

**Melendez v Figler**

2018 NY Slip Op 30417(U)

March 5, 2018

Supreme Court, New York County

Docket Number: 161439/2015

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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SANDRA MELENDEZ, Individually and as Administratrix of the Estate of HECTOR LUIS MELENDEZ, Deceased,

INDEX NO. 161439/2015

Plaintiff,

- v -

MOTION SEQ. NO. 001, 002

EDWIN FIGLER, ABM INDUSTRIES, INC., T.F. CORNERSTONE, INC., ROSE ASSOCIATES, INC., LOCAL 32BJ SERVICE EMPLOYEE INTERNATIONAL UNION, ABC CORP. I - X, JOHN DOES I - X,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 30, 32, 33, 38

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 31, 34, 35, 37

were read on this motion to/for DISMISS

Upon the foregoing documents, it is ordered that the motions are decided as follows.

Plaintiff Sandra Melendez, Individually and as Administratrix of the Estate of Hector Luis Melendez, seeks to recover, inter alia, damages for negligence and wrongful death as against defendants Edwin Figler, Jr., ABM Industries, Inc., and T.F. Cornerstone, Inc. Defendant ABM Industries, Inc. moves (Mot. Seq. 001), pursuant to CPLR 3211(a)(7), to dismiss the complaint. Defendants T.F. Cornerstone and Edwin Figler., Jr. move (Mot. Seq. 002), pursuant to the same statute, to dismiss the complaint. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are granted and the complaint is dismissed in its entirety.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This matter was commenced by plaintiff Sandra Melendez (plaintiff), Individually and as Administratrix of the Estate of Hector Luis Melendez (decedent), as against defendants Edwin Figler, Jr. (Figler), ABM Industries, Inc. (ABM), T.F. Cornerstone, Inc. (Cornerstone), Rose Associates, Inc., and Local 32BJ Service Employee International Union, ABC Corp. 1-10, and John Does 1-10 on November 6, 2015. Doc. 1.<sup>1</sup> On January 7, 2016, ABM removed the claim to the United States District Court for the Southern District of New York (SDNY) on the ground that the complaint appeared to assert discrimination claims which, it urged, were governed by the collective bargaining agreement (CBA) between decedent and his employer, ABM. Doc. 12; Doc. 24, at par. 3.

On May 5, 2016, Cornerstone and ABM filed motions to dismiss the original complaint or, in the alternative, to stay the action and compel arbitration in the SDNY pursuant to the CBA. Doc. 24, at par. 5. On May 27, 2016, plaintiff filed an amended complaint in the SDNY action naming as defendants Figler, Cornerstone, ABM, as well as certain fictitious entities. Doc. 24, at par. 6; Doc. 28. Plaintiff thereafter moved to remand the action to state court after she represented to SDNY that the amended complaint did not assert discrimination claims. Doc. 24, at par. 7. The parties subsequently stipulated to remand the action to this Court. Doc. 13; Doc. 24, at par. 8. Plaintiff then filed with this Court the amended complaint appended to her motion, which asserted claims against Figler, ABM, and Cornerstone. Doc. 25.

In the amended complaint, plaintiff alleged, inter alia, that Cornerstone was the manager of 230 Park Avenue South in Manhattan (the building) (Doc. 25, at par. 3); that Figler was hired by Cornerstone in 2009 and worked as lead engineer at the building (Doc. 25, at pars. 4, 7-8, 15);

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

that ABM provided janitorial services to the building (Doc. 25, at par. 6); and that decedent was employed by ABM to perform janitorial services at the building (Doc. 25, at par. 9).

Plaintiff claimed that Figler had a “history of engaging in racially insensitive, harassing, and abusive behavior toward co-workers and other persons with whom he had contact with [sic] in the workplace prior to being hired or retained by [Cornerstone].” Doc. 25, at par. 16. This behavior allegedly led to complaints against Figler and/or his prior employers before he was hired by Cornerstone. Doc. 25, at par. 17. Plaintiff claimed that Cornerstone, which employed and controlled Figler, knew, or should have known, about Figler’s abusive behavior but nevertheless assigned him to the building, where he could “terrorize and abuse workers in the [b]uilding.” Doc. 25, at pars. 18, 20-30. Plaintiff also claimed that, although Cornerstone and ABM knew, or should have known, about Figler’s conduct, they did nothing to stop it. Doc. 25, at pars. 39, 49.

Plaintiff alleged that “[r]epresentatives” of ABM, Cornerstone and decedent’s union advised decedent to “watch out for [Figler]”, “stay away from [Figler]”, and to “speak up about his experiences with [Figler]” since there had been “other complaints” about Figler’s behavior. Doc. 25, at par. 34.

According to plaintiff, Figler “engaged in a pervasive pattern of abuse and harassment” of decedent until the latter took his own life as a result of the defendants’ negligent, careless, reckless and/or intentional conduct. Doc. 25, at par. 35. The “abuse and harassment” committed by Figler consisted of:

- 1) moving decedent’s desk into a chemical supply room where decedent was exposed to chemical fumes;
- 2) refusing to move decedent’s desk out of the chemical supply room until decedent provided medical documentation that he was suffering health problems as a result of being in the closet;

- 3) positioning decedent's desk against a back wall so that he could not see who was entering his office, thereby trying to scare and intimidate him;
- 4) deliberately harassing decedent by removing his personal locker from the boiler room, while allowing other employees to keep their lockers in that room;
- 5) refusing to allow decedent to take weekends off;
- 6) advising decedent that he (Figler) was the new "sheriff" in town, and making fun of how Hispanics pronounced that word;
- 7) After an ABM manager told decedent to minimize contact with Figler by communicating with him through a log book, Figler stapled dirty paper towels to the logbook in order to intimidate and harass decedent;
- 8) intentionally placing dirty paper towels on decedent's desk and monitor;
- 9) calling decedent into his office during meetings with tenants so that he (Figler) could humiliate decedent;
- 10) making false accusations about decedent to decedent's superiors;
- 11) complaining about decedent's performance even where such task was not decedent's responsibility;
- 12) leaving matchsticks around the building to see whether decedent would notice them;
- 13) marking walls with highlighter to torture and harass decedent;
- 14) splashing water on bathroom mirrors to create additional work for decedent;
- 15) calling decedent to complain about his work during times when he was not on duty; and
- 16) making derogatory and racially insensitive comments about decedent.

Doc. 25, at par. 36.

During the course of the claimed harassment, decedent allegedly complained about Figler's conduct to colleagues, supervisors, management, representatives of defendants, and his union, but no action was taken against Figler. Doc. 25, at pars. 38, 39, 49.

Plaintiff alleged that, as a result of the harassment by Figler, decedent suffered, inter alia, emotional distress, mental anguish, and post-traumatic stress disorder, leading him to commit suicide on November 6, 2013. Doc. 25, at par. 51.

As a first cause of action, plaintiff alleged that decedent's injuries and ultimate death were caused by the negligence, carelessness, recklessness and/or intentional conduct of defendants. Doc. 25, at par. 56.

As a second cause of action, plaintiff alleged negligent hiring, supervision, and retention of Figler by Cornerstone. Doc. 25, at pars. 58-69. Plaintiff further alleged that ABM failed to protect decedent from an unsafe work environment. Doc. 25, at par. 68.

As a third cause of action, plaintiff alleged that defendants were vicariously liable for Figler's actions. Doc. 25, at pars. 70-73.

As a fourth cause of action, plaintiff alleged that ABM failed to protect decedent from Figler and thus failed to provide him with a safe work environment. Doc. 25, at pars. 74-83.

As fifth and sixth causes of action, plaintiff alleged wrongful death and survival claims, respectively. Doc. 25, at pars. 84-94.

Finally, as a seventh cause of action, plaintiff alleged a claim for loss of consortium. Doc. 25, at pars. 95-97.

On February 9, 2017, ABM moved (Mot. Seq. 001), pursuant to CPLR 3211(a)(7), to dismiss the amended complaint for failure to state a claim. Doc. 16. Cornerstone and Figler also

moved (Mot. Seq. 002) to dismiss the amended complaint on the same ground. Doc. 22. Plaintiff opposed the motions.

#### **CONTENTIONS OF THE PARTIES:**

In support of its motion (Mot. Seq. 001), ABM argues that the amended complaint fails to sufficiently allege claims of negligence, failure to provide a safe working environment, wrongful death, vicarious liability, and loss of consortium. ABM further asserts that plaintiff's claims against it are barred by Workers' Compensation Law sections 11 and 29 (6), which provide the exclusive remedy for workplace injuries. ABM also asserts that plaintiff did not plead a valid claim for failure to provide a safe working environment. Additionally, ABM maintains that, since plaintiff fails to sufficiently plead a negligence claim, her wrongful death, vicarious liability, and loss of consortium claims must fail as well.

In support of their motion (Mot. Seq. 002), Cornerstone and Figler argue that plaintiff's negligence claim must be dismissed because she fails to plead any of the elements of negligence, i.e., duty, breach of duty, proximate cause, and damages. Even if a duty had been pleaded, urge Cornerstone and Figler, they owed no duty to decedent. They insist that New York law does not protect one against workplace bullying or harassment unless it is motivated by a person's membership in a protected class. Further, urge Cornerstone and Figler, plaintiff's negligence claim fails because decedent's suicide was not foreseeable.

Cornerstone and Figler further argue that plaintiff's claims sounding in negligent hiring, negligent retention and negligent supervision must be dismissed since they are conclusory. Cornerstone further asserts that plaintiff fails to allege how it knew or should have known of Figler's propensity to commit abusive behavior. It also argues that the causes of action for

vicarious liability, wrongful death, and loss of consortium must be dismissed since these claims must fail absent a finding of negligence against it.

Cornerstone and Figler also assert that the first, second, fifth and sixth causes of action must be dismissed since suicide is not a foreseeable consequence of negligent conduct.

In opposition, plaintiff argues that she has sufficiently pleaded claims sounding in negligence, failure to provide a safe work environment, as well as negligent hiring, retention, and supervision. She further asserts that she sufficiently pleaded claims for vicarious liability, wrongful death, and loss of consortium and that her claims are not barred by the Workers' Compensation Law.

#### LEGAL CONCLUSIONS:

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). This Court addresses the claims against the defendants *seriatim* below.

#### The First Cause of Action

The first cause of action alleges that decedent suffered injuries, as well as death, due to the negligence, carelessness, and intentional conduct of defendants.

The negligence claim must be dismissed on the ground that it fails to state a claim against Figler, ABM, or Cornerstone. To sufficiently plead a negligence claim, a plaintiff must allege (1) a duty



owed by a defendant to the plaintiff, (2) a breach of that duty, and (3) an injury proximately caused by the breach of the duty. *Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985). Here, the negligence claim must be dismissed since plaintiff, in her first cause of action, “fails to identify any duty defendants owed to [decedent].”<sup>2</sup> *New Delhi Tel. Ltd. v Nielsen Holdings N.V.*, 111 AD3d 437 (1<sup>st</sup> Dept 2013). Even if such a duty had been alleged, defendants would not be liable to plaintiff. The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the threshold question in any negligence action, and it is a legal question for the court.” *On v BKO Express LLC*, 148 AD3d 50 (1st Dept 2017) (internal quotation marks and citations omitted); see *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 (1st Dept 2016). As discussed in detail in connection with the second cause of action, plaintiff failed to allege that defendants’ actions were motivated by decedent’s membership in a protected class of persons. *Burke v NY City Dept. of Educ.*, 2016 NY Slip Op 32150(U), \*4 (Sup Ct, NY County 2016). Thus, defendants breached no legally recognized duty to decedent as a result of the alleged harassment and abuse.

Given that plaintiff has failed to state a claim of negligence against Figler, it follows that his employer, Cornerstone, cannot be vicariously liable for any negligence on the part of Figler. In any event, Cornerstone would not be vicariously liable for Figler’s allegedly abusive conduct, since it clearly was not committed in furtherance Cornerstone’s interests. *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 (1<sup>st</sup> Dept 2006).

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<sup>2</sup> The only “duty” referenced in the entire complaint is Cornerstone’s duty to ensure that its own employees acted properly (Doc. 25, at pars. 59-61) and that ABM had a duty to maintain a safe working environment for plaintiff. Doc. 25, at par. 76.

Although the first cause of action can be construed as alleging intentional conduct by Figler, plaintiff fails to plead any specific tort arising from such acts. Therefore, the first cause of action must be dismissed in its entirety.

Further, plaintiff's claims against ABM, decedent's employer, are also barred by the exclusive remedy of Workers' Compensation Law §11. *Hernandez v Sanchez*, 40 AD3d 446, 447 (1<sup>st</sup> Dept 2007).

### **The Second Cause of Action**

In her second cause of action, plaintiff alleges negligent hiring, supervision and retention by Cornerstone. Doc. 25, at pars. 58-69. Plaintiff further alleges that ABM failed to protect decedent from Figler. Doc. 25, at par. 68.

In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision. However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept], *cert denied* 522 U.S. 967, 118 S. Ct. 413, 139 L. Ed. 2d 316 [1997] [citations omitted]).

*NY Disaster Interfaith Servs. Inc. v Council of Peoples Org., Inc.*, 2018 NY Slip Op 50067(U), \*6 (Sup Ct, NY County 2018); see also *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d at 244; *Gomez v City of New York*, 304 AD2d 374 (1<sup>st</sup> Dept 2003).

Here, plaintiff sets forth allegations against Cornerstone including, inter alia, that it failed to investigate "Figler's work history and background" and "criminal history" (Doc. 25, at par. 63[b], [c]); "[f]ailed to heed warnings about [Figler's] history of workplace abuse and harassment" (Doc. 25, at par. 63[e]); "ignored evidence of complaints about [Figler's] abusive and harassing

behavior in hiring and/or retaining him” (Doc. 25, at par. 63[l]); and ignored Figler’s “abusive and harassing conduct towards [decedent] (Doc. 25, at par. 63[r]). Plaintiff further asserts that Cornerstone knew, or should have know, that Figler “had a propensity to engage in the wrongful conduct alleged herein, and that this conduct would directly and proximately result in injury and death to [decedent].” Doc. 25, at par. 64. Thus, the claim asserted by plaintiff against Cornerstone is essentially one of a hostile work environment.

Even assuming, arguendo, that the amended complaint sufficiently pleads a propensity by Figler to commit harassment or abusive behavior, plaintiff’s claims against Cornerstone sounding in negligent hiring, retention, and supervision are still subject to dismissal since plaintiff may not recover on those theories.

“Bullying and harassment have no place in the workplace, but unless they are motivated by the victim’s membership in a protected class, they do not provide the basis for an action” (*Johnson v. City University of New York*, 48 FSupp3d 572 [SDNY 2014]; see also *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 FSupp2d 575 [SDNY 2010] “[E]ven if mean-spiritedness or bullying render a workplace environment abusive, there is no violation of the law.”).

*Burke v NY City Dept. of Educ.*, 2016 NY Slip Op 32150(U), \*4 (Sup Ct, NY County 2016).

Here, although the amended complaint alleges that Figler behaved in a “racially insensitive” manner (Doc. 25, at par. 16), abused the janitorial staff, many of whom were minorities (Doc. 25, at par. 21), and made “humiliating and derogatory comments regarding Hispanic employees’ pronunciation” of the word “sheriff” (Doc. 25, at par. 36[f]), plaintiff has not alleged that Figler’s actions were motivated by decedent’s membership in a protected class. In fact, despite the foregoing, allegations, the amended complaint does not even allege that decedent was Hispanic. Therefore, as this Court stated in *Burke v NY City Dept. of Educ.*, *supra*, “plaintiff

has failed to allege any facts within the four corners of [the] amended complaint to establish that this conduct was motivated by [decedent's] membership in a protected class."<sup>3</sup>

Similarly, there is no liability as against ABM based on its alleged failure to protect decedent against Figler given that plaintiff does not plead that decedent was subjected to an abusive working environment based on his membership in a protected class.

### **The Third Cause of Action**

As a third cause of action, plaintiff alleges that Cornerstone and ABM are vicariously liable for Figler's actions. Doc. 25, at pars. 70-73. ABM did not employ Figler and plaintiff pleads no theory upon which such vicarious liability may be based. As noted above, Cornerstone is not vicariously liable for Figler's actions. *See White v Hampton Mgt. Co. L.L.C.*, 35 AD3d at 244. Where, as here, the acts of an employee constitute an intentional tort committed solely for personal reasons and not in furtherance of the employer's business interests, those acts are not attributable to the employer based on vicarious liability principles. *See Horvath v L & B Gardens, Inc.*, 89 AD3d 803, 803-804 (2d Dept 2011); *Kunz v New Netherlands Routes, Inc.*, 64 AD3d 956, 985 (3d Dept 2009).

### **The Fourth Cause of Action**

In her fourth cause of action, plaintiff alleges that ABM failed to protect decedent from Figler, thereby failing to provide him with a safe work environment. Doc. 25, at pars. 74-83. As noted above, however, there is no liability as against ABM based on its alleged failure to protect decedent against Figler given that plaintiff does not plead that decedent was subjected to an abusive

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<sup>3</sup> As noted previously, plaintiff represented to the SDNY that no discrimination claim was alleged and the parties stipulated to remand the captioned action to state court. Doc. 13; Doc. 24, at pars. 7-8.

working environment based on his membership in a protected class. *See Burke v NY City Dept. of Educ., supra.*

#### **The Fifth and Sixth Causes of Action**

As fifth and sixth causes of action, plaintiff alleges wrongful death and survival actions pursuant to EPTL 5-4.1 and 11-3.2(b), respectively. However, since the negligence claims against defendants are dismissed, these claims cannot survive. *See Meroni v Holy Spirit Assoc. for Unification of the World Christianity*, 119 AD2d 200 (2d Dept 1986); *see also Mahoney v Sharma*, 110 AD2d 627 (2d Dept 1985) (motion to amend complaint to add wrongful death claim denied in absence of medical proof that negligence caused the alleged death).

#### **The Seventh Cause of Action**

In her seventh cause of action, plaintiff alleges loss of consortium. Doc. 25, at pars. 95-97. However, “[b]ecause all of the substantive claims [are] dismissed, the derivative loss of consortium claim asserted by plaintiff [ ] also fails to state a claim (*see Kaisman v Hernandez*, 61 AD3d 565, 566 [1<sup>st</sup> Dept 2009]).” *Kornicki v Shur*, 132 AD3d 403, 404 (1<sup>st</sup> Dept 2015).

Therefore, in light of the foregoing, it is hereby:


ORDERED that the motion (Mot. Seq. 001) by defendant ABM Industries, Inc. to dismiss the complaint against it pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED that the motion (Mot. Seq. 002), by defendants T.F. Cornerstone, Inc. and Edwin Figler., Jr. to dismiss the complaint against them pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that this constitutes the decision and order of the court.

3/5/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: