Mullen v Wishner
2017 NY Slip Op 31675(U)
August 8, 2017
Supreme Court, Suffolk County
Docket Number: 08-28687
Judge: Joseph Farneti
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SHORT FORM ORDER

COPY

INDEX No. 08-28687
CAL. No. 16-01775OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-16-17
ADJ. DATE 3-16-17
Mot. Seq. # 014 - MotD

ALLISON MULLEN,

Plaintiff,

- against -

STEVEN G. WISHNER and HUNTINGTON MEDICAL GROUP,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment and to correct pleading; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 25 ; Replying Affidavits and supporting papers 26 - 28 ; Other affidavit in support 16 - 18; it is,

ORDERED that the motion by the defendant Huntington Medical Group for, among other things, an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is granted to the extent that the second and third causes of action are dismissed, and the language in the first cause of action alleging a violation of the Human Rights Law is stricken, and is otherwise denied.

The plaintiff commenced this action to recover, among other things, for personal injuries arising out of alleged medical malpractice and civil assault when the defendant Steven G. Wishner ("Wishner")

allegedly improperly and inappropriately performed a physical examination of her. It is undisputed that Wishner was an employee of the defendant Huntington Medical Group ("HMG") at the time, and that the physical examination took place at the offices of HMG. The plaintiff alleges that Wishner made unnecessary, unwanted and improper contact with her in a manner that would not have occurred during a proper examination, and that he had her stand on a footstool completely naked for five to ten minutes while speaking to her.

The plaintiff commenced this action by the filing of a summons and complaint dated July 11, 2008, which contained three causes of action. Thereafter, the plaintiff moved to amend the complaint to add four additional causes of action. Wishner cross-moved, among other things, to dismiss the complaint as time-barred, and HMG cross-moved for summary judgment dismissing the complaint. By Order dated October 13, 2011, this Court granted the plaintiff's motion, granted Wishner's cross motion only to the extent of dismissing the cause of action for civil assault in the original complaint as untimely, and denied HMG's cross motion as procedurally defective because it failed to include copies of all of the pleadings.

In her amended complaint, the plaintiff sets forth seven causes of action. In her first cause of action, sounding in negligence, gross negligence, and medical malpractice, the plaintiff alleges, among other things, that HMG had prior knowledge of Wishner's "dangerous propensities," and that the defendants' "disparate treatment" of the plaintiff violated the New York State Human Rights Law. In her second cause of action, the plaintiff repeats her allegations that the defendants violated the New York State Human Rights Law. In her third cause of action, the plaintiff sets forth a claim for civil assault. In her fourth, fifth and sixth causes of action, the plaintiff respectively sets forth claims for negligent training, hiring and retention against HMG. In her seventh cause of action, the plaintiff alleges that HMG is liable herein under the doctrine of respondeat superior. The service of an amended complaint eliminates the complaint that it was intended to supersede, the previous pleading has no effect, and the litigation proceeds as if the previous complaint had never been served (*see* ***Healthcare I.Q., LLC v. Tsai Chung Chao***, 118 AD3d 98, 986 NYS2d 42 [1st Dept 2014]; ***Stella v Stella***, 92 AD2d 589, 459 NYS2d 478 [2d Dept 1983]). Thus, all references herein are to the plaintiff's amended complaint.

After the completion of discovery, HMG now moves for summary judgment dismissing the second cause of action, for summary judgment or dismissal pursuant to CPLR 3211 of the plaintiff's third, fourth, fifth, sixth, and seventh causes of action, and for an order "striking all superfluous language" from the plaintiff's first cause of action. The essence of HMG's contentions regarding dismissal pursuant to CPLR 3211 are based on the arguments that the plaintiff has failed to state causes of action. Because issue has been joined, and a motion to dismiss for failure to state a cause of action is one of the permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211 [e]), this motion should be deemed to have been brought entirely under CPLR 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211 [c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]). Here, upon review of the papers, the Court finds that HMG has clearly charted a summary judgment course,

that HMG's notice of motion specifically demands said relief, and that it has submitted extensive documentary evidence and affidavits in support of its position (*see generally* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the Court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]).

In support of its motion, HMG submits a copy of the complaint and its answer, but fails to submit Wishner's answer. Initially, counsel for the plaintiff contends that HMG's motion for summary judgment must be denied as procedurally defective. In response, HMG submits Wishner's answer in its reply papers. CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced." Thus, it has been held that where the record is sufficiently complete, and there is no proof that a substantial right of a party has been impaired by the failure of a movant to submit copies of the pleadings, that a court may address the merits of the motion (***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996 NYS2d 162 [2d Dept 2014]; *see also* ***Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello***, 97AD3d 611, 948 NYS2d 377 [2d Dept 2012]). Here, no substantial right of the plaintiff is prejudiced as all of the pleadings were submitted and served upon all parties in the motion made by HMG, and the record is more than sufficiently complete.

In support of its motion, HMG also submits the affirmation of its attorney, a copy of the Court's Order dated October 13, 2011, the plaintiff's bill of particulars, and the transcripts of the deposition testimony of the plaintiff and two nonparty witnesses. The depositions of the plaintiff and the nonparty witnesses are unsigned, and HMG has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witnesses is not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). However, the plaintiff's deposition transcript may be considered herein as the parties have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

At her deposition, the plaintiff testified that, in 2006, her opthamologist recommended eye surgery and informed her that she needed a physical examination, that she called HMG and was given an appointment for October 9, 2006, and that she did not know which physician she would be seeing that day. She stated that, when she arrived at HMG for her appointment, she filled out some paperwork and a woman called her name and led her to an examination room, that the woman told her to put on a robe, and that she believes that the woman told her to remove her bra and panties. She indicated that, when Wishner entered the room, she told him that she was there "just for a routine physical, I have an eye surgery coming up and I need a physical." The plaintiff further testified that Wishner stated "we're going to do a breast exam," that Wishner opened her robe and "began to feel around my chest," and that Wishner "then continued to feel down my abdomen, my stomach down close to my pubic bone," an inch or two above her genitals. She indicated that Wishner then asked her to stand up and disrobe, that he asked her to stand on a stool, and that he sat in a corner of the examination room talking to her for five

or ten minutes. She stated that she told Wishner that she felt very uncomfortable at the time, that Wishner was "sweating profusely," and that "in the midst of me standing there completely naked, there was a knock at the door."

The plaintiff further testified that Wishner leaped out of his chair and "grabbed the door," that he had a five, ten or 15 second conversation with a woman at the door, and that he then sat back down and, while she was still standing on the stool, told her that there is a "new type of cancer out and that it's very important that you get tested for it." She stated that Wishner then asked her if she wanted to be tested for the cancer, that she said yes, and that he said "okay, turn around and put your hands on the [examination] table and bend over." She indicated that she told Wishner that she was "very uncomfortable with this," that Wishner came over to her and "spread my butt cheeks and then closed them," and that he then said "okay, your exam is done, you don't have cancer, you [can] put your robe back on." The plaintiff further testified that she put on her robe, changed into her clothes and left HMG, that she did not report anything to HMG, and that she spoke with her parents and a friend who is a nurse about her experience. She indicated that her friend said the examination did not sound "normal" and she should probably report Wishner, and that she wrote a letter to the Office of Professional Medical Conduct ("OPMC") dated May 1, 2010. She stated that she later had a conference call with two representatives from OPMC, and that she did not have any further conversations or correspondence with that office after said conversation.

The Court now turns to the branches of HMG's motion for summary judgment which seek to dismiss the plaintiff's second and third causes of action. In his affirmation in support of the motion, counsel for HMG contends that the plaintiff's complaint, amplified by her bill of particulars, does not allege that she was denied any services, privileges or accommodations offered by HMG, or any other facts necessary to establish a cause of action for violation of Human Rights Law § 296 (2). Counsel for HMG further contends that the plaintiff's third cause of action for civil assault is time-barred as the plaintiff failed to commence this action within the one-year time period set forth in CPLR 215 (3) and, in any event, the plaintiff's testimony establishes that was not placed in "apprehension of an 'immediate fear of harm' " necessary to maintain said cause of action.

The complaint sets forth a single allegation of "offensive, un-consented to bodily contact" by Wishner. The bill of particulars alleges that HMG "improperly performed a physical examination . . . made unnecessary, unwanted, and improper contact with plaintiff." HMG has established its *prima facie* entitlement to summary judgment dismissing the second cause of action as the plaintiff's testimony does not indicate that there was any violation of the Human Rights Law. In addition, HMG has established its *prima facie* entitlement to summary judgment dismissing the third cause of action herein. In the Order dated October 13, 2011, this Court dismissed said cause of action in the original complaint as untimely pursuant to Wishner's cross motion. It is undisputed that this incident occurred on October 9, 2006, and this action was commenced on or after July 11, 2008, well after the one-year statute of limitations provided in CPLR 215 (3). That is, the cause of action for civil assault is untimely to both defendants. Moreover, the plaintiff has failed to address the arguments proffered by HMG regarding her second and third causes of action in her opposition and, thus, has conceded that she does not have causes of action for violation of the Human Rights Law or for civil assault (*see* ***McNamee Constr. Corp. v City of New***

Rochelle, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 [3d Dept 2003]). Accordingly, the plaintiff's second and third causes of action are dismissed.

The Court now turns to the branches of HMG's motion for summary judgment which seek to dismiss the plaintiff's fourth, fifth and sixth causes of action for negligent training, hiring and retention. In his affirmation, counsel for HMG states that "[i]t is well established that, in general, no cause of action may proceed against an employer under the theory of negligent hiring, retention or supervision when said employer would be responsible under a theory of *respondeat superior*. Neiger v. City of New York, 72 A.D.3d. 663 (2d Dept. 2010) ...." That is, that the plaintiff cannot maintain these causes of action because her seventh cause of action seeks to hold HMG liable under the doctrine of respondeat superior. Counsel for HMG notes that there is an exception to the general rule where the plaintiff seeks punitive damages, provided that said claim is meritorious, and he asserts that "as a matter of law the conduct and decisions of HMG cannot be said to have been so reckless or wanton as to evince a moral culpability and reckless disregard warranting the imposition of punitive damages." Thus, he claims, the plaintiff cannot establish a basis for the "very limited exception" to the general rule, and the respective causes of action should be dismissed.

Initially, the contentions of counsel for HMG are based on his belief that the plaintiff has failed to set forth factual allegations in the pleadings sufficient to support a claim for punitive damages. In addition, counsel concedes that his client conducted an investigation into a complaint similar to that of the plaintiff made against Wishner prior to this incident. However, counsel argues that HMG acted reasonably in retaining Wishner as an employee after said investigation. Counsel's first contention is rejected as the argument is not dispositive when determining a motion for summary judgment. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

In addition, it is well-settled that the determination whether to award punitive damages is a matter within the sound discretion of the trier of fact (*see* ***Nardelli v Stamberg***, 44 NY2d 500, 406 NYS2d 443 [1978]; ***Solis-Vicuna v Notias***, 71 AD3d 868, 898 NYS2d 45 [2d Dept 2010]). HMG has failed to establish as a matter of law that its conduct was such that the trier of fact could not find its actions morally culpable. HMG has not submitted admissible evidence regarding its investigation into the prior complaint, any documentation regarding said investigation, its hiring, or its training of Wishner, or what actions it took with regard to training or oversight of its employees between the time of the prior incident referred to by counsel for HMG and this incident.

The failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the branches of HMG's motion for summary judgment which seek to dismiss the plaintiff's fourth, fifth, and sixth cause of action are denied.

HMG's sole contention in seeking summary judgment dismissing the plaintiff's seventh cause of action is that the claim is duplicative of the plaintiff's first cause of action. As set forth above, the

plaintiff's first cause of action alleges, among other things, that Wishner and HMG were grossly negligent in treating the plaintiff. The plaintiff's seventh cause of action alleges, in essence, that HMG is vicariously liable to the plaintiff based on the negligence of Wishner. It is well-settled that employers are vicariously liable for the torts of their employees under the theory of respondeat superior if the acts were committed while the employee was acting within the scope of his or her employment and in furtherance of the employer's business (*see* ***Riviello v Waldron***, 47 NY2d 297, 418 NYS2d 300 [1979]; ***Xin Tang Wu v Ng***, 70 AD3d 818, 894 NYS2d 141 [2d Dept 2010]; ***Carnegie v J.P. Philips, Inc.***, 28 AD3d 599, 815 NYS2d 107 [2d Dept 2006]). However, the employer will bear no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business (*see* ***White v Alkoutayni***, 18 AD3d 540, 794 NYS2d 667 [2d Dept 2005]; ***Brancato v Dee & Dee Purch.***, 296 AD2d 518, 745 NYS2d 564 [2d Dept 2002]).

Here, HMG has failed to establish as a matter of law that the trier of fact could determine, for example, that Wishner was acting for personal motives and that HMG was grossly negligent in its treatment of the plaintiff. That is, there are issues of fact requiring a trial of this action, and the plaintiff's seventh cause of action is not duplicative of her first cause of action as a matter of law. Accordingly, the branch of HMG's motion for summary judgment which seeks to dismiss the plaintiff's seventh cause of action is denied.

Finally, it is determined that HMG's request to strike the plaintiff's allegation in her first cause of action regarding an alleged violation of the Human Rights Law should be granted under the circumstances. Matters that are unnecessary to the viability of a cause of action and would cause undue prejudice to a defendant should be stricken from the pleading or bill of particulars (*see* CPLR 3024 [b]; ***Irving v Four Seasons Nursing and Rehabilitation Ctr.***, 121 AD3d 1046, 995 NYS2d 184 [2d Dept 2014]; ***Kinzer v Bederman***, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]). In light of the determination to dismiss the plaintiff's second cause of action alleging a violation of the Human Rights Law herein, the aforesaid language is superfluous, unnecessary to said first cause of action, and its inclusion in the complaint is prejudicial and potentially confusing to a jury, if any, in a trial of this action. However, HMG's request to strike the allegations which support the plaintiff's fourth, fifth, and sixth causes of action is denied as those claims have not been dismissed.

Accordingly, HMG's motion for summary judgment dismissing the complaint, and to strike scandalous material from the complaint, is granted to the extent that the second and third causes of action are dismissed, and the language in the first cause of action alleging a violation of the Human Rights Law is stricken, and is otherwise denied. The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: August 8, 2017

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION