2016 IL App (1st) 151850-U

SIXTH DIVISION
January 29, 2016

No. 1-15-1850

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JENNIFER FLORES,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13 L 5618
	)	
MANUEL SANTIAGO,	)	Honorable
	)	Janet Adams Brosnahan,
Defendant-Appellee.	)	Judge Presiding

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court correctly granted summary judgment in favor of defendant and against plaintiff on her battery and Illinois Gender Violence Act claims.

¶ 2 Jennifer Flores sued her physician, Dr. Manuel Santiago, on various theories, including battery and a claim under the Illinois Gender Violence Act, (740 ILCS 82/10 (West 2010)), based on non-consensual sexual contact which Santiago allegedly had with Flores while she was under the influence of narcotics. Three years ago, we held that Flores's amended complaint

stated a valid cause of action and remanded the case for further proceedings. *Flores v. Santiago*, 2013 IL App (1st) 122454 (*Flores I*).

¶ 3 After that remand, the parties engaged in discovery and were deposed. Eventually, Santiago moved for summary judgment, contending that deposition testimony bore out that the sexual relationship between the parties was entirely consensual. The trial court found that there was no issue of material fact demonstrating that Flores did not consent to the sexual contact. Since lack of consent was a necessary element of Flores's causes of action, the court granted judgment in Santiago's favor. This appeal followed.

¶ 4 The pertinent allegations and background were set forth in *Flores I*, so we only briefly summarize them here. Flores alleged that Santiago is a licensed physician and that she was his patient for treatment regarding her eyes. Flores claimed that in June 2011 and thereafter, Santiago would flirt, tease and play with her during checkups and regular evaluations, and while she was his patient, the pair had sexual intercourse and oral sexual contact on a number of occasions. The sexual activity was not part of any standard medical examination, diagnosis or treatment for her health problems. Flores's amended complaint further alleged that Santiago gave Flores drugs which rendered her unable to consent to any sexual contact with him. We held that this amended complaint stated a valid cause of action. Particularly relevant to this appeal was the statement in our opinion that Flores "may be able to prove a lack of consent [to the sexual contact] based on severe intoxication." *Flores I*, ¶ 17. We also noted that Flores had not pleaded a theory of breach of fiduciary duty based merely on the physician-patient relationship. See *Flores I*, ¶ 18. This fact has not changed; Flores never amended her complaint to add any such claim.

¶ 5 In her deposition, Flores testified that she met Santiago in October, 2010 when she sought treatment for cataracts. She admitted that she often flirted with Santiago during her visits. She proceeded through a course of treatment involving about twelve visits. After her treatment ended, she began a six-month long extramarital romantic relationship with him. She voluntarily engaged in sexual relations with Santiago on their first date and many times thereafter. During the course of that relationship, Flores was no longer his regular patient but she did return to see him once for an emergency treatment. She admitted that she did not engage in the relationship with him because he was her doctor. She also specifically admitted that Santiago never forced her to have sex or threatened her in any way about anything. She terminated the relationship in November, 2011 and changed her telephone number around the same time. However, she provided Santiago with her new number a month later.

¶ 6 Flores stated that every time she and Santiago were together, she used drugs – which included liquid cocaine – with him. The liquid cocaine was taken intranasally. She was a past user of illegal drugs. When asked if the drugs gave her a good and euphoric feeling, she responded affirmatively, but was unable to recall any other feelings the liquid cocaine gave her. She was aware of her actions while under the influence of the cocaine. The effect of the cocaine wears off in about 15 to 20 minutes. She had not used cocaine for several years, but she began to crave the liquid cocaine and became addicted to it. During this time, she listed herself on a dating website, seeking out partners who had similar access to cocaine. She also admitted that the sexual relationship between Santiago and her was fully consensual. During the relationship, they sent sexually explicit text messages to each other, none of which hint at Flores's remorse, regret, or withdrawal of consent to sexual contact.

¶ 7 Text message records showed that when the relationship ended in December, 2012, Flores threatened Santiago with litigation and complaints to medical licensing authorities. The messages also demonstrated that the relationship was consensual and that Flores aggressively sought out sexual contact with Santiago. Flores filed this lawsuit a few weeks after the relationship ended.

¶ 8 Santiago testified that in July, 2011, after Flores completed her series of treatments and was no longer his patient, she sent him a text message asking him if there was "an itch she could scratch." Flores had previously sent Santiago a text message including a picture of her breasts. The two began dating and engaged in a consensual sexual relationship which continued for about six months. Santiago denied forcing Flores to engage in sexual contact with him.

¶ 9 Purchasing records indicated that, during the course of the relationship, Santiago had bought four 10-milliliter bottles of cocaine hydrochloride solution from the Gottlieb Hospital Pharmacy for his medical practice. Whether these particular bottles were Santiago's only source of liquid cocaine is not resolved by the record. Santiago's brief in this court claims that these bottles were "at most" the only liquid cocaine he possessed during the pertinent time period, but the testimony in the record cited in support of that assertion contains no such limitation, leaving open the question that some of the cocaine might have come from a different, or pre-existing source.

¶ 10 Dr. Jerrold Leikin, a medical toxicologist and Director of Medical Toxicology at NorthShore University Health Systems, submitted an uncontroverted affidavit opining, within "a reasonable degree of medical certainty," that "sporadic intranasal doses of cocaine of 80 mg or less are insufficient to produce inebriation * * * or addiction." An amount of 80 milligrams was greater than the 40 milliliters Santiago purchased from the Gottlieb Hospital pharmacy over the

course of the relationship. Leiken stated that a milliliter of liquid cocaine contains 40 milligrams of cocaine. As Flores testified that she ingested liquid cocaine "every time" she was with Santiago, and she saw him at least weekly for about 20 weeks, she would have taken, on average, no more than 1.94 milliliters of liquid cocaine, which equates to 77.6 milligrams of cocaine on each visit. That amount is less than the 80 milligrams which Leiken stated was insufficient to cause Flores to lose her ability to consent.

¶ 11 Rejecting Flores's contentions regarding her lack of consent, the trial court specifically found that "[t]he undisputed facts conclusively show that Flores invited the sexual contact, cut it off when she wanted to and re-commenced it at will." Accordingly, the trial court granted summary judgment in favor of Santiago and against Flores. This appeal followed.

¶ 12 Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2–1005 (West 2012); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). The purpose of summary judgment is not to try a question of fact but to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 416-17 (2008). To determine whether a genuine issue of material fact exists, a court construes the pleadings liberally in favor of the nonmoving party. *Id.* at 417. Summary judgment should not be granted unless the movant's right to judgment is free and clear from doubt. *Mitchell v. Special Education Joint Agreement School District No. 208*, 386 Ill. App. 3d 106, 111 (2008). "However, summary judgment requires the responding party to come forward with the evidence that it has – it is the put up or shut up moment in a lawsuit." (internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶

14. We review orders granting summary judgment *de novo. Jones v. Country Mutual Insurance Co.*, 371 Ill. App. 3d 1096, 1098 (2007).

¶ 13 The primary issue before us is whether there is a material issue of fact regarding Flores's consent to the sexual activities in question. Lack of consent is an element of battery. *Country Mutual Insurance Co. v. Olsak*, 391 Ill. App. 3d 295, 306 (2009) (quoting *Cowan v. Insurance Co. of North America*, 22 Ill. App. 3d 883, 890 (1974)). It is also an element of a valid Gender Violence Act claim. 740 ILCS 82/5(2) (West 2012). "Knowing consent requires [the court] to examine all of the circumstances to see if defendant knowingly exercised such control over complainant that a trier of fact could find that complainant did not submit to the sexual advances of defendant voluntarily, intelligently, and by an active concurrence." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 39 (quoting *People v. Whitten*, 269 Ill.. App. 3d 1037, 1044 (5th Dist. 1995)). In *Flores I*, we held that lack of consent could be found if the victim was under the influence of narcotics administered by the defendant with the intent to deprive the victim of her will to deny consent. *Flores I*, ¶ 17. In this appeal, Flores relies strongly on that holding, contending that it is "law of the case" and that her testimony that Santiago gave her liquid cocaine before they engaged in sexual acts, by itself, creates an issue of fact precluding summary judgment. We disagree.

¶ 14 Even giving Flores's deposition testimony a generous interpretation, we find that it hardly supports the notion that her use of the liquid cocaine so intoxicated her that she lost the ability to knowingly consent to the sexual contact in question. At best, she presents a few vague statements about intoxication which are largely contradicted by her related testimony on the subject. Nothing she stated demonstrates even a sporadic episode of non-consent, or rises to the level of severe intoxication as set forth in *Flores I*. Her statements were insufficient to create

genuine issues of material fact regarding consent sufficient to survive summary judgment. Additionally, the expert testimony of Dr. Leikin, which was unrebutted, demonstrated that the amount of liquid cocaine which Flores ingested was insufficient to intoxicate her to such an extent as to deprive her of her will to consent to sexual activity with Santiago.

¶ 15 We cannot find, based on this record, that Flores has demonstrated a material issue of genuine fact showing that she was so severely intoxicated that she was incapable of consent during her sexual encounters with Santiago. The trial court correctly granted summary judgment in favor of defendant and against plaintiff.

¶ 16 Affirmed.