevens" because of the embarrassing and sensitive nature of the allegations and because of the additional harm that will be inflicted on plaintiff if she were compelled to proceed under her legal name. Defendant moves to compel plaintiff to proceed under her legal name, per C.P.L.R. § 2101(c).[2] Defendant argues that it is prejudicial to defendant to allow plaintiff to proceed anonymously, particularly because plaintiff's counsel has commented on the case to the press. In addition, defendant argues that the subject matter of the case does not warrant plaintiff's use of a pseudonym.

When determining whether to allow plaintiff to proceed anonymously, the court must use its discretion in balancing plaintiff's privacy interest against the presumption in

[2] C.P.L.R. § 2101(c) provides, in relevant part, "In a summons, a complaint or a judgment the title shall include the names of all parties . . ." N.Y. C.P.L.R. § 2101(c) (McKinney 2012).

favor of open trials and against any potential prejudice to defendant. *Doe v. Szul Jewelry, Inc.*, No. 31382U, slip op. at 15 (Sup. Ct. N.Y. Cnty. May 13, 2008); *Doe v. N.Y. Univ.*, 6 Misc. 3d 866, 879, 786 N.Y.S.2d 892, 903 (Sup. Ct. N.Y. Cnty. 2004); *Anonymous v. Anonymous*, 191 Misc. 2d 707, 708, 744 N.Y.S.2d 659, 660 (Sup. Ct. N.Y. Cnty. 2002). The court considers the following factors:

> [1] Whether the justification asserted . . . is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature; [2] whether the party seeking anonymity has an illegitimate ulterior motive; [3] the extent to which the identity of the litigant has been kept confidential; [4] whether identification poses a risk of mental or physical harm, harassment, ridicule, or personal embarrassment; [5] whether the case involves information of the utmost intimacy; [6] whether the action is against a governmental or private entity; [7] the magnitude of the public interest in maintaining confidentiality or knowing the party's identity; [8] whether revealing the identity of the party will dissuade the party from bringing the lawsuit; [9] whether the opposition to anonymity has an illegitimate basis; [and] [10] [] whether the other side will be prejudiced by use of the pseudonym.

Szul, No. 31382U, slip. op. at 16–17. Although plaintiff's embarrassment is not sufficient to permit her to proceed anonymously, it is relevant when determining "whether plaintiff's situation is compelling, involving highly sensitive matters including social stigmatization." *Doe v. N.Y. Univ.*, 6 Misc. 3d at 879, 786 N.Y.S.2d at 903 (citation and internal quotation marks omitted). Plaintiff should be permitted to proceed anonymously if there is a "substantial privacy interest" at stake. *Id.* (citation and internal quotation marks omitted). However, a party seeking to proceed anonymously undermines her cause by identifying the opposing party in the pleadings and to the press. *See Doe v. Kidd*, 19 Misc. 3d 782, 789, 860 N.Y.S.2d 866, 872 (Sup. Ct. N.Y. Cnty. 2008) ("[P]laintiff's voluntary identification of a widely-recognized and famous

basketball player, in her pleadings, and to the press, undermines her claimed need to protect her privacy and identity.").

After weighing the above considerations, the court finds that plaintiff should be permitted to proceed under a pseudonym. The deeply personal and sensitive subject matter of the case warrants protection of plaintiff's privacy interest. In addition, the court finds that plaintiff would face considerable embarrassment and social stigmatization if she were compelled to proceed under her legal name. Although, as defendant states, defendant has been unfairly prejudiced to the extent that plaintiff's counsel has discussed the case with the press, the magnitude of plaintiff's privacy interest favors permitting plaintiff to proceed under a pseudonym.[3] Finally, allowing plaintiff to proceed under a pseudonym does not significantly hamper the public's interest in open trials because the public will still have access to the court records for this case. *See Anonymous v. Anonymous*, 191 Misc. 2d at 708, 744 N.Y.S.2d at 660 ("Granting [a party] the right to proceed as 'Anonymous' does not prevent the public from accessing court records."). Accordingly, the court denies defendant's motion to compel plaintiff to proceed under her legal name, and grants plaintiff's cross-motion to proceed under a pseudonym.

REDACTION OF PLAINTIFF'S LEGAL NAME IN CASE FILE

Pursuant to § 216.1(a) of the Uniform Rules for the New York State Trial Courts, plaintiff moves to redact plaintiff's legal name in plaintiff's affidavit and accompanying medical reports. Plaintiff's arguments for proceeding under a pseudonym are equally

[3] Plaintiff is willing to stipulate to defendant's use of a pseudonym. The court recognizes that this may be cold comfort because defendant's legal name has already been revealed in the pleadings and to the press. However, upon application, the court would grant this relief.

applicable to redaction of plaintiff's identity under § 216.1(a). Defendant does not oppose this branch of plaintiff's cross-motion, except to the extent that his objections to plaintiff proceeding under a pseudonym apply equally here.

Section 216.1(a) provides, in relevant part:

> 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.

N.Y. Uniform Rules for the N.Y. State Trial Courts § 216.1(a) (McKinney 2012). The good cause standard under § 216.1(a) is somewhat vague. *Danco Labs. v. Chem. Works of Gedeon Richter*, 274 A.D.2d 1, 8, 711 N.Y.S.2d 419, 424–25 (1st Dep't 2000). However, to overcome the presumption in favor of public access to trial information, "compelling circumstances must be shown by the party seeking to have the records sealed." *Coopersmith v. Gold*, 156 Misc. 2d 594, 606, 594 N.Y.S.2d 521, 530 (Sup. Ct. Rockland Cnty. 1992). In evaluating whether such compelling circumstances are present, the court uses its discretion in "engag[ing] in a balancing process weighing the potential for harm and embarrassment to the litigants and public alike." *Id.* If the case file contained plaintiff's affidavit in her legal name or any medical reports, the court would find no reason to deny plaintiff's request because (1) the public interest in knowing plaintiff's legal name is minimal compared to plaintiff's privacy interest, (2) the public will still have access to the court records for this case, and (3) defendant does not oppose plaintiff's motion. However, plaintiff has not included the above documents, or any other documents that reveal plaintiff's legal name, in the case file; thus, there

is nothing to redact. Accordingly, the court denies the part of plaintiff's motion that seeks to redact plaintiff's legal name in plaintiff's affidavit and accompanying medical reports.

CONCLUSION

For the reasons set forth above, the court grants defendant's motion to the extent of dismissing the second cause of action and otherwise denies the motion, and grants plaintiff's cross-motion to the extent of allowing plaintiff to proceed under a pseudonym and otherwise denies the cross-motion.

Therefore, it is

ORDERED that the motion to dismiss is granted to the extent that the second cause of action of the complaint is dismissed; and it is further

ORDERED that defendant's motion to compel plaintiff to proceed under her legal name is denied; and it is further

ORDERED that plaintiff's cross-motion to proceed under a pseudonym is granted; and it is further

ORDERED that plaintiff's cross-motion to redact plaintiff's legal name in plaintiff's affidavit and accompanying medical reports is denied.

Dated: 7/2/12

ENTER:

LOUIS B. YORK, J.S.C.