Robb v Robb
2021 NY Slip Op 32565(U)
December 3, 2021
Supreme Court, New York County
Docket Number: Index No. 950000/2019
Judge: Deborah A. Kaplan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

KATHRYN ROBB Index No. 950000/2019

Plaintiff,

-v.-

GEORGE ROBB,

Defendant

----------x

HON. DEBORAH A. KAPLAN:

With the instant motion, plaintiff KATHRYN ROBB ("plaintiff") moves, pursuant to CPLR §3212, for summary judgment on the issue of liability against defendant GEORGE ROBB ("defendant"). Defendant opposes the application, and cross moves for leave to amend defendant's answer, and subsequently dismiss plaintiff's complaint.

BACKGROUND AND ARGUMENTS

Plaintiff's lawsuit stems from allegations that defendant sexually abused plaintiff, his younger sister, while they were both minors. At his deposition, defendant admitted to having sexual contact with plaintiff when he was eight years old, and she was approximately four years old. Defendant testified that the sexual contact with plaintiff occurred once a month over a period of five or six years. Defendant further testified to having sexual contact with plaintiff approximately fifty to sixty times.[1]

Based on defendant's testimony, plaintiff moves for summary judgment, arguing that there can be no question as to whether defendant violated several sections of the N.Y. Penal Law, including §130.50, §130.65, 130.75, §130.80, §255.25, and §255.27. Plaintiff is presently an adult, and ordinarily her claims, which are premised on alleged conduct several years removed from the present, would be time-barred. However, plaintiff's claims were filed following New York State's enactment of the Child Victims Act (L. 2019 c.11) ("CVA"), a revival statute which, *inter alia*, (1) extends the statute of limitations on criminal cases involving certain sex offenses against children under 18 (*see* CPL §30.10 [f]); (2) extends the time which civil actions based upon such criminal conduct may be brought until the child victim reaches 55 years old (*see* CPLR §208 [b]); and (3) opens a window reviving civil actions for which the statute of limitations has already run (even in cases that were litigated and dismissed on limitations grounds) (*see* CPLR §214-g). Accordingly, plaintiff filed her complaint as an alleged survivor of childhood sex abuse whose claims would have been time-barred, but have since been revived by legislative action.

[1] During oral argument it was alleged that plaintiff "has a vivid recall" that the last time that the sexual abuse took place, she was more than fourteen, and, accordingly, defendant would have been 18 or 19 years of age.

In response to plaintiff's motion for summary judgment, defendant cross moves for leave to serve an amended answer asserting the affirmative defense of statute of limitations. Upon the granting of said motion, defendant moves for dismissal of plaintiff's complaint by arguing that since the events alleged to have occurred happened prior to defendant's sixteenth birthday, such claims were not revived by the CVA because a child under the age of sixteen could not be guilty of a crime during the years at issue, and such claims are therefore are time-barred.

DISCUSSION

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment is appropriate where the moving party makes a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]); *Zuckerman*, 49 NY2d at 562, *supra*). The party opposing summary judgment cannot demonstrate a genuine issue of fact by using "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" (*see Arnatulli v. Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]). CPLR §3212(b) requires a movant for summary judgment to, not only show that there is no issue of fact for the cause of action, but also that "there is no defense to the cause action or that the … defense has no merit."

Here, plaintiff establishes, without question, that defendant admitted to liability repeatedly at his deposition when he testified that he violated numerous provisions of the penal code and otherwise engaged in sexual acts when plaintiff did not, or could not, consent. For instance, plaintiff proffers evidence, by way of defendant's own testimony, that unequivocally establishes that defendant performed oral sex on plaintiff multiple times when she was between the ages of seven and eleven, which is a *per se* violation of N.Y. Penal Law §§ 130.50, 130.65, 130.75, 130.80, 255.25, and 255.27. Defendant does not object, refute, or shift the burden back to plaintiff in any way. Rather, defendant argues that dismissal is warranted on account of the affirmative defense of statute of limitations. Notably, defendant did not attempt to assert the affirmative defense of statute of limitations in his answer or at any point until his opposition and cross-motion to plaintiff's instant motion for summary judgment. A defendant who omits an affirmative defense from an answer has not waived the defense if he files an amended answer which includes that defense before the time for amending the answer without leave of court has expired (*see* McKinney's CPLR §3025[a], § 3211[e]; *see Iacovangelo v Shepherd*, 5 NY3d 184, 800 NYS2d 116 [2005]).

Here, the defendant failed to amend his answer to include the defense of statute of limitations in a timely fashion such that leave of court is required (CPLR §3025[a]). Although leave to amend pleadings pursuant to CPLR §3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (*Anoun v City of New York*, 85 AD3d 694, [1st Dept. 2011]), here leave would be improper because a presumably valid defense of statute of limitations should have been asserted at an earlier juncture in time rather than on the eve of trial. Discovery is complete in this matter, and plaintiff has filed a note of issue. As such, it is highly prejudicial to plaintiff were defendant to be permitted leave to amend his complaint at this juncture in the litigation. Furthermore, defendant does not offer a reasonable excuse for his delay in seeking to

amend his original answer. Likewise, defendant would have been aware of his alleged "mental disease or defect" and purported inability to know right from wrong at the time of his answer or, at a very minimum, before discovery concluded. Indeed, this court has already decided a similar application for dismissal where a defendant affirmatively raised a statute of limitations defense in defendant's answer (*Schearer v. Fitzgerald*, Index No. 514920/2020 [Sup. Ct. Kings County October 1, 2021]). In contrast, here defendant, with no explanation for the inexcusable delay, raised this issue for the first time in a cross motion to plaintiff's summary judgment motion—nearly five months after discovery was completed. Defendant proffers no explanation for this inexcusable delay

Even if leave to amend were granted here, defendant's application would still fail. Defendant's invocation of the infancy defense to dismiss all claims alleged to have occurred prior to defendant's sixteenth birthday, is without merit. Notably, a person aged thirteen, fourteen or fifteen years of age can be held criminally responsible for grave, felony sexual abuse (*see e.g.* Penal Law §§130.50, 130.70). Construing plaintiff's allegations in a light most favorable, this court cannot discount the fact that plaintiff's allegations fall within the sphere of circumstances wherein the infancy defense does not apply. Indeed, the conduct admitted to by defendant in his own testimony provides a basis for the claim that he violated multiple sections of the Penal Code, including Penal Law Sections 130.50, 130.65, 130.75, 130.80, 255.25 and 255.27. Moreover, in response to questions from the court during oral argument, counsel for the plaintiff, as well as for the defendant, acknowledged that plaintiff alleged that the sexual abuse began when she was four and defendant was eight, and continued until defendant was 18 or 19 years of age.

Likewise, it is self-evident when reviewing the statutory language of the CVA that the Legislature expressly revived "every" claim or cause of action brought against a defendant so long as the claim alleges intentional or negligent conduct by a person causing injury because of specific child sexual abuse offenses. The qualifying offenses are broad, and the conduct encompassed within each offense is not narrowly circumscribed. As such, much of the offensive conduct alleged by plaintiff against defendant falls outside the protections of the infancy defense. If the Legislature had thought, in its prudence, to prohibit any CVA claim asserted against a defendant who was an infant at the time that alleged offenses were committed, it would have so stated; no such prohibition exists within the language of the CVA. To suggest that plaintiff's claims are in any way time-barred simply ignores the contents of the law (*see* CPLR §214-g; *see also Digiorgio v. Roman Catholic Diocese of Brooklyn*, 2021 NYLJ LEXIS 495 [Sup. Ct. Kings County April 22, 2021]). Indeed, defendant's argument that the CVA "did not revive 'all' child sexual abuse cases" is plainly contradicted by the language of the statute. Put simply, CPLR §214-g, provides that "every civil claim or cause of action brought against any party…" is revived by the CVA.

Moreover, even if defendant's purported infancy and mental defect were at all connected to the statute of limitations, the law in New York is longstanding and clear that defendant can still be liable in tort for actions committed when he was a child or of unsound mind (*Rosen v. Schwartz*, 148 AD3d 653 [1st Dept. 2017][holding "an insane person may be liable in tort for his actions" where the defendant was found not guilty for the charges against him by reason of mental disease or defect]).

As defendant has not sufficiently rebutted plaintiff's prima facie showing on plaintiff's application for summary judgment on the issue of liability based on defendant's testimonial admissions, plaintiff's motion is granted. In addition, for the reasons articulated above, defendant's cross motion to amend defendant's answer is denied. Notably, even if the court had permitted defendant's unjustifiably late proposed amendment, defendant's statute of limitations defense would nonetheless fail for the reasons articulated. The court further notes that defendant's motion is also denied on account of its lateness, as the motion was filed 140 days after the note of issue with no excuse for the delay (*Brill v. New York*, 2 NY3d 648 [2004]["[n]o excuse at all, or a perfunctory excuse, cannot be "good cause"]).

Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR §3212, granting plaintiff summary judgment on the issue of liability against defendant on all causes of action, is granted; and it is further

ORDERED that defendant's cross motion seeking leave to amend defendant's answer and subsequent dismissal of plaintiff's complaint, is denied; and it is further

ORDERED that the Clerk of the Court, New York County, is directed to enter judgment in plaintiff's favor on the issue of liability accordingly.

This constitutes the decision and order of the court.

December 3, 2021
DATE

HON. DEBORAH A. KAPLAN, J.S.C.

Deborah A. Kaplan
J.S.C.