Eskenazi-McGibney v Connetquot Cent. Sch. Dist.
2015 NY Slip Op 32898(U)
September 18, 2015
Supreme Court, Suffolk County
Docket Number: 15-11449
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

PUBLISH

INDEX No. 15-11449

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 9-22-15
ADJ. DATE 10-15-15
Mot. Seq. #001 - MotD
Mot. Seq. #002 - MD

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JOSHUA ESKENAZI-MCGIBNEY, JOHN MCGIBNEY, and ROBIN ESKENAZI-McGIBNEY,

Plaintiffs,

- against -

CONNETQUOT CENTRAL SCHOOL DISTRICT, EASTERN SUFFOLK BOCES, ALAN B. GROVEMAN, GREGORY J. MURTHA, NANCY SMALLING and ROBERTA KEMPF,

Defendants.

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Upon the following papers numbered 1 to 39 read on these motions to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1-11 (#001); 25- 37 (#002) ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-21 (#001, #002) ; Replying Affidavits and supporting papers 22-24 (#001); 38- 39 (#002) ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) of defendants Eastern Suffolk Board of Cooperative Educational Services, Nancy Smalling, and Roberta Kempf and the motion (seq. 002) of defendants Connetquot Central School District, Alan Groveman, and Gregory Murtha are consolidated for purposes of this determination; and it is

ORDERED the motion of defendants Eastern Suffolk Board of Cooperative Educational Services, Nancy Smalling, and Roberta Kempf dismissing the complaint against them pursuant to CPLR 3211(a) (1) and (7) is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that the motion of defendants Connetquot Central School District, Alan Groveman, and Gregory Murtha is granted to the extent set forth herein, and is otherwise denied.

Plaintiffs commenced this action to recover damages for emotional injuries allegedly sustained by plaintiff Joshua Eskenazi-McGibney. The verified complaint alleges that plaintiff Joshua Eskenazi-McGibney (hereinafter JEM) was bullied and harassed by another student while attending defendants' school, and that defendants were negligent in failing to properly supervise the students and allowing the bullying to occur. It also asserts claims on behalf of plaintiffs John McGibney and Robin Eskenazi-McGibney, JEM's parents. In addition, the complaint alleges that defendants were in violation of the Dignity for All Students Act (Education Law §10 *et seq.*), and that such violation was the proximate cause of plaintiffs' injuries.

Defendants Eastern Suffolk Board of Cooperative Educational Services, s/h/a Eastern Suffolk BOCES (hereinafter BOCES), Nancy Smalling, and Roberta Kempf now move for an order dismissing all claims asserted by plaintiffs John McGibney and Robin Eskenazi-McGibney on the ground that they have no standing, and dismissing JEM's claims for violations of the New York Education Law and for attorneys' fees.

In determining a motion to dismiss a complaint made pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Sokol v Leader***, 74 AD3d 1180, 1181, 904 NYS2d 153 [2d Dept 2010]). The facts pleaded are presumed to be true, and the sole criterion is whether from the four corners of the complaint it can be discerned that any cause of action cognizable at law exits (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Raach v SLSJET Mgt. Corp.***, 134 AD3d 792, 20 NYS3d 613 [2d Dept 2015]).

The verified complaint alleges that JEM is 19 years of age and was a student at Connetquot High School and BOCES at the time the incidents which form the basis of this action occurred. Further, it alleges that JEM suffers from learning disabilities, including attention deficit hyperactivity disorder, which required him to attend special education courses at Connetquot High School and BOCES. The complaint alleges that JEM attended Connetquot High School in the morning and was transported by bus to BOCES in the afternoon. Plaintiffs allege that in September and November 2012, JEM was struck by another student, Chris, while attending BOCES and during a school field trip. Plaintiffs allege that they reported the incidents to JEM's teachers at BOCES and the high school. Further, the complaint alleges that throughout the 2012/2013 school year, JEM was threatened by Chris and that plaintiffs complained to officials at both BOCES and Connetquot High School, including defendants Alan Groveman, the District Superintendent, Gregory Murtha, Principal of Connetquot School District, Nancy Smalling, Principal of BOCES and Roberta Kempf, assistant principal of BOCES, but received no response. Several other similar incidents are alleged in the verified complaint. Plaintiffs allege that JEM became emotionally distraught due to the incidents, causing him to miss school.

Defendants argue that plaintiffs cannot maintain a cause of action for a violation of Section 10 *et seq.* of the Education Law, as the statute does not expressly authorize such action. In 2010, the Education Law was amended to add Article 2, known as the "Dignity for All Students Act." The statute prohibits students from being subjected "to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function"

(Education Law §12). To achieve this goal, the statute requires that "the board of education and the trustees or sole trustee of every school district shall create policies, procedures and guidelines intended to create a school environment that is free from harassment, bullying and discrimination" (Education Law§ 13). The statute further mandates, among other things, that procedures be created to enable students to make oral or written reports to school personnel of any incidents of bullying, harassment or discrimination and requires school employees to file a written report with the principal, superintendent or a designee. The statute issues guidelines to be used in school training programs to discourage the development of harassment, bullying, and discrimination. Additionally, Section 14 sets forth the responsibilities of the Commissioner and mandates, among other things, that the commissioner provide grants to local school districts and promulgate regulations to assist them in implementing the guidelines. However, the act does not provide any enforcement mechanisms, and it is silent with respect to remedies for a violation.

When a statute does not expressly provide a remedy for its violation or expressly authorize a private right of action, the long-standing rule of statutory construction provides that a private right of action for the violation of a statute exists for the benefit of persons injured by that violation (***Pauley v Steam Gauge & Lantern Co.***, 131 NY 90, 29 NE 999 [1892]). Absent explicit legislative direction on matters of sanctions and enforcement, it is for the courts to determine what the Legislature intended (***Burns Jackson Miller Summit & Spitzer v Lindner***, 59 NY2d 314, 464 NYS2d 712 [1983]). However, only if it can be implied from the statute that the legislature intented to create such a right of action will a cause of action lie (***Ader v Guzman***, 135 AD3d 668, 22 NYS3d 576 [2d Dept 2016]). The language of a statute is the best evidence of the Legislature's intent (***Riley v County of Broome***, 95 NY2d 455, 719 NYS2d 623 [2000]). Furthermore, the court is required to examine the following three factors in determining whether a private right of action exists for the statutes violation: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme (***Matter of Stray from the Heart, Inc. v Department of Health - Mental Hygiene of the City of New York***, 20 NY3d 946, 958 NYS2d 674 [2012]; ***Uhr v East Greenbush Cent. Sch. Dist.***, 94 NY2d 32, 698 NYS2d 609 [1999]).

Here, the legislative intent is manifested in Section 10 of the Education Law. It provides as follows:

> The legislature finds that students' ability to learn and to meet high academic standards, and a school's ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation. It is hereby declared to be the policy of the state to afford all students in public schools an environment free of discrimination and harassment. The purpose of this article is to foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school's educational mission.

Section 11 of the statute defines harassment and bullying, as relevant here, as the creation of a hostile environment by conduct or by threats, intimidation or abuse, having the effect of interfering with a student's educational performance, or mental, emotional or physical well-being or would reasonably cause or reasonably be expected to cause physical injury or emotional harm to a student. Section 11 of the statute

further defines disability to mean disability as defined in subdivision twenty-one of section two hundred ninety-two of the executive law. Section 292 (21) of the Executive Law provides:

> The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

It appears that JEM is a member of the class for whom the statute was created, as the verified complaint alleges he suffers from disabilities and was a student at a public school. Whether he actually is disabled is not for the court to determine on a motion for dismissal based on a failure to state a cause of action (*see* ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman Sachs & Co.***, 5 NY3d 11, 19, 799 NYS 2d 170, 175 [2005]). Such determination is reserved for the trier of fact. JEM alleges that he was harassed and bullied and that he suffers from emotional injuries as a result. Accepting these allegations as true and affording him the benefit of every possible favorable inference, the complaint does state a cause of action for a violation of the dignity for all students act contained in the Education Law (*see* ***Shaffer v Gilberg***, 125 AD3d 632, 4 NYS3d 49 [2d Dept 2015]). However, with respect to JEM'S parents, they are clearly not a member of the class and cannot seek civil damages for a violation of the statute.

With respect to the second factor, whether recognition of a private right would promote the purpose of the statute, liability for civil damages would provide an incentive to enforce the anti-bullying policy and create a deterrent for those officials who would ignore the complaints of those students who the statute seeks to protect. The failure to protect such students should not go unnoticed and not be taken lightly in view of declaration of the strong legislative intent to prevent and prohibit such conduct.

Turning to the third factor, whether a private right of action is consistent with the legislative scheme, the court should not find an implied right if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme (***Cruz v TD Bank, N.A.***, 22 NY3d 61, 979 NYS2d [2013]; ***Uhr v East Greenbush Central School Dist.***, 94 NY2d 32, 698 NYS2d 609). Here, the statute does not contain an enforcement mechanism but its purpose is evident and a private cause of action would serve to promote that purpose. The statute and its implementing regulations are not simply remedial in nature but afford the students various rights and impose an affirmative duty on school officials to provide the students with an environment that is free from discrimination, bullying and harassment. "When the statute is designed to protect a definite class from a hazard of definable orbit, which they themselves are incapable of avoiding is it deemed to create a statutory cause of action and to impose a liability unrelated to questions of negligence" (***Van Gaasbeck v Webatuck Cent. School Dist.***, 21 NY2d 239, 287 NYS2d 77 [1967]).

Accordingly, defendants' motion dismissing the cause of action by JEM seeking damages for violations of the Dignity for All Students Act is denied. However, with respect to the causes of action asserted by his parents for such statutory violation, the motion is granted. Furthermore, their cause of action against defendants for negligent supervision and retention is dismissed, as JEM is not an infant, they are not suing as his representative, and there are no derivative claims asserted in the complaint. Liability for negligence must be premised upon a finding of a legal duty owed by the defendant to the plaintiff (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc.***, 93 AD3d 658, 940 NYS2d 123 [2d Dept 2012]). As the complaint fails to allege sufficient facts demonstrating they have a legally cognizable cause of action against defendants, the branch of defendants' motion for an order dismissing plaintiffs John McGibney and Robin Eskenzai-Mcgibney's causes of action is granted.

The branch of defendants' motion for dismissal pursuant to CPLR 3211(a)(1) is denied. Only where the documentary evidence that forms the basis of the defense refutes the plaintiff's factual allegations and conclusively disposes of the plaintiff's claims as a matter of law should the motion be granted under CPLR 3211 (a)(1) (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858 [2012]). Here, no documentary evidence has been submitted with the motion. Neither counsel's affirmation or the memorandum of law qualify as a document (*see* ***Shofel v DaGrossa***, 133 AD3d 649, 19 NYS3d 427 [2d Dept 2015]). As such, the motion must be denied (***Eisner v Cusumano Constr., Inc.***, 132 AD3d 940, 18 NYS3d 683 [2d Dept 2015]; ***Fontanetta v John Doe 1***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

The branch of the motion for dismissal of the cause of action which seeks attorneys' fees is granted. Absent an agreement, a statute or a court rule, a prevailing party is not entitled to attorneys' fees (***Mount Vernon City School Dist. v Nova Cas. Co.***, 19 NY3d 28, 945 NYS2d 202 [2012]; ***Matter of A. G. Ship Maintenance Corp. v Lezak***, 69 NY2d 1, 511 NYS2d 216 [1986]; ***Halstead v Fournia***, 134 AD3d 1269, 22 NYS3d 606 [2d Dept 2015]). No such authorization exists here.

Defendants Connetquot Central School District, Alan Groveman, and Gregory Murtha move to dismiss the complaint against them and assert the same grounds as defendants BOCES, Nancy Smalling, and Roberta Kempf. For the reasons set forth above, the motion is denied. With respect to their argument that they did not owe plaintiff a duty of care, as the alleged acts of bullying all occurred while plaintiff attended BOCES, the motion is denied, as the complaint contains various allegations against the school district, and the validity of the allegations in the complaint are not at issue on a motion pursuant to CPLR 3211 (a)(7). Furthermore, no documentary evidence has been submitted defining the agreement between BOCES and the school district which would enable this court to determine the relative duties of each party.

Dated: 9/15/16

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION