

Perez v City of New York
2019 NY Slip Op 31179(U)
April 29, 2019
Supreme Court, New York County
Docket Number: 160047/2016
Judge: Julio Rodriguez III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM

Justice

INDEX NO. 160047/2016
MOTION DATE 03/21/2019
MOTION SEQ. NO. 001, 002

CARMEN PEREZ,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 38, 39, 40, 41

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for DISMISS / SUMMARY JUDGMENT; AMEND COMPLAINT

Plaintiff commenced this action seeking damages from an alleged incident on a school bus travelling at or near Franklin D. Roosevelt East River Drive, New York, New York, on January 13, 2016. On the date of the incident, plaintiff was a school bus matron. Plaintiff alleges, amongst other things, that her damages arose from defendants' negligence in protecting plaintiff from a student on the subject bus by failing to provide her with pertinent information about the student's past behavior.

In motion sequence one, plaintiff moves to compel discovery responses to its demand for a bill of particulars as to affirmative defenses dated March 16, 2017, and notice for discovery and inspection dated May 15, 2018, which is a demand for one item: "[a] complete copy of the student file of F.G., the student who assaulted Plaintiff for three years prior to the date of the subject incident". Defendants City of New York ("City"), New York City Department of Education ("DOE"), and New York City Board of Education ("BOE") (collectively "City Defendants") oppose the motion.

In support of her motion to compel, plaintiff attaches the pleadings, her bill of particulars, plaintiff's demand for a bill of particulars as to affirmative defenses dated March 16, 2017, the case scheduling order, five compliance conference orders, a good faith letter, and plaintiff's deposition transcript. In their opposition papers dated September 24, 2018, City Defendants argue that plaintiff's motion to compel is "entirely frivolous and moot", attaching a response dated September 24, 2018, to plaintiff's demand for a bill of particulars dated March 16, 2017, a

response, dated September 24, 2018, to plaintiff's notice for discovery and inspection dated May 15, 2018 (which asserts that the requested file may not be exchanged pursuant to the Family Educational Rights and Privacy Act of 1914 ["FERPA"]), an affidavit of service for their answer, and the case scheduling and compliance conference orders. In reply, plaintiff attaches the notice of claim and plaintiff's 50-h transcript.

In motion sequence two, City Defendants seek an order dismissing the complaint for failure to state a claim pursuant to CPLR 3211 (a) (7) and/or granting summary judgment. Plaintiff opposes the motion and cross-moves on motion sequence two to amend her complaint pursuant to CPLR 3025 (b). City Defendants oppose the cross-motion.

In support of its motion to dismiss or grant summary judgment, City Defendants attach the notice of claim, pleadings, plaintiff's bill of particulars, plaintiff's 50-h transcript, and plaintiff's deposition transcript. In opposition to City Defendants' motion and in support of her cross-motion to amend the complaint, plaintiff attaches, in addition, plaintiff's supplemental bill of particulars, plaintiff's demand for a bill of particulars as to affirmative defense and City Defendant's response, an affidavit of merit, the case scheduling and compliance conference orders, copies of the papers submitted on motion sequence one, and plaintiff's proposed amended complaint. In reply, City Defendants attach two trial court orders. Plaintiff also submits a reply on her cross-motion.

This decision analyzes the motions as follows: first, plaintiff's cross-motion to amend her complaint; second, City Defendants' motion to dismiss and/or for summary judgment; third; plaintiff's motion to compel discovery.

Plaintiff's cross-motion to amend her complaint

Plaintiff cross-moves to amend her complaint as indicated by Exhibit 14 of her affirmation in support of cross-motion (*Zwaig aff.* dated December 21, 2018, Exhibit 14, proposed amended complaint). City Defendants oppose this cross-motion on the bases that 1) plaintiff failed to seek leave within the applicable statute of limitations to file an amended notice of claim to plead a special duty and 2) notwithstanding any proposed amendment, City Defendants established, in their view, that no special duty existed as a matter of law.

"Under CPLR 3025, a party may amend a pleading 'at any time by leave of court'" (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014] citing CPLR 3025 [b]). "[A]bsent prejudice, courts are free to permit amendment [of pleadings] even after trial" (*Kimso*). However, "where the proposed amendment is devoid of merit, leave should be denied" (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Here, plaintiff cross-moves to amend her complaint, attaching a proposed amended pleading (*Zwaig aff.* dated December 21, 2018, Exhibit 14, proposed amended complaint) pursuant to CPLR 3025 (b).

Notably, City Defendants do not argue that plaintiff's proposed amendment creates prejudice nor that the proposed amendment is devoid of merit. With respect to City Defendants' contention that plaintiff has not sought leave to amend her notice of claim, the court notes that this is not required where the original notice of claim gives notice of the "essential facts of the

claim” (see *Corwin v City of New York*, 141 AD3d 484 [2016]). Plaintiff’s original notice of claim provided notice of the alleged incident and plaintiff’s alleged basis of liability: “negligen[ce]...in failing to inform...claimant of the violent tendencies of the student who attacked claimant” (*Zwaig aff.* dated December 21, 2018, Exhibit 1, notice of claim, at 2; see *Rollins v New York City Bd. Of Educ.*, 68 AD3d 540 [1st Dept 2009]).¹ Consequently, plaintiff’s motion to amend the complaint is granted.²

City Defendants’ motion to dismiss and/or grant summary judgment

“[O]n a CPLR 3211 motion to dismiss we ‘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’ (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994])” (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501 [1st Dept 2018]). “[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018] citing *Leon*). “[T]he criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” and the court “determine[s] only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013] citing *Leon*).

As a starting point, as to potential municipal liability here, “the rule...is that ‘[g]overnment 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’” (*Valdez v City of New York*, 18 NY3d 69, 76 [2011] quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]). Stated differently, “[a] public employee’s discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality’s liability even when the conduct is negligent. By contrast, ministerial acts—meaning conduct requiring adherence to a governing rule, with a compulsory result—may subject the municipal employer to liability for negligence” when combined with a special duty (*Lauer v City of New York*, 95 NYD2d 95, 99 [2000]; see *Valdez*, 18 NY3d at 76).

“[A] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition” (*Tara N.P. v Western Suffolk Board of Coop. Educational Services*, 28 NY3d 709 [2017] quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). In this case, situations one and three are not applicable, and the issue is whether plaintiff has sufficiently pled the second type of special relationship, namely, that City

¹ Additionally, in this context (where a motion to dismiss is pending and City Defendants contend that plaintiff’s notice of claim is insufficient), “the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court” (*D’Alessandro v New York City Transit Authority*, 83 NY2d 891 [1994]). Here, plaintiff stated at her 50-h hearing that the students’ schools are under an obligation to inform her, as a bus matron, of pertinent information about the students and that she was in fact provided with information about the students on the bus (*Zwaig aff.* dated December 21, 2018, Exhibit 5, transcript of 50-h hearing, at 15-16).

² City Defendants’ second argument (that notwithstanding any proposed amendment, no special duty existed as a matter of law) is substantively an argument for summary judgment and will be analyzed as such.

Defendants “voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally” (*id.*).

The Court of Appeals articulated the four elements of this special relationship in *Tara N.P.* (28 NY3d at 714): “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of *direct contact* between the municipality's agents and the injured party; and (4) that party's *justifiable reliance* on the municipality's affirmative undertaking” (*id.*, quoting *Cuffy v. City of New York*, 69 NY2d 255 [1987]). “[A]ll four elements must be present for a special duty to attach” (*Tara* citing *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]). Additionally, “the direct contact requirement has not been applied in an overly rigid manner” (*Tara*, 28 NY3d 709, quoting *Cuffy*, 69 NY2d 255).

In her amended complaint, plaintiff specifically alleges (1) that the City Defendants provided records to plaintiff that were meant to convey “all the pertinent information about [students’ potential] violent tendencies” (*see Zwaig aff.* dated December 21, 2018, Exhibit 14, proposed amended complaint, at ¶ 13), (2) that City Defendants had knowledge of the specific student’s violent tendencies and knew that not providing records noting or describing such tendencies could lead to harm (*id.*, at ¶¶ 32-34), (3) that an agent of City Defendants had direct contact with plaintiff (*id.*, at ¶¶ 18, 38), and (4) that plaintiff relied on the information she was provided, which caused her to relax her vigilance and turn her back to the subject student (*id.*, at ¶ 41). Additionally, plaintiff alleges that the foregoing caused the alleged damages (*id.*, at ¶ 42). Plaintiff’s amended pleading thus states a cause of action for negligence against City Defendants based on an alleged special duty, and City Defendants’ motion to dismiss for failure to state a claim is denied.

City Defendants also move pursuant to CPLR 3212 for summary judgment. The proponent of a motion for summary judgment must tender sufficient evidence to show the right to entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, “the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so” (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

In support of their motion for summary judgment, City Defendants attach the notice of claim, pleadings, plaintiff’s bill of particulars, plaintiff’s 50-h transcript, and plaintiff’s deposition transcript.

Insofar as plaintiff’s testimony corroborates plaintiff’s allegations that plaintiff was provided with records and information about the children on the bus at issue (*see e.g., Zwaig aff.* dated December 21, 2018, Exhibit 6, transcript of deposition, at 15), City Defendants have failed

to make a *prima facie* showing of entitlement to judgment. In any event, plaintiff created a question of fact through her testimony and affidavit (*see Zwaig aff.* dated December 21, 2018, Exhibit 5, transcript of 50-h hearing; Exhibit 6, transcript of deposition; Exhibit 8, affidavit dated November 6, 2018). At her deposition, plaintiff testified that she was provided records that described the students' "different needs" (*Zwaig aff.* dated December 21, 2018, Exhibit 6, transcript of deposition, at 15). Additionally, in plaintiff's affidavit dated November 6, 2018, she stated *inter alia* that a school employee "and others involved in the Defendants' pupil transportation system routinely provided me records regarding Student F.G." (*Zwaig aff.* dated December 21, 2018, Exhibit 8, affidavit dated November 6, 2018), that plaintiff "was told that these records would always provide all pertinent information about Student F.G.'s violent tendencies, in order to prevent harm" (*id.*), and that the records "did not contain any information about any violent tendencies" (*id.*).

Finally, to the extent that City Defendants argue that provision of this information to plaintiff was discretionary in nature, they have adduced no evidence to that effect.

City Defendants' motion for summary judgment is therefore denied, with leave to renew.

Plaintiff's motion to compel

Plaintiff also moves to compel discovery responses to its demand for a bill of particulars as to affirmative defenses dated March 16, 2017, and notice for discovery and inspection dated May 15, 2018, which is a demand for one item: "[a] complete copy of the student file of F.G., the student who assaulted Plaintiff for three years prior to the date of the subject incident". As City Defendants provided a response to plaintiff's demand for a bill of particulars as to affirmative defenses in its opposition, that branch of the motion is moot. With respect to student F.G.'s file, plaintiff's motion is granted to the extent that student F.G.'s file will be reviewed *in camera* prior to its exchange to ensure compliance with FERPA and any other confidentiality requirements; City Defendants are ordered to submit to this court a copy of student F.G.'s file—as well as a copy of student F.G.'s file *with proposed redactions*—within 45 days of service of the notice of entry of this order.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof, and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service, and it is further

ORDERED, that defendants City of New York, New York City Department of Education, and New York City Board of Education's motion to dismiss and/or for summary judgment is denied, and it is further,

ORDERED, that plaintiff's motion to compel discovery is granted to the extent that defendants City of New York, New York City Department of Education, and New York City Board of Education must submit to this court a copy of student F.G.'s file, as well as a copy of student F.G.'s file with proposed redactions, within 45 days of service of the notice of entry, with a redacted copy of the file to be exchanged to plaintiff following *in camera* review, and it is further,

ORDERED, that defendants City of New York, New York City Department of Education, and New York City Board of Education must make any required notifications, including any notifications required by 34 CFR 99.31, prior to its submission to this court of student F.G.'s file and defendants' proposed redactions, and it is further,

ORDERED, that plaintiff is to serve a copy of this order with notice of entry upon all parties and the General Clerk's Office, and it is further,

ORDERED, that the parties are directed to appear for the scheduled compliance conference on June 20, 2018.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

April 29, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE