STATE OF NEW YORK: SUPREME COURT

COUNTY OF BROOME

A.M.P..,

Plaintiff,

-vs-

RONALD R. BENJAMIN, ESQ., and THE LAW OFFICE OF RONALD R. BENJAMIN,

Defendants.

DECISION & ORDER

Index No. EFCA2019 003543

Submissions & Appearances:

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RICH, J.

This matter is before the court on a motion by the Defendant to:

- Dismiss certain causes of action in the Amended Complaint as barred by the statute of limitations, contradicted by documentary evidence or because they fail to state a cause of action[1].

- Objecting to the Plaintiff's prosecution of the matter anonymously or in the alternative requesting that the defendants also be captioned anonymously.

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[1]. Causes of Action; 2nd, 3rd, 4th, 5th, 7th (in part), 8th, 9th, 10th, 11th, 13th (in part), 14th & 15th.

- Striking the "Law Office of Ronald R. Benjamin," which he claims is not a separate entity.

Attorney Benjamin has submitted an affidavit and memorandum of law regarding the motion, which contains documentary exhibits (to include Family Court documents). Attorney Ferrara has also submitted an affidavit and a memorandum of law on the motion. Further, Attorney Ferrara has submitted a cross-motion seeking to seal certain defense exhibits and for sanctions.

Oral argument on the motion was heard in court virtually on September 1, 2020. Attorney Daniel Rose appeared for Attorney Ferrara and Attorney Benjamin appeared pro se.

The court has already ruled on the issues of anonymity and naming the law office as a defendant. Since evidence of a change in circumstances or law has not been shown, the law of the case stands, the motion in those regards are found to be inappropriate and are denied. The court understands the points of Attorney Benjamin regarding his law office, but feels they are premature until discovery is complete. He may renew his motion in that regard, if appropriate, at that time. The court believes that was pointed out in the previous decision.

Gender Biased Causes:

In regard to the causes of action which allege a violation of Section 79-n of the Civil Rights Law, it would seem that the statute of limitations period is extended from one year to three years. *See,* CPLR Sections 215 and 214. Attorney Benjamin attacks the causes on two fronts. The first argument is what might be called the "duck argument" - if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck. Attorney Benjamin argues, in truth, the matters alleged are common law torts and should be treated as such. The second issue is whether the causes of action correctly and sufficiently plead a violation of that statute. In this regard, Benjamin argues that some of the alleged conduct does not come within the statute and that the causes do not set forth sufficient facts to show that the alleged victim was singled out because of her gender.

If the causes are properly under the statute, they would be timely, and, if they are not, they would be untimely.

> "New York's Civil Rights Law §79-n (2) and New York City Administrative Code (City Code) §8-904 are commonly referred to as 'hate crime' laws. Civil Rights Law 79-n(2) provides a civil remedy against any person 'who intentionally selects a person or property for harm or causes damage to the property of another or causes physical injury or death to another in whole or in substantial part because of a belief or perception regarding the ... gender ... of a person....' 'Gender' is defined in subsection (1)(d) as" a person's actual or perceived sex and shall include a person's gender identity or expression.'The legislative history of the statute indicates that it applies only to bias-related

violence or intimidation. New York Bill Jacket, 2010 A.B. 529, Ch. 227.' Gottwald v Sebert, 2016 N.Y. Misc. LEXIS 5202, *23-24 (S.Ct., NY Co., 2014).

New York County Supreme Court continues: "Movants seek dismissal of both of these claims on the grounds that no facts support Kesha's conclusory allegations that the alleged violent incidents were motivated by gender . . . Although Gottwald's alleged actions were directed to Kesha, who is female, the CCs do not allege that Gottwald harbored animus toward women or was motivated by gender animus when he allegedly behaved violently toward Kesha. Every rape is not a gender-motivated hate crime." Gottwald v Sebert, 2016 N.Y. Misc. LEXIS 5202, *25-26.

In Spring v. Allegany-Limestone Cent. Sch. Dist., 2017 U.S. Dist. LEXIS 209250 (W.D.N.Y., 2017), the court, citing statutory language and legislative history, found that a claim of bias-related violence or intimidation was required specifically on the part of the defendant(s) and that the remedy was not available, "where existing discrimination laws already provide protection, such as in employment or public housing decisions." Id. At *27. *See also*, Karam v Cnty. Of Renselear, 2016 U.S. Dist. LEXIS 368, *55 (N.D.N.Y., 2016). Defendant's reliance on Waxter v State of Neew York, 33AD3d 1180 (3rd Dept., 2006) may be misplaced or overstated, as that dealt with a constitutional tort and not a gender based claim.

Since Section 79-n CRL is a fairly new statute and there is not substantial case law regarding the statute, courts have looked to other gender-based and hate based statutes for guidance.

"The cases addressing the GMVA {Gender-Motivated Violence Act] are scant. While actions arising from the statute are invariably predicated on reprehensible conduct against female victims, this factor alone cannot sustain a GMVA claim. In spite of the egregious nature of the allegations, courts have dismissed GMVA claims based on the plaintiff's failure to state 'any facts showing that [defendant's] alleged acts demonstrated any hostility based on gender.' *Cordero v. Epstein*, 22 Misc. 3d 161, 163, 869 N.Y.S.2d 725 (N.Y. Sup. Ct. 2008) (defendant touched plaintiff's private parts and coerced oral sex); see also *Gottwald,* 2016 N.Y. Misc. LEXIS 5202, 2016 WL 1365969, at **4, 9 (defendant repeatedly drugged and raped plaintiff, made negative comments about plaintiff's body, and threatened to destroy plaintiff's career); *Adams v. Jenkins*, 2005 WL 6584554, at **1, 4 (N.Y. Sup. Ct. Apr. 22, 2005) (defendant slapped and pushed plaintiff, called her a "bitch," and threatened to kill her but court found plaintiff had failed to plead that assault was 'motivated by gender bias'). Even the non-GMVA cases that Hughes cites by analogy—like the Violence Against Women Act—expressly require the gender animus element to be pleaded. *See Fierro v. Taylor*, 2012 U.S. Dist. LEXIS 186433, 2012 WL 6965719, at *1 (S.D.N.Y. Oct. 22, 2012) (animus can be shown through factors such as 'perpetrator's language, severity of the attack, lack of provocation, previous

history of similar incidents, absence of other apparent motive, and common sense'); *Jugmohan v. Zola*, 2000 U.S. Dist. LEXIS 1910, 2000 WL 222186, at *3-4 (S.D.N.Y. Feb. 2000) ('extensive history of acting in a humiliating, abusive, or degrading sexual manner exclusively toward other women' that included criminal charges). Hughes' allegations draw nowhere near to establishing that Payne was motivated, even in part, by animosity against women." Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429, 455 (S.D.N.Y., 2018).

In interpreting New York City's "Victims of Gender-Motivated Violence Protection Law" (VWM) and the Violence Against Women Act, the First Department stated as follows:

"VAWA's legislative history, and its varied case law, have exerted a gravitational pull on the few decisions, all from trial courts, that have interpreted VGM thus far. In some of these decisions, courts have interpreted the animus requirement in a way that veers from the statute's remedial purpose. These decisions, often invoking the 'not all rapes' language from VAWA's legislative history, have interpreted animus in VGM to require the plaintiffs to show extrinsic evidence of the defendant's expressed hatred toward women as a group (see *Hughes v Twenty First Century Fox, Inc.*, 304 F Supp 3d 429, 455 [SD NY 2018] [the defendant's verbal abuse, violent behavior, and workplace discrimination, in addition to his alleged rape of the plaintiff, insufficient to demonstrate animosity towards women as required by VGM]; *Gottwald v Sebert*, 2016 N.Y. Misc. LEXIS 5202, 2016 NY Slip Op 32815[U], *21 [Sup Ct, NY County 2016] [complaint did not allege that the defendant harbored animus toward women as a group when he raped and behaved violently toward the plaintiff because not every rape is 'a gender-motivated hate crime' under VGM]; *Garcia v Comprehensive Ctr., LLC*, 2018 US Dist LEXIS 138983, *11, 2018 WL 3918180, *5 [SD NY, Aug. 16, 2018, No. 17-CV-8970 (JPO)] [supervisor's assault, misogynistic insults, and intimations that the plaintiff would be treated better if she provided sexual services, insufficient under VGM because these allegations do not allege "feelings of animosity and malevolent ill will" against women] [internal quotation marks omitted]).

Other trial courts interpreting VGM, including Supreme Court in this case, have applied the "totality of the circumstances" analysis borrowed from Title VII to find that plaintiffs sufficiently showed gender-based animus by alleging actions and statements by the perpetrator during the commission of the alleged crime of violence (*see e.g. Roelcke v Zip Aviation, LLC*, 2018 U.S. Dist. LEXIS 51452, *36, 2018 WL 1792374, *13 [SD NY, Mar. 26, 2018, No. 15 Civ. 6284 (DAB)] [the defendant's use of 'gendered terms' while assaulting the plaintiff sufficient to state a cause of action]; see also Mosley v Brittain, 2017 N.Y. Misc. LEXIS 4511, 2017 NY Slip Op 32447[U] [Sup Ct, NY County 2018] [cause of action stated where the defendant repeatedly called plaintiff a 'bitch' and contemporaneously kneed her in the crotch]).

What the few cases that have grappled with VGM's pleading requirements

have in common is the premise that some allegation of other acts or statements tending to show gender animus are necessary to supplement allegations of rape or sexual assault. Some courts, such as the Supreme Court below, have found that a plaintiff states a cause of action with very limited additional allegations; others have erected insuperable barriers to stating a claim.

We find that cases interpreting VGM have been distorted by the vestigial legislative history and case law of VAWA. While the City Council was clearly filling a gap left by VAWA's demise, it does not follow that it incorporated all of VAWA's legislative compromises into VGM. There is no stated concern in VGM's legislative history that the number of cases brought under VGM must somehow be limited. The legislative history of VGM does not invoke the 'not all rapes' language from VAWA's legislative history. Accordingly, courts seeking to interpret VGM's pleading requirements are not required to follow the pre-Morrison federal case law that often struggled to determine the meaning of the animus provision in VAWA's civil rights cause of action.

However, the animus provision remains in VGM, and a statute "is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided" (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 587, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]). As we find that VGM's legislative history provides no insight on this point, and that VAWA's legislative history and case law are inapposite, we return to the two possible definitions of animus.

Plaintiff's interpretation of the animus requirement, that it signifies "attitude or governing spirit," would render superfluous the language that comes immediately before it in the statute. As noted above, VGM defines a 'crime of violence motivated by gender' 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' (Administrative Code § 10-1103). It is redundant to say that a crime is committed 'because of gender or on the basis of gender' and that the crime is due in part because of animus based on gender, where animus is defined as an 'attitude or governing spirit' based on the victim's gender. In order for animus to add meaning to the statute, and avoid redundancy, it must mean what defendant urges: malice or ill will.

However, even under this definition plaintiff's claims in the amended complaint that she was raped and sexually assaulted are sufficient to allege animus on the basis of gender. She need not allege any further evidence of gender-based animus. Defendant has conceded that the allegations herein are sufficient to show that the acts alleged were 'committed because of gender or on the basis of gender.' That the alleged rape and sexual assault was 'due, at least in part, to an animus based on the victim's gender' is sufficiently pleaded by the nature of the crimes alleged.

Rape and sexual assault are, by definition, actions taken against the victim without the victim's consent. Without consent, sexual acts such as those alleged in the complaint are a violation of the victim's bodily autonomy and an expression of

the perpetrator's contempt for that autonomy. Coerced sexual activity is dehumanizing and fear-inducing. Malice or ill will based on gender is apparent from the alleged commission of the act itself. Animus inheres where consent is absent.

Accordingly, plaintiff has stated a claim under VGM." Breest v Haggis, 180 A.D.3d 83, 92-94 (1st Dept., 2019).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634). Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994).

"'When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference' (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582, 69 NYS3d 520, 92 NE3d 743 [2017] [internal quotation marks omitted]). 'Whether 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 NY3d 11, 19, 832 NE2d 26, 799 NYS2d 170 [2005]). Furthermore, '[u]nlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings' (*Davis v Boeheim*, 24 NY3d 262, 268, 998 NYS2d 131, 22 NE3d 999 [2014] [internal quotation marks omitted])." Cortlandt St. Recovery Corp. v Bonderman, 31 N.Y.3d 30, 38 (2018).

Second Cause of Action:

The second cause of action in the amended complaint charges "Gender-Biased Assault & Battery, Civil Rights Law Section 79-n." The count alleges, among other things, forcible and violent physical abuse, assault and battery, which was intimidating and motivated, in whole or in part, upon defendant's bias toward women.

Violence and intimidation are set forth (Gottwald v Sebert, 2016 N.Y. Misc. LEXIS 5202, *23-24 (S.Ct., NY Co., 2014). The defense has set forth a common law remedy, but not one which is an anti-discrimination law. Spring v. Allegany-Limestone Cent. Sch. Dist., 2017 U.S. Dist. LEXIS 209250 (W.D.N.Y., 2017). The conduct alleged is not specifically a sexual assault and does not in and of itself come under the statute without other factual allegations. Breest v Haggis, 180 A.D.3d 83, 92-94 (1st Dept., 2019).

In regard to gender animus, the cause of action states: "Upon information and belief,

Defendant Benjamin's actions were motivated, in whole or in part, upon his bias toward person's of AMP's gender, i.e., women." The court sees nothing in the opening numbered paragraphs which would expand upon the gender animus issue.

The court finds that the factual allegations are not sufficient to bring the allegations within the statute and the second cause of action is dismissed.

Third Cause of Action:

The third cause of action in the amended complaint charges "Gender Based Verbal Assault, Battery and Harassment, Civil Rights Law Section 79-n." Alleged in the cause of action, among other things is verbal abuse, assault, battery and harassment offensive to plaintiff's dignity. Not specifically alleged are acts of physical violence. Whether intimidation is alleged is a closer question. (Gottwald v Sebert, 2016 N.Y. Misc. LEXIS 5202, *23-24 (S.Ct., NY Co., 2014). The conduct alleged does not specifically, in and of itself, come under the statute without other factual allegations. Breest v Haggis, 180 A.D.3d 83, 92-94 (1st Dept., 2019).

In regard to gender animus, the amended complaint states as follows:

"105. Upon information and belief, such verbal abuse, assault, battery and harassment was motivated, at least in part, by Defendant Benjamin's bias toward AMP's gender, i.e., women.

106. Upon further information and belief, Defendant Benjamin's demeaning and unwelcome conduct toward persons of AMP's gender, i.e., women, is not limited tio AMP. Rather, Defendant Benjamin regularly and consistently conducts himself in a manner toward others of AMP's gender."

Although sparsely pled, at this early point in the action, the court finds that the allegations are sufficient to avoid dismissal.

Fourth Cause of Action:

The fourth cause of action in the amended complaint charges"Sexual Harassment, Civil Rights Law Section 79-n." The count alleges that the defendant used his position of power over the plaintiff to force and intimidate her into unwanted sexual advances, actions and activity, based at least in part, by his bias against women. The cause appears to cover intimidation and unwanted sexual physical actions. It also alleges that the conduct occurred over a period of time from June 2016 to November 2017.

The cause of action states: "Upon information and belief, Defendant Benjamin's unwelcomed sexual advances and other conduct were motivated, at least in part, by his bias toward person of MAP's gender, i.e., women, and sought to intimidate and/or harm AMP as a result thereof."

Although sparsely pled, at this early point in the action, the court finds that the allegations are sufficient to avoid dismissal.

Fifth Cause of Action:

The fifth cause of action in the amended complaint charges "Intentional Infliction of Emotional Distress, Civil Rights Law Section 79-n." The count alleges that the defendant intended to cause her, "emotional distress, anguish, anxiety, depression, embarrassment, humiliation and mental pain and suffering," motivated by his bias against women. It further alleges that he did so in part to pressure her into unwelcome sexual acts and that she was intimidated thereby.

> "Plaintiff's second cause of action is framed in terms of a claim for intentional infliction of emotional distress. To survive a motion to dismiss, plaintiff's allegations must satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v Maloney* (43 NY2d 553, 557), that: 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress' (§ 46, subd [1]). Comment d to that section notes that: "Liability has been found only where the conduct has been 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 community". Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 303 (1983). *See also*, Chanko v American Broadcasting Cos., Inc., 27 NY3d 46 (2016).
>
> "We reach a similar conclusion regarding plaintiff's cause of action for intentional infliction of emotional distress. It is well settled that a cause of action for intentional infliction of emotional distress should not be entertained 'where the conduct complained of falls well within the ambit of other traditional tort liability'" (*Sweeney v Prisoners' Legal Servs. of N.Y.*, 146 AD2d 1, 7, 538 N.Y.S.2d 370, *lv dismissed* 74 NY2d 842, quoting *Fischer v Maloney*, 43 NY2d 553, 558, 402 N.Y.S.2d 991, 373 N.E.2d 1215 [emphasis in original]). Additionally, the facts alleged in the amended complaint, even if true, are insufficient to state a cause of action for intentional infliction of emotional distress, which requires 'extreme and outrageous conduct [so transcending] the bounds of decency as to be regarded as atrocious and intolerable in a civilized society' (*Freihofer v Hearst Corp., supra*, at 143)." Butler v. Delaware Otsego Corp., 203 A.D.2d 783, 784-785 (3rd Dept., 1994).

If proven, the court finds the allegations in this matter to be extreme, outrageous, indecent and intolerable.

Based upon the Butler case, that cause of action is dismissed.

Seventh Cause of Action:

The seventh cause of action in the amended complaint charges legal malpractice in the family court representation of the plaint6iff by defendants. Defendant argues that the legal malpractice sounds in negligence but that certain specifications in paragraph 153 allege intentional torts. Upon review, the court has to agree and strikes subsections (f) through (l) thereof.

Eighth Cause of Action:

The court previously ruled on this cause of action, plaintiff has complied with the directives of that decision and defendant has set forth nothing which causes the court to alter its previous decision.

Ninth & Eleventh Causes of Action:

The ninth cause of action in the amended complaint charges negligence, while the eleventh charges gross negligence. Defendants claim that the causes of action allege intentional torts cloaked in terms of neglect and gross neglect. Attorney Benjamin argues that the negligence allegations are only incidental to the intentional tort allegations and are being used simply to extend the statute of limitations.

> "A plaintiff cannot avoid a shorter limitations period merely by casting her complaint in a form that would extend that period (*see, Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264; *Stadtman v Cambere*, 73 AD2d 501, 502). "Where the allegations of fraud are only incidental to another cause of action, the fraud Statute of Limitations cannot be invoked [citation omitted]" (*New York Seven-Up Bottling Co. v Dow Chem. Co.*, 96 AD2d 1051, 1053, *affd* for reasons stated at App Div 61 NY2d 828; *see also, Paver & Wildfoerster* [In re Catholic High School Assn. of N.Y.], 38 NY2d 669, 674-675). Plaintiff's injury was caused by alleged sexual abuse, an intentional tort. Defendant's alleged fraudulent conduct may have facilitated access to plaintiff and may have managed to keep the alleged sexual abuse secret, but it did not directly give rise to the injuries for which plaintiff seeks recovery." Doe v. Roe, 192 A.D.2d 1089, 1090 (4th Dept., 1993).

> "When determining the applicable statute of limitations, courts look to the essence of the stated claims and not to the label ascribed to them by the plaintiffs (*see Western Elec. Co. v Brenner*, 41 NY2d 291, 293, 360 NE2d 1091, 392 NYS2d 409 [1977]; *Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 263-264, 11 NE2d 902 [1937]; *Schetzen v Robotsis*, 273 AD2d 220, 220-221, 709 NYS2d 193 [2000]). Here, the gravamen of the plaintiffs' claims is that the defendant subjected her to unwelcome sexual contact for purposes unrelated to medical treatment. Regardless of how it is characterized, such a claim alleges an intentional tort subject to a one-year statute of limitations (see CPLR 215 [3];

Langford v Roman Catholic Diocese of Brooklyn, 271 AD2d 494, 495, 705 NYS2d 661 [2000]; *Tserotas v Greek Orthodox Archdiocese of N. & S. Am.*, 251 AD2d 323, 324, 673 NYS2d 1011 [1998]; *Karczewski v Sharpe*, 248 AD2d 679, 680, 670 NYS2d 318 [1998]; *Sharon B. v Reverend S.*, 244 AD2d 878, 879, 665 NYS2d 139 [1997]). Since the defendant's alleged conduct occurred on October 29, 2001, and the plaintiff's claim was not interposed until October 3, 2003, the Supreme Court correctly granted the defendant's motion to dismiss on the ground that the plaintiffs' claims were barred by the one-year statute of limitations applicable to intentional torts (see CPLR 215 [3]) and, upon reargument, properly adhered to its original determination." Doe v. Jacobs, 19 A.D.3d 641, 642 (2nd Dept., 2005).

Both of these cases have been cited by the defense and are on point. In light of these cases, the ninth and eleventh causes of action are dismissed as exceeding the statute of limitations period.

Tenth Cause of Action:

The tenth cause of action in the amended complaint charges "Negligent Infliction of Emotional Distress."

"A cause of action to recover damages for negligent infliction of emotional distress does not require a showing of physical injury but "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" (*E.B. v Liberation Publs.*, 7 AD3d 566, 567, 777 NYS2d 133 [2004]; *Hecht v Kaplan*, 221 AD2d 100, 105, 645 NYS2d 51 [1996]). Such a claim must fail where, as here, '[n]o allegations of negligence appear in the pleadings' (*Russo v Iacono*, 73 AD2d 913, 913, 423 NYS2d 253 [1980]). Moreover, the plaintiffs made no allegation that the defendant's conduct unreasonably endangered the mother's physical safety or caused her to fear for her own safety." Daluise v. Sottile, 40 A.D.3d 801, 803-804 (2nd Dept., 2007).

"Negligent Infliction of Emotional Distress (NIED)

The elements of an action for NIED are a breach of a duty owed to plaintiff which exposes him or her to an unreasonable risk of bodily injury or death (*Bovsun v Sanperi*, 61 NY2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 [1984]). While physical injury is not a necessary element of a cause of action to recover for negligent infliction of emotional distress, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for her own safety (*Saava v Longo*, 8 AD3d 551, 779 N.Y.S.2d 129 [2004]; *Johnson v New York City Board of Education*, 270 AD2d 310, 704 N.Y.S.2d 281 [2000]). A cause of action for either intentional or negligent infliction of emotional distress must be supported

by allegations of conduct by a defendant "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 community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303, 448 N.E.2d 86, 461 N.Y.S.2d 232 [1983] [citation omitted]; *see also Howell v New York Post Co.*, 81 NY2d 115, 121-122, 612 N.E.2d 699, 596 N.Y.S.2d 350 [1993]). The courts apply the same standard to both the intentional and negligence theories of emotional distress (*Young v GSL Enters.*, 237 AD2d 119, 654 N.Y.S.2d 24 [1997]; *Naturman v Crain Communications*, 216 AD2d 150, 628 N.Y.S.2d 281 [1995]). Such extreme and outrageous conduct must be clearly alleged for the pleadings to survive dismissal (*Trachtman v Empire Blue Cross & Blue Shield*, 251 AD2d 322, 673 N.Y.S.2d 726 [1998]). Morris v Rochdale Vil., Inc., 2011 N.Y. Misc. LEXIS 5969, *16-17 (S. Ct., Queens Co., 2011).

"It is well-settled that a person 'to whom a duty of care is owed . . . may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations' (*Johnson v State of New York*, [4] 37 NY2d 378, 381, 334 NE2d 590, 372 NYS2d 638 [1975] [citations omitted]). A breach of the duty of care 'resulting directly in emotional harm is compensable even though no physical injury occurred' (*Kennedy v McKesson Co.*, 58 NY2d 500, 504, 448 NE2d 1332, 462 NYS2d 421 [1983]) when the mental injury is 'a direct, rather than a consequential, result of the breach" (*id.* at 506) and when the claim possesses 'some guarantee of genuineness' (*Ferrara v Galluchio*, 5 NY2d 16, 21, 152 NE2d 249, 176 NYS2d 996 [1958]). Applying these principles to negligent infliction of emotional distress claims arising from exposure to HIV, New York courts have required plaintiffs who have not tested HIV positive to come forward with proof that, due to the negligence of another party, they were exposed to HIV [**1190] through 'a scientifically accepted method of transmission of the virus . . . and that the source of the allegedly transmitted blood or fluid was in fact HIV positive' (*Bishop v Mount Sinai Med. Ctr.*, 247 AD2d 329, 331, 669 NYS2d 530 [1st Dept 1998] [internal quotation marks omitted]; *see O'Neill v O'Neill*, 264 AD2d 766, 694 NYS2d 772 [2d Dept], *lv dismissed* 94 NY2d 858, 704 NYS2d 533, 725 NE2d 1095 [1999]; *McLarney v Community Health Plan*, 250 AD2d 310, 680 NYS2d 281 [3d Dept 1998], *lv dismissed* 93 NY2d 848, 688 NYS2d 495, 710 NE2d 1094 [1999])." Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008).

Plaintiff has satisfied the extreme, outrageous, utterly intolerable conduct allegations in the amended complaint. The Plaintiff has sparsely pled the physical aspects of the damages, however, at this early point in the action, the court finds that the allegations are sufficient to avoid dismissal.

Thirteenth Cause of Action:

The thirteenth cause of action in the amended complaint charges, "Violation of Judiciary Law Section 487."

Liberally construing the pleadings in plaintiff's favor and accepting the facts offered as true, as the court must do (McNeary v. Niagara Mohawk Power Corp., 286 AD2d 522 [3rd Dept., 2001]), the court finds the pleadings on this cause to be sufficient.

Fourteenth Cause of Action:

The fourteenth cause of action in the amended complaint charges, "Punitive Damages."

"New York does not recognize an independent cause of action for punitive damages. Instead, '[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action' (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616, 634 NE2d 940, 612 NYS2d 339 [1994]). Demands for punitive damages usually arise in the context of intentional torts such as fraud, libel, or malicious prosecution, and therefore the availability of punitive damages is often discussed in terms of conduct that is intentional, malicious, and done in bad faith. In *Ross v Louise Wise Servs., Inc.*, for example, the sole cause of action in issue was based on wrongful adoption and common-law fraud, which, as the court noted, required proof, inter alia, of a false representation made with the specific intent to deceive the plaintiff (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d at 488). In other contexts, however, it is well-settled that conduct warranting an award of punitive damages 'need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness' (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 204, 550 NE2d 930, 551 NYS2d 481 [1990]; *see e.g. Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, 830 NYS2d 871 [2007], *lv denied* 9 NY3d 801, 872 NE2d 252, 840 NYS2d 566 [2007]; *Gruber v Craig*, 208 AD2d 900, 901, 618 NYS2d 84 [1994]). Such wantonly negligent or reckless conduct must be 'sufficiently blameworthy,' and the award of punitive damages must advance a strong public policy of the State by deterring its future violation (*Doe v Roe*, 190 AD2d 463, 474-475, 599 NYS2d 350 [1993]). Indeed, as the Court of Appeals has often said, a principal goal of punitive or exemplary damages is to 'deter future reprehensible conduct' by the wrongdoer 'and others similarly situated' (*Ross v Louise Wise Servs., Inc.*, 8 NY3d at 479, 489 [citations omitted]; *see Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 316, 642 NE2d 1065, 618 NYS2d 609 [1994]; *Soto v State Farm Ins. Co.*, 83 NY2d 718, 724, 635 NE2d 1222, 613 NYS2d 352 [1994]; *Walker v Sheldon*, 10 NY2d 401, 404, 179 NE2d 497, 223 NYS2d 488 [1961]; *see also Suffolk Sports Ctr. v Belli Constr. Corp.*, 212 AD2d 241, 247, 628 NYS2d 952 [1995]). We decline to hold, as our dissenting colleagues apparently would, that only conduct done with evil motive or in bad faith warrants deterrence through punitive damages. Courts in this state have long recognized that those who, without specifically intending to

cause harm, nevertheless engage in grossly negligent or reckless conduct showing an utter disregard for the safety or rights of others, may also be deserving of the imposition of punitive damages (*see e.g. Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 550 NE2d 930, 551 NYS2d 481 [1990] [products liability action based on failure to warn]; *Giblin v Murphy*, 73 NY2d 769, 532 NE2d 1282, 536 NYS2d 54 [1988] [breach of fiduciary duty without proof of outright fraud]; *Fordham-Coleman v National Fuel Gas Distrib.. Corp.*, 42 AD3d 106, 834 NYS2d 422 [2007] [negligent failure to supply fuel under Public Service Law]; *Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, 830 NYS2d 871 [2007], *lv denied* 9 NY3d 801, 872 NE2d 252, 840 NYS2d 566 [2007] [negligence in leaving prescription drugs within reach of toddler]; *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715, 808 NYS2d 705 [2005] [negligent failure to keep ferrous materials away from an MRI magnet]; *Sosa v Ideal El. Corp.*, 216 AD2d 128, 629 NYS2d 253 [1995] [negligent maintenance of elevator]; *Gruber v Craig*, 208 AD2d 900, 618 NYS2d 84 [1994] [negligent failure to repair gas pipe]; *Figueroa v Flatbush Women's Servs.*, 201 AD2d 613, 613-614, 608 NYS2d 235 [1994] [medical malpractice in performance of abortion]; *Doe v Roe*, 190 AD2d at 474-476 [unauthorized disclosure of HIV-status information in violation of Public Health Law]; *Graham v Columbia-Presbyt. Med. Ctr.*, 185 AD2d 753, 588 NYS2d 2 [1992] [negligent abandonment by physician of physically unstable patient during treatment]; *Rinaldo v Mashayekhi*, 185 AD2d 435, 585 NYS2d 615 [1992] [driving while intoxicated]; *McWilliams v Catholic Diocese of Rochester*, 145 AD2d 904, 536 NYS2d 285 [1988] [mistreatment of patient in community residence for mentally retarded persons]). Randi A. J. v. Long Is. Surgi-Center, 46 A.D.3d 74, 80-82 (2nd Dept., 2007).

"At the outset, the third cause of action, for punitive damages, is dismissed in its entirety, inasmuch as 'New York does not recognize an independent cause of action for punitive damages' (*Gershman v Ahmad*, 156 AD3d 868, 868 [2d Dept 2017])." Roxbury Contr. v. Long Beach Youth & Family Servs., 2020 N.Y. Misc. LEXIS 6235, *3 (S. Ct, Suffolk Co., 2020).

"Finally, although the request for punitive damages was erroneously set forth in a separate cause of action, it was not improper for the Supreme Court to deem that cause of action a demand for damages in the first cause of action (*see, Laufer v Rothschild, Unterberg, Towbin*, 143 AD2d 732)." Classic Appraisals Corp. v. DeSantis, 159 A.D.2d 537, 538 (2nd Dept., 1990).

The separate fourteenth cause of action is dismissed. Punitive damages are already demanded in the first cause of action.

Fifteenth Cause of Action:

The fifteenth cause of action in the amended complaint alleges vicarious liability on the part of the law office. Attorney Benjamin repeats his arguments that his law office is not a separate entity.

As indicated previously, the court feels this should await the completion of discovery, but if appropriate, the court is willing to address the matter again at that time.

Sanctions:

As Attorney Benjamin has presented more cogent arguments and case law with this motion, the court does not believe that sanctions are appropriate.

Sealing:

The motion to seal papers which reveal the identity of the plaintiff is granted and such papers are sealed. Defendants are directed to redact plaintiff's identifying information from future filings and to provide redacted copies of already filed papers.

SUMMARY/ORDER:

Therefore, it is hereby

ORDERED, that the Second Cause of Action is dismissed, as it fails to set forth sufficient factual allegations to bring it within the ambit of Section 79-n CRL, and it is further

ORDERED, that the motion to dismiss is denied as to the Third Cause of Action, and it is further

ORDERED, that the motion to dismiss is denied as to the Fourth Cause of Action, and it is further

ORDERED, that the Fifth Cause of Action is dismissed, and it is further

ORDERED, that as to the Seventh Cause of Action, subsections (f) through (l) are stricken, and it is further

ORDERED, that the motion to dismiss is denied as to the Eighth Cause of Action, and it is further

ORDERED, that the Ninth and Eleventh Causes of Action are dismissed as exceeding the statute of limitations, and it is further

ORDERED, that the motion to dismiss is denied as to the Tenth and Thirteenth Causes of Action, and it is further

ORDERED, that the Fourteenth Cause of Action is dismissed, as New York does not recognize a separate cause of action for punitive damages, and, punitive damages are already requested under the First Cause of Action, and it is further

ORDERED, that the motion to dismiss is at this time denied as to the Fifteenth Cause of Action, allowing the Defendant to renew his motion, if appropriate, following the completion of discovery, and it is further

ORDERED, that the request for sanctions against Attorney Benjamin is denied, and it is further

ORDERED, that the papers filed identifying the plaintiff are to be sealed, Attorney Benjamin is to file replacement pages obscuring the identity of the plaintiff for inclusion in the public record and that plaintiff's identity is not to be disclosed in future filings.

This constitutes the decision, opinion and order of the court.

Dated: October 19, 2020

RICHARD W. RICH, JR.
Acting Supreme Court Justice

FILED
OCT 23 2020
BROOME COUNTY CLERK