SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

JAMES J. REILLY and DIANA A. REILLY,
RUDOLPH CAROLEO and LORETTA CAROLEO,

Plaintiffs,

- against -

GARDEN CITY UNION FREE SCHOOL DISTRICT,

Defendant.

TRIAL/IAS PART 18
NASSAU COUNTY

INDEX NO. 9968/09

X X X

MOTION SUBMISSION
DATE: 10/8/09

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

RELIEF REQUESTED

The defendant, the Garden City Union Free School District, (hereinafter referred to as the "School District"), moves for an order pursuant to CPLR §§3211(a)(1), (5), (7), and 3211(c) for judgment dismissing plaintiffs' complaint against the School District on the basis that the complaint fails to state a cause of action against the defendant, that the cause of action may not be maintained because of statute of limitations by failure to timely file a Notice of Claim and/or Summons and Complaint, a defense is founded upon documentary evidence, and that punitive damages are not recoverable against a municipal entity. The plaintiffs submit opposition. The defendant submits a reply affirmation.

BACKGROUND

The plaintiffs served a Notice of Claim on or about September 22, 2008. A Municipal Hearing pursuant to §50-h of the Municipal Law was held on or about December 3, 2008 of plaintiffs James J. Reilly and Diana A. Reilly, and was held on or about December 10, 2008 of the plaintiffs, Rudolph Coroleo and Loretta Coroleo. The plaintiffs filed a Summons and Complaint on May 22, 2009.

The plaintiffs, James J. Reilly and Diana A. Reilly, (hereinafter referred to as "Reilly"), the parents of Alison Brooke Reilly, non-party, deceased, allege that they were subjected to tremendous pain and suffering and significant emotional distress as a result of the "offensive and libelous language published by the defendant with reference to their daughter, beginning in January 2004 and continuing to date". The plaintiffs, Rudolph Caroleo and Loretta Caroleo, (hereinafter referred to as "Caroleo"), parents of Christina Caroleo, deceased, allege the aforesaid allegations as well. The plaintiffs' complaint provides that their respective daughters who were 15-year old students at Garden City High School, killed while passengers in a motor vehicle accident, had no drugs or alcohol in their system at the time of their deaths. The plaintiffs' complaint provides that the defendant published a high school newspaper "The Echo" in January of 2004 whereby their daughters were an example of what happens when you drink and drive. The plaintiffs' complaint provides that on March 9, 2004, minutes of a PTA meeting were published and that said minutes contained the following statement: "They're drinking at your homes! I can't go out to the Hamptons to police them if you rent them houses. We buried 3 kids over the break: if we don't learn now, then we're never going to learn. I have had many many meetings in this building on this issue, but unless parents decide to do something, nothing will happen." The plaintiffs submit that "two of the 'buried 3 kids' referred to were Alison Reilly and Christina Reilly." The plaintiffs allege that they discovered the articles in "The Echo" on the internet on June 26, 2008.

The plaintiffs allege, as a "First Cause of Action" that the defendant subjected the plaintiffs to "inappropriate and extraordinarily painful statements which they knew to be false" causing plaintiffs to suffer severe mental and physical distress caused by the defendant's negligence. The plaintiffs allege, as a "Second Cause of Action" that the defendant's actions have been malicious, wanton and in bad faith, entitling plaintiffs to compensatory and punitive damages.

APPLICABLE LAW

Generally, on a motion to dismiss pursuant to CPLR §3211(a)(7), on the ground that the complaint fails to state a cause of action, the court must determine whether, accepting as true the factual averments of the pleading, affording the benefits of any favorable inferences which may be drawn therefrom, whether the pleading can succeed upon any reasonable view of the facts stated. (*City Line Rent A Car, Inc. v. Alfess Realty, LLC*, 33 AD3d 835). The criteria is whether the proponent of the pleading has a cause of action, not whether he has stated one. (*Guggenheimer v. Ginzburg*, 43 NY2d 268; *Rovello v. Orofino Realty Co.*, 40 NY2d 633).

Pursuant to CPLR §215(3), an action for libel or slander must be commenced within one year. "The one-year Statute of Limitations begins to run on the date of the first publication" and "under the 'single publication rule', a reading of libelous material by additional individuals after the original publication date does not change the accrual date for a defamation action but, rather, the accrual date remains the time of the original publication." (*Drakes v. Rulon*, 6 Misc3d 1025(A), citing *Gelbard v. Bodary*, 270 AD2d 866). A reading of libelous material after the original publication date did not change the accrual date for a defamation cause of action, whereby if the court were to hold otherwise, a "defamation claim could accrue when a letter is provided to other individuals involved in a professional review process months or even years later". (*Id.*, citing *Gelbard, supra*).

The statute of limitations period applicable to defamation claims is one year and generally accrues on the date of the first publication. (*Hoesten v. Best*, 34 AD3d 143). The publication of a defamatory statement in a single issue of a newspaper or magazine, although widely circulated, constitutes one publication, and the statute of limitations runs from the date of that publication. (*Id.*) "[N]either the time nor the circumstance in which a copy of a book or other publication finds its way to a particular consumer is, in and of itself, to militate against the operation of the unitary, integrated publication concept." (*Id.*, citing *Rinaldi v. Viking Penguin*, 52 NY2d 422). "The Court of Appeals has stated that the rationale underlying this rule is the prevention of "endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants". (*Id.*, citing *Firth v. State of New York*, 98 NY2d 365).

A cause of action seeking to recover damages for intentional infliction of emotional distress is subject to a one-year statute of limitations. (CPLR §215). Liability for a claim for the infliction of emotional distress is found "only where the conduct has been so outrageous in character, and so extreme in degree, to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". (*Clark v. Elam Sand and Gravel, Inc.*, 4 Misc3d 294, citing *Howell v. New York Post Company, Inc.*, 81 NY2d 115).

As a general rule, a plaintiff who has not suffered any physical injury may recover damages for mental or emotional distress if he can establish that the defendant owed a duty to him, and that breach of duty directly resulted in mental or emotional harm. (*Id.*, citing *Rainnie v. Community Memorial Hospital*, 87 AD2d 707). "While the law has recognized the right of recovery for negligent infliction of emotional injury under unique circumstances, such recovery is circumscribed to unique facts where a special duty is owed." (*Rubenstein v. New York Post*, 128 Misc2d 1). "While physical injury is not a necessary element of a cause of action to recover for negligent infliction of emotional distress, such a cause of action must be generally premised upon a breach of a duty owed directly to the plaintiff which either unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." (*E.B. v. Liberation Publications, Inc.*, 7 AD3d 566).

General Municipal Law §50-e provides that a notice of claim must be served within ninety days after the claim arises. The statutory requirement of service of a notice of claim is a jurisdictional condition precedent to the commencement of an action. (*Young v. New York City Health & Hospitals Corp.*, 91 NY2d 291). No action shall be maintained against a school district unless the action is commenced within one year and ninety days after the happening of the event upon which the claim is based. (*General Municipal Law* §50-I). A complaint filed one year and 91 days after the happening of an accident was barred under the statute of limitations requiring that an action against a municipality be filed within the one year and 90-day period. (*Pietrowksi v. City of New York*, 166 AD2d 423).

DISCUSSION

In evaluating whether the plaintiffs' complaint fails to state a cause of action under CPLR §3211(a), generally, the inquiry focuses on whether the pleading can succeed upon any reasonable view of the facts stated. (*City Line Rent A Car, Inc. v. Alfess Realty, LLC, supra*). Here, the defendant also asserts that the plaintiffs' complaint must fail as it is time-barred pursuant to CPLR

§3211(a)(5). Assuming, *arguendo*, that the plaintiffs' complaint, liberally construed, has stated a cause of action for defamation, libel, intentional, and/or negligent infliction of emotional distress, the plaintiffs' causes of action are time-barred.

The subject publications, the "Echo" article and the PTA minutes, were published in 2004, and apparently, a second "Echo" article was published in 2007. Therefore, the applicable one-year and 90-day statute of limitations expired prior to plaintiffs' filing and service of the notice of claim and subsequent filing of plaintiffs' complaint. The plaintiffs' contention that the statute of limitations accrues on June 26, 2008, and not from 2004, and/or 2007, is unavailing. The plaintiffs submit that since the plaintiffs became aware of the article in 'Echo" on-line on June 26, 2008, that date controls, and that their cause of action therefore accrued on June 26, 2008. However, under the "single publication rule", a reading of libelous material by additional individuals after the original publication date does not change the accrual date for a defamation action. (*Drakes v. Rulon, supra*; *Gelbard v. Bodary, supra*). If the court were to hold otherwise, a defamation claim could accrue months or years later. (*Id.*) Accordingly, the plaintiffs' defamation and/or libel cause of action is time-barred.

The plaintiffs' causes of action for intentional and/or negligent infliction or emotional distress must also fail. The plaintiffs have not alleged conduct sufficiently outrageous in character to support a cause of action for intentional infliction of emotional distress. (*Clark v. Elam Sand and Gravel, Inc., supra*). More importantly, any claim for intentional infliction of emotional distress is time-barred as the one-year statute of limitations expired prior to plaintiffs' filing of their complaint. Additionally, here, since the plaintiffs' causes of action for the infliction of emotional distress are predicated upon the allegations that constitute a defamation claim, it must be presumed that the causes of action arise out of the subject statements, and therefore, such causes of action are time-barred. (*Drakes v. Rulon, supra*).

The plaintiffs' causes of action for negligent infliction of emotional distress must fail as the plaintiffs cannot establish that the defendant owed a special duty to the plaintiffs, and that a breach of that duty resulted in mental or emotional harm. (*Rubenstein v. New York Post, supra; E.B. v. Liberation Publications, Inc., supra*). The plaintiffs have not established that the defendant owed a duty to the plaintiffs whereby any potential breach could have resulted in mental or emotional harm. (*Howell v. New York Post Company, Inc., supra*). Such elements are not present here.

Plaintiffs' reliance of *Dana v. Oak Park Marina*, 230 AD2d 204, is misplaced. In *Dana, supra*, the court found that the statutory duty provided a basis upon which the plaintiff could proceed with a complaint for negligent infliction of emotional distress. Here, the plaintiffs have not demonstrated the availability of a civil cause of action based upon the violation of any statute or duty.

This Court has reviewed plaintiffs' remaining contentions and has found them to be without merit.

Upon the foregoing, that branch of the defendant's motion seeking dismissal pursuant to CPLR §3211(a)(7) for failure to state a cause of action, and pursuant to CPLR §3211(a)(5) statute of limitations, is granted.

In light of this determination, this Court need not address the defendant's remaining contentions.

ENTER:

J.S.C.

Dated: December 1, 2009

cc: Godosky & Gentile, P.C.
Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger