

**Lerner v Friends of Mayanot Inst., Inc.**

2014 NY Slip Op 30278(U)

January 29, 2014

Supreme Court, New York County

Docket Number: 159038/2012

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ Justice

PART 13

AMANDA LERNER, Plaintiff, -against-

INDEX NO. 159038/12 MOTION DATE 01-15-14 MOTION SEQ. NO. 001 MOTION CAL. NO.

FRIENDS OF MAYANOT INSTITUTE, INC., MAYANOT INSTITUTE OF JEWISH STUDIES, and TANNENBAUM CHABAD HOUSE,

Defendants.

The following papers, numbered 1 to 8 were read on this motion to/for Dismiss Pursuant to CPLR §3211[a][5],[7],[8] :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that TANNENBAUM CHABAD HOUSE's motion pursuant to CPLR §3211 [a],[5], [7],[8] is granted only to the extent that the third cause of action asserted against it in the Amended Complaint is severed and dismissed. The remainder of the motion is denied.

Tannenbaum Chabad House (hereinafter referred to as "TCH"), seeks to dismiss the causes of action asserted against it in plaintiff's Amended Verified Complaint pursuant to CPLR §3211[a], [5], [7],[8].

Plaintiff alleges that on December 20, 2009, while on a trip to Israel, she was sexually assaulted at the King Solomon Hotel in Tiberias, Israel. At the time she was a 19 year old student attending Northwestern University in Evanston, Illinois. Plaintiff participated in the Taglit-Birthright Israel program which advertised on its website a "free" "peer education" trip to Israel for Jewish individuals that were 18-26 years old and had never previously been to the country. The website also advertised the trip as a "gift." but an e-mail sent to plaintiff explaining registration details, states that a "fully-refundable" deposit was required. Plaintiff obtained the consent of her parents to go on the trip based on their determination that it would be supervised by Rabbi Dov Klein of TCH at Northwestern University who was plaintiff's chaperone during the trip.

Plaintiff commenced an action on December 19, 2012, naming Friends of Mayanot Institute Inc., Mayanot Institute of Jewish Studies, and Fiedler Hillel at Northwestern University, asserting causes of action for negligence and negligent infliction of emotional distress for their failure to properly supervise and ensure her safety while on the tour. On April 30, 2013, plaintiff amended the summons and complaint without seeking leave of court, removing Fiedler Hillel at Northwestern University, naming Tannenbaum Chabad House as a defendant and adding a cause of action for breach of contract.

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

Pursuant to CPLR §3211[a][5], an action may be dismissed as it is time-barred because the statute of limitations has expired. Pursuant to CPLR §214, personal injury claims alleging negligent conduct have a three year statute of limitations (*Goldstein v. Massachusetts Mut. Life Ins. Co.*, 32 A.D. 3d 821, 820 N.Y.S. 2d 852 [N.Y.A.D. 2<sup>nd</sup> Dept., 2006]). Pursuant to CPLR §213 [2], a cause of action for breach of contract has a six year statute of limitations (*Adrian v. Canuso*, 28 A.D. 3d 691, 814 N.Y.S. 2d 668 [N.Y.A.D. 2<sup>nd</sup> Dept., 2006]).

In those instances where the statute of limitations has run as to non-parties, they can still be joined to the action. Pursuant to the relation back doctrine, a determination by the Court that non-parties are united in interest with a party that was timely served will result in joinder. The plaintiff under the relation back doctrine is required to establish, “...(1) both claims arose out of the same conduct, transaction or occurrence (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the proper parties, the action would have been brought against him as well.” (*Buran v. Coupal*, 87 N.Y. 2d 173, 661 N.E. 2d 978, 638 N.Y.S. 2d 405 [1995]).

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

The plaintiff asserting a cause of action for the negligent infliction of emotional distress is required to establish a breach of a duty owed directly to the plaintiff that, “...either unreasonably endangers the plaintiff’s physical safety or causes the plaintiff to fear for his or her own safety.” (*DaLuise v. Sottile*, 40 A.D. 3d 801, 837 N.Y.S. 2d 175 [N.Y.A.D. 2<sup>nd</sup> Dept., 2007]).

To establish a breach of contract claim, a party must allege, “(1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages”( *Oppman v. IRMC Holdings, Inc.*, 14 Misc. 3d 1219(A), 836 N.Y.S.2d 494 [N.Y. Sup. Ct., 2007] citing to *Noise in the Attic Productions, Inc. v. London Records*, 10 A.D. 3d 303, 782 N.Y.S. 2d 1 [N.Y.A.D. 1<sup>st</sup> Dept., 2004] ). A valid enforceable written contract governing a specific subject matter prevents recovery events arising out of the same subject matter. In the absence of an express agreement, the relief sought is in “quasi contract” which is not actually a contract but an obligation...” (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y. 2d 382, 516 N.E. 2d 190, 521 N.Y.S. 2d 653 [1987]).

A motion to dismiss pursuant to CPLR §3211[a][8], is based on lack of jurisdiction over the defendant. The plaintiff is only required to demonstrate that there are facts that may exist to establish there is personal jurisdiction (*Peterson v. Spartan Industries*, 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974] and *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D. 3d 986, 845 N.Y.S. 2d 797 [N.Y.A.D. 2<sup>nd</sup> Dept., 2007]).

Pursuant to CPLR §302[a][1], long-arm jurisdiction over a nondomiciliary corporation exists, when in person or through an agent it, “transacts business within the state or contracts anywhere to supply goods or services in the state.” A determination of whether CPLR §302, long-arm jurisdiction exists, is based on a two-prong test

establishing, “(i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business...” (Johnson v. Ward, 4 N.Y. 3d 516, 829 N.E. 2d 1201, 797 N.Y.S. 2d 33 [2005]).

TCH contends that the first and second causes of action asserted against it in the Amended Verified Complaint are barred by the statute of limitations. TCH also contends that the relation back doctrine does not apply because there is no unity in interest with the co-defendants and plaintiff cannot establish excusable mistake. TCH seeks to dismiss the second and third causes of action asserted against it in the Amended Complaint pursuant to CPLR §3211[a][7], for failure to properly state causes of action. TCH also seeks to dismiss the Amended Complaint pursuant to CPLR 3211[a][8], for plaintiff’s failure to obtain personal jurisdiction.

TCH provides the affidavits of Rabbi Dov Klein, its Director and President, he states that prior to service of the summons and complaint TCH did not have notice of the pending action. He claims that as a chaperone on plaintiff’s trip, he only acted on his own behalf and not as a representative of TCH, which did not participate in the trip or any related tours. Rabbi Klein also claims that TCH did not participate in the organization, or creation of rules and restrictions for the tour, and there was no contractual relationship between TCH and the co-defendants, or the plaintiff. TCH contends that plaintiff did not obtain personal jurisdiction over it because there are no minimum contacts and it has not transacted any business within New York.

Plaintiff opposes the motion contending that TCH is united in interest with the co-defendants. She claims that she was solicited to travel through the TCH server, the TCH website has a link to the co-defendant’s website, Rabbi Dov Klein was described as organizing the trip through TCH at Northwestern and was her chaperone. Plaintiff claims that the failure to initially name TCH was based merely on a mistake and not neglect. Plaintiff contends that she has sufficiently stated her causes of action for intentional infliction of emotional distress because TCH was responsible for her physical safety. Plaintiff also claims that TCH is liable for breach of contract because it acted as an agent on behalf of the co-defendants and the payment of the non-refundable deposit constituted her performance under the contract. Plaintiff contends that jurisdiction was obtained over TCH because it committed a tort outside of the state of New York that caused injury to a New York resident. She also contends that there are minimum contacts with New York State since the trip originated in New York not Illinois and TCH partnered with a New York based organization. Plaintiff claims that further discovery is needed to determine the extent of TCH’s minimum contacts with New York.


This Court finds that TCH has not established a basis to dismiss this action against it. Although the statute of limitations has expired as to the first and second causes of action for negligence and negligent infliction of emotional distress, plaintiff has established potential unity of interest between TCH and the co-defendants. TCH has provided links to the co-defendants website, and TCH through Rabbi Dov Klein openly solicited students to participate in the program. The failure to name TCH as a defendant in the initial Summons and Verified Complaint, was excusable error. Defendants have pursuant to CPLR §3211[a][7] stated a basis to dismiss the third cause of action for breach of contract. Plaintiff has not established the terms of a contract or that one exists between herself and TCH related to the trip to Israel. Plaintiff has stated potential facts that may exist to establish there is personal jurisdiction over TCH requiring discovery based on her claims of injury and potential minimum contacts with New York.

Accordingly, it is ORDERED that TANNENBAUM CHABAD HOUSE's motion to dismiss the Amended Summons and Amended Verified Complaint pursuant to CPLR §3211[a] [5],[7],[8] is granted, only to the extent that the third cause of action for breach of contract asserted against TANNENBAUM CHABAD HOUSE in the Amended Complaint is severed and dismissed, and it is further,

ORDERED that the remainder of the motion is denied, and it is further,

ORDERED that, TANNENBAUM CHABAD HOUSE, shall within twenty days from the date of service of a copy of this Order with Notice of Entry, serve and file an Answer on all parties and the Clerk of this Court.

ENTER:

  
\_\_\_\_\_  
MANUEL J. MENDEZ,  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Dated: January 29, 2014

Check one:  FINAL DISPOSITION    X    NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE