Schmittau v City of New York
2017 NY Slip Op 32539(U)
July 28, 2017
Supreme Court, Richmond County
Docket Number: 102020-2011
Judge: Thomas P. Aliotta
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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JOHN SCHMITTAU and DENISE SCHMITTAU,

Plaintiff,

- against -

THE CITY OF NEW YORK, NYC DEPARTMENT OF SANITATION AND STEPHEN MONTANINO,

Defendants.

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DECISION & ORDER
Index No.: 102020-2011
Motion No.: 2195-002
2645-003

Recitation, as required by C.P.L.R. 2219(a), of the papers considered on the review of this motion fully submitted on July 5, 2017.

PAPERS	**NUMBERED**
Plaintiffs' Notice of Motion (002) and Affirmation with Exhibits Annexed	1, 2
Defendants' Notice of Cross-Motion (003)	3
Plaintiff's Affirmation in Opposition to Cross-Motion and Reply with Exhibits Annexed	4

Upon the foregoing cited papers, the decision on plaintiff's motion (002) and defendants' cross-motion (003), is as follows:

This is an action for damages commenced by plaintiff John Schmittau. The complaint filed alleges several causes of action including hostile work environment, slander, libel, slander per se, negligent training, intentional and negligent infliction of emotional distress and a derivative cause of action on behalf of his wife, Denise.

Decedent, John Schmittau, was a sanitation supervisor for the City of New York. The acts alleged in plaintiffs' notice of claim commenced on May 29, 2010 when the decedent was subjected to drug testing, i.e., a breathalyzer and a full body cavity search of his genitals and

rectum. His supervisors deemed the testing appropriate based upon decedent's alleged "irrational behavior." The foregoing results were negative. After a formal investigation into this incident, decedent's supervisor was reassigned to another borough. Decedent's co-workers and subordinates mocked him and undermined his authority as a supervisor causing him physical and emotional distress.

Plaintiffs filed a notice of claim on August 29, 2010 and each of them appeared for a statutory hearing on January 25, 2011. Thereafter, plaintiffs commenced this action on June 29, 2011 and defendants served an answer on February 29, 2012. Thereafter, John Schmittau passed away on November 28, 2012. The Surrogate of Richmond County issued Limited Letters of Administration on April 10, 2015 and the powers thereunder were expanded by a further Order dated March 29, 2017. Plaintiff, Denise Schmittau, has now filed the instant motion substituting her as plaintiff in this action in her capacity as the Administratrix of the Estate of John Schmittau. Defendants have cross-moved to dismiss, seeking an order "dismissing the Complaint on the grounds that plaintiff's motion to substitute is untimely and because the Complaint fails to state a cause of action." In support of the cross-motion, defendants have submitted only a memorandum of law.

Upon the death of a party to an action, the Court shall order that the proper party be substituted in their stead if the substitution occurs before final judgment and is made within a reasonable time (CPLR § 1015[a] and § 1021). "The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit" (*Terpis v. Regal Heights Rehabilitation and Health Care Center, Inc.*, 108 A.D.3d 618, 619 [2d Dept. 2013]).

Here, unlike the facts presented in *Terpis* wherein the proposed plaintiff did not attach an affidavit of merit, plaintiff has demonstrated through the sworn notice of claim and the sworn testimony of John Schmittau, that meritorious claims exist as to the second, third, seventh and eighth causes of action (*infra.*) and that defendants were not prejudiced by the delay. The timely notice of claim and the hearing conducted pursuant to the General Municipal Law afforded defendants a full and fair opportunity to investigate the facts and circumstances of decedent's claims as early as August 2010 (*See, Nasca v. County of Nassau,* 10 A.D.3d 415). The notice of claim and testimony also preserved the identity of ten separate sanitation employees and union members who were either witnesses to or participants in the alleged acts claimed by plaintiff. By contrast, defendants' unsworn and conclusory allegation that "[T]he prejudice to defendants resulting from plaintiff's delay is as obvious as it is real" in their memorandum of law in opposition to plaintiff's motion lacks probative value and is not properly before this Court (*Zawatski v. Cheektowaga-Maryvale Union Free School Dist.*, 261 A.D.2d 860 [4th Dept. 1999] *lv. denied* 94 N.Y.2d 754).[1] Therefore, defendants have not established through admissible evidence that their defense has been prejudiced in any way (*Connell v. Brink,* 199 A.D.2d 1032, *citing, Zuckerman v. City of New York,* 49 N.Y.2d 557, 562).

Despite this lack of prejudice, plaintiff has failed to establish a meritorious cause of action for negligent hiring and supervision (*Karoon v. New York City Transit Authority*, 241 A.D.2d 323, 324), and harassment, hostile work environment, as plaintiff has neither pleaded nor

[1] The action is also distinguishable from *Cueller v. Betanes Food Corp.*, 24 A.D.3d 201 (1st Dept. 2005). In *Cueller,* the action was marked off the calendar and dismissed one year later pursuant to CPLR 3404. Although the dismissal was a nullity because it occurred after plaintiff's death and prior to the substitution of a legal representative for him, the Court denied the motion to restore due to the six-year delay in obtaining letters of administration plus the resulting prejudice to defendant. Here, the action was stayed on the calendar and, therefore, a motion to restore is not before this Court.

established through the pre-action testimony that decedent was a member of a protected class (*Johnson v. North Shore Long Island Jewish Health System, Inc.*, 137 A.D.3d 977). The sixth cause of action for intentional infliction of emotional distress is also without merit as public policy prohibits such liability against a municipality (*Sawitsky v. State*, 146 A.D.3d 914, 915).

However, there is no such prohibition of liability with respect to a claim for negligent infliction of emotional distress. Although a physical injury is not a necessary element to maintain a cause of action for negligent infliction of emotional distress, "it must be premised upon conduct which unreasonably endangers the plaintiff's physical safety" (*Glendora v. Gallicano*, 206 A.D.2d 456) resulting in contemporaneous or consequential physical harm supported by objective manifestations (*Johnson v. State*, 37 N.Y.2d 378, 383), or the existence of special circumstances giving rise to the likelihood of genuine and serious mental distress that guarantees the claim is not spurious and allows for recovery in the absence of physical harm or fear of physical harm (*Hering v. Lighthouse 2001, LLC*, 21 A.D.3d 449, 451, *citing Johnson v. State*, 37 N.Y.2d 382 [internal quotations omitted]). Here, plaintiff has presented facts that fit within the elements of this cause of action through the sworn notice of claim and pre-action testimony, i.e., that despite a breathalyzer and body cavity search returning negative results, the events were negligently communicated to his co-workers and subordinates who, in turn, then ridiculed decedent causing him to suffer mental distress, insomnia, irritable bowel syndrome and difficulty in his marriage. Again, defendants' unsworn statement that the foregoing was neither published nor communicated to third parties is without probative value.

At the pleading stage and prior to discovery, plaintiff does not have knowledge of, and cannot possibly plead, any further factual allegations concerning publication of the alleged defamatory statements (*See, Knutt v. Metro,* 91 A.D.3d 915). Decedent's sworn testimony has

set forth facts which support the prima facie publication of the allegations of drug usage and irrational behavior to his co-workers and subordinates. These facts also, on their face, fit within a cognizable cause of action for libel and slander per se in that the alleged false statements caused decedent to be injured in his trade or profession as a sanitation supervisor (*See Liberman v. Gelstein,* 80 N.Y.2d 429). Therefore, defendants' motion to dismiss with respect to decedent's second, third and seventh cause of action, and the Administratrix' eighth cause of action, is denied with leave to renew upon the conclusion of discovery.

Accordingly, it is hereby

ORDERED, that the Administratrix' motion to be substituted as plaintiff in this action is granted; and it is further

ORDERED, that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
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DENISE SCHMITTAU, as the Administratrix of The Estate of JOHN SCHMITTAU, and DENISE SCHMITTAU, Individually,

Plaintiff,

- against -

THE CITY OF NEW YORK, NYC DEPARTMENT OF SANITATION AND STEPHEN MONTANINO,

Defendants.
----------X

and it is further,

ORDERED, that defendants' cross-motion to dismiss is granted as to the first, fourth, fifth and sixth causes of action only; and it is further

ORDERED, that defendants' cross-motion is denied as to the second, third, seventh and eighth causes of action.

This constitutes the decision and order of the Court.

Dated: July 28, 2017

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.

GRANTED
AUG - 8 2017
STEPHEN J. FIALA