SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 34

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LUCY ENGELMAN, BRIDGET DOLAN, TARA BRUNO, ANGELA JOACHIN, J.J., MARIA ELENA ARMIJO, DANIELLE ORNELAS, CINDY SPTIKO, I.R., TRACY PARKER and HEATHER BLASKO, on behalf of themselves and on behalf of other similarly situated individuals,

Plaintiffs,

- against -

PETER ROFE and PDR VOICE, INC.,

Defendants.

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Index No. 152072/2018
Decision/Order

HON. CARMEN VICTORIA ST. GEORGE, J.:

Defendants Peter Rofe and PDR Voice, Inc. (PDR Voice), a New York State S-Corporation solely owned by Rofe,[1] move pre-answer to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), (5) and (7). After consideration of the papers and following oral argument, the court grants their motion.

Plaintiffs are 11 women claiming sexual assault and harassment by Rofe, seeking to bring their claims, first commenced in March 2018, as a class action on behalf of themselves and others similarly situated, pursuant to CPLR article 9 (Klausner affirmation, exhibit B [amended complaint], ¶ 31).[2] They allege four causes of action: negligence, negligent infliction of emotional distress, negligent hiring and supervision, and violation of Title 8, chapter 9 of the Administrative Code of the City of New York, known as the Victims of Gender-Motivated

[1] See Klausner affirmation ¶ 36.

[2] The original summons and complaint was brought in plaintiff Engelman's name and filed on March 7, 2018; an amended summons and complaint naming the other 10 plaintiffs was filed on April 30, 2018 (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 1 [summons and complaint]; No. 2 [amended summons]; No. 3 [amended complaint]).

Violence protection Act (hereinafter the Gender-Motivated Violence Act or GMVA). They seek compensatory, and punitive and exemplary damages (*id.* ¶¶ 51, 72).

According to the allegations of the "collective and class action amended complaint," plaintiffs were individual clients of Peter Rofe, a well-known voice-over coach and the owner of PDR Voice, who forcibly attacked each of them individually between the summer of 2011 and July 13, 2016, during recordings of voice-over demo reels, or private voice-over sessions (*id.* ¶¶ 20-30). Rofe allegedly made unwanted sexual advances, including forcing himself on the women, touching, kissing, and/or groping and in certain instances exposing or rubbing his penis against the woman's body (*id.*). Many of the plaintiffs allege that Rofe intimated or stated that his actions were necessary to improve their work (*see. e.g.* amended complaint ¶ 21 [Rofe told plaintiff Dolan that she "needed to get in the mood," then groped her]; ¶ 22 [Rofe told plaintiff Bruno that "if she wanted to get the scene right, she had to kiss him," then forced himself on her]; ¶ 25 [Rofe instructed plaintiff Armijo to use her "sexy voice," and said that they should kiss so she could "get 'in the mood,'" then forcibly kissed and groped her body]).

The first cause of action alleges that defendants were negligent because they owed each plaintiff a duty of care to keep her safe from the kind of harms to which they were subjected; defendants knew or should have known that Rofe had previously committed sexual assaults and was likely to do so again; and because of his acts, plaintiffs "suffer[ed] personal injuries, emotional distress, conscious pain and suffering, embarrassment, humiliation, nightmares, mental anguish, and other losses" (*id.* ¶¶ 49-50). The second cause of action alleges that defendants knew or should have known that Rofe's "battery, assault, and improper conduct" would result in physical and emotional distress to plaintiffs, and although defendants had the authority and duty to stop such improper conduct, they failed to act to stop, prevent or prohibit it,

causing negligent infliction of emotional distress (*id.* ¶¶ 55-58). The third cause of action alleges that PDR Voice had a duty to supervise and prevent known risks of harm, and that defendants were "negligent in hiring and supervising their personnel, including but not limited to Peter Rofe" (*id.* ¶¶ 62-63). The fourth cause of action, brought under the Victims of Gender-Motivated Violence Act (Administrative Code §§ 8-901—8-907), alleges that Rofe's "barbaric acts," whether or not they resulted in criminal charges, were crimes of violence motivated by or committed at least in part, by animus based on each plaintiff's gender, and caused physical, psychological and emotional damage to plaintiffs (*id.* ¶¶ 68-70).

In moving to dismiss the complaint, defendants argue that the first cause of action, although sounding in negligence, alleges intentional rather than negligent conduct and is therefore controlled by the one-year statute of limitations (CPLR 215 [3]; CPLR 3211 [a] [5]), rendering the claims untimely (*see* Klausner affirmation, ¶¶ 19, 30-31). They argue the second cause of action, negligent infliction of emotional distress, is duplicative of the first and third causes of action, and at best alleges negligent supervision by PDR Voice, and assault and battery as to Rofe, and is time barred as well as legally invalid (Klausner affirmation, ¶¶ 32, 35). The third claim of negligent hiring and supervision should be dismissed, they argue, because it fails to state a cognizable legal claim in that Rofe is not an "employee" of his S-Corporation, PDR Voice (CPLR 3211 [a] [7]); as to plaintiffs Dolan, Bruno, Armijo and Sptiko, the complaint is also untimely, given the three-year statute of limitations (*id.* ¶¶ 36-38). Similarly, the fourth cause of action under the GMVA is also time-barred, defendants argue, despite its seven-year statute of limitations, as the doctrine of preemption forbids using the New York City regulation to extend the one-year statute of limitations mandated by the legislature for intentional tort

claims (*id.* ¶¶ 39-40). Additionally, defendants argue that the claim for a class action should be dismissed as plaintiffs have not pleaded any viable or timely causes of action (*id.* ¶¶ 41-42).

In opposition, plaintiffs argue that the allegations in the complaint "indicat[e] something more than the intentional conduct committed by defendant," more specifically that defendants had a duty, which they breached, to provide and ensure a safe environment for plaintiffs-students, and that the sexual abuse was a foreseeable harm within defendants' sphere of control and knowledge (Merson affirmation in opp, ¶¶ 22-25). They assert their claims are "well-established, legally recognized claims of negligence, negligent infliction of emotional distress and negligent supervision and negligent hiring," and not, as defendants would characterize them, "creative labeling" (*id.* at ¶ 26). They argue that the third cause of action of negligent hiring and supervision is viable because an entity can be found negligent for acts of its employees, and PDR Voice was on notice of Rofe's abusive conduct (*id.* ¶¶ 38-39). While Rofe is the sole owner, he indicated in his bill of particulars filed in an unrelated litigation, that PDR Voice was his "employer" (Merson affirmation in opp, ¶ 47, citing exhibit G [Rofe bill of particulars at ¶ 7]). There is documentary and testimonial evidence to show that Rofe was not the only employee (*id.* ¶¶ 42-44 [citing *id.*, exhibit D [Rofe EBT transcript in unrelated matter]; exhibit E [PDR Voice website]; and exhibit F [PDR Voice Twitter video, posted early 2017]). Rofe was responsible for not only the coaching and teaching, but the running of the company including hiring; he owed a duty of care to his clients as the "agent" of the company providing the coaching services, as well as a duty to supervise all employees providing services, including himself (*id.* ¶ 48). Plaintiffs argue that the form and function of PDR Voice is unclear but it may be accountable for claims of negligent hiring and supervision (*id.* ¶ 46). As to the fourth cause of action brought under the GMVA, plaintiffs argue that there is no preemption issue; the gender-motivated

component of the Act distinguishes it from claims of assault and battery, the statute of limitations of which is controlled by CPLR 215 (*see* Merson affirmation in opp, ¶¶ 51-54). Administrative Code § 8-902 expressly states that the legislative intent of the Victims of Gender-Motivated Violence Act was to circumvent the "often unduly harsh" one-year statute of limitations for victims of sexual crimes, and to provide a private right of action by victims against their perpetrators to seek redress from gender-motivated violence (*id.* ¶ 56). They contend they have adequately pleaded assault and the claim should be allowed to continue. Finally, they dispute the necessity of dismissing the claim for a class action, on the basis that their claims are viable and should go forward (*id.* ¶ 65).

Discussion

The court's task when determining a motion to dismiss brought under CPLR 3211, is to "determine whether plaintiffs' pleadings state a cause of action"; if from the four corners of the pleadings, there are factual allegations "which taken together manifest any cause of action cognizable at law," the court will deny the motion (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002] [internal quotation marks and citation omitted]). The complaint is "liberally construe[d]," and the alleged facts are considered true, as are any submissions in opposition to the motion to dismiss (*Jennifer Realty Co.* at 152). The plaintiff is accorded "the benefit of every possible favorable inference" (*id.*, citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The question is notably not whether a plaintiff will ultimately succeed in establishing the allegations (*see Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013]). Where the pleading is defective on its face, the court will grant the motion to dismiss pursuant to CPLR 3211(a) (7) (*see Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 135 [1st Dept 2017]).

Statutes of Limitations

Civil assault and battery are among the intentional torts that have a one-year statute of limitations (*see* CPLR 215 [3]). Negligence is governed by the three-year statute of limitations as provided in CPLR 214 (5). The GMVA provides a seven-year statute of limitations for commencing an action under the its authority (*see* Admin Code § 8-905 [a]).

The court begins its analysis by addressing defendants' argument that plaintiffs' first cause of action, denominated as arising in negligence, in fact alleges intentional misconduct and is governed by the one-year statute of limitations. Negligence arises from a breach of a legal duty of care (*see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). The threshold question is whether defendants breached a legally recognized duty of care to plaintiffs (*id.*). The existence and scope of their duty is a legal question to be determined by the court (*see Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). The scope of defendants' duty is "defined by the risk of harm reasonably to be perceived" (*id.*; *see Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928]). Thus, a claim in negligence is sufficiently pleaded when it is alleged that the defendant failed to exercise "that degree of care which a reasonably prudent person would have exercised in the circumstances, and a probable risk of harm was reasonably foreseeable from this failure" (*Ohdan v City of New York*, 268 AD2d 86, 88 [1st Dept 2000], citing 1A PJI 2:10, 2:12). The plaintiff need not "demonstrate the foreseeability of the precise manner" in which the harm occurred, or the "precise type of harm produced," but liability will not attach unless the harm is "within the class" of reasonably foreseeable hazards "that the duty exists to prevent" (*Di Ponzio v Riordan,* 89 NY2d 578, 583-584 [1997]).

Despite plaintiffs' arguments otherwise, the gravamen of their complaint is that Rofe assaulted them and is liable to them in damages for his intentional conduct. It is of no matter that

the complaint asserts claims of negligence based on defendants' failure to prevent or stop Rofe's acts (*see Kantrow v Security Mut. Ins. Co.*, 49 AD3d 818, 819 [2d Dept 2008] [denying claim for insurance coverage based on the plaintiffs' negligence in permitting or failing to stop their son from sexual assault because the gravamen of the underlying action sought to hold the plaintiffs liable for the injuries resulting from their son's intentional acts]). It is the essence of the cause of action that controls, not its descriptive name (*see Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564, 564 [1st Dept 2016] [holding that the plaintiff could not avoid the statute of limitations by reframing his intentional tort claim of assault by a security guard as a claim based on the duty to keep the premises safe]; *Palker v MacDougal Rest. Inc.*, 96 AD3d 629, 630 [1st Dept 2012] [where the defendant's employee pushed the plaintiff down a flight of stairs, the conduct could not be deemed negligent under any fair construction of the complaint or from the plaintiff's version of what happened]). Allegations that the plaintiff was "assaulted, struck, grabbed, battered, beaten, punched, thrown, and seriously injured" by the defendant's employee, asserted a claim not of negligence, but of the intentional tort of assault (*Williams v 268 W 47th Rest. Inc.*, 160 AD3d 436, 437 [1st Dept 2018] [internal quotation marks omitted]). Once it has been established that there was intentional offensive contact by the defendant, he or she is liable for assault, not negligence (*see Cagliostro v Madison Sq. Garden, Inc.*, 73 AD3d 534, 535 [1st Dept 2010]). As the one-year statute of limitations has run, the first cause of action is dismissed as untimely.

Negligent infliction of emotional distress

A claim for negligent infliction of emotional distress "must generally be premised upon conduct which 'unreasonably endangers' the plaintiff's physical safety," although physical injury is not a necessary element (*Glendora v Gallicano*, 206 AD2d 456, 456 [2d Dept 1994]; *see De*

Rosa v Stanley B. Michelman, P.C., 184 AD2d 490, 491 [2d Dept 1992]). A person "*to whom a duty of care is owed* . . . may recover for harm sustained . . . as a result of an initial, *negligently-caused* psychological trauma, . . . with ensuing psychic harm with residual physical manifestations" (*Johnson v State of New York*, 37 NY2d 378, 381 [1975] [emphases added]). Said somewhat differently, a claim for negligently inflicted emotional harm "must generally be premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety" (*Daluise v Sottile*, 40 AD3d 801, 803 [2d Dept 2007] [internal quotation marks and citations omitted]). The conduct must be "so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community" (*Wolkstein v Morgenstern*, 275 AD2d 635, 636-637 [1st Dept 2000] [internal quotation marks and citation omitted]).

The problem with this second cause of action alleging that PDR Voice and Rofe negligently inflicted emotional distress because they reasonably should have known that their failure to prevent Rofe's assaults would proximately result in physical and emotional distress to plaintiffs—is that, like the first cause of action, it derives from Rofe's intentional conduct, although framed as negligence. There is no such claim as negligent assault, because "once intentional offensive contact has been established, the actor is liable for assault and not negligence" (*Wertzberger v City of New York*, 254 AD2d 352, 352 [2d Dept 1998] [internal quotation marks and citations omitted]; *see also Cagliostro v Madison Sq. Garden, Inc.*, 73 AD3d at 535). In such instances, a cause of action alleging negligent infliction of emotional distress will not lie (*see, e.g. James v Flynn*, 132 AD3d 1214, 1216 [3d Dept 2015] [denying amendment of complaint to add claim for negligent infliction of emotional distress where the

plaintiff had not alleged that the defendant acted negligently, but rather that he had stalked her, entered her home, and threatened her with a weapon]; *Santana v Leith*, 117 AD3d 711, 712 [2d Dept 2014] [allegations that the defendant "deliberately and violently" attacked the plaintiff with a hammer while using racial and ethnic slurs, were premised on intentional conduct and not negligence, and there could be no claim for negligent infliction of emotional distress]).

Moreover, a "cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action" (*Wolkstein v Morgenstern*, 275 AD2d at 637). Although plaintiffs here claim negligent infliction of emotional distress, the complaint's allegations pertain to claims of negligent hiring and retention by PDR Voice, and assault by Rofe and are duplicative of the first and third causes of action (*cf. Murphy v American Home Prods. Corp.* (58 NY2d 293, 303 [1983] [plaintiff may not skirt New York's absence of a cause of action in tort for wrongful or abusive discharge of an at-will employee "by casting his cause of action in terms of a tort of intentional infliction of emotional distress"]).

Accordingly, the second cause of action must be dismissed for failure to state a cause of action.

Negligent hiring and supervision

An "employer" is defined as a person "who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages" (Black's Law Dictionary 565 [8th ed 2004]). According to federal regulations, the employer-employee relationship exists, in general, when "the person for whom services are performed has the right to control and direct the individual who performs the services not only as to the result...but also as to the details and means by which that result is accomplished" (26 CFR 31.3121 [d]-1 [c]-[2]).

Under the theory of negligent hiring and retention, an employer can be held liable for its employee's actions done outside the scope of his or her employment (*see Gonzalez v City of the New York*, 133 AD3d 65, 67 [1st Dept 2015]; PJI 2:240). In New York, an employer has a duty "to use reasonable care in the employment, training and supervision of its employees," and to "find out whether they are competent to do their work without danger of harm to others" (PJI 2:240). An employer fails in its duty when it has knowledge that its employee has, for instance, assaulted a client, and does not use reasonable care to correct or remove the employee (*id.*). Its negligence arises from placing its employee in a position to cause foreseeable harm, "harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]).

Plaintiffs allege that Rofe, who has described himself as an employee of PDR Voice in unrelated deposition testimony and a bill of particulars (*see* plaintiffs' memorandum of law, ¶¶ 42, 47), was obviously known by the company to have engaged in repeated sexual misconduct with his clients, and plaintiffs argue that the company can therefore be found negligent for his actions since it failed to remove him (*id.* ¶¶ 38-39, citing *Gomez v City of New York*, 304 AD2d 374, 374 [1st Dept 2003]). Rofe was responsible "not only for providing voice-over coaching services at PDR Voice, but also for any and all business decisions . . . including, who worked at PDR[,] their responsibilities, performance and retention," he also "owed duties to his clients not only as a voice-over coach, but as the agent of the company that was providing the services" (plaintiffs memorandum of law, ¶ 48). Therefore, as the company's "main officer and agent," Rofe "had a duty to supervise all professionals that provided services in the company's setting, including, himself" (*id.*).

The trial court decision, *Campbell v Gabryszak* (57 Misc 3d 1206 [A], 2015 NY Slip Op 52037[U] [Sup Court, Erie County 2015]), cited by defendants, is helpful in this analysis. There, a former employee of a member of the New York State Assembly brought suit against the assembly member as well as other State officials and entities, alleging a hostile work environment. As is relevant here, her claim against her former employer of negligent supervision and retention was dismissed, with the court explicitly agreeing that he could not "supervise or retain himself" (*see Campbell*, 2015 NY Slip Op 52037 [U] *3). So too, here, plaintiffs fail to allege a viable cause of action. Their argument, when boiled down, is that Rofe was negligent in, if not hiring himself, then in retaining himself as the voice coach, after he allegedly began sexually assaulting female clients. The argument that PDR Voice can be held liable because Rofe was allegedly not the only employee of the corporation, is of little persuasion. PDR Voice has no separate corporate structure which could make decisions independently of its sole shareholder and owner.[3] As argued by defendant, Rofe functions as owner, manager, employer and employee, and whether there is more than one employee is of no matter, because an individual "cannot be alleged to have hired or supervised himself" (Klausner affirmation ¶ 37).

There appears to be no appellate authority on this issue. This court finds that the reasoning and conclusion in *Campbell,* that a person cannot supervise or retain himself, is compelling as applied to the facts here, because of Rofe's sole ownership of PDR Voice and its lack of corporate structure. As plaintiffs cannot make out a cognizable claim of negligent hiring and retention, the third cause of action is dismissed.

[3] Illustrating the nearly seamless nature of Rofe and PDR Voice, it is noted that an S-corporation is one "whose income is taxed *through its shareholders* rather than through the corporation itself" (Black's Law Dictionary 368 [8th ed 2004] [emphasis added]).

Claim under the Gender-Motivated Violence Act

Title 8 of the New York City Administrative Code pertains to civil rights and is often termed the City's Human Rights Law.[4] Chapter 9 was passed by the New York City Council in 2000, after it concluded

> "that victims of gender motivated violence should have a private right of action against their perpetrators under the Administrative Code. This private right of action aims to resolve the difficulty that victims face in seeking court remedies by providing an officially sanctioned and legitimate cause of action for seeking redress for injuries resulting from gender-motivated violence."

(Administrative Code § 8-902). A "crime of violence" is defined as "an act or series of acts that would constitute a misdemeanor or felony against the person...if the conduct presents a serious risk of physical injury to another" (Admin Code 8-903 [a]). A "crime of violence motivated by gender" is defined as a crime "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender" (Admin Code § 8-903 [b]).

The GMVA provides a seven-year statute of limitations within which the victim must commence a civil action (*see* Admin Code § 8-905 [a]). There is no requirement that there have been a "prior criminal complaint, prosecution or conviction to establish the elements of a cause of action under this chapter" (Admin Code §8-905 [c]). Under this statute, plaintiffs' claims would all be timely.

Defendants argue that the claim cannot stand because it is preempted by CPLR 215, codified by the New York State Legislature (Klausner affirmation, ¶ 40). They cite *Cordero v Epstein* (22 Misc 3d 161 [Sup Ct, New York County 2008]) which held that a plaintiff may not use the New York City regulations to extend the one-year state-mandated statute of limitations for intentional torts. In *Cordero*, the plaintiff, who had alleged several instances of sexual

[4] See, e.g. *Williams v New York City Hous. Auth.* (61 AD3d 62, 65-66 [1st Dept 2009]).

assault, sought to add causes of action alleging violations of Administrative Code §§ 10-401-10-406, and §§ 8-901- 8-907, both of which provide a civil action against persons committing crimes of violence, and a six- and seven-year statute of limitations, respectively (*Cordero* at 164). As to the claim brought under the GMVA, the court dismissed it, holding that the amended complaint did not provide factual allegations to show the crimes were motivated by an animus toward gender (*Cordero* at 164, 169). Additionally, neither claim was timely, reasoned the court, because the New York City Council's extension of the statute of limitations through "creating subclasses of such torts and setting forth longer periods of repose for such subclasses than is provided in article 2 of the CPLR is *violative of the preemption doctrine*" (*Cordero* at 168, emphasis added).

As discussed in *New York State Club Assn. v City of New York* (69 NY2d 211 [1987], probable jurisdiction noted by 484 US 812 [1987]; *affd* 487 US 1 [1988]), the New York State Constitution provides, under its "home rule provision," that local governments "have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects[:]...[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein' (i.e., the police power)" (*id.* at 217 and n 2 [internal punctuation modified]). However, a local government "may not exercise its police power by adopting a local law inconsistent with constitutional or general law," nor "exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation" (*id.* at 217).

Cordero, referenced above, relied on *Albany Area Bldrs. Assn. v Town of Guilderland* (74 NY2d 372 [1989]), in assessing whether the statutes of limitations set forth in the two provisions in the Administrative Code pertaining to crimes and sexual assaults at issue in its

case, were preempted by CPLR 215. *Guilderland* invalidated a town's transportation impact fee to be paid by building permit applicants, reasoning that it was preempted by the state's "comprehensive and detailed regulatory scheme in the field of highway funding" (74 NY2d at 377). *Guilderland* recognized that localities have been "invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern," but that the doctrine of preemption embodies "'the untrammeled primacy of the Legislature to act * * * with respect to matters of State concern'" (*id.*, quoting *Wambat Realty Corp. v State of New York*, 41 NY2d 490, 497 [1977]). A legislative intent to preempt can be implied from the nature of the subject matter being regulated and the scope and purpose of the State legislative scheme, "including the need for State-wide uniformity in a given area" (*Guilderland* at 377). In *Guilderland*, for example, there was concern that permitting towns to raise revenues by using impact fees would let them skirt statutory restrictions on how money is raised and create a fund of money not subject to the statutory requirements "governing how funds for highway improvements are spent" (*id.* at 379).

Defendants argue that the claim brought under the Gender-Motivated Violence Act is time-barred because the doctrine of preemption forbids extending the one-year statute of limitations for intentional torts, codified in CPLR 215, by employing a longer statute of limitations provided by local law. Plaintiffs argue that the GMVA serves a different purpose than bringing an assault claim subject to CPLR 215, because the basis for their claim is not the assaults, but that plaintiffs were sought out and targeted because of their gender; this gender-motivated component of their claims, they argue, is distinct from intentional acts subject to CPLR 215 (*see* plaintiffs' memorandum of law, ¶ 52).

In resolving this argument, the court notes that the Appellate Division has indicated that, as concerns the City's Human Rights Law, the City Council has made it clear "in text and legislative history," that the law is to be "construed *more broadly than federal civil rights laws and the State* [Human Rights Law]," and that the City Council "wanted the local law's provisions to be construed *as more remedial than federal civil rights and the State HRL*" (*Williams v New York City Hous. Auth.*, 61 AD3d at 74). The court is also cognizant that "the mere fact that a local law touches upon the same matters as State legislation does not, in and of itself, render it invalid on preemption grounds," and that the query is whether the State has shown that it intends to "occupy an entire field of regulation," as seen by the "pervasive scheme" of its legislation, or whether the local law "expressly conflicts with the State legislation" (*Dougal v County of Suffolk*, 102 AD2d 531, 532 [2d Dept 1984], *affd* 65 NY2d 668 [1985]). In either situation, "the local legislation must yield" (*id.* at 532).

The court finds that the First Department's discussion in *Williams* pertains to the content of a law rather than its statute of limitations and agrees with *Cordero v Epstein* that the City Council improperly extended the applicable statutes of limitation by creating "subclasses" of assault and criminality (*see* 22 Misc 3d at 168). The GMVA more than "touches on" CPLR 215's category of assault as an intentional tort; it creates a new class of assault based at least in part on an element of gender animus. However, under current New York law, an action alleging an intentional sexual assault is subject to a one-year statute of limitations (*see, e.g. Krioutchkova v Gaad Realty Corp.*, 28 AD3d 427, 428 [2d Dept 2006] [citing CPLR 215]; *Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356, 358 [2d Dept 2005] [citing CPLR 215]; *see also Cordero v Epstein*, 22 Misc 3d at 168).

Notably, the legislature has carved out separate, longer, statutes of limitations for crime victims and victims of sexual and violent assault. CPLR 213–b provides that a victim of a crime has seven years from the date of the crime to commence an action to recover damages from a defendant convicted of that crime, and a victim has ten years to commence an action after the perpetrator's conviction to recover for injuries or loss suffered as a result of violent felonies, class B felonies, and other crimes enumerated in Executive Law § 632-a (1) (e). Additionally, CPLR 213-c provides a five-year statute of limitations within which to commence an action to recover for injuries suffered from a first-degree rape (Penal Law § 130.35), criminal sexual act in the first degree (Penal Law § 130.50), or aggravated sexual abuse (Penal Law § 130.70). Although neither statute has application here, they clearly indicate the legislature's intention of occupying the entire spectrum of time limitations pertaining to claims of assault.

Plaintiffs raise important issues concerning crimes of sexual assault and their short statutes of limitations, an issue the New York City Council sought to address with the GMVA. But this court is constrained to find that the GMVA's statute of limitations is inconsistent with and preempted by that in CPLR 215. As stated in *McCarthy v Volkswagen of Am.* (55 NY2d 543 [1982]), statutes of limitation "are essentially arbitrary time limitations barring the commencement of an action, and they reflect the legislative judgment that individuals should be protected from stale claims" (55 NY2d at 548). They are "aptly...described as statutes of repose" (*id.*). Therefore, it is up to the New York State Legislature, rather than the court, to reexamine the statute of limitations pertaining to assaults, including sexual assaults, and potentially further expand the time frames within which to commence actions for damages sustained in sexual assaults where no criminal charges were brought.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 5, 2019

ENTER:

J.S.C.