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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 K. DOE, et al.,

4 Plaintiffs,

5 v.

15 Civ. 7822 CS

6 KURT LUDWIGSEN, et al.,

7 Defendants.

8 -----x

9 White Plains, N.Y.
10 May 18, 2016
2:55 p.m.

11 Before:

12 HON. CATHY SEIBEL,

13 District Judge

14 APPEARANCES

15 LAW OFFICE OF TODD J. KROUNER

Attorney for Plaintiffs

16 TODD JAY KROUNER

JESSICA YANEKSKI

17 JACOB SHER

18 BURKE, MIELE & GOLDEN

Attorney for Defendant Ludwigsen

19 MICHAEL KENNEDY BURKE

20 JULIEN & SCHLESINGER

Attorney for Nyack College Defendants

21 MICHELLE L. BOCHNER

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1 THE COURTROOM DEPUTY: Doe v. Ludwigsen.

2 THE COURT: Ms Bochner, you have everybody but
3 Mr. Ludwigsen and Mr. Burke has Mr. Ludwigsen.

4 MS BOCHNER: That's correct, your Honor.

5 THE COURT: Have a seat, everyone. First thing I will
6 do is sign your stipulation and order of confidentiality. I
7 probably should study it a little more but I tend to believe
8 that these things are negotiated among the parties so they're
9 going to be all right with me.

10 Then let's see what else I have. I have a memorandum
11 giving the real names of the Does, which is something that came
12 up in one of the letters. And then I have two other items that
13 came up in the letters, one an e-mail, the other a written
14 statement. Let me just take a moment to read them.

15 (Pause)

16 THE COURT: Okay. Our business here today is prompted
17 by Mr. Krouner's April 20th letter to which I have Mr. Burke's
18 April 29th response, and Ms Bochner's April 28th letter to
19 which I have Mr. Burke's May 11th response. And the documents
20 I just reviewed came up in that regard.

21 So I kind of want to say, Mr. Burke, really? Really?
22 From what I understand, your client admitted to -- and I think
23 everybody agrees he would only be bound by what he admitted to,
24 nobody is saying he's bound by the accusations, what he
25 admitted to -- he pled to forcibly touching the intimate parts

1 of the victim without consent in order to degrade or abuse her
2 or to satisfy her own sexual desire. He admitted to doing that
3 seven times. I'm not clear on how it could be plausible that
4 the victims intentionally interfered with his contract for the
5 sole purpose of -- hold on, let me make sure I get it all
6 right -- that they wrongfully interfered with his contract for
7 the sole purpose of harming him. What did they do? They
8 reported that he acted inappropriately and there's no question
9 he did. So how could a tortious interference claim possibly
10 get anywhere?

11 MR. BURKE: The allegations go far beyond the
12 admission --

13 THE COURT: I understand that. But let's say they
14 said that he did A, B, C and D and the only thing we can take
15 to the bank is that he did A because he admitted A but A is
16 going to get you fired no matter what. And he did A and they
17 reported A. And he got fired. How are you ever going to show
18 that the reason they reported A was to interfere with his
19 contract as opposed to getting him to stop?

20 MR. BURKE: What at this stage is unknown is what is
21 reported that led to his termination.

22 THE COURT: Are you saying the school would have said
23 oh, if all we knew is that you were grabbing the tushies of the
24 players without their consent in order to degrade or abuse them
25 or satisfy your own sexual desires you could stay, but the fact

1 that they made claims beyond that means you have to go? I mean
2 that's not just plausible.

3 MR. BURKE: I think, your Honor, as far as the factual
4 allegations in the complaint, they go well beyond that, as you
5 know, and there's --

6 THE COURT: For you to make out the claim, you would
7 have to be arguing to me, if only the true part -- let me
8 rephrase that. You would have to be saying that the college
9 would have kept him on if the only accusations were the things
10 he admitted. In other words, for the --

11 MR. BURKE: I don't think we have to establish that.

12 THE COURT: If the accusation was he did A, B and C
13 and he has only admitted A, for you to have a plausible claim
14 you'd have to be saying they never would have fired him just
15 for A.

16 MR. BURKE: I don't think that's so under tortious
17 interference, your Honor. Let's first look at it collectively.
18 You have six plaintiffs. Only three are the ones that he
19 admitted to so you have three others that there's no admitted
20 conduct. So this is a collective case.

21 THE COURT: But we know that he did it to four others
22 who aren't plaintiffs.

23 MR. BURKE: He's admitted that he slapped the buttocks
24 of four others for sexual gratification. That's what I
25 understand the allocution was.

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1 THE COURT: You weren't his lawyer in the criminal
2 case?

3 MR. BURKE: I was not.

4 THE COURT: Where is the part that the plaintiffs did
5 something for the sole purpose of harming him in connection
6 with his contract with the school?

7 MR. BURKE: My understanding, your Honor, as to how it
8 came about that he was terminated was that after he had
9 disciplined some players for either violating curfew and then
10 they reported this, or -- we don't know what was reported
11 because we don't know what the level of the investigation the
12 college had and what was reported, etc. So it was in response
13 to him disciplining some players who violated curfew that then
14 led to reporting of something, that then led to his termination
15 before criminal charges were ever brought. So the fact that
16 after the fact he admits to limited criminal conduct as to
17 three of the plaintiffs, I think there's still an argument to
18 be had, and we have to have discovery to make that
19 determination, that whatever was reported that was false
20 interfered led to his termination and that's the basis for the
21 counterclaim, your Honor.

22 THE COURT: What about the sliver of it that's true?
23 Three of them truthfully reported that he forcibly touched them
24 on their intimate parts for his sexual gratification. He was
25 going to get fired for that. It's not plausible that they

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1 would have kept him on.

2 MR. BURKE: That specific act was reported, Judge, and
3 we don't know that. If they said: He smacked me on the
4 buttocks for sexual gratification and he admitted that later
5 on, then your point is well-taken. But we don't know that.
6 It's premature at this stage. We have a counterclaim and
7 cross-claim to the college for that which led to the
8 termination of Mr. Ludwigsen.

9 THE COURT: What makes you think that anything about
10 what the intent was -- how do I infer that? I mean don't know
11 how I can infer -- and I'm going to let you amend because I
12 always let people amend before motions to dismiss -- but from
13 what you're saying it sounds like if anything their motive was
14 to get out from under the discipline or to get him to stop
15 feeling them up. But where is it that their own motive was to
16 get him fired?

17 MR. BURKE: Your Honor, where do I have to show that
18 the sole motive --

19 THE COURT: You have to plausibly allege that they
20 wrongfully interfered in his contract for the sole purpose of
21 harming the plaintiff.

22 MR. BURKE: And by making allegations that are false,
23 the likely result would be termination.

24 THE COURT: There could be any number of reasons why
25 one would do it, but it has to be their subjective intent, as I

1 understand it. Their sole purpose has to be to harm him as
2 opposed to getting the discipline lifted or getting him to stop
3 what he was doing. It may be that the three as to whom there
4 are guilty pleas are in a different footing than the three who
5 are not. I don't know. But also big picture, what is your
6 point? There's no way in a million, billion years that a jury
7 is ever going to award your client anything. What's the
8 purpose here?

9 MR. BURKE: The purpose is to get at what the
10 investigation was. And again, we're at the pleading stage.

11 THE COURT: I understand.

12 MR. BURKE: And he was constructively discharged
13 because of the allegations that were made. And there is a
14 plausible claim that can be made that the motive was improper
15 by either the other players or these players themselves from
16 what was reported that led to his termination.

17 THE COURT: That's where you're losing me. At least
18 as to the three that he admitted he committed a firing offense.
19 Unless you think that a Christian college is going to say it's
20 okay for you to feel up your players for your own sexual
21 gratification, which they're never going to do, right? What
22 are your damages? He would have lost his job if he did this to
23 one person and now he did it to seven.

24 MR. BURKE: He allocuted as to the sexual
25 gratification, smacking players in the buttocks.

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1 THE COURT: Do you think that they would have kept him
2 on?

3 MR. BURKE: I don't know.

4 THE COURT: Come on.

5 MR. BURKE: Likely not.

6 THE COURT: Right. So even if you win, all you're
7 trying to do, it looks like -- well, withdrawn. Even if you
8 win, your damages are going to be zero.

9 MR. BURKE: He lost his job.

10 THE COURT: For you to get a penny the jury would have
11 to believe that had the school known the truth they would have
12 kept him on.

13 MR. BURKE: Or if it was just limited to --

14 THE COURT: If all they knew is that he grabbed the
15 tushies of seven of his players for his own gratification they
16 would have kept him on? That's just never going to happen.
17 That's just never going to happen. And IIED seems like more of
18 a stretch. IIED cases almost never fly anyway.

19 On the other hand, the documents I just read, I don't
20 think I could consider them on a motion to dismiss but once we
21 get to summary judgment, how is your client ever going to
22 prusue an IIED claim when he has this *mea culpa* and he's
23 apologizing and he feels so terrible about what he did to these
24 students. I don't know how that's going anywhere. Not that I
25 would be able to consider it on a motion to dismiss. And I

1 don't know what your damages would be on an IIED claim either.
2 Maybe he feels like the accusation, the false accusations did
3 him some harm. The true ones didn't.

4 With respect to the college's letter, I have to say I
5 did not understand the argument about the breach of the
6 contract, Ms Bochner. The language you quote from the contract
7 suggests, if anything, that he was not an employee-at-will. It
8 looked to me like the college agreed that it could only
9 terminate him if he was unable or unwilling to carry out his
10 contractual duties. It looks like they bargained away their
11 right to fire him at will. And from what I can tell, they
12 didn't even retain the right to fire him for cause.

13 MS BOCHNER: There is a question as to whether we have
14 a fully executed employment contract with Mr. Ludwigsen. The
15 paragraph that I cite from the contract is from an unsigned
16 employment contract with Mr. Ludwigsen. Therefore, if
17 Mr. Ludwigsen cannot furnish a signed copy, Mr. Ludwigsen would
18 be considered an employee-at-will.

19 THE COURT: That would come about at summary judgment,
20 but you can't move to dismiss.

21 MS BOCHNER: That's correct, your Honor. But in
22 reading the paragraph cited, that an employee can be terminated
23 if he's unable or unwilling to carry out his contractual
24 duties, the argument would be that an employee is unable to
25 carry out his contractual duties dealing with underage minors

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1 after admitting that he committed sexual acts for his own
2 gratification --

3 THE COURT: Does the contract say he has to be on good
4 behavior?

5 MS BOCHNER: It does, your Honor.

6 THE COURT: What does it say? I mean his contractual
7 duties have to be set forth in the contract. Maybe there's a
8 provision in the contract that says you've got to behave
9 yourself.

10 MS BOCHNER: Your Honor, the contract states in
11 Article IV, this document is unsigned and has not been
12 exchanged with any of the parties, that out of respect for
13 differences within the Christian community, students are
14 expected to observe certain behavioral standards. The employee
15 acknowledges his or her obligation and agreement to set an
16 example for students. Based upon the argument that has been
17 made, that this is a Christian institution, Mr. Ludwigsen
18 acknowledges his agreement to set an example for the students
19 and failure to set an example through inappropriate conduct
20 towards his players would be a fireable offense for cause by
21 Nyack College.

22 THE COURT: Very poorly drafted contract, I have to
23 say. I don't know why every contract wouldn't include in it
24 some provision, a morals clause.

25 MS BOCHNER: The contract also refers to the employee,

1 to MPA regulations and other Nyack College documents. And
2 within those documents there are moral clauses with respect to
3 sexual abuse, sexual discrimination. Upon signing the
4 employment contract the employee acknowledges that he has read
5 those documents and manuals and handbooks.

6 THE COURT: I guess you can make the motion. You can
7 argue, if there were no dispute that that was the contract, you
8 could argue it's integral to the complaint and that I should
9 consider it. But I think you're going to have to make up your
10 mind whether you want to argue that that is the contract and it
11 allows you to fire him or you want to argue that there was no
12 contract and therefore he's an employee-at-will. Or maybe
13 there's some theory on which you can argue both.

14 Is it your position, Mr. Burke, that -- well, first of
15 all, I'm not sure what's the difference between the breach of
16 contract and wrongful termination claims against the college.
17 Are you bringing two kinds of claims?

18 MR. BURKE: Yes.

19 THE COURT: What is the difference between them?

20 MR. BURKE: Let me just take a look at my answer, your
21 Honor. Are you looking at my answer now?

22 THE COURT: I have it here. There's one cross-claim
23 for breach of the employment contract and constructive
24 discharge and then there's one -- I'm sorry, the second one is
25 for indemnity. Again --

1 MS BOCHNER: But he does cite wrongful termination and
2 breach of employment contract.

3 THE COURT: It's the same thing. Again, do you think
4 there's a snowball's chance in hell that anybody is going to,
5 that a juror is ever going to say that the college was wrong to
6 fire him? Your argument would have to be, okay, I did do this
7 improper stuff. But they took the word of six girls instead of
8 doing a proper investigation and therefore I should have been
9 entitled to stay on even though I did do it. I just don't see
10 that ever resulting in a nickel for your client. Wouldn't that
11 have to be the theory? Let's say six girls or four girls or
12 however many go knocking on the dean's door and say our coach
13 is feeling us up, and they say okay, coach, you're fired; or
14 let's say they go to the school and they say the coach is
15 feeling us up and he's doing a bunch of other bad stuff, and
16 the school without doing any investigation just takes their
17 word for it and fires him and then it turns out he was feeling
18 them up. You're not going to get any money, right? How is it
19 plausibly a wrongful termination? Even if they should have
20 done a better investigation -- and I don't know that they have
21 an obligation to do an investigation, they're not a
22 governmental agency -- he still deserved to be fired, right?
23 As a practical matter is a jury ever going to give him a penny?
24 I don't think so.

25 MR. BURKE: You're assuming a lot as to what was

1 reported. And that's the issue, I think.

2 THE COURT: I'm assuming that what was reported was at
3 least what he admitted to.

4 MR. BURKE: We don't know that.

5 THE COURT: Then how did you bring this claim?

6 MR. BURKE: Because we know he was terminated.

7 THE COURT: Right. But you're saying he was
8 terminated wrongfully. Don't you have to have some good-faith
9 basis for believing that what they reported was not the truth?

10 MR. BURKE: Yes, we do. And I think that your Honor,
11 if, in fact, what is being said in the complaint as to what the
12 allegations are, if they're saying that that's what was being
13 reported, then we believe that we have met our standard. Other
14 physical acts or other conduct on the part of Mr. Ludwigsen
15 that he has denied. If that was solely what was reported, then
16 yes, we have a sufficient basis for making our claim here.

17 THE COURT: Let me ask you another practical question.
18 The girls said he did A, B and C. He only admitted to A.
19 Fine. When you get in front of a jury and six girls get up and
20 said oh, he did B and C, and he says no, I didn't, what do you
21 think is going to happen? I just think this is a colossal Hail
22 Mary, pardon the expression. I don't understand where your
23 client is coming from, I really don't.

24 MR. KROUNER: Your Honor, may I be heard?

25 THE COURT: Sure.

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1 MR. KROUNER: I cannot say anything more eloquently
2 than the Court already has on the legal standards for this
3 frivolous motion. Your Honor has touched on the language of
4 Rule 11 but has been too gracious to invoke it specifically.
5 I'm not that gracious. If Mr. Ludwigsen's counsel is not
6 persuaded by the clear and persistent signals of the Court, I
7 would simply seek leave in responding to any such motion to
8 seek Rule 11 sanctions.

9 THE COURT: You don't need leave to make a Rule 11
10 motion under my rules.

11 MR. KROUNER: Your Honor asked a question. I don't
12 know if it was rhetorical or went unanswered by defendant's
13 counsel about the motive. The motive here is clearly one of
14 harassment, given everything else that cannot be established.
15 And while your Honor says that the Court cannot consider the
16 extracomplaint exhibits that we have offered up today and
17 referenced in our letter, first, we would seek to convert the
18 motion now to a Rule 56 motion. Procedurally, I would like to
19 note that the e-mail from Kurt Ludwigsen to defendant athletic
20 director Keith Davie dated April 9, 2015 has been marked
21 confidential by Nyack College's counsel, but with her
22 permission today she has indicated that I can read into the
23 record the last sentence in paragraph 2 of that letter which
24 really ought to just put an end to this entire discussion.

25 "Mr. Ludwigsen states: As you and I had discussed, if

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1 the situation were not me but another person, I would demand
2 they be removed immediately to insure that no further harm
3 would come, and that includes myself."

4 The Court is obliged to embrace the legal fiction of
5 accepting the allegations in the complaint as true in a
6 Rule 12(b)(6) motion. However, Rule 11 does not permit
7 Mr. Ludwigsen or his counsel to invent facts that they know are
8 inconsistent with those allegations. Here, in an e-mail to his
9 former employer, the athletic director at Nyack College, Kurt
10 Ludwigsen admits that he deserved to be fired. I don't know
11 what further we need to discuss on that subject. So whether
12 it's a motion that we can convert to summary judgment now to
13 put an end to this folly, or whether it's a Rule 11 motion
14 which we have not from three, not from six, not from fifteen
15 student athletes, who will sing a consistent chorus as to what
16 happened here, but coming from the defendant's own e-mail that
17 he deserved to be fired, we're done either by way of Rule 12
18 motion, Rule 56 motion and/or Rule 11 motion. That should
19 really be the end of it.

20 THE COURT: Let's go off the record for a moment since
21 it's just us chickens here.

22 (Discussion off the record)

23 THE COURT: I'm going to refer you to Magistrate
24 Judge Davison to see if an early agreement can be reached. I'm
25 also going to do what I always do, which is build in time

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1 before I deal with any motions for, in this case, the defendant
2 to amend to address to the extent possible the issues raised by
3 the premotion letters, or if the information received today
4 causes Mr. Ludwigsen or his counsel to think better of it, to
5 withdraw them. And then I'll set a schedule for a motion to
6 dismiss that won't require you to put pen to paper until after
7 Judge Davison has given settlement a shot.

8 MS BOCHNER: Your Honor, just before you set dates,
9 just a question. I had entered into a stipulation with
10 Mr. Krouner for the time to put in an answer on behalf of the
11 Nyack College and the Nyack College defendants until May 27th.
12 I don't know if you want to extend that in your order to allow
13 the entire issue to be resolved so one answer can be put in and
14 not multiple amendments.

15 THE COURT: I think you should answer the complaint.
16 You don't have to answer the cross-claim.

17 MR. KROUNER: Your Honor, the Court knows, I'm sure
18 recalls, we do have a schedule for Nyack College's motions to
19 dismiss already on the books.

20 THE COURT: Oh, we do?

21 MR. KROUNER: And your Honor had already built in some
22 considerable time.

23 THE COURT: When did I do that? The last time we were
24 here? So I did.

25 MR. KROUNER: I would respectfully request that we

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1 dual track and basically do everything on that timeline. In
2 part there's a personal point to that request concerning
3 Ms Yanefski's pregnancy.

4 THE COURT: That is important.

5 MR. KROUNER: And expectancy.

6 THE COURT: God forbid you should have to write the
7 brief. When are we losing you Ms Yanefski?

8 MS YANEFSKI: I'm due the end of August. From then
9 until the end of the year I won't be much help.

10 MR. KROUNER: And that won't be a good thing. I think
11 we previously had these motions fully submitted by...

12 THE COURT: August 1.

13 MR. KROUNER: Right.

14 THE COURT: That's all right. The college's motion to
15 dismiss plaintiff's claims will be on the track set earlier.
16 If we have let's say 30 days for Mr. Burke to rethink and amend
17 if he wants, that would take us to June 17th. Then how long
18 after that would you want to move to dismiss the counterclaims
19 and cross-claims?

20 MR. KROUNER: Ms Yanefski asks if she may have 30
21 days.

22 MS BOCHNER: 30 days is fine with us.

23 THE COURT: July 15th. That's a little less than 30
24 days. You'd rather file it on a Friday than a Monday, right?
25 You want the same 30 days for your opposition, Mr. Burke?

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1 MR. BURKE: Yes.

2 THE COURT: Is that going to ruin any vacation?

3 MR. BURKE: Hold on. I am away the first week of
4 August. Can we put it to the week of the 19th, August 19th.

5 THE COURT: August 19th. Mr. Krouner, you're going to
6 have to handle the reply yourself, sorry, or get Mr. Sher to
7 help you. How long after August 19th do you want? Two weeks,
8 three, for your reply?

9 MS BOCHNER: I'd be fine with two weeks, getting it in
10 before the Labor Day activities.

11 THE COURT: September 2nd. Get it off your desk
12 before Labor Day.

13 MR. KROUNER: August 26, your Honor?

14 THE COURT: That's only a week. September 2nd -- if
15 Mr. Burke's opposition is August 19th then you want to
16 September 2nd, which is the Friday before Labor Day?

17 MR. KROUNER: Sure.

18 THE COURT: I don't know what Judge Davison's schedule
19 looks like. He's usually pretty current on things. But if you
20 can, if it feels like you're getting somewhere and I know I'm
21 being very optimistic, but if it feels like you're getting
22 somewhere and you want to fiddle with these dates, let me know.

23 Anything else we should do this afternoon? Thank you
24 all, I'll look for the papers.

25 (Proceedings adjourned; 3:40 p.m.)