

Pellegrino v Diocese of Rockville Ctr.

2009 NY Slip Op 32590(U)

October 26, 2009

Supreme Court, Nassau County

Docket Number: 13414/08

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER

mod,mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

DARIO PELLEGRINO, an infant,

Plaintiff(s),

MOTION DATE: 8/11/09

INDEX No.:13414/08

-against-

MOTION SEQUENCE NO:2,4

CAL. NO.:

DIOCESE OF ROCKVILLE CENTRE, et al.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Notice of Cross Motion.....	4-6
Answering Affidavits.....	7-8
Replying Affidavits.....	9,10
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendants LaFleur for an order pursuant to CPLR 3025, 3211(a)(5), 3211(a)(7) and 308 granting leave to amend their answer and to include the affirmative defense of collateral estoppel and dismissing all of plaintiffs' causes of action as against defendants LaFleur are disposed of as follows.

Plaintiffs' cross-motion for an order pursuant to CPLR 3025 granting leave to amend their complaint to: 1) include a more detailed allegation of the duty owed by the infant defendants to the infant plaintiff; 2) add a cause of action for damages resulting from the unintentional consequences of intentional acts against the infant defendants and 3) clarify that Francis A. Pellegrino's claim for loss of services stems from the negligence of the defendants rather from their intentional acts is granted.

So much of defendants' motion which seeks leave to amend their answer is denied. Defendants' motion for an order pursuant to 3211(a)(7) dismissing plaintiffs' complaint for its failure to state a cause of action is denied in part and granted in part. So much of defendants' motion for an order pursuant to 3211(a)(5) dismissing plaintiffs' complaint upon the grounds that it is barred under the theory of collateral estoppel is denied.

This is an action by plaintiff Dario Pellegrino, an infant under the age of 18 years, by his father and natural guardian Francis Pellegrino and Francis A. Pellegrino, individually (plaintiffs) seeking to recover money damages for personal injuries he allegedly sustained against the Diocese of Rockville Centre, St. Dominic Roman Catholic Church and St. Dominic High School, as well as Fabrice LaFleur, an infant under the age of 18 years, by his father and natural guardian, Joe K. LaFleur, Philip O. Izevbehai, an infant under the age of 18 years, by his father and natural guardian, Philip H. Izevbehai, Justin Toussaint, an infant under the age of 18 years, by his guardian, Bridgette L. Carter, George Beamon, an infant under the age of 18 years, by his mother and natural guardian, Deborah H. Beamon, and Jareid Bryan, an infant under the age of 18 years, by his mother and natural guardian Paulette Brian (defendants).

Plaintiffs allege that on February 2, 2007, infant plaintiff attended a high school basketball game at St. Dominic High School. When he entered the boy's locker room he was grabbed, forced to the ground and held down by one or more of the individual infant defendants. As a result of this, the infant plaintiff allegedly sustained injuries, both personal and emotional, that required medical care and treatment.

Pursuant to CPLR 3025(b) "Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." The proponent of a motion to amend is required to make an evidentiary showing sufficient to support the proposed claim (see D'Orazio v. Mainetti, 39 AD3d 981; Jackson v. Dow Chem. Co., 295 AD2d 855.

Here, both parties have submitted proposed amended pleadings to the court. Plaintiffs will be granted leave to amend their complaint in the form annexed to the motion papers as Exhibit A. Defendants LaFleur seek leave to amend their answer to include an additional affirmative defense of collateral estoppel pursuant to CPLR 3211(a)5, which is also one of the grounds enumerated in their motion to dismiss plaintiffs' complaint. As discussed later in detail, this court finds that the doctrine of collateral estoppel does not apply, so much of this motion which seeks leave to amend their answer is denied.

Pursuant to CPLR 3211(a)(7) a party may move for an order dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. Defendants herein argue that the plaintiffs' negligence claim should be dismissed for failure to state a cause of action as a matter of law since plaintiffs have not alleged a duty or breach thereof.

In Williams v. New York City Housing Authority (238 AD2d 413) the court held that "unless the defendant demonstrates that a material fact alleged by the plaintiff to be true 'is not a fact at all' and that 'no significant dispute exists regarding it,' the complaint should not be dismissed" (Id. At 414). Furthermore, in Guggenheimer v. Ginsberg (43 NY2d 268), "when evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Id. at 275). Here it appears to the satisfaction of the court that a cause of action exists within the four corners of the complaint. Thus the plaintiffs' cause of action against movant cannot be dismissed for its failure to state a cause of action. It should be noted that this claim contains an issue or issues that may be decided after the completion of discovery and that may possibly be dealt with upon the making of summary judgment motion.

Defendants argue that adult plaintiff's loss of services claim against defendants for battery, assault and false imprisonment should be dismissed as a matter of law pursuant to CPLR 215, the statute of limitations for intentional torts being one year from the date of the incident. However, pursuant to CPLR 208 the statute of limitations for intentional torts applicable to

infant plaintiff's claim will not begin to run until he reaches the age of 18. Plaintiffs acknowledge in their cross-motion the tolling of the statute of limitations as to adult plaintiff's loss of services claims for the intentional torts, therefore those claims will be dismissed. Additionally, defendants argue that the adult plaintiff's negligence claim should fail because his claim is derived from the infant's claim, which should be dismissed. The court disagrees as negligence is not an intentional tort. In Maidman v. Stagg (82 AD2d 299) the Appellate Division held that the plaintiff who alleges loss of services suffers no direct injury, but rather his or her injury is derived, both in a literal and legal sense, from the injury suffered by her spouse, or in this case, adult plaintiff's child. Since this court held that plaintiffs' negligence claim should not be dismissed, the adult plaintiff's loss of services claim derived therefrom will also stand.

Pursuant to CPLR 3211(a)(5) a party may move for dismissal of one or more causes of action asserted against him on the ground that: the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds. Here, defendants argue that all of the plaintiffs' claims should be dismissed under the doctrine of collateral estoppel. Two requirements must be met before collateral estoppel can be invoked. First, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action. Second, there must have been a full and fair opportunity to contest the decision now said to be controlling (Beuchel v. Bain, 97 NY2d 295, see also Gilberg v. Barbieri, 53 NY2d 285).

In the case at bar, the criminal portion of the action having been determined by the Family Court and those records having been sealed, counsel for all parties have not been able to review the record. Thus, it is unclear whether the issues present in this action have been determined in the said action. Furthermore, the decision of a criminal proceeding in connection with a civil proceeding does not necessarily control. "A dismissal of a criminal charge or an acquittal does not generally constitute

collateral estoppel in relation to a civil action because of the difference in the burden of proof to establish the factual issues." (Kalra v. Kalra, 149 AD2d 409). Therefore, plaintiffs' claims cannot be dismissed as a matter of law based upon the doctrine of collateral estoppel.

Accordingly, plaintiffs will be permitted to amend their complaint. Defendants' request to amend their answer is denied. The infant plaintiff's negligence claim is not dismissed, nor is adult plaintiff's loss of services claim derived from the infant plaintiff's negligence claim. All of the adult plaintiff's loss of services claims derived from intentional torts are dismissed. Finally, defendants LaFleur's motion to dismiss plaintiffs' complaint pursuant to the doctrine of collateral estoppel is denied.

Dated: OCT 26 2009

W. J. Walsh
J.S.C.

ENTERED

OCT 29 2009

CLERK