Bellantoni v Rare Chelsea Rest. Group LLC
2018 NY Slip Op 32285(U)
September 12, 2018
Supreme Court, New York County
Docket Number: 652051/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 652051/2017

CARLY BELLANTONI,

Plaintiff,

MOTION SEQ. NO. 002

- v -

RARE CHELSEA RESTAURANT GROUP LLC and DOUG BOXER,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17

were read on this motion to DISMISS.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this action seeking damages for, *inter alia*, gross negligence, defendants Rare Chelsea Restaurant Group LLC ("Rare Chelsea") and Doug Boxer ("Boxer") (collectively "defendants") move, pursuant to CPLR 3211(a)(7), to dismiss the fourth cause of action in the first amended complaint of plaintiff Carla Bellantoni ("Bellantoni"). After oral argument, as well as a review of the parties' papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Bellantoni commenced this action by filing a summons and verified complaint against defendants Rare Chelsea and Boxer on April 17, 2017. (Doc. 17.) In the complaint, Bellantoni alleged that, in February of 2016, she became employed as the manager of Rare View, a rooftop bar located at the restaurant Rare Bar & Grill in Manhattan. (*Id.* at 5.) Although her

employment contract provided that she "[m]ust have the stamina to work up to 60 hours per week" (*id.* at 6), Bellantoni often found herself working more than that (*id.*). In fact, Bellantoni alleged that, in May and June of 2016, she worked an average of 90 hours per week for 7 out of 8 weeks. (*Id.*) Bellantoni raised concerns about her excessive hours to defendant Boxer, the managing partner of Rare Chelsea,[1] and suggested that the restaurant hire additional employees. (*Id.* at 7.)

Bellantoni also alleged that Rare View employees were not given adequate break time. She claimed that she was only allowed to order and eat food between 4–5 and 10–11 p.m. (*Id.* at 8.) However, because those were among the bar's busiest hours, Bellantoni often had to skip her meals and continue working without a break. (*Id.*) Further, Bellantoni claimed that, whenever she sat down for a short break, Boxer and Ladd Ljungberg ("Ljungberg"), the general manager of Rare Chelsea, reprimanded her. (*Id.*)

Bellantoni further alleged that defendants committed safety violations arising from improper ventilation and the failure to provide adequate sanitation and cooking equipment. (*Id.* at 8–9.) For example, in May and June of 2016, Rare Chelsea catered several private events at Rare View. (*Id.* at 9.) According to Bellantoni, restaurant staff cooked some of the food for those events in the Rare View office instead of in the kitchen because it was more convenient than having to bring the food up from the ground floor, where the kitchen was located. (*Id.*) Additionally, Boxer ordered Bellantoni to lie to customers about the quality of the establishment's water so that they would purchase more bottled water. (*Id.* at 9–10.) When

[1] Bellantoni alleges that Rare Chelsea is the owner of Rare Bar & Grill. (Doc. 17 at 3–4.) However, in their affirmation in support of the instant motion, defendants assert that DHR Restaurant Company, LLC owned the restaurant and bar. (Doc. 13 at 1–2.)

Bellantoni voiced opposition to defendants' conduct, Boxer told her, "Don't worry about [it]. That's how we do things here." (*Id.*)

On the night of June 24, 2016, Rare View was filled to capacity with patrons, but was short-staffed because two employees called in sick. (*Id.* at 10.) As a result, Bellantoni decided to bartend while also acting as the rooftop manager. (*Id.*) Due to the high volume of work, Bellantoni relied on her experience as a bartender to estimate how much liquor to pour into customers' drinks. (*Id.*) This was in violation of restaurant policy, which required bartenders to pour liquor into a measuring shot glass prior to mixing it into a drink so as to measure the amount of alcohol served. (*Id.*) A few days later, on June 27, 2016, Ljungberg terminated Bellantoni for violating the policy. (*Id.*) Plaintiff believed that this reason was pretextual and that defendants actually fired her for voicing her concerns about the inadequate break time, excessive work hours, and health and safety violations. (*Id.* at 11.)

In addition to these allegations, Bellantoni also alleged several injuries caused by defendant Boxer's dog. Specifically, on March 8, 2016, Bellantoni was bitten on the hand by the dog. (*Id.*) She was given no prior warning of the dog's vicious propensities. (*Id.*) On March 17, 2016, the dog bit Bellantoni again, after which she learned that several other employees had been bitten by the dog as well. (*Id.*) On March 30, 2016, plaintiff was bitten by the dog a third time when it lunged at her from behind a "gate" in Boxer's office. (*Id.*) The third injury required Bellantoni to receive a tetanus shot. (*Id.*)

In her complaint, Bellantoni alleged four causes of action. First, she claimed that Rare Chelsea breached her employment contract by requiring her to work more than 60 hours per week. (*Id.* at 12.) Second, she alleged that defendants Rare Chelsea and Boxer violated New York Labor Law § 215 by terminating her employment in retaliation for complaining about the

inadequate break times. (*Id.* at 12–13.) Third, she argued that defendants violated Labor Law § 740, which prohibits retaliatory actions against an employee who discloses, or threatens to disclose, an illegal employer practice that creates a danger to public health or safety. (*Id.* at 13–14.) Fourth, she asserted a common law negligence claim against defendants stemming from the dog bites. (*Id.* at 14.) In a first amended complaint dated September 19, 2017, plaintiff changed her fourth cause of action against defendants from negligence to gross negligence. (Doc. 14 at 13.)

Defendants now move, pursuant to CPLR 3211(a)(7), to dismiss the fourth cause of action in Bellantoni's first amended complaint.

POSITIONS OF THE PARTIES:

Defendants argue that plaintiff's fourth cause of action should be dismissed because New York Workers' Compensation Law §§ 11, 25, 52, 120, and 200 mandate that workers' compensation is to be an employee's exclusive remedy for a work-related injury that is based on an employer's negligence. Defendants further maintain that this is so even when a plaintiff's claim sounds in gross negligence. Because Bellantoni's injury is work-related, and because her fourth cause of action is for common law gross negligence, defendants assert that it is barred by the Workers' Compensation Law.

In opposition, plaintiff claims that the Workers' Compensation Law acts as a plaintiff's exclusive remedy only when both plaintiff and defendant were acting within the scope of their employment at the time of injury. In this regard, plaintiff asserts that defendant Boxer was acting outside the scope of his employment in bringing the dog to Rare View's office, since doing so was not in furtherance of maintaining the business. Thus, plaintiff argues, her gross negligence

claim should not be dismissed. Plaintiff also maintains that, whether a particular act is within the scope of employment is a question reserved for the jury. Last, plaintiff relies on the intentional tort exception to the Workers' Compensation Law, which allows a plaintiff to recover if he or she can point to specific facts demonstrating that the defendant intended to cause harm. Plaintiff argues that she should be able to recover on her gross negligence claim because defendant Boxer's intent to cause harm can be inferred from the fact that he continued to bring his dog to Rare View's office despite his awareness of its propensity to bite.

In response, defendants contend that the factual allegations in plaintiff's complaint are insufficient to support an intentional tort claim and, thus, plaintiff cannot invoke the intentional tort exception to the Workers' Compensation Law. Moreover, defendants assert that the dog bites occurred while the parties were acting within the scope of their employment because both Bellantoni and Boxer were at the Rare View premises doing work that was connected with the business when plaintiff was bitten by Boxer's dog.

LEGAL CONCLUSIONS:

In deciding a motion to dismiss, courts have clarified that "the nature of the inquiry is whether a cause of action exists and not whether it has been properly stated." (*Marini v D'Apolito*, 162 AD2d 391, 392 [1st Dept 1990].) Pursuant to CPLR 3211(a)(7), "where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of the plaintiff." (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261 [1st Dept 2004].)

Under New York's Workers' Compensation Law, "workers' compensation is intended to be the exclusive remedy for work-related injuries (Workers' Compensation Law, § 11)." (*Burlew v Am. Mut. Ins. Co.*, 63 NY2d 412, 416 [1984]; *Orzechowski v Warner-Lambert Co.*, 92 AD2d 110, 111–12 [2d Dept 1983] ("[T]he Workers' Compensation Law generally requires employees to forfeit their right to maintain a common-law tort action against their employers . . . for work-related injuries . . . .").) However, plaintiffs may vitiate the "Workers' Compensation Law's exclusivity of remedy" by alleging that their employers engaged in intentionally tortious conduct. (*See Bardere v Zafir*, 102 AD2d 422, 424–25 [1st Dept 1984].) To do this, the complaint must establish facts showing that the employer engaged in "intentional or deliberate conduct directed at causing harm [to a] particular employee." (*Id.* (internal quotations omitted).) Intentional behavior may be found where the defendants "had knowledge of, or acquiesced in, the tortious conduct . . . ." (*Jean-Louis v Hilton Hotels Corp.*, 68 AD3d 406, 406 [1st Dept 2009].) It is not sufficient for a plaintiff to show merely that the employer "intentionally ignored" a known risk. (*See Orzechowski*, 92 AD2d at 113 (intentionally ignoring a hazard is not a specific act that satisfies the intentional tort exception to the Workers' Compensation Law).)

Defendants Rare Chelsea and Boxer argue that, "[a]s an initial matter . . . plaintiff has not even asserted a cause of action for an intentional tort." (Doc. 16 at 1–2.) Although plaintiff's first amended complaint does assert her fourth cause of action as one sounding in gross negligence (Doc. 14 at 13), CPLR 3211(a)(7) directs that this Court must nevertheless look to the pleadings to determine whether a cause of action exists for an intentional tort. (*See Marini*, 162 AD2d at 392 (the inquiry is not whether the cause of action "has been properly stated.").) Courts have consistently held that, under CPLR 3013, pleadings are to be liberally construed. (*See Barrick v Barrick*, 24 AD2d 895 [2d Dept 1965] (pleadings can even give a cause of action a wrong

name).) Therefore, whether Bellantoni may avail herself of the intentional tort exception to the Workers' Compensation Law depends on whether facts in the first amended complaint exist which give rise to an intentional tort.

This Court finds that, based on the pleadings in plaintiff's first amended complaint, a cause of action for an intentional tort cannot be sustained. Plaintiff claims in her reply affirmation to defendants' motion to dismiss that defendant Boxer's "intent to harm" can be inferred from the fact that he "continued to bring his dog to work, even after multiple bite incidents . . . ." (Doc. 15 at 3.) Further, given the dog's prior attacks on both plaintiff and other employees, "Boxer must have known it was only a matter of time until his dog would strike again." (*Id.*)

However, nothing in the first amended complaint states a cause of action for an intentional tort stemming from the dog bites. With respect to the first 2 incidents that occurred on March 8 and 17, 2016, the complaint alleges that the dog bit Bellantoni as she attempted to open the office door. (Doc. 14 at 10.) The third incident occurred when the dog pushed through the "'gate' portion of the door and bit [Bellantoni] . . . ." (*Id.*) The complaint then alleges that defendants were "aware of the dog bite incidents . . . and failed to take any precautionary measures . . . ." (Doc. 14 at 11.) These allegations fall short of establishing deliberate, specific acts directed at causing harm to plaintiff. (*See Bardere*, 102 AD2d at 424–25.) Moreover, even if defendants "intentionally ignored" the risk of Boxer's dog biting the employees, courts have held that as insufficient to meet the intentional tort exception to the Workers' Compensation Law. (*See Orzechowski*, 92 AD2d at 113.) Plaintiff's fourth cause of action must.therefore be dismissed pursuant to CPLR 3211(a)(7) for failure to state a claim.

Plaintiff also argues that defendant Boxer was acting outside the scope of his employment in bringing his dog to Rare View's office (Doc. 15 at 1–2), and that her fourth cause of action should not be dismissed because the question of whether a particular act is within the scope of one's employment is one reserved for the jury (*id.* at 2–3). However, because this Court finds that Bellantoni's fourth cause of action must be dismissed as against defendants Rare Chelsea and Boxer for failure to satisfy the intentional tort exception to the Workers' Compensation Law, it does not matter whether defendant Boxer was acting outside the scope of his employment. This Court therefore need not address those arguments.

In accordance with the foregoing, it is hereby:

ORDERED that defendants Rare Chelsea Restaurant Group LLC's and Doug Boxer's motion to dismiss is granted as to the fourth cause of action set forth in the first amended complaint of plaintiff Carly Bellantoni; and it is further

ORDERED that, within 20 days of the uploading of this order to NYSCEF, defendant is directed to serve a copy of this order with notice of entry on plaintiff's counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order and with notice of entry; and it is further

ORERED that the parties are to appear for a preliminary conference on January 15, 2019, at 80 Centre Street, Room 280, at 2:15 PM; and it is further

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

9/12/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

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