C.T. v Board of Educ. of S. Glens Falls Cent. Sch. Dist.
2016 NY Slip Op 32934(U)
August 9, 2016
Supreme Court, Saratoga County
Docket Number: 2016-829
Judge: Ann C. Crowell
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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

C.T. and R.T. Individually, and, C.T. as Administrator of Estate of J.T. a deceased infant,

Plaintiffs,

-against-

BOARD OF EDUCATION OF SOUTH GLENS FALLS CENTRAL SCHOOL DISTRICT, SOUTH GLENS FALLS SCHOOL DISTRICT, TERRI BROWN, SUSAN LIEBERMAN, JASON SPECTOR, and MARK FISH,

Defendants.

DECISION and ORDER
RJI #45-1-2016-0584
Index # 2016-829

APPEARANCES:

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ANN C. CROWELL, J.

The defendants, Board of Education of South Glens Falls Central School District and South Glens Falls School District ("District") and Terri Brown, Susan Lieberman, Jason Spector and Mark Fish ("individual defendants") move pursuant to CPLR § 3211 for an order dismissing the Complaint. Defendants also seek, pursuant to CPLR § 3024(b) an order striking certain alleged irrelevant, inflammatory and prejudicial allegations from the Complaint. In response, plaintiffs filed and served an Amended Summons and Amended Complaint and a memorandum of law in opposition. The parties have requested/elected to have the Court apply defendants'

motion to dismiss to the amended pleadings. *D'Amico v Correctional Medical Center,* 129 AD3d 956 [4th Dept. 2014].

Inexplicably, plaintiffs' counsel failed to comply with CPLR § 3014 and separately state and number plaintiffs' causes of action in both the Summons and Complaint and the Amended Summons and Amended Complaint.

Defendants' motion to dismiss addresses a variety of potential causes of action that they believe plaintiffs are asserting in this action: (1) violation of the Dignity for All Students Act, Education Law §§ 11(7) and 12(1) ("DASA"); (2) negligent supervision and wrongful death as a result of such negligent supervision; (3) constitutional violations of Equal Protection and Due Process under 42 USC § 1983; and (4) a violation of Title IX of the Education Amendments of 1972, 20 USC § 1681. In defendants' request for relief, defendants seek the dismissal of the entire complaint, or in the alternative, plaintiffs' claims for: (1) wrongful death; (2) violation of DASA; (3) violation of decedent's substantive due process; (4) violation of decedent's equal protection rights; (5) plaintiffs' own emotional distress and suffering; and (6) punitive damages.

In opposition to the defendants' motion to dismiss, plaintiffs filed an Amended Summons and Amended Complaint along with a memorandum of law. Plaintiffs' memorandum of law advocates that the pleadings sufficiently state the following causes of action: (1) negligent supervision resulting in the decedent's conscious pain and suffering while he was alive and his foreseeable suicide (wrongful death); (2) a private right of action under DASA (incorrectly referred to in plaintiffs' memorandum of law as the "third and fourth causes of action"); (3) a cause of action for a violation of decedent's fourteenth amendment right to equal protection; and (4) plaintiffs', as the parents of decedent, individual cause of action for

the continued society, association, companionship and relationship of their son under 42 USC § 1983 and the Fourteenth Amendment of the Constitution. Plaintiffs also advocate that punitive damages are available against the individual defendants. In the complete absence of any separately numbered causes of action within plaintiffs' pleadings, the Court will address only those causes of action asserted in plaintiffs' memorandum of law. Any other potential causes of action are dismissed as abandoned.

In considering a motion to dismiss for failure to state a cause of action, the question is whether the plaintiff has a cause of action, not whether he has stated one. *Torok v Moore's Flatwork & Foundations, LLC,* 106 AD3d 1421 [3d Dept. 2013]. The complaint must be afforded a liberal construction, the facts plead are presumed to be true and the plaintiff is to be accorded every favorable inference. *Rodriguez v Jacoby & Meyers, LLP*, 126 AD3d 1183 [3d Dept. 2015]; *Esposito-Hilder v SFX Broadcasting, Inc.*, 236 AD2d 186 [3d Dept. 1997]. The Court must determine whether the facts as alleged fit within any cognizable legal theory. *Id.* However, "claims consisting of bare legal conclusions with no factual specificity" are insufficient to survive a motion to dismiss. *Id, quoting Godfrey v Spano,* 13 NY3d 358, 373 [2009].

Defendants concede that a cause of action for negligence survives the death of the person in whose favor the cause of action existed. Accordingly, defendants' motion to dismiss with respect to plaintiffs' cause of action for negligent supervision alleging that decedent suffered conscious pain and suffering while he was alive is denied. *Cavello v Sherburne-Earlville Cent. School Dist.*, 110 AD2d 253 [3d Dept. 1985]. However, defendants contend that they cannot be held liable for the wrongful death of the thirteen year old decedent.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate

supervision" *Mirand v City of New York*, 84 NY2d 44, 49 [1994]. In determining whether the duty has been breached, plaintiffs must establish that school authorities had sufficiently specific knowledge or notice of the third party's dangerous conduct which causes the injury. *Id.* However, schools are not insurers of the safety of their students. A school's duty generally extends only to the boundaries of the school property and is co-extensive with the school's physical custody and control over the students. *Chalen v Glen Cove School Dist.*, 29 AD3d 508 [2d Dept. 2006]; *see also, Mayorga v Berkshire Farm Center and Services for Youth*, 136 AD3d 1262 [3d Dept. 2016]. There is no dispute that the thirteen year old decedent killed himself at his parents' home.

The Complaint sets forth the following allegations that must be accepted as true. The decedent was repeatedly tormented, bullied and harassed by fellow students, including being told to "go kill himself." The school district was actually or constructively aware of this behavior but failed to take any remedial action or implement any preventative measures. Decedent's suicide note states:

> "Dear mom and Dad
>
> "I'm sorry but I can not live anymore. I just can't deal with all of the bullies, being called gay, asshole, being told to go kill myself. I'm also done with being pushed, punched, tripped. I'm sorry for all that I put you through. I LOVE YOU"

"[N]egligent conduct can only support liability for another person's suicide under certain circumstances and where suicide is a foreseeable consequence of such conduct." *Stein v Kendal at Ithaca*, 129 AD3d 1366 [3d Dept. 2015], citing *Stolarski v DeSimone*, 83 AD3d 1042 [2d Dept. 2011]; *see, Fuller v Preis*, 35 NY2d 425 [1974]. Whether any of the pain and suffering allegedly suffered by the decedent while physically in the custody of the school is a proximate cause of the decedent's suicide is a question of fact left for the trier of fact to consider and

resolve. *Wood v Watervliet City School Dist.*, 30 AD3d 663 [3d Dept. 2006]; *Braunstein v Half Hollow Hills Cent. School Dist.*, 104 AD3d 893 [2d Dept. 2013]. According plaintiffs every favorable inference of the facts plead, defendants' motion to dismiss plaintiffs' wrongful death cause of action is denied. *Rodriguez v Jacoby & Meyers, LLP*, 126 AD3d 1183 [3d Dept. 2015]; *but compare, Elissa v City of New York*, 44 Misc 3d 526 [Sup. Ct., Queens Cty. 2014].

Plaintiffs also seek to assert a private right of action under DASA. Since the Amended Summons and Amended Complaint was filed in this action, the Appellate Division, Third Department has determined that a private cause of action does not exist under DASA. *Motta v Eldred Cent. School Dist.*, ___ AD3d ___, 2016 WL 3619331 [3d Dept. 2016]. Accordingly, plaintiffs' cause of action asserting a private right of action under DASA is dismissed. *Motta v Eldred Cent. School Dist., supra; see also, Terrill v Windham-Ashland-Jewett Central school Dist.*, ___ F. Supp. 3d ___, 2016 WL 1275048 [N.D.N.Y. 2016].

Plaintiffs assert a cause of action for a violation of decedent's fourteenth amendment right to equal protection. In support of this cause of action, plaintiffs assert that decedent was "repeatedly demeaned on the basis of his perceived homosexuality and failure to live up to gender stereotypes" and that "gender and homosexuality" are protected classes under the equal protection clause. Plaintiffs further assert that "without discovery in this matter it is impossible to pinpoint the exact spots of discrimination defendants claim plaintiffs omit."

In order to maintain a Section 1983 action against a municipality for the unconstitutional acts of employees, a plaintiff must establish that a custom or policy caused the violation of his constitutional rights. *Preston v Hilton Cent. School Dist.*, 876 F. Supp 2d 235, 244 [W.D.N.Y. 2012]. In order to state a claim against individual school administrators or teachers, a plaintiff must allege facts that: (1) those particular defendants had actual knowledge

that the misconduct in question was directed at the decedent because of his protected status; and (2) that the administrators and teachers were deliberately indifferent to the misconduct. *Estate of D.B. Briggs v Thousand Island Cent. School Dist.*, ___ F. Supp 3d ___ [N.D.N.Y. 2016].

For any Equal Protection claim, the plaintiff must be a member of a protected class. The Amended Complaint asserts that plaintiff was in the protected classifications of gender and perceived homosexuality. With respect to plaintiffs' gender based claims, the Amended Complaint at paragraph 63 contains boilerplate allegations that:

> "(1) the District treated female victims of male battery and harassment differently than male victims of male battery and harassment, (2) the District had no legitimate basis for tolerating harassment and bullying directed a[t] male students; and, (3) the District's departure from its anti-harassment policies and practices evinces discriminatory intent."

When considering federal causes of action in State Court, the Court is guided by the requirements for a federal cause of action under Federal Rule of Civil Procedure Section 12(b)(6). The Court need not accept as true legal conclusions supported by mere conclusory statements without any further factual enhancement. *Ashcroft v Iqbal*, 556 US 662, 678 [2009]. Plaintiffs' Amended Complaint is devoid of any factual allegations which might form a plausible basis that similarly situated students who suffered harassment were ever treated differently from the decedent based upon his male gender. Therefore, plaintiffs' Equal Protection cause of action based upon decedent's male gender is dismissed. *Preston v Hilton Cent. School Dist.*, 876 F. Supp 2d 235 [W.D.N.Y. 2012]. Any Title IX claim based upon decedent's male gender is similarly deficient.

Plaintiffs' Amended Complaint does not contain any allegation that the decedent was homosexual or heterosexual. The Amended Complaint indicates that decedent was harassed based upon his perceived homosexuality. Plaintiffs' Amended Complaint paragraph 34 states:

> "By way of example, Decedent was repeatedly called gay, asshole, and being told to go kill himself. Decedent was constantly ridiculed and subjected to rumors about his sexuality."

Plaintiffs' Amended Complaint states in a conclusory fashion that decedent was called gay. The Amended Complaint is devoid of any factual allegations which might form a plausible basis that similarly situated students who suffered harassment were ever treated differently from the decedent based upon him being a homosexual. The Amended Complaint contains no allegations stating decedent's sexual orientation. Given the lack of such factual averments, plaintiffs' Equal Protection cause of action based upon his perceived homosexuality is dismissed. *Preston v Hilton Cent. School Dist., supra*; *compare Nabozny v Podlesny,* 92 F3d 446 [7th Circuit 1996]. In *Nabozny v Podlesny,* the plaintiff specifically alleged he was a homosexual.

Plaintiffs, as the parents of decedent, assert a cause of action based upon the "federally constitutionally protected liberty interest in the continued society, association, companionship, and relationship of their son" under 42 USC § 1983. Plaintiffs have conceded that no such cause of action exists under New York State law. *Cavello v Sherburne-Earlville Cent. School Dist., supra*; *Elissa v City of New York, supra.*

The United States Court of Appeals for the Ninth Circuit has specifically allowed this type of federal cause of action in the context of a child who killed himself on school property without a showing of intent. *Kelson v City of Springfield,* 767 F.2d 651 [9th Cir. 1985]. However, the majority of Federal Circuit Courts addressing the issue of when family members have been deprived of an adult family member have required the demonstration of a defendant's intent to interfere with the protected liberty interest in maintaining that relationship. *Rindfleisch v Wright,* 2010 WL 8522545 [N.D.N.Y. 2010]; *see also, Greene v City*

of New York, 675 F.Supp 110 [S.D.N.Y. 1987]. Historically, negligent conduct by a state actor, even though causing injury, does not constitute a deprivation under the Due Process Clause. *Deskovic v City of Peekskill*, 894 F. Supp. 2d 443, 471 [S.D.N.Y. 2012]. Since the Second Circuit has not specifically addressed this issue, this Court joins the logic of those courts requiring intent when addressing the protected liberty interest in maintaining a relationship with their adult children. *See, Rindfleisch v Wright, supra.* The Court declines to follow the Ninth Circuit allowing the cause of action based upon negligence alone and finds that an allegation of intent to interfere with that relationship is necessary to state a claim. Although the plaintiffs allege that the state actors acted recklessly and with deliberate indifference with respect to the bullying of the decedent, there is no allegation that the district or any of the individual defendants acted with any intent or even deliberate indifference to the relationship between the decedent and his parents. Accordingly, plaintiff C.T. and R.T.'s individual causes of action against the defendants are dismissed.

Punitive damages are not available against a municipal defendant unless specifically authorized by statute. Plaintiffs' have not proffered any statutory authority providing for punitive damages in this case. Plaintiffs' punitive damages claim against the municipal defendants is dismissed. *Miller v City of Rensselaer*, 94 AD2d 862 [3d Dept. 1983]; *City of Newport v Fact Concerts, Inc.*, 453 US 247 [1981]; *see also, Rehabilitation Support Services, Inc. v City Of Albany*, 2015 WL 4067066 [N.D.N.Y. 2015].

Plaintiffs' Amended Complaint, paragraph 75, states that the plaintiff is seeking punitive damages against the District only, not the individual defendants. Plaintiffs' Amended Complaint adds the individual defendants, Terri Brown, Susan Lieberman, Jason Spector and Mark Fish to the action. Plaintiffs' memorandum of law asserts that punitive damages are

available against these individual actors. Paragraphs 23-26 of the Amended Complaint uniformly allege that each individual defendant:

> "*** is named as a defendant based upon his [her] personal knowledge of Decedent being bullied in school and his [her] deliberate indifference in failing to take action to address; report; document; or remedy the problem."

Paragraphs 28 of the Amended Complaint states:

> "Each of the individual defendants are alleged to be individually liable based upon their reckless and/or callous indifference to the federally protected rights of J.T.,as outlined in this pleading."

Punitive damages "may be awarded when a defendant's conduct is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others." *Rahn v Carkner,* 241 AD2d 585, 586 [3d Dept. 1997]. Plaintiffs failed to proffer or support any cause of action based upon substantive due process in their papers in opposition to defendants' motion to dismiss. A substantive due process claim also requires conscience shocking behavior. Making a bad decision or acting negligently is not generally conscience shocking behavior. *County of Sacramento v Lewis,* 523 US 833, 847-849 [1998]. In addition to the generic and conclusory allegations outlined above, the Amended Complaint contains some more specific allegations against the individual defendants in paragraphs 37, 40, and 46-48. Even considering these allegations in the light most favorable to the plaintiffs, such allegations merely demonstrate negligent behavior and are insufficient to state a claim for punitive damages against the individual defendants.

The plaintiffs' complete failure to plead that the individual defendants were acting outside of the scope of their employment is not fatal to a punitive damages claim. *See, Miller v City of Rensselaer, supra.* However, such failure provides an additional basis for dismissing plaintiffs' claim for punitive damages against the individual defendants in this case. Plaintiffs'

punitive damages claim against the individual defendants is dismissed.

Defendants also move pursuant to CPLR § 3024(b) to strike the inflammatory and prejudicial allegations in the Amended Complaint, paragraph 11, that there are a "disproportionate number of suicides in the District" and that many people refer to "the District as 'Suicide Falls.'" Pleadings are replete with appropriate allegations that are inflammatory and prejudicial to the opposing party. The test is whether the allegations are unnecessarily included in the pleading, i.e. "irrelevant" to the cause of action. *NYC Health and Hosps. Corp. v St. Barnabas Comm. Health Plan,* 22 AD3d 391 [1st Dept. 2005]. Whether allegations are unnecessarily included can be measured by whether they would be admissible at trial. *Talbot v Johnson Newspaper Corp.,* 124 AD2d 284 [3d Dept. 1985]. It is premature to determine whether the allegations will be ruled as irrelevant at trial. *See, Elsawi v Saratoga Springs City School Dist.,* ___ AD3d ___, 2016 WL 3747930 [3d Dept. 2016]. Defendants' motion to strike is denied.

Defendants' motion to dismiss plaintiffs' causes of action for negligent supervision and wrongful death is denied. The remainder of defendants' motion to dismiss is granted. Defendants' motion to strike is denied. Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for the defendants for filing and entry. The underlying papers will be filed by the Court.

Dated: August 9, 2016
Ballston Spa, New York

Ann C. Crowell

ANN C. CROWELL, J.S.C.

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Saratoga County Clerk