

Rabinowitz v Devereux Connecticut Glenholme

2010 NY Slip Op 32920(U)

October 8, 2010

Sup Ct, NY County

Docket Number: 107322/08

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Doris Ling-Cohan
. Justice

PART 36

Index Number : 107322/2008
RABINOWITZ, STEVE
vs.
DEVEREUX CONNECTICUT
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1, 2
3
4

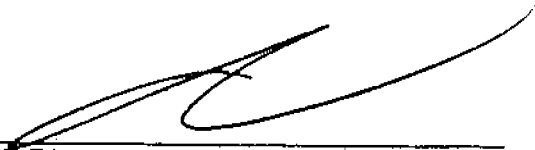
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the attached memorandum decision.*

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/8/10


JUSTICE DORIS LING-COHAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 36

-----X
STEVE RABINOWITZ and ANAPAULA
RABINOWITZ,

Plaintiffs,

-against-

DEVEREUX CONNECTICUT GLENHOLME,
DEVEREUX GLENHOLME and
GLENHOLME SCHOOL,

Defendants.
-----X

Index No. 107322/08

Motion Seq. No. 007

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

DORIS LING-COHAN, J.:

This action was commenced to recover for personal injuries sustained by plaintiff AnaPaula Rabinowitz ("AnaPaula") while attending defendant school, Devereux Foundation d/b/a Devereux Glenholme (improperly pleaded as "Devereux Connecticut Glenholme, Devereux Glenholme and Glenholme School") (hereinafter, "Devereux"). Between January 2005 and June 2006, plaintiff AnaPaula resided at the school, located in Connecticut. Prior to that time, AnaPaula had been enrolled in other schools within the New York Education program. Devereux was then selected as a replacement school, with approval and funding from the New York City Department of Education ("Department of Education"), as AnaPaula's prior school was unable to adequately respond to her alleged behavioral problems.

On June 5, 2006, plaintiff AnaPaula allegedly jumped out a second story window in her dorm room to the ground and sustained a fractured right ankle. After this incident, plaintiff AnaPaula was admitted to Danbury Hospital for treatment of her fracture and psychiatric treatment. AnaPaula remained at Danbury Hospital until June 28, 2006, at which time she was

enrolled in the Chamberlain School located in Massachusetts.

Plaintiffs allege that Devereux negligently supervised the minor plaintiff, AnaPaula, while she resided at and attended Devereux and that Devereux failed to provide window guards in order to prevent plaintiff AnaPaula from jumping out the window. Plaintiff AnaPaula seeks monetary damages due to her alleged personal injury. Plaintiff Steve Rabinowitz, AnaPaula's father, also seeks monetary damages as a result of AnaPaula's injuries.

Defendant Devereux now moves for summary judgment, pursuant to CPLR 3212, with respect to plaintiff Steve Rabinowitz's First and Second Causes of Action (counts three and four of the complaint). The complaint alleges two causes of action as to plaintiff Steve Rabinowitz: (1) that, as a result of negligence by Devereux, he was deprived of services, society of companionship of his daughter, he was caused to expend money to cure his daughter and for his loss of earnings; and (2) that, as a result of a breach of contract by Devereux, he was deprived of services, society of companionship of his daughter, he was caused to expend money to cure his daughter and for his loss of earnings.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to

defeat summary judgment. *Id.*

In both of Steve Rabinowitz's causes of action, he seeks damages for: (1) "depriv[ation] of the services, society and companionship of his daughter;" (2) expenses incurred or to be incurred in the future with regard to curing his daughter's injuries; and (3) past and future lost earnings as a result of having to allegedly change and/or decrease his employment due to his daughter's injuries and required change of school. As discussed below, each category of damages sought by plaintiff Steve Rabinowitz in this action is not recoverable, and therefore Devereux is entitled to summary judgment with respect thereto.

The first category of damages sought by plaintiff Steve Rabinowitz is for "depriv[ation] of the services, society and companionship of his daughter." Compl ¶¶ 64, 70. As to the deprivation of society and companionship of a child, it is well-settled in New York that such damages are not recoverable. *See Gilbert v Stanton Brewery, Inc.*, 295 NY 270, 273 (1946) (where the Court of Appeals held it was reversible error to charge the jury for loss of companionship); *Devito v Opatich*, 215 AD2d 714, 715 (2d Dep't 1995) (where the Appellate Division held the lower court erred by "includ[ing] as an element of the parents' damage the loss of their minor daughter's society which is not compensable"). As to deprivation of services, while they are a recoverable form of damages (*see Gilbert*, 295 NY at 273), plaintiff Steve Rabinowitz has not provided any evidence that there was a deprivation of services. Notably, no affidavit has been submitted by plaintiff Steve Rabinowitz to state that there were services by his daughter he was deprived of, and his deposition is also void as to this element of damages being sought.

As to the second category of damages plaintiff Steve Rabinowitz is seeking (expenses

incurred in the past and to be incurred in the future to restore his daughter to good health after the alleged incident), again, no proof or evidence has been submitted by plaintiff in the form of an affidavit, bills, or testimony at his deposition with regard to any past expenses. Further, plaintiffs' verified bill of particulars fails to allege any out-of-pocket medical special damages. Moreover, any future expenses are not recoverable by a parent. *See Clarke v Eighth Ave. R.R. Co.*, 238 NY 246, 250 (1924) (where the Court of Appeals determined that a parent of a minor child was not entitled to recover the estimated cost of prospective medical treatment as "[t]he infant, and not the father, was entitled to recovery for these items. . . . It insures that whatever sum is recovered will be more likely to be used for the infant's benefit than if a recovery be permitted by the parent."); *Stiles v Caddick*, 11 AD2d 889, 889 (3d Dep't 1960) ("Such future [medical] expenses are . . . properly recoverable in the infant's action, and not in that of the father.").

With regard to the third category of damages (recovery of past and future lost earnings as a result of having to decrease his hours at work and ultimately take a lesser-paying job due to his daughter's injuries and required change of school), such damages are also not recoverable. *See Ceigler v Hopper-Morgan Co.*, 90 AD 379 (4th Dep't 1904) ("It was also error . . . to charge that the father could recover . . . for neglect of business in consequence of the child's illness."). Moreover, while the parent of an injured infant plaintiff would be able to recover the value of services performed in nursing said child, here, it is undisputed that plaintiff AnaPaula remained at Danbury Hospital following the injury until such time as she could be enrolled in the Chamberlain School. *See Chen Affirmation*, Exh D at 22. Thus, all medical care was provided by Danbury Hospital. Based on the above, both of Steve Rabinowitz's causes of action are

dismissed, as the elements of damages sought in both claims are not recoverable, as stated above, either as a matter of law or as a result of plaintiff failing to provide any evidence that such damages exist.

Furthermore, as to Steve Rabinowitz's second cause of action for breach of contract, plaintiff Steve Rabinowitz alleges that defendant Devereux breached a purported contractual duty to provide one-to-one care to plaintiff AnaPaula. Defendant Devereux moves to dismiss this cause of action arguing that there was no purported contract between Steve Rabinowitz and Devereux, between Steve Rabinowitz and the Department of Education, nor between Devereux and the Department of Education. Devereux further contends that, even if an implied contract did exist, Steve Rabinowitz was not in privity nor was a third-party beneficiary and, moreover, there was no consideration paid to modify such contract with respect to providing one-to-one care to AnaPaula. Plaintiff Steve Rabinowitz opposes the motion, contending that there is a valid contract that provides for one-to-one supervision of AnaPaula and, thus, his cause of action based on breach of contract should not be dismissed.

Devereux has attested that there was no such contract between it and the Department of Education to provide one-to-one care for AnaPaula. *See* Tanya Dyson Aff ¶ 4 (attached to Chen Reply Affirmation, Exh J). While it appears that plaintiff AnaPaula was enrolled at the school because it was allegedly better suited to deal with some of her behavioral issues, at the time of her enrollment, it appears there was no agreement that there would be one-to-one supervision. In fact, the class in which AnaPaula was to be placed was to have a class ratio of 12:1:1, that is, 12 students to one teacher and one paraprofessional. *Melissa Y. Wu Affirmation in Opp, Exh A*. At a later point, on May 24, 2006, during a yearly review meeting, the topic of AnaPaula receiving

one-to-one supervision was discussed and Devereux requested and received approval from the Department of Education to provide AnaPaula with one-to-one supervision when needed. *See* Chen Affirmation, Exh I. However, there is no evidence submitted to show that such one-to-one supervision was the result of any contractual obligation. Although plaintiffs' counsel alleges that there was an applicable contract, no evidence has been presented that a contract with respect to the one-to-one supervision exists. No affidavit by plaintiff Steve Rabinowitz has been submitted that there was an applicable contract; plaintiffs' counsel simply states that "one-to-one care was mandated for AnaPaula. Presumably, such a mandate must have been memorialized by a contract, agreement, or other written instrument." Wu Affirmation in Opp ¶ 21. However, without more, such speculation is insufficient to oppose the showing made by defendant. Thus, defendant's motion for summary judgment dismissing Steve Rabinowitz's second cause of action for breach of contract is granted.

The court notes that, at the time this motion was made, discovery had been completed and a note of issue filed almost two months prior, on January 8, 2010. Further, although plaintiffs allege that they are in the process of obtaining records from the Department of Education (*see id.* ¶ 8), which could contain a contract with regard to the one-to-one supervision (*see id.* ¶ 24), such FOIL request was first served on December 14, 2009 with a follow-up on January 7, 2010, and no contract has yet to be produced. This litigation was commenced on or about May 22, 2008, yet plaintiffs waited approximately one-and-a-half years, and at about the time the note of issue was filed, to request records from the Department of Education. As of March 15, 2010, the Department of Education has stated that it is continuing to look for documents. However, as defendant had made a prior similar FOIL request to the Department of Education, and no

contracts were found as a result of that search (*see* Chen Reply Affirmation ¶¶ 7, 14-17), it is unlikely and completely speculative that the Department of Education will now produce a contract as a result of plaintiff's request.

Accordingly, it is

ORDERED that the motion for partial summary judgment is granted and first and second causes of action of plaintiff Steve Rabinowitz (counts three and four) are dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order with notice of entry upon plaintiffs.

Dated: _____

10/9/10



DORIS LING-COHAN, J.S.C.

J:\Summary Judgment\Rabinowitz, seq 7, sj to dismiss father's claims for lost wages and services - granted.wpd

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE