Perez v Ethical Culture Fieldston Sch.
2016 NY Slip Op 31871(U)
October 5, 2016
Supreme Court, New York County
Docket Number: 154168/15
Judge: Barry Ostrager
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

GERARDO PEREZ,

Plaintiff, Counter-Defendant,

Index No. 154168/15

-against-

Mot.Seq. No. 005

ETHICAL CULTURE FIELDSTON SCHOOL and DAMIAN FERNANDEZ, individually,

Defendants, Counter-Claimants.

X

OSTRAGER, J:

Before the Court is a motion by the defendants, Ethical Culture Fieldston School ("Fieldston"or the "School") and its Head Dr. Damian Fernandez ("Dr. Fernandez"), pursuant to CPLR 2221(d) to reargue only so much of this Court's July 25, 2016 decision which denied defendants' summary judgment motion (Mot. Seq. 003) with respect to the five tort claims asserted in the complaint: Breach of Fiduciary Duty, Fraud, Fraud in the Inducement, Negligent Infliction of Emotional Distress, and Negligent Supervision (the "Tort Claims").[1] Defendants do not seek to reargue that part of the decision which denied defendants' motion for summary judgment dismissing plaintiff's First Cause of Action sounding in Breach of Contract. Nor do they challenge that part of the decision which denied defendants summary judgment on their First and Third Counterclaims sounding in Breach of Contract.

In the July 25 decision, the Court denied the post-Note of Issue motion, finding triable issues of fact existed for determination by the jury. As defendants correctly note, the focus of the decision was on the competing breach of contract claims; the Court did not directly address each

[1] The plaintiff has asserted seven causes of action in the complaint: (1) Breach of Contract; (2) Breach of Fiduciary Duty; (3) Fraud; (4) Fraud in the Inducement; (5) Intentional Infliction of Emotional Distress; (6) Negligent Infliction of Emotional Distress; and (7) Negligent Supervision. The plaintiff voluntarily discontinued the fifth cause of action for Intentional Infliction of Emotional Distress in February of 2016 (moving papers, ¶ 7).

of the five Tort Claims. Accordingly, reargument is granted, and the Court modifies its July 25, 2016 decision as follows.[2]

The underlying facts are as follows. Plaintiff Gerardo Perez ("Perez"), a middle school history teacher at defendant Fieldston School from 2011 to 2013 and since unemployed, settled a wrongful termination case with defendants pursuant to a written agreement dated October 7, 2014 and titled "Confidential Settlement Agreement and General Release" (the "Agreement" or the "Settlement Agreement"). The Agreement provided for a substantial cash payment to Perez and a commitment from Dr. Fernandez on behalf of Fieldston that Dr. Fernandez would use his "very best efforts" to help Perez obtain employment as a teacher elsewhere. Specifically, Paragraph 6 of the Agreement provides (with emphasis added) that:

> In addition to writing an excellent reference letter, the School confirms that ***Dr. Fernandez is also pleased to and will use his very best efforts to help Perez obtain school employment elsewhere***, including recommending Perez to other heads of school and/or other key people by such means as, without limitation, telephone, letters, or e-mail communications (as appropriate), ***if (a) Dr. Fernandez is first requested by Perez to do so as to a particular employment prospect, or (b) if Dr. Fernandez, Kevin Jacobson, Keira Rogers or Joan Walrond, (the School's Director of Human Resources) are contacted by a representative of any school to which Perez has applied***. The School further acknowledges that ***the willingness of Dr. Fernandez to use his very best efforts in the above manner*** was also a material inducement for Perez to enter this Agreement. The School understands and agrees that this obligation is non-delegable to any other person at the School, and by signing on behalf of the School below, Dr. Fernandez represents that he undertakes to carry out this obligation on the part of the School for a period of three years from the Effective Date or until Perez is hired by a school as a full-time teacher, whichever occurs earlier, and regardless of whether Fernandez remains the Head of the Ethical Culture Fieldston School; provided Perez honors his commitments set forth in this Agreement.

[2] Early in the case, by decision dated September 30, 2015, the Court denied defendants' motion for summary judgment on certain counterclaims, finding discovery should be completed (Mot. Seq. No. 002). Motions 001 and 004 related to sealing so are not relevant here. In Motion Sequence 006, not yet submitted, defendants seek to bifurcate the liability and damages portions of the trial on the Tort Claims.

The First Department has held that "best efforts" clauses are only enforceable when accompanied by "objective criteria against which a party's efforts can be measured ..." *Timberline Dev. v Kronman*, 263 AD2d 175, 178(1st Dep't 2000), *citing Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 113 (1st Dep't 1998); *see also Strauss Paper Co., Inc. v RSA Exec. Search,* 260 AD2d 570, 571 (2d Dep't 1999), *citing Bernstein v. Felske*, 143 AD2d 863, 865 (2d Dep't 1988) (where "agreement expressly provides that a party must use its 'best efforts', it is essential that the agreement also contain clear guidelines against which to measure such efforts in order for such clause to be enforced").

Paragraph 6 of the Agreement triggers Dr. Fernandez's obligations to use his "very best efforts" under two agreed upon circumstances, "***if*** (a) Dr. Fernandez is first requested by Perez to do so as to a particular employment prospect, ***or*** (b) ***if*** Dr. Fernandez, Kevin Jacobson, Keira Rogers or Joan Walrond, (the School's Director of Human Resources) are contacted by a representative of any school to which Perez has applied." The next sentence in paragraph 6 reinforces the guidelines, stating that "the willingness of Dr. Fernandez to use his very best efforts ***in the above manner*** was also a material inducement for Perez to enter this Agreement." In short, the defendants' contractual undertaking is limited by the terms of the Agreement, and no interpretation of the Agreement can transform Dr. Fernandez's contractual obligation into an open-ended obligation to find employment for Perez.

The record in this case contains much evidence as to how the parties proceeded after the Agreement was signed and whether Dr. Fernandez fulfilled his obligation to use his "very best efforts" to assist Perez in finding other school employment. However, that evidence is relevant primarily to the breach of contract claim so it need not be detailed here. The Court thus turns to the Five Tort Claims that are at issue in this motion to reargue and analyzes each one in detail below.

The Second Cause of Action: Breach of Fiduciary Duty

Defendants argue that the breach of fiduciary claim should be dismissed for several reasons. First, defendants assert that the Agreement was reached based on an arms-length negotiation that resulted in a written contract, and that plaintiff's theory that a fiduciary relationship existed between Perez and Fieldston, via Dr. Fernandez, is unsupported by case law (moving papers at 6). Second, defendants allege the breach of fiduciary duty claim is duplicative of the breach of contract claim because both claims are based on the same allegation that Dr. Fernandez failed to use his "very best efforts" to help Perez find another teaching job through Dr. Fernandez's contacts in the community of schools in the National Association of Independent Schools (NAIS) (Reply at 3-4). Plaintiff repeated this allegation in his Complaint, in his deposition testimony, and in his papers in opposition to the earlier motion for summary judgment. Third, defendants assert that plaintiff is arguing for the first time that the breach of fiduciary duty claim is not duplicative of the breach of contract claim (Reply at 4).

In opposition, plaintiff asserts that Dr. Fernandez was aware that Perez placed his trust in Dr. Fernandez, thus creating a fiduciary relationship (¶ 24). As proof, plaintiff points to an in-person meeting between Perez and Dr. Fernandez in January 2015 in which Dr. Fernandez allegedly reaffirmed his commitment to use his "very best efforts," as well as Dr. Fernandez's alleged promises along those lines "directly after the mediation session" (Opp. ¶ 23). Further, plaintiff argues that Perez and Dr. Fernandez had a "special relationship" as "two Latino males in the mostly white NAIS world" (*id*). In support of this contention, plaintiff points to Dr. Fernandez's deposition testimony where Dr. Fernandez stated: "I really cared about a young man of color who happens to be Latino like me" (NYSCEF Doc. No. 114 at 228). Finally, plaintiff argues the two claims are not duplicative because the breach of contract claim is based on the defendants' alleged failure to use "very best efforts" and the delegation of Dr. Fernandez's duties

under the Settlement Agreement to the Assistant School Head, whereas the breach of fiduciary duty claim is based on allegations that Dr. Fernandez "held a position of special trust based, in part, upon assurances that Dr. Fernandez privately made to plaintiff, even post-settlement" (Opp. at 10-11).

To establish a breach of fiduciary duty claim, plaintiff must prove (1) the existence of a fiduciary relationship, (2) misconduct by the defendants, and (3) damages directly caused by the defendants' misconduct. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dep't 2014), *citing Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dep't 2007). A fiduciary relationship is "necessarily fact-specific" and is also "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." *Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584, 593 (2012), *citing EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005).

The New York Court of Appeals has held that a fiduciary duty exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011). Additionally, the Court has held that a fiduciary relationship *may* exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *Id., quoting AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 (2008) ("A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other").

Here, there is insufficient evidence in the record of any "special circumstances" that give rise to a fiduciary duty between the plaintiff and defendants independent of the obligations in the Settlement Agreement. In addition to receiving a significant sum of money to settle his claim, plaintiff received additional consideration in the form of defendants undertaking additional

obligations by committing to use "very best efforts" to help Perez find other school employment in the circumstances expressly defined in the Settlement Agreement. Defendants have no fiduciary duty separate and apart from the contractual obligations to which defendants committed in the Settlement Agreement, notwithstanding that Dr. Fernandez and Perez may have had a cultural bond (*see* Fernandez Deposition Testimony, NYSCEF 114 at 228). Further, both sides were represented by able counsel when the Agreement was negotiated and agreed upon.

Accordingly, defendants' motion for summary judgment dismissing the Second Cause of Action for Breach of Fiduciary Duty is granted upon reargument.

The Third Cause of Action: Fraud

In their challenge to plaintiff's fraud claim, defendants note that plaintiff's fraud claim relies on the same factual allegations upon which his breach of contract claim is based; that is, that defendants allegedly misrepresented they would use "very best efforts" to help Perez obtain employment elsewhere, that Perez relied on Dr. Fernandez's assurances he would use his "very best efforts," and that Perez was induced to settle his lawsuit by relying on such assurances (*id.* at 6-7). Citing *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397 (1st Dep't 2008), defendants assert the fraud claim must therefore be dismissed as duplicative of the breach of contract claim (*id.* at 7).

In opposition, plaintiff asserts the fraud claim is distinct from the contract claim in that it alleges Dr. Fernandez committed fraud in the ***performance*** of the Settlement Agreement, after it was signed (Opp. ¶ 34). For support, plaintiff points in particular to Dr. Fernandez's deposition testimony regarding a January 2015 meeting[3], about four months *after* the Agreement was signed, wherein Dr. Fernandez allegedly assured Perez he would use his "best efforts" to help Perez. Plaintiff asserts these assurances amounted to misrepresentations because Dr. Fernandez

[3] *See* Dr. Fernandez's deposition testimony, NYSCEF Doc. No. 114 at 143.

did not have the requisite contacts or influence in the NAIS world, which was largely the reason Dr. Fernandez delegated his responsibilities under the Agreement to the Assistant School Head.

"The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages ...." *Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 (2009) (citations omitted); *see also, Bramex Assoc. v CBI Agencies*, 149 AD2d 383, 384 (1st Dep't 1989). Further, proof by clear and convincing evidence is required, a standard higher than a fair preponderance of the evidence. *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 349-50 (1999) ("Not every misrepresentation or omission rises to the level of fraud. An omission or misrepresentation may be so trifling as to be legally inconsequential or so egregious as to be fraudulent, or even criminal. Or it may fall somewhere in between...").

On a motion for summary judgment the moving party has the obligation to produce all the evidence within his ken, as upon a trial, and the same obligation rests upon the opposing party. *Five Boro Elec. Contrs. Assn. v City of New York*, 37 AD2d 807 (1st Dep't 1971), *aff'd* 33 NY2d 676 (1973). The only evidence proffered by plaintiff in support of the fraud claim are the purported misrepresentations by Dr. Fernandez after the Agreement was signed as to his intent or ability to perform under the contract. A such, the fraud claim is wholly duplicative of the contract claim and must be dismissed. *Gorman v Fowkes,* 97 AD3d 726 (2d Dep't 2012)(dismissing fraud claim when alleged misrepresentations "amounted only to a misrepresentation of the intent or ability to perform under the contract"); *see also, ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397 (1st Dep't 2008) (dismissing fraud claims as duplicative of breach of contract claims, since they arose directly from the written provisions of the agreement).

Accordingly, defendants' motion for summary judgment dismissing the Third Cause of Action for Fraud is granted upon reargument.

The Fourth Cause of Action: Fraud in the Inducement

Defendants also seek summary judgment dismissing plaintiff's Fourth Cause of Action alleging Fraud in the Inducement. To state a claim of fraudulent inducement, "there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury."*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 438-39 (1st Dep't 2015), *quoting Go Smile, Inc. v Levine,* 81 AD3d 77, 81 (1st Dep't 2010), *lv dismissed* 17 NY3d 782 (2011). Plaintiff alleges here that, during the course of the mediation, Dr. Fernandez misrepresented the extent of his contacts with other Heads of schools in the NAIS community in Manhattan and Riverdale in order to induce plaintiff to settle his claims against Fieldston and its employees and that plaintiff reasonably relied on those misrepresentations when deciding to settle his claims in exchange for a commitment by Dr. Fernandez to use his "very best efforts" to assist Perez in finding other school employment. Plaintiff further claims that he has suffered injury as a result of the misrepresentations in that he remains unemployed to this date. In addition to seeking damages from Dr. Fernandez, Perez seeks to hold Fieldston liable on the claim, alleging that Fieldston knew or should have known that Dr. Fernandez was misrepresenting his contacts and fraudulently inducing Perez to enter into the Settlement Agreement.

Defendant seeks dismissal of the claim, asserting that the majority of the representations made during the mediation were made by Dr. Fernandez to the Mediator, and not to Perez. Specifically, defendants assert that, but for a "brief exchange at the end of the mediation when the parties had already reached an agreement, at no time did Plaintiff ever speak with Dr. Fernandez about the existence or extent of his contacts at private schools in New York City"

(Stmt. F. para 16-18). Thus, defendants assert that plaintiff has not and cannot prove the type of misrepresentation needed to establish a fraudulent inducement claim.

Although plaintiff's opposition does not clearly set forth specific evidence on this point, there appears to be some dispute as to the precise representations that Dr. Fernandez made and to whom and whether those representations were made at a time when plaintiff could have reasonably relied on them to decide to agree to the settlement, or whether instead the representations were made *after* the parties had reached agreement and therefore could not have induced Perez to agree. However, the Court need not address those issues in further detail because the Court finds as a matter of law, that plaintiff's fraudulent inducement claim is barred by the merger clause set forth in Paragraph 20 of the Settlement Agreement. That provision states in relevant part (with emphasis added) that:

> This Agreement and the General Release attached hereto as Exhibit A, constitute the entire agreement between the Parties and cannot be changed or modified in any manner, except by a writing signed by both Parties. Further, ***the provisions of this Agreement supersede*** the Mediator's Proposal agreement entered into by the Parties on September 8, 2014, and ***any and all prior representations by the School***, as well as any and all prior agreements, oral or written, existing between Perez and the School regarding the subject matter herein and/or settlement of the Charge and any and all differences or disputes between the Parties.

Where, as here, the Agreement contains a clause expressly stating that the provisions of the Agreement supersede any and all prior representations, that language bars a claim of fraud in the inducement. *Danann Realty Corp. v Harris,* 5 NY2d 317, 320 (express language that "neither party [is] relying upon any statement or representation, not embodied in the contract, made by the other" barred fraudulent inducement claim); *Montchal v Northeast Sav. Bank,* 243 AD2d 452, 453 (2d Dep't 1997) ("the purported vague and speculative assurances allegedly made by a representative of the defendant are patently insufficient to sustain the cause of action sounding in

fraudulent inducement, especially in view of the plaintiff's written disclaimer of reliance upon any oral presentations or promises regarding the conditions of his employment"); *Marine Midland Bank v Walsh*, 260 AD2d 990, 991 (3d Dep't 1999) (language indicating agreement was intended to be the "final, complete and exclusive expression of the agreement" between the parties foreclosed claim of fraudulent inducement); *see also, Citibank v Plapinger*, 66 NY2d 90, 95 (1985) (affirming summary judgment dismissing fraudulent inducement defense to guarantee that recited that it was absolute and unconditional, as such recitals were inconsistent with claim of reliance on oral representations).

Plaintiff's fraudulent inducement claim is further undermined by the terms of Paragraph 6 of the Settlement Agreement. That provision states in relevant part that the "willingness of Dr. Fernandez to use his very best efforts [to help Perez obtain school employment elsewhere] was also a material inducement for [Perez] to enter [into] this Agreement." Significantly, the Agreement contains no representations as to the number or nature of contacts that Dr. Fernandez had with other school administrators, nor any indication that Perez was relying on anything other than Dr. Fernandez's "willingness" to use his "very best efforts" by taking the specific steps defined in Paragraph 6 in response to a specific request by Perez or a potential employer.

Plaintiff in his opposition papers does not address the merger clause at all. Rather, his focus is on the details about the 47 schools in the NAIS community and the purported misrepresentations by Dr. Fernandez as to his contacts at those schools. While such evidence could conceivably be relevant at trial in connection with plaintiff's breach of contract claim, they do not establish a fraudulent inducement claim.[4]

[4]Further, to the extent the alleged misrepresentations related to the intent or ability of Dr. Fernandez to perform under the contract, the fraudulent inducement claim must be dismissed as duplicative of the breach of contract claim. *Board of Managers of Loft Space Condo. v SDS Leonard, LLC, et al.*, 2016 WL 5375659 (1st Dep't 2016).

Accordingly, defendant is granted summary judgment dismissing the Fourth Cause of Action for Fraud in the Inducement upon reargument

The Sixth Cause of Action: Negligent Infliction of Emotional Distress

In his sixth cause of action, plaintiff seeks to recover damages for negligent infliction of emotional distress. Specifically, in his Amended Complaint (at ¶81-82), plaintiff alleges that: "Defendants violated New York's common laws against Negligent infliction of emotional distress, when defendants engaged in extreme and outrageous conduct ... by promising to ... [use] their 'very best efforts' to assist [Perez] to find work as a teacher; and then, in the end, utterly refusing to do so ... The settlement agreement at issue created a duty for defendants to use their 'very best efforts' to assist plaintiff in finding employment as a teacher in Riverdale and Manhattan. Defendants brazenly refused to so, despite their prior promises."

To the extent the claim seeks damages based on an alleged breach of the Settlement Agreement, the claim must fail. The law is clear that "there is no right of recovery for mental distress resulting from the breach of a contract-related duty ..." *Wehringer v Standard Sec. Life Ins. Co. of N.Y.*, 57 NY2d 757, 759 (1982) (citations omitted). Further, to the extent the claim relies solely on an alleged failure to perform obligations set forth in the Settlement Agreement, the claim, is subject to dismissal as "duplicative" of the breach of contract claim. *See, e.g., Edon Roc, LLLP v Marriott International, Inc.*, 116 AD3d 486 (1st Dep't 2014), *citing Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 492 (1st Dep't 2012).

Plaintiff does not dispute these principles of law. Rather, counsel argues in his opposition papers (at ¶43) that "defendant had a duty of care which went beyond the contract, when they promised to use their very best efforts to find him a job, yet apparently lied about their ability to deliver." (*See also* September 29, 2016 letter from plaintiff's counsel, NYSCEF Doc. No. 152,

confirming that "plaintiff is and has always alleged that the emotional damages to which he is entitled stem from those [Tort] Claims, as opposed to his breach of contract claim").

As the Court of Appeals reiterated in *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 (1987)(citations omitted), a legal duty separate and apart from the contractual obligations must be established for a negligence claim to survive:

> It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated .... This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.

Thus, the Court in *Clark-Fitzpatrick* found that no cause of action for gross negligence existed based on a claim that defendant had failed to exercise "due care" in completing the project, as the claim was "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract. ..." 70 NY2d at 390 (citations omitted).

In addition to the legal duty, the breach of duty plaintiff must establish to sustain a claim for negligent infliction of emotional distress is quite specific. As the First Department explained in *Sheila C. v Povich*, 11 AD3d 120, 130 (1st Dep't 2004) (citations omitted):

> A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally 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 ... Moreover, a cause of action for either intentional or negligent infliction of emotional distress 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....

Plaintiff in this case has failed to establish a legal duty beyond the obligations in the contract. The promise to use best efforts is merely a restatement of the defendants' obligations as set forth in the contract. No circumstances extraneous to, and not constituting elements of, the contract have been established, as required by the *Clark-Fitzpatrick* Court. Nor has plaintiff come forth with evidence sufficient to establish conduct by the defendants that was "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" as the First Department in *Sheila C.* indicated is required. *See also, Murphy v American Home Prods. Corp.*, 58 NY2d 293 (1983).

Accordingly, defendants' motion for summary judgment dismissing the Sixth Cause of Action for Negligent Infliction of Emotional Distress is granted upon reargument.

The Seventh Cause of Action: Negligent Supervision

Defendants argue that the allegations underlying plaintiff's negligent supervision claim are insufficient as a matter of law, and the claim is also duplicative of the breach of contract claim. In their Reply, defendants further argue that plaintiff has not cited "a single case supporting his theory that a negligent supervision claim can exist in connection with ensuring an officer of a company complies with obligations in a contract" (at 9).

In opposition, plaintiff seeks to distinguish the two claims, asserting that the negligent supervision claim relates to Fieldston's failure to supervise Dr. Fernandez in the ***performance*** of the Agreement. Specifically, plaintiff asserts that Fieldston "appear[s] to have left him [Dr. Fernandez] to [his] own devices", and "there is no record evidence that any school officials knew about his [Dr. Fernandez's] 1/29/15 meeting with plaintiff, or that there was any predetermined or pre-arranged periodic review of Dr. Fernandez's activities under the settlement agreement" (Opp., ¶¶ 39-41). In addition, plaintiff argues that Fieldston knew or should have known that Dr.

Fernandez came to Fieldston with "very little experience at NAIS schools" and that Dr. Fernandez therefore did not have the requisite contacts to help Perez obtain employment in the NAIS community (¶ 38).

To prevail on a claim of negligent supervision of an employee, plaintiff must show that the employer "knew or should have known of the employee's propensity for the conduct which caused the injury" and that the allegedly deficient supervision was a proximate cause of plaintiff's injury. *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801 (2d Dep't 2010) (citations omitted); *see also, White v Hampton Mgt. Co. LLC*, 35 AD3d 243 (1st Dep't 2006).

As defendants correctly argue, plaintiff has not established that Dr. Fernandez committed a "tortious act" against him or that Fieldston knew or should have known of Dr. Fernandez's "propensity" to commit such acts. *See Naegele v Archdiocese of New York*, 39 AD3d 270 (1st Dep't 2007) (failure to establish that employer knew or should have known about employee's propensity to commit the tortious acts alleged "negates employer's liability as a matter of law").

Accordingly, defendants' motion for summary judgment dismissing the Seventh Cause of Action for Negligent Supervision is granted upon reargument.

For all the foregoing reasons, it is hereby

ORDERED that defendants' motion for reargument is granted, and upon reargument, the July 25, 2016 decision and order previously issued by this Court is hereby modified to grant summary judgment in favor of defendants dismissing plaintiff's Five Tort Claims, in addition to the sixth tort claim voluntarily discontinued by plaintiff; and it is further

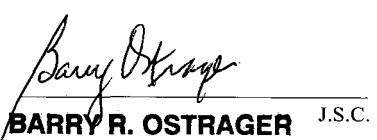
ORDERED that the Clerk is directed to sever and dismiss the Second Cause of Action for Breach of Fiduciary Duty; the Third Cause of Action for Fraud; the Fourth Cause of Action for Fraud in the Inducement; the Fifth Cause of Action for Intentional Infliction of Emotional

Distress; the Sixth Cause of Action for Negligent Infliction of Emotional Distress; and the Seventh Cause of Action for Negligent Supervision.

However, particularly in light of the fact that many of the claims are being dismissed as duplicative of plaintiff's First Cause of Action for Breach of Contract, this decision shall not bar plaintiff from asserting at trial any facts in support of his breach of contract claim or in defense of defendants' counterclaims that were asserted in support of any of the causes of action that are being dismissed as part of this decision.

This constitutes the decision and order of this Court. A final pre-trial conference is scheduled for October 11, 2016 at 10:00 a.m. in Room 341.

Dated: October 5, 2016



BARRY R. OSTRAGER J.S.C.
JSC