M.H.B. v Ethical Culture Fieldston Sch.
2019 NY Slip Op 32219(U)
March 1, 2019
Supreme Court, Bronx County
Docket Number: 23518/2018E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___
---X

M.H.B., an infant, by his parents and natural guardians CHRISTOPHER BROWN and HILLARY ANNE HALLETT, et al.

Index №. 23518/2018E

-against-

Hon. MARY ANN BRIGANTTI

Justice Supreme Court

ETHICAL CULTURE FIELDSTON SCHOOL, et al.
---X

The following papers numbered 1 to __6__ were read on this motion (Seq. No. _______) for ___**DISMISSAL** noticed on ___June 29, 2018_.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s)1,2
Answering Affidavit and Exhibits	No(s).3,4
Replying Affidavit and Exhibits	No(s).5,6

Motion is Respectfully Referred to Justice: ____________
Dated: ____________

Upon the foregoing papers and oral argument, the defendants Ethical Culture Fieldston School ("EFCS"), Jessica L. Bagby ("Bagby"), Chia-Chee Chiu ("Chiu"), Bree Aitoro ("Aitoro"), and "John and Jane Does," said names being fictitious and intended to represent individual employees, staff, teachers, and personnel of Ethical Culture Fieldston School (collectively, "Defendants") move for an order pursuant to CPLR 3211(a)(7), dismissing the amended complaint of the plaintiff M.H.B., an infant by his parents and natural guardians Christopher Brown and Hilary Anne Hallett (hereinafter "M.H.B."), Christopher Brown, individually ("Brown"), and Hilary Anne Hallett ("Hallett")(collectively, "Plaintiffs"). Plaintiffs oppose the motion.

Background

According to the amended complaint, at relevant times, M.H.B. was a 12-year-old bi-racial student enrolled at ECFS, a private school designated as a not-for-profit organization located in the Bronx (Pl. Complaint at ¶ 7, 12, 20). Defendant Babgy was ECFS's Head of School. Defendant Chiu was the principal of the ECFS middle school, and defendant Aitoro was the middle school counselor (*id.* at ¶ 13-15). Soon after he was accepted to ECFS, M.H.B. allegedly learned that a classmate "H.K." was considered a racist and had made racist statements (*id.* at ¶ 20). In subsequent weeks, M.H.B. allegedly experienced a pattern of racial isolationism and tension from his classmates during recess and lunch, and it is claimed that the Defendants collectively condoned that behavior and permitted Caucasian students to exclude their African-American counterparts from intermingling with them during social activities (*id.* at ¶ 21). Brown and Hallett, M.H.B.'s parents, complained to Chiu about certain school exercises that allegedly encouraged racial segregation (*id.* at ¶ 22). Plaintiffs allege that racial tension

peaked in early November 2017 when H.K.'s parents - who were Caucasian - complained to the school about M.H.B. confronting H.K. about H.K.'s alleged past racist statements (*id.* at ¶ 23). Plaintiffs claim that Defendants thereafter began to retaliate against Plaintiffs due to their complaints of race -related problems at the school (*id.*at ¶25-30).

Plaintiffs specifically allege that Defendants' retaliatory actions began after November 10, 2017, when M.H.B. went to the school nurse after he injured his elbow playing football at recess (*id.* at ¶31). Hallett went to the school to pick M.H.B. up and she called M.H.B.'s pediatrician to notify him of the accident (*id.* at ¶31). That same day, the pediatrician advised Hallett that it was best to wait and see how M.H.B. responded before sending him for a x-ray and exposing him to unneeded radiation (*id.* at ¶ 34). Defendants allegedly never required that Plaintiffs obtain a doctor's note before M.H.B. returned to school on November 13, 2017 (*id.* at ¶ 34-35). When M.H.B. returned to school, the school nurse removed him from class and sent him to the physical trainer for an examination, even though M.H.B. did not make any complaints about his elbow (*id.* at ¶ 37). The trainer then contacted Hallett and instructed her to get an x-ray. Plaintiffs did so later that day, and the x-ray revealed no fracture (*id.*). On November 14, 2017, M.H.B. brought a note to school indicating that he only had a bone bruise and that he should refrain from participating in physical education classes for the remainder of the week (*id.* at ¶38). The complaint alleges, however, that despite doing all that was asked by ECFS staff, the defendants, including Bagby, Chiu and unnamed John and Jane Doe employees and staff, acted together to use the November 10, 2017 incident to retaliate against Plaintiffs and force them out of the school (*id.* at ¶36).

Plaintiffs allege that on November 15, 2017, the sixth-grade dean as well as Chiu e-mailed Hallett wishing to set up a meeting, under the guise of being concerned about Hallett's complaints regarding racism and tension at the school (*id.* at ¶39-40). Plaintiffs allege, however, that the meeting did not occur, and two days later, "[i]n clear retaliation for speaking out against the racial tension M.H.B. was experiencing as an African-American student, Defendant ECFS, in concert with Defendants Bagby, Chiu and 'John and Jane Does,' made a false complaint to Child Protective Services (hereinafter "CPS") about Plaintiffs Brown and Hallett..." (*id.* at ¶41). On November 20, 2017, CPS case worker Esaban Orvalle ("Orvalle") came to Plaintiffs' home to investigate child abuse allegations made by Defendants (*id.* at ¶42). Orvalle told "Brown and Hallett that a complaint was made by a staff member of EFCS alleging that M.H.B. arrived to school hungry on two occasions, failed to see his personal physician after his November 10, 2017 football injury, and that there was concerns over Hallett's response to the injury (*id.* at ¶42). Plaintiffs allege that the CPS complaint was retaliatory, discriminatory and unreasonable, as Plaintiffs had done all that was asked of them about the football injury, Defendants had never raised an issue about M.H.B. reporting to school hungry, and M.H.B. was entitled to get breakfast at school as many other students did each day (*id.* at ¶43). Plaintiffs claim that Defendants acted with demonstrated malice (*id.* at ¶45). The following day,

Plaintiffs Brown and Hallett went to EFCS to speak with Chiu and the school nurse about the CPS investigation. Chiu was allegedly unsympathetic and insisted that she escort Plaintiffs to the nurse's office, and she spoke with nurse office staff privately before allowing Plaintiffs to speak with them (*id.* at ¶45). Plaintiffs assert that Caucasian parents never had to be supervised by ECFS staff while discussing their child's care (*id.* at ¶46). Later that day, CPS worker Orvalle went to the school to continue his investigation. Defendant Aitoro allegedly pulled M.H.B. out of class before M.H.B. met with the case worker, thus causing him to endure additional distress, anxiety, and sleep disturbances (*id.* at ¶47). In addition, Brown and Hallett were never notified of the meeting between M.H.B. Orvalle, and Aitoro (*id.* at ¶49), and it is alleged that, upon information and belief, Caucasian families were not treated in the same manner (*id.*).

As the CPS investigation continued, Brown and Hallett expressed their complaints about the defamatory allegations made by an employee of the school. In response, Plaintiffs claim that Bagby tacitly supported the CPS complaint (*id.* ¶53), and also discouraged Plaintiffs from speaking with anyone regarding the allegations (*id.* at ¶54), even though Orvalle had already made face-to-face visits with Plaintiffs' family demanding that they provide the names of individuals who could speak on their behalf as parents (*id.*). Plaintiffs allege that Defendants were unsympathetic to M.H.B.'s subsequent declines in school due to his distress (*id.* at ¶55). On November 29, 2017, Hallett and Brown met with Bagby to discuss their complaints and concerns about continuing to send M.H.B. to ECFS (*id.* at ¶56). During this meeting, Bagby allegedly claimed that an EFCS employee - who she referred to as "she," - reported Plaintiffs to CPS, and had conferred with other employees on guidance on how the handle the report (*id.*). Bagby allegedly acknowledged that the employee that was consulted should have encouraged the "reporter" to follow proper protocol, and the reporter acted "rogue" by not following the school's internal protocol, which required conferring with Bagby, or complying with Social Services Law §413 requiring "reasonable cause" before filing a complaint with CPS (*id.*). The complaint also alleges that defendants Bagby and Chiu failed to stop the CPS investigation despite their knowledge that the complaint was unreasonable and violated Social Services Law §413 (*id.* at ¶56-58). Plaintiffs believe that the reporter was defendant Chiu, because the report involved a health-related issue and an academic issue, both of which Chiu had institutional control over (*id.* at ¶61). The complaint goes on to assert that Defendants tried to force Plaintiffs out of the school in retaliation for their complaints about racism, and engaged in conduct that was not done to Caucasian families (*id.* at ¶62-65).

Plaintiffs commenced a lawsuit on March 27, 2018 (*id.* at ¶33). Immediately after filing the lawsuit, Bagby sent an e-mail to the entire ECFS community stating:

Dear ECFS families,

I am writing to update you on the issue that is not public and may receive media attention. The school was recently approached by a lawyer who demanded the school pay $8 million or face an inflammatory lawsuit. The parents claim that a single phone call was made to child services reporting potential child neglect. Under state laws, employees of the school are "mandatory reporters," and the mandatory reporting system is vital to the safety and security of students across the country.

This situation was handled in accordance with legal requirements. While the family has now filed a lawsuit, you should be assured that our school's child safety policies will not be compromised. We are saddened that anyone in our community would try to undermine this important system with a baseless lawsuit that puts profiteering ahead of students' safety.

Yours,
Jessica. (*Id.* at ¶77).

Plaintiffs allege that this e-mail contained false statements and was a part of Defendants' ploy to conceal their own wrongdoing and to tarnish Plaintiffs' reputation (*id.* at ¶78).

Plaintiffs' amended complaint alleges causes of action against defendant for (1) intentional infliction of emotional distress; (2) defamation and State Law violations; (3) libel; (4) discrimination under New York State Human Rights Law; (5) retaliation under New York State Human Rights Law; (6) aiding and abetting in violation of New York State Human Rights Law; (7) discrimination under New York City Human Rights Law; (8) retaliation under New York City Human Rights Law; (9) aiding and abetting in Violation of New York City Human Rights Law; (10) negligent hiring, training and supervision.

Defendants now move to dismiss Plaintiffs' complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7). Defendants claim that Plaintiffs' complaint fails because each of the causes of action, aside from the libel claim, depend upon the identity and motives of the CPS reporter, who is anonymous. Defendants argue that Plaintiffs only make speculative assertions that Defendants are responsible for the CPS report. Defendants also assert that New York's mandatory reporting obligations require individuals to act in their own capacity, even before reporting concerns to the school. Thus, Plaintiffs do not and cannot establish that any staff member was acting as the agent of ECFS or the other defendants, and the complaint does not plead that the mandated reporter ever notified the school or any of the other defendants. Even if the reporter did so, it would not convert the report into one from the school, or create any obligation on the school's part to conduct its own investigation into the merits of the report. Defendants also argue that since New York law protects the identity of the mandatory reporter, and because reporters are generally immune

from civil or criminal liability for their good-faith reporting of child abuse, Plaintiffs' amended complaint must be dismissed. Defendants allege that since Plaintiffs cannot allege, "beyond rank speculation," who made the report here, they cannot use this lawsuit as a mechanism to learn the identity of the reporter and pursue their claims. Defendants further assert that Plaintiff's cause of action for libel must be dismissed because the statements contained in the subject e-mail were not defamatory and are not otherwise actionable. Plaintiff has submitted a memorandum in opposition, and Defendants have submitted a reply memorandum. The contentions in the opposition and reply will be addressed *infra* if necessary.

Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see,* CPLR 3026). 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 into any cognizable legal theory"(*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]).

Applicable Law and Analysis

(1) Plaintiff's Claims for : Intentional Infliction of Emotional Distress; Defamation and State Law Violations; Discrimination, Retaliation, and Aiding and Abetting violations of New York State and City Human Rights Law; and Negligent Hiring, Training and Supervision.

Defendants motion to dismiss does not specifically address whether Plaintiff has adequately stated claims of intentional infliction of emotional distress, defamation, violations of New York State and City Human Rights Law, or negligent hiring, training and supervision. Defendants' motion is premised on the assertion that these claims can be dispensed with because the complaint only proffers "rank speculation" as to who made the CPS report, and whether any of the defendants were involved, and the complaint serves as

an improper vehicle to determine who made the report. This Court, to the contrary, finds that Plaintiffs' complaint adequately sets forth a factual basis for their claims concerning the CPS report. Again, on a motion to dismiss pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true and the plaintiff must be afforded every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d 83, 87-88; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 [1976]).

Plaintiffs' complaint specifically alleges that "Defendant ECFS, in concert with Defendants Bagby, Chiu," and the John and Jane Doe defendants, "made a false complaint to Child Protective Services...on November 17, 2017" (Pl. Complaint at ¶41). Defendants' motion does not address this paragraph at all. The complaint also alleges that CPS case worker Orvalle told Plaintiffs that a "staff member" of the school made the report (*id.* at ¶42) and claimed that M.H.B. arrived to school hungry on two occasions, and his mother Hallett did not respond appropriately to his football injury (*id*). The complaint later alleges that Plaintiffs Brown and Hallett engaged in a discussion with Bagby, wherein the report was discussed, Bagby indicated that she knew of the staff member who made the report, and she related that an employee who consulted the reporter went "rogue" and did not follow the school's internal protocol (*id.* at ¶56). The complaint also alleges Plaintiffs' belief that defendant Chiu made the report (*id.* at ¶61), and supports that contention by stating that the report involved a health-related and academic issue, both of which Chiu had institutional control over (*id.*). The foregoing allegations demonstrate the existence of a valid, non-speculative basis Plaintiffs' belief that Defendants' staff - specifically Chiu, in concert with EFCS administration - initiated the allegedly false report to CPS. Furthermore, contrary to Defendants' contentions, the complaint sufficiently makes a claim against Defendants collectively, since it alleges that defendants Bagby and Chiu were responsible for "subsequent administration" necessitated by the report, and they failed to stop the investigation from proceeding or instruct their employees to inform the case worker that there was no good cause to continue the investigation, because the allegations were untrue (*id.* at ¶58) (*see* Social Services Law §413[1][b] [a school official who makes a report pursuant to Social Services Law §413[1][a] must "immediately notify the person in charge" of the school, and the person in charge is then "responsible for all subsequent administration necessitated by the report"]).

The matters relied on by Defendants, *Deleon v. Putnam Valley Bd. of Ed.*, 228 F.R.D. 213 (S.D.N.Y. 2005) and *Selapack v. Iroquois Cent. School Dist.*, 17 A.D.3d 1169 (4th Dept. 2005), do not compel dismissal of this matter. Both of those cases did not involve motions to dismiss, but rather involved determination of whether the identity of the anonymous reporter should be revealed. *Selapack* only acknowledged that the identity of a reporter could not be disclosed simply because it was alleged that the person acted with wilful misconduct or gross negligence (*Selapack*, 17 A.D.3d at 1170). *Deleon*, unlike the instant case, contained no specific allegations of bad faith on the part of school officials or the mandatory reports (228 F.R.D. at 220-221). In any event, neither case addressed the issue of whether the

circumstances warranted dismissal of the respective actions for failure to state a claim upon which relief could be granted.

It is true that a reporter is "entitled to immunity from liability based upon the good-faith making of a report of suspected child abuse (*see* Social Services Law §419; *Escalera v. Favaro*, 298 A.D.2d 552 [2nd Dept. 2002]), and the good faith of any person required to report cases of suspected child abuse shall be presumed (*see* Social Services Law §419; *Kempster v. Child Protective Servs. of Dept. of Social Sevs. of County of Suffolk*, 130 A.D.2d 623, 624 [2nd Dept. 1987])" (*Zornberg v. North Shore University Hosp.*, 29 A.D.3d 986 [2nd Dept. 2006]). However, "a civil action may be maintained based on the false reporting of child abuse and maltreatment" (*Schollar v. City of New York*, 160 A.D.3d 140, 145 [1st Dept. 2018]), where it is alleged that the defendant-reporter had no reasonable cause to suspect child abuse, did not act in good faith, or acted with actual malice (*Vaz v. Sipsas*, 1 A.D.3d 503, 504 [2nd Dept. 2003]). In this matter, assuming the allegations in the complaint are true and affording Plaintiff all favorable inferences, Plaintiffs sufficiently allege that Defendants, in retaliation for speaking out against racial tensions M.H.B. was experiencing at the school, made a false complaint to CPS (Pl. Complaint at ¶41; 62; 83; *passim*), that was discriminatory and unreasonable (*id.* at ¶43 and 46, *passim*), and that Defendants acted with demonstrated malice (*id.* at ¶45). Plaintiffs thus adequately state a cause of action predicated upon a false report of child abuse that was made in bad faith and with no reasonable basis (*see Vaz v. Sipsas*, 1 A.D.3d 503, 504-05). Again, Defendants do not address each of Plaintiff's causes of action - aside from the libel claim - and therefore they failed to affirmatively demonstrate entitlement to dismissal of those claims (*id.*, see also *Zornberg v. North Shore University Hosp.*, 29 A.D.3d 986]). Defendants cannot address the substance of Plaintiffs' causes of action for the first time in reply papers (*see, e.g., Erdey v. City of New York*, 129 A.D.3d 546 [1st Dept. 2015]).

(2) Libel

Defendants also argue that they are entitled to dismissal of Plaintiff's libel claim. "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory" (*Brian v. Richardson*, 87 N.Y.2d 46, 50 [1995]). "On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are 'reasonably susceptible of a defamatory connotation,' such that the issue is worthy of submission to a jury'" (*see Stepanov v. Dow Jones & Co., Inc.*, 120 A.D.3d 28, 34 [1st Dept. 2014][internal citations omitted]). Statements that are "susceptible to a defamatory connotation," are false statements "which tend[] to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Foster v. Churchill*, 87 N.Y.2d 744, 751 [1996][internal quotations omitted]).

Importantly, "'only statements alleging facts can properly be the subject of a defamation action'" (*Davis v. Boeheim*, 24 N.Y.3d 262, 268 [2014], quoting *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152-153 [1993], citing *600 W. 115th St. Corp. v. Von Gutfield*, 80 N.Y.2d 130[1992], and *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 254 [1991]). The Court of Appeals has instructed that a defamatory statement of fact is different than expressions of "pure opinion," which are not actionable and are deemed privileged "no matter how offensive" (*Davis v. Boeheim*, 24 N.Y.3d at 269 [internal citations omitted]). A non-actionable "pure opinion" is either (1) "a statement of opinion which is accompanied by a recitation of the facts upon which it is based" or (2) "'[a]n opinion not accompanied by such a factual recitation' so long as 'it does not imply that it is based upon undisclosed facts'" (*id.* [internal quotations omitted]). On the other hand, an opinion that "'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a 'mixed opinion' and is actionable'" (*id*, quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 [1986], citing cases]). Determining whether a statement is fact or opinion is a matter of law for the courts, and "the dispositive inquiry ... is 'whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff'" (*id.* [citing cases]). Furthermore, there is a three-factor test to determine whether a reader would reasonably consider a statement to be fact or opinion: "'(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact'" (*id.* At 270, quoting *Mann v. Abel*, 10 N.Y.3d 271, 276 [2008], quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51 [1995]).

Plaintiffs' complaint, when construed broadly, sufficiently states a claim for libel. Plaintiff alleges that the e-mail written by Bagby "falsely claimed that the Plaintiffs 'demanded the school $8 million [sic] or face an inflammatory lawsuit" (Pl. Complaint at ¶93). The complaint also alleges that Defendants disclosed "confidential settlement discussions," but it does not admit that the $8 million dollar demand in fact occurred. While Bagby's characterization of the lawsuit as "baseless," or profiteering and "trying to undermine" the school's child safety policies may be protected opinion, when read in full context, the e-mail also implies that the lawsuit is based on "a single phone call" to child services regarding potential child neglect, when the suit is actually premised upon other facts that were withheld from the e-mail. Plaintiffs also allege that while the e-mail states that the "situation was handled in accordance with legal requirements," this was in contrast to what Bagby disclosed to them at a private meeting where she admitted that the reporter went "rogue" and did not follow the school's internal protocols when making the report to CPS (*id.* at ¶79). In sum, the statements of opinion contained in the e-mail "impl[y] that [they are] based upon facts which justify the opinion but are unknown to those reading or hearing it," and this

constitutes an actionable "mixed opinion" (*see Davis v. Boeheim*, 24 N.Y.3d at 269 [internal citations omitted]). As a whole, the written, allegedly false statements that Plaintiffs demanded $8 million from Defendants, and filed a baseless lawsuit, that seeks to undermine child abuse reporting and to put "profiteering ahead of students' safety" may "expose [Plaintiffs] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society'" (*Foster v. Churchill*, 87 N.Y.2d 744, 751).

Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/1/19 **Hon.** Mary Ann Brigantti **J.S.C.**

1. CHECK ONE... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS.. ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT