Renu Contr. & Restoration, Inc. v Lawrence Union Free Sch. Dist.
2015 NY Slip Op 32665(U)
March 26, 2015
Supreme Court, Nassau County
Docket Number: 601761/13
Judge: Antonio I. Brandveen
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

RENU CONTRACTING & RESTORATION, INC.,

Plaintiff,

- against -

THE LAWRENCE UNION FREE SCHOOL DISTRICT, ASHER MANSDORF, individually and in his capacity as Former President and current Trustee of the Board of Education, MURRAY FORMAN, individually and in his capacity as former Vice President and current Trustee of the Board of Education, DAVID SUSSMAN, individually and in his capacity as Trustee and current President of the Board of Education, SOLOMON BLISKO, individually and in his capacity as former Trustee of the Board of Education, URI KAUFMAN, individually and in his capacity as current Trustee of the Board of Education, NAHUM MARCUS, individually and in his capacity as former Trustee of the Board of Education, ABEL FELDHAMER, individually and in his capacity as Trustee and current Vice President of the Board of Education, TOVA PLAUT, individually and in her capacity as current Trustee of the Board of education, and MICHAEL HATTEN, individually and in his capacity as current Trustee of the Board of Education,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 601761/13

Motion Sequence No. 004, 005, 006, 007

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2, 3, 4
Answering Affidavits 5, 6, 7
Replying Affidavits 8, 9

Briefs: Plaintiff's / Petitioner's 10, 11
Defendant's / Respondent's 12, 13

The plaintiff moves by order to show cause (Sequence #004) for an order striking the defendants' answer as a result of their willful contumacious failure to respond to discovery and comply with court orders. The plaintiff also seeks an award of all costs and fees, including but not limited to attorneys' fees, relating to the plaintiff's motion practice as a result of the defendants' discovery malfeasance.

The defendants move by order to show cause (Sequence #005) pursuant to CPLR 3211(a)(7) to dismiss the verified complaint against the individual natural defendants based on the doctrine of governmental immunity. The defendants also move to dismiss the fourth cause of action against all defendants for failure to plead with specificity as required by CPLR 3016(b).

The defendants move (Sequence #006) pursuant to CPLR 3103(a) for a protective order vacating, denying, limiting, conditioning or regulating the 12 improper notices of deposition served on the individual trustee defendants.

The plaintiff cross moves (Sequence #007) for an order denying the defendants' motion. The plaintiff also seeks an order granting the plaintiff's cross motion for sanctions pursuant to 22 NYCRR § 130-1.1 because the defendants' motion and conduct are frivolous.

Each side responds to the relief sought by the opposing parties. And, memoranda

of law are presented with respect to the issues raised.

It is alleged the Lawrence High School, owned and operated by the Lawrence Union Free School District, suffered extensive damage from Super Storm Sandy, and the School District sought the plaintiff to perform necessary repairs at the Lawrence High School. The plaintiff asserts it performed that work more than six months, and contends the School District owes approximately $4.5 million for that work, but has wrongfully withheld payment despite the plaintiff's performance. There appears to be no written contract. The defendants Michael J. Hatten and Abel Feldhamer testified, respectively on December 3 and 12, 2014, at depositions regarding this matter. Hatten is a current trustee member of the Board of Education and Feldhamer is the current vice president and trustee for the defendant Lawrence Union Free School District.

CPLR 3101(a) provides: "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The supervision of disclosure is left generally to the broad discretion of the Court balancing the parties' competing interests, and unlimited disclosure is not required (CPLR 3101(a); ***Palermo Mason Constr. v. Aark Holding Corp.***, 300 A.D.2d 460, 751 N.Y.S.2d 599). The law provides a Court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). Here, there is an insufficient showing by the plaintiff that the

defendants' conduct was willful and contumacious, rather the defendants show they have substantially complied with disclosure (***see Wadolowski v. Cohen***, 99 A.D.3d 793).

> A municipality, in the first instance, has the right to determine which of its officers or employees with knowledge of the facts may appear for a deposition (***see Pomilio–Young v. City of New York***, 7 A.D.3d 600, 775 N.Y.S.2d 906; ***Del Rosa v. City of New York***, 304 A.D.2d 786, 757 N.Y.S.2d 805; ***D & S Realty Dev. v. Town of Huntington***, 295 A.D.2d 306, 307, 743 N.Y.S.2d 147). The plaintiff may demand the production of additional witnesses upon a showing that (1) the representative already deposed had insufficient knowledge or was otherwise inadequate, and (2) there is a substantial likelihood that the person sought for deposition possesses information which is material and necessary to the prosecution of the case (***see Del Rosa v. City of New York***, 304 A.D.2d 786, 757 N.Y.S.2d 805; ***Zollner v. City of New York***, 204 A.D.2d 626, 627, 612 N.Y.S.2d 627; ***Simon v. Advance Equipment Co.***, 126 A.D.2d 632, 511 N.Y.S.2d 68)

Douglas v. New York City Transit Authority, 48 A.D.3d 615, 616.

Here, the plaintiff served all of the defendants seeking to depose each of the individual defendants, two employees of the School District and a third-party unknown to the defendants. The notices of depositions are defective to the extent the plaintiff seeks to designate individual School District employees and to depose two School District employees because the School District may initially appear at a deposition by an individual of its own choice with knowledge of the facts. The plaintiff has not made a showing that the two trustees already deposed or a person designated by the School District has insufficient knowledge or was otherwise inadequate, and that there is a substantial likelihood that the person sought for deposition possesses information which is material and necessary to the prosecution of the case.

"Government action, if discretionary, may not be a basis for liability, while

> ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (***McLean v. City of New York***, 12 N.Y.3d 194, 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167). A special duty is "a duty to exercise reasonable care toward the plaintiff," and is "born of a special relationship between the plaintiff and the governmental entity" (***id.*** at 199, 878 N.Y.S.2d 238, 905 N.E.2d 1167 [internal quotation marks omitted]; ***see Pelaez v. Seide***, 2 N.Y.3d 186, 198–199, 778 N.Y.S.2d 111, 810 N.E.2d 393). This special relationship "can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (***Pelaez v. Seide***, 2 N.Y.3d at 199–200, 778 N.Y.S.2d 111, 810 N.E.2d 393; ***see McLean v. City of New York***, 12 N.Y.3d at 199, 878 N.Y.S.2d 238, 905 N.E.2d 1167)

Tara N.P. (Anonymous) v. Western Suffolk Bd. of Co-op. Educational Services, 120 A.D.3d 1323, 1325.

"In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Webb v. Greater New York Auto. Dealers Ass'n, Inc.***, 123 A.D.3d 1111). This Court considered the parties' submissions in evaluating the defense motion to dismiss the verified complaint against the individual natural defendants based on the doctrine of governmental immunity. This Court determines the defendants establish, *prima facie*, the natural defendants in their individual capacities entitled to judgment as a matter of law dismissing the verified complaint against them on the ground of governmental immunity by demonstrating that they did not voluntarily assume a special duty to the plaintiff (***see Sposato v. Village of Pelham***, 275 A.D.2d 364). In

opposition, the plaintiff fails to sufficiently plead a cause of action against the natural defendants individually by not showing an exception to governmental immunity afforded the individual natural defendants (***see generally Hephzibah v. City of New York***, 124 A.D.3d 442). The natural individual defendants' decision not to appropriate public funds to pay alleged contractual or quasi-contractual obligations is discretionary (***Cristo Bros. v Troy Urban Renewal Agency***, 116 A.D.2d 793).

> "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages." "All of the elements of a fraud claim 'must be supported by factual allegations containing the details constituting the wrong' in order to satisfy the pleading requirements of CPLR 3016(b)." In certain circumstances, however, it may be "almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party." "Under such circumstances, the heightened pleading requirements of CPLR 3016(b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme" [citations omitted]

JP Morgan Chase Bank, N.A. v. Hall, 122 A.D.3d 576, 579-580.

Here, accepting all facts alleged as true, the verified complaint contains sufficient allegations of fact regarding the plaintiff's allegations in the fourth cause of action.

> A court may impose financial sanctions upon a party or attorney who engages in "frivolous conduct." Conduct is frivolous if "it is completely without merit in law" or fact and "cannot be support by a[ny] reasonable argument for an extension, modification or reversal of existing law." Sanctions may be warranted where the party's arguments are belied by the record, and are completely without merit in law or fact [citations omitted]

Weissman v. Weissman, 116 A.D.3d 848, 849.

Contrary to the plaintiff's assertions, this Court determines the defendants and their attorneys are in substantial compliance with the rules governing attorney conduct in this action. The conduct of the defendants and their attorneys is not frivolous. Their conduct has not been shown to be completely without merit in law or fact or unsupported by reasonable argument for an extension, modification or reversal of existing law. Under these circumstances, a hearing is not required because the plaintiff's papers are insufficient to warrant it (22 NYCRR § 130–1.1[d]; ***Tso-Horiuchi v. Horiuchi***, 122 A.D.3d 918).

ORDERED that the branch of the plaintiff's motion (Sequence #004) is DENIED for an order striking the defendants' answer as a result of their willful contumacious failure to respond to discovery and comply with court orders, and it is also,

ORDERED that the branch of the plaintiff's motion (Sequence #004) is DENIED seeking an order of an award of all costs and fees, including but not limited to attorneys' fees, relating to the plaintiff's motion practice as a result of the defendants' discovery malfeasance, and it is also,

ORDERED that the branch of the defendants' motion (Sequence #005) is GRANTED pursuant to CPLR 3211(a)(7) to dismiss the verified complaint against the natural defendants in their individual personal capacities based on the doctrine of governmental immunity, and it is also,

ORDERED that the branch of the defendants' motion (Sequence #005) is DENIED seeking to dismiss the fourth cause of action against all defendants for failure to plead with specificity as required by CPLR 3016(b), and it is also,

ORDERED that the branch of the defendants' motion (Sequence #006) is GRANTED pursuant to CPLR 3103(a) for a protective order vacating the 12 improper notices of deposition served on the individual trustee defendants in their personal capacities, and it is also,

ORDERED that the branch of the plaintiff's cross motion (Sequence #007) is DENIED for an order denying the defendants' motion, and it is further,

ORDERED that the branch of the plaintiff's cross motion (Sequence #007) is DENIED for an order granting the plaintiff's cross motion for sanctions pursuant to 22 NYCRR § 130-1.1 because the defendants' motion and conduct are frivolous.

So ordered.

Dated: **March 26, 2015**

ENTER:

J. S. C.

NON FINAL DISPOSITION