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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5

Justice

Index Number : 103504/2010
HIRSCH, YITZCHAK M.
vs.
N.Y.C. DEPT. OF EDUCATION
SEQUENCE NUMBER : 003
DISMISS Cycle # 3

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 04 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10-30-13
OCT 30 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH, by DEVORAH HIRSCH, MOTHER AND Guardian ad Litem of YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH, and DEVORAH HIRSCH,

Plaintiffs,

-against-

THE NEW YORK DEPARTMENT OF EDUCATION, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, CITY OF NEW YORK, POLICE COMMISSIONER RAYMOND W. KELLY, in his official capacity, JAMES SECRETO, ASSISTANT CHIEF and COMMANDING OFFICER OF THE NYPD SCHOOL SAFETY DIVISION or his SUCCESSOR, in his official capacity, NEW EXPLORATIONS IN SCIENCE TECHNOLOGY AND MATH (a/k/a NEST + m), DR. OLGA LIVANIS, in her individual and official capacity, BREDAN ALFIERI, in his individual and official capacity, JOSE MARTINEZ-ELIAS, in his individual and official capacity and SCHOOL SAFETY AGENTS "JANE DOE 1" "JANE DOE 2," in their individual and official capacities,

Defendants.

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DECISION/ORDER
Index No. 103504/2010
Seq. No. 003

KATHRYN E. FREED, JSC:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 (Exhs. A-G)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3 (Exhs. A-R)
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants, (collectively, "the City"), move for an order pursuant to CPLR§3211(a)(7) dismissing the complaint as against all encaptioned defendants, or in the alternative, pursuant to CPLR§3212, granting summary judgment to all encaptioned defendants, or for an order pursuant to CPLR§3211(a)(7) dismissing the complaint in its entirety against defendant Raymond Kelly, and pursuant to CPLR§3103, issuing a protective order limiting discovery to supervised compliance conferences.

Plaintiff *pro se* Devorah Hirsch ("plaintiff"), opposes. After a review of the papers presented, all relevant statutes and case law, the Court **grants** the instant motion for summary judgment.

Factual and procedural background:

This matter emanates from a drug related search of then infant plaintiff, Yitzchak Hirsch, ("Justin"),and his subsequent suspension from High School in March 2009. This case has a protracted and tortured procedural history. According to the City, on October 6, 2010, plaintiff, via an Order To Show Cause, moved for a temporary restraining order ("TRO"), enjoining defendants from conducting further searches of her son without her being present, and from making any defamatory statements about him. Said TRO proceeding addressed and ultimately decided what the City refers to as the "central issue" in this case from which all causes of action flow: the legality of the search of Justin and the reasonableness of the school's conduct in doing so.

Via an Decision/Order rendered on January 3, 2011, Justice Barbara Jaffe denied plaintiff's application for a temporary restraint, holding that the March and October 2009 searches of Justin were supported by reasonable suspicion. Justice Jaffe also determined the alleged defamation to be inadmissible, and that Justin's academic failures did not result from the search in that said failures predated the first search of Justin occurring in March 2009.

In the course of opposing said TRO, the City asserted that it had obtained extensive evidence supporting its opposition. Specifically, it obtained an affidavit of Dr. Olga Livanis, School Principal, in addition to more witness statements from students and teachers. The City also obtained plaintiff's academic record.

According to the affidavit of Principal Dr. Olga Livanis, (annexed to Motion as Exh. B), on March 17, 2009, Russell Groat, a Physical Education Teacher, reported to Assistant Principal Jared Rosoff, that three middle school students observed two high school students smoking marihuana in the gym locker room. In signed statements, these students provided a detailed description of both the high school students in question. Justin and the other student, Joshua Urena, matched the descriptions. Both Justin and Urena signed statements admitting their presence in the locker room bathroom and gym. Dr. Livanis interviewed both of them individually.

Dr. Livanis states that her observation of Justin led her to believe that he was "high," in that his eyes were red and glassy, he smelled strongly of marihuana, he slouched in his seat, laughed inappropriately and spoke incoherently. Principal Livanis called the School Safety Agent, Melissa White, prior to directing Justin and Urena to empty their pockets and book bags. Principal Livanis also states that in Justin's possession were empty "dime bags," (small clear plastic bags used for holding $10.00 worth of marihuana); rolling paper; blunt wrappers; a plastic film container which smelled of marihuana; several ten dollar bills stuffed in most of his pockets; three lighters, a metal container which also smelled of marihuana; and remnants of a partially smoked joint. The aforementioned items were photographed and Devorah Hirsch, Justin's mother, was called to the school. When Ms. Hirsch arrived, she was informed that Justin would only be receiving a one day Principal's suspension, because the School Safety Supervisor decided against calling the police.

Additionally, Principal Livanis states that on March 19, 2009, two high school students, Tasheen Bennett and Christopher Owens informed guidance counselor Stephanie Glasgall that Justin had offered to sell them marihuana. These students signed statements relating and attesting to said incident. Consequently, both Justin and plaintiff were called to Livanis's office. Ms. Hirsch would not permit Justin to write a statement. However, the incident was filed on the Online Occurrence Report System which automatically triggers a Superintendent's suspension hearing, which was subsequently held on March 27, 2009. Since neither Bennett nor Owens appeared at the hearing, the charges against Justin were dropped.

Positions of the parties:

Now, utilizing the aforementioned evidence, the City seeks dismissal of the complaint based upon Justice Jaffe's Decision/Order, pursuant to the doctrine of law of the case. The City argues that plaintiffs' first, second, third, fourth, ninth, tenth, eleventh, thirteenth and fourteenth causes of action all assert claims that directly relate to the school's conduct which was previously determined by Justice Jaffe to be lawful. Additionally, the City also argues that plaintiff's complaint against Commissioner Kelly warrants dismissal as he is immune from suit. The City further argues that if the complaint is not dismissed, this Court should then issue a protective order regulating discovery to supervised compliance conferences.

Plaintiff argues that both the Livanis affidavit and the City's motion contain numerous misstatements of fact, untruths and contradictions. She claims that "straight out of a scene from the TV series 'Law and Order,' Justin was "aggressively interrogated, intimidated, and threatened." (Aff. in Opp., p.10, ¶ 28). She also alleges that Justin was informed that he would not be permitted to call her and that his cell phone was confiscated to prevent him from attempting to do so. Plaintiff also

alleges that a body and book bag search failed to yield any evidence of marihuana, drug paraphernalia or any other contraband on Jason's person.

Plaintiff also argues that Judge Jaffe's decision and order previously denying her application for a preliminary injunction does not serve as a basis for the instant motion to dismiss because the granting or denial of a motion for a preliminary injunction does not constitute law of the case. Additionally, plaintiff argues that said previous decision and order regarding her motion for a TRO was for specific relief and did not determine on the merits, her fourteen valid causes of action against defendants.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex re Spitzer v. Grasso*, 50 A.D.2d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance on surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

Plaintiff is correct in her argument that "the granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for" (*J.A. Preston Corp. v. Fabrication Enters.*, 68 N.Y.2d 397, 399 [1986]). Therefore, this Court cannot bind itself to Justice Jaffe's determination pursuant to the concept of law of the case. However, the Court agrees with the City that a significant number of plaintiffs' causes of action are inextricably intertwined with the underlying issue of whether the two searches of Justin had a legal basis.

While this Court may not be bound by Justice Jaffe's determination, in using its own independent analysis, it nevertheless also finds that reasonable suspicion existed for the subject searches to be conducted. The Fourth Amendment protects students inside school premises from unreasonable searches and seizures (*New Jersey v. T.L.O.*, 469 U.S.325, 105 S.Ct. 733 [1985]; *Matter of Gregory M.*, 82 N.Y.2d 588, 592 [1st Dept. 1992], *affd* 82 N.Y.2d 588 [1993]). However, "[u]nder ordinary circumstances, a search of a student by a school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating....the law" (*New Jersey v. T.L.O.*, 469 U.S. 325 at 341-342).

An in-school encounter between a student and a school safety officer is *not* the functional equivalent of a street encounter between a private citizen and a police officer (*People v. Butler*, 188 Misc.2d 48, 2001 Slip Op. 21225 [Sup Ct Kings County 2001]). School safety agents are held to the standard of "reasonable suspicion, not probable cause, in determining the reasonableness of a search (*Gregory M.*, 82 N.Y.2d 588 citing *New Jersey v. T.L.O.*, 469 U.S. 325), and a student's expectation of privacy is balanced against the school's interest in keeping the school and its students free from illegal activity (*Gregory M.*, 82 N.Y.2d. at 593-594; see also *People v. Butler*, 188

Misc.2d 48 at 50)).

Moreover, it is well established that "information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest" (*Lyman v. Town of Amherst*, 74 A.D. 3d 1842, 1842 [4th Dept. 2010]). In consideration of this, the Court finds that the March 17, 2009 search based on the statements of identified students that they observed Justin and another student smoking marihuana in the gym locker room, was certainly sufficient to establish reasonable suspicion that Justin may have committed a crime, warranting the subsequent search of his person and book bag. The search was further justified by Principal Livanis's own personal observations of Justin's physical appearance and behavior. The reasonable suspicion to conduct the search was not undermined by the fact that only circumstantial evidence of drug possession and/or use existed.

The Court also finds the October 1, 2010 search to be reasonable under the circumstances. On that day, Justin's Mathematics teacher, Dr. Andrew Fox, reported an incident which he perceived to be a suspicious transaction between Justin and another student, possibly involving drugs. Dr. Fox's report followed the aforementioned incident occurring on March 19, 2009, wherein the two identified students informed a school guidance counselor that Justin had offered to sell them marihuana in school. Despite the fact that nothing became of this accusation, it nonetheless played a part in supporting the reasonable suspicion to search Justin on October 1st.

Having determined that both searches were legal, the Court now turns to plaintiff's various causes of action. It is important to note at the outset that the Court agrees with the City that certain causes of action necessitate dismissal because they are related with the underlying searches which have been declared to be legitimate. These include the first cause of action for abuse of process; the

second cause of action for malicious prosecution; the fourth cause of action for breach of fiduciary duty; the twelfth cause of action for unlawful suspension and denial of plaintiffs' due process rights; the thirteenth cause of action for unlawful search and the fourteenth cause of action alleging conspiracy to injure plaintiff's reputation (which also involves the same discussion evident in the seventh and eight causes of action). However, the Court believes that the remaining causes of action warrant further discussion.

The third cause of action is for injurious falsehood. The Court notes that this cause of action and its accompanying allegations are essentially the same as those contained in the seventh cause of action which alleges defamation of character. Since this cause of action was considered in conjunction with the seventh cause of action, the Court dismisses it, referring to and relying on the legal reasoning addressing the causes of action sounding in defamation.

The fifth cause of action for intentional infliction of emotional distress necessitates dismissal because "[p]ublic policy bars claims for intentional infliction of emotional distress against a governmental entity" (*Liranzo v. N.Y. City Health & Hosps. Corp.*, 300 A.D.2d 548 [2d Dept.2002]; see also *Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]).

Plaintiff's sixth cause of action for negligent infliction of emotional distress is also not cognizable since there is no indication of extreme or outrageous conduct which " [goes] beyond all possible bounds of decency," as is required to maintain such a claim (*Tartaro v. Allstate Indem. Co.*, 56 A.D.3d 758, 759 [2d Dept. 2008]).

Plaintiff's seventh cause of action for defamation of character also must be dismissed. Defamation is the injury to one's reputation, either by written expression (libel) or oral expression (slander) (see *Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 [1967]). To establish a cause

of action for defamation, plaintiff must establish the following elements: 1) a false statement on the part of defendants concerning the plaintiff(s); 2) published without privilege or authorization to a third party; 3) with the requisite level of fault on the part of defendants; and 4) causing damage to plaintiff(s) reputation by special harm or defamation per se (see *Restatement [Second] of Torts § 558*; *Dillon v. City of New York*, 261 A.D.2d at 38; *Salvatore v. Kumar*, 45 A.D.3d 560, 563 [2d Dept. 2007], *lv denied* 10 N.Y.3d 703 [2008]).

The complaint must set forth the particular words allegedly constituting the defamation (CPLR§ 3016[a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made (*Dillon v. City of New York*, 261 A.D.2d at 38). Statements are not considered defamatory if they did not subject plaintiff(s) "to the scorn and contempt of the community," (*Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250, 260 [1st Dept. 1995]) and a claim for defamation is defeated by a showing that the published statements are substantially true (*Newport Serv. & Leasing, Inc. v. Meadowbrook Distrib. Corp.*, 18 A.D.3d 454 [2d Dept. 2005]).

In the instant case, plaintiff alleges that "the defamatory statements made by Defendants contains language that constitutes slander and libel, and is actionable per se, without the need for proof of special loss of damage because the defamation falls into the category consisting of statements and/or allegations that impute that the minor committed a crime" (Motion, Exh. D, p. 55, ¶ 241). Plaintiff argues that because Justin has been labeled a "drug addict" and/or "drug dealer," he is "held up to ridicule and is shunned by his peers, teachers and school staff." (*Id.*). Plaintiff also alleges that Justin has been losing sleep and peace of mind, and has been under the care of a medical professional due to the patently false charges leveled against him. Indeed, while plaintiff asserts that

defendants made "false, injurious, malicious and defamatory statements" about and against Justin, she fails to specify what these alleged statements consisted of, or when and to whom they were made. Thus, this cause of action cannot stand.

The eighth cause of action is for libel and slander per se. "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value' " (*Rufeh v. Schwartz*, 50 A.D.3d 1002, 2003 [2d Dept. 2008]), quoting *Liberman v. Gelstein*, 80 N.Y.2d 429, 434-435 [1992]. "A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se" (*Rufeh v. Schwartz*, 50 A.D.3d at 1003). The four exceptions constituting "slander per se," are statements that (1) charge plaintiff with a serious crime; 2) tend to injure plaintiff in its business, trade or profession; 3) plaintiff has some loathsome disease; or 4) impute unchastity (*Liberman v. Gelstein*, 80 N.Y.2d at 435; see also *Harris v. Hirsh*, 228 A.D.2d 206 [1st Dept. 1996], *lv denied* 89 N.Y.2d 895 [1996]).

The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff (*Idema v. Wager*, 120 F. Supp. 2d 361 [S.D. .N.Y 2000]; *Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 2005 N.Y. Slip Op. (Sup Ct, New York County 2005)).

The aforementioned four exceptions constituting slander per se also apply to libel per se.

In the instant case, Justin was never charged with any crime, let alone a "serious" one. In attempting to support this cause of action, plaintiff again reiterates that defendants' conduct was willful and deliberate and caused Justin to suffer emotional distress. She alleges that the "defamatory statements remain in minor Plaintiff's permanent academic records and that the

defamatory statements ....are complete on its face and being in writing is more or less permanent and capable of broad dissemination" (id. p. 54,¶¶ 233-234). The Court finds this argument unavailing in that it is rife with speculation and again fails to state with any semblance of specificity what statements were made. The Court is also not convinced that information contained in a student's record will be broadly disseminated to those not authorized to have access to it. Therefore, the eight cause of action is dismissed.

The ninth cause of action is for negligence. To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach (see *Boltax v. Joy Day Camp*, 67 N.Y.2d 617 [1986]; *Hyatt v. Metro North Commuter R.R.*, 16 A.D.3d 218 [1st Dept. 2005]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 [2002]; *Asante v. JP Morgan Chase & Co.*, 93 A.D.3d 429, 430 [1st Dept. 2012], *lv denied* 19 N.Y.3d 813 [2012]).

In an effort to demonstrate this threshold factor, the injured party is required to show not only that the defendant owed a general duty to society but a specific duty to the injured party. Without a duty to the injured person, there can be no liability, however foreseeable the harm (*Lauer v. City of New York*, 95 N.Y.2d 95 [2000]). Plaintiff alleges that negligence arose "from Defendants duty and obligation to conform to a certain standard of conduct for the protection of the minor Plaintiff against unreasonable risks and Defendants breached that duty and that breach was the proximate cause of Plaintiff's injury...." (id. p.57, ¶ 253). Plaintiff also alleges that "Defendants breached a direct duty of care to the Plaintiffs which resulted in the minor Plaintiff being unreasonably placed in fear of

physical and emotional harm due to the events stated (id. p. 58, ¶ 256).

In the instant case, it is important to note that plaintiff consistently makes the same allegations and consistently references defendants' "malicious conduct" which caused Justin to suffer "emotional distress." However, she fails to proffer any evidence of irreparable harm to Jason. Her allegations that as a result of these incidents, he lost his ability to sleep, eat or concentrate, without more, is conclusory, self serving and insufficient to defeat this motion. Furthermore, in this cause of action, plaintiff alleges that defendants had a duty of care to plaintiff. The Court agrees and believes that the school has a duty of care to all of its students. It does not, however, believe any duty of care owed to Justin was breached.

The Court also finds that this cause of action was essentially premised on the rejected defamation theory, in that the facts alleged are inseparable from the tort of defamation. Indeed, a plaintiff cannot simply transpose a defamation claim into a contrived negligence claim or vice versa, (*Colon v. City of Rochester*, 307 A.D.2d 742 [4th Dept. 2003], *lv denied* 100 N.Y.2d 628 [2003]). "A defamation cause of action is not transformed into one for negligence merely by casting it as a negligence cause of action" (*Iafallo v. Nationwide Mut. Fire Ins. Co.*, 299 A.D.2d 925, 925 [4th Dept. 2002]). The Court is also convinced that in its attempt to determine whether Justine was selling and/or using any kind of drug, the school was exercising a necessary and expected duty of care. The reiterates that a student's expectation of privacy is balanced against a school's interest in keeping the school and its students free of illegal activity (Gregory M., 82 N.Y.2d at 593-594). Therefore, this cause of action is dismissed.

The tenth cause of action is for prima facie tort. Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort

provides a remedy. However, it does not exist to provide a catchall alternative to every cause of action which is not independently viable (see *Lancaster v. Town of E. Hampton*, 54 A.D.3d 906, 908 [2d Dept. 2008]; *Bassim v. Hassett*, 184 A.D.2d 908, 910 [3d Dept. 1992]; *Epifani v. Johnson*, 65 A.D.3d 224 2d Dept. 2009]).

The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; (4) by an act or series of acts which would otherwise be lawful (see *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 137 [1984]). To establish a sufficient claim sounding in prima facie tort, "the plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]" (*R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 A.D.3d 890, 896 [2d Dept. 2008]).

Plaintiff asserts "that Defendants engaged in a series of acts that were unlawful without justification or excuse with the knowledge that said series of acts would harm Plaintiffs and Defendants in reckless disregard continued said course of conduct that lacked justification or excuse and Plaintiffs were harmed....." (*id.* p. 59, ¶ 268). The Court finds that this cause of action also fails as a "catch-all alternative" for other unsupported tort claims because it cannot be "a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort" (*Freihofer v. Hearst Corp.*, 65 N.Y.2d at 142-143 [1985]). Once again, plaintiff merely reiterates the elements constituting prima facie tort without asserting sufficient facts to support this cause of action. Therefore, the tenth cause of action is dismissed.

Plaintiff's eleventh cause of action is for intentional tort, and alleges that "[d]efendants failed to follow proper procedures as stated in the Regulations of the Chancellor, that Defendants created and maintained the environment which resulted in injury to Plaintiffs and said environment was

continued by Defendants and exists in such a manner so as to constitute knowledge by the Defendants thereof" (*id.* p. 61, ¶¶ 274-275).

The Court sees no discernable "intentional tort" pled in this cause of action. Indeed, it seems that this cause of action is merely an extension of the tenth cause of action. Nevertheless, the Court finds the eleventh cause of action to be deficient on its face, necessitating dismissal.

Lastly, the plaintiff's complaint against Police Commissioner Kelly is also dismissed. By virtue of County Law § 54, made applicable to the counties within the City of New York by County Law § 941, the head of an agency may not be held personally liable for the actions or omissions of his subordinates. In the instant case, the municipality is the real party in interest, not Commissioner Kelly (see *Thomas v. Tarpley*, 268 A.D.2d 258, 258 [1st Dept. 2000].

In the case at bar, the Court finds that defendants' have made a prima facie entitlement to summary judgment. Indeed, plaintiff's failure to allege special damages with specific particularity resulted in her unequivocal failure to undermine defendants' prima facie case.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the City's motion for summary judgment is granted and the complaint and any cross-claims against it and the other named defendants are severed and dismissed as against them, and the Clerk is directed to enter judgment in favor of all the named defendants, dismissing the within action; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 30, 2013

ENTER:

OCT 30 2013

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT