

**Mcphee v Tornee**

2011 NY Slip Op 32413(U)

September 13, 2011

Sup Ct, Suffolk County

Docket Number: 08400/2011

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

\_\_\_\_\_  
Giselle McPhee and Daniel McPhee, as parents  
of minor child Gabrielle McPhee,

Plaintiffs,

-against-

Bryan Tornee, Commack Union Free School  
District and The Board of Education of the  
Commack Union Free School District,

Defendants.  
\_\_\_\_\_

Clerk of the Court

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Motion Sequence No.: 001; MOT.D

Motion Date: 4/28/11

Submitted: 6/15/11

Motion Sequence No.: 002; MD

Motion Date: 5/19/11

Submitted: 6/15/11

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Upon the following papers numbered 1 to 19 read on these motions to dismiss and to amend the complaint: Notice of Motion and supporting papers (001), 1 - 11; Notice of Cross Motion (002), 12 - 16; Answering Affidavits and supporting papers, 17 - 19.

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This action was instituted by plaintiffs, Giselle McPhee and Daniel McPhee (“the McPhees”) as parents of minor child Gabrielle McPhee, to recover damages allegedly sustained by the minor child primarily as a result of the actions of defendant Bryan Tornee (“Tornee”), a track coach and janitor employed by defendant Commack Union Free School District and the Board of Education of the Commack Union Free School District (“the school district”). Plaintiffs claim that defendant Tornee coerced the fifteen year old minor Gabrielle McPhee, through the internet and text messaging (during the school sessions and school break), to meet him off school grounds on December 26, 2009, at which time he laid hold of, touched, struck and battered her in a sexual manner and without her consent. Plaintiffs allege that defendant Tornee was indicted on criminal charges for his actions.

Plaintiffs served a Notice of Claim, verified on March 23, 2010, upon the school district which indicated that the nature of the claim was for money damages as a result of assault and battery and sexual assault and battery of a minor; slander and defamation; negligence in hiring, training, and supervision; conspiracy and cover up by the school district of previous claims of assault and battery by defendant Tornee; and, breach of policies and laws resulting in the spreading of false information to the public about plaintiffs. In a complaint dated March 17, 2011, plaintiffs allege eight causes of action against defendants: the first cause of action alleged assault and sexual assault; the second cause of action alleged intentional infliction of emotional harm; the third cause of action alleged negligence and vicarious liability; the fourth cause of action alleged failure to supervise/negligent supervision; the fifth cause of action alleged defamation; the sixth cause of action alleged tortious interference with business relations; the seventh cause of action alleged punitive damages flowing from the defamation; and, the eighth cause of action alleged violation of New York State privacy rules, the school district rules, and the Family Educational Rights and Privacy Act (“FERPA”).

Giselle, Daniel and Gabrielle McPhee were deposed in connection with their notice of claim, pursuant to General Municipal Law section 50-h, on July 9, 2010. During the 50-h hearing of Gabrielle McPhee, counsel for plaintiffs indicated that because plaintiffs were “not suing the school district for Mr. Tornee’s criminal action ... any area regarding the sexual assault of Ms. McPhee is [not] fodder for this 50 (h) hearing ... I’m going to be directing her not to answer any questions regarding that ... The actual details of the sexual assault ... are completely irrelevant for your client’s [sic] purposes ... We are not going to be going into any specific details about the sexual assault.” The attorney then indicated that Gabrielle McPhee would not answer questions about what occurred on the evening of December 26, 2009 between her and Tornee. Testimony was elicited from Gabrielle McPhee with regard to the events leading up to her meeting with defendant Tornee, her getting into his car, driving to a Stop and Shop parking lot and motel with him, going into the motel with Tornee, returning from the motel, as well as the aftermath of this liaison. However, no questions were answered in connection with the events which took place in defendant Tornee’s vehicle or within the motel room, although Gabrielle McPhee did testify that “sexual activity did take place that evening.”

The school district now seeks an order dismissing plaintiffs’ complaint in its entirety as a result of plaintiff Gabrielle McPhee’s refusal to answer questions at an examination under oath pursuant to General Municipal Law 50-h. In the alternative, the school district requests the Court

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to dismiss plaintiffs' fifth, sixth, seventh and eighth causes of action. It alleges that the fifth cause of action sounding in defamation, fails to satisfy the pleading requirements of CPLR §3016; that the seventh cause of action for punitive damages for the alleged defamation fails as a result of the pleading deficiencies; that the sixth cause of action for tortious interference with business must be dismissed as it was not included in the notice of claim and because it was not properly plead; and, that the eighth cause of action seeking damages resulting from an alleged violation of FERPA must be dismissed as there are no personally enforceable rights emanating from FERPA.

Plaintiffs oppose the defendants' motion and request that the Court permit them to amend the complaint pursuant to CPLR §3025. The proposed amended complaint seeks to add the following paragraphs to the fifth and seventh causes of action:

**FIFTY-NINTH:** and **SEVENTY-THIRD:** "That during the month of January 2010, Commack Middle School psychologist discussed the sexual abuse by Bryan Tornee with Gabrielle McPhee's brother after he was called to the psychologist's office. More specifically, the psychologist said, "I understand your sister has had a lot of problems that are going on right no[w], and I wanted to know how you are handling it."

**SIXTIETH:** and **SEVENTY-FOURTH:** "That shortly following Bryan Tornee's abuse of Ms. McPhee, a Commack High School substitute teacher discussed the incident with students in a manner that was false, derogatory, scandalous, misleading, and malicious."

Section 50-h of the General Municipal Law provides that "... the school district shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made"; a governmental entity is enabled to make a prompt investigation into the circumstances of a claim by permitting it to conduct an examination of the claimant about the facts of the claim (see, Nasca v. Town of Brookhaven, 10 AD3d 415 [2<sup>nd</sup> Dept., 2004]). When requested, a claimant's submission to a 50-h hearing is a condition precedent to the commencement of the lawsuit against a school district and failure to appear and submit to same may result in a dismissal of an action (see, Steenbuck v. Sklarow, 63 AD3d 823 [2<sup>nd</sup> Dept., 2009]; Brian VV v. Chenango Forks Cent. School Dist., 299 AD2d 803 [3<sup>rd</sup> Dept., 2002]). However, where the claimant submits to the examination but refuses to answer certain questions, a dismissal of the claim is not always warranted in the first instance (see, Gold v. Rockville Centre Police Dept., 71 AD3d 632 [2<sup>nd</sup> Dept., 2010], *leave to app dismissed* 14 NY3d 867, 903 NYS2d 326 [2010]; Nasca v. Town of Brookhaven, 10 AD3d 415 [2<sup>nd</sup> Dept., 2004]).

Here, where plaintiff Gabrielle McPhee (who is now seventeen years of age) has brought a claim for assault, sexual assault and intentional infliction of emotional harm and the damages that flow therefrom, the school district is entitled to inquire with regard to the events which constitute her claim. Pursuant to CPLR §3103, the Court has broad discretion to preclude or limit an additional examination before trial to avoid redundancy or annoyance in light of the child's testimony under

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oath at the section 50-h examination, if it deems it necessary. Since plaintiffs appeared for and testified at a 50-h examination pursuant to notice served by the school district but failed to answer only one area of inquiry, the appropriate relief is a continuation of the 50-h hearing, with leave to renew this motion if the plaintiff continues to refuse to answer questions concerning the incidents which occurred on the evening of December 26, 2009 in defendant Tornee's vehicle and at the motel.

A complaint alleging a cause of action for defamation (libel or slander) must set forth the particular words constituting the slander and it must specify the time when, the place where, the person to whom and the manner in which the statement was made (see, Epifani v. Johnson, 65 AD3d 224 [2<sup>nd</sup> Dept., 2009]). The requirement of CPLR §3016(a) that the allegedly slanderous words be stated verbatim is strictly enforced so that the failure to do so will result in a dismissal of the complaint (see, Erlitz v. Segal, Liling & Erlitz, 142 AD2d 710 [2<sup>nd</sup> Dept., 1988]; Grynberg v. Alexander's, Inc., 133 AD2d 667 [2<sup>nd</sup> Dept., 1987] *app denied* 70 NY2d 616, 526 NYS2d 436 [1988]). Generally, in a cause of action alleging slander, special damages must be alleged and proven; however, if plaintiff establishes that the defamatory statement either charged plaintiff with a serious crime, tended to harm plaintiff in his or her trade, business or profession, indicated that plaintiff had a loathsome disease, or imputed unchastity to a female plaintiff, then plaintiff need not prove special damages and the defamatory statement is considered "slander *per se*" (see, Epifani v. Johnson, 65 AD3d 224 [2<sup>nd</sup> Dept., 2009]). Although CPLR §3025 (b) directs that leave to amend pleadings shall be freely given in the absence of prejudice or surprise, where the proposed amendment is devoid of merit, leave to amend should be denied (see, Ferrandino & Son, Inc. v. Wheaton Builders, Inc., LLC, 82 AD3d 1035 [2<sup>nd</sup> Dept., 2011]; Ingrami v. Rovner, 45 AD3d 806 [2<sup>nd</sup> Dept., 2007]; Hill v. 2016 Realty Assoc., 42 AD3d 432 [2<sup>nd</sup> Dept., 2007]).

Here, the exact words alleging defamation were not stated in the fifth cause of action in the complaint, thus it fails to meet the requirements of CPLR §3016(a) and is dismissed. The proposed amended complaint has offered nothing additional insofar as the alleged words stated by a "substitute teacher". Although it indicated the exact words spoken by a school psychologist<sup>1</sup>, these words are not and cannot be considered "slander *per se*", thus this amendment is devoid of merit. Therefore, as the proposed amended complaint has failed to meet the pleading requirements for slander, leave to amend is denied. Inasmuch as there is no independent cause of action for punitive damages (see, Rocanova v. Equitable Live Assur. Socy of U.S., 83 NY2d 603 [1994]; Entler v. Koch, 85 AD3d 1098 [2<sup>nd</sup> Dept., 2011]; Probst v. Cacoulidis, 295 AD2d 331 [2<sup>nd</sup> Dept., 2002]), the seventh cause of action for punitive damages is dismissed.

General Municipal Law 50-e requires, *inter alia*, that the notice of claim sufficiently identify the claimant and the nature of the claim being asserted against the school district prior to the institution of an action against it. A cause of action asserted in a complaint which alleges factual allegations which were not asserted or for which the nature of the claim was not indicated in the

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<sup>1</sup> "I understand your sister has had a lot of problems that are going on right no[w], and I wanted to know how you are handling it."

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notice of claim, must be dismissed as it fails to satisfy this 50-e condition precedent (see, Santoro v. Town of Smithtown, 40 AD3d 736 [2<sup>nd</sup> Dept., 2007]). Plaintiffs' sixth cause of action alleges tortious interference with business relations, yet no facts were set forth in plaintiffs' notice of claim, nor was the nature of this claim asserted in the said notice. Thus, the cause of action for tortious interference with plaintiffs' business is dismissed.

FERPA's nondisclosure provisions do not confer any individually enforceable private rights (see, Gonzaga Univ. v. John Doe, 536 US 273, 122 SCt 2268 [2002]). Therefore, that portion of plaintiffs' eighth cause of action which alleges a violation of FERPA is dismissed.

Accordingly, the motion by the school district (001) is granted solely to the extent that the fifth, sixth, and seventh causes of action, as well as the portion of the eighth cause of action alleging a violation of FERPA are dismissed. The motion by plaintiffs for leave to amend their complaint (002) is denied. Defendant school district is granted leave to schedule a continued 50-h hearing within the first sixty days following the date of this order, if it be so advised.

So ordered.

Dated: September 15, 2011

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION