Herman v Town of Oyster Bay
2019 NY Slip Op 34255(U)
May 28, 2019
Supreme Court, Nassau County
Docket Number: Index No. 601401/2018
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LINDA M. HERMAN and RICHARD J. HERMAN,

Plaintiffs,

-against-

THE TOWN OF OYSTER BAY, THE TOWN BOARD OF THE TOWN OF OYSTER BAY, COMMISSIONER OF THE TOWN OF OYSTER BAY NON-DISCRIMINATION AND ANTI-HARRASSMENT POLICY COMMITTEE, TOWN OF OYSTER BAY NON-DISCRIMINATION AND ANTI-HARRASSMENT POLICY COMMITTEE, CSEA LOCAL 881-TOWN OF OYSTER BAY,

Defendants.

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IAS Part 15
Index No. 601401/2018
Mot. Seq. Nos. 001-003

DECISION AND ORDER

MOD
CASEDISP

LEONARD D. STEINMAN, J.

The following papers, in addition to any legal memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant Town of Oyster Bay's Notice of Motion, Affirmation & Exhibits.....1
Defendant CSEA's Notice of Motion & Affirmation.....2
Plaintiffs' Affirmation in Opposition, Affidavit & Exhibits.....3
Plaintiffs' Notice of Cross-Motion, Affirmation & Exhibits.....4
Defendant CSEA's Affirmation in Reply and Opposition.....5
Defendant Town of Oyster Bay's Reply.....6

In this action, plaintiffs allege various claims against the Town of Oyster Bay and its Board (collectively, "the Town"), as well as Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA").[1] The claims stem from the defendants' alleged failure to come to the aid of plaintiff Linda Herman ("Herman") in the face of threats, harassment and accusations directed against her as an employee of the Town by a third-party, Robert Ripp, who has been described by the media as a Town critic. Herman alleges that she has suffered psychological harm resulting in physical ailments because of the defendants' failure to defend

[1] CSEA was sued as CSEA Local 881-Town of Oyster Bay.

her. Plaintiff Richard Herman is her husband, and he sues derivatively for loss of consortium. The Town and CSEA now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and, for the reasons set forth below, the motions are granted.

BACKGROUND

Herman is an employee of the Town. Since 1986 she has performed a variety of clerical and secretarial functions in different departments. From 1999 to March 2017, Herman was Secretary to the Town Clerk, where her duties included, among other things, keeping minutes of Town Board meetings and handling Freedom of Information Law requests. In March 2017, following her request for transfer, Herman was transferred to the Town's Comptroller's office where she was no longer was responsible for Board meeting minutes.

Herman alleges that she was subjected to the following actions by Ripp:

In January 2012, Ripp made repeated requests for FOIL documents and bullied Herman, making comments and sarcastic remarks.

In January 2017, Ripp posted a video on Facebook of a September 26, 2016 open Town Board meeting in which he stated that Herman was guilty of tampering with official documents. Ripp also made posts to his Facebook page in January and February of 2017 stating that Herman and others should be arrested and accusing Herman of criminal acts in connection with her duties. Ripp allegedly accused Herman of changing the contents of Board meeting transcripts; Herman asserts that she merely points out ministerial errors to the official reporter.

Herman alleges that Ripp's allegedly unfounded and defamatory Facebook posts continued through at least July 2017.

Herman alleges the following misdeeds by the Town and CSEA:

From March through July 2017, Herman was asked by the Town to assist with responses to FOIL requests—some from Ripp, some not—that caused her emotional pain because she "was besieged with memories of the torment of Robert Ripp." Plaintiff does not allege that she had any contact with Ripp during this period.

Herman alleges that despite repeated requests, the Town failed to stop Ripp from pursuing his alleged campaign against her. She alleges that on January 24, 2017 she requested a transfer, but that the Town did not transfer her until March 2017.

Herman alleges that CSEA failed to champion her cause and get the Town to take action against Ripp, despite her requests that it do so

LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord … the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Coventry First LLC*, 13 N.Y.3d 108 (2009); *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 (2d Dept. 2002); *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 (2d Dept. 1989)), and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "In assessing a motion under CPLR § 3211(a)(7), a Court may freely consider affidavits submitted by a party to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

Plaintiffs' first cause of action alleges violation of the Workplace Violence Prevention Act (WVPA), New York Labor Law § 27-b. The WVPA requires public employers to evaluate the risk of workplace violence and to create a policy and program to address such risks. The Town has such a program, which is annexed to the complaint as an exhibit. Plaintiff alleges that the Town failed to act in accordance with its program because it failed to take appropriate action in response to plaintiff's complaints about Ripp.

Labor Law § 27-b does not provide for a private right of action in the circumstance that it or any program developed under it is not followed. Nor can a private right of action under Labor Law § 27-b be fairly implied. *See Carrier v. Salvation Army*, 88 N.Y.2d 298 (1996). To imply such a cause of action (1) the plaintiff must be one of the class for whose particular benefit the statute was enacted, (2) recognition of a private right of action must promote the legislative purpose of the governing statute and (3) a private cause of action must be consistent with the legislative scheme. *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629. Labor Law §27-(b)(6)

explicitly sets forth an employee's remedies with respect to claimed violations: any employee who believes that an uncorrected violation of the program or an imminent danger exists may give notice to the Commissioner of Labor, who has the authority to enforce WVPA. A private right of action cannot be implied from the language of the statute. (Herman alleges that she gave such notice to the Commissioner of alleged violations (see Complaint, ¶ 142), but fails to state the result of such complaint).

Recognition of a private right of action cannot fairly be implied for the further reason that the legislative goal of the statute would be complicated and not furthered by such a cause of action. Plaintiff has sued not only her public employer but her labor union as well. The program the Town established states that it was reviewed by a union representative, who presumably also participated in developing the program as required by regulations implementing the statute. *See* 12 NYCRR §800.6. Permitting a private cause of action for violating the statute runs the risk of interfering with often fraught labor relations. And, of course, there are competing workers' compensation laws at play.

Finally, it is unclear from the pleading precisely how the statute and the Town's program were violated (was the program deficient or simply not followed?). Even if this court were permitted to entertain the cause of action and conjure up its elements, plaintiffs' complaint fails to allege the facts upon which the alleged breach is based. Plaintiffs allege that Herman should have been free from Ripp's filing of "false documents, slander, libel," etc. (Complaint, ¶¶ 117, 118.) The precise actions that the Town should have taken pursuant to § 27-b are absent.

The first and second causes of action alleging failure to comply with Labor Law § 27-b and the Town's WVPA program are therefore dismissed. In addition, the third cause of action alleging the violation of unspecified statutes, codes, rules and regulations is dismissed.

Plaintiffs' fourth, fifth and seventh causes of action sound in negligence. The New York Workers' Compensation Law is the exclusive remedy when an employee is injured "by the negligence or wrong of another in the same employ." N.Y. Workers' Comp. Law § 29(6); *see, e.g., Miller v. Huntington Hospital*, 15 A.D. 3d 548, 548-50 (2d Dept. 2005); *Conde v. Yeshiva Univ.*, 16 A.D.3d 185, 186-87 (1st Dept. 2005) (dismissing claims for negligent hiring, supervision).

Although the negligence claims are also directed at the CSEA, it was not Herman's employer and had no duty to supervise the Town's staff. Plaintiffs fail to identify any duty

CSEA had towards her that was negligently performed. The fourth, fifth and seventh causes of action must therefore be dismissed.

The sixth cause of action alleges intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress plaintiffs must allege conduct which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Ruggiero v. Contemporary Shells, Inc.*, 160 A.D.2d 986 (2d Dept. 1990), *quoting Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303 (1983). As recognized in *Ruggiero*, in which defendants allegedly harassed and discharged their employee-plaintiff, whether a cause of action is stated is not measured by how upsetting the claimed conduct is to the plaintiff. Here, the conduct alleged, regardless of the effect and motivation, does not satisfy the standard. *See, e.g., Petkowitz v. Dutchess County Dept. of Community & Family Services*, 137 A.D.3d 990 (2d Dept. 2016)(employee allegations that supervisor was overtly hostile leading to discharge insufficient to state claim).

The eighth cause of action against CSEA alleges the failure of the CSEA to properly represent Herman, in breach of the collective bargaining agreement. For the various reasons set forth in the CSEA's memoranda of law, this claim lacks merit.

Finally, the ninth cause of action alleges that the defendants conduct violated the equal protection clause of the United States Constitution. To state a viable cause of action under the equal protection clause, plaintiffs must allege that they "compared with others similarly situated," were "selectively treated" and that "such treatment [was] based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bath faith intent to injure a person." *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004). The complaint fails in this regard. For this reason, the claim is deficient and the entire complaint is dismissed.

Plaintiffs have cross-moved for leave to serve an amended complaint and attached a proposed pleading. Because the proposed pleading does not correct the deficiencies noted herein, the cross-motion is denied. Furthermore, plaintiffs' proposed new cause of action

alleging *prima facie* tort fails to state a claim. No special damages are alleged.

This constitutes the Decision and Order of this court.

Dated: May 28, 2019
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

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ENTERED
MAY 30 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE