

Pinks v Turnbull

2009 NY Slip Op 31585(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 100228/04

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH

PART 02

Justice

DAVID PINKS,
Plaintiff,

INDEX NO. 100228/04

- v -

MOTION DATE _____

HORACE TURNBULL, ET AL.
Defendants.

MOTION SEQ. NO. 14

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion — Affidavits — Exhibits

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers,

FILED

This motion is decided in accordance with the attached memorandum of law.

JUL 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

The foregoing constitutes the decision and order of the Court.

Dated: 7/14/09

K S S

Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----x
DAVID PINKS,

Plaintiff,

Index No.
100228/04

-against-

Motion Sequence Nos.
010-012 and 014-015

HORACE TURNBULL AS EXECUTOR OF THE ESTATE OF WALTER TURNBULL, HORACE TURNBULL, JOHN KING, FRANK JONES, THE BOYS CHOIR OF HARLEM, INC., THE NEW YORK CITY BOARD OF EDUCATION, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, JOHN DOE, JANE DOE, teachers, supervisors, employees of Choir Academy of Harlem, BOYS CHOIR OF HARLEM, INC., THE NEW YORK CITY BOARD OF EDUCATION, THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK, whose identities are unknown to plaintiff,

Defendants.

FILED
JUL 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
HON. KAREN S. SMITH ¹

Motion sequence numbers 010-012 and 014-015 are consolidated for disposition.

In motion sequence 010, defendant The City of New York (NYC) moves to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (7, or, in the alternative moves for summary judgment pursuant to CPLR 3212, dismissing plaintiff's complaint in its entirety, as

¹The Court wishes to thank Leslie Treff for her help in the preparation of this decision.

well as any cross-claims asserted against it.

In motion sequence 011, defendant Horace Turnbull as Executor of the Estate of Walter Turnbull (Estate), Horace Turnbull, and The Boys Choir of Harlem, Inc. (Boys Choir) seek summary judgment (CPLR 3212) dismissing plaintiff's complaint and all cross-claims asserted against the Boys Choir. Additionally, the Estate and Horace Turnbull seek "such other and further relief as this Court may deem just and proper."

In motion sequence 012, the Board of Education of the City School District of the City of New York i/s/h/a New York City Board of Education (BOE) and John King (King) seek summary judgment (CPLR 3212) dismissing plaintiff's entire complaint and all cross-claims against them.

In motion sequence 014, defendant NYC seeks dismissal (CPLR 3211 [a] [7]) of plaintiff's amended complaint against it, as well as summary judgment (CPLR 3212) dismissing plaintiff's complaint and all cross-claims against it.

In motion sequence 015, defendants Estate, Horace Turnbull, and the Boys Choir move for summary judgment dismissing paragraph 67A of plaintiff's amended complaint.

Background

This action arises as the result of allegations of sexual abuse and the subsequent criminal conviction for such abuse of

defendant Frank Jones (Jones).² At the time it is alleged that the abuse took place, Jones, had been employed by the Boys Choir for more than 20 years as a guidance counselor Plaintiff alleges that the abuse occurred from approximately June 1998 through the summer of 2001, during the time that plaintiff was a member of the Boys Choir and attended the Choir Academy of Harlem (CAH), a public school operated by the BOE. Plaintiff also alleges he told Walter and Horace Turnbull about the alleged abuse in the fall of 2000. After the fall of 2000, according to plaintiff, Jones never touched or approached him again. Plaintiff's allegations of sexual abuse after the touching stopped in 2000 until Jones's arrest in 2001 is based solely on Jones's continued presence in the school and the effect of his presence on plaintiff. While it is unclear at this stage in the proceedings what, if any, investigation was conducted by the Turnballs and the Boys Choir, there appears to be no claim that these defendants reported the alleged abuse to any governmental authority.

Plaintiff alleges that, at the time of the abuse, Walter Turnbull was the president of the Boys Choir, Horace Turnbull was its Vice President, and Jones was a social worker in its employ. Further, plaintiff alleges that King was the principal of the CAH. Defendants contest this description of King's position at

² Jones was convicted of abusing plaintiff in December 2002 and served prison time for his offenses.

the time that Jones abused plaintiff.

It is uncontested that the BOE established the CAH in 1993 as a diploma-granting alternative school for fourth through the twelfth grades. Such school was established "to better benefit those students, enabling them to increase their performance." Such school was formed as "a coeducational, collaborative school developed by Community District Five, the Division of High Schools, and the Boys Choir." (See the 1993 Establishment Resolution attached to BOE's Notice of Motion as Exhibit J.)

Plaintiff alleges that, because of the collaboration between the CAH and the Boys Choir, as well as the integration of the students' academic school day with Boys Choir's music classes, all defendants are liable for the sexual abuse and battery he suffered during the period in question. Additionally, plaintiff seeks to recover damages for the injuries he suffered at the hands of all defendants for the intentional infliction of emotional distress.

Further, as against all defendants except Jones, plaintiff alleges negligence in their failure to supervise Jones, dismiss Jones, and provide a safe environment for plaintiff, as well as negligence in failing to investigate and report charges of child abuse, and failure to train staff on how to detect and handle suspected child abuse.

On December 11, 2008, this court allowed plaintiff to amend

his complaint to include the allegation that he is entitled to the limited liability exception to CPLR § 1601, alleging for the first time that defendants acted with reckless disregard for plaintiff's safety. (See Exhibit A, attached to NYC's Notice of Motion.)

Discussion

Defendants, the Estate, Horace Turnbull, Boys Choir, NYC, King, and BOE, have all answered plaintiff's original complaint. Only BOE and King have filed an answer to plaintiff's amended complaint.

Although the Estate, Horace Turnbull, and the Boys Choir seek summary judgment in their motions (sequence numbers 011 and 015), pursuant to CPLR 3212 (a), such motion is only appropriate where issue is joined. Absent an answer to the amended complaint, this court considers these motions as pre-joinder prayers to dismiss pursuant to CPLR 3211 (a) (7).

NYC's motions (sequence numbers 010 and 014) are labeled as motions to dismiss and are discussed below in that section.

The summary judgment motion of BOE and King (sequence 012), who have filed a joint answer to plaintiff's amended complaint, is also discussed below in the section on summary judgment.

Motions to Dismiss

Under CPLR 3211 (a) (7), when a motion to dismiss is made prior to joinder of issue, the allegations contained in the

pleadings are deemed to be true, and courts "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see also *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002).

The Estate, Horace Turnbull, Boys Choir, and NYC all contend that they are not proper parties to this action, and that each is entitled to dismissal of all causes of action.

First Cause of Action

The Estate, Horace Turnbull, Boys Choir, and NYC assert that they had no intentional involvement in Jones's alleged sexual abuse and battery, and that they, therefore, cannot be held liable for either tort.

There is no evidence proffered that either Walter or Horace Turnbull personally engaged in the intentional tort of sexual abuse toward plaintiff. In addition, the Estate, Horace Turnbull, Boys Choir, and NYC cannot be held to be vicariously liable for Jones's actions, as any sexual abuse committed by Jones was outside the scope of his employment. See *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 (2d Dept), *lv dismissed* 91 NY2d 848 (1997); see also *Riviello v Waldron*, 47 NY2d 297 (1979). As these defendants cannot be held vicariously liable for Jones's intentional tort of sexual abuse, they are entitled to dismissal of that portion of the first cause of

action that alleges intentional sexual abuse against them.

In addition to sexual abuse, the first cause of action in plaintiff's amended complaint alleges battery. Plaintiff proffered testimony that teachers and administrators hit students at the CAH while he was in attendance, and that he was hit more than once while a student there. See Plaintiff's March 11, 2003 Examination Before Trial (EBT), at 47, 66. It is unclear from plaintiff's testimony who exactly hit him, i.e., whether it was CAH or Boys Choir's teacher(s) that allegedly assaulted him, or whether he was struck by Walter or Horace Turnbull. This distinction is important because, according to the testimony of Horace Turnbull, although the academic teachers at the school were BOE employees, the music staff and counselors were employees of the Boys Choir. (See Horace Turnbull EBT, at 21-22.) Plaintiff's testimony, in this regard, is sufficient to defeat that portion of the Estate and Horace Turnbull's motion that seeks to dismiss plaintiff's battery cause of action.

As respects the Boys Choir, that defendant cannot assert that any such assault was outside any teacher or counselor's job, because the Boys Choir has not proffered any statement of expected behavior as respects physical punishment of children. The employee policies that were proffered to the court do not address this issue. (See Boys Choir's Employee Policies and Practices, attached to the BOE Notice of Motion as Exhibit H.)

Absent evidence of the Boys Choir's policy as regards punishment of children, that portion of its motion that seeks dismissal of the battery portion of plaintiff's first cause of action is denied.

For the same reasons, NYC could be held vicariously liable for the actions of its employees in regards to the claim of a battery. The BOE proffered Regulation A-42 (dated September 5, 2000), which solely concerns Safety in the Schools. (See Exhibit M, attached to BOE's Notice of Motion.) A prohibition on hitting or "paddling" students is not included. Without proffering a prohibition on such actions, plaintiff's allegation of battery against NYC cannot be dismissed at this stage in the proceedings.

Second Cause of Action

In the second cause of action, plaintiff alleges that the Estate, Horace Turnbull, Boys Choir, and NYC intentionally inflicted emotional distress upon plaintiff. Plaintiff alleges that those defendants had notice of Jones's acts and failed to act upon that notice to protect plaintiff from Jones's abuse.

To survive a motion to dismiss, an allegation of intentional infliction of emotional distress must show that the "conduct has been 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."

Murphy v Am. Home Prod. Corp., 58 NY2d 293, 303 (1983) (quoting

Restatement of Torts, Second).

Although Jones's acts of sexual abuse might fall within this category, plaintiff concedes that he told no one of the abuse prior to the summer of 2000, and then admits that he was not physically abused by Jones after plaintiff told Walter and Horace Turnbull about Jones's actions. Although plaintiff maintains that he continued to be sexually abused after that date, in that he was emotionally intimidated by Jones's presence in the school during the following summer at the Boys Choir's Summer Institute, there was no further inappropriate touching between the two, nor did Jones attempt to lure plaintiff into behaviors that were inappropriate. (See Plaintiff's E.T., at 208.)

While there are questions as to whether any of the movants here acted appropriately in failing to act upon learning of Jones's abuse of plaintiff, such allegations would support a claim of negligent infliction of emotional distress, not a claim of **intentional** infliction of emotional distress. Thus, the second cause of action in plaintiff's amended complaint is dismissed as to the Estate, Horace Turnbull, Boys Choir, and NYC.

Third Through Fifth Causes of Action

Plaintiff's third through fifth causes of action concern defendants' failure to supervise and to provide a safe environment for plaintiff, as well as for defendants' retention of Jones after plaintiff reported his abuse to Walter and Horace

Turnbull.

"School authorities have a duty of care to students on school premises or when students are otherwise in the control of school personnel." *C.M. v City of New York*, 9 Misc 3d 251, 253 (Sup Ct, NY County 2005). Additionally, the "Board of Education has a duty, arising from the fact of its physical custody over students, to exercise the same degree of care and supervision which a reasonably prudent parent would employ in the given circumstances." *Logan v City of New York*, 148 AD2d 167, 168 (1st Dept 1989).

NYC contends that it is entitled to dismissal because much of the actual physical touching of plaintiff occurred at the Boys Choir's Summer Institute or in Jones's apartment, not on the premises of the school. However, plaintiff makes it very clear in his testimony that Jones acted inappropriately and touched him on the school grounds. (See Plaintiff's EBT, at 99, 115, 191.) Therefore, NYC's contention it had no duty to plaintiff is unavailing.

Additionally, the "Use Agreement" between the Boys Choir and the BOE (see Agreement for Use of Space, attached to BOE's Notice of Motion as Exhibit J) gives the Boys Choir use of several rooms from 9:00 am to 3:00 pm "on all days that School is on regular session. Further, such "Use Agreement" states that: "15. [The Boys Choir] has administrative control of the Space under the

general supervision of the Principal of the School. However, no one will be allowed to enter or remain on the School Premises unless the Custodian or Principal , or an authorized representative ..., is on the School Premises."

Therefore, although it is uncontested that Jones was an employee of the Boys Choir and not employed by NYC to work as a counselor in the school, NYC, King, and the BOE's supervisory relationship to plaintiff under the "Use Agreement" is in question.

These allegations are sufficient to survive a motion to dismiss as to NYC. As respects the Estate, Horace Turnbull, and the Boys Choir, each had supervisory responsibilities for Jones, and thus those portions of the motions by the Estate, Horace Turnbull, Boys Choir, and NYC that seek dismissal of the third through fifth causes of action are denied.

Sixth Through Eighth Causes of Action

Plaintiff's sixth through eighth causes of action concern defendants' negligence in failing to investigate plaintiff's child abuse accusations, defendants' intentional failure to report Jones's abuse of plaintiff, and their negligence in failing to properly train the staff to recognize such child abuse.

As stated above, testimony has been proffered that Walter and Horace Turnbull were told of plaintiff's accusations, and

that they failed to take action to dismiss Jones. (See Plaintiff's EBT, at 195-201.) That testimony alone, in addition to questions about whether they performed the proper investigation in light of such allegations, and whether they told NYC or the BOE as required, require denial of those portions of the Estate and Horace Turnbull motions to dismiss the sixth through eighth causes of action.

Whether the Walter and Horace Turnbull's actions can be imputed to either the Boys Choir or NYC depends upon some further factual determinations discussed above, which require this court's denial of those portions of the Boys Choir and NYC's motion to dismiss.

Paragraph 67A of Amended Complaint

The Estate, Horace Turnbull, and Boys Choir seek dismissal of paragraph 67A of the amended complaint, asserting that plaintiff's allegation that it is entitled to the exception to the limited liability protection of CPLR § 1601 is in error.

Pursuant to that section, when a

claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable ... and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss.

Plaintiff alleges entitlement to an exception to the limitation

for each tortfeasor under CPLR § 1602 (7). That subsection states that, the limitations of CPLR § 1601 are not in effect when a tortfeasor is "held liable for causing claimant's injury by having acted with reckless disregard for the safety of others."

Under the standards set for CPLR 3211 (a) (7), it would be premature for this court to hold that defendants did not act recklessly as provided for under the CPLR § 1602 exception, and to dismiss this allegation. Therefore, that portion of the Estate, Horace Turnbull, and Boys Choir motion that seeks dismissal of paragraph 67A of the complaint is denied.

Punitive Damages

The Estate, Horace Turnbull, Boys Choir, and NYC seek dismissal of the punitive damages prayer in plaintiff's amended complaint.

"Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." *Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994). When a private party seeks to recover punitive damages as the result of a wrong, it "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Id.*; see also *Fulton v Allstate Ins. Co.*, 14 AD3d 380 (1st Dept

2005).

Absent any evidence at all that there was a pattern of sexual abuse on the part of Jones, even if a trier of fact determines that plaintiff is entitled to judgment against any or all of defendants herein, an award of punitive damages would not be appropriate under the standards set forth above. Therefore, that portion of plaintiff's complaint that seeks punitive damages as a remedy for his injuries is dismissed.

Summary Judgment

King and the BOE have filed an answer to plaintiff's amended complaint (see King and BOE's Supplemental Affirmation, Exhibit C), and, thus, as to those defendants issue is joined.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

First Cause of Action

There is no allegation that either King or the BOE sexually

abused plaintiff. Nor could either be held vicariously liable for Jones's sexual abuse of plaintiff. Therefore, plaintiff's allegation of intentional sexual abuse as to King and the BOE is dismissed.

As respects that portion of plaintiff's first cause of action that alleges battery, there are material questions of fact as to whether, during the time that King was the principal of the CAH,³ King was aware of or hit or "paddled" plaintiff. As it is uncontested that King was an employee of the BOE, such questions of fact also remain for the BOE.

Second Cause of Action

As to the second cause of action, there is no proffered evidence that King had actual notice of Jones's sexual abuse of plaintiff. However, whether or not the BOE had such notice is a question of fact that must await determination by the trier of fact, because, under the "Use Agreement," Walter and Horace Turnbull's relationship to the BOE cannot be decided as a matter of law.

Third Through Fifth Causes of Action

Plaintiff's third through fifth causes of action concern a failure to supervise and to provide a safe environment for plaintiff, as well as for Jones's continuing retention after

³At various times during the period of alleged abuse, King was a teacher, an assistant principal, and then acting principal.

plaintiff revealed the abuse.

Given paragraph 15 of the "Use Agreement," whereby the Boys Choir is under the general supervision of the principal of the CAH, these are material questions of fact as to King and/or the BOE's liability regarding these issues that must await trial.

Sixth Through Eighth Causes of Action

As respects causes of action six through eight, there are material questions of fact as to whether King and the BOE were aware of the abuse, which would have required investigation and reporting. Such questions of fact require denial of that portion of King and BOE's motion that seeks dismissal of the sixth and seventh causes of action in plaintiff's amended complaint.

Additionally, there is proffered evidence that the BOE contracted to provide the Boys Choir staff with training related to child abuse. However, the contents of that training and the list of employees that it was given to was not among the proffered evidence. Further, no evidence was proffered that the same training was provided to BOE's own employees within the school. As such, there remain material questions of fact regarding the eighth cause of action that require trial.

Cross-Claims

All movants seek dismissal of all cross-claims against them. However, the only cross-claims currently before the court are those contained in King and BOE's answer to the amended

complaint, i.e., as against the Estate, Horace Turnbull, Jones, and Boys Choir for contribution and indemnification.

Any common-law indemnification or contribution is premature prior to a finding of liability in a tort action. See *Matthews v Trump 767 Fifth Ave., LLC*, 50 AD3d 486 (1st Dept 2008); see also *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61-62 (2d Dept), lv dismissed 100 NY2d 614 (2003) (quoting 23 NY Jur 2d, Contribution, Indemnity, and Subrogation § 24) (as respects the claims for contribution, recovery "is available [only] where 'two or more tortfeasors combine to cause an injury[,] and is determined 'in accordance with the relative culpability of each such person.'"). As plaintiff's claims regarding the liability of all defendants for Jones's actions remain, King and the BOE's common-law indemnification and contribution cross-claims will not be dismissed.

As respects any contractual indemnification cross-claims, the Boys Choir's "Use Agreement" contains an indemnification clause in which the Boy's Choir agrees to indemnify the BOE for tort claims. Because the Estate and Horace Turnbull are not parties to this agreement, any of King and the BOE's cross-claims based upon entitlement to contractual indemnification from either the Estate or Horace Turnbull are dismissed.

Order

Accordingly, it is hereby

ORDERED that the City of New York's motions are granted, solely to the extent of: (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; and (3) dismissing plaintiff's claims for punitive damages, and are otherwise denied; and it is further

ORDERED that defendant Horace Turnbull as the Executor of the Estate of Walter Turnbull's motions are granted, solely to the extent of (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; (3) dismissing plaintiff's claims for punitive damages; and (4) dismissing John King and The New York City Board of Education's cross-claims against him, and are otherwise denied; and it is further

ORDERED that defendant Horace Turnbull's motions are granted, solely to the extent of (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; (3) dismissing plaintiff's claims for punitive damages; and (4) dismissing John King and The New York City Board of Education's cross-claims against him, and is otherwise denied; and it is further

ORDERED that the Boys Choir of Harlem, Inc.'s motion is granted, solely to the extent of: (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; and (3) dismissing plaintiff's claims for punitive damages, and is otherwise denied; and it is further

ORDERED that the Estate, Horace Turnball, Boys Choir and NYC serve and file their answer within twenty days of service of this decision and order with notice of entry; and it is further

ORDERED that the Board of Education of the City School District of the City of New York i/s/h/a New York City Board of Education's motion is granted, solely to the extent of: (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; and (3) dismissing plaintiff's claims for punitive damages, and is otherwise denied; and it is further

ORDERED that John King's motion is granted, solely to the extent of: (1) dismissing plaintiff's claim of sexual abuse; (2) dismissing the second cause of action; and (3) dismissing plaintiff's claims for punitive damages, and is otherwise denied.

This constitutes the decision and order of the Court.

Dated: July 14, 2009
New York, New York


KAREN S. SMITH, J.S.C.

FILED
JUL 20 2009
COUNTY CLERK'S OFFICE
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