

Atkinson v Campbell

2009 NY Slip Op 31364(U)

June 23, 2009

Supreme Court, Suffolk County

Docket Number: 14244/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 14244/2008

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

JOHN ATKINSON IV AND MIKENNA
 ATKINSON, INFANTS, BY LENOR CAPRIA,
 THEIR PARENT AND NATURAL GUARDIAN,
 LENOR CAPRIA, INDIVIDUALLY, AND
 BRITTANI ATKINSON,

Plaintiff(s),

-against-

MATTHEW CAMPBELL A/K/A MATTHEW
 GIBSON CAMPBELL, ANNA VINICOMBE
 A/K/A ANNAMARIE VINICOMBE, MATTHEW
 CAMPBELL D/B/A DR. MATTHEW
 CAMPBELL AND DR. ANNA VINICOMBE
 AND ASSOCIATES, ANNA VINICOMBE D/B/A
 DR. MATTHEW CAMPBELL AND DR. ANNA
 VINICOMBE AND ASSOCIATES, DR.
 MATTHEW CAMPBELL AND DR. ANNA
 VINICOMBE AND ASSOCIATES AND
 MICHELLE DELEVANTE,

Defendant(s).

ORIG. RETURN DATE: July 2, 2008
FINAL RETURN DATE: July 23, 2008
MTN. SEQ. #: 001-MotD
 002-MG

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Upon the following papers numbered 1 to 100 read on this motion and cross motion to dismiss: Notice of Motion and supporting papers 1 - 15; Affidavit in Opposition and supporting papers 16 - 45; Reply Affirmation and supporting papers 46 - 55; Notice of Cross Motion and supporting papers 56 - 65; Affirmation in Opposition and supporting papers 66 - 90; Reply Affirmation and supporting papers 91 - 100; it is,

ORDERED that the motion (001) by the defendants Matthew Campbell a/k/a Matthew Gibson Campbell (hereinafter Campbell), Anna Vinicombe a/k/a Annamarie Vinicombe (hereinafter Vinicombe), Matthew Campbell d/b/a Dr. Matthew Campbell and Dr. Anna Vinicombe and Associates, Anna Vinicombe d/b/a Dr. Matthew Campbell and Dr. Anna Vinicombe and Associates, and Dr. Matthew Campbell and Dr. Anna Vinicombe and Associates (hereinafter, collectively, the Campbell business entities) for dismissal of the complaint in its entirety as to them pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is decided as follows: it is

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ORDERED that that part of this motion (001) seeking dismissal as to Campbell is denied; and it is further

ORDERED that that part of this motion (001) seeking dismissal as to Vinicombe is granted; and it is further

ORDERED that that part of this motion (001) seeking dismissal as to the Campbell business entities is denied; and it is further

ORDERED that the motion (002) by the defendant Michelle Delevante for dismissal of the complaint in its entirety as to her pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted; and it is further

ORDERED that the defendants Anna Vinicombe a/k/a Annamarie Vinicombe and Michelle Delevante are severed from the caption and that this action shall continue only as against the defendants Campbell and the Campbell business entities; and it is further

ORDERED that the moving defendants in the first motion (001) are directed to serve a copy of this Decision and Order upon each of the other parties pursuant to CPLR 2103 within 30 days of the date hereof and thereafter file the proofs of service with the Clerk of the Court; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the remaining parties are directed to appear for a preliminary conference on August 6, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.; said date allowing for service of an answer in accordance with CPLR 3211(f).

This action arises out of a brutal assault of the plaintiff Lenor Capria (hereinafter Lenor) by her former husband in front of their three children at the offices of Campbell who was a court-appointed psychologist whose "offices" were directed by the court to supervise visitation among the former husband and their three children as well as to provide individual therapy to the former husband. The former husband was arrested after the assault, tried, convicted and incarcerated for over two years. In addition, a separate civil action was brought by Lenor against her former husband for damages (index No. 15790/05). According to the on-line records of the Clerk of the Court, that action was settled.

The instant action is brought by Lenor and the three children against Campbell, Vinicombe (another psychologist working in the same offices) and various business entities alleged to be related to Campbell, Vinicombe and the services they provide. The complaint alleges four causes of action; to wit: By Lenor against all the defendants for negligence (first cause of action); by Lenor against all the defendants for the negligent infliction of emotional distress (second cause of action); by the plaintiff children against all the defendants for the negligent infliction of emotional distress under a "bystander theory" (third cause of action); and, by the plaintiff children against all the defendants for the negligent infliction of emotional distress under a "direct duty theory" (fourth cause of action).

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The Campbell, Vinicombe and Campbell business entities (hereinafter the Campbell defendants) bring this motion (001) to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) based upon documentary evidence and failure to state a cause of action.

In support of this motion, the Campbell defendants submit a copy of the court order issued by Justice Joseph Farneti on December 14, 2004 in the underlying matrimonial action (*Atkinson v Atkinson*, Sup Ct, Suffolk County, index No. 5352/03). This order provided, inter alia, that the defendant/father was to have supervised visitation with the children (then ages 14, 10 and 7) at the “offices of Matthew G. Campbell, PhD.” and that the defendant/father “shall attend individual therapy sessions with Dr. Campbell’s office until successfully completed.”

The contention of the Campbell defendants is that since any involvement or responsibilities they may have had in this matter were the result of a court order that they were entitled to a qualified immunity. Accordingly, they argue that the Campbell defendants cannot be held liable for the claims herein. In this regard, they submit the pertinent order of the court to show that this defense is founded upon documentary evidence (*see* CPLR 3211[a][1]).

As to a dismissal for the failure to state a cause of action (*see* CPLR 3211[a][7]), the Campbell defendants reiterate the immunity argument as well as arguing that the three causes of action with regard to the negligent infliction of emotional distress fail to contain allegations showing that the conduct of the Campbell defendants was “so outrageous and extreme as to exceed all bounds of decency” (*see Kenneth S. v Berkshire Farm Ctr. & Services for Youth*, 36 AD3d 1092, 829 NYS2d 715 [3d Dept 2007]).

The Campbell defendants further contend that the cause of action for negligence must be dismissed as there was no duty owed to Lenor by the Campbell defendants. Thus, they argue, there could be no breach of a duty and, consequently, no liability.

In addition, with specific regard to Vinicombe, an affidavit from Vinicombe is submitted in which she states that she was not involved in the care and treatment of the plaintiffs or the father, she never treated them and was not present at the time of the underlying assault.

In order to prevail on a motion to dismiss on the basis of documentary evidence (CPLR 3211[a][1]), the admissible documents must conclusively resolve factual issues raised in the pleadings in favor of the moving party (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563, 759 NYS2d 372 [2d Dept 2003]). Here the relevant document (the court order providing for supervised visitation and therapy) does not conclusively resolve those issues in favor of the moving parties. While the submitted court order conclusively establishes the duties and responsibilities required by the court as to the “offices of Matthew G. Campbell, PhD.,” the document does not absolve the Campbell defendants of any potential liability for the alleged claims of negligence outside of the work performed pursuant to the order (*see e.g. Bridget M. v Billick*, 36 AD3d 489, 826 NYS2d 568 [1st Dept]).

The complaint alleges that the father had violent tendencies known to the Campbell defendants, that the Campbell defendants were aware of an Order of Protection in effect at the time of the assault providing, inter alia, that the father was to have no contact with Lenor, that the Campbell defendants knew that the father was in an angered and agitated state on the day of the assault and that the father was known to be “bellicose.” Based upon these allegations, the complaint claims that the Campbell defendants had a duty to prevent any contact between Lenor and the father and to take appropriate steps to ensure her safety under such circumstances. These claims address duties which transcend the duties within the court’s order and, thus, the order cannot be said to conclusively resolve the factual issues in favor of the Campbell defendants.

Accordingly, that part of this motion (001) seeking dismissal on the basis of documentary evidence is denied.

Turning now to that part of this motion seeking a dismissal of the complaint for its failure to state a cause of action, in general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court’s role is limited to “determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]” (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading “is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]” (*Id.*, at 120-121, 12). Also, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (7) (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]) but only for the purpose of remedying any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636, 389 NYS2d 314, 316 [1976]; *DaCosta v Trade-Winds Envtl. Restoration, Inc.*, __AD3d__, 877 NYS2d 373 [2d Dept 2009]).

However, affidavits submitted by the moving party (as contrasted to affidavits by the opposing party plaintiff) in support of such a motion which,

“Do no more than assert the inaccuracy of plaintiff’s allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint [*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314], and do not otherwise conclusively establish a defense to the asserted claims as a matter of law [*see Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 (1994)]” (*Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]).

In support of this motion, the Campbell defendants submit, inter alia, an attorney’s affirmation and affidavits from the defendants Campbell and Vinicombe. The Campbell affidavit falls under the category of doing nothing more than asserting the inaccuracy of the plaintiffs’ assertions and, thus, may not be considered with regard to that part of the motion seeking dismissal pursuant to CPLR 3211(a)(7) (*id.*).

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On the other hand, the affidavit in opposition submitted by Lenor to this part of the motion, whose allegations must be taken as true (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]), remedies defects in the complaint to the extent that she provides additional allegations supporting the claim that the conduct of Campbell and the Campbell business entities was “outrageous and extreme” in that Campbell and the Campbell business entities had been conducting supervised visitations and therapy for the father for almost six months and, during that period, always took steps to avoid contact, both physical and visual, between the mother and father in order to avoid any confrontational incidents between them. This was due to their knowledge of the father’s temper and volatility. These steps involved bringing the children from the mother to another area where the father was, reversing the procedure at the end of the visit and detaining the father until the mother and children were safely gone.

According to Lenor’s affidavit, on the day of the assault, May 26, 2005, there was a deviation from the usual practice. That day, Lenor had dropped off the children and had actually left the building with the intent to pick them up after the visit as usual. On that day, however, the father, in the presence of the children in the treating room, became angry and abusive toward the defendant Michelle Delevante (a social worker in the office who worked with the father and the children; hereinafter Delevante). Delevante then called Lenor to come back and pick up the children as she had decided to cut the visit short for that day. Although Delevante had called Lenor to return, when she reached the point of letting the children out of the treating room to go to the waiting room, Delevante did not realize that Lenor had already arrived and because Delevante did not take the usual precautions to avoid contact, the father saw Lenor, pushed Delevante aside and attacked and brutally beat Lenor in front of the children. Campbell, Lenor alleges upon information and belief, was behind closed doors in his office and although there were shouts and noise as well as the father banging Lenor’s head against the door to Campbell’s office, Campbell never came out and took no role in the incident.

In looking within the four corners of the complaint and in considering the affidavit submitted by Lenor to the extent that it corrects any defects in the complaint, the court finds ample support for the allegations of “outrageous and extreme conduct” outside of the bounds of decency and, thus, finds support for the causes of action alleging negligent infliction of emotional distress with regard to Campbell and the Campbell business entities (*see Murphy v Am. Home Prods.*, 58 NY2d 293, 303, 461 NYS2d 232 [1983]; *Sheila C. v Povich*, 11 AD3d 120, 130-131, 781 NYS2d 342 [1st Dept 2004]).

In addition, a similar review of the complaint as well as Lenor’s affidavit and the attorney’s affirmation insofar as he has personal knowledge as to the existence of the Campbell business entities, the court finds sufficient allegations to support the retention of the alleged Campbell business entities as parties to this action at this time.

As to the contention that no duty was owed to Lenor, a duty does, indeed, arise when there is a relationship between the defendant and the person who threatens harm (i.e. the father) to a third person (i.e. Lenor) or where the relationship between the defendant and the person exposed to harm (i.e. Lenor) requires the defendant to “afford protection from certain dangers including the conduct of others [such as the father] [cite omitted]” (*Pulka v Edelman*, 40 NY2d 781, 783, 390 NYS2d 393 [1976], *reh denied* 41 NY2d 901 [1977]; *also Purdy v Pub. Adm’r. of County of Westchester*, 72 NY2d 1, 8, 530 NYS2d 513 [1988]).

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Accordingly, in applying the liberal standards of review in favor of plaintiffs, the court finds that that part of the defendants' motion to dismiss the complaint as to Campbell and the Campbell business entities pursuant to CPLR 3211(a)(7) must be denied.

With regard to the defendant Vinicombe, however, her affidavit conclusively establishes a defense to the claims asserted against her as a matter of law and, thus, may be considered on this motion (*see Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146, 147 [1st Dept 2007]). Specifically, Vinicombe makes factual statements to the effect that she never treated the plaintiffs in any professional capacity, had no involvement whatsoever with the individuals involved and, moreover, was not even present in the offices at the time of the incident. Accordingly, insofar as the defendant Vinicombe is concerned, the complaint fails to state a cause of action against her and the complaint as to her is dismissed pursuant to CPLR 3211(a)(7).

Turning now to the cross motion (002) by the defendant Delevante for dismissal on similar grounds, the court notes that the attorneys for the plaintiffs and Delevante submitted a signed written stipulation to the effect that the causes of action against Delevante are "discontinued with prejudice." This document, however, is without force and effect as a Stipulation of Discontinuance because it is not signed by the attorneys of record for all parties and because there are parties who are infants (*see* CPLR 3217[a][2]).

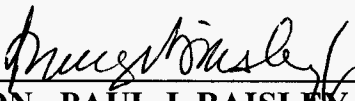
This purported Stipulation of Discontinuance does, however, have a bearing in the context of the cross motion to dismiss to the extent that it effectively withdraws the plaintiffs' opposition to the cross motion. In light of there being no further opposition to Delevante's cross motion to dismiss and, in addition, no opposition from the co-defendants, the cross motion to dismiss the complaint as to the defendant Delevante is granted.

In conclusion, the complaint is dismissed as to the defendants Vinicombe and Delevante and the action shall continue as to the defendants Campbell and the Campbell business entities. This decision, of course, is without prejudice to any future motions for summary judgment after issue is joined.

This constitutes the decision and order of the court.

Dated:

June 23, 2009



HON. PAUL J. BAISLEY, JR., J.S.C.