

Siriboon v Ramapo Cent. Sch. Dist.
2016 NY Slip Op 32474(U)
October 13, 2016
Supreme Court, Rockland County
Docket Number: 033861/2015
Judge: Robert M. Berliner
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

-----X
JAE LIN SIRIBOON, an infant under the age of
18 by CHAIYAVUTT SIRIBOON, her parent
and natural guardian,

Plaintiff,

-against-

THE RAMAPO CENTRAL SCHOOL
DISTRICT, ROCKLAND BOARD OF
COOPERATIVE EDUCATIONAL SERVICES,
VIOLA ELEMENTARY SCHOOL, DOUGLAS
S. ADAMS, Superintendent of Schools and
CHRISTINE DRUSS, Principal in their official
and individual capacity.

Defendants.
-----X

DECISION AND ORDER

Index No.: 033861/2015

Motion Sequence #1, #2 & #3

The following papers, numbered 1 to 14 were read in connection with Plaintiff's Order to Show Cause seeking a preliminary injunction, Defendants' cross-motion to dismiss and Plaintiff's cross-motion regarding the timeliness of Plaintiff's notice of claim:

Order to Show Cause for Preliminary Injunction/Exhibits (A-C).....	1
Defendants' Notice of Cross-Motion/Affirmation (Johnson)/Affidavit (Fromson) /Affidavit (Druss)/Affidavit (Aguilar)/Affidavit (Hahn)/Affidavit (Kearney)/Affidavit (O'Keefe)/Exhibits (A-I)/Memorandum of Law.....	2-10
Plaintiff's Notice of Cross-Motion/Affirmation (Langman)/Exhibits (A-H)	11-12
Affidavit (Fromson)/Memorandum of Law in Opposition to Plaintiff's Cross-Motion and in Support of Defendants' Cross-Motion.....	13-14

Upon the foregoing papers, it is ORDERED that these applications are disposed of as follows:

Plaintiff initiated this action in connection with alleged incidents of bullying and harassment that have been occurring since 2014, during Jaelin Siriboon's Kindergarten and 1st grade years. Plaintiff states that Jaelin's parents have expressed their concern over these alleged incidents of bullying and harassment to school administrators through telephone calls and emails.

On March 11, 2015, school staff and Jaelin's parents created a "plan of action" in order to address the repeated incidents of alleged bullying and harassment. Plaintiff states that on June 9, 2015 another incident occurred in which Jaelin had to be treated at Good Samaritan Hospital for a sprain and strain of the shoulder and upper arm. After this, Jaelin's parents removed her from Viola Elementary School and on September 9, 2015 enrolled her in a private parochial school, Sacred Heart.

The Court will first address Plaintiff's motion regarding its Notice of Claim. Plaintiff served a Notice of Claim upon Ramapo Central School District on June 24, 2015. On September 11, 2015, Defendants conducted an examination of Jaelin's father, Chaiyavutt Siriboon, pursuant to New York General Municipal Law § 50-h. During the 50-h examination Mr. Siriboon stated that he did not have any contact with school administrators between May 2015 and August 31, 2015. Additionally, Mr. Siriboon stated that on August 31, 2015, he and Mrs. Siriboon spoke with Viola School Principal, Christine Druss. She invited them to meet with her and Jaelin's second grade teacher, but Mr. and Mrs. Siriboon declined the meeting invitation.

Plaintiff filed a Summons, Complaint and Order to Show Cause seeking a Temporary Restraining Order ("TRO") compelling Defendants to initiate a safety transfer for Jaelin to Cherry Lane Elementary School during the pendency of this case. This Court heard oral argument, denied Plaintiff's application for a TRO, and directed Defendants to respond to Plaintiff's Order to Show Cause seeking a preliminary injunction transferring Jaelin to Cherry Lane Elementary School. Defendants cross-moved, *inter alia*, to dismiss this action pursuant to CPLR § 3211(a) (7) alleging Plaintiff has failed to state a cause of action. Plaintiff, *inter alia*, cross-moved for an order deeming plaintiff's notice of claim filed timely as to all incidents of bullying and harassment in the complaint, or in the alternative, to permit a late notice of claim.

The Second Department has held that a Court must consider a number of factors in determining whether to grant leave to serve a late notice of claim:

"Under General Municipal Law § 50-e(5), in determining whether to grant leave to serve a late notice of claim, the court must consider various factors, of which the 'most important, based on its placement in the statute and its relation to other relevant factors' is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter. Additional factors relevant to whether a petition for leave to serve a late notice of claim should be granted include whether the claimant was an infant at the time the claim arose and, if so, whether there was a nexus between the claimant's infancy and the delay in service of a notice of claim, whether the claimant had a reasonable excuse for the delay, and whether the public

corporation was substantially prejudiced by the delay in its ability to maintain its defense on the merits. *Lavender v Garden City Union Free School Dist.*, 93 AD3d 670, 670–71 [2d Dept 2012][internal citations omitted].

Plaintiff's Notice of Claim was served June 24, 2015, 15 days after the June 9, 2015 incident which required Jaelin to seek medical attention. However, the Notice of Claim refers to alleged incidents of bullying and harassment that date back to December 2014 which exceeds the 90-day time frame to file a claim. Given this fact, the Court must determine whether the Ramapo Central School District had acquired actual notice of the essential facts constituting the claim. Both Plaintiff's and Defendants' submissions establish that the school and Mr. and Mrs. Siriboon were in constant contact during the time period of December 2014 until June 9, 2015. The Court finds that the Ramapo Central School District had actual notice of the essential facts constituting the claim based upon e-mail exchanges between school personnel and Mr. and Mrs. Siriboon, as well as the "plan of action" created on or about March 11, 2015. Therefore, the Court grants Plaintiff's Cross-Motion and deems its Notice of Claim timely filed as to all alleged incidents of bullying and harassment in the Complaint.

Next, the Court must address Plaintiff's Order to Show Cause requesting a preliminary injunction seeking to transfer Jaelin to Cherry Lane Elementary School.

"Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously. Thus, a party is entitled to a preliminary injunction only where it demonstrates (1) a probability of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of the equities in its favor. To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts. Where the facts are in sharp dispute, a temporary injunction will not be granted. *Related Properties, Inc. v. Town Bd. of Town/Vil. of Harrison*, 22 AD3d 587, 590 [2d Dept 2005].

In considering the parties' submissions, the Court finds that a preliminary injunction is not appropriate at this time. The Plaintiff has not demonstrated a clear right to relief which is plain from the undisputed facts presented or proven danger of irreparable harm in the absence of an injunction. While the Court is sympathetic to Jaelin's situation, a preliminary injunction at this time would be a drastic remedy. As the Court has stated previously, the Court urges the parties to work together in the common goal of doing what is in Jaelin's best interest.

As to the Defendants' cross-motion to dismiss this action, "[i]n determining 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 plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Signature Bank v Holtz Rubenstein Reminick*, 109 AD3d 465, 466 [2d Dept 2013][internal citations omitted].

Defendants assert, *inter alia*, that Plaintiff fails to state a cognizable legal theory under which to proceed in this action. As to Plaintiff's negligence claim, Defendants argue that the doctrine of governmental immunity precludes tort liability in cases where school employees perform discretionary acts involving the exercise of reasoned judgment and that public schools are not liable for impulsive or unanticipated acts of students. Additionally, Defendants claim that this action is moot given the fact that Mr. and Mrs. Siriboon have pulled Jaelin out of Viola Elementary School and enrolled her at Sacred Heart. As to Plaintiff's second cause of action, that the Defendants' actions allegedly violated the Dignity of All Students Act ("DASA"), Defendants state that DASA does not create a private right of action.

In opposition, Plaintiff submits, *inter alia*, numerous emails between Jaelin's parents and school officials detailing the alleged incidents of harassment and bullying that Jaelin experienced. As to Plaintiff's first cause of action of negligence, Plaintiff alleges that Defendants owed a duty of care, safety and supervision to Jaelin and that Defendants should be held liable for the foreseeable injuries proximately related to the absence of adequate supervision. Plaintiff asserts that the school authorities had sufficient specific knowledge of the dangerous conduct which caused the alleged injury to Jaelin and the Defendants failed to provide adequate supervision to prevent further incidents. As to Plaintiff's second cause of action under DASA, Plaintiff argues that the statute prohibits any and all harassment and bullying for any reason. Plaintiff claims that Jaelin has a liberty interest in being free from harassment and bullying and relies on *North Syracuse Central School District v. New York State Division of Human Rights* to support that proposition. 19 NY3d 481, 495 [2012].

The Court has examined the Plaintiff's complaint and in giving Plaintiff's submissions every possible favorable inference, the Court finds that Plaintiff has submitted sufficient evidence of a claim and states facts that fall within a cognizable legal theory to support Plaintiff's negligence cause of action. Therefore, Defendant's cross-motion to dismiss Plaintiff's first cause of action is denied. In examining Plaintiff's second cause of action under DASA, the Court finds that Plaintiff failed to state facts that fall within a cognizable legal theory or claim. Plaintiff's reliance on *North*

Syracuse Central School District v. New York State Division of Human Rights is misplaced. That case stands, *inter alia*, for the proposition that potential remedies are available to public school students under federal law or by filing a complaint with the Commissioner of Education but not that DASA itself creates a private right of action under state law. *See Motta ex rel. Motta v Eldred Cent. School Dist.*, 141 AD3d 819, 820 [3d Dept. 2016]. Therefore, Defendant's cross-motion to dismiss Plaintiff's second cause of action is granted.

The parties are advised that a preliminary conference has been scheduled for **Tuesday, November 1, 2016 at 9:30 a.m.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
October 13, 2016

ENTER


HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel for Plaintiff
Tamir Law Group, P.C.

Counsel for Defendants
Lemire, Johnson & Higgins, LLC
Greenberg Wanderman & Fromson