MCVAWCD-Doe v Columbus Ave. Elementary Sch.
2020 NY Slip Op 34559(U)
August 17, 2020
Supreme Court, Nassau County
Docket Number: 52435/2020
Judge: Steven M. Jaeger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART CVA-R
______________________________________X

MCVAWCD-DOE,

Plaintiff,

Index No.: 52435/2020
COUNTY OF WESTCHESTER
Mot. Seq. No. 002
Decision & Order

-against-

COLUMBUS AVENUE ELEMENTARY SCHOOL and VALHALLA UNION FREE SCHOOL DISTRICT,

Defendants.
______________________________________X

Defendant VALHALLA UNION FREE SCHOOL DISTRICT (hereinafter the "DISTRICT") moved to dismiss the Complaint herein against it and its former school (Defendant COLUMBUS AVENUE ELEMENTARY SCHOOL) pursuant to CPLR 3211(a)(7).

Plaintiff opposed the motion.

Plaintiff's compliant contains the following causes of action stemming from allegations that Plaintiff was sexually assaulted while a child from in or about 1980 through 1983 by Gary Ranum, a special education teacher for the DISTRICT:

1. Negligent Hiring, Retention, Supervision, and Direction
2. Negligent, Reckless, and Willful Misconduct
3. Negligent Infliction of Emotional Distress
4. Premises Liability
5. Breach of Fiduciary Duty
6. Breach of Duty *in Loco Parentis*
7. Breach of Statutory Duties to Report

DISCUSSION AND DECISION:

On February 14, 2019, New York State enacted the Child Victims Act (L. 2019 c.11) ("CVA") which, *inter alia*, (1) extended the statute of limitations on criminal cases involving certain sex offenses against children under 18 (see CPL 30.10[f]); (2) extended the time in which civil actions based upon such criminal conduct may be brought until the child victim reaches 55 years old (see CPLR 208 [b]); and (3) opened a one-year window reviving civil actions for which the statute of limitations has already run (even in cases that were litigated and dismissed on limitations grounds), commencing August 14, 2019 (see CPLR 214-g). The "window" period has now been extended for an additional one (1) year by amendment of CPLR 214-g effective August 3, 2020.

The DISTRICT application is only brought pursuant to CPLR 3211(a)(7).

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must determine whether, from the four corners of the pleading, "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law." *Salvatore v Kumar*, 45 AD3d 560 (2d Dept 2007), *lv to app den.* 10 NY3d 703 (2008), quoting *Morad v Morad,* 27 AD3d 626, 627 (2d Dept 2006). Further, the pleading is to be afforded the benefit of every possible favorable inference. *Leon v Martinezi,* 84 NY2d 83, 87-88 (1994). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *EBC I, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11, 19 (2005).

> On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. At the same time, **however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal**

> **of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.**

Connaughton v Chipotle Mexican Grill, Inc., 29 NY3d 137, 141-142 (2017) (citations omitted) (emphasis added).

Moreover, if documentary evidence "flatly contradict[s]" the allegations then they are not entitled to be presumed true and accorded every favorable inference. *Biondi v Beekman Hill House Apartment Corp.,* 257 AD2d 76, 80-81 (1st Dept.1999), *aff'd*, 94 N.Y.2d 659 (2000). If the moving party's evidentiary material establishes that there is no claim then dismissal is appropriate. *See, Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977); *Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 850 (2d Dept.2013). (affirming dismissal where evidentiary material

Failure to State a Cause of Action Claims

A. Negligent Hiring, Retention, Supervision, and Direction

Defendant claims that Plaintiff's cause of action for negligent supervision should be dismissed for failure to state a claim since there are not sufficient allegations that Defendant knew or should have known of Ranum's propensity to commit sexual abuse of minors before the alleged abuse of Plaintiff.

As opined by the Appellate Division, Second Department: "There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity." (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]).

In order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately

resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.3d 817, 825 (2016); *see also, Mitchell v Icolari*, 108 AD3d 600 (2d Dept 2013); *Turcotte v Fell,* 68 NY2d 432, 437 [1986]); *see also*, *Maheshwari v City of New York*, 2 NY3d 288, 294 (2004). "A necessary element of a cause of action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct with caused the injury.'" (*Bumpus v New York City Transit Authority*, 47 AD3d 653 [2d Dept 2008]).

> Although an employer cannot be held vicariously liable 'for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business,' the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee. . . . The employer's negligence lies in having 'placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention' of the employee."

(*Johansmeyer v New York City Dept. of Ed.*, 165 AD3d 634 [2d Dept 2018]) (internal citations omitted).

In the instant matter, upon review of Plaintiff's complaint it is determined that Plaintiff has adequately pled a cause of action against the Defendant for negligent hiring, retention, supervision, and direction. Plaintiff alleged that the Defendants "knew or should have known that Ranum was a danger to minors like Plaintiff before he sexually abused Plaintiff." Therefore, that branch of Defendant's application to dismiss Plaintiff's First Cause of Action is hereby DENIED. However, to the extent that Plaintiff alleged that Ranum's actions were within the scope of his employment relationship with the Defendants, the doctrine of respondeat superior is not applicable to this case.

Plaintiff cannot seek to hold Defendants responsible for the acts of Ranum. (*Torrey v Portville Central School*, 66 Misc3d 1225[A][Sup. Ct. Cattaraugus Co. 2020]). Sexual abuse of a minor is a clear departure from a tortfeasor's scope of employment if "…committed solely for personal reasons, and unrelated to furtherance of his employer's business." (*Doe v Rohan*, 17 AD3d 509, 512 [2d Dept. 2005], *lv. denied* 6 NY3d 701).

B. Negligence/Reckless, and Willful Misconduct

In order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.3d 817, 825 (2016); see also, Mitchell v Icolari, 108 AD3d 600 (2d Dept 2013); *Turcotte v Fell*, 68 NY2d 432, 437 [1986]); *see also, Maheshwari v City of New York*, 2 NY3d 288, 294 (2004).

A claim of "reckless or willful misconduct" is, as Defendant recognizes, in the nature of a claim of gross negligence.

> Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" (*Colnaghi, U.S.A. v. Jewelers Protection Servs.,* 81 N.Y.2d 821, 823, 595 N.Y.S.2d 381, 611 N.E.2d 282; *see Goldstein v. Carnell Assoc., Inc.,* 74 A.D.3d 745, 746, 906 N.Y.S.2d 905). "To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others" (*Ryan v. IM Kapco, Inc.,* 88 A.D.3d 682, 683, 930 N.Y.S.2d 627 [internal quotation marks and brackets omitted]). "Stated differently, a party is grossly negligent when it fails to exercise even slight care or slight diligence" (*id.* at 683, 930 N.Y.S.2d 627 [internal quotation marks omitted]; *see Goldstein v. Carnell Assoc., Inc.,* 74 A.D.3d at 747, 906 N.Y.S.2d 905). Ordinarily, the question of gross negligence is a matter to be determined by the trier of fact (*see Food Pageant v. Consolidated Edison Co.,* 54 N.Y.2d 167, 172–173, 445 N.Y.S.2d 60, 429 N.E.2d 738).

Dolphin Holdings, Ltd., v Gander & White Shipping, Inc., 122 AD3d 901 (2d Dept. 2014).

The Plaintiff's Complaint adequately states a cause of action for negligence, reckless, willful misconduct. However, to the extent that Plaintiff alleged that Ranum's actions were within the scope of his employment relationship with the Defendants, the doctrine of respondeat superior is not applicable to this case. Plaintiff cannot seek to hold Defendants responsible on that basis for the acts of Ranum. (*Torrey v Portville Central School*, 66 Misc3d 1225[A][Sup. Ct. Cattaraugus Co. 2020]). Sexual abuse of a minor is a clear departure from a tortfeasor's scope of employment if "…committed solely for personal reasons, and unrelated to furtherance of his employer's business." (*Doe v Rohan*, 17 AD3d 509, 512 [2d Dept. 2005], *lv. denied* 6 NY3d 701).

C. Negligent Infliction of Emotional Distress

A cause of action for negligent infliction of emotional distress

> "…generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (Sheila C. v. Povich, 11 A.D.3d 120, 130, 781 N.Y.S.2d 342; see Jason v. Krey, 60 A.D.3d 735, 736, 875 N.Y.S.2d 194; Davidovici v. Fritzson, 49 A.D.3d 488, 490, 853 N.Y.S.2d 594; Gaylord v. Fiorilla, 28 A.D.3d 713, 713–714, 813 N.Y.S.2d 534; Lipton v. Unumprovident Corp., 10 A.D.3d 703, 706, 783 N.Y.S.2d 601; Savva v. Longo, 8 A.D.3d 551, 552, 779 N.Y.S.2d 129; E.B. v. Liberation Publs., 7 A.D.3d 566, 567, 777 N.Y.S.2d 133). "Such a claim must fail, where, as here, 'no allegations of negligence appear in the pleadings' " (Daluise v. Sottile, 40 A.D.3d 801, 803, 837 N.Y.S.2d 175, quoting Russo v. Iacono, 73 A.D.2d 913, 913, 423 N.Y.S.2d 253).

Santana v. Leith, 117 AD3d 711, 712 (2d Dept. 2014).

Further, it is generally held that a cause of action for infliction of emotional distress is not allowed if "essentially" duplicative of tort or contract causes of action. *Wolkstein v. Morgenstern*, 275 AD2d 635, 637 (1st Dept. 2000).

> "Further, the allegations of negligent infliction of emotional distress were duplicative of the viable portions of the subject causes of action (see Fischer v. Maloney, 43 N.Y.2d 553, 558, 402 N.Y.S.2d 991, 373 N.E.2d 1215; Leonard v. Reinhardt, 20 A.D.3d 510, 799 N.Y.S.2d 118; Brancaleone v. Mesagna, 290 A.D.2d 467, 468, 736 N.Y.S.2d 685; Ghaly v. Mardiros, 204 A.D.2d 272, 273, 611 N.Y.S.2d 582)."

Afifi v. City of New York, 104 AD3d 712, 713 (2d Dept. 2013).

Here, the allegations in this cause of action for negligent infliction of emotional distress refer to the prior recitation in the Complaint of the actions of the Defendants, that those actions endangered Plaintiff's safety, and caused her injuries. Thus, the facts that consist of Plaintiff's negligence claim against Defendants are the same facts supporting this cause of action. Accordingly, the Court finds this cause of action is duplicative of the negligence causes of action. As such, Defendant's motion to dismiss the Third Cause of Action is GRANTED.

D. Premises Liability

In the Fourth Cause of Action, the Complaint alleges that Defendants "failed to provide a reasonably safe premises that was free from the presence of sexual predators and/or the assault by the occupants of the premises, including Ranum."

Here, the allegations in this cause of action for premises liability refer to the prior recitation in the Complaint of the actions of the Defendants, that those actions endangered Plaintiff's safety, and caused her injuries. Thus, the facts that consist of Plaintiff's negligence claim against Defendants are the same facts supporting this cause

of action. Accordingly, the Court finds this cause of action is duplicative of the negligence causes of action. As such, Defendant's motion to dismiss the Fourth Cause of Action is GRANTED.

E. Breach of Fiduciary Duty

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *AG Capital Funding, LP v. State Street Bank and Trust*, 11 NY3d 146, 158 [2008]). However. conclusory allegations that a fiduciary duty exists, with nothing more, are insufficient. (*id.*) Further, and more significantly, this cause of action is no different than the negligence cause of action. While a plaintiff is "entitled to plead alternative and inconsistent causes of action and to seek alternative forms of relief" (*Gold v 29-15 Queens Plaza Realty, LLC*, 43 AD3d 866 [2d Dept 2007]), causes of action that are based on the same facts and do not "seek distinct and different damages" may be dismissed as duplicative. *Kliger-Weiss Infosystems, Inc. v. Ruskin Moscou Faltischek, P.C.,* 159 AD3d 683, 685 (2d Dept. 2018); *Wolkstein v. Morgenstern*, 275 AD2d 635, 637 (1st Dept. 2000). Accordingly, Defendants' motion to dismiss the Fifth Cause of Action is GRANTED.

F. Breach of Duty *In Loco Parentis*

Plaintiff's Sixth Cause of Action is for "breach of duty *in loco parentis*." "The concept of *in loco parentis* is the fountainhead of the duty of care owed by a school to its students." (*Williams v Weatherstone*, 23 NY3d 384, 403 [2014] [*citing Mirand v City of New York*, 84 NY2d 44, 49 [1994] ["(t)he duty owed derives from the simple fact that

a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians"]).

> "In loco parentis refers to a person who has fully put himself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations" (see, Rutkowski v. Wasko, supra, 286 App.Div. at 331, 143 N.Y.S.2d 1; see also, Matter of Jamal B., 119 Misc.2d 808, 465 N.Y.S.2d 115).

Hadden v Kero-Sun, Inc., 197 AD2d 668, 669 (2d Dept 1993).

The Complaint alleges that the Defendants stood *in loco parentis*, which the Court must accept as true for purposes of this motion. However, this refers to their status, while the issue of whether the duty owed by these Defendants creates a cause of action is based on the principles of negligence. *Johnson v Jamaica Hosp.,* 62 N.Y.2d 523, 529 (1984); *Torrey v Portville Central School, supra*. Accordingly, Defendant's motion to dismiss the Sixth Cause of Action is GRANTED.

G. Breach of Statutory Duties to Report

In the Seventh Cause of Action, Plaintiff alleges that each Defendant had a statutory duty to report reasonable suspicion of abuse of children in its care pursuant to Soc. Serv. Law §§ 413 and 420. Plaintiff states that each Defendant breached that duty "by failing to report reasonable suspicion of sexual abuse by Ranum" causing injury to Plaintiff.

Pursuant to Social Services Law § 413, school officials, which include but are not limited to school teachers, school guidance counselors, school psychologists, school social workers, school nurses, school administrators or other school personnel required to hold a teaching or administrative license or certificate, are required to report "when

they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child."

Social Services Law § 420(2) states that "Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure."

The Legislature enacted Social Services Law § 420 which expressly allows a private cause of action for money damages upon the failure of any person, official or institution required by title 6 to report a case of suspected child abuse or maltreatment." (*Rivera v. County of Westchester*, 31 Misc3d 985, 994 [Sup Ct. Westchester Co 2006]). "An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse." (*Young v. Campbell*, 87 AD3d 692, 694 [2nd Dept 2011], lv denied 18 NY3d 801). Accordingly, the Court finds that Plaintiff has sufficiently stated a claim under Soc. Serv. Law §§ 413 and 420. Defendants' motion to dismiss the Seventh Cause of Action is denied.

H. Punitive Damages

Defendants also argue that Plaintiff is not entitled to punitive damages as a matter of law. "[A] municipality is not liable for punitive damages flowing from its employees' misconduct in the absence of express legislative authorization to the contrary." *Krohn v. NY City Police Department*, 2 NY3d 329, 336 (2004). School Districts are public corporations and punitive damages cannot be assessed against them. *See, Dixon v. William Floyd Union Free School District*, 136 AD3d 972, 973 (2nd

Dept 2016); and *Hargraves v. Bath Central School District,* 237 AD2d 977, 978 (4th Dept 1997). Any claim for punitive damages against Defendants is therefore dismissed.

All applications not specifically addressed herein are hereby denied.

The foregoing constitutes the decision and order of the Court.

DATED: August 17, 2020
Mineola, New York

Steven M. Jaeger

Hon. Steven M. Jaeger,
A.J.S.C.