

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KATELYNN BREANA DUNLAP, :
 : C.A. No. K13C-05-005 WLW
Plaintiff, :
 :
v. :
 :
VANCE C. PHILLIPS, :
 :
Defendant. :

Submitted: April 13, 2015
Decided: July 9, 2015

ORDER

Upon Plaintiff's Motion for Partial Summary
Judgment as to Liability.
Denied.

Nicholas H. Rodriguez, Esquire and Brian Brittingham, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Plaintiff.

Kurt M. Heyman, Esquire and Melissa N. Donimirski, Esquire of Proctor Heyman LLP, Wilmington, Delaware; attorneys for Defendant.

WITHAM, R.J.

Plaintiff filed a personal injury action with this Court alleging that Vance C. Phillips committed a wide range of offenses, including rape, sexual assault, battery, offensive touching, harassment, unlawful imprisonment, and mental harm. Plaintiff files her motion for Partial Summary Judgment as to liability based on Defendant's assertion of his Fifth Amendment right when giving testimony. For the forgoing reasons, the Plaintiff's motion is denied.

FACTS AND PROCEDURE

On November 12, 2014, Katelynn Breana Dunlap (hereinafter "Plaintiff") filed a motion for Partial Summary Judgment as to liability. Vance Phillips (hereinafter "Defendant") filed his opposition on December 18, 2014.¹ Plaintiff's complaint alleges that Defendant committed serious acts against the Plaintiff including but not limited to rape, harassment, unlawful imprisonment, battery, and mental harm.

Plaintiff details the beginning of her relationship with the Defendant as one of a mentor-mentee. Plaintiff was working with the Defendant on his campaign for political office and due to her involvement, she frequently spent time alone with Defendant. Plaintiff argues that Defendant's relationship with Plaintiff became inappropriate and when Plaintiff's parents became aware of the relationship, they

¹ At the beginning of oral arguments which were held on April 13, 2015, the parties notified the Court that they had reached a mutually agreed-to solution concerning Defendant's Amended Motion for Judgment on the Pleadings. The parties agreed that they would strike Count 1 of Plaintiff's complaint, as the parties agreed that a criminal statute does not give rise to a civil liability or a civil tort claim. The Court requested that the parties file an amendment to the complaint by way of a stipulation. To date, no such stipulation has been filed, but this does not change the outcome of the present Partial Motion for Summary Judgment.

instructed the Defendant to halt all communications with Plaintiff. However, Plaintiff and Defendant allegedly continued to interact closely with one another in a non-physical capacity, until May of 2011 when Defendant allegedly forced Plaintiff to have sexual intercourse, threatening to harm her if she did not obey.

Plaintiff details a litany of examples where Defendant threatened Plaintiff if she did not succumb to his sexual advances. However despite these advances, Plaintiff did not contact anyone to report the abuse, alleging duress for fear of Defendant acting on his promise to physically harm Plaintiff if she told anyone. Plaintiff alleges the sexual abuse continued through the month of August, including an incident where Plaintiff was sexually abused after she went alone to meet the Defendant at a Super 8 Motel in Dover, Delaware, at Defendant's request.

An anonymous letter was sent to the Delaware General Assembly and an investigation by the Delaware State Police was launched with respect to possible acts committed against the Plaintiff.² To date, no formal criminal charges have been filed against the Defendant. Plaintiff claims that because the Defendant has not contested or denied Plaintiff's allegations and claims, and has instead invoked his Fifth Amendment right, that Summary Judgment is proper. Plaintiff now moves for this Court to enter partial summary judgment for the Plaintiff on the basis of liability because, she claims, the record is not in dispute. Plaintiff argues that incontrovertible evidence must be accepted as fact in a motion for summary judgment.

Defendant argues in his Opposition to Plaintiff's Motion for Summary

² Complaint at 9.

Judgment as to Liability that Delaware Rule of Evidence 512(a)³ denies a Court the ability to assume, and that the State of Delaware does not permit, a negative inference on the basis of one invoking their Fifth Amendment Right. Defendant also argues that Plaintiff's inconsistent statements serve as reason to deny summary judgment.

The defense argues that material facts are in dispute based on Plaintiff's own testimony. According to the defense, Plaintiff's inconsistent statements and testimony create an issue of credibility, and thus this case should go before a jury. The Defendant argues those facts in dispute are germane to the case, such as whether or not any sexual activity between the parties was consensual. Plaintiff argues that no issues of material fact exist with regard to liability.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."⁴ This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.⁵ When

³ "The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom." D.R.E. 512(a).

⁴ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991 (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); see also Del. Super. Ct. Civ. R. 56(c).

⁵ Del. Super. Ct. Civ. R. 56(c).

material facts are in dispute, or “it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances,” summary judgment will not be appropriate.⁶ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁷

DISCUSSION

A. Privilege

Plaintiff argues that summary judgment as to liability may be entered when a defendant has failed to deny or defend on the basis of the privilege against self-incrimination.⁸ Plaintiff contends that a defendant asserting his Fifth Amendment Right is equivalent to the Defendant failing to deny or dispute Plaintiff’s claim. The Court disagrees.

Plaintiff argues that core issues of material fact have not been answered by the Defendant. Plaintiff cites to the following examples in which Defendant refuses to answer with anything other than an assertion of the Fifth Amendment:

“(1) whether he [the Defendant] ever had sexual relations with Plaintiff; (2) whether he visited Plaintiff at her college in Virginia; (3) in regard to a former tenant of his ; (4) the reason he and his ex-wife divorced; (5) whether Plaintiff has ever been

⁶ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

⁷ *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁸ *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *8 (Del. Ch. Dec. 29, 2009)

to his residence; (6) whether his behavior toward Plaintiff was of concern to fellow campaign members; (7) in regard to the February 2011 meeting between he, his then wife, and Plaintiff, and the subsequent meeting held by Plaintiff's family; (8) in regard to a typed statement he gave; and (9) whether he had ever been to Plaintiff's place of employment in Dover, Delaware."⁹

Defendant cites to two relevant Delaware Chancery Court cases, *W.L. Gore & Associates, Inc. v. Long*¹⁰ and *Digiacobbe v. Sestak*.¹¹ Both cases stand for the proposition that one's Fifth Amendment right may be asserted under oath, when the answer to the question being asked would force the speaker to reveal incriminating information. Both cases cite to Delaware Rule of Evidence 512(a). Similarly, *Mumford v. Croft*, 93 A.2d 506, 508 (Del. Super. 1952) held that the privilege against self-incrimination applied in civil cases;

"...it is settled that the privilege against self-incrimination, as guaranteed by constitutional provisions such as ours, may be asserted in civil cases. Equally well settled is the rule that the privilege may be claimed whether or not the witness stands accused of crime at the time of questioning."¹²

⁹ Plaintiff's Motion for Partial Summary Judgment at 13.

¹⁰ *W.L. Gore & Associates, Inc. v. Long*, 2011 WL 6935278 (Del. Ch. Dec. 28, 2011).

¹¹ *Digiacobbe v. Sestak*, 1998 WL 684149, at *1 (Del. Ch. July 7, 1998).

¹² *Ocwen Loan Servicing, LLC v. HSBC Bank USA*, 2014 WL 3058230, at *1 (Del. Super. June 30, 2014).

In Defendant's Answer to the Complaint, he does not assert his Fifth Amendment right as a response to every single allegation. In most cases, the Defendant asserts this right when the complaint or deposition question pertains to specific instances where Defendant has interacted with Plaintiff, and usually concerns an alleged sexual act performed by the two parties. The Court finds that the Defendant properly asserted his right in the manner proscribed by *W.L. Gore*¹³: "[A]ssertions of privilege must be made on a question-by-question basis where the *particular* answer either would support a conviction or 'furnish a link in the chain of evidence needed to prosecute' the witness." The Court finds that Defendant asserted his Fifth Amendment right in a proper manner, and was not doing so in an effort to evade answering questions by Plaintiff's Counsel.

B. Inconsistent Statements

Defendant also raises the issue of Plaintiff's inconsistent statements as a reason for denying summary judgment. Defendant argues that the summary judgment standard makes clear that no issues of material fact may be present in order to grant the motion. The Defendant argues that because Plaintiff's motion is based entirely on testimony, any discrepancy or inconsistency should be noted by the Court. The Defendant cites *Ocwen Loan Servicing, LLC v. HSBC Bank USA*,¹⁴ as an example of the Court deciding that the inconsistency in one's testimony should be weighed by

¹³ *Supra* note 10.

¹⁴ 2014 WL 3058230.

the court in deciding a Motion for Summary Judgment. The Court agrees.

Plaintiff acknowledges the differences in her testimony.¹⁵ Defendant points out several inconsistencies, the first being the most important: whether the Plaintiff was a rape victim. This is alleged in the complaint, however in Plaintiff's police interview, she denies as much.¹⁶ Also notable, during Plaintiff's deposition she admits that she had previously told a detective that the sexual acts between her and Defendant were consensual.¹⁷

Upon viewing the evidence in a light most favorable to the nonmoving party, there are substantial issues of material fact. "...if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate. Similarly, where issues of fact are based on the credibility of a witness, the Court will not grant summary judgment."¹⁸

The Court finds that an issue of fact remains as to whether the Defendant performed the various sexual acts and instances of harassment and violence against the Plaintiff. The Court cannot pick and choose what portions of Plaintiff's testimony

¹⁵ Motion at 14.

¹⁶ Police Interview #1 of Plaintiff. (Def. Exhibit 3).

¹⁷ Plaintiff's Depo. At 77. (Def. Exhibit 1).

¹⁸ *Ocwen Loan Servicing, LLC v. HSBC Bank USA*, 2014 WL 3058230, at *2 (Del. Super. June 30, 2014) citing *Block Fin. Corp. v. Inisoft Corp.*, 2006 WL 3240010, at *3 (Del. Super. Oct. 30, 2006); *Lynch v. Athey Products Corp.*, 505 A.2d 42, 43 (Del. Super. 1985); *Young v. Delaware Auth. for Reg'l Transit*, 1983 WL 412267, at *1 (Del. Super. Aug. 2, 1983) aff'd, 494 A.2d 169 (Del. 1984).

Dunlap v. Phillips
C.A. No. K13C-05-005 WLW
July 9, 2015

are considered more credible than others. Substantial inconsistencies in the basic facts of this case do not warrant a summary judgment ruling in favor of the Plaintiff.

CONCLUSION

Based on the foregoing, Plaintiff's motion for partial summary judgment as to liability is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh