Abrams v Pecile
2018 NY Slip Op 30680(U)
April 16, 2018
Supreme Court, New York County
Docket Number: 110329/2009
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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SANDRA PIEDRABEUNA ABRAMS,

Plaintiff,

-against-

DANIELLE PECILE,

Defendant.

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Index No. 110329/2009
Motion Seq: 017

DECISION & ORDER
ARLENE P. BLUTH, JSC

The motion by defendant for summary judgment dismissing plaintiff's claim for intentional infliction of emotional distress ("IIED") and limiting plaintiff's damages for certain claims is granted.

Background

This matter arises out of defendant's retention of plaintiff's topless honeymoon photographs. Defendant worked as an executive assistant for plaintiff's husband Russell Abrams and her brother-in-law Mark Abrams at Titan Capital Group, LLC (Titan), a financial services firm. Defendant claims that on December 5, 2008, Russell asked her to develop photographs on two CDs from a kiosk at a local pharmacy. Defendant contends that in getting these photographs developed, she was forced to view topless photos of plaintiff. Defendant maintains that when she returned the photos to Russell he leered and smirked at her and asked her if she liked the photos. Defendant acknowledges that she retained a copy of the photos, although she claimed that she did so inadvertently.

Defendant eventually resigned from her position at Titan and filed a sexual harassment complaint with the Equal Employment Opportunity Commission ("EEOC") and plaintiff included the photos in her EEOC filing. Thereafter, plaintiff commenced this case alleging causes of action for *inter alia* conversion, IIED and prima facie tort against defendant, Cristina Culicea (another executive assistant at Titan) and defendant's attorneys. Plaintiff contends that defendant should not have kept these photos knowing that they were personal and that they did not belong to her. Culicea and defendant's attorneys have already been dismissed from the action.

Defendant previously moved for summary judgment and the Supreme Court dismissed plaintiff's amended complaint, including plaintiff's IIED claim. The Appellate Division, First Department reversed and reinstated the conversion, replevin and IIED causes of action. With respect to the IIED claim, the Court held that "It was premature to dismiss the intentional infliction of emotional distress claim, given that defendant had not yet been deposed. Plaintiff cannot establish the elements of her claim without deposing defendant. Indeed, plaintiff does not know the universe of persons to whom defendant showed her 'personal and revealing photographs'" (*Abrams v Pecile*, 115 AD3d 565, 566, 983 NYS2d 502 [1st Dept 2014]). Now, after defendant has been deposed, defendant brings this motion.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee.*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

IIED

"The tort of intentional infliction of emotional distress predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). "The tort has four elements: (I) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii)

a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121, 596 NYS2d 350 [1993]).

"[W]here severe mental pain or anguish is inflicted through a deliberate and malicious campaign or harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress" (*Nader v General Motors Corp.*, 25 NY2d 560, 569, 307 NYS2d 647 [1970]).

Given the First Department's ruling in this matter, the central question for this Court is whether, after defendant's deposition, the IIED claim should be dismissed. Defendant claims that she did not show the photos to anyone other than the EEOC in connection with her sexual harassment complaint.

In opposition, plaintiff complains about defendant using the photographs as part of scheme to extort $2.5 million from plaintiff. Plaintiff also insists that these were honeymoon photos, that defendant has "invaded the sanctity of [her] marriage" and that defendant is "using the stolen photographs as a vehicle to objectify Plaintiff, and to turn her into a laughing stock and a joke" (NYSCEF Doc. No. 51 at 1).

Plaintiff failed to raise an issue of fact. Plaintiff cannot show, either from defendant's deposition or from any other source, that her photos were distributed to anyone with the intent to cause plaintiff severe emotional distress. The only parties who received the photos from defendant were the EEOC, defendant's attorneys and a neutral third party who has retained these photos during the pendency of this litigation. The Court finds that retaining these photos does not constitute extreme or outrageous conduct as a matter of law under the facts adduced here (*see e.g., Anderson v Abodeen*, 29 AD3d 431, 432, 816 NYS2d 415 [1st Dept 2006] [dismissing an

IIED claim, where plaintiff's supervisor displayed nude modeling photos of plaintiff to coworkers, because it did not constitute extreme or outrageous conduct]). Although defendant's claim that she inadvertently kept the photos is not a convincing explanation for how she retained a copy, it does not demonstrate outrageous conduct, especially where it could be proof of her claims of sexual harassment.

The Court also observes that it was plaintiff's *husband* who initially gave these photos to defendant to develop. And it was plaintiff's *husband* who told defendant to get the photos developed at a drugstore kiosk where, presumably, defendant and the store's employee would see these photos. If plaintiff was concerned about others seeing these photos, then she should have ensured that her husband didn't have them to distribute.

Plaintiff's claim about the use of the photos as part of an extortion scheme also fails. The letter cited for this proposition does not mention anything about the return of the photos in exchange for money (*see* NYSCEF Doc. No. 85). Instead, the letter refers to a possible settlement of defendant's claims against plaintiff's husband and brother-in-law for sexual harassment (this is the subject of a subsequent and separate litigation). The reference to the photos is used to support defendant's contention that there was sexual harassment; there is no basis to find that the letter constitutes extortion with respect to *plaintiff*.

And to the extent that plaintiff complains about the publishing of newspaper articles about this lawsuit at defendant's request, the fact is that the articles cited by plaintiff appeared *after* this action was commenced. Plaintiff cannot start a case and then assert an IIED claim based on defendant's response to that litigation (even if that response is in the media). Setting

aside whether litigating in the press is a good strategy, it certainly does not constitute an IIED claim where it occurs during the pendency of a litigation commenced by plaintiff.

Plaintiff also contends that defendant "needlessly" attached the photos to her EEOC complaint. That does not create an issue of fact either. It was clearly part of her sexual harassment claim– that her boss gave her these photos knowing she would see them and then allegedly making lewd remarks about the photos. The photos provided independent corroboration for defendant's sexual harassment claim.

Damages Claim

Defendant also moves for summary judgment to limit plaintiff's damages on her replevin claim to the return of the CD and her conversion cause of action to the value of the CD (which plaintiff alleges is worth $1). Because plaintiff did not oppose this branch of defendant's motion, it is granted.

Accordingly, it is hereby

ORDERED that the branch of the motion by defendant for summary judgment dismissing plaintiff's intentional infliction of emotional distress claim is granted; and it is further

ORDERED that the branch of defendant's motion seeking to limit the damages plaintiff can seek for her replevin claim to the return of the CD and for her conversion claim to the market value of the CD is granted.

This is the Decision and Order of the Court.

Dated: April 16, 2018
New York, New York

ARLENE P. BLUTH, JSC.

HON. ARLENE P. BLUTH