SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
- X
ALEXANDRA WATERBURY,

Index No. 158220/2018

Plaintiff,

-against-

NEW YORK CITY BALLET, INC., JARED LONGHITANO, CHASE FINLAY, SCHOOL OF AMERICAN BALLET, AMAR RAMASAR, AND, ZACH CATAZARO

Defendants.
- X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NEW YORK CITY BALLET, INC.'S MOTION TO DISMISS PLAINTIFF'S AMENDED VERIFIED COMPLAINT

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Defendant New York City Ballet, Inc. (the "Ballet"), through its attorneys Proskauer Rose LLP, respectfully submits this Memorandum of Law in support of its motion for an order pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") 3211(a)(7) dismissing the Amended Verified Complaint (the "Complaint") of Plaintiff Alexandra Waterbury in its entirety as to the Ballet. The Ballet separately files its Verified Answer and Affirmative Defenses to the Complaint.[1]

PRELIMINARY STATEMENT

Plaintiff alleges that her ex-boyfriend, defendant Chase Finlay, photographed her while they had sex and later shared those photographs with his friends. Plaintiff, who is a former student of defendant School of American Ballet ("SAB"), has never been a Ballet employee and has no alleged affiliation with the Ballet at all. Plaintiff's single alleged connection to the Ballet is that the Ballet employed Finlay during the time she dated him. Based on that most tenuous connection, Plaintiff asserts that the Ballet is liable for actions that allegedly occurred during, or arose from, her private, sexual encounters. That contention finds no basis in law, and Plaintiff's best efforts to cobble together allegations of conduct entirely unrelated to her, bare legal conclusions about the Ballet, and pure innuendo do not change that result.

Plaintiff asserts eleven causes of action against the Ballet, each of which suffers from one or more fundamental legal defects. Those defects include:

- Plaintiff's negligence claim against the Ballet fails because the Ballet did not owe her a duty of care. Indeed, New York courts have long held that an employer does not owe a duty of care to its employees' significant others;

[1] Under C.P.L.R. 3211(e), a motion to dismiss based on C.P.L.R. 3211(a)(7) need not be made before a responsive pleading is filed; it "may be made at any subsequent time or in a later pleading."

- Plaintiff's assault and battery claims fail because Plaintiff's sexual relationship with Finlay was plainly not within the scope of his employment as a dancer; consequently the Ballet is not vicariously liable for his conduct;
- Plaintiff's claims for aiding and abetting assault and battery fail because even if Plaintiff had alleged an underlying assault or battery, she has not alleged that the Ballet committed any intentional act that harmed her;
- Plaintiff's claim for negligent hiring, training, retention and/or supervision fails because even if Finlay's conduct was within the scope of his employment, which it is not, Plaintiff does not allege any facts putting the Ballet on notice of Finlay's supposed propensity for the type of sexual behavior alleged in the Complaint;
- Plaintiff's claims based on New York City Administrative Code Section 10-177 fail because that statute does not apply to the Ballet, and no cause of action exists for "aiding or abetting" a violation of the statute;
- Plaintiff's claims for negligent and intentional infliction of emotional distress against the Ballet fail because they are entirely duplicative of her other causes of action, and, in any event, she does not allege the basic elements of those extreme claims; and
- Plaintiff's claim for aiding and abetting invasion of privacy fails because no such cause of action exists, and even if it did, Plaintiff has not alleged an invasion of privacy, which requires that an image be used for advertising or trade purposes.

For each of these reasons and for the reasons that follow, the Court should reject Plaintiff's baseless attempt to pull the Ballet into her private dispute with her ex-boyfriend and should dismiss the Complaint in its entirety, with prejudice, as to the Ballet.

BACKGROUND

The Ballet is a nonprofit institution dedicated to developing and presenting ballet and other dance performances. (Compl. ¶¶ 13-14.)[2] The SAB—separately named as a defendant in this action—is a ballet school and an institution distinct from the Ballet. (*Id.* ¶ 27.) Plaintiff is a former student of the SAB who had a romantic relationship with defendant Finlay, one of the Ballet's former dancers. (Compl. ¶¶ 3, 112.)

Plaintiff's Romantic Relationship With Finlay

Plaintiff alleges that she met Finlay while she was a student at the SAB. (*Id.* ¶ 72.) Plaintiff alleges that one year into her romantic relationship with Finlay, she discovered that he "had secretly been recording and saving explicit photographs and videos of her." (*Id.* ¶ 72.) Finlay allegedly took those photographs and videos "while the two were engaged in sexual activity" or while Plaintiff was otherwise "without clothing." (*Id.*) Plaintiff consented to the sexual activity with Finlay at the time it occurred, but she allegedly would not have done so had she "known she was being recorded." (*Id.* ¶¶ 179, 202.)

Plaintiff alleges that after Finlay photographed or recorded her, he sent photographs of her to three individuals by text message. (*Id.* ¶¶ 82, 86-88, 95-96.)[3] Two of those three individuals allegedly had no affiliation with the Ballet—one was a former student of the SAB named Craig Hall (*id.* ¶ 86-88) (and not an employee of the Ballet of the same name), and the other was a former student of the SAB "who is now a dancer at Pacific Northwest Ballet" (*id.* ¶

[2] A copy of the Complaint is attached as Exhibit A to the Affirmation of Kathleen M. McKenna dated February 19, 2019, and filed concurrently with this memorandum. The Ballet's reference in this memorandum to any allegation in the Complaint is not a concession that the allegation is true. As explained below, the Ballet argues only that even if Plaintiff's allegations were true, she has not alleged a viable cause of action against the Ballet.

[3] The Complaint alleges that Finlay transmitted two other photographs of Plaintiff but does not identify the recipient. (Compl. ¶¶ 78, 82.)

96). The third was defendant Amar Ramasar, a "friend" of Plaintiff's (*id.* ¶ 4) and a former dancer for the Ballet, who allegedly received two photographs of Plaintiff from Mr. Finlay. (*Id.* ¶ 95.) Plaintiff does not allege that Ramasar transmitted any of the photographs that Finlay sent to him or otherwise took any actions that affected Plaintiff, rather than other women.

Plaintiff also alleges that Finlay discussed sexual topics and exchanged photographs of other women with his male friends. For example, Plaintiff alleges that Catazaro sent Finlay a picture of a former student of the SAB. (*Id.* ¶ 80, 83.) Those exchanges have no alleged connection to Plaintiff, except to the extent that they supposedly encouraged Finlay's conduct. (*See, e.g., id.* ¶ 2 (alleging that Longhitano "encouraged, incited and instigated" Finlay and others to "send[ ] the explicit text messages and images that are the subject of this lawsuit").)[4]

Plaintiff's Vague, Unrelated Allegations About the Ballet

Plaintiff's alleged connection to the Ballet is that the Ballet employed her ex-boyfriend, Finlay. (*Id.* ¶ 18.) In an effort to make the Ballet responsible for events in her personal life, Plaintiff recites entirely conclusory allegations that allegedly demonstrate that the Ballet "condoned" or "permitted" Finlay's alleged conduct and even actively "encouraged" it. (*Id.* ¶ 38.) Theses events, even as vaguely alleged, do not have even the most tenuous relationship to Plaintiff or the type of conduct alleged in the Complaint. These include:

- Allowing a principal dancer to return to work after attending "rehab" for one week, which had allegedly been precipitated by substance abuse and "domestic violence" involving another Ballet employee (*id.* ¶ 41);

[4] However, Plaintiff alleges that Finlay's conduct had already begun by the time that these exchanges took place. (*See id.* ¶ 78 (alleging Finlay shared photograph of Plaintiff on September 3, 2017); *compare id.* ¶ 80 (alleging that Longhitano later texted Finlay and Catazaro about women other than Plaintiff).)

- "Ask[ing]" Finlay about alcohol use "because he smelled like alcoholic beverages" but not "investigating" (*id.* ¶ 43);
- "[O]rdering" that dancers should limit misbehavior to New York City in response to several dancers allegedly hosting a party in a Washington D.C. hotel that incurred a $150,000 fine (*id.* ¶¶ 45-46);
- "Continu[ing] to take . . . money" from a donor who exchanged "text messages about ballet dancers [but not Plaintiff]," despite being aware that he "hosted NYCB parties where excess alcoholic consumption is encouraged" (*id.* ¶¶ 48, 54);
- Continuing to employ a male dancer despite an unidentified source's "claims" of "raping" a female colleague in Vail, Colorado, and "assaulting" another colleague (*id.* ¶ 58); and
- Accepting the resignation of the Ballet's former artistic director after an independent investigation determined that "complaints of physical, verbal and sexual abuse . . . were unfounded" (*id.* ¶ 63).[5]

With the exception of the former artistic director's resignation, the Complaint does not specify when any of these incidents supposedly occurred. Nor does Plaintiff allege that they occurred prior to the conduct that she alleges was directed at her, such that they could have even plausibly caused that conduct. Indeed, Plaintiff does not even allege that the individuals who supposedly harmed her were aware of these alleged incidents. Most importantly, not one of these alleged events establish any basis for any alleged duty of care owed by the Ballet to Plaintiff.

[5] Plaintiff alleges that the resignation in January 2018 later caused Finlay and others to harm her. Yet according to Plaintiff's allegations, this was months after Finlay had already begun photographing her during their sexual activities and sharing those photographs. (*See, e.g.,* Compl. ¶¶ 78-86.)

Based on little more than these vague allegations about the Ballet's handling of extraneous personnel matters, Plaintiff asserts eleven causes of action against the Ballet for: (1) Negligence; (2) Negligent Hiring, Training, Retention, and/or Supervision; (3) Assault; (4) Battery: (5) Violation of New York City Administrative Code Section 10-177 ("Section 10-177") (6) Aiding and Abetting a Violation of Section 10-177; (7) Negligent Infliction of Emotional Distress; (8) Intentional Infliction of Emotional Distress; (9) Aiding and Abetting Assault; (10) Aiding and Abetting Battery; and (11) Aiding and Abetting Invasion of Privacy. Each and every cause of action merits dismissal as a matter of law.

ARGUMENT

On a C.P.L.R. 3211(a)(7) motion to dismiss for failure to state a cause of action, the court determines whether, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Godfrey v. Spano*, 13 N.Y.3d 358 (2009). Although a plaintiff's allegations are presumed to be true for purposes of such a motion, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Id*. at 373. When Plaintiff's factual allegations are set against this standard, fundamental legal principles make clear that Plaintiff has no cause of action against the Ballet.

I. Plaintiff Fails to State a Cause of Action for Negligence Against the Ballet.

Plaintiff's First Cause of Action for negligence is premised on the allegation that the Ballet breached a duty of care to her, causing Finlay to secretly capture videos and photographs that depicted her in intimate circumstances. (Compl. ¶¶ 120-23.) Plaintiff never claims to have been employed by the Ballet because she was not. The conduct of which she complains, the unpermitted taking of sexual photographs by an employee of the Ballet, were not taken as part of or in furtherance of Finlay's employment as a dancer at the Ballet.

The "threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party." *Sheila C. v. Povich*, 11 A.D.3d 120, 125 (1st Dep't 2004). That issue is properly resolved on a motion to dismiss because "[t]he existence and scope of that duty is a legal question." *Id.* at 125 (granting motion to dismiss negligence claim for failure to allege facts establishing existence of duty). Whether or not a duty exists is based on the relationship of the parties and their expectations, as well as public policy considerations like the potential proliferation of claims and the likelihood of unlimited or insurer-like liability. *Id.* at 129.

Whether alleged harm was the foreseeable result of a defendant's actions is irrelevant to whether that defendant owed the plaintiff a duty of care. *See Pulka v. Edelman*, 40 N.Y.2d 781, 785 (1976) ("Foreseeability should not be confused with duty."); *On v. BKO Express LLC*, 148 A.D.3d 50, 55 (1st Dep't 2017) ("[F]oreseeability may not be relied on to create a duty."). Instead, courts must "limit the legal consequences of wrongs to a controllable degree." *Tobin v Grossman*, 24 N.Y.2d 609, 619 (1969).

Consequently, courts have regularly held that an employer owes no duty of care to the spouses of its employees—let alone to their boyfriends or girlfriends. For example, in *In re Holdampf v. A.C. & S., Inc.*, 5 N.Y.3d 486, 494 (2005), the Court of Appeals held that the defendant owed no duty of care to the wife of one of its employees who sued in negligence. The court explained that the plaintiff had "no relationship" to her husband's employer and rejected the plaintiff's proposal for a "new duty . . . to members of the household of the employer's employee." *Id.* at 498. Likewise, in *Maldonado v. Hunts Point Coop. Mkt., Inc.*, 82 A.D.3d 510 (1st Dep't 2011), the court held that an employer owed no duty of care to the girlfriend of a former employee who sued in negligence. The court explained that even though the defendant,

as the boyfriend's employer, "had a degree of control over [the boyfriend's] actions," it was not responsible for actions that took place "at his place of residence during a domestic dispute." *Id.* at 511.

Here, Plaintiff's lack of connection to the Ballet is precisely the type of relationship that does not give rise to a duty of care. Plaintiff alleges that she was the girlfriend of Finlay, one of the Ballet's employees (Compl. ¶¶ 4, 18), and that as a result, the Ballet had a duty to "safeguard" her (*id.* ¶ 118), "no longer encourage, condone and/or permit" its employees "to act unlawfully" towards her (*id.* ¶ 120), and "to not create an environment and circumstances" in which employees would "mistreat" her (*id.* at 121).[6] Yet none of these supposed duties finds any basis in law. *See Holdampf*, 5 N.Y.3d at 498 (relying on "long-settled common-law notions of an employer's . . . duties").

Plaintiff's other efforts to insinuate a relationship with the Ballet fail to establish a duty of care. Plaintiff alleges merely that she studied at the SAB where she met Finlay and that students at the SAB may become dancers at the Ballet. (Compl. ¶¶ 3, 24-25.) But these allegation are meaningless, particularly because courts must narrowly construe "the class of potential plaintiffs to whom the duty is owed" to ensure that "the specter of limitless liability is not present." *Holdampf*, 5 N.Y.3d at 494; *see, e.g., Bonomonte v. City of N.Y.*, 79 A.D.3d 515, 515 (1st Dep't 2010) (rejecting duty of care notwithstanding plaintiff's contention that injuries were "foreseeable consequence of defendant's negligence").[7]

[6] Plaintiff also alleges that she was the "friend" of another Ballet employee (Compl. ¶ 4), but this relationship does not support a duty of care for the same reasons that her romantic relationship with Finlay does not.

[7] For the same reason, Plaintiff's entirely conclusory allegation the Ballet owed a "special duty . . . to ballet dancers, students and others given the role of the male ballet dancers and their superior position" has absolutely no basis in law.

Because Plaintiff has not alleged facts establishing that the Ballet owed her a duty of care, her negligence claim fails as a matter of law and should be dismissed with prejudice. *See Sheila C.*, 11 A.D.3d at 129 (dismissing claims under C.P.L.R. 3211(a)(7) where "circumstances . . . do not warrant a finding that the incident which allegedly befell plaintiff falls within the defendants' orbit of duty").

II. Plaintiff Fails to State a Cause of Action for Negligent Hiring, Training, Retention and/or Supervision Against the Ballet.

Plaintiff's Second Cause of Action, for negligent hiring, training, retention and/or supervision, asserts that the Ballet knew or should have known that Finlay and friends were "creating an environment" in which Plaintiff could be "assaulted, battered, sexually abused, [or have] sexual images disseminated without her consent." (Compl. ¶ 129.) Plaintiff makes no effort to allege any factual connection between the employment of Finlay as a dancer and the responsibility of his employer to know about or train him with respect to the treatment of his girlfriend. Even if Plaintiff could assert some nexus between his employment as a dancer and his employer's responsibility for his personal relationships such that a duty of care existed to her, her claims for negligence in hiring, retention and supervision fail as a matter of law.

Plaintiff's claim for negligent hiring, retention and training fails for the simple reason that she does not and cannot allege that the Ballet by employing Finlay and Ramasar as dancers "placed [them] in a position" that made the harm alleged in the Complaint foreseeable. *Detone v. Bullit Courier Serv., Inc.*, 140 A.D.2d 278, 279 (1st Dep't 1988); *see Ford v. Gildin*, 200 A.D.2d 224, 229 (1st Dep't 1994) (dismissing negligent hiring claim where employee's "sexual assaults . . . had nothing to do with his employment"). Similarly, any supposed negligence on the Ballet's part in training Finlay or Ramasar was not the proximate cause of any of the intentional tortious conduct that allegedly injured Plaintiff. *See Claudio v. Sawyer*, No.

104877/2010, 2013 WL 5949874, at *10 (Sup. Ct. N.Y. Cty. Oct. 28, 2013), *aff'd*, 126 A.D.3d 616 (1st Dep't 2015) (dismissing negligent training claim that lacked "necessary nexus or proximate cause between the [employer's] training and what was clearly [its employee's] personal action/conduct"). There plainly is no nexus between the hiring of a dancer and that dancer's actions towards individuals who are unrelated third parties to the employer.

Even if there were a nexus to create a duty of care to Plaintiff, and there is not, Plaintiff's claim for negligent hiring, training and retention fails for additional reasons. The "essential element" of a claim for negligent hiring (or training, retention or supervision) is that "the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." *Sheila C.*, 11 A.D.3d at 129-30; *see also Malizia v. Lulu's LLC*, 2010 N.Y. Misc. LEXIS 1310, at *4 (Sup. Ct. N.Y Cty., Jan. 21, 2010).

To support a cause of action, the type of conduct known to an employer must be closely related to the type of conduct that allegedly caused a plaintiff's injury. For example, where an employee is alleged to have assaulted a plaintiff, the employer can only be held liable if it had "knowledge of the employee's violent, threatening, or assaultive propensities." *Detone*, 140 A.D.2d at 280 (holding that evidence employee had been fired on two prior occasions was insufficient "to infer that [employee] had a history of violent behavior"). Even prior convictions, past misconduct, and erratic behavior are insufficient to support a cause of action where they do not involve the same type of act alleged to have caused injury. *See, e.g., McCann v. Varrick Grp. LLC*, 84 A.D.3d 591, 591-92 (1st Dep't 2011) (past conviction of accessory to kidnapping "bears no relation to" security guard's propensity for reckless behavior towards customers); *Doe v. Montefiore Med. Ctr.*, No. 12 Civ. 686 (CM), 2013 WL 624688, at *4 (S.D.N.Y. Feb. 19,

2013) ("aggressiveness, unpredictability, delusional paranoia, and possible need of mental health intervention" required "too much of a leap to infer a known risk of sexual assault").

Here, Plaintiff has not alleged that the Ballet knew or should have known of any conduct that would support a cause of action for negligent hiring or the like. Plaintiff alleges that two Ballet employees—Finlay and Ramasar—harmed her.[8] As to Finlay, Plaintiff alleges, at most, that the Ballet knew he had engaged in "partying and alcohol use." (Compl. ¶ 43.) But even if the Ballet knew that Finlay had engaged in these activities, they hardly suggest knowledge of a propensity for the distribution of intimate photographs alleged in the Complaint. *See Coffey v. City of N.Y.*, 49 A.D.3d 449, 450 (1st Dep't 2008) ("various infractions and a prior accident on the job" unrelated to "propensity for drunk driving," even where employer knew that alcoholism had cause "lateness and absenteeism").

Plaintiff's allegations as to Ramasar are even more deficient. The Amended Complaint does not allege that the Ballet had any knowledge of prior misconduct by Ramasar and certainly not any misconduct that would have indicated a propensity to solicit or distribute intimate photographs of women. *See Sheila C.*, 11 A.D.3d at 130 (dismissing negligent hiring and retention claim because complaint was "devoid of any allegations concerning this essential element"). While Plaintiff alleges that "it is clear that [the Ballet] had actual notice that its male dancers were unlawfully disseminating sexual and explicit images of female ballet dancers and other women" (Compl. ¶ 111), this is precisely the type of "bare legal conclusion[ ] with no factual specificity" that is insufficient to survive a motion to dismiss, *Godfrey*, 13 N.Y.3d at 373.

[8] The only other individuals identified in the Complaint who were allegedly affiliated with the Ballet—Catazaro and Longhitano—are not alleged to have sent or received photographs of Plaintiff. Their only alleged conduct relates to other women. (Compl. ¶¶ 80, 83-85.)

The same is true of Plaintiff's entirely conclusory statement that the Ballet "was on notice of relevant tortious propensities of Mr. Longhitano, Mr. Finlay and Mr. Ramasar." (Compl. ¶ 136.)

III. Plaintiff Fails to State a Cause of Action for Assault or Battery Against the Ballet.

Plaintiff's Eight Cause of Action for assault against the Ballet and Ninth Cause of Action for battery against the Ballet allege that the Ballet is vicariously liable for Finlay's alleged conduct. (Compl. ¶ 190 (alleging that Finlay "created a reasonable apprehension in plaintiff [ ] of immediate, harmful or offensive contact"); ¶ 203 (alleging that Finlay's actions "amounted to a series of harmful and offensive touchings")). But these claims, premised on Plaintiff's consensual sexual relationship with Finlay, fail for two independent reasons.

A. Plaintiff Does Not Allege Conduct Constituting an Assault or Battery.

A cause of action for assault requires allegations of "physical conduct placing plaintiff in imminent apprehension of harmful contact." *Holtz v. Wildenstein & Co., Inc.*, 261 A.D.2d 336, 336 (1st Dep't 1999). Battery requires intentional bodily contact offensive to a reasonable person. *Wende C. v. United Methodist Church*, 4 N.Y.3d 293, 298 (2005). A plaintiff who consented to the physical conduct or bodily contact on which an assault or battery claim is based does not have a cause of action. *See Id.*, 4 N.Y.3d at 298 (dismissing battery claim where "the sexual relationship between the parties was indeed consensual"); *Jencsik v. Shanley*, No. 151365/12, 2013 N.Y. Misc. LEXIS 6118, at *15 (Sup. Ct. N.Y. Cty., Dec. 24, 2013) ("[A]s with assault, lack of consent is a necessary condition to a cause of action for battery.").

Here, Finlay's alleged conduct in photographing or recording Plaintiff cannot support a cause of action for assault or battery. As to assault, it is not the type of "menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct." *Okoli v. Paul Hastings LLP*, 117 A.D.3d 539, 540 (1st Dep't 2014); *see Griffin v. William M. Mercer, Inc.*, No. 101146/96, 1998 WL 1050968, at *12 (Sup. Ct. N.Y. Cty. Mar. 25, 1998) ("[P]laintiff's

allegations . . . of . . . yelling and cursing at her, leaving obscene messages on her voice mail, and making lewd comments to her, even if taken as true, are insufficient to support her claim of assault as a matter of law"). Likewise, Finlay could not have placed Plaintiff in "reasonable apprehension of imminent harmful conduct," *Okoli*, 117 A.D.3d at 540, by photographing or recording her because Plaintiff alleges that she *did not know it was occurring* (*e.g.* Compl. ¶ 4); *see Tom v. Lenox Hill Hosp.*, 165 Misc. 2d 313, 315 (Sup. Ct. N.Y. Cty. 1995) ("[W]here it is claimed that the plaintiff was unconscious, he could not have been in apprehension of imminent harmful or offensive contact."). As to battery, Finlay's alleged photographing and recording are insufficient because they did not involve physical contact with Plaintiff. *Higgins v. Hamilton*, 18 A.D.3d 436, 436 (2d Dep't 2005) (dismissing cause of action for battery and requiring a plaintiff to "prove that there was bodily contact").

Plaintiff's alleged sexual activity with Finlay cannot support a cause of action for assault or battery either. She alleges that she consented to that activity at the time it occurred.[9] (Compl. ¶ 179, 202 ("Had plaintiff . . . known she was being recorded, she would not have consented to the sexual activity . . .").) Indeed, Plaintiff alleges that she only "discovered" that Finlay had "secretly been recording . . . intimate photographs and videos of her" months after her consensual, sexual activity with Finlay occurred. (*See, e.g., id.* ¶ 4.) Her assault and battery claims therefore fail as a matter of law. *See Welter v. Feigenbaum*, No. 127969/02, 2013 N.Y. Misc. LEXIS 176, at *3 (Sup. Ct. N.Y. Cty. Jan. 11, 2013) (dismissing battery claim because a plaintiff must demonstrate that "the sexual contact with defendant, as opposed to the

[9] To the extent Plaintiff purports to base her assault claim on the alleged conduct of anyone other than Finlay (*see* Compl. ¶ 190 (referencing "agents, servants, employees, donors, principals and/or others")), her allegations are plainly inadequate because only Finlay is alleged to have engaged in "physical conduct" towards Plaintiff. *Jencsik*, 2013 N.Y. Misc. LEXIS 6118, at *11 (explaining that "[w]ords unaccompanied by an act or gesture are generally not sufficient to sustain a claim of assault").

consequences of such contact, was not consensual"); *see also Naughright v. Weiss*, 826 F. Supp. 2d 676, 685 (S.D.N.Y. 2011) (dismissing claims for assault and battery where plaintiff "consented to the bodily contact . . . at the time the contact was made"). Those claims must be dismissed as to the Ballet.

B. Even if Plaintiff's Assault and Battery Claims Were Viable, the Ballet Cannot Be Held Vicariously Liable for Finlay's Conduct.

An employer is not vicariously liable for its employees' intentional torts committed outside the scope of their employment. *See Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933 (1999). Tortious conduct is within the scope of employment only when it is "generally foreseeable and a natural incident of the employment." *Id*. Consequently, courts regularly hold that intentional torts involving sexual assault or battery or otherwise involving sexually motivated conduct are not within the scope of an employee's employment. *See, e.g., N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 (2002) (describing "sexual assault" as "a clear departure from the scope of employment, having been committed for wholly personal motives"); *Noto v. St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 160 A.D.2d 656, 657 (1st Dep't 1990) (affirming dismissal of tort claim based on plaintiff's "sexual liaison" with defendant's employee).

Sexually motivated conduct is outside the scope of employment even when it occurs during work hours, while the employee is on duty. *See Judith M.*, 93 N.Y.2d at 933; *Taylor v. United Parcel Serv, Inc.*, 72 A.D.3d 573, 573 (1st Dep't 2010 (affirming dismissal of sexual assault claim allegedly committed by UPS driver during delivery to plaintiff's apartment); *Herskovitz v. Equinox Holdings, Inc.*, No. 151065/2013, 2013 WL 2642956, at *6 (Sup. Ct. N.Y. Cty. June 3, 2013) ("alleged lewd act" towards customer by "maintenance employee, assigned to clean the room after a yoga class" was "not in furtherance of the yoga studio's business and was a clear departure from his cleaning duties").

Here, Finlay's sexual relations with Plaintiff were not even remotely connected to his employment as a dancer for the Ballet. (Compl. ¶¶ 18.) Indeed, Plaintiff does not and could not allege that anything about Finlay's job as a dancer required him to engage in a sexual relationship with her, that Finlay was acting in furtherance of the Ballet's interests in any way, or even that any of her sexual contact with Finlay took place while he was on duty. To the contrary, Finlay's alleged tortious conduct took place entirely within the confines of a private relationship with Plaintiff. *See Stallings v. U.S. Elecs., Inc.*, 270 A.D.2d 188, 188 (1st Dep't 2000) (affirming dismissal of tort claims arising from "nonwork-related intimate relationship" because "giving plaintiff's allegations every favorable intendment, the supervisor acted for personal motives unrelated to the furtherance of the employer's business"). Because the Ballet is not vicariously liable for that alleged conduct, the Court should dismiss Plaintiff's causes of action for assault and battery against the Ballet. *See Herskovitz*, 2013 WL 2642956, at *6-*7 (granting C.P.L.R. 3211(a)(7) motion to dismiss because "defendant as employer cannot be held vicariously liable for the alleged sexual assault of its employee as a matter of law").

IV. Plaintiff Fails to State a Cause of Action for Aiding or Abetting Assault or Battery Against the Ballet.

Plaintiff's Fifteenth Cause of Action for aiding and abetting assault against the Ballet and Sixteenth Cause of Action for aiding and abetting battery against the Ballet allege that the Ballet "provided substantial assistance" in Finlay's assault and battery of Plaintiff. (Compl. ¶¶ 256, 263.) These claims fail in the first instance because, as explained above, Plaintiff has not alleged any conduct constituting an assault or battery (leaving nothing for the Ballet to have aided or abetted). *See Best-Simpson v. Gosseen*, No. 111313/11, 2012 WL 1079213 (Sup. Ct. N.Y. Cty. Mar. 22, 2012); *Naughright*, 826 F. Supp. 2d at 691-92 (dismissing claim for aiding and abetting

battery because "a cognizable cause of action for battery has not been pled" and "such a claim stands or falls with the underlying tort").

Even if Plaintiff had alleged conduct amounting to an assault or battery, her aiding and abetting claim would still fail as to the Ballet. Aiding and abetting assault or battery requires an "overt act in furtherance of" the tortious conduct. *Offenhartz v. Cohen*, 168 A.D.2d 268, 268 (1st Dep't 1990). That act must be "intentional or deliberate" and "directed at causing harm." *Shea v. Cornell Univ.*, 192 A.D.2d 857, 858 (3d Dep't 1993). Indirect facilitation and passive awareness do not support a cause of action. *See Steinberg v. Goldstein*, 27 A.D.2d 955, 956 (2d Dep't 1967) ("The fact that [defendant] drove the car the few minutes before the assault cannot be used as an inference of complicity in the assault"); *Shea*, 192 A.D.2d at 857 (dismissing claim for aiding and abetting assault where "at best" defendants "should have been aware of [alleged tortfeasor's] crude and vulgar nature, his demeaning and malevolent attitude toward women, and, in a limited sense, his history of hostile physical aggression toward women"); *compare Wilson v. DiCaprio*, 278 A.D.2d 25, 26 (1st Dep't 2000) (rejecting dismissal of aiding and abetting claim where defendant allegedly "shout[ed] to the group, 'We'll go kick his ass'" and reaction of group was allegedly "to follow and assault plaintiff").

Here, Plaintiff fails to allege any overt act on behalf of the Ballet that was intended to cause and did cause Finlay to harm Plaintiff. Plaintiff relies on the Ballet's alleged handling of several personnel matters, such as a dancer who was "sent to rehab" but allowed to return "after a week or so and now continues to be employed." (Compl. ¶ 41.) These alleged incidents supposedly "sent the message" to Finlay and others "that it was acceptable . . . to abuse substances and degrade, demean, dehumanize and physically abuse women." (*Id.* ¶ 42.) Even indulging this highly implausible chain of inferences, Plaintiff does not and cannot allege that the

Ballet intended to cause Finlay to secretly record his sexual activity with Plaintiff. *See Shea*, 192 A.D.2d at 858 (requiring conduct "intentionally or deliberately directed at causing the assault"). None of these alleged incidents were allegedly aimed at communicating anything to Finlay, and the Complaint does not even allege that he was aware of them. Plaintiff's causes of action for aiding and abetting assault and battery must be dismissed as a result.

V. Plaintiff Fails to State a Cause of Action for Violation of or Aiding and Abetting Violation of Section 10-177 Against the Ballet.

Plaintiff's Eleventh Cause of Action for violation of Section 10-177 and Twelfth Cause of Action for aiding and abetting a violation of Section 10-177 allege that Ballet is responsible for or assisted in Finlay's alleged violation of the statute. Section 10-177 provides, in relevant part, that "[i]t is unlawful for a covered recipient to disclose an intimate image, without the depicted individual's consent." *Id*. Plaintiff's claims under Section 10-177 fail for two reasons.

A. Section 10-177 Does Not Apply to the Ballet.

Section 10-177 creates a civil cause of action for someone depicted in an "intimate image" against only a "covered recipient." N.Y.C. Admin. Code §§ 10-177*(b)(1), (d)(1). A "covered recipient" is "an individual who gains possession of, or access to, an intimate image *from a depicted individual*, including through the recording of the intimate image." *Id.* at § 10-177*(a) (emphasis added). According to Plaintiff's allegations, only Finlay is a "covered recipient," as he is the only individual alleged to have "gain[ed] possession of" intimate images from Plaintiff, the "depicted individual." (Compl. ¶ 4.) Section 10-177 does not, of course, create a cause of action against the employer of a "covered recipient." Indeed, it does not even create a cause of action against an individual who further disseminates an image after receiving it from a "covered individual." As a result, Finlay is the only individual to whom Section 10-177

applies. The plain language of Section 10-177 indicates that Plaintiff does not and cannot state a cause of action against the Ballet.

B. Section 10-177 Does Not Create Aiding-and-Abetting Liability.

Section 10-177 makes no mention whatsoever of aider and abettor liability. Indeed, the statute is narrowly drafted to attach liability solely to a "covered recipient." To transform the statute into one that creates liability for aiding and abetting is contrary to fundamental principles of statutory interpretation. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 842 (1990) (refusing to construe statute to create cause of action against individuals not specified in statute because "it is not for us to write such a remedy into the statute by judicial construction"); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) ("[W]hen Congress enacts a statute . . . *there is no general presumption that the plaintiff may also sue aiders and abettors*.") (emphasis added); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010), *aff'd*, 770 F.3d 170 (2d Cir. 2014) (explaining that courts should not presume aiding and abetting liability in a statute that does not expressly provide for such liability). Moreover, where the New York City Administrative Code was intended to create aiding and abetting liability, it does so explicitly. *See, e.g.,* N.Y.C. Admin. Code § 8-107(6) ("It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."). Section 10-177 contains no analogous provision.

Finally, even if such a cause of action for aiding and abetting a Section 10-177 violation did exist, Plaintiff's claim would fail because she has not alleged any "overt act" intended to cause Finlay's alleged violation. *See supra* at 17-18. Plaintiff's conclusory allegations that the Ballet "encouraged, permitted, condoned and created a demeanor, state-of-mind, environment

and/or mentality," (Compl. ¶ 234), are wholly insufficient in this regard, *see Godfrey*, 13 N.Y.3d at 373.

VI. Plaintiff Fails to State a Cause of Action for Negligent or Intentional Infliction of Emotional Distress Against the Ballet.

Plaintiff's Thirteenth Cause of Action, for negligent infliction of emotional distress ("NIED") alleges that the Ballet negligently caused Finlay's conduct. (Compl. ¶ 241.) A cause of action for negligent infliction of emotional distress "must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." *Sheila C.*, 11 A.D.3d at 130-31. It "must be supported by allegations of conduct by the defendants 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* (quoting *Murphy v. Amer. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983)). Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss. *Dillon v City of N.Y.*, 261 A.D.2d 34, 41 (1st Dep't 1999).

Plaintiff's Fourteenth Cause of Action, for intentional infliction of emotional distress ("IIED"), alleges that the Ballet is vicariously liable for Finlay's conduct. (*Id.* ¶ 247.) To state a claim for intentional infliction of emotional distress, a plaintiff must allege (1) extreme and outrageous conduct; (2) an intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (1993). These requirements "are rigorous, and difficult to satisfy" and liability can be "found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all

possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 122 (citing *Murphy*, 58 N.Y.2d at 303).

As to the Ballet, these claims fail for multiple reasons.

A. Plaintiff's NIED and IIED Claims are Duplicative of Her Other Claims.

As an initial matter, Plaintiff's NIED and IIED claims should be dismissed as duplicative because the conduct alleged falls within the ambit of other causes of action. *See Fischer v. Malone*y, 43 N.Y.2d 553, 558 (1978) (cause of action should not be entertained "where the conduct complained of falls well within the ambit of other traditional tort liability"); *Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 538-39 (1st Dep't 2013) (dismissing IIED claim as duplicative of defamation claim); *Leonard v. Reinhardt*, 20 A.D.3d 510, 510 (2d Dept. 2005) (dismissing IIED claim as duplicative of assault and battery causes of action); *Mulligan v. Long Island Fury Volleyball Club*, 76 N.Y.S.3d 784, 789 (Sup. Ct. Suffolk Cty. 2018) (dismissing NIED claim arising from alleged sexual relations as duplicative of breach of fiduciary duty claim).

Here, Plaintiff's NIED claim is based on the Ballet's same alleged "negligence in failing to exercise due care in hiring…and supervising defendant Chase Finlay and/or their other agents" (Compl. ¶ 241) that she alleges in support of her First Cause of Action for negligence (*id.* ¶¶ 119-121) and Second Cause of Action for negligent hiring, training, retention and/or supervision (*id.* ¶¶ 134-35). Likewise, Plaintiff's NIED claim (*id.* ¶¶ 241-42) and IIED claim (*id.* ¶ 248) are based on the same conduct that Plaintiff alleges in support of her Eighth Cause of Action for assault (*id.* ¶¶ 189-190) and Ninth Cause of Action for battery against the Ballet (*id.* ¶¶ 201-203). Because the alleged conduct underlying these claims is substantively identical to Plaintiff's other causes of action, the Court should dismiss them.

B. Even if Not Duplicative, Plaintiff's NIED and IIED Claims Fail as a Matter of Law.

Even were Plaintiff's NIED and IIED claims not subject to dismissal as duplicative, they fail as a matter of law and should be dismissed. Plaintiff's NIED and IIED claims are premised on a theory of vicarious liability (Compl. ¶¶ 242, 248), yet none of the alleged conduct is within the scope of Finlay's employment as a dancer, thus the claims must be dismissed. *See supra* at 15-16; *see also Spielman v. Carrino,* 77 A.D.3d 816, 818 (2d Dep't 2010) (plaintiff congregants could not hold church vicariously liable for IIED based on the pastor's engaging in secret, sexual affairs with them); *Elmore v. City of N.Y.*, 15 A.D.3d 334, 335 (2d Dep't 2005) (dismissing IIED claim as against the City because "the alleged battery and intentional infliction of emotional distress committed by [its employee] were 'solely for personal motives unrelated to the furtherance of the City's business'"). Because the Ballet cannot be held vicariously liable for the alleged conduct, the claims should be dismissed.

To the extent Plaintiff relies on a theory of direct liability rather than vicarious liability, her claims fail for additional reasons. Plaintiff's NIED claim fails because it is based in negligence, and a negligence claim cannot stand because the Ballet did not owe her a duty of care. *See supra* at 8-9; *Sheila C.,* 11 A.D.3d at 130 ("A cause of action for negligent infliction of emotional distress . . . generally must be premised upon the breach of a duty owed to plaintiff . . ."). Plaintiff's IIED claim fails because she does not allege any conduct on the part of the Ballet (as opposed to conduct on Finlay's part) that was intended to cause her severe emotional distress. *See Howell*, 81 N.Y.2d at 121; *Doe v. Am. Broad. Co*., 152 A.D.2d 482, 483 (1st Dept. 1989) ("There can be recovery for this tort only 'where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation.'")). Here, Plaintiff alleges, at most, that the Ballet encouraged Finlay or communicated that his behavior was

acceptable. (*See, e.g.,* Compl. ¶ 71 ("This is no different than a principal telling an agent to act unlawfully, or that it is ok to do so . . . .") Such purported approval is hardly the type of intentional and extreme or outrageous behavior necessary to support an IIED cause of action. *See Gray v. Schenectady City Sch. Dist.*, 86 A.D.3d 771, 773 (3d Dep't 2011) ("[D]efendant's mere inaction after receiving complaints about [employee's] behavior … cannot be considered the type of extreme and outrageous conduct that is 'utterly intolerable in a civilized community'").

For each of these reasons, the Court should dismiss Plaintiff's NIED and IIED claims, notwithstanding that they are duplicative of Plaintiff's other claims and subject to dismissal for that reason as well.

VII. Plaintiff Fails to State a Cause of Action for Aiding and Abetting Invasion of Privacy Against the Ballet.

The Court should dismiss Plaintiff's Nineteenth Cause of Action for aiding and abetting an invasion of privacy for the threshold reason that it is not a cognizable claim. Invasion of privacy is governed exclusively by Civil Rights Law sections 50 and 51, *see Howell*, 81 N.Y.2d at 123, which do not provide for aiding and abetting liability.[10] The court should therefore decline to create a cause of action that finds no support in the text of the statute. *See supra* at 19.

In any event, this cause of action fails for the independent reason that Plaintiff has not adequately alleged an underlying invasion of privacy claim against Finlay (Plaintiff's Seventeenth Cause of Action). *See, e.g., Mascola v. City Univ. of N.Y.*, 14 A.D.3d 409, 410 (1st

[10] Civil Rights Law section 50 provides, in pertinent part that "us[ing] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is . . . a misdemeanor." Civil Rights Law section 51 provides that, subject to certain exceptions, a "person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained by reason of such use."

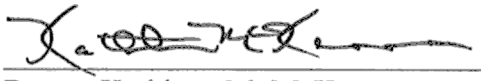
Dept. 2005) (dismissing aiding and abetting claim (where authorized by statute) because underlying claim for violation of statute was not viable). An invasion of privacy claim requires that a plaintiff's name or likeness has been used "for advertising purposes or for the purposes of trade." N.Y. Civ. Rights Law §51; *Sondik v. Kimmel*, 131 A.D.3d 1041, 1042 (2d Dep't 2015) (granting motion to dismiss invasion of privacy claim because "the video footage in which the plaintiff's voice, picture, and likeness appeared was not used for advertising or trade purposes"). Here, Plaintiff does not and cannot allege that images or videos depicting her were used for advertising or trade purposes. As a result, she has not adequately alleged an underlying invasion of privacy claim against Finlay, and her aiding and abetting claim against the Ballet must therefore be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint in its entirety, with prejudice, as to the Ballet.

February 20, 2019

PROSKAUER ROSE LLP



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