SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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ELIZABETH LATHOURAKIS,

Plaintiff,

-against-

RAYMOURS FURNITURE COMPANY, INC. d/b/a RAYMOUR & FLANIGAN FURNITURE,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 59130/2020

Motion Return Date:
January 8, 2021
Sequence No. 1

The following papers (NYSCEF document nos. 10-14; 19-20) were read on the motion by the defendant for an order dismissing the complaint in accordance with CPLR 3211 (a) (7) or, alternatively, staying this action pending passage of legislation which seeks to amend the workers' compensation law to include exposure to COVID-19 (coronavirus) as an occupational disease (NY Assembly Bill A10401).

Notice of Motion-Affirmation-Exhibits (A-C)
Memorandum of Law in Opposition
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion is granted and the complaint is dismissed.

Plaintiff sues for damages allegedly sustained as a result of contracting COVID-19 (coronavirus) during the course of her employment at defendant's furniture store located in White Plains, New York.

Plaintiff alleges that from January through March of 2020, defendant failed to take proper precautions to protect its workers and customers from exposure to COVID-19 while making public statements to the contrary (Lathourakis complaint at ¶¶ 1, 17). Specifically, plaintiff alleges that during this time frame, management refused to send sick employees home (*id.* at ¶¶ 14, 15, 18, and 26), permitted sick employees to return to work (*id.* at ¶ 18), and failed to follow and maintain appropriate safety and cleaning protocols in the store (*id.* at ¶¶ 19, 26, 35). As a result, on or about March 19, 2020, plaintiff alleges she contracted

COVID-19 after being exposed at the store by a co-worker who she alleged was "sick" and "symptomatic" (*id.* at ¶¶ 15, 23).

Plaintiff further alleges that she then transmitted the virus to her mother and her husband both of whom lived with plaintiff and who both subsequently tested positive for COVID-19 (*id.* at ¶¶ 19, 23). Plaintiff alleges that her husband ultimately succumbed to the virus (*id.* at ¶¶ 24, 31). Plaintiff alleges that despite recovering from the worst of the symptoms caused by the virus, she nevertheless continues to suffer from diminished senses of taste and smell, headaches, gets winded easily, and is under the treatment of a psychiatrist for anxiety (*id.* at ¶¶ 28-30). Plaintiff alleges that as a result of being infected with the virus, she was required to go on furlough and is in the process of taking full disability leave (*id.* at ¶ 32).

Plaintiff alleges that had defendant "acted in accordance with its duty" or in accordance with "state or federal guidelines", she would not have sustained any damages (*id.* at ¶ 33). Plaintiff alleges that defendant's sole focus was on making profits at the expense of the safety and well-being of its workers (*id.* at ¶¶ 1, 21, 27).

Plaintiff alleges that defendant's "intentional or negligent actions were the direct and proximate cause of her damages" (*id.* at ¶ 33). Plaintiff's complaint asserts causes of action for "negligence", "intentional misconduct", "negligent infliction of emotional distress", and "intentional infliction of emotional distress".

Prior to interposing an answer, defendant moves for, *inter alia*, an order dismissing the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7). In support of the motion, defendant contends, among other things, that plaintiff's causes of action sounding in negligence are barred by the exclusive remedy provisions of the Workers' Compensation Law and that no exception to the exclusivity provisions apply. Regarding those causes of actions plaintiff labeled as intentional torts, defendant argues that the complaint fails to allege sufficient facts demonstrating that defendant intended to cause plaintiff harm so as to circumvent the exclusivity provisions of the Workers' Compensation Law. Defendant asserts that, at most, plaintiff's complaint sounds in negligence and is therefore barred by the Workers' Compensation Law.

In opposition, plaintiff argues, among other things, that her exclusive remedy is not workers' compensation because she has alleged intentional acts by defendant that resulted in her injuries. Accordingly, plaintiff asserts that the exclusive remedy provisions of the Workers' Compensation Law do not apply. Alternatively, plaintiff requests that in the event the court is inclined to dismiss the complaint, then she should be granted leave to amend her pleading.

In reply, defendant contends, among other things, that because the complaint fails to allege an intentional or deliberate act by defendant directed at causing harm to plaintiff,

the complaint fails to state a cause of action upon which relief may be granted. Defendant asserts that the complaint merely alleges that it should have taken more precautions to prevent the spread of COVID-19 at the store, which it contends is insufficient to demonstrate that it deliberately intended for the plaintiff to become infected with the virus. Thus, it asserts that plaintiff's sole remedy is workers' compensation and, accordingly, dismissal of the complaint is warranted.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court is to afford the pleading a liberal construction, accept the alleged facts as true, afford the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see* CPLR 3026; *Sarva v Self Help Community Servs., Inc.*, 73 AD3d 1155, 1155-56 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss [pursuant to CPLR 3211]" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, factual allegations that are speculative and conclusory and allegations that plead bare legal conclusions are not entitled to the benefit of the presumption of truth and, consequently, are not accorded every favorable inference (*see GDG Realty, LLC v 149 Glen St. Corp.*, 155 AD3d 833, 835 [2d Dept 2017]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2d Dept 2008]).

In addition, "[t]he Workers' Compensation Law provides the exclusive remedy for an employee who seeks damages for unintentional injuries which he or she incurs in the course of employment" (*Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836 [2d Dept 2008]; *see* Workers' Compensation Law §§ 10, 11, 29). Although "an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege an intentional or deliberate act by the employer directed at causing harm to this particular employee" (*Pereira*, 54 AD3d at 836 [internal quotation marks omitted]). Accordingly, allegations that an employer exposed an employee to a substantial risk of injury are insufficient to circumvent the exclusivity provisions of the Workers' Compensation Law and are subject to dismissal on a CPLR 3211 (a) (7) motion (*see Pereira*, 54 AD3d at 837; *cf. Barnes v Dungan*, 261 AD2d 797, 798 [3d Dept 1999]). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury" (*Miller v Huntington Hosp.*, 15 AD3d 548, 549-550 [2d Dept 2005] [internal quotation marks omitted]). "A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" (*Finch v Swingly*, 42 AD2d 1035, 1036 [4th Dept 1973]).

Here, plaintiff's causes of action sounding in negligence and negligent infliction of emotional distress are dismissed insofar as they are barred by the exclusive remedy provisions of the Workers' Compensation Law (*see Kruger v EMFT, LLC*, 87 AD3d 717, 719 [2d Dept 2011]; *Miller*, 15 AD3d at 550).

For the same reason, plaintiff's remaining causes of action for "intentional misconduct" and "intentional infliction of emotional distress" are also dismissed. Even accepting the allegations of the complaint as true, and affording the plaintiff the benefit of every possible favorable inference, the complaint fails to set forth sufficient factual allegations of intentional misconduct to exempt such causes of action from the Workers' Compensation Law (*see Fucile v Grand Union Co., Inc.*, 270 AD2d 227, 228 [2d Dept 2000]). Plaintiff's allegations are conclusory in nature and fail to sufficiently demonstrate that the nature of defendant's conduct was of the requisite intentional import—that is, the allegations fail to demonstrate "a desire [by defendant] to bring about the consequences of the act" (*Miller*, 15 AD3d at 549-550; *Acevedo v Consolidated Edison Co. of N.Y.*, 189 AD2d 497, 501 [1st Dept 1993]; *cf. Elson v Consolidated Edison Co. of N.Y.*, 226 AD2d 288, 289 [1st Dept 1996]). Such allegations are not entitled to the benefit of the presumption of truth (*see Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710-711 [2d Dept 2012]; *GDG Realty, LLC*, 155 AD3d at 835-836).

While the court is entirely sympathetic to plaintiff's plight, at most, plaintiff's allegations amount to gross negligence or reckless conduct on the part of defendant which is insufficient to circumvent the exclusivity provisions of the Workers' Compensation Law (*see Gagliardi v Trapp*, 221 AD2d 315, 316 [2d Dept 1995]; *Nash v Oberman*, 117 AD2d 724, 725 [2d Dept 1986]). Although plaintiff seeks leave to amend her complaint, plaintiff failed to cross-move for such affirmative relief (*see* CPLR 2215; *99 Cents Concepts, Inc. v Queens Broadway, LLC*, 70 AD3d 656, 659 [2d Dept 2010]) and, in any event, plaintiff failed to annex a copy of the proposed amended pleading to her motion papers (*see* CPLR 3025 [b]). To the extent not specifically addressed herein, the court finds plaintiff's remaining arguments unavailing.

Accordingly, defendant's motion is granted and the complaint is dismissed. Defendant's remaining branch of the motion for an order staying this action is denied as academic.

E N T E R,

Dated: White Plains, New York
March 5, 2021

Joan B. Lefkowitz
Digitally signed by Joan B. Lefkowitz
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HON. JOAN B. LEFKOWITZ, J.S.C.