Colindres v Carpenito

2015 NY Slip Op 32685(U)

September 17, 2015

Supreme Court, Westchester County

Docket Number: 56312/2015

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROCHELLE COLINDRES,

Plaintiff,

-against-

MARIO CARPENITO, JR., WHITE PLAINS DEPARTMENT OF PARKING, and CITY OF WHITE PLAINS,

Defendants.

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DECISION and ORDER
Sequence Nos. 1 & 2
Index No. 56312/2015

CONNOLLY, J.

The following papers were considered in connection with: (1) the motion of the defendants White Plains Parking Department and the City of White Plains to dismiss the complaint insofar as asserted against them; and (2) the cross motion of the defendant Mario Carpenito, Jr., to dismiss the complaint insofar as asserted against him:

City's notice of motion, affirmation, exhibits, memo of law	1-6
Carpenito's notice of motion, affirmation, exhibits	7-10
Plaintiff's affirmation in opposition, exhibits	11-16
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The plaintiff commenced this action to recover damages she allegedly sustained as a result of a November 19, 2014 interaction with the defendant Mario Carpenito, Jr. (hereinafter Carpenito), a parking enforcement officer employed by the defendant City of White Plains, also sued herein as the defendant White Plains Parking Department (hereinafter collectively the City).

The complaint alleges that Carpenito issued a parking citation to the plaintiff and, thereafter, made statements of a sexual nature to her of a harmful and/or offensive nature, causing her to suffer severe emotional distress, mental trauma, and anguish. The plaintiff asserts four causes of action: (1) assault against both defendants; (2) intentional infliction of emotional distress against Carpenito; (3) negligent hiring, retention, and supervision of Carpenito "despite notice of his propensity to sexually harass members of the public and/or abuse his power as a public employee ;" and (4) for a violation of her civil rights pursuant to 42 USC § 1983.

At a hearing pursuant to General Municipal Law § 50-h, the plaintiff testified that, on the day in question, she parked her car in a metered space in front of a store on East Post Road in White Plains. When she exited the store, Carpenito, who was wearing a White Plains parking enforcement officer's uniform, was standing by the driver's side of her car printing a citation. The plaintiff yelled at Carpenito and asked him to cut her some slack. Carpenito stated that he was only giving her a twenty dollar parking ticket and not a one-hundred dollar ticket for her vehicle's inspection. After some banter, Carpenito stated that the plaintiff's boyfriend should take care of the ticket and then asked the plaintiff how old her boyfriend was. When the plaintiff replied that her boyfriend was twenty years old, Carpenito stated that she should be dating older men. Then, the defendant stated that he could do her a favor and that "he could take care of [her] if [the plaintiff] could take care of him." He stated, "I'll scratch your back if you scratch mine." Another Parking Enforcement Officer in a truck pulled up to the scene and told Carpenito to "leave that poor girl alone." After the other officer left, Carpenito told the plaintiff that he wanted her to perform oral sex on him ten times. The plaintiff stated that she would rather pay the ticket and asked, "how much is all this worth?" Carpenito responded that it was worth two-hundred fifty dollars, that he would give her an allowance, that they would become friends, that he would get rid of the parking ticket, that he would pay to have her tire fixed, for her vehicle inspection, and get rid of her other tickets. Carpenito then offered to give the plaintiff his phone number and the plaintiff, feeling "freaked out," gave her number to Carpenito. The plaintiff then went back into the store. Less than an hour later, Carpenito called the plaintiff and sent her text messages. Later that day, the plaintiff called Carpenito and recorded her conversation with him. That night, the plaintiff decided to go to the police and report the incident. The plaintiff learned that Carpenito was arrested two days later.[1] The plaintiff testified that she suffered no physical injuries, but has seen a therapist and suffered insomnia, depression, and anxiety since the incident.

The City now moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it for failure to state a cause of action. Carpenito separately cross-moves to dismiss pursuant to CPLR 3211 (a) (7). The plaintiff opposes both motions.

For the reasons that follow, the motions are granted in part.

1. <u>The assault cause of action is dismissed</u>

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Bastein v Sotto*, 299 AD2d 432, 433 [2d Dept 2002]). Accepting the facts as alleged in the complaint as true and according the plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the allegations that Carpenito propositioned the plaintiff for sex and offered to pay her and/or make her parking tickets go away are insufficient to establish that Carpenito placed her in imminent apprehension of harmful contact (*see Gould v Rempel*, 99 AD3d 759, 760 [2d Dept

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[1] In her opposition papers, the plaintiff asserts that Carpenito later pled guilty to the crime of receiving unlawful gratuities (*see* Penal Law § 200.35) and was forced to resign from the White Plains Parking Department.

2012] ["words, without some menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault"]; NY PJI 3d 3:2 [Assault], Comment ["to request that a person engage in sexual intercourse is not an assault . . . but to state an intention to kiss someone and to move toward him or her in an apparent attempt to do so may constitute an assault"]). Accordingly, the first cause of action alleging assault is dismissed.

2. The intentional infliction of emotional distress cause of action is dismissed[2]

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2d Dept 2012]). "The subject 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.* [internal quotation marks omitted]). "Furthermore, conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress" (*id.* at 711).

Here, while Carpenito's alleged conduct is morally reprehensible, the plaintiff's allegations are insufficient to allege outrageous and extreme conduct (*see Shea v Cornell Univ.*, 192 AD2d 857, 858 [3d Dept 1993] ["It is alleged that these defendants permitted crude and offensive statements of a sexually derisive nature to occur in the workplace and, in effect, participated therein. While such conduct is unacceptable and socially repugnant . . . it does not rise to the level of an atrocity and, accordingly, the fourth cause of action [for intentional infliction of emotional distress] was properly dismissed"]; *see also Nelson v Vigorito*, 121 AD3d 872, 873 [2d Dept 2014] [where plaintiff alleged that the defendant "propositioned her repeatedly in crude and vulgar terms, and touched her inappropriately," her cause of action to recover damages for intentional infliction of emotional distress was properly dismissed]). Accordingly, the second cause of action alleging intentional infliction of emotional distress is dismissed.

3. The complaint states a cause of action for negligent hiring, retention, and supervision against the City

"A necessary element of a cause of action alleging negligent retention or negligent supervision is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654 [2d Dept 2008]). Here, accepting the facts as alleged in the complaint as true and according the plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint states a cause of action against the City to recover damages for negligent hiring, retention, and supervision of Carpenito, as the complaint specifically alleges that the City employed him despite "notice of his propensity to sexually harass members of the public and/or abuse his power

[2] In the plaintiff's opposition papers, she clarifies that this cause of action is asserted only against Carpenito.

as a public employee," and that its negligence caused her injuries (*see Bumpus v New York City Tr. Auth.*, 47 AD3d at 654; *see also Kenneth R. v Roman Catholic Diocese*, 229 AD2d 159, 162 [2d Dept 1997] ["There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity"]). Contrary to the City's contention, a cause of action for negligent supervision does not rely on the existence of an underlying viable cause of action, as the duty to supervise is not a vicarious theory of liability, but is premised upon a duty owed directly by the employer to the third person (*see generally* 53 NY Jur Employment Relations § 406 ["[negligence supervision] on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior"]).

4. <u>The section 1983 cause of action is dismissed insofar as asserted against the City</u>

As an initial matter, the plaintiff's 42 USC § 1983 cause of action is dismissed insofar as asserted against the City, as the plaintiff has failed to allege a deprivation of constitutional rights caused by an official policy or practice (*see Monell v Dep't of Soc. Servs.*, 436 US 658, 690 [1978] ["Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"]; *Adickes v S. H. Kress & Co.*, 398 US 144, 167-168 [1970] [practices are actionable pursuant to section 1983 where, "[a]lthough not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law"]; *see also Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]).

However, as against Carpenito, the plaintiff need not allege that his conduct occurred pursuant to an official custom or practice, but only that he violated a federally protected right under color of state law (*see Coleman v Daines*, 79 AD3d 554, 564 [1st Dept 2010] ["In order to state a claim under 42 USC § 1983, a petitioner must allege conduct, by a person acting under color of law, that deprives the injured party of a right, privilege, or immunity guaranteed by the Constitution or the laws of the United States" (internal quotation marks omitted)], *aff'd* 19 NY3d 1087 [2012]).

Here, the plaintiff has sufficiently alleged that Carpenito's harassment, committed in uniform, in attempting to coerce the plaintiff to engage in sex acts in exchange for fixing her parking tickets violated her federally protected due process rights. "[A person] has a constitutional right not to be compelled to commit sexual acts by a government actor" (*Richardson v City of New York*, 2006 US Dist LEXIS 92731, *48 [SDNY 2006] [finding issues of fact as to whether probation officer's sex with the plaintiff constituted a violation of section 1983]). Accordingly, as no person should feel compelled to negotiate with an officer of the law as to whether they should receive a citation in exchange for performing a sexual act, the Court finds that the plaintiff has stated a cause of action pursuant to 42 USC § 1983 against Carpenito in his individual capacity.

Based upon the foregoing, it is hereby,

ORDERED that the branches of the motion of the defendants White Plains Parking Department and the City of White Plains which are to dismiss the first and fourth causes of action (assault and 42 USC § 1983) insofar as asserted against them are granted, and the motion is otherwise denied; and it is further

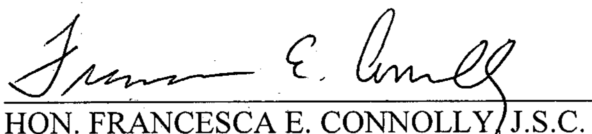
ORDERED that the branches of the motion of the defendant Mario Carpenito, Jr., to dismiss the first and second causes of action (assault and intentional infliction of emotional distress) are granted, and the motion is otherwise denied; and it is further

ORDERED that the parties appear in the Preliminary Conference Part on October 19, 2015 at 9:30 a.m., in Room 811 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 17, 2015



HON. FRANCESCA E. CONNOLLY, J.S.C.

TO: Sanocki Newman & Turret, LLP
Attorneys for the plaintiff
225 Broadway, 8th Floor
New York, NY 10007
By NYSCEF

Hodges Walsh & Messemer, LLP
Attorneys for the defendant Mario Carpenito, Jr.
55 Church Street, Suite 211
White Pains, NY 10601
By NYSCEF

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for the defendants White Plains Parking
Department and the City of White Plains
1133 Westchester Ave.
White Plains, NY 10604
By NYSCEF