

**Scholz v Wright**

2007 NY Slip Op 34266(U)

December 27, 2007

Supreme Court, Suffolk County

Docket Number: 0017037/2006

Judge: Peter Fox Cohalan

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 RETURN DATE: 3-28-07  
 MOT. SEQ. # 002

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

**PRESENT:**

**Hon. PETER FOX COHALAN**

-----x  
 PAUL SCHOLZ and TERESE HERBERT-SCHOLZ,

Plaintiffs,

-against-

HELEN WRIGHT, ST. PETER'S EVANGELICAL  
 LUTHERAN CHURCH, INC. and ST. PETER'S  
 NURSERY SCHOOL,

Defendants.  
 -----x

CALENDAR DATE: August 22, 2007  
 MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

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 Carle Place, NY

DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to 18 read on this motion to dismiss \_\_\_\_\_;  
 Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross-Motion and  
 supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 13-16; Replying  
 Affidavits and supporting papers 17-18; Other \_\_\_\_\_; and after hearing counsel in support of and  
 opposed to the motion it is,

**ORDERED** that this motion by the defendants, Helen Wright and St. Peter's  
 Evangelical Lutheran Church, Inc. et al., (hereinafter "St. Peter's"), for dismissal of the  
 plaintiffs' action pursuant to CPLR §3211 (a)(7) for failure to state a cause of action is, after  
 due consideration, denied in its entirety.

The plaintiffs instituted this action against the defendants for negligence,  
 defamation and making false statements to a governmental agency about a false claim of  
 child abuse. The plaintiffs allege that their child attended a nursery school run by the  
 defendant St. Peter's and supervised by the co-defendant, Helen Wright (hereinafter  
 "Wright"). The plaintiff, Terese Herbert-Scholz, claims that she was involved in a dispute on  
 January 23, 2006 with Wright about the plaintiffs' intent to remove their son from the school  
 and enroll him in another school. She claims Wright made certain statements that the plaintiff  
 would "be sorry" if the child was removed from the school and that "she'd get even" for the  
 confrontation by the plaintiff. Subsequently, a report of suspected child abuse was reported to  
 CPS and the Department of Social Services by the defendants and this lawsuit thereafter  
 ensued.

The defendants now move for dismissal of the plaintiffs' action for failure to state  
 a cause of action pursuant to CPLR §3211 (a)(7) arguing that Wright reported suspicious  
 injuries to the New York Statewide Central Register (SCR) of child abuse and maltreatment in  
 her capacity as a mandated reporter. The defendants claim that the malicious reporting and  
 defamation fail to set forth a claim because Wright was mandated by New York State Social

Services Law §413, (hereinafter "SSL"), to report her suspicions. The plaintiffs argue that the reporting was not done in a good faith but maliciously and only after a threat to get even with the plaintiffs for removing their child from the school, and they argue that the report of child abuse allegedly occurring in January 2006 was made on February 1, 2006, after the disagreement between Wright and the plaintiff Terese Herbert-Scholz on January 23, 2006.

For the following reasons, the defendants' motion for dismissal of the plaintiffs' complaint pursuant to CPLR §3211 (a)(7) for failure to state a cause of action is hereby denied in its entirety.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action know to our law can be discerned from its averments. **Frank v. DaimlerChrysler Corp.**, 292 AD2d 118, 741 NYS2d 9 (1<sup>st</sup> Dept. 2002); **Gruen v. County of Suffolk**, 187 AD2d 560, 590 NYS2d 217 (2<sup>nd</sup> Dept. 1992); **Moore v. Johnson**, 147 AD2d 621, 538 NYS2d 28 (2<sup>nd</sup> Dept. 1989); **Conroy v. Cadillac Fairview Shopping Center Properties**, 143 AD2d 726, 533 NYS2d 446 (2<sup>nd</sup> Dept. 1988). Furthermore, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should be assumed to be true. **P.T. Bank Central Asai v. ABN Amro Bank N.V.**, 301 AD2d 373, 754 NYS2d 245 (1<sup>st</sup> Dept. 2003); **Palazzolo v. Herrick, Feinstein, LLP**, 298 AD2d 372, 751 NYS2d 401 (2<sup>nd</sup> Dept. 2002); **Holly v. Pennysaver Corp.**, 98 AD2d 570, 471 NYS2d 611 (2<sup>nd</sup> Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. **McGill v. Parker**, 179 AD2d 98, 582 NYS2d 91 (1<sup>st</sup> Dept. 1992); **Marini v. D'Atolito**, 162 AD2d 391, 557 NYS2d 45 (1<sup>st</sup> Dept. 1990).

As noted by the Court in **Pace v. Perk**, 81 AD2d 444, 440 NYS2d 710 (2<sup>nd</sup> Dept. 1981) with regard to a motion to dismiss pursuant to CPLR 3211,

" Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (**Denihan Enterprises v. O'Dwyer**, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (**Condon v. Associated Hosp. Service of New York**, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action know to our

law can be discerned from its averments (CPLR 3013; **Foley v. D'Agostino**, 21 AD2d 60, 62-65, 248 NYS2d 121; **Guggenheimer v. Ginzberg**, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (**Rovello v. Orofino Realty Co.**, 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

The rules governing the Court's review of a motion to dismiss pursuant to CPLR 3211 (a)(7) are both simple and straight forward. The Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. **Guggenheimer v. Ginzburg**, 43 NY2d 268, 401 NYS2d 182 (1978); **One Acre Inc. V. Town of Hempstead**, 215 AD2d 359, 626 NYS2d 226 (2<sup>nd</sup> Dept. 1995). Although as the Court noted the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by plaintiff, they "may be used freely to preserve in artfully pleaded, but potentially meritorious claims" (**Rovello v. Orofino Realty Co.**, supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court, upon review of the plaintiffs' complaint and the allegations contained therein, finds that the plaintiffs' complaint sets forth sufficient facts to warrant a denial of the motion to dismiss, especially at this very early stage of the proceeding. While the defendants point to their defined obligations to report, pursuant to SSL, cases of suspected child abuse, the facts as set forth in the plaintiffs' complaint suggest that the defendants made a malicious and false report of child abuse for the most crass of reasons, i.e. money and loss of student attendance. The plaintiff, Terese Herbert-Scholtz, in her affidavit alleges a heated argument concerning the removal of the plaintiffs' young son from St. Peter's and an implied threat to her by Wright that she'd "be sorry" and "she'd [meaning Wright] would get even." Notwithstanding the requirement of reporting, as set forth in the SSL, in **Zornberg v. North University Hospital**, 29 AD3d 986, 815 NYS2d 719 (2<sup>nd</sup> Dept. 2006) the Court in dealing with this very issue and upholding the denial on a motion to dismiss by the lower court stated:

"Assuming the truth of the allegations in the complaint, and giving the plaintiff the benefit of every favorable inference (see **Leon v. Martinez**, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 N.E.2d 511; **Pankin v. Cronin**, 12 AD3d 492, 493, 783 NYS2d 868) the complaint states a cause of action (see, **Vaz v. Sipsas**, 1 AD3d 503, 767 NYS2d 250). \*\*\*

Although the defendants are entitled to immunity from liability based upon a good-faith making of a report of suspected child abuse (see, Social Services Law Section 419; *Escalera v. Favaro*, 298 AD2d 552, 749 NYS2d 263), and the good faith of any person required to report cases of suspected child abuse shall be presumed (see, Social Services Law §419; *Kempster v. Child Protective Servs. of Social Servs. of County of Suffolk*, 130 AD2d 623, 624, 515 NYS2d 807), the complaint alleged facts sufficient to support a claim of actual malice (*Vaz v. Sipsas*, supra).

The Court when assessing the motion pursuant to CPLR §3211 (a)(7) may freely consider the plaintiffs' affidavit to remedy any defects which may be apparent in the complaint. The criterion is not whether the proponent has pleaded a cause of action but whether, in fact, the proponent has one and affidavits and other evidence may be considered. *Fay Estates v. Toys "r" Us, Inc.*, 22 AD3rd 712, 803 NYS2d 135 (2<sup>nd</sup> Dept. 2005); *Pechko v. Gendelman*, 20 AD3rd 404, 799 NYS2d 80 (2<sup>nd</sup> Dept. 2005). Here in the case at bar, the allegations of the plaintiffs are to be considered as true. The plaintiffs state that the defendant Wright said she would "get even" and make the plaintiffs "sorry" for removing their son from St. Peter's and that Wright thereafter filed a child abuse suspicion report. The plaintiffs allege it was this personal dispute between Wright and Teresa Herbert-Scholz which resulted in the reports of alleged child abuse, thus contesting the defendants' claims that this was a good faith report of suspected child abuse.

Clearly, the plaintiffs have made out a cause of action for malicious reporting, negligence and defamation to withstand the defendants' motion to dismiss. It is quite apparent that discovery is necessary to determine the necessity of and the facts underlying the report filed by Wright and the timing of the defendants' report in relationship to the injuries allegedly noted by Wright and any possible damages which may flow from the either a false or malicious report of child abuse, should plaintiffs prevail. See, *Oglesby v. Eikszta*, \_\_\_ F. Supp \_\_\_ (June 28, 2007) reported WL1879723 (N.D.N.Y. 2007). As the Court in *Scott v. Cooper*, 215 AD2d 368, 625 NYS2d 661 (2<sup>nd</sup> Dept. 1995) app. Dis. 86 NY2d 812, 632 NYS2d 497, aptly noted:

" The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see, *Stukuls v. State of New York*, 42 NY2d 272, 275; *Detmer v. Acampora*, 207 AD2d 475; *Greenview Trading Co. V. Hershman & Leicher*, 108 AD2d 468, 470)."

Accordingly, the motion by the defendants, Helen Wright and St. Peter's Evangelical Lutheran Church, Inc., for dismissal of the plaintiffs' complaint pursuant to CPLR §3211 (a)(7) for failure to state a cause of action is hereby denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: December 27, 2007



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J.S.C.