

Shaw v Spitzer

2004 NY Slip Op 30351(U)

September 2, 2004

Sup Ct, NY County

Docket Number: 400845/2004

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TORRES
Justice

PART 15

Shaw

INDEX NO. 400845-04

MOTION DATE _____

- v -
Spitzer

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

attached decision

decided per
FILED
SEP -9 2004
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/2/04

WALTER B. TORRES
J.S.C.

Check one: FINAL DISPOSITION ~~NON-FINAL~~ DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x

JAMES SHAW, JR.,

Plaintiff,

-against-

ELIOT SPITZER, Attorney General and
OFFICE OF THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK and JACQUELINE BLAND,

Defendants.

-----x

**Index No. 400845/2004
Mtn Seq.**

WALTER B. TOLUB, J.:

The plaintiff, in an application that may be so frivolous as to justify sanctions pursuant to 22 NYCRR 130-1.1, has brought this declaratory judgment action to require the State of New York to indemnify him for his alleged acts of sexual misconduct. Plaintiff, the defendant in an action in the Federal court, has sued the Attorney General of the State of New York and Jacqueline Bland, the complainant in the Federal action, seeking indemnification pursuant to Public Officers Law § 17.

Plaintiff James Shaw, Jr. is a former Justice of the Supreme Court of the State of New York, Kings County, who retired in 1999. In November, 1997, Ms. Bland, Justice Shaw's secretary, filed a formal complaint with the Chief Judge and with the Equal Employment Opportunity Office of the Office of Court Administration accusing Justice Shaw of sexual harassment. In May, 1998, Justice Shaw terminated Ms. Bland from her employment and Ms. Bland filed a complaint with the New York City Human

Rights Commission which sua sponte transferred the case to the United State Equal Employment Opportunity Commission ("EEOC"). Following her termination, Ms. Bland filed a supplemental Complaint with the EEOC alleging retaliatory dismissal. Ms. Bland was reinstated by the Office of Court Administration.

In the interim, the New York State Commission on Judicial Conduct held a hearing at which Ms. Bland, a Ms. Rucker, and Justice Shaw testified. In November, 1999, the Commission on Judicial Conduct concluded that Justice Shaw had, over a period of twelve years, sexually harassed Ms. Bland. Because Judge Shaw faced mandatory retirement at the end of the year, the Commission on Judicial Conduct determined that censure was the appropriate sanction.

The EEOC found probable cause with respect to the complaint filed by Ms. Bland and, after conciliation failed, issued a Notice of Right to Sue.

Ms. Bland filed suit in the Federal District Court for the Eastern District of New York, alleging she had been sexually harassed over a twelve year period and retaliated against when she complained. She sued Justice Shaw and the New York State Office of Court Administration. The State of New York, recognizing that under Public Officers Law § 17 the duty of the State to defend is broader than the duty to indemnify, (See *LoRusso v. New York State Office of Court Administration*, 229

AD2d 995 [4th Dept. 1996]), provided Justice Shaw with independent counsel.

United States District Court Judge Edward R. Korman, in a March 2003 decision, dismissed all of the claims brought by Ms. Bland against the State of New York and the Office of Court Administration, dismissed Ms. Bland's claims relating to retaliation and declined Ms. Bland's application to give preclusive effect to the findings of the Commission on Judicial Conduct and to award her judgment.

Justice Shaw commenced the instant action in Kings County in February 2004 and the case was transferred to New York County in March. The plaintiff seeks a judgment that declares that the State of New York is obligated and required to indemnify Judge Shaw, pursuant to Public Officer's Law § 17, as a result of settlement of or any verdict which might be rendered against him in the action brought by Ms. Bland in Federal court.

The Attorney General moves to dismiss the complaint because it: 1) is premature and 2) fails to state a cause of action. The plaintiff cross-moves for summary judgment and the co-defendant Bland joins in that application. The court recognizes that without indemnification from the State of New York, Ms. Bland's successful prosecution in the Federal action may result in a pyrrhic victory. Nonetheless, the Attorney General's motion to be dismissed must be granted.

The Action is Premature

The Attorney General argues that a literal reading of Public Officer's Law § 17(3)(a)&(d) compels the conclusion that the action is premature in that no right to indemnification exists prior to a judgment or settlement (*Messinger v. Yap*, 203 AD2d 870 [3rd Dept. 1994]) and that the right to indemnification only arises after a settlement or judgment (*Frontier Ins. Co. v. State*, 197 AD2d 177 [1994]). This conclusion is in accordance with the principle that a right, unknown at common law, created by statute, must be strictly construed (*McKinney's Statutes* § 301; *Bose v. United Employment Agencies*, 200 Misc. 176 [Mun. Ct., Kings County 1951]). The defendant Bland, in an attempt to avoid dismissal, has presented to the court a letter of "settlement" of the Federal action. The letter in essence provides that if the State of New York will pay, Justice Shaw and Ms. Bland will settle the Federal action for \$275,000 inclusive of costs and attorneys' fees. This, in the court's opinion, is not a "settlement" as envisioned by the statute because it is conditioned upon the Attorney General's willingness to pay, which the Attorney General has already declined. The court might be inclined to dismiss or to hold this proceeding in abeyance pending a settlement or verdict but for the fact that it is the court's opinion that this matter warrants outright dismissal on the merits.

The Complaint Fails to State a Cause of Action

Public Officers Law § 17(3)(a) requires the State to indemnify an employee only where "the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties" and further provides that "the duty to indemnify . . . shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee".

The allegations with respect to Justice Shaw in the Federal Action (Atty Gen'l's Ex. A), were summarized by Judge Korman in his decision of March 7, 2004 (*Bland v. State of New York*, 263 F.Supp.2d 526, 532 (EDNY 2003) as follows:

The complaint alleges that shortly after Ms. Bland went to work as Justice Shaw's secretary he began to physically touch her in an uninvited, unprofessional and inappropriate manner. His conduct included but was not limited to pulling her onto his lap, holding her hand, massaging her shoulders, cupping the side of her breast, intertwining his pinky finger in hers, and sitting uncomfortably close to her rather than on his own side of his desk. Defendant Shaw continued engaging in such inappropriate behavior throughout Ms. Bland's employment. [Complaint] ¶¶ 24-26. Plaintiff claims to have objected to this conduct, and to have repeatedly told him that it was unprofessional and unacceptable. Plaintiff claims not to have condoned this conduct in any manner. *Id.* Plaintiff also makes claims about verbal harassment, including comments that plaintiff's breasts or "tits" were "voluptuous"; that her husband "never gets thirsty"; that she was losing her "titties and ass" when she had begun to lose weight; that an "old man [the judge] needed a little excitement in his life"; that he did not like it when she wore loose clothing to the office; that her hips were "wide and sexy"; that she should be having sex, and that she should be having sex with him; and that her lips were "sexy," "big," "wide" and "voluptuous." Plaintiff alleges

that Justice Shaw also told her about men's pleasure at sucking on breasts, and exhibited gestures depicting such acts, as well as indicating the size of her breasts with his hands. *Id.* ¶¶ 27-28, 42, 48. Plaintiff also alleges that Justice Shaw's requirement that she use the bathroom in chambers threatened her sense of safety and increased her anxiety. *Id.* ¶¶ 29-30. Plaintiff further claims that Justice Shaw described affairs he had while married, asked intimate questions, routinely tried to kiss her, pulling her tightly toward him. At least on one occasion he kissed her and put his tongue into her mouth. He is alleged to have asked her to "give an old man a hug" and to have asked her to have sex with him. *Id.* ¶¶ 41-44. He is also alleged to have described medical procedures he underwent in an obscene way and referred to plaintiff's "big pink nipples." *Id.* ¶¶ 55, 56. Plaintiff alleges she felt disrespected and degraded and became depressed, anxious, emotionally distraught and suffered from migraine headaches. *Id.* ¶ 51. Justice Shaw is also claimed to have said a number of disparaging things to her about dark-skinned African-American women, stating that he preferred women who were lighter-complected, such as Ms. Bland. ¶¶ 33-35. Shaw repeatedly asserted to plaintiff that he had the power to fire her, threatening her with the loss of her job if she did not acquiesce or if she complained.

Justice Shaw asks this court to assume, *arguendo*, the accusations of Ms. Bland are true and "since all of the plaintiff's [i.e. Bland's] grievances arise out of actions committed in the employment relation and in the course of regular working hours, it cannot be said that such acts are not within the purview of those for which Justice Shaw would be entitled to indemnification. . . ." (Plaintiff's Counsel Aff. at p. 5).

This court cannot emphasize how strongly it disagrees. Assuming the allegations to be true, it is clear that the acts complained of are outside the scope of employment and constitute an intentional tort for which indemnification will not lie. Our

courts have held that sexual assault or abuse perpetrated by an employee is not in furtherance of an employer's business and is a "clear departure from the scope of employment, having been committed for wholly personal motives." (*Judith M. v. Sisters of Charity Hospital*, 9 3 NY2d 932, 933 [1999]; see also *N.X. v. Cabrini Medical Ctr.*, 97 NY2d 247 [2002]); *Bowman v. State of New York*, ___ AD3d ___, 2004 WL 1900382 [1st Dept. 2004]. Moreover, Sexually motivated conduct uniformly has been characterized as "intentional". (See *Allstate Ins. Co. v. Mugavero*, 79 NY2d 153 [1992]; *Allstate Ins. Co. v. Oles*, 838 F.Supp. 46 [E.D.N.Y. 1993]). Thus in an analgous situation, the Appellate Division held that an insurance policy did not provide coverage against a claim of sexual harassment, where the policy limited coverage to acts within the scope of the employee's duties, because the intentional act of harassment was not within the scope of employment and did not advance the employer's interest. (*Somers v. Titan Indem. Co.*, 289 AD2d 563, 564 [2nd Dept. 2001]). Accordingly, and for the reasons set forth, plaintiff is not entitled to indemnification under Public Officers Law § 17. The motion of The Attorney General to dismiss the complaint is granted and the plaintiff's cross-motion for summary judgment is denied.

Moreover, this court deems the instant action as without merit and contrary to existing law and believes that it cannot be

supported by a reasonable argument for an extension, modification or reversal of existing law. The complaint and papers submitted by the plaintiff fail to elucidate, other than in conclusory terms, how sexually harassing a secretary might constitute acts "within the scope of his public employment or duties" as a judge as opposed to an "intentional wrongdoing" for entirely personal motives. The absence of any rational explanation as to how sexual harassment might constitute acts within the scope of employment leads the court to consider imposing sanctions on the plaintiff, in accordance with the Rules of the Chief Administrator, 22 NYCRR § 130-1.1, and only the absence of case law specifically on point warrants restraint. Accordingly it is

ORDERED that the complaint is hereby dismissed and the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/2/04

FILED
 'SEP 9 2004

Walter B. Tolub

CLERK OF THE COURT
 COUNTY OF ALBANY OFFICE

WALTER B. TOLUB, J.S.C.