

Parker v Rubin

2019 NY Slip Op 30353(U)

February 13, 2019

Supreme Court, New York County

Docket Number: 650126/2018

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 36

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JULIE PARKER,

Plaintiff,

Index No. 650126/2018

-against-

Motion Sequence No.:001

HOWARD RUBIN,

Defendant.

-----X
Doris Ling-Cohan, J.S.C.:

In this action commenced by plaintiff seeking damages for violation of Penal Law §§ 130.35, 130.30, and 130.70 and for fraudulent inducement, defendant makes this pre-answer motion to dismiss.

Factual and Procedural Background¹

Plaintiff, a 20-year-old resident of California, met defendant, a New York resident and a portfolio manager at Soros Fund Management, LLC, through a person named Nicole Minton. Minton informed plaintiff that she would be paid \$2,000.00 to have a dinner and drinks with defendant, a wealthy man, but would not be required to have sex with him.

On November 4, 2015, plaintiff received a text from Minton indicating that she should meet defendant for lunch the next day at the Russian Tea Room, in Manhattan. During lunch, plaintiff and defendant consumed food and alcohol and defendant offered to fly plaintiff out to Miami to watch a baseball or basketball game because he had floor seats.

At some point during the lunch, defendant's assistant, Stephanie, arrived at the restaurant

¹ All the facts presented herein are taken from the complaint and accepted as true (see CPLR 3211; *Children's Magical Garden, Inc. v Norfolk Street Dev., LLC*, 164 AD3d 73 [1st Dept 2018]).

and presented plaintiff with a non-disclosure agreement (the NDA). The NDA indicated that defendant could sue plaintiff for \$1,000,000 if she disclosed any of the activities or conduct that occurred between them. When plaintiff asked why she needed to sign such an agreement, defendant said it was because he had a wife and kids, and a business. Although intoxicated, plaintiff decided to sign the NDA, however she was never given a copy of it. Stephanie left the restaurant with the signed the NDA.

Defendant then told plaintiff that he had a lavish penthouse apartment at the Metropolitan Tower, right next to the Russian Tea Room. He told her that he had dated many famous models and Playboy playmates with whom he had taken pictures, and that he kept a book of these pictures in the penthouse apartment. Defendant invited plaintiff to his apartment to see the book.

At the apartment, defendant made plaintiff several alcoholic beverages and showed her his book of photos. Plaintiff began to feel lightheaded and disoriented (plaintiff now believes that defendant put drugs in her drink). Defendant then took her to his "toy room" which was a room filled with sadomasochistic-type sexual devices. Defendant then asked plaintiff if he could lightly tie her up, fully clothed, with the mutual understanding that when she said the "safe word" – pineapples – he would stop all activities.

At a certain point, defendant restrained plaintiff more tightly, completely restraining her, and then hit her hard in the face. Plaintiff yelled the word "pineapples," but defendant did not stop. She continued to yell the safe word, but defendant proceeded to rape, sexually assault, and physically and verbally abuse her; leaving her crying, bruised and bleeding. When he was finished, defendant offered plaintiff a drink, thanked her for a pleasurable experience, and then told her she had to leave because he was going to have dinner with his wife and kids. On the car ride back to the apartment where she was staying, plaintiff called a friend screaming and crying. About 180

minutes later, plaintiff video taped her bruises and documented her experience.

Thereafter, plaintiff attended college, but her emotional stability was damaged. She began to take drugs and drink excessively. In 2016, she started to experience anxiety, panic attacks, and depression. Plaintiff then dropped out of school. She also tried to commit suicide. In May 2017, plaintiff traveled to Bali where she learned meditation and yoga to try to find inner peace, and treat her anxiety depression and substance abuse. She returned to the USA in late 2017.

Plaintiff then commenced this action alleging, in her first cause of action, that, pursuant to CPLR § 213-c, defendant violated Penal Law § 130.35 (Rape in the First Degree), § 130.50 (Criminal Sexual Acts in the First Degree), § 130.70 (Aggravated Sexual Abuse), seeking \$2.5 million in actual and compensatory damages and \$7.5 million in exemplary and punitive damages. Plaintiff's second cause of action alleges that defendant fraudulently induced her to sign the NDA, as a means of getting away with sexually assaulting her, and also seeks \$2.5 million in actual and compensatory damages and \$7.5 million in exemplary and punitive damages.

Defendant now makes this pre-answer motion to dismiss, pursuant to CPLR 3211 (a) (7), arguing that even accepting every allegation in the amended complaint as true, plaintiff's first cause of action must be dismissed because there is no private cause of action pursuant to CPLR § 213-c. Defendant argues that CPLR § 213-c does not permit a plaintiff to allege a sex crime, under the Penal Law, as a tort in a civil action. Rather, it is a provision that establishes a limitations period for certain types of civil claims.

Defendant also argues that plaintiff has not sufficiently alleged a cause of action for fraudulent inducement because she has not alleged any false representation, that she relied on that false representation, and that she suffered damages. Defendant argues that he is not denying that he asked for the NDA because he was married with kids and had a high-profile job, thus, there was

no fraudulent inducement. Further, defendant claims that plaintiff has not suffered any out of pocket losses due to her being fraudulently induced to sign the NDA.

In opposition, plaintiff argues that CPLR § 213-c does permit a private cause of action under the Penal Law, and that she has properly alleged each element of those claims. Plaintiff also argues that she sufficiently alleged a cause of action for fraudulent inducement by alleging that defendant induced her into to signing the NDA, knowing that he was going to rape and sexually assault her, to prevent her from reporting him to the police or seeking medical attention by threatening to ruin her life and sue her for \$ 1 million dollars, if she disclosed the rape and sexual assault. Plaintiff also contends that, based upon the severity and depravity of the sexual assault, she is entitled to seek punitive damages. Plaintiff also cross moves for summary judgment on the issue of liability on her first cause of action arguing that defendant has conceded that claim.

Discussion

“On a motion to dismiss for failure to state a cause of action, “[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Wilson v Dantas*, 29 NY3d 1051, 1056–57 [2017] quoting *Leon v Martinez*, 84 N.Y.2d 83, 87–88 [1994]).

First Cause of Action

CPLR § 213-c. **Action by victim of conduct constituting certain sexual offenses**, provides, in relevant part:

“Notwithstanding any other limitation set forth in this article, a civil claim or cause of action to recover from a defendant as hereinafter defined, for physical, psychological or other injury or condition suffered by a person as a result of acts by such defendant of rape in the first degree as defined in section 130.35 of the penal law, or criminal sexual act in the first degree as defined in section 130.50 of the penal law, or aggravated sexual abuse in the first degree as defined in section 130.70 of the penal law, or course of sexual conduct against a child in the first

degree as defined in section 130.75 of the penal law may be brought within five years. 211[a][7])”

(CPLR § 213-c).

Here, plaintiff has made sufficient factual allegations to support her claims of rape in the first degree, criminal sexual acts in the first degree, and aggravated sexual abuse in the first degree. Notably, defendant does not challenge the sufficiency of plaintiff’s factual allegations, but argues that CPLR § 213-c does not confer a private right of action, and therefore, plaintiff’s first cause of action must be dismissed. Defendant’s argument is without merit.

“CPLR 213-c was adopted in 2006 as part of a legislative package that was applauded for eliminating the statute of limitations in criminal prosecutions for first degree rape and three other serious sexual offenses (first degree criminal sexual act, first degree aggravated sexual abuse, and first degree course of sexual conduct against a child). See Crim. Proc. Law § 30.10(2)(a). In order to enhance the civil remedies of the victims of such crimes, CPLR 213-c provides for a five-year statute of limitations for an action seeking recovery for physical, psychological or other injury against the person who committed the crime. (Prior law generally provided for only a one-year period of limitation. CPLR 215(3)). Under CPLR 213-c, there need be no criminal prosecution of the defendant in order for the plaintiff to benefit from the five-year statute of limitations. It is noteworthy, however, that CPLR 213-c generally applies only to actions against the actual perpetrator of the crime (the person who ‘commits the acts described in this section or who, in a criminal proceeding, could be charged with criminal liability for the commission of such acts’)”

(Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 213-c, 2007).

Since 2006, only a few trial level cases have considered whether CPLR 213-c permits a private right of action. In *Cordero v Epstein* (22 Misc3d 161, 2008 Slip Op 28391 [Sup Ct NY County 2008]), the motion court held that while plaintiff alleged a violation of Penal Law § 130.50, her action was time-barred by the 5-year statute of limitations set forth in CPLR § 213-c.

In *Caen v Medina*, (537 F Supp2d 471 [EDNY 2008]), the federal court, declining jurisdiction over plaintiff’s state claims, dismissed the state claims including a claim of criminal

conduct pursuant to CPLR § 213-c. The *Caen* court noted it was also declining jurisdiction in light of the novel issue of state law raised by plaintiff regarding a private right of action pursuant to CPLR § 213-c, which was not enacted until 2006 (*id.* at 478).

In *Monaghan v Roman Catholic Diocese of Rockville Centre* (2016 WL 10516233 [Sup Ct, Nassau County, May 25, 2016, Index No. 600406/2015] *revd in part* 165 AD3d 650 [2nd Dept 2018]), although the motion court dismissed plaintiff's CPLR § 213-c claim, the court held that "CPLR 213-c extends the statute of limitations to five years on intentional torts for several specifically defined causes of action. In order to avail itself of the extended limitation period, a party must allege conduct that violates Penal Law §§ 130.35, 130.50, 130.70 or 130.75" (*id.* at *2).

In *Volpe v Paniccioli*, 57 Misc. 3d 1219[A], 2017 WL 5574692, at *1 n.1 [Sup Ct, NY County 2017], the motion court stated that a plaintiff "may assert a civil cause of action for the alleged crime under CPLR § 213-c."

In *Roelcke v Zip Aviation LCC* (2018 WL 1792374, 2018 U.S. Dist. LEXIS 51452 [SD NY, March 26, 2018, 15 Civ. 6284 (DAB)]), the federal court denied defendant's motion to dismiss plaintiff's claims pursuant to CPLR § 213-c stating, "the statutory language suggests that a plaintiff can bring a cause of action. Defendants cite no case law in support of their proposition that § 213-c does not create an independent cause of action. The little case law citing this section indicates that a plaintiff 'may assert a civil cause of action for the alleged crime under CPLR § 213-c'" (2018 WL 1792374, *9 [SD NY March 26, 2018 15-Civ-6284 (DAB)] citing *Volpe v Paniccioli*, *supra*).

In *Haggis v Breest* (2018 WL 4698660, *23 [Sup Ct, NY County August 15, 2018]), the trial court granted plaintiff's motion to amend the complaint stating, among other things, "to the extent that we're talking about the CPLR § 213-c, that does allow for the extension on statute of

limitations and makes clear that the intent of the legislature is to allow for a private right of action that identifies and relates the facts to the specified Penal Law provisions.”

While there is relatively little case law on this issue, each of the trial courts that has analyzed CPLR 213-c concludes that it provides for a private right of action for violations of the Penal Law. Defendant, for his part, has not cited any case law or other legal authority that comes to a different conclusion.

Moreover, even if CPLR 213-c did not permit a private right of action, plaintiff has sufficiently alleged numerous instances of the intentional tort of assault. It is well settled, that all pleadings must be liberally construed (see CPLR 3026; *see also Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). The inquiry is whether the complaint “states a cause of action – any cause of action” (Siegel, NY Prac § 308 at 391 [6th ed 2018]). Indeed, defendant does not dispute that plaintiff has alleged claims sounding in assault (*see* Defendant’s Memorandum of Law, NYSCEF doc # 35, p. 5).

Based on the foregoing commentaries and case law, and the fact that defendant has not cited a single case indicating that there is no private right of action under CPLR 213-c, defendant’s motion to dismiss the first cause of action is denied.

Second Cause of Action

To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury (*Sokolow, Dunaud, Mercadier & Carreras, LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]).

Here, plaintiff has alleged that defendant, knowing he was going to rape and sexually assault her, induced her to sign the NDA to prevent her from seeking any redress for his criminal

actions, and, as a result, has suffered severe monetary and non-monetary damage. Accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, plaintiff has sufficiently alleged a cause of action for fraudulent inducement (*see Wilson*, 29 NY3d at 1056–57).

Defendant contends, however, that he made no misrepresentations to plaintiff because he is married with children and did intend for the NDA to protect his family and business interests. Further, defendant notes that even if he did have a secondary reason for the NDA, he had no duty to disclose such information to plaintiff, since he had no fiduciary relationship with her. Moreover, defendant claims that plaintiff's alleged injuries would have occurred regardless of whether she signed the NDA. Defendant's arguments are without merit and do not support the dismissal of plaintiff's claim.

Certainly, if defendant had disclosed to plaintiff his alleged intent to rape, sexually assault, and beat her, and then use the NDA as leverage to prevent her from going to the police or seeking medical attention, it is reasonable to expect that she would not have signed the NDA or continued her encounter with him. Thus, she would not have suffered the alleged severe monetary and non-monetary damages. Plaintiff has sufficiently alleged that her injuries are causally related to defendant fraudulently inducing her into signing the NDA (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002] ["An essential element of the plaintiff's cause of action for negligence, or for ... any ... tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered" citing Prosser and Keeton, Torts § 41, at 263 [5th ed]).

Plaintiff's cross motion for summary judgment on her complaint is denied as premature since issue has not yet been joined (*see CPLR 3212 [a]*; *City of Rochester v Chiarella*, 65 NY2d

92, 101 [1985])).

Accordingly, based upon the above, it is

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on the issue of liability on her first cause of action is denied as premature; and it is further

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

ORDERED that **counsel are directed to appear for a discovery compliance conference in Room 428, 60 Centre Street on March 14, 2019, at 10 o'clock a.m.**, as previously directed in this Court's Preliminary Conference order dated October 9, 2018, and all discovery shall be completed as provided therein, with **a note of issue filed by April 10, 2019**; and it is further

ORDERED that within 20 days of the date of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

DATED: February 13, 2019



Hon. Doris Ling-Cohan, J.S.C.

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