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| Melo v City of New York |
| 2020 NY Slip Op 30184(U) |
| January 22, 2020 |
| Supreme Court, New York County |
| Docket Number: 151503/2018 |
| Judge: Laurence L. Love |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

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INDEX NO. 151503/2018

MARIA MELO,

MOTION DATE 11/12/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, NEW YORK CITY HEALTH
AND HOSPITAL CORPORATION, GOTHAM HEALTH
FQHC, INC., YANNEK LOWE

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISSAL

On May 8, 2017, plaintiff served a Notice of Claim alleging that Yannek Lowe inappropriately touched plaintiff during a checkup at Gotham Health/Renaissance Health Care Network Diagnostic and Treatment Center at 264 West 118th Street. Plaintiff commenced this action by purchasing an index number and e-filing a Summons and Complaint with the New York County Clerk's Office on or about February 16, 2018. The Complaint alleges causes of action for assault; battery; failure to protect; negligent hiring, training, and retention; and negligent infliction of emotional distress. The City joined issue by service of a Verified Answer on April 6, 2018. Co-defendant New York City Health and Hospitals Corporation (hereinafter, "HHC") served an Answer on or about April 19, 2018. Co-defendant Lowe served an Answer on or about May 22, 2019. By an affirmation filed on May 21, 2019 HHC denied employing Lowe but asserted that non-party White Glove Placement employed him.

The City of New York now moves for dismissal pursuant to CPLR R. 3211(a)(7) alleging that plaintiff has failed to state a cause of action against the city as HHC is a separate and distinct

entity from the city. The Complaint alleges that the City owned, maintained, controlled, managed, operated, and supervised the Gotham Health/Renaissance Health Care Network Diagnostic and Treatment Center; that the City had a duty to supervise Lowe and protect patients from harm; and that the City is vicariously liable for Lowe's actions. Plaintiff further alleges that the City knew or should have known about Lowe's propensity for sexual harassment, sexual assault, assault and battery, and intentional and negligent infliction of emotional distress and failed to take steps to protect Plaintiff from Lowe's actions. Lastly, the Complaint alleges that the City was negligent in its hiring and retention of Lowe.

The City of New York now moves to dismiss any claims and cross-claims asserted against it based upon plaintiff's failure to state a cause of action, as HHC is a separate legal entity from the City, and the City may not be held liable for the actions of HHC staff, See, McKinney's Unconsolidated Laws of New York § 7384(1), § 7385(5) and § 7401(4); Haynes v. Guiliani, 238 A.D.2d 257 (1st Dept. 1997); Vaughn v City of New York, 108 Misc 2d 994, 998, affd 89 AD2d 944; Brennan v City of New York, 59 NY2d 791).

Plaintiff's initial opposition to the City's motion argued that as the City failed to move under CPLR 3211(a)(1) and moved only under CPLR 3211(a)(7), the City's motion must be denied as "When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleading as true, affording the non-moving party the benefit of every possible favorable inference and determining "only whether the facts as alleged fit within any cognizable legal theory." D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh, 168 A.D.3d 505, 92 N.Y.S.3d 231 (1S Dept. 2019); Wejl Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1st Dept. 2004); see also AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582 (2005). As the Court is required to accept the plaintiff's allegations as

true, and because whether plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss, plaintiff argues that the City's motion must be denied.

After submission of the initial opposition, the Court sent notice to both parties that the instant motion would be entertained on CPLR 3211(a)(1) grounds and allowed both parties time to submit additional papers.

Plaintiff's second opposition to the instant motion objects to its consideration as a 3211(a)(1) motion, and argues that the City did not preserve its right to move for dismissal by failing to raise said defense in its answer, See CPLR 3211(e) and failed to support its motion with any documentary evidence as a cause of action may be dismissed under CPLR 3211(a)(1) "only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). In its Answer the City raised the defense that it is not a proper party to this lawsuit, as such, plaintiff's first argument is inapplicable. As plaintiff correctly cites, documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic, and undeniable (Magee-Boyle v Reliastar Life Ins. Co. of New York, 173 A.D.3d 1157, 105 N.Y.S.3d 90 [2d Dep't. 2019]). While the City does not include any exhibits which establish the relationship between itself and defendants HHC and Lowe, the City does include citations to the law which establishes the HHC and its relationship to the City of New York and judicial records that conclusively establish that the City is a distinct legal entity from HHS and plays no role in the hiring and supervision of any hospital staff. As such, the City's submissions utterly refute plaintiff's allegations. Furthermore, as the Court held in M.D. v. Pasadena Realty Co., 300 A.D.2d 235 (1st Dep't 2002): "Judicial economy is not promoted by requiring the parties

to delay a case that is appropriate for summary disposition on the ground that it fails to state a cause of action."

ORDERED that the motion of defendant the City of New York to dismiss the complaint herein and any cross-claims is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

1/22/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE