Jencsik v Shanley
2013 NY Slip Op 33310(U)
December 24, 2013
Sup Ct, New York County
Docket Number: 151365/2012
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN **PART 7**
Justice

AMANDA JENCSIK,
Plaintiff,

- against -

JOHN PATRICK SHANLEY,
Defendant.

INDEX NO. 151365/12

MOTION SEQ. 002

The following papers were read on this motion by defendant to dismiss the amended verified complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Reply Affidavits — Exhibits (Memo)	4

Cross-Motion: ☐ **Yes** ■ **No**

Amanda Jencsik (plaintiff) commenced the herein action against John Patrick Shanley (defendant) to recover damages for battery, assault, and intentional infliction of emotional distress regarding incidents that arose out of a previous intimate relationship. Before the Court is a motion by the defendant, pursuant to CPLR 3211(a)(7) to dismiss the amended verified complaint for failure to state a claim regarding all three causes of action. Moreover, defendant maintains that the third cause of action for intentional infliction of emotional distress should be dismissed as duplicative. Plaintiff is in opposition to the motion. Discovery in this matter is not complete and the Note of Issue has not been filed.

BACKGROUND

This case arises from incidents occurring from January 2010 through August 2011. Plaintiff alleges she began corresponding with the defendant on the social networking site Facebook in or about October of 2009 (*see* Plaintiff's Amended Verified Complaint ¶ 6).

Plaintiff alleges that she was aware of defendant's recent screenplays, playwrights, and awards and looked to the defendant as a possible mentor (*id.* at 9). Plaintiff and defendant corresponded for months and began discussing meeting in person (*id.* at 10), and met twice in or about January 2010 in New York, New York (*id.* at 14, 17). At their first meeting, plaintiff and defendant met in front of a bar located in New York, New York and conversed for approximately two hours (*id.* at 14, 16). During their second encounter at dinner, plaintiff alleges defendant grabbed her and "kissed her on the mouth without her consent" (*id.* at 17-18). Plaintiff called a cab to take her home, and defendant extended an invitation for plaintiff to wait for an arriving cab at his residence, which plaintiff accepted, and at defendant's residence the parties engaged in sexual intercourse (*id.* at 19-22). The next day, defendant sent plaintiff a text message asking "Do you want to go out again and do everything that we did last time?" (*id.* at 23). On January 29, 2010, plaintiff and defendant arranged to meet at defendant's residence (*id.* at 24), where plaintiff alleges defendant appeared to be intoxicated when he arrived home late to meet her (*id.* at 27). Upon entering the elevator to defendant's home, plaintiff and defendant began to engage in intimate relations, when plaintiff asserts defendant began to have forcible anal intercourse with her, against her will and without her permission (*id.* at 29). Plaintiff contends she told defendant during the incident to stop, but defendant did not respect her request and continued the unwanted actions (*id.* at 30-32). After the incident plaintiff asserts that she told defendant his actions were against her will and had caused her pain (*id.* at 33). Plaintiff did not press criminal charges against the defendant (*id.* at 37).

After the abovementioned incidents, plaintiff and defendant continued to be involved with one another, which plaintiff details in the amended complaint, citing incidents occurring in or about April of 2010, February of 2011, and August of 2011 (*id.* at *in passim*). Plaintiff alleges that defendant continued to use force during sexual intercourse, including hitting and slapping plaintiff across the face and placing his hands over her neck and mouth, and continued to

engage in non-consensual sexual acts with plaintiff, including anal intercourse (*id.* at 40, 42-47). Due to defendant's behavior, plaintiff alleges the development of the following: bruises, severe pain in her stomach and anus, fear defendant was trying to kill her, night terrors, insomnia, loss of appetite leading to extreme weight loss, extreme paranoia and the subsequent diagnoses of constipation, obstruction within the bowel, and Post Traumatic Stress Disorder (*id.* at 49-52, 55, 61), leading plaintiff to incur over twenty thousand dollars in medical bills (*id.* at 63).

Plaintiff commenced this action by the filing of a summons and verified complaint on March 29, 2012, which she amended on May 31, 2012. In her amended complaint, plaintiff seeks monetary damages of no less than five million dollars against defendant for assault, battery, and intentional infliction of emotional distress.

Now before the Court is a motion by the defendant, pursuant to CPLR 3211(a)(7), to dismiss the amended verified complaint, including each of plaintiff's three causes of action with prejudice for failure to state a claim for relief. Defendant also moves to dismiss the third cause of action for intentional infliction of emotional distress on the basis that the allegation falls within the domain of the first two causes of action and is therefore "impermissibly duplicative."

In support of the motion, defendant argues that the first cause of action for assault should be dismissed because plaintiff does not present the proof necessary to sustain a claim for assault. Defendant maintains that plaintiff contradicts her position that she engaged in the subject behaviors out of "fear" of the defendant by repeatedly and voluntarily returning to interact with defendant and engaging in sexual behavior with him. Defendant maintains that plaintiff's actions, as described in the amended complaint, clearly show that plaintiff did not consider defendant's conduct to be harmful, and thus are inadequate to sustain a claim for assault. In regards to the second cause of action for battery, defendant argues plaintiff's claim is "incredible" in light of the totality of circumstances surrounding the alleged incidents. Defendant contends plaintiff could not have found defendant's conduct "offensive" or "wrongful"

since plaintiff returned to engage in sexual behavior with defendant multiple times, thus plaintiff does not satisfy the requirements to sustain a claim for battery. In regards to the third cause of action for intentional infliction of emotional distress defendant maintains plaintiff does not meet New York's requirements because anal intercourse does not qualify as "extreme and outrageous conduct." Moreover, plaintiff's claim for intentional infliction of emotional distress cannot be sustained since the alleged behavior falls within the ambit of the other torts alleged – assault and battery.

In opposition, plaintiff argues that defendant's motion to dismiss the amended verified complaint should be denied. In regards to the first cause of action for assault, plaintiff argues, *inter alia*, that the amended complaint established imminent apprehension of harmful conduct to sustain an actionable claim. Plaintiff maintains defendant was manipulative and intimidating, had control over plaintiff and debilitated her ability to escape the situation through mental and physical abuse, causing her to suffer from battered woman's syndrome. Moreover, plaintiff claims the alleged assault was intentional. In regards to the second cause of action for battery, plaintiff asserts that there transpired deliberate bodily contact between the parties, including hitting and the use of defendant's hands to restrain the plaintiff, the contact was deemed to be offensive or harmful by the plaintiff, and defendant was aware the contact was offensive. In regards to the third cause of action for intentional infliction of emotional distress, plaintiff maintains that defendant's conduct was sufficient to sustain this claim as the conduct was clearly extreme and outrageous, and included mental and physical abuse, intimidation, forceful and unwanted behavior, which caused plaintiff mental and physical injuries.

In reply, defendant, argues *inter alia*, that plaintiff repeatedly, knowingly, willingly, and voluntarily engaged in the alleged conduct and therefore defendant did not place her in imminent apprehension of harmful conduct, necessary for a claim of assault. Defendant asserts plaintiff must not have found the behavior "harmful" or "offensive," since she repeatedly,

and with sufficient time to reflect in between occurrences, agreed to see defendant and engage in the intimate behavior, actions defendant claims signaled her desire to continue the subject behaviors. Defendant raises issues in response to plaintiff's claim of battered woman's syndrome since plaintiff does not mention battered women's syndrome in the amended complaint nor is this claim supported by case law in this context. Defendant notes plaintiff has not satisfied all the elements for a claim of battery since the amended complaint shows plaintiff consented to the actions and behaviors at issue in this case. Defendant contends plaintiff's defense of the intentional infliction of emotional distress is inadequate, as plaintiff does not attempt to explain how the alleged conduct meets the high standard, or why this claim should survive in light of plaintiff's assault and battery claims.

MOTION TO DISMISS 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,..."

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiff's statements can *sustain* a cause of action, not whether the plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]). In doing so, the Court must "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 Reality Co.*, 98 NY2d 144, 151-152 [2002]; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 97 [1994]; *Wieder v Skala*, 80 NY2d 628 [1992]), as well as "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal

theory" (*Leon*, 84 NY2d at 87-88; *see Guggenheimer*, 43 NY2d at 275 ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *511 W. 232 Owners Corp.*, 98 NY2d at 152; *Sokoloff*, 96 NY2d at 414; *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 188 [1st Dept 1999] ["The opposing party needs only to assert facts which 'fit within any cognizable legal theory'"]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]). "It 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 v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]; *see also Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991]).

DISCUSSION

Pursuant to CPLR 215(3), claims of assault, battery and intentional infliction of emotional distress have a statute of limitations of one year (CPLR 215[3]; *see also Wende C v United Methodist Church, N.Y. W. Area*, 4 NY3d 293, 297 [2005] ["the claims of battery – arising from incidents of touching that occurred more than a year prior to commencement of this action – were time-barred"]; *Villanueva v Comparetto*, 180 AD2d 627, 629 [2d Dept 1992]). Since plaintiff filed the summons and verified complaint on March 29, 2012 and the amended complaint on May 31, 2012, of the four incidents alleged (in or about January 29, 2010, April 2010, February 2011, and August 2011), only the August 2011 incident is not barred by the one-year statute of limitations applicable to all three causes of action. Therefore, this Court will only consider plaintiff's claims in regards to the fourth and final incident alleged in the amended complaint.

"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]; *see Charkhy v Altman*, 252 AD2d 413, 414 [1st Dept 1998], quoting *United Natl. Ins. Co. v Waterfront N.Y. Realty Corp.*, 994 F.2d 105, 108 [2nd Cir. 1993] ["A civil assault 'is an intentional placing of another person in fear of imminent harmful or offensive contact'"]). Words unaccompanied by an act or gesture are generally not sufficient to sustain a claim of assault (*Gould v Rempel*, 99 AD3d 759, 760 [2d Dept 2012]).

The Court finds that plaintiff's assault claim, arising from the incident occurring in or about August 2011, must be dismissed. In light of the previous relationship between parties outlined in the amended verified complaint, plaintiff has contradicted any potential claim of imminent apprehension of harmful conduct. Plaintiff voluntarily accepted defendant's invitation to dinner in or about August 2011, roughly six months after their last encounter (Amended Verified Complaint at 56). Plaintiff claimed she was afraid of defendant after the original unwanted conduct occurred in or about January 29, 2010, and defendant "intimidated" plaintiff by stating "he was an ex-Marine, and that he could find out any information through Google and internet resources" and talking about past relationships (*id.* at 37-39). However, plaintiff did not allege behavior occurring within the statute of limitations that would have put her in an imminent apprehension of harmful contact necessary for a claim of assault (*see Cecora v De La Hoya*, 106 AD3d 565, 566 [1st Dept 2013] ["plaintiff's assertion that she was placed in imminent apprehension of harmful contact by defendant's sexual advances was contradicted by the allegations of the complaint"]). Defendant's post-intercourse conversation with plaintiff in or about August 2011 in which plaintiff claims defendant asked "Have you told anyone about what happened?" is not enough to sustain a claim of assault (*Gould*, 99 AD3d at 760 ["words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault"]). While plaintiff does claim defendant "forced this 'type of

intercourse'" on her (Amended Complaint at 56), plaintiff voluntarily agreed to go to dinner with defendant and return to his apartment afterwards fully aware of the activity they had engaged in during previous encounters. Furthermore, consent bars recovery for assault claims (14 N.Y. Prac., New York Law of Torts § 1:18). Plaintiff's repeated acquiescence to meeting up with defendant and engaging in the alleged unwanted behavior, despite the incident that occurred in or about January 29, 2010, can be seen as consent (*id.*). Moreover, the Court is not persuaded by plaintiff's allegation in opposition to defendant's motion that she is a victim of battered woman's syndrome, as she does not allege this claim in her complaint, nor does she meet the criteria for this syndrome.

A claim for battery requires "intentional wrongful physical contact with another person without consent" (*Charkhy*, 252 Ad2d at 414; *see Wende C*, 4 NY3d at 298 ["A valid claim for battery exists where a person intentionally touches another without that person's consent"]). The resulting injury can be unintentional, accidental, or unforeseen, however intentional physical contact without consent must be proved (*Tower Ins. Co. of N.Y. v Old N. Blvd. Rest. Corp.*, 245 AD2d 241, 242 [1st Dept 1997]; *Villanueva*, 180 AD2d at 629) and the intended contact must be itself "'offensive,' i.e., wrongful under all the circumstances'" (*Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 35 [1st Dept 2001], quoting *Zgraggen v Wilsey*, 200 AD2d 818, 819 [3d Dept 1994]; *Zgraggen*, 200 AD2d at 819 ["Lack of consent on the part of plaintiff is an element to consider in determining whether the contact was offensive, but it is not...conclusive"]).

In regards to plaintiff's battery claim arising from the incident occurring in or about August 2011, plaintiff's complaint does not support all conditions necessary to sustain the claim. While plaintiff has presented sufficient evidence to satisfy the necessary requirement of intentional physical contact with the plaintiff, by looking at the allegations of the complaint in light of the full circumstances surrounding the encounter plaintiff has not, and cannot, prove

that the intentional contact was "wrongful" or "offensive" (*Messina*, 284 AD2d at 35). To be considered "offensive" the alleged contact must be "wrongful under all the circumstances" (*id.*). As previously stated, plaintiff voluntarily agreed to attend dinner with defendant and return to his apartment in or about August 2011 (Amended Verified Complaint at 56), in spite of the previous three alleged incidents of unwanted conduct and contact in or about January 29, 2010 to February 2011. In light of the past relationship between plaintiff and defendant, the "type of intercourse" (*id.*) committed by both parties in or about August 2011 is not "wrongful under all the circumstances" (*Cecora*, 106 AD3d at 566; *Messina*, 284 AD2d at 35). Furthermore, as with assault, lack of consent is a necessary condition to a cause of action for battery (14 N.Y. Prac., New York Law of Torts § 1:18). Plaintiff's actions in voluntarily agreeing to go to defendant's apartment and engage in the alleged activity show a sufficient form of consent necessary to negate a claim of battery. As such, plaintiff's claim for battery is dismissed.

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability" (Restatement [Second] of Torts § 46; *see Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). "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]). The Court of Appeals stated in *Howell* that "every [claim for intentional infliction of emotional distress considered by this Court] has failed because the alleged conduct was not sufficiently outrageous" (81 NY2d at 122; *see also Cecora*, 106 AD3d at 566 ["plaintiff [did not] allege conduct that approaches the level of outrageousness or extremity necessary to support [the] claim"]; *Lapidus v New York City Ch. of the N.Y. State Assn. for Retarded Children*, 118 AD2d

122, 129-130 [1st Dept 1986]). "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; *see also Freihofer*, 65 NY2d at 143; *Murphy*, 58 NY2d at 303).

The Court finds that plaintiff's description of the incident occurring in or about August 2011 does not meet the strict requirements necessary to state a cause of action for intentional infliction of emotional distress. Plaintiff fails to establish the first of four required elements to sustain this cause of action, as plaintiff cannot claim or prove that "extreme and outrageous conduct" occurred (*see Cecora*, 106 AD3d at 566). While the conduct of the defendant alleged in the complaint may be seen as immoral or ghastly to many, it does not meet the strict standard necessary to be considered "extreme and outrageous" or "utterly intolerable in a civilized community" by the courts (*see Howell*, 81 NY2d at 122; Restatement [Second] of Torts § 46; *see generally People v Onofre,* 51 NY2d 476, 490 [1980] ["the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public. . . will serve to advance the cause of public morality . . . There has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct"]). As plaintiff cannot establish the first element, her entire claim for intentional infliction of emotional distress must be dismissed.

CONCLUSION

Accordingly, it is

ORDERED the 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 the defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/24/13 **Enter:**

PAUL WOOTEN J.S.C.

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

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