

**Cheslowitz v Board of Trustees of the Knox Sch.**

2015 NY Slip Op 30642(U)

April 14, 2015

Supreme Court, Suffolk County

Docket Number: 13-61353

Judge: W. Gerard Asher

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and in his official capacity, JAMIE ISAACS ANTI-BULLYING FOUNDATION, ANNE ISAACS, Individually and in her official capacity, RON ISAACS, Individually and in his official capacity, HARRIET ARONOW, LEON BOODMAN, and "HAROLD JOSE MOSER V",

Defendants.

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Upon the following papers numbered 1 to 32 read on these motions to dismiss the complaint and to preclude evidence at trial; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 15; 16 - 24; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 25 - 26; 27 - 28; Replying Affidavits and supporting papers 29 - 30; 31 - 32; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (# 002) by defendants the Board of Trustees of the Knox School, the Knox School, Frank Cassano, Stuart Guthrie, Thad Gaebelin, Elektra Gaebelin, Sonia Rodriguez, Janice Zingale, George J. Naron, Sharon Lawrence, Duncan L. Marshall and Debbie Moore, the motion (# 003) by defendant Jennifer Stowell, and the motion (# 004) by defendant Harriet Aronow are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion (# 002) by defendants the Board of Trustees of the Knox School, the Knox School, Frank Cassano, Stuart Guthrie, Thad Gaebelin, Elektra Gaebelin, Sonia Rodriguez, Janice Zingale, George J. Naron, Sharon Lawrence, Duncan L. Marshall and Debbie Moore for an order pursuant to CPLR 3211 (a)(5) dismissing the complaint as asserted against them is granted, and the complaint against them is dismissed; and it is further

**ORDERED** that the motion (# 003) by defendant Jennifer Stowell for an order pursuant to CPLR 3211 (a)(7) dismissing the first, second, fourth, fifth and sixth causes of action as asserted against her is granted, and the complaint against her is dismissed.

**ORDERED** that the unopposed motion (# 004) by defendant Harriet Aronow for an order precluding the plaintiffs from offering evidence at the trial of this action is denied as moot.

Plaintiffs commenced this plenary action sounding in fraud, negligence, infliction of emotional distress, breach of contract, defamation and malicious prosecution against the defendants, including the Knox School and its board of trustees and faculty members, seeking an award of compensatory and punitive damages. The plaintiffs' claims arise out of infant plaintiff Austin Cheslowitz's tenure as a student of the Knox School from the Spring 2011 through his suspension and later withdrawal in the Fall 2012. It is undisputed that plaintiff Scott Cheslowitz, father of Austin Cheslowitz, signed an enrollment agreement each year that the infant plaintiff was a student at the Knox School. The agreement had a binding arbitration provision requiring all claims arising out of the agreement or attendance at the school be decided by arbitration in accordance with the American Arbitration Association. On the demand of

Scott Cheslowitz, the parties proceeded to arbitration. On March 25, 2014, the arbitrator rendered a decision and award in favor of the Knox School, denying Scott Cheslowitz's claim for return of tuition monies paid.

In their complaint, the plaintiffs allege that although defendant Duncan L. Marshall represented to Scott Cheslowitz that he believed Austin could thrive at the Knox School, the school's employees continuously bullied Austin and singled him out. They allege Austin was suspended for getting into an argument, yet another student involved in drug use was not suspended. The plaintiffs also allege that defendant Jennifer Stowell, a former instructor in the equestrian program at the Knox School, maintained an inappropriate relationship with Austin, which continued after her termination from the school, that she exchanged many text messages with him, and that "[a]s a result of the mistreatment, bullying and inappropriate relationship at the hands of the Knox School and its employees and/or agents, Scott withdrew Austin from the school, for his own safety, and demanded a refund of the tuition." However, the Knox School refused to refund any tuition.

Defendant Jennifer Stowell moves (# 003) for an order pursuant to CPLR 3211 (a) (7) dismissing the first, second, fourth, fifth and sixth causes of action as asserted against her.

Under CPLR 3211 (a)(7), the Court is limited to examining the pleading to determine whether it states a cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*see Pacific Carlton Dev. Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, initially the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see Leon v Martinez, supra; International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*see Guggenheimer v Ginzburg, supra*).

#### The First and Second Causes of Action: Fraud and Misrepresentation

The first cause of action alleges that "false and fraudulent representations" were made to plaintiffs to "act in the manner herein alleged." The second cause of action alleges that although all the defendants including Stowell promised plaintiffs that an unnamed "fund" would be used to further infant plaintiff's education and help bullied students, defendants did not intend to perform the promises. The plaintiffs' claims of fraud and fraudulent misrepresentation are not pleaded with the requisite particularity under CPLR 3016 (b). The essential elements of an action seeking damages for actual fraud are a representation or an omission as to a material fact made by the defendant that was false and known to be false, made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance by the plaintiff on the misrepresentation or material omission, and injury suffered as a result of such reliance (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 646 NYS2d 76; *Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 930 NYS2d 619 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; *Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d

877, 815 NYS2d 265 [2d Dept 2006]). A plaintiff claiming fraud based on misrepresentation must demonstrate that the misrepresentation was of an existing fact, that it actually relied on the misrepresentation, and that such reliance was reasonable (see *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445; *Regina v Marotta*, 67 AD3d 766, 887 NYS2d 861 [2d Dept 2009]; *International Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; *Fitch v TMF Sys.*, 272 AD2d 775, 707 NYS2d 539 [2d Dept 2000]). CPLR 3016 (b) further requires that the circumstances of the fraud must be stated in detail, including specific dates and factual allegations establishing the elements of fraud (see *Eurycleia Partners, LP v Seward & Kissle, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]; *Gregor v Rossi*, 120 AD3d 447, 992 NYS2d 17 [1st Dept 2014]). Here, the plaintiffs failed to allege specific facts with respect to the time, place, or manner in which all the defendants including Stowell made the false misrepresentations (see *Gregor v Rossi*, *supra*; *Riverbay Corp. v Thyssenkrupp Northern Elevator Corp.*, 116 AD3d 487, 984 NYS2d 14 [1st Dept 2014]). Thus, the first and second causes of action as asserted against all the defendants are dismissed.

#### The Fourth Causes of Action: Negligence

The fourth cause of action alleges that “defendants were negligent, careless and reckless in their treatment, conduct and actions towards plaintiffs.” To state a cause of action in negligence, a party must allege the existence of a duty of care owed to the injured party, a breach of that duty, and an injury proximately caused by that breach (see *Merchants Mut. Ins. Co. v Quality Signs of Middletown*, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013]; *Jiminez v Shahid*, 83 AD3d 900, 922 NYS2d 123 [2d Dept 2011]; *Ruiz v Griffin*, 71 AD3d 1112, 1114, 898 NYS2d 590 [2d Dept 2010]). Here, while the plaintiffs allege in the complaint that defendant Stowell exchanged many text messages with Austin, and that she had an “inappropriate relationship” with Austin, the plaintiffs failed to explain in sufficient detail the nature of the relationship, and the complaint does not allege how defendant Stowell breached a duty of care owed to the infant plaintiff and the injury caused by such breach. Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Baron v Galasso*, 83 AD3d 626, 628, 921 NYS2d 100 [2d Dept 2011]; *Riback v Margulis*, 43 AD3d 1023, 842 NYS2d 54 [2d Dept 2007]), nor are legal conclusions or factual claims which are inherently incredible (see *Aqua NY of Sea Cliff v Buckeye Pipeline Co., L.P.*, 119 AD3d 829, 989 NYS2d 373 [2d Dept 2014]; *Greene v Doral Conference Ctr. Assocs.*, 18 AD3d 429, 430 NYS2d 252 [2d Dept 2005]). Thus, the fourth cause of action as asserted against defendant Stowell is dismissed.

#### The Fifth and Sixth Causes of Action: Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

The fifth cause of action alleges that the conduct of all the defendants, including Stowell, was so “extreme and outrageous” as to have “caused plaintiffs severe emotional distress.” The sixth cause of action alleges that certain negligent conduct on the part of all the defendants, including Stowell, caused plaintiffs severe emotional distress. In order to state a cause of action to recover damages for intentional infliction of emotional distress, the complaint must allege conduct that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and was utterly intolerable in a civilized community (see *Borawski v Abulafia*, 117 AD3d 662, 985 NYS2d 284 [2d Dept 2014];

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*Baumann v Hanover Community Bank*, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]). The existence of extreme and outrageous conduct is also a necessary element for a claim of negligent infliction of emotional distress (see *Lau v S&M Enterprises*, 72 AD3d 497, 898 NYS2d 42 [1st Dept 2010]; *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 799 NYS2d 452 [1st Dept 2005]). Further, such extreme and outrageous conduct must be clearly alleged for the pleading to survive dismissal (see *Dillon v City of New York*, 261 AD2d 34, 39, 704 NYS2d 1 [1st Dept 1999]). Here, as discussed above, the plaintiffs allege that defendant Stowell exchanged text messages and had an “inappropriate relationship” with Austin, without explanation in sufficient detail. The Court concludes the plaintiffs’ allegations do not rise to the level of the requirement of “extreme or outrageous” conduct as the complaint does not detail any conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and utterly intolerable in a civilized community. Thus, the fifth and sixth causes of action as asserted against defendant Stowell are dismissed.

Defendants the Board of Trustees of the Knox School, the Knox School, Frank Cassano, Stuart Guthrie, Thad Gaebelein, Elektra Gaebelein, Sonia Rodriguez, Janice Zingale, George J. Naron, Sharon Lawrence, Duncan L. Marshall and Debbie Moore (“School defendants”) move (# 002) for an order pursuant to CPLR 3211 (a)(5) dismissing the complaint as asserted against them on the ground that this action should have been brought pursuant to CPLR article 78 and is therefore time-barred by the four-month statute of limitations.

#### The First and Second Causes of Action: Fraud and Misrepresentation

Since those causes of action to recover damages for fraud and misrepresentation relate to nonacademic matters, these claims are not limited to article 78 review. However, as discussed above, the first and second causes of action as asserted against the School defendants are dismissed on the ground that they are not pleaded with the requisite particularity under CPLR 3016 (b).

#### The Third Cause of Action: Breach of Contract

The third cause of action alleges that plaintiffs entered into a binding contract wherein the Knox School agreed to provide a quality education to the infant plaintiff in exchange for tuition. It is alleged that the school breached said contract by failing to provide educational instruction to the infant plaintiff, repeatedly causing and forcing the infant plaintiff to miss school, and refusing to refund any portion of the tuition payments, despite the infant plaintiff’s enrollment having been terminated. Here, the School defendants have established that they are entitled to the benefit of collateral estoppel because the nature of the claim in this plenary action is the same as in the subject arbitration. The doctrines of res judicata and collateral estoppel apply to arbitration awards with the same force and effect as they apply to judgments of a court (see *Diorio v Ossining Union Free Sch. Dist.*, 96 AD3d 710, 946 NYS2d 195 [2d Dept 2012]; *Mahler v Campagna*, 60 AD3d 1009, 876 NYS2d 143 [2d Dept 2009]; *QDR Consultants & Dev. Corp. v. Colonia Ins. Co.*, 251 AD2d 641, 642, 675 NYS2d 117 [2d Dept 1998]). Thus, the third cause of action as asserted against the School defendants is dismissed.

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#### The Fourth Cause of Action: Negligence

To state a cause of action in negligence, a party must allege the existence of a duty of care owed to the injured party, a breach of that duty, and an injury proximately caused by that breach (*see Merchants Mut. Ins. Co. v Quality Signs of Middletown, supra; Jiminez v Shahid, supra; Ruiz v Griffin, supra*). While the plaintiffs allege in the complaint that they suffered severe physical as well as emotional damages, the complaint fails to allege any conduct of the School defendants which caused physical damages to the plaintiffs. The Court concludes that the complaint fails to allege any breach of duty on the part of the School defendants, causing physical damages to the plaintiffs. Thus, the fourth cause of action as asserted against the School defendants is dismissed.

#### The Fifth Cause of Action: Intentional Infliction of Emotional Distress

In the complaint, the plaintiffs allege that defendant Guthrie continuously bullied Austin, that defendant Naron threatened to call the police on Austin for befriending a female student, that defendant Cassano threw all of Austin's laundry out of a window, that defendant Rodriguez had Austin suspended for cursing while on a bus, and that defendants Thad Gaebelein and Naron had Austin suspended for a week for throwing a shoe at someone. In order to state a cause of action to recover damages for intentional infliction of emotional distress, the complaint must allege conduct that was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and was utterly intolerable in a civilized community (*see Borawski v Abulafia, supra; Baumann v Hanover Community Bank, supra*). Here, the plaintiffs' allegations did not detail any conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and utterly intolerable in a civilized community (*see Rodgers v City of New York*, 106 AD3d 1068, 966 NYS2d 466 [2d Dept 2013]). Thus, the fifth cause of action as asserted against the School defendants is dismissed.

#### The Sixth Cause of Action: Negligent Infliction of Emotional Distress

The sixth cause of action seeking to recover damages for "negligent infliction of emotional distress" is in actuality a cause of action sounding in educational malpractice, which is not cognizable in New York (*see id.; Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 899, 911 NYS2d 442 [2d Dept 2010]; *McGovern v Nassau County Dept. of Social Servs.*, 60 AD3d 1016, 876 NYS2d 141 [2d Dept 2009]). Thus, the sixth cause of action is dismissed.

#### The Seventh, Eighth and Ninth Causes of Action: Negligent Hiring, Negligent Supervision, and Negligent Retention

The seventh, eighth and ninth causes of action allege that the Board of Trustees and the Knox School were negligent in failing to properly hire, supervise and retain teachers, administrators, deans and headmasters. To the extent plaintiffs allege that the negligent administration of the Board of Trustees and the Knox School caused infant plaintiff's nervous breakdown, that is a separate issue from academic matters. However, there is no cause of action in New York for educational malpractice, which is the gist of these claims (*see Kickertz v New York Univ., supra; Introna v Huntington Learning Ctrs., Inc., supra; McGovern v Nassau County Dept. of Social Servs., supra*). Thus, the seventh, eighth and ninth causes of action are dismissed.

### The Tenth and Eleventh Causes of Action: Libel and Slander

The tenth and eleventh causes of action for libel and slander are asserted only against defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman. Since these causes of action are asserted only against the aforementioned defendants, none of whom were employed by or related to the school, the tenth and eleventh causes of action as asserted against the School defendants are dismissed. Moreover, the complaint fails to allege any libelous writings or slanderous statements were published by defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman. It is well settled that a cause of action for libel requires publication of a defamatory statement (*see El Jamal v Weil*, 116 AD3d 732, 986 NYS2d 146 [2d Dept 2014]; *Baker v Inamdar*, 99 AD3d 742, 952 NYS2d 208 [2d Dept 2012]; *Barber v Daly*, 185 AD2d 567, 586 NYS2d 398 [3d Dept 1992]). Thus, the tenth and eleventh causes of action as asserted against defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman are dismissed by the court, *sua sponte*.

### The Twelfth Cause of Action: Malicious Prosecution

The twelfth cause of action for malicious prosecution is asserted only against defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman. Since this cause of action is asserted only against the aforementioned defendants, none of whom were employed by or related to the school, the twelfth cause of action as asserted against the School defendants is dismissed. Moreover, the complaint fails to allege any criminal proceeding was initiated by defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman against the plaintiffs. To prevail on a malicious prosecution claim, a plaintiff has a “heavy burden” (*see Smith-Hunter v Harvey*, 95 NY2d 191, 712 NYS2d 438 [2000]), and must establish the following four elements: “(1) the initiation of a criminal proceeding by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) malice” (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 746 NYS2d 141 [1st Dept 2002]; *see Moorhouse v The Standard, New York*, 124 AD3d 1, 997 NYS2d 127 [1st Dept 2014]). A plaintiff’s failure to prove any one of these elements will defeat the entire claim (*see Moorhouse v The Standard, New York, supra*; *Brown v Sears Roebuck & Co., supra*). Thus, the twelfth cause of action as asserted against defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman is dismissed by the court, *sua sponte*.

In view of the foregoing, the School defendants’ motion for an order dismissing the complaint as asserted against them is granted, and the complaint against them is dismissed. Defendant Stowell’s motion for an order dismissing the first, second, fourth, fifth and sixth causes of action as asserted against her is granted, and the complaint against her is dismissed. Moreover, the Court, *sua sponte*, dismisses the tenth, eleventh and twelfth causes of action as asserted against defendants Ane Isaacs, Ron Isaacs, Harriet Aronow and Leon Boodman. Furthermore, the first, second, fourth, fifth and sixth causes of action asserted against defendants Domenik Veraldi, Jamie Isaacs Anti-Bullying Foundation, and “Harold Jose Moser V” failed to state causes of action against them, and thus, the complaint as asserted against them is dismissed by the court, *sua sponte*.

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Finally, the motion (# 004) by defendant Harriet Aronow for an order precluding the plaintiffs from presenting evidence at trial for failing to respond to her demands for a bill of particulars and disclosure is denied as moot, since the complaint is dismissed.

Dated: April 14, 2015

W. Gerard Ashe  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION

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