

Superior Court of New Jersey, Law Division.
Bergen County
KAUFMAN, et. als.,
v.
DOWNEY, et. als.
No. L-42205-87.
May 10, 1991.

Peter F. Boggia, J.S.C.

May 13, 1991

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Dear Counselors:

This matter comes before this court by way of defendants, Morton Downey, Jr. ("Downey"); Q.M.I., Productions, Inc., ("Q.M.I."); WWOR-T.V., Inc. ("WWOR"); John Wolf ("Wolf"); Andrew Regal ("Regal"); David Sittenfeld ("Sittenfeld"); Michael Weinberg ("Weinberg"); Robert Woodruff ("Woodruff"); William Miller ("Miller"); and

Stanley Powers (“Powers”); motion for partial summary judgment hereinafter collectively referred to as the “WWOR Motion”; and defendants Burns International Security Services (“Burns”) and Julio Cerpa (“Cerpa”) motion for partial summary judgment hereinafter collectively referred to as the “Burns Motion”.

The facts may be summarized as follows:

Troma, Inc., (“Troma”) is a New York based film company that specializes in horror films. Plaintiff, Lloyd Kaufman, (“Kaufman”) is the president of Troma, as well as one of its co-owners, writers, producers and directors. Plaintiff, Patricia Kaufman, is the wife of Lloyd Kaufman. Plaintiff, Arthur Ajzenman (“Ajzenman”) is the marketing director for Troma.

For the October 30, 1987 Morton Downey, Jr. Show, the producers decided to have a Halloween theme. Since horror movies are somewhat related to Halloween, the plaintiffs, Kaufman and Ajzenman, were invited to appear as guests on the Show due to their involvement in the horror film industry.

Defendant Q.M.I. is a Delaware Corporation licensed to do business in New Jersey. QMI, in conjunction with defendant, WWOR, produced the Morton Downey, Jr., television show.

Defendant, WWOR-TV, Inc., is an Ohio Corporation licensed to do business in New Jersey. WWOR owns and operates a television station which broadcasts from Secaucus, New Jersey. WWOR cc-produced the Morton Downey, Jr. Show.

Defendant, Morton Downey, Jr., was the controversial host of the Morton Downey, Jr. Show and an employee of QMI.

Defendant, John Wolf, was an employee of WWOR and the director of the Show. Wolf's responsibilities included directing the technical and stage crews, camera operators, audio personnel, electronic graphics and technical directors.

Defendants, Andrew Regal, David Sittenfeld, and Michael Weinberg were employed by QMI as segment producers for the show. Their responsibilities included conceiving topics for the show, choosing and booking quests, writing questions for the host, and arranging transportation for the guests.

Defendant, Robert Woodruff, was employed by WWOR as an executive producer. Woodruff was the producer of the October 30, 1987 Show.

Defendant William Miller was, in October 1987, employed by WWOR as Supervisor of Security.

Defendant, Stanley Pomers was, in October 1987, employed by WWOR as a security guard.

Defendant, BPS Guard Services, Inc., d/b/a Burns International Security Services, provided security personnel for the Show and defendant, Julio Cerpa (hereinafter referred to as “Cerpa”) was employed, in October 1987, by Burns as a security guard.

On October 27 and 28, 1987, Weinberg, a segment producer, contacted Ajzenman and Kaufman by telephone and invited them to appear on the Show. Weinberg also requested a videotape of film clips from various Troma movies to use during the interview. The plaintiffs agreed to appear as guests. There were nine (9) live telecasts of the show prior to plaintiffs' appearance.

Technical difficulties developed with the video tapes supplied by Troma. Substitute videotapes were furnished but were unusable, again because of technical problems. Concern arose as to whether the horror film sequence, including the film clips and interview, would be sufficient in the duration to cover the allotted time slot. Due to the possibility that the segment wouldn't be long enough, an alternative was created which would allow Downey to end the interview prematurely. This "contingency plan" would feature Downey leaving the stage and entering the control room to find out who was responsible for booking the guests.

The plaintiffs appeared on the Show as planned with a burned corpse which had been used in one of their recent films. Downey began the interview by making a few comments about how long they had been in business and he gave a list of some of the movies Troma had produced. At this point, the video tape clips from the movie "War" were shown.

After the film clips were shown, the audience began booing and jeering the plaintiffs. Downey stated that the movie "really sucks" and that it was "garbage". This further maddened the audience.

Downey made some more comments about the quality of the movies and the fact that he had requested copies of the videotapes three times and that the quality of the tapes were extremely poor. At this point, Downey asked the audience whether the guests should stay or go. In accordance with the audience's response, he asked them to leave. The plaintiffs remained seated on stage and refused to go despite repeated requests by Downey. Downey then summoned the security guards to remove the plaintiffs from the stage. Defendants Pomers and Miller each grabbed on to Kaufman's arms and tried to escort him off stage. Kaufman struggled with the guards. At this point, defendant Cerpa assisted and the guards removed Kaufman from the stage.

While the security guards were removing the plaintiffs, Downey, in accordance with the contingency plan, sought to find the person responsible for having the plaintiffs on the show. Each person he asked, as planned, blamed someone else in succession. During this entire incident, Patricia Kaufman, wife of Lloyd

Kaufman, was present in the studio audience.

New Jersey Rules of Court 4:46-2 states: "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law" .

This standard was applied by the Supreme Court in Judson v. Peoples Bank and Trust of Westfield, 17 N.J. 67 (1954) where the court explained that summary judgment is to be granted when there are no issues of material fact which require disposition at trial.

But "[if] there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied". Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211 (App. Div. 1987).

I. WWOR MOTION

Defendants contend they are entitled to summary judgment in accordance with New Jersey Court Rule 4:46-2 on Counts Two, Three, Four, Five, Six, Seven, Eight, Nine, Twelve, Thirteen and on the punitive damage claims of plaintiffs' Amended Complaint.

For the following reasons, this court grants in part/denies in part the "WWOR Motion".

The Second Count of plaintiffs' Complaint seeks damages for the intentional infliction of emotional distress. In order to recover damages for intentional infliction of emotional distress, a plaintiff must prove that the defendant's

conduct:

1. was intentional or reckless;
2. was “extreme and outrageous”;
3. proximately caused plaintiffs' emotional distress; and
4. caused the plaintiffs to suffer “severe” emotional distress.

Buckley v. Trenton Savings Fund Society, 111 N.J. 355, 366 (1988).

This court finds, as a matter of law, that plaintiffs have failed to satisfy the requirements for intentional infliction of emotional distress expressed in *Buckley*.

The New Jersey Supreme Court has held that to be compensable, emotional distress must be “palpable, severe or enduring”. Decker v. Princeton Packet, Inc., 116 N.J. 418, 422 (1989), or, put another way, “so severe that no reasonable man could expect to endure it”. Buckley, 111 N.J. at 366.

In the present case, plaintiffs' allege, inter alia, “sleeplessness”, “embarrassment”, “humiliation” and “becoming more conservative in business dealings” as the emotional distress suffered. This court finds that the distress complained of by plaintiffs is insufficient, as a matter of law, to state a claim for intentional infliction of emotional distress. As a result, summary judgment is hereby granted with respect to Count Two of plaintiffs' Complaint.

Defendants' motion for summary judgment with respect to the Thirteenth Count of plaintiffs' Complaint is also granted. In Count Thirteen, Patricia Kaufman alleges she suffered severe emotional distress by observing the events that occurred on October 30, 1987 Show as a member of the studio audience.

In Portee v. Jaffee, 84 N.J. 88, 101 (1980), the Supreme Court of New Jersey set forth the following elements for a bystander's cause of action for negligent infliction of emotional distress:

1. the death or serious physical injury of another caused by defendant's negligence;
2. a marital or intimate, familial relationship between plaintiff and the injured person;
3. observation of the death or injury at the scene of accident;
4. resulting severe emotional distress.

Portee, 84 N.J. at 101.

This court finds, as a matter of law, that Patricia Kaufman's husband, did not sustain “death or serious physical injury” as required under *Portee*. Furthermore, this court finds that Patricia Kaufman's alleged mental injuries do not rise to the requisite level of severity required under *Buckley*. Therefore, the Thirteen the Count of plaintiffs' Complaint is also dismissed.

In Count Three, plaintiffs allege false imprisonment. It is well established that the tort of false imprisonment arises from an unlawful restraint of a person's freedom of locomotion. Jorgensen v. Pennsylvania Railroad Co., 38 N.J. Super. 317 (App. Div. 1955); cert. denied, 20 N.J. 308 (1956). However, an essential element of the tort is the constraint of the person without color of legal authority. See Cannon v. Krakowitch, 54 N.J. Super. 93 (App. Div. 1959).

In the present case, this court finds material issues of fact surrounding the appropriateness of the security guards conduct under the circumstances and whether plaintiffs' legal “status” changed during the course of the telecast. Furthermore, the fact that all of the defendants participated in planning and staging the contingency plan also creates material issues of fact which prevent this court from dismissing that count against all defendants except the security guards. As a result, summary judgment is hereby denied on Count Three.

This court also finds material issues of fact surrounding Counts One and Fourteen of plaintiffs' Complaint since all

of the defendants, as noted above, participated in the planning and staging of the contingency plan. Accordingly, summary judgment is also denied on Counts One and Fourteen.

The Seventh Count of plaintiffs' Complaint alleges that Downey negligently incited the studio audience, directed the security guards to eject the plaintiffs from the studio and otherwise created a hazardous condition, all in breach of his duty to conduct himself in a professional manner pursuant to Federal Communication Commission ("FCC") guidelines. This court finds that plaintiffs have failed to establish a standard of care and failed to state a legally cognizable claim against Downey with respect to this Count. As a result, summary judgment is granted on Count Seven.

Defendants' motion for summary judgment with respect to the Fourth and Sixth Counts of plaintiffs' Complaint is granted to the extent asserted by plaintiff Ajzenman and denied against plaintiff Kaufman.

In Count Four, plaintiffs' allege that Downey and other defendants incited the studio audience. In Count Six, plaintiffs' alleged that the defendants provided unsafe premises. In these Counts, the "hazardous condition" alleged is the studio audience. This court finds that neither the alleged incitement nor the studio audience itself was the proximate cause of plaintiff Ajzenman's alleged injuries. Accordingly, Counts Four and Six are dismissed to the extent asserted by Ajzenman.

However, this court finds material issues of fact surrounding Counts Four and Six as to plaintiff Kaufman. All of the party defendants played a role in planning and/or orchestrating the contingency plan which resulted in Kaufman's removal from the stage during the telecast. The video tape of the show clearly indicates that Kaufman was struck by a member of the studio audience. Whether the defendants should have expected or foreseen the probability of injury to plaintiff Kaufman creates material issues of fact.

Furthermore, this court finds that the defendants as producers, host, directors and security personnel were in control of the studio and the telecast. Therefore, defendants were the "possessors" of the premises and were under a duty to maintain a safe environment for their guests. See *Handleman v. Cox*, 39 N.J. 95 (1963). Thus, summary judgment is denied with respect to Kaufman on Counts Four and Six of plaintiffs' Complaint.

The Fifth Count of plaintiffs' Complaint seeks damages for i) breach of warranty and ii) misrepresentation. This court finds that plaintiffs were invited to appear on the October 30, 1987 Morton Downey, Jr. Show and were advised that the Show was going to be a fun-filled Halloween celebration. Thereafter, defendant Weinberg conducted a "pre-interview" with Kaufman concerning the art of making of horror films. In reliance upon Weinberg's representations, Kaufman contends that he agreed to appear on the Show.

This court finds, as a matter of law, that an invitation to appear on a talk show does not warrant an interview. Thus, that portion of Count Five alleging breach of warranty is dismissed.

However, this court finds material issues of fact concerning the alleged misrepresentations made by Weinberg in order to secure plaintiffs as guests for that evening's Show. Since all of the defendants allegedly also played a role in the planning and/or orchestrating the contingency plan, this court denies summary judgment with respect to all defendants as to the "misrepresentation" portion of Count Five.

This court finds no genuine issues of material fact surrounding Count Eight of plaintiffs' complaint. Plaintiffs allege that defendants QMI and WWOR "negligently and carelessly" retained Downey to host the Show, despite knowing of his "propensity" to act in an "outrageous and reckless manner and his propensity to...assault and batter" guests. In *Di Cosala v. Kay*, 91 N.J. 159, 173 (1982), the court held that:

"An employer will only be held responsible for the torts of its employees beyond the scope of the employment where it knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons."

In the court's mind, the plaintiffs have failed to establish that defendants "knew or had reason to know of [Downey's] particular unfitness, incompetence or dangerous attributes". *Id.* at 173. This court finds that Downey's firing in 1983 due to an altercation with a guest does not establish a "particular unfitness" or a "dangerous attribute". As a result, summary judgment is granted in favor of defendants on Count Eight of plaintiffs' Complaint.

Defendants' motion for summary judgment with respect to the punitive damage claims alleged in Counts One and Nine and in the remaining viable claims in Counts Four, Five and Six is hereby denied.

In the present case, it is clear that defendants Woodruff, Weinberg, Wolf, Sittenfeld and Regal spent time creating, planning, and preparing the contingency plan, and yet decided not to inform plaintiffs.

This court finds that defendants' conscious objective not to inform plaintiffs of the contingency plan they had created for the Show creates material issues of fact. This court finds that a jury could conclude that defendants' failure to inform plaintiffs of their plans was in reckless disregard of the probability that injuries to the plaintiffs could result.

Likewise, this court finds that Downey's incitement of the audience and his actions towards the plaintiffs creates a question of fact for a jury to determine whether such conduct was "reckless". This court also finds sufficient evidence for a jury to reasonably infer that defendants Miller and Pomers conduct in removing the plaintiffs from the stage was wantonly reckless and/or malicious in character.

In light of the above, this court also finds material issues of fact surrounding defendants QMI and WWOR's knowledge and/or authorization of the conduct of the above named defendants, all employees of QMI and WWOR.

As a result, summary judgment is hereby denied with respect to the remaining viable punitive damage claims alleged by plaintiffs.

II. BURNS MOTION

Defendants Burns International Security Services ("Burns") and Julio Cerpa ("Cerpa") contend they are entitled to summary judgment in accordance with New Jersey Court Rule 4:46-2 on Counts Two, Three, Four, Five, Six, Seven, Eight, Nine, Twelve and on the punitive claims of plaintiffs' Complaint.

Defendants motion for summary judgment with respect to the Second and Thirteenth Counts is hereby granted on the same grounds as noted above.

Summary judgment is also granted on Count Nine. This court finds that plaintiffs' have failed to establish that Burns "knew or had reason to know of the particular unfitness, incompetence or dangerous attributes" of Cerpa. Di Cosola, 91 N.J. at 173.

Counts Four, Five, Six, Seven, Eight and Twelve of plaintiffs' complaint are also dismissed against Burns and Cerpa. This court finds no evidence to indicate that Burns or Cerpa participated in or were in any way responsible for the claims set forth in these counts.

However, this court finds material issues of fact surrounding the Third Count of plaintiffs' complaint. As noted above, this court finds factual issues concerning the appropriateness of the security guards conduct under the circumstances and whether plaintiffs' legal "status" changed during the course of the telecast. Accordingly, summary judgment is denied with respect to the Third Count of plaintiffs' Complaint.

Yet, defendants' motion for summary judgment with respect to the punitive damage claims alleged in plaintiffs' complaint is hereby granted. This court finds no evidence or claim indicating that Burns or Cerpa were part of the contingency plan. Thus, it is clear that Cerpa was merely following the direction of his direct supervisor in assisting the WWOR guards in escorting Kaufman off stage. As a result, this court finds no evidence whatsoever of evil-minded, wanton or willful conduct on the part of Burns or Cerpa. Accordingly, plaintiffs claims for punitive damages are dismissed.

III. CONCLUSION

Based on the foregoing, the "WWOR Motion" for summary judgment is granted in full on Counts Two, Thirteen, Seven and Eight. In addition, summary judgment is granted with respect to plaintiff Ajzeman on Counts Four and Six and on the "Breach of Warranty" portion of Count Five. Summary judgment is denied in full on Counts One, Three and Fourteen, with respect to plaintiff Kaufman on Counts Four and Six, on the "misrepresentation" portion Count Five and on the viable punitive damage claims alleged by plaintiffs.

Summary judgment is hereby granted on the "Burns Motion" on Counts Two, Four, Five, Six, Seven, Eight, Nine, Twelve, Thirteen and on the plaintiffs' punitive damage claims. However, summary judgment is denied on Count Three of Plaintiffs' complaint.

Plaintiffs' counsel is hereby directed to submit an order outlining this opinion under the five (5) day rule.

Very truly yours,

Peter F. Boggia, J.S.C.

PFB/sd

Kaufman v. Downey
1991 WL 11723381 (N.J.Super.L.) (Trial Order)

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