SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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COURTNEY A. SCHAEL,

Plaintiff,

Index No. 011230/06
Sequence #001 #002
Part 40
9/12/2008

- against -

NEIL M. SISKIND

Defendants

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Notice of Motion.. .1
Notice of Cross-Motion..2
Affidavit In Opposition...3
Affidavits in Answer/Reply...4,5,6

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Upon the forgoing papers, defendant's motion for summary judgment in the nature of a CPLR §3211 application and plaintiff's cross-motion for partial summary judgment are determined as follows:

Plaintiff's complaint filed July 14, 2006 emerges from a prolonged custody battle in Family Court. Plaintiff was awarded custody of their infant child by a decision and order dated November 19, 2006. The parties were never married.

Issue was joined by defendant's verified answer dated August 10, 2006. Since then the action lie fallow until defendant's instant application which is, in reality, a CPLR §3211 motion to dismiss.

The complaint alleges six causes of action. The first seeks $19,919.00 for the repayment of several loans made by oral agreement, the second requests an unstated amount for reimbursement of household and other expenses which defendant promised to pay and the third cause of action for conversion demands $17,500.00 in damages for personal property that was not returned to her when she moved out of defendant's home in May 2003.

The fourth and fifth causes of actions are for intentional infliction of extreme emotional distress and for negligent conduct causing the same. The sixth cause of action is for battery.

Defendant maintains that the first cause of action for repayment of certain loans is devoid of facts sufficiently particular to give him notice of the occurrences alleged (CPLR §3211(a)(7) and §3013). However, plaintiff specifically sets forth the amount of the four loans and the month, all within 2002, that the loan agreements were made. Plaintiff also admits that upon demand, defendant paid approximately one-third of the balance, leaving the contested amount due of $19,919.00.
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The first cause of action sounding in breach of contract is stated with sufficient specificity. In fact, defendant admits to owing plaintiff an additional $8,419.00. With regards to the remaining disputed balance, $11.500.00, the case should proceed to the discovery process since it is premature to consider a CPLR §3212 application at this juncture or one under General Obligations Law 5-701.

As for the undisputed amount, plaintiff's cross-motion for partial summary judgment against defendant under the first cause of action for $8,419.00 is granted (Seq. #002).

Turning to the second cause of action for reimbursement of household and other expenses, defendant also raises the CPLR §3013 specificity argument and Statute of Frauds. Defendant's application under this cause of action is denied for the same reason of prematurity stated above. Defendant may demand a bill of particulars at the Preliminary Conference.

Under the third cause of action for conversion of plaintiff's personal property, plaintiff states she left defendant's home in May 2003. She explains in her cross-motion that on June 18, 2003 she went to the residence with movers to retrieve her belongings as per an arrangement between Family Court counsel. Upon arrival she was advised that defendant had already packed her property in sealed construction bags which were in the garage. It was not until afterward when she opened the bags and other packed boxes that she realized certain items were missing.

While ordinarily, a three-year statute of limitations applies to a conversion cause of action running from the date of interference with the property rather from the date of the discovery (CPLR §214; PJI §3:10 Commentary), under certain circumstances defendant may be estopped from asserting the affirmative defense *(General Stencils v. Chiappa, 18 NY2d 125; see Matter of Estate of Bella Spewack, 203 AD2d 133)*.

Here plaintiff alludes to the agreement between her attorney and defendant's counsel to allow plaintiff to remove her personal property from defendant's home. The alleged facts could be viewed as an affirmative misrepresentation by defendant through his attorney which was part of defendants concealment of the taking.

It could also be considered a breach of an implied contract, rather than a conversion, if pleaded as such *(Siegel, New York Practice Fourth Edition, §37; See PJI §3:10)*.

Nevertheless, as it stands, the third cause of action must be dismissed with leave for plaintiff to replead by an amended complaint.

According to defendant, the fourth cause of action for intentional or reckless extreme emotional distress for defendant's continuing conduct of physical, verbal and emotional abuse, including defendant's actions referred to in the first three and sixth causes of action, should be dismissed under CPLR §3211(a)(7) and §3013.

"The extreme and outrageous nature of conduct may arise from abuse by the defendant of some

relation or position that gives a defendant actual apparent power to damage plaintiff's interests" *(Vasarhelyi v. New School for Social Research, 230 AD2d 658; PJI §3.6).*

If defendant was aware that plaintiff was particularly susceptible to emotional distress by reason of, for instance, a physical or mental condition, defendant's conduct must be evaluated in light of his knowledge.

The conduct alleged must be extreme and outrageous measure by the reasonable bounds of decency and is, in the first instance, for the Court to determine *(Cavallaro v. Pozzi, 28 AD2d 1075).* The emotional distress suffered must be the direct, rather than consequential, result of defendants conduct *(Howel v. New York Post Co., Inc. 81 NY2d 115).*

The undersigned is aware through plaintiff's opposition of certain allegations made against defendant in prior litigation and allusions to plaintiff's prior mental state of post-traumatic stress syndrome and to battered "spouse" syndrome. However, none of these allegations which could provide the requisite specificity are plead here.

Given the difficulty to properly plead this claim (Id.), the Court dismisses the fourth cause of action with leave to replead. Since plaintiff alleges the claim is based upon defendant's past and continuing conduct, the undersigned does not dismiss the fourth cause of action under defendant's statute of limitations theory at this juncture. The statute of limitations does not begin to run until plaintiff suffered the severe emotional distress *(Dana v. Oak Park Marina, 230 AD2d 204).*

The complaint's fifth cause of action sounding in the negligent infliction of emotional distress must be read in conjunction with the fourth (see above) and sixth assault and battery causes of action alleging intentional behavior.

The statute of limitations for negligence is three years *(Yong Wen Mo v. Gee Ming Chan, 17 AD3d 356).* In order to recover for pure emotional distress the emotional disturbance must be serious and verifiable *(Bovsun v. Samperi, 61 NY2d 219, 231; Battalla v. State of New York, 10 NY2d 237).* For example, exacerbation of a pre-existing post traumatic distress disorder is actionable when there is expert proof *(see Graber v. Bachman, 27 AD3d 986; PJI §2:284).*

A plaintiff may recover under this negligence theory when a defendant's conduct is not sufficiently outrageous to be "utterly intolerable in a civilized community" *(Howel v. New York Post Co., Inc., supra),* and when the conduct does not rise to the level of recklessness so as to be the equivalent of intentional behavior.

Plaintiff's fifth cause of action also alleges a continuing course of conduct which may relate back to actions prior to the three-year state of limitations. Unlike the fourth cause of action, it is sufficient as plead and may be amplified by a bill of particulars.

The complaint's sixth and final cause of action under the theory of intentional assault and battery must be dismissed since the complaint was filed over one year after the parties ceased to reside

together *(CPLR §215; compare Trott v. Merit Department Store , 106 AD2d 158 with Wimmer v. Pratt Institute, 63 AD2d 885)*. Unless there was more recent conduct under this theory, plaintiff may not replead this claim.

Once plaintiff has served her amended complaint and defendant has answered, plaintiff is directed to schedule a Preliminary Conference in order for the discovery process to begin.

Dated: September 16, 2008 ....J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE