

De Cespedes v Weil
2021 NY Slip Op 30401(U)
February 10, 2021
Supreme Court, New York County
Docket Number: 155472/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. BARBARA JAFFE</u>	PART	IAS MOTION 12
	<i>Justice</i>		
	-----X	INDEX NO.	<u>155472/2020</u>
	MICHELLE DE CESPEDES,	MOTION DATE	_____
	Plaintiff,	MOTION SEQ. NO.	<u>001</u>
	- v -		

MARC WEIL, JAMES WEIL, and NEIL DAVIS,
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5-16
were read on this motion to dismiss.

Weil defendants move pursuant to CPLR 3211(a)(5) for an order dismissing certain of plaintiff's causes of action as time-barred. In the alternative, they move pursuant to CPLR 3024(b), for an order striking allegations contained within the complaint relating to prejudicial and/or irrelevant conduct occurring more than one year before the filing of the complaint, and pursuant to CPLR 3211(a)(7) for an order dismissing certain causes of action for failure to state claims, respectively, under the New York City's Victims of Gender-Motivated Violence Protection Law (VGM) and on the ground that there is no cognizable cause of action for civil conspiracy. Plaintiff opposes.

I. FIRST AMENDED VERIFIED COMPLAINT (NYSCEF 8)

Plaintiff commenced this action on July 16, 2020 and in her first amended complaint, filed September 3, 2020, as pertinent here, she provides a detailed description of her relationship with Weil defendants, particularly, her former fiancé Marc, whom she met in 2010. After they dated for several months, she alleges, Marc violently assaulted her during the course of an

argument. Thereafter, according to plaintiff, Marc became engaged to another woman, and on information and belief, that relationship ended violently when Marc, among other things, refused to leave the woman's workplace and was escorted from the premises by security.

Plaintiff recounts how she and Marc reconnected in 2015 and resumed their relationship in 2018, when they moved in together. Although they enjoyed periods of relative happiness together, plaintiff states that Marc repeatedly assaulted her. In one instance, she reports, on June 8, 2019, Marc grabbed her, shook her, and screamed at her, and then they reconciled and planned to become engaged to marry. Soon thereafter, plaintiff learned that she was pregnant with Marc's baby and the relationship was good until the end of July 2019 when, she asserts, Marc resumed his violent outbursts.

Plaintiff also alleges that on the night of August 4, 2019, Marc pushed her into a wall, threw her to the ground, hit her in the face, dragged her by the wrist, choked her, and kicked her in the back, after which Marc called his father, James, and told him that he had injured plaintiff in the course of an altercation with her. Plaintiff reports that she could hear James scream at Marc to "get out of there and tell her if she does anything stupid I can make her disappear." Marc then left the apartment and went to his family's house, where he lived for the next few months. Plaintiff contends that in another instance, on August 13, 2019, Marc wrestled away her phone and pushed her to the ground.

Then, plaintiff describes how James embarked on a series of acts over the next six weeks designed to coerce her into having an abortion. By that time, plaintiff claims, she was over 12 weeks pregnant and was diagnosed with post-traumatic stress disorder (PTSD) and perinatal depressive disorder.

Several more instances of harassing conduct by James ensued, states plaintiff, whereby

he would appear at the apartment unannounced, once threatening her to “do the right things or things will be very difficult for you.” Soon thereafter, she was terminated from her job. Plaintiff claims that on September 10, 2019, James barged into the apartment and rifled through her personal items.

On September 23, 2019, at her therapist’s suggestion, plaintiff sought to place her belongings in storage in advance of moving out of the apartment. Based on James’s accusation that plaintiff had stolen valuable items from Marc, plaintiff alleges, the building’s management refused to permit her movers into the building. Plaintiff describes how when she attempted to persuade management otherwise, Marc appeared with codefendant Davis, and then James arrived, repeating by telephone to the management’s general counsel his accusation against her. Plaintiff then acceded to what she took as James’s offer that if she permitted him to see what she was removing from the apartment, he would permit her to move her items out.

Plaintiff claims that while riding with James and Davis in the elevator to the apartment, James directed at her a throat-slashing motion and when the elevator doors opened, he shoved her out of the elevator and pushed her again, causing her to hit her stomach against a wall. She describes how they then entered the apartment and tore open her storage boxes, digging through her undergarments and other personal items, as she cried in pain and James and Neil laughed. When James heard plaintiff calling the police, she states, he and Davis departed. Soon thereafter, plaintiff received word from building management that the movers would be permitted to enter the apartment and move her belongings. When she went downstairs to let the movers in, she saw James hand a doorman a “stack of cash.” Plaintiff confronted the doorman, who allegedly apologized to her.

On September 27, plaintiff contends, when she returned to the apartment before moving

out, she discovered what she believed to be a surveillance camera.

Plaintiff also accuses the Weils of cancelling her healthcare policy, asserting that she had been unaware that James had made himself “an unauthorized user” on the account. She was then five months pregnant and suffering severe and debilitating anxiety and emotional distress as a result of the Weils’s conduct. She states that she nonetheless refused to have an abortion which she claims resulted in Marc falsely telling several people that she was “a whore” who was “pregnant with a bartender’s baby.” Plaintiff maintains that Marc’s sexist, demeaning, and defamatory statements were intended to degrade, humiliate, and ruin her reputation.

After Marc pleaded guilty to second-degree harassment, plaintiff obtained a permanent order of protection against him. In July 2020, a paternity test revealed that Marc was most likely the father of plaintiff’s baby. Single and unemployed, plaintiff has been raising their daughter without financial assistance from the Weils. Included among her damages are the loss of her job, physical and mental pain and suffering, and serious psychological and emotional distress, mental anguish, anxiety, embarrassment and humiliation, costs incurred for medical expenses, psychotherapy, medicine, and other expenses related to the disruptions in her life resulting from the Weils’s actions. She claims entitlement to attorney fees and costs for the Weils’s repeated violations of the VGM and punitive damages.

Based on the foregoing, plaintiff advances 11 causes of action, of which defendants challenge the following:

- (1) battery (Marc);
- (3) assault, based on the alleged threats of physical violence Marc levelled at plaintiff and his alleged lengthy history of physical violence toward her, to which she attributes her reasonable fear of imminent harmful and offensive contact by him;

(5) violation of the VGM, based on Marc's alleged history of committing violent and threatening acts against plaintiff and other women, his alleged history of using sexist and demeaning language against plaintiff and other women including calling plaintiff a "whore" in front of several people and claiming that she was "pregnant with a bartender's baby," and the Weils's alleged batteries by which they sought to coerce her into having an abortion or suffer a miscarriage. Plaintiff asserts that they engaged in such conduct because of or on the basis of her gender, due, at least in part, to an animus based on her gender, which she claims was expressed by their batteries of her, knowing she was pregnant;

(9) civil conspiracy, based on the alleged agreement between the Weils to engage in a common scheme to coerce plaintiff to obtain an abortion, and in furtherance of the scheme, they agreed to commit the torts of assault and battery and took overt actions to commit them; and

(11) intentional infliction of emotional distress (Marc, James).

II. PLAINTIFF'S AFFIDAVIT (NYSCEF 12)

In addition to the allegations set forth in her complaint, by affidavit dated October 16, 2020, plaintiff alleges that at the end of July 2019, Marc became "concerned that [she] would become 'fat and disgusting'" as a result of the pregnancy and arranged for her to work out with a personal trainer. When plaintiff was occasionally unable to work out due to pregnancy-related fatigue, Marc "pulled [her] out of the bed by [her] arm or [her] hair, yelling at [her] that he did not want a 'fat wife,' and that he would leave [her] if [she] became 'fat and disgusting.'" Having experienced Marc's "capacity for physical violence," plaintiff states that his conduct on such occasions caused her "to fear that he would harm [her] during these violent outbursts." During some of his outbursts, Marc is also alleged to have told plaintiff that she should "know [her] fucking role" in the relationship, which she understood as a "role" subservient to him, that it was

her “job to listen” to him, and that he could easily find another girlfriend or wife. It was during approximately the same time period, plaintiff asserts, when Marc first suggested that she get an abortion, and when she declined, he became menacing and violent.

Plaintiff reiterates in her affidavit Marc’s alleged August 4, 2019 assault of her, and adds that during the course of it, he repeatedly called her a “bitch” and told her “that if [she] would have ‘just listened to him,’ like she [was] ‘supposed to,’ things would not have ‘to be this way.’” Marc also referenced her earlier terminated pregnancy, calling [her] a ‘whore’” who had been pregnant before. (*Id.*).

III. DISCUSSION

A. CPLR 3211(a)(5)

Pursuant to CPLR 3211(a)(5), a party may move for an order dismissing a cause of action against it on the ground, among others, that it is time-barred. As pertinent here, actions to recover damages for assault and for battery must be commenced within one year (CPLR 215[3]), and they “accrue on the date of the aggressive or nonconsensual act.”

Likewise, an action to recover damages for intentional infliction of emotional distress must be commenced within one year, although that cause of action “accrues when the injury occurs, i.e. when all elements of the tort can be truthfully alleged in a complaint.” (Vincent C. Alexander, Supplementary Practice Commentaries, McKinney, CPLR 215[3]). Conduct occurring more than one year before the commencement of the action is not time-barred as it is “governed by the continuing tort doctrine, permitting the plaintiff to rely on such wrongful conduct as long as the final actionable event occurred within one year of the suit.” (*Brummer v Wey*, 187 AD3d 566 [1st Dept 2020]; *Shannon v MTA Metro-N. R.R.*, 269 AD2d 218, 219[1st Dept 2000]).

1. Contentions

a. Defendants (NYSCEF 5-8)

Defendants argue that pursuant to CPLR 215(3), the intentional torts of battery, assault, and intentional infliction alleged to have been committed by Marc from 2010 to July 16, 2019 are time-barred, as is the allegation that Marc's relationship with another woman had ended violently in 2015 and other violent conduct alleged in paragraphs 10, 11, and 15 that pre-date July 16, 2019.

b. Plaintiff (NYSCEF 11, 13-15)

Plaintiff observes that the one-year statute of limitations governing her causes of action for assault, battery, and intentional infliction was tolled as of March 20, 2020, with the issuance by the Governor of the State of New York of Executive Order 202.8 in response to the COVID-19 pandemic.

c. Defendants (NYSCEF 16)

Defendants reiterate their initial argument and deny that the Governor's Executive Order renders admissible the conduct alleged to have occurred before 2019.

2. Analysis

In light of the tolling of statutes of limitation by virtue of the Governor's Executive Order, only the causes of action for assault and battery, to the extent they arise from conduct alleged to have occurred before March 20, 2019, are time-barred. Conduct occurring before that date in support of her claim for intentional infliction of emotional distress is not time-barred as the final actionable event is alleged to have occurred within one year of the suit. As plaintiff does not rely on a tolling agreement between the parties (NYSCEF 15), it is not considered.

B. CPLR 3211(a)(7)

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleadings liberally, accept the facts alleged as true, and afford the plaintiff “the benefit of every possible favorable inference.” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “The motion must be denied if from the four corners of the pleadings ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “[O]n a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party.” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

1. Contentions

a. Defendants (NYSCEF 5-8)

Defendants contend that absent conduct reflecting gender-specific animus, plaintiff fails to state a cause of action for a violation of the VGM, as violent conduct directed at a woman, in and of itself, does not constitute evidence of gender-based animus, and observe that the complaint contains no allegation that either Marc or James uttered any words expressing animosity toward women. They maintain that knowledge of plaintiff’s pregnancy does not cure plaintiff’s failure to state a cause of action under the VGM based on the alleged assaults and batteries. Nor do Marc’s alleged statements that plaintiff is a “whore” and that she was “pregnant with a bartender’s baby” prove animus as they were not uttered to or in front of plaintiff. For all

of these reasons, defendants contend that plaintiff's fifth cause of action brought under the VGM is insufficient as a matter of law, and that Marc's supposed violent history against other women provides no proper basis for that cause of action.

Defendants also argue that there exists no cause of action for civil conspiracy.

b. Plaintiff (NYSCEF 11, 13-15)

Plaintiff seeks to offer evidence of Marc's statements and past violent conduct directed at her and other women in support of her cause of action for violation of the VGM based on its relevance to his animus toward women in general and to her specifically, citing in support *Breest v Haggis*, 180 AD3d 83 (1st Dept 2019).

Although plaintiff acknowledges that there is no independent tort of civil conspiracy, she nonetheless argues that because she pleads all of the elements necessary to state a claim for civil conspiracy to commit the underlying torts of assault and battery, her ninth cause of action for civil conspiracy should not be dismissed.

c. Defendants' reply (NYSCEF 16)

According to defendants, plaintiff's recent affidavit does not support her VGM claim against James, and the statements she attributes therein to Marc do not reflect an animus against women generally. They also maintain that *Breest, supra*, is inapposite. Defendants again assert that the requirement that animus be pleaded in support of a VGM claim is not satisfied by allegations concerning plaintiff's pregnancy, nor by any of the other statements falsely alleged to have been made by Marc and relied on by plaintiff as evidence of his gender-based animus.

Defendants argue that plaintiff's claim for civil conspiracy fails not only because there is no such cause of action, but because it is not pleaded against any defendants against whom primary liability for the alleged assault and battery claims is not pleaded. Thus, a claim for civil

conspiracy as against the Weils is duplicative of the claims against them for assault and battery.

2. Analysis

In 2000, the New York City Council enacted the “Victims of Gender-Motivated Violence Protection Law” (VGM) (New York City Admin. Code § 10-1101, *et seq.*). The law provides for a civil cause of action for injuries caused by those who commit crimes of violence motivated by gender. (Admin. Code § 10–1104). The VGM defines a crime of violence as “an act or series of acts that would constitute a misdemeanor or felony against the person as defined in state or federal law . . . if the conduct presents a serious risk of physical injury to another, whether or not those acts actually resulted in criminal charges, prosecution or conviction,” and a crime of violence motivated by gender is one “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.” (*Id.*).

In *Breest v Haggis*, the Court observed that as rape and sexual assault “are, by definition, actions taken against the victim without the victim’s consent,” animus is “apparent from the alleged commission of the act itself.” Thus, a pleading based on violent sexual acts states a claim under the VGM. (180 AD3d 83, 94 [1st Dept 2019]). In light of that finding, the Court held that where alleged conduct sufficiently reflects animus, such as rape or sexual assault, allegations concerning prior incidents of rape or attempted rape should be stricken pursuant to CPLR 3024(b) as unnecessary to satisfy the animus element of the VGM. (*Id.*, 180 AD3d at 95).

Whether Marc’s violent conduct alone is sufficient to prove his animus need not be addressed given the plaintiff’s allegations that he made sexist and demeaning statements such as calling plaintiff a “bitch,” and a “whore” in front of several people and claiming that she was “pregnant with a bartender’s baby” and had a history of committing violent and threatening acts against plaintiff and other women which, when viewed in the light most favorable to plaintiff,

reflect Marc's animus against women in general and plaintiff in particular. The Weils's batteries of plaintiff to coerce her into having an abortion or suffer a miscarriage also reflect, when viewed in the light most favorable to plaintiff, gender-motivated animus. That certain statements were not uttered in plaintiff's presence is immaterial, as is Marc's having directed his malice at plaintiff alone; neither circumstance precludes the reasonable inference that he harbored an animus against women in general, at least for purposes of the instant motion. Consequently, defendants do not demonstrate that plaintiff fails to state a cause of action against either Marc or James under the VGM. (*See e.g. Roelcke v Zip Aviation, LLC*, 2018 WL 1792374, *13 [SD NY 2018] [defendant's use of "gendered terms" while assaulting plaintiff sufficient to state cause of action]; *see also Mosley v Brittain*, 2017 NY Slip Op 32447[U], *1 [Sup Ct, NY County 2017] [cause of action stated where defendant repeatedly called plaintiff "bitch" and contemporaneously kneed her in crotch]).

As the Weils are each charged with assault and with battery, there is no need for an independent cause of action for civil conspiracy. Thus, defendants demonstrate that plaintiff does not state a claim in her ninth cause of action for civil conspiracy.

C. CPLR 3024(b)

A party may move for an order striking any scandalous or prejudicial matter unnecessarily inserted in a pleading. (CPLR 3024[b]). The determination of such a motion requires inquiry into "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). And, "if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)." (*Soumayah*, 41 AD3d at 393).

1. Contentions

a. Defendants (NYSCEF 5-8)

Defendants seek, pursuant to CPLR 3024(b), an order striking all allegations contained within the complaint that, if not time-barred, are unnecessary to plaintiff's claims and are included in the complaint solely for scandalous and prejudicial reasons and to damage their reputations.

b. Plaintiff (NYSCEF 11, 13-15)

As liability for assault requires that the plaintiff reasonably apprehend "imminent harmful conduct," plaintiff asserts that her allegations concerning Marc's history of domestic violence are relevant and thus, her awareness of Marc's history of domestic violence and her own earlier experiences of his abusive conduct, are admissible to prove whether she reasonably apprehended imminent harmful conduct with each alleged assault. She also asserts that all of Marc's conduct is admissible as evidence of his animus against her and women in general in support of her cause of action under the VGM. (*Supra*, III.B.1.b.).

Given her detailed account of Marc's violent outbursts at her, plaintiff contends that the allegations contained within paragraphs 10, 11, and 15 of the complaint are superfluous in terms of their being scandalous.

c. Defendants' reply (NYSCEF 16)

Defendants again assert that, in any event, the scandalous and prejudicial allegations that are not necessary to the complaint should be stricken, adding that the conduct occurring before 2019 is too stale to constitute evidence of plaintiff's later apprehension of harm when assaulted.

2. Analysis

Given the liberality with which evidence may be found relevant for admission at trial

(*People v Harris*, 26 NY3d 1, 5 [2015] [relevant evidence is anything with “tendency” to prove existence of material fact]), evidence of Marc’s prior violent conduct with plaintiff and other women is relevant to whether plaintiff reasonably apprehended “imminent harmful conduct.” Defendants offer no basis for their claim that some of the conduct occurred too long ago to be probative in that regard, and the history of plaintiff’s relationship with Marc and Marc’s prior violent conduct with other women is relevant to demonstrate his animus against women in general and her specifically (*supra*, III.B.2.). Thus, defendants offer an insufficient basis for striking the pleadings. (See e.g., *Meridian Capital v Fifth Avenue 58/59*, 2007 NY Slip Op 33035[U] [Sup Ct, NY County 2007], *affd* 60 AD3d 434 [1st Dept 2009] [denying motion to strike allegations that otherwise constituted inadmissible settlement material, as they were used to establish motive]).

Additionally, given the violent conduct alleged throughout the complaint, relatively speaking, none is so scandalous as to warrant striking, nor are they too vague to provide sufficient notice of the conduct alleged.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ motion is granted to the extent of:

- (1) severing and dismissing plaintiff’s ninth cause of action for civil conspiracy; and
- (2) severing and dismissing any claims arising solely from incidents that occurred before March 20, 2019;

and is otherwise denied.

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2/10/2021

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE