Zheng v Rivera
2014 NY Slip Op 33217(U)
December 9, 2014
Supreme Court, New York County
Docket Number: 157108/14
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MAO KAI ZHENG,

Plaintiff,

- against -

CIRILO BRAVO RIVERA,

Defendant.

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Index No. 157108/14

Mot. seq. nos. 001, 002

DECISION AND ORDER

BARBARA JAFFE, J.:

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Defendant moves pursuant to CPLR 3211(a)(7) to dismiss the complaint, which plaintiff opposes. Plaintiff also moves pursuant to CPLR 3025(b) for leave to amend his complaint, which defendant opposes. The motions are consolidated for disposition.

I. BACKGROUND

On July 21, 2013, defendant, plaintiff's employee, allegedly sent plaintiff via text message a photograph of himself "wearing a frightening mask with the image of a grinning skull, had a gun slung across his body, and was holding up a sign reading 'Zheng Mao Kai you're next.'" (NYSCEF 3). Thereafter, plaintiff terminated defendant's employment. (NYSCEF 3, 17). On November 7, 2013, defendant commenced an action against plaintiff in the Southern District of New York for alleged violations of the Fair Labor Standards Act. (NYSCEF 11).

On or about July 21, 2014, plaintiff commenced this action. (NYSCEF 1). In his first

cause of action, for assault, plaintiff alleges that the photograph sent by defendant placed him in imminent apprehension of harmful contact and in fear for his safety. In his second cause of action, for intentional infliction of emotional distress, plaintiff alleges that sending the photograph was extreme and outrageous, that it was carried out with the intent to cause or in disregard of a substantial likelihood of causing him severe emotional distress, and that it caused him to fear for his and his family's safety, to lose sleep, and to suffer anxiety. Plaintiff also alleges that whenever he disciplined defendant for work infractions, defendant threatened and cursed at him. (NYSCEF 3).

By affidavit dated September 8, 2014, plaintiff alleges that on or about August 13, 2013, defendant displayed a long sushi knife "and threatened [him] by telling [him] to watch out and be careful," that on or about August 19, 2013, defendant again texted the photograph referenced in the complaint, and that on his last day of work, defendant pushed him and leveled at him a racial slur. (NYSCEF 17).

By notice of motion dated October 17, 2014, as the motion to dismiss is *sub judice,* plaintiff seeks leave to amend his complaint. In his proposed amended complaint of the same date, plaintiff pleads the events recounted in his September affidavit, adding that on September 28, 2013, defendant pushed and leveled at him a racial slur. He asserts causes of action for assault and intentional infliction of emotional distress arising from these incidents (NYSCEF 23), and submits an affidavit dated October 17, 2014, attesting to the merits of the amendment (NYSCEF 21).

II. MOTION TO DISMISS

A. Contentions

Defendant denies that the conduct as alleged in the complaint could have placed plaintiff in imminent apprehension of harmful contact as the electronic transmission of a photograph from a remote location does not constitute physical conduct. He thus argues that plaintiff has failed to state a cause of action for assault. Defendant also claims that plaintiff's cause of action for intentional infliction of emotional distress fails absent a longstanding campaign of harassment, and that the purported fear for his safety is belied by his failure to report the alleged incident to law enforcement and by his continued employment of defendant thereafter. In defendant's view, plaintiff's action constitutes an attempt to discourage him from prosecuting his action against plaintiff. (NYSCEF 11).

Plaintiff, in opposition, asserts that the sending of the photograph constitutes a menacing gesture, and maintains that the allegations he set forth in his September 2014 affidavit remedy any defects in his complaint, support his cause of action for assault, and comprise a longstanding campaign of harassment sufficient to state a cause of action for intentional infliction of emotional distress. (NYSCEF 16).

In reply, defendant asserts that the events described by plaintiff in his affidavit are time-barred, and as they concern conduct separate and apart from the incident alleged in the complaint, do not relate back to the claims previously advanced. Defendant also alleges that plaintiff fails to provide sufficient detail concerning the incident occurring on plaintiff's last day of work, and thus, that claim is deficient. (NYSCEF 18).

Even if the September 2014 affidavit is considered, defendant denies that plaintiff has

pleaded an assault or an intentional infliction of emotional distress. (*Id.*).

B. Analysis

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept all the alleged facts as true, and accord the non-movant every possible inference, ascertaining only whether the allegations fall within any cognizable theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994], *see also* CPLR 3026 [pleading to be construed liberally]).

1. Assault

A person assaults another person when he intentionally places the other person in apprehension of imminent harmful or offensive contact. (*Gould v Rempel*, 99AD3d 759, 760 [2d Dept 2012]). A threat of future force does not constitute an assault. In *Silver v Kuehbeck*, the defendant said to the plaintiff, "I'm going to have you taken care of," as he walked away from the plaintiff. The court held that the conduct did not qualify as an assault, absent a suggestion of imminent harmful contact. (2005 WL 2990642, at *13, NYLJ, Nov. 21, 2005 [SD NY 2005], *affd on other grounds* 217 Fed Appx 18 [2d Cir 2007]). "[I]f the parties are so far apart as to make immediate contact impossible, there is no assault." (NY Pattern Jury Instr. Civil 3:2, Comment, *citing Roller v Frankel*, 14 AD2d 971 [3d Dept 1961], *and Clayton v Keeler*, 18 Misc 488, 495 [Sup Ct, New York County 1896]). Thus, telephoned threats and those made over the Internet do not suffice to constitute a valid claim for assault. (14 NY Prac, New York Law of Torts § 1:4).

Liberally construing the pleading here, accepting all facts alleged as true, and according

plaintiff every possible inference in this case yields the conclusion that although the text message contains a threat and menacing image, the lack of imminence precludes a cause of action for assault (*see Cloeter v Cloeter*, 17 Neb App 741 [Ct App 2009] [text message containing letters combined to spell out "behead" did not, by physical menace, place victim in fear of imminent bodily injury]).

2. Intentional infliction of emotional distress

The elements of a cause of action for intentional infliction of emotional distress are: 1) extreme and outrageous conduct, 2) with the intent, or disregard of a substantial likelihood, of causing severe emotional distress, 3) a causal connection between the conduct and injury, and 4) severe emotional distress. (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). "The conduct must be 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." (*Id.*, at 122). Allegations of mere threats, no matter how upsetting, are insufficient. (Kreindler et al., New York Law of Torts § 1:38 [14 West's Prac Series 2014]; *Owen v Leventritt*, 174 AD2d 471 [1st Dept 1991], *lv denied* 79 NY2d 751). To survive dismissal, the plaintiff must allege facts demonstrating a campaign of intolerable conduct. (*See Nader v Gen. Motors Corp.*, 25 NY2d 560, 569 [1970]; *164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004], *lv denied* 2 NY3d 793; *Seltzer v Bayer*, 272 AD2d 263, 264-265 [1st Dept 2000]).

The high bar imposed on one seeking recovery for this tort is expressed in *Seltzer v Bayer*. There, the plaintiff alleged that the defendant "dumped a pile of cement on the sidewalk in front of his house, tossed lighted cigarettes into his backyard, threw eggs on his front steps,

and threatened once to paint a swastika on his house." (272 AD2d at 265). The Court found that this evidence was not outrageous, observing that the threshold of outrageousness "is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, 'every one has failed because the alleged conduct was not sufficiently outrageous.'" (*Id.* at 264).

Here, plaintiff identifies a single incident in his complaint, the transmission of a threat and a threatening image. While fearful, the conduct is neither sufficiently extreme nor outrageous, nor is there alleged a campaign of harassment. (*See Marmelstein v Kehilat New Hempstead*, 11 NY3d 15 [2008] [spiritual leader's 3-½ year sexual relationship with congregant not sufficiently extreme and outrageous]; *Cenzon-Decarlo v Mount Sinai Hosp.*, 101 AD3d 924, 927 [2d Dept 2012], *lv denied*, 21 NY3d 858 [2013] [supervisor compelling plaintiff-nurse to assist in performance of abortion over her known religious objections not sufficiently extreme and outrageous]; *Baumann v Hanover Community Bank*, 100 AD3d 814, 816 [2d Dept 2012] [defendant bank's refusal to fund loan commitment it had issued to plaintiff after learning of plaintiff's wife's death not sufficiently extreme and outrageous]; *Suarez v Bakalchuk*, 66 AD3d 419 [1st Dept 2009] [doctor's use of vulgar language on discharge form in stating treatment prescribed, "while extremely offensive and bizarre," insufficiently outrageous]; *Owen*, 174 AD2d at 471 [defendant's exclamation that "she would have no alternative but to kill" plaintiff not sufficiently extreme or outrageous, nor was it evidence of malicious campaign of harassment or intimidation]).

In the authority cited by plaintiff, courts declined to dismiss claims where the plaintiffs alleged repeated instances of intolerable conduct. (*See Shannon v MTA Metro-N.R.R.*, 269 AD2d

218, 219 [1st Dept 2000] [plaintiff provided "detailed allegations that defendants intentionally and maliciously engaged in a pattern of harassment, intimidation, humiliation and abuse, causing him unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years"]; *Warner v Druckier*, 266 AD2d 2, 3 [1st Dept 1999] [defendants alleged to have deliberately, systematically, and maliciously harassed plaintiff over years, injuring him in his capacity as tenant]; *Bunker v Testa*, 234 AD2d 1004 [4th Dept 1996] [yelling, gesturing obscenely, following plaintiff home and refusing to leave the premises, following plaintiff's children and family and telling plaintiff that he knew where children went to school and when they got out of school]).

3. Plaintiff's affidavit

Pursuant to CPLR 3013 "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved . . . ." A pleading must convey the nature of the claim and the relief sought. (*Shapolsky v Shapolsky*, 22 AD2d 91, 91 [1st Dept 1964]; *see also* Siegel, NY Prac § 208 [5th ed 2014]). Where the pleading is defective for being insufficiently particular and giving insufficient notice of the transactions or occurrences, the plaintiff's sole remedy is a motion for leave to amend the pleading. (*See* Connors, Practice Commentaries, McKinney's Cons Law of NY, CPLR C3013:12).

Here, plaintiff does not cross-move for leave to amend his pleading. Instead, in opposition to defendant's motion, he offers new claims relating to events occurring after those set forth in the complaint, thereby circumventing the pleading requirements set forth above. (*Cf. Bibbo v 31-30 LLC*, 2011 NY Slip Op 32506[U] [Sup Ct, Nassau County 2011], *affd* 105 AD3d

791 [2d Dept 2013] [plaintiff could not circumvent statute of limitations defense by failing to plead when damages incurred, thereby rendering it unclear if his claim was time-barred]). And, although a time-barred claim may be properly pleaded when it relates back to a previously and timely asserted claim (CPLR 203[f]), plaintiff does not offer a pleading. Instead, he advances new allegations in his affidavit, which he cannot do here. (*Cf. Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998] [a plaintiff may submit affidavits for limited purpose of remedying defects in complaint to preserve inartfully pleaded, and potentially meritorious claims]).

III. MOTION FOR LEAVE TO AMEND

A. Contentions

Plaintiff now moves for leave to amend, asserting that he seeks to expand on, and provide additional instances of, defendant's menacing acts and gestures pleaded in the complaint, thereby providing defendant with notice of the additional incidents that relate back to the complaint. He claims that because defendant did everything as alleged, defendant has knowledge of it and is thus neither prejudiced nor surprised by the proposed amended complaint. (NYSCEF 22).

In opposition, defendant alleges that in his proposed amendment, plaintiff describes discrete events that occurred more than a year before filing the complaint, and arise from conduct that is distinct from the single incident underlying the causes of action set forth in the original complaint. As plaintiff advances new claims based on different conduct, defendant denies that they relate back. He also disputes plaintiff's claim to have suffered emotional distress from incidents not initially pleaded, having continued to employ defendant and never contacting law enforcement. Defendant maintains that the new allegations do not state a claim for assault absent any accompanying menacing gesture, and asserts that four incidents over two months is not

sufficiently longstanding. (NYSCEF 24).

In reply, plaintiff claims that his affidavit of merit demonstrates that his amendment is not patently without merit, and maintains that the occurrences now alleged amplify his allegation in the original complaint that defendant cursed at and threatened him, and that the text of the photograph on July 21 is one example. Plaintiff also observes that defendant does not allege prejudice or surprise, which, in his view, shows that defendant was on notice of the new allegations. (NYSCEF 28).

B. Governing law

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted, at any time, absent prejudice or surprise. (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). The motion must be supported by an affidavit of merits. (*Zaid Theatre Corp v. Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A court should deny an amendment that cannot withstand a motion to dismiss. (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York,* 98 NY2d 314 [2002]). Leave should be denied if the amendment is patently without merit or palpably insufficient. (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]).

A party may not amend a time-barred cause of action (*see Shefa Unlimited, Inc. v Amsterdam & Lewinter*, 49 AD3d 521 [2d Dept 2008]), and courts have no discretion to overlook statutes of limitation (*see Arnold v Mayal Realty Co.*, 299 NY 57, 60 [1949]; *Liberty Mut. Ins. Co. v Mohabir*, 115 AD3d 413 [1st Dept 2014]). However, pursuant to CPLR 203(f)

> a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading.

This statute permits a party to correct omissions in a complaint and add a new claim, provided that the original complaint affords notice of the transactions and occurrences alleged in the amendment. (*Buran v Coupal*, 87 NY2d 173 [1995]; *see also Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]).

Notice of the occurrences in the original complaint must enable the defendant to undertake a defense to the newly alleged claims (*Johnson v Phillips*, 115 AD2d 299, 299-300 [4th Dept 1985]), to "motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation" (*Giambrone*, 10 AD3d at 548, *citing* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C203:11; *see also Hyacinthe v Edwards*, 10 AD3d 629, 631 [2d Dept 2004] [prior pleadings must fairly apprise opponent of need to defend against new allegations]). It is the movant's burden to establish that his claims relate back to the original complaint. (*Rivera v Fishkin*, 48 AD3d 663, 664 [2d Dept 2008]).

A cause of action for assault or intentional infliction of emotional distress must be commenced within one year of the date of the plaintiff's injury. (CPLR 215[3]; *Palker v MacDougal Rest. Inc.*, 96 AD3d 629, 630 [1st Dept 2012]; *Wilson v Erra*, 94 AD3d 756, 756 [2d Dept 2012]; *Schultes v Kane*, 50 AD3d 1277, 1278 [3d Dept 2008]).

C. Analysis

In his proposed amended complaint, the causes of action for assault and intentional

infliction of emotional distress are predicated not only on the July 21 text, but also on the three newly alleged incidents: defendant's alleged threat and display of a knife, a second text duplicating the first, and the incident of pushing and slurring. As the three incidents are alleged to have occurred more than a year before October 17, 2014, when plaintiff filed this motion, the causes of action arising therefrom are viable only if they relate back to the original complaint that is predicated solely on the July 21 text. While plaintiff also alleged in the complaint that defendant had responded to discipline by cursing at and threatening him, he offered no detail, nor did he seek relief based on that conduct. Consequently, he provided no notice to defendant sufficient to give him reason to anticipate having to defend against claims arising from the three newly alleged incidents. Thus, the causes of action arising from the three incidents are time-barred. (*Matter of Carvel v Davis*, 307 AD2d 964, 964-965 [2d Dept 2003] [general demand for compensation in original pleading too vague to provide sufficient notice of cross claim for payment of commissions]; *Infurna v City of New York,* 270 AD2d 24 [1st Dept 2000] [new negligent hiring claim did not relate back to prior allegations of negligent maintenance of bed rails, in which plaintiff did not allege that defendant was aware its employees had propensity for violence]; *Roe v Barad*, 267 AD2d 221 [2d Dept 1999] [prior pleading in which plaintiff asserted causes of action arising from defendant's guilty plea to a single count in a 16-count indictment, which she attached to pleading, failed to provide sufficient notice that she was seeking damages from defendant based on all transactions alleged in indictment; to allow new claims to relate back would unreasonably expand reach of CPLR 203(f)]; *Monaco v New York University Medical Center*, 213 AD2d 167 [1st Dept 1995], *lv denied* 86 NY2d 882 [plaintiff's original claims for medical malpractice and lack of informed consent arising from hospital's alleged

misrepresentation concerning blood transfusion did not state circumstances constituting fraud claim sufficient to afford hospital notice]).

The authority cited by plaintiff is distinguishable. In *Duffy v Horton Mem. Hosp.*, the Court of Appeals held that a medical-malpractice plaintiff's direct claim against a third-party defendant related back to the third-party complaint, where claims in both pleadings arose from the same occurrence. The Court observed that the third-party defendant was already defending against these same allegations, and was previously served with plaintiff's original complaint pursuant CPLR 1007, and was therefore on notice of her potential direct claim. (66 NY2d 473 [1983]). Here by contrast, defendant was never notified of the occurrences plaintiff now seeks to prove. In *Pendleton v City of New York, supra*, the plaintiff's civil rights claim was held to have related back to his original negligent training claim, as they both arose from the same transactions at issue. (44 AD3d at 737). Here, plaintiff's allegation that defendant threatened and cursed at him was gratuitously included in the complaint, and did not serve as a predicate for either cause of action.

Amendments were also held to have related back to original complaints in *Omni Group Farms, Inc. v County of Cayuga*, and in *Citibank (N.Y. State), N.A. v Suthers,* even though the complaints contained additional facts. There, the claims arose from the same series of occurrences in the complaints. (199 AD2d 1033, 1035 [4th Dept 1993]; *Suthers*, 68 AD2d 790, 796 [4th Dept 1979]). Here, however, plaintiff seeks relief based on occurrences that are not previously identified.

To claim that the defendant obtained notice by virtue of his own conduct and then arguing that the defendant is thus neither surprised nor prejudiced by new allegations based on that

conduct borders on the frivolous, and is contrary to the rationale behind statutes of limitation. (*See Duffy,* 66 NY2d at 476 [limitation period ensures defendant will not be called on to resist old claims]; *Shapiro v Schoninger*, 122 AD2d 38, 40 [2d Dept 1986] [notice of occurrences alleged in amendment must be effectuated by prior pleading; actual notice immaterial]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Cirilo Bravo Rivera to dismiss the complaint of plaintiff Mao Kai Zheng is granted in its entirety; it is further

ORDERED, that plaintiff's motion for leave to amend his complaint is denied in its entirety; it is further

ORDERED, that the complaint is dismissed in its entirety; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: December 9, 2014
New York, New York