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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JANE DOE,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 53972/2019
Sequence Nos. 1,2,3,4,5

MIDHUDSON REGIONAL HOSPITAL OF THE WESTCHESTER MEDICAL CENTER, WESTCHESTER COUNTY HEALTH CARE CORPORATION, MID-HUDSON VALLEY STAFFCO, LLC, and PAYAM SHAKOURI, M.D.,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 23-92, were read in connection with the motion to dismiss (Seq 1) by defendants Mid Hudson Regional Hospital of the Westchester Medical Center ("WMC"), and Westchester County Health Care Corporation ("WCHCC", collectively "WMCHealth"), which motion has subsequently been withdrawn and will not be addressed by the court[1]; Cross-motion (Seq 2) by plaintiff to grant leave to file a late notice of claim pursuant to GML §50-e; WMCHealth's motion to dismiss the Amended Complaint (Seq 3); Motion for default judgment in favor of plaintiff against defendant Payam Shakouri (Seq 4), which has been withdrawn and will not be addressed by the court; and motion to dismiss by defendant Mid-Hudson Staffco LLC ("Staffco") (Seq 5).

[1]Seq 1 motion to dismiss plaintiff's original complaint, was essentially replaced by Seq 3 by WMCHealth, as Seq 3 moves to dismiss plaintiff's Amended Complaint.

Plaintiff commenced this action against defendants alleging that during her course of employment at WMCHealth, Dr.Payam Shakouri sexually assaulted and harassed her, and that her employers failed to protect her from physical and emotional harm, and to eliminate sexual harassment in the workplace. Since 2006, plaintiff was employed at MidHudson Regional Hospital ("the hospital") as a registered nurse. According to the complaint, at all relevant times, WMCHealth and Staffco were plaintiff's joint employers, and Dr. Shakouri, a contractor, agent, servant and/or employee of WMCHealth and a member of its medical staff, exercised authority and control over plaintiff. Plaintiff claims that starting in or about December 2015, and continuing through 2018, and with knowledge of WMCHealth and Staffco, Dr.Shakouri and nursing staff, circulated false rumors that plaintiff was having sexual relations with multiple physicians. These false rumors damaged plaintiff's reputation with her superiors and co-workers. On multiple occasions at the hospital, Dr. Shakouri behaved in a manner that was both unwelcome and offensive, including physically brushing against plaintiff's body, touching or patting her body, including groin and buttocks, making sexual comments, requesting sexual favors and dates, telling her that he wants her and sending unwelcome, sexually charged text messages. According to plaintiff, she rejected Dr. Shakouri's advances by ignoring him, punching him away, physically retreating when he was present, and telling him to stop. Plaintiff claims that her supervisor, James Hansen, and nursing staff knew this open sexual harassment was taking place. On or about February 15, 2018, while plaintiff was in the hospital room of a patient leaning toward the patient, Dr. Shakouri entered the room and sexually assaulted her by shoving his hand into her pants and groping her. Over a month after this alleged incident, on or about March 17, 2018, plaintiff told Dr. Paul Feldman MD, a member of the medical staff at WMC Health that Dr. Shakouri sexually assaulted her. On April 24, 2018, plaintiff received a

call from Human Resources Officer, Nancy Estremera, asking her for information about the incident. Plaintiff was directed to appear at a hearing commenced by WMC Health concerning her allegations against Dr. Shakouri and recounted the sexual harassment and assault. These events lead to the instant action.

NOW, based on the foregoing, the motions are decided as follows:

It is well-settled that under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994]; 730 J&J LLC v. Fillmore Agency, Inc., 303 AD2d 486 [2d Dept 2003]; Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713 [2d Dept 2012]). The documentary evidence offered must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable (Rabos v R&R Bagels & Bakery, Inc., 100 AD3d 849 [2d Dept 2012]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgage, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (97 AD3d 713 [2d Dept 2012]).

Moreover, pursuant to CPLR 3211(a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged

fit within any cognizable legal theory"[2] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 A.D.3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). This does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR § 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v. Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to "establish conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR §3211(a) (7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

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[2]Internal citations omitted.

In her Amended Complaint, plaintiff asserts five causes of action. The First Cause of Action is for sexual harassment and discrimination under the New York State Human Rights Law (the "NYSHRL"), Executive Law 296 against all defendants; Second Cause of Action for forcible touching against Dr. Shakouri only; Third Cause of Action for battery against Dr. Shakouri only; Fourth Cause of Action for Negligence for All Corporate Defendants; Fifth Cause of Action for Intentional Infliction of Emotional Distress against Dr. Shakouri. Plaintiff filed an Amended Complaint adding Staffco as a defendant and adding a cause of action against WMCHealth and Staffco for negligence.

Turning to Motion Seq #2- Plaintiff's motion for leave to serve a late Notice of Claim pursuant to General Municipal Law §50-e(5), and Public Authorities Law §3316, to preserve her State law claims against WMCHealth.

As a preliminary matter, the court addresses whether a notice of claim is required under NYSHRL. Generally, when a person seeks to sue a public corporation or entity, like WMCHealth, one must serve a notice of claim on that public corporation within 90 days after the claim arises (*see* General Municipal Law §50–e[1][a]; (Fethallah v N.Y. City Police Dep't, No. 2016 01934, 2017 WL 2126086, at 1 [2d Dept May 17, 2017]). GML §50-i is the statute which makes §50-e applicable on a statewide basis to all municipal corporations: no tort action shall be maintained against a "city, county, town, village, fire district or school district" unless a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with §50-e. However, the Court of Appeals has ruled that no notice of claim is required as "[h]uman rights claims are not tort actions under [GML§] 50-e and are not personal injury, wrongful death, or damage to personal property claims under General Municipal Law §] 50-I" (Margerum v City of Buffalo, 24 N.Y.3d 721, [2015]),

Plaintiff's claim is not a claim for personal injury, wrongful death or damage to real or personal property. The General Municipal Law does not encompass a cause of action based on the Human Rights Law and "[s]ervice of a notice of claim is therefore not a condition precedent to commencement of an action based on the Human Rights Law in a jurisdiction where General Municipal Law §§ 50–e and 50–i provide the only notice of claim criteria (Margerum v City of Buffalo, 24 NY3d 721, 730 [2015]).

Accordingly, claims brought against WMCHealth under the NYSHRL are not subject to Notice of Claim requirements of GMA §50-e or Public Authorities Law §3316.

In any event, plaintiff meets the requirement to file a late notice of claim. "In determining whether to grant an application for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc, the court must consider all relevant facts and circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits" (Destine v City of N.Y., 111 AD3d 629 [2d Dept 2013]). While the determination to grant leave to serve a late notice of claim is left to the sound discretion of the court, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance (Romeo v Long Island Power Auth., 133 AD3d 667, 668 [2d Dept 2015]).

Here, the alleged assault was reported to a Human Resources Officer for WMC Health when that individual contacted plaintiff on or about April 24, 2018, and then interviewed her on about May 1, 2018, concerning her claims. Plaintiff was called by WMC Health to testify at that internal proceeding on February 4, 2019, where she testified under oath about the incidents

described in the complaint. Thus, within 90 days following the incident, WMC Health had an opportunity to interview plaintiff about the claims and also examined her under oath concerning the incidents that form the basis of the complaint. Plaintiff's excuse as to why she had not filed a timely notice of claim is that she had not retained legal counsel at the time and had believed her direct notification to representatives of WMC Health was sufficient to preserve her legal rights. The current counsel was retained in February 2019.

Under these circumstances, while plaintiff may not have a reasonable excuse for failing to serve a notice of claim within 90 days of the accrual of the claim, the absence of a reasonable excuse is not fatal here, where WMCHealth had actual notice of the essential facts constituting the claim, and there is no evidence that WMCHealth was prejudiced in its ability to maintain a defense (Kumar v Westchester Cty. Health Care Corp., 78 AD3d 1054, 1055 [2d Dept 2010]). Thus, plaintiffs's application to file a late notice of claim is granted.

Turning to separate motions to dismiss (Seqs 3 and 5) by WMCHealth and Staffco, plaintiff's amended complaint's First Cause of Action under NYSHRL, and Fourth Cause of Action sounding in negligence apply to these moving defendants.

The record shows that Dr. Shakouri is employed as a nephrologist by Advanced Kidney Care of Hudson Valley, a practice independent from Staffco and WMCHealth. While Dr. Shakouri has privileges to admit and treat his patients at MidHudsonRH as a member of MidHudson RH's medical staff, he is neither employed nor compensated by Staffco or WMCHealth.

The record also shows that plaintiff is an employee of Staffco, a professional employer organization (PEO), that provides services to the various hospitals that are part of the WMCHealth network, including the hospital.

Effective as of May 9, 2014, Westchester County Health Care Corporation, a public benefit corporation as operator of Westchester Medical Center, and Staffco, a single member limited liability company registered as a PEO entered into a Professional Employer Agreement ("PEA"). Staffco, as the PEO, agreed to offer employment to substantially all of the non-physician staff employed to the hospital. Staffco was responsible for all administrative and human resources function regarding Staffco employees, including hiring, firing, collective bargaining policies, assigning job responsibilities, paying Staffco employees, benefits, unemployment insurance, and workers compensation. However, when it came to removing Staffco employees, notice and consultation with WMC was required.

Of significance, the PEO specifically states in Section 21 entitled "Independent Contractors":

"A. Except for the purposes of coverage under the Workers' Compensation Law and in accordance with the New York State Labor Law §922(4), **the PEO [Staffco] Employees shall not be considered employees of WMC, and shall be considered independent contractors of WMC. As such, PEO will not hold PEO Employees out as, nor shall PEO claim that PEO Employees are employees of WMC.** PEO shall not, by reason of this Agreement, make or support any claim, demand or application on behalf of , for the benefit of PEO Employees to or for any right or privilege applicable to an employee of WMC, including but not limited to Unemployment Insurance Benefits, Social Security coverage or Retirement membership and any protection afforded by Public Officers Law Sections 17 and 19...". (*see* NYSCEF Doc No. 26).

After weighing various factors including the control that the entity exercises over an individual's conditions of employment, there is an issue as to whether WMCHealth and Staffco, could be deemed part of a single integrated enterprise, and each being an employer. According to the Affirmation of Barbara Kukowski, Vice President of Legal Affairs for defendant WCHCC, it is a public benefit corporation originally created to operate WMC. Staffco is a limited liability company, whose sole member is WMC. WCHCC is the sole member of WMC.

At the time of the alleged assault, plaintiff worked at MidHudsonRH as a per diem registered nurse, where she would float among different departments on an as-needed basis. Staffco has the sole responsibility for compensating the Staffco employees, and paying all taxes, and benefits to Staffco employees. Staffco also has the responsibility for hiring, firing, assigning job responsibilities and reporting relationships to Staffco employees, and is responsible for training, evaluating, promoting, terminating and disciplining Staffco employees.

Further, Staffco argues that plaintiff's NYSHRL claim against Staffco must be dismissed because she fails to sufficiently allege any discriminatory act or omission by any employee of Staffco. According to Staffco, plaintiff alleges that her floor supervisor and other supervisory personnel were aware of the unwelcome, offensive and harassing sexual discriminatory conduct and failed to respond adequately. Plaintiff fails to identify any of these supervisory personnel by name or to state when and whether she informed them about Dr. Shakouri's alleged misconduct. More significantly, plaintiff fails to allege that these individual were employees of Staffco.

However, Staffco is alleged in the amended complaint to have known about the false rumors that plaintiff was sleeping with physicians, and to have known about Dr. Shakouri's openly explicit sexually harassing plaintiff, but failed to take any action to stop the sexual harassment directed at plaintiff.

Whether WMCHealth was plaintiff's employer for the purpose of the statutes in question is an issue that cannot be determined at this stage of the litigation. Considering the record, the court finds that at this juncture, plaintiff's cause of action under NYSHRL, as against Staffco and WMCHealth states a cause of action. Thus, moving defendants' motion to dismiss on this ground is denied.

Under the Fourth Cause of Action for negligence, plaintiff alleges that WMCHealth and Staffco had a duty to protect plaintiff from injury while plaintiff was lawfully working at the hospital; are responsible for supervising and training staff and physicians while on hospital premises and taking steps to prevent foreseeable injuries; failed to take adequate and reasonable steps to protect plaintiff from sexual harassment and assault; should have known plaintiff was being sexually harassed in the workplace and failed to investigate and eliminate the harassment. Plaintiff claims that she was sexually assaulted due to the negligence and carelessness of WMCHealth and Staffco.

Staffco, as plaintiff's employer argues that workers compensation is the exclusive remedy to plaintiff under Sections 11 and 29(6) Workers Compensation Law. It is indeed well-settled that plaintiff cannot sue her employer for injuries sustained during the course of her employment. (See Workers' Comp. Law 11 & 29(6) ("[C]ontroversies regarding the applicability of the Workers' Compensation Law rest within the primary jurisdiction of the Workers' Compensation Board, including issues as to the existence of an employer-employee relationship" (Santiago v Dedvukaj, 167 AD2d 529 [1990] [citation omitted]). Thus, the common-law negligence causes of action, as against Staffco, as plaintiff's employer, may very will be barred by the exclusivity provisions of the Workers' Compensation Law (Rodriguez v. Dickard Widder Indus., 150 A.D.3d 1169, 1171 [2d Dept 2017).

Also, Labor Law §922(4) states unequivocally that both a PEO and its client may not be sued by an employee for injuries occurring in the course of her employment (Crespo v. State, 41 Misc. 3d 807, 813, [(Ct. Cl. 2013]). Labor Law §922, referenced in the above requirements, provides that a PEO must have a written agreement with the client in which the PEO (i) "reserves a right of direction and control over the worksite employees," provided the client

maintains "such direction and control over the worksite as necessary to conduct the client's business"; (ii) "assumes responsibility" for payroll taxes and employee benefits; and (iii) "retains authority" to hire, fire and discipline workers. Further, the PEO must give written notice of the "general nature" of the relationship to worksite employees, and must "assume" responsibility for paying wages and unemployment insurance, and collecting taxes (Crespo v State, 41 Misc.3d 807, 814 (Ct. Cl. 2013).

In addition, an employee may be considered to be acting within the scope of his or her employment regardless of whether the precise act or the exact manner of the injury was foreseen by the employer, so long as "the general type of conduct may have been reasonably expected" (Stewart v. Westchester Inst. for Human Dev., 136 AD3d 1014, 1018 (2d Dept 2016). Under the circumstances here, it is clear that Dr. Shakouri's alleged acts were committed for purely personal motives and were an obvious departure from his normal duties as a doctor (Riviello v Waldron, 47 NY2d 297, 302 [1997]). An employer is vicariously liable for the torts of its employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment (see, Riviello v Waldron, 47 NY2d 297, 302).

Staffco argues that it has no duty to protect plaintiff from the conduct of Dr. Shakouri, because he is not a Staffco employee. In addition to the traditional standard elements of negligence, a plaintiff must show, among other elements that the tortfeasor and defendant were in an employer/employee relationship. Plaintiff cannot establish that Dr. Shakouri-the alleged tortfeasor was in an employer/employee relationship with Staffco, and as a result, her negligent supervision/retention claim must be dismissed as a matter of law. The causes of action fail to state a claim under the theory of respondeat superior. Pursuant to that doctrine, an employer will

not be vicariously liable for its employee's alleged assault "where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (Yeboah v Snapple, Inc., 286 AD2d 204, 204-205 [2001]).

However, Plaintiff responds that it is not proceeding under a respondeat superior theory, but that Staffco knew of the harassment, and that it failed to train staff and failed to provide a reasonable complaint procedure, Staffco was aware that the staff and Dr. Shakouri were spreading false rumors that plaintiff had sexual relations with physicians; that Staffco was aware that Shakouri was inappropriately touching her and making sexual comments to her at the hospital; and failed to train non-physician staff performing services at MidHudsonRegional Hospital regarding sexual harassment and discriminatory policies and procedures for filing complaints, including plaintiff.

At this stage of this action, no sufficient paperwork was provided showing the Workers' Compensation Claim, and there are issues as to whether notification was properly followed and other issues do not require the dismissal of negligence claims.

In any event, for this motion, the facts alleged in the Verified Amended Complaint must be accepted as true. Considering this evidence in the light most favorable to the non-moving party, and affording plaintiff the benefit of every favorable inference that can be drawn from the evidence the court finds that plaintiff alleges a proper cause of action for common law negligence.

Accordingly, it is hereby

ORDERED, that WMCHealth's motion to dismiss the complaint (Seq 1), as well as plaintiff's motion for default judgment (Seq 4) were both withdrawn; and it is further

ORDERED, that WMCHealth's motion to dismiss the amended complaint (Seq 3) is denied; and it is further

ORDERED, that plaintiff's motion to file a late notice of claim (Seq 2) is granted; and it is further

ORDERED, that the verified notice of claim in the form proposed shall be deemed timely served upon service of a copy of this order with notice of entry and a copy of the proposed notice of claim upon Mid Hudson Regional Hospital of the Westchester Medical Center and Westchester County Health Care Corporation; and it is further

ORDERED, that Staffco's motion to dismiss (Seq 5), is denied; and it is further

ORDERED, that the parties are directed to appear in the Compliance Part on November 7th, 2019 at 9:30AM, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601.

The court has considered the remainder of the factual and legal contentions of the parties, and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this Decision and Order. This constitutes the Decision and Order of the Court.

Dated: **October 28, 2019**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF