Laviano v Bonafede
2015 NY Slip Op 32761(U)
February 9, 2015
Supreme Court, Nassau County
Docket Number: 600405/14
Judge: Daniel R. Palmieri

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

----------X TRIAL/IAS PART 20

MICHAEL THOMAS LAVIANO, and infant under the age of 18 by his father and natural guardian, THOMAS LAVIANO and THOMAS LAVIANO, individually,

Plaintiffs,

- against -

SAMUEL BONAFEDE, by and through his father and natural guardian, JOSEPH BONAFEDE, ROBERT SPERANZA, LISA SPERANZA, JOSEPH BONAFEDE and MARY BONAFEDE,

Defendants.

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Mot. Seq. #001
Mot. Seq. #002
Mot. Date: 10-22-14
Submit Date: 1-30-15

The following papers were read on this motion:

Notice of Motion, dated 10-2-14.....(Mot. Seq. #001).....1
Notice of Motion, dated 10-8-14.....(Mot. Seq. #002).....2
Notice of Cross Motion, dated 12-18-14.....3
Reply Affirmation in Support, dated 1-20-15.....4
Reply Affirmation, dated 1-23-15.....5

The motions of the defendants (Seqs. 1 and 2) to amend their answer asserting new affirmative defenses and counterclaims are denied.

The cross motion of plaintiffs (no Seq. Number) to vacate this Court's stipulated Conference Order (Conference Order) dated November 24, 2014, for a protective order and for other relief is denied.

This action, commenced January 2014, arises out of an incident that took place in September 2013 at a social gathering in defendants' (Speranza) home in which it is alleged that

during an altercation defendant Samuel Bonafede struck and injured the infant plaintiff. In March 2014 the defendants each served extensive answers containing numerous affirmative defenses and cross claims. On these motions the defendants seek to add counterclaims against plaintiff Thomas Laviano, the father of the infant plaintiff which include allegations that the infant plaintiff had been, with the knowledge and consent of his father, consuming and had been provided with alcoholic beverages, that the father knew of and failed to control his son's violent propensities and that Michael's father, Thomas, served alcohol to his plaintiff son prior to the latter's attendance at the Speranza house party.

The motions of defendants' are made by attorneys on "information and belief" and contain not a shred of evidence or fact to support the claims of intoxication, service of alcohol by Thomas to Michael or Thomas' known propensities for violence. Also, lacking is any citation to legal authority as to the efficacy of such claims.

Plaintiffs' cross motion seeks to vacate the Conference Order in which plaintiffs' counsel agreed to provide authorizations for plaintiffs social media accounts. By stipulation dated September 17, 2014, plaintiffs agreed to respond to the demand by Bonafede for social media information and in an undated response plaintiff objected to providing such information. However, thereafter, pursuant to the Conference Order plaintiff agreed to provide social media authorizations and the parties agreed to a schedule for these motions to amend. The Conference Order makes no mention of any objections and although the defendants' motions were pending no mention of the plaintiffs' cross motion.

Portions of text messages concerning the event contain assertions by Bonefede that plaintiff

was drunk, however there is no affidavit from that defendant and no other sworn testimony to that effect. It is this flimsy, self serving and inadmissible evidence which forms the factual predicate for amending the answers. The source of the "information and belief" as to the contentions of the defendants has not been revealed and none of them have submitted any testimony.

All requests for relief not specifically addressed are denied.

The Court finds that even under the most liberal of pleading standards, the proposed new pleadings are patently insufficient. CPLR §3016(b). *Vermont Mut. Ins. Co. v. McCabe & Mach, LLP.*, 105 AD3d 837 (2d Dept. 2013); *Pace v. Raisman & Assoc., Esqs. LLP.*, 95 AD3d 1185 (2d Dept. 2012).

Leave to amend pleadings is usually freely given unless the proposed amendment will prejudice or surprise the opposing party or the proposed amendment is patently insufficient or devoid of merit. *Unger v. Leviton*, 25 AD3d 689 (2d Dept. 2006). Mere lateness is not a barrier. However, lateness coupled with significant prejudice to the other side, the very element of the laches doctrine is a bar. *St. Paul Fire and Marine Insurance Company v. Town of Hempstead*, 291 AD2d 488 (2d Dept. 2002). The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is, as here, clear and free from doubt. *Lucido v. Mancuso*, 49 AD3d 220, 227 (2d Dept. 2008). A request to amend an answer to plead an affirmative defense is evaluated in the same manner. *Tag v. V.I.P. Structures, Inc.*, 63 AD3d 1504 (4th Dept. 2009).

Prejudice to the nonmoving party is shown where that party is hindered in the preparation of its case or has been prevented from taking some measure in support of its position. *AnCor, Inc.*

v. BSB Bank & Trust Company, 34 AD3d 1282 (4th Dept. 2006).

Based on the proposed amendment and its lack of any factual content, the Court is not able to assess whether the proposed new pleadings possess any merit. *Cf., Pike v. New York Life Ins. Co.*, 72 AD3d 1043 (2d Dept. 2010).

It has been held that mere negligent supervision of a child is not actionable. *Ballard v. Mouzon*, 266 AD2d 490 (2d Dept. 1999) *citing Holodook v. Spencer*, 36 NY2d 35 (1974).

Moreover, defendants have not identified any recognized exceptions to this doctrine. *See, Nolechek v. Gesuale*, 46 NY2d332 (1978) [negligent entrustment of a dangerous instrument]; *Adolph E. v. Linda M.*,170 AD2d 1011 (4th Dept. 1991) [knowledge of vicious propensity].

Conclusory generalized assertions of violent tendencies and propensities are insufficient to satisfy the requisite pertinent knowledge on the part of the parent. *LaTorre v. Genesee Mgt. Inc.*, 90 NY2d 576 (1997).

Equally lacking are any factual assertions to support a claim of violation of GOL § 11-100. *Dollar v O'Hearn,* 248 AD2d 886, 887 (3d Dept. 1998). Here the proposed pleadings and motions are conclusory and lacking in any factual content. *Holiday v. Poffenbarger*, 110 AD3d 841 (2d Dept. 2013). Notably absent from the submission by defendants are any depositions or affidavit testimony in support of their proposed amendments or any explanation as to why none have been proffered.

A "so ordered stipulation" is a binding contract that must be interpreted in accordance with contract principles. *Aivaliotis v. Continental Broker-Dealer Corp.*, 30 AD3d 446 (2d Dept. 2006). Plaintiffs have failed to comply with the Conference Order and have failed to provide a reason for such noncompliance. *VanEtten Oil Co., Inc., v. Exotic Flora & Fauna Ltd.*, 78 AD3d 1438, 1440

(3rd 2010).

While plaintiffs may have correctly advanced reasons for denial of a request for social media discovery it is not necessary for the Court to address that issue because the plaintiffs have failed to provide any cognizable reason for vacatur of the Conference Order.

CPLR § 2104 provides in substance that written agreement relating to any matter in an action if signed by a party or an attorney for party is binding. *Colon v. Rite Fold Corp.*, 106 AD3d 862 (2d Dept. 2014). Stipulations are favored by the Courts and are not to be lightly set aside. *See, Macaluso v. Macaluso,* 62 AD3d 963 (2d Dept. 2009).

In sum while plaintiffs' have argued against the discovery of social media content they have failed to submit any reason why their stipulation to provide such information should not be enforced. Hence, plaintiffs' are ordered and directed to provide to defendants not later than 5:00 p.m., March 2, 2015, authorizations, including sufficient identifications for all social media accounts maintained by them or accessible by plaintiff Michael Thomas Laviano for the period commencing September 1, 2013 to the date of response. In the event plaintiffs fail timely and completely to comply they shall, without further order or notice, be precluded from testifying at trial or from submitting any affidavit in this action.

Based on the foregoing the motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: February 9, 2015

HON. DANIEL PALMIERI, J.S.C.

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