

BL Doe 2 v Fleming
2020 NY Slip Op 34657(U)
August 5, 2020
Supreme Court, Monroe County
Docket Number: Index No. E2019011072
Judge: Deborah Chimes
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**STATE OF NEW YORK
SUPREME COURT: COUNTY OF MONROE**

BL Doe 2,

Plaintiff,

v

DECISION

Index No. E2019011072

**Edwin D. Fleming,
The Rochester City School District,**

Defendants.

This claim was instituted under the revival clause of the Child Victims Act. *See* CPLR 314-g. Defendant, Rochester City School District, (hereinafter RCSD), made a pre-Answer motion to dismiss all five causes of action in the Complaint pursuant to CPLR 3211(a)(7) and (a)(5) (NYSCEF motion 002).

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), "[w]e 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...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]).

Though defendant RCSD submitted no evidentiary material in support of the motion to dismiss, "[i]n opposition to a motion to dismiss pursuant to CPLR 3211(a)(7), a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v. Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 829 [2nd Dept 2018] internal citations omitted).

CPLR 3211(a)(5) is grounds for dismissal if the action was filed after the statute of limitations expired.

Plaintiff alleges to have been sexually abused from 1972-1974, while a student under the age of eighteen by defendant teacher, Edwin D. Fleming. Plaintiff's first cause of action is for negligence; the second cause of action for negligent failure to report child abuse; the third cause of action for the failure to report abuse pursuant to Social Services Law § 420; the fourth cause of action for violation of Title IX; and the fifth cause of action for violation of plaintiff's Fourth Amendment due process rights pursuant to 42 USC § 1983.

Negligence

RCSD's first argument in support of its motion to dismiss the negligence cause of action is based on the lack of respondeat superior liability for the actions of Fleming. This Court previously ruled on respondeat superior liability under similar circumstances in *Torrey v. Portville Central School*.

As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts are within the scope of the employment." (*Adams v New York City Transit Authority*, 88 NY2d 116, 119 [1996]). Further, "[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." (*Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]). Sexual abuse is a clear departure from scope of employment, "committed solely for personal reasons, and unrelated to the furtherance of his employer's business." (*Id.*; *see also, Mazarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012]; and *Mary KK v Jack LL*, 203 AD2d 840, 841 [3d Dept 1994]). Therefore, as a matter of law, the doctrine of respondeat superior is not applicable to the present matter.

(*Torrey v. Portville Cent. Sch.*, 2020 NY Slip Op 50244(U), 66 Misc. 3d 1225(A) [Sup. Ct. Erie County 2020]).

In reviewing the four corners of the Complaint, there appears to be no claim for negligence against RCSD based on respondeat superior liability for the actions of Fleming. RCSD's motion to dismiss based upon lack of respondeat superior liability is therefore denied.

With respect to the negligence claim against RCSD, the elements of a cause of action based on the failure to protect plaintiff from sexual assaults are "(1) that defendant was provided with actual or constructive notice that such assaults might be made upon the infant plaintiff so as to give rise to a duty to protect him, (2) that defendant was negligent in failing to take reasonable protective measures, (3) that the infant plaintiff sustained actual injury, and (4) that defendant's negligence was a proximate cause of that injury" (*Jamal P. v. City of N.Y.*, 24 AD3d 301, 303 [1st Dept], citing *Mirand v City of New York*, 84 NY2d 44, 49-50 [1994]). Here, plaintiff pled the necessary elements to support a cause of action for negligence against RCSD. Plaintiff additionally submitted facts in the form of Affidavits of other plaintiffs also alleging sexual abuse by Fleming while they were students at defendant RCSD schools to establish that a significant dispute may exist regarding material facts on the issue of whether RCSD knew or should have known of the abuse. RCSD's motion to dismiss plaintiff's first cause of action for negligence is denied.

Common Law Duty to Report

Plaintiff's second cause of action is for the negligent failure to report child abuse. RCSD has not established that the Complaint fails to state a cause of action based on the common law duty to report as a matter of law (*see Kimberly SM v Bradford CSD*, 226 AD2d 85, 87-8 [4th Dept 1996], where the Fourth Department discussed the common law duty to report, but declined to apply it because the alleged sexual abuse in the case before it occurred while the child was not

in the school's charge, which is not the circumstance presented here). RCSD's motion to dismiss the second cause of action is denied.

Statutory Duty to Report

Plaintiff's third cause of action is based on the failure to report abuse pursuant to Social Services Law § § 413 and 415 to 420, which were all first enacted in 1973. 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 [Westchester Co Sup Ct 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 [2011]).

RCSD argues that the Child Victims Act did not revive plaintiff's claims for breach of statutory duty to report abuse. However, as this Court previously determined in *Torrey v. Portville Central School*, *supra*,

CPLR 208, entitled "Infancy, insanity", was amended by the State Legislature in 2019 in conjunction with the Child Victims Act, to add paragraph (b). In relevant part, that paragraph states:

Notwithstanding any provision of law which imposes a period of limitation to the contrary...with respect to *all civil claims or causes of action* brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a sexual offense...committed against such person who was less than eighteen years of age...*such action may be commenced, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, on or before the plaintiff or infant plaintiff reaches the age of fifty-five years* (emphasis added).

Based on the language of CPLR 208(b) and the Child Victims Act, plaintiff's claims for breach of statutory duty to report abuse and gross negligence claims have been revived.

As such, RCSD's motion to dismiss plaintiff's third cause of action is denied, with the exception of any claim that accrued pursuant to Social Services Law § 420 prior to 1973.

Federal Claims

The first issue to address is whether CLR 214-g revived the federal claims set forth in the Complaint. Plaintiff asserted a claim for violation of Title IX of the Education Amendments of 1972 and a claim that RCSD's policies or customs were performed with a deliberate indifference to Plaintiffs Fourteenth Amendment due process right to bodily integrity in violation of the obligations owed to plaintiff under 42 USC § 1983.

CPLR 214-g, entitled "Certain child abuse sex cases", revives "*every civil claim or cause of action* brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense...committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired" (emphasis added).

With respect to claims brought under Title IX, "[t]he court borrows the relevant state statute of limitations as to pendent state claims, and the borrowed state statute of limitations are governed by its own rules of applications, tolling and *revival*, absent a conflicting federal policy underlying the cause of action" (*Gardner v. St. Bonaventure Univ.*, 171 F. Supp. 2d 118, 128 [W.D.N.Y. 2001] emphasis added). The Court finds therefore that CPLR 214-g applies to plaintiff's claim for violation of Title IX and that plaintiff's Title IX claim has been revived.

The same analysis applies to the claim plaintiff brought under 42 USC § 1983. In addressing the issue, the United States Supreme Court stated that "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, *revival*, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim" (*Bd. of Regents v. Tomanio*, 446 U.S. 478, 485-86 [1980] emphasis added; *see also Hardin v. Straub*, 490 U.S. 536, 538-39 [1989]). Plaintiff's § 1983 claims have also been revived by the Child Victims Act.

Title IX

Analysis turns now to whether plaintiff adequately pled a claim under Title IX. In pertinent part, Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 USC § 1681(a). "The Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), establishes that a school district can be held liable in

damages in cases involving a teacher's sexual harassment of a student" (*Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 331 [E.D.N.Y. 2012]).

The elements of a Title IX claim are "(1) the school authorities had actual knowledge of the [gender-based] harassment; (2) they were deliberately indifferent to the harassment; and (3) the harassment was so severe, pervasive, and objectively offensive that it deprived plaintiff of access to the education provided by the school." (*Doe v. Patrick*, 2020 U.S. Dist. LEXIS 16929, at *42 [N.D.N.Y. 2020]). Here, plaintiff pleads all three elements of a Title IX claim and RSCD's 3211(a)(7) motion to dismiss is denied.

Due Process 42 USC § 1983

The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right "secured by the Constitution and laws" (*Baker v. McCollan*, 443 U.S. 137, 140 [1979]). RCSD argues that plaintiff failed to identify an applicable Constitutional right and that there is no Fourteenth Amendment right of "bodily integrity" as pled in the Complaint. The sole case plaintiff cites to in opposition to RCSD's motion discusses the constitutional right to be free of sexual abuse and the failure to establish policies and procedures, (*see Kline v. Mansfield*, 255 Fed. Appx 624 [3d Cir. 2007]), but not the right of bodily integrity. Nonetheless, federal courts applying New York substantive law have recognized an individual's right to bodily integrity free from unjustifiable government interference (*see Lombardi v. Whitman*, 485 F.3d 73, 79 [2d Cir. 2007]; *Chambers v. N. Rockland Cent. Sch. Dist.*, 815 F. Supp. 2d 753 [S.D.N.Y. 2011]; and *Romero v. City of N.Y.*, 839 F. Supp. 2d 588 [E.D.N.Y. 2012]). Additionally, "[s]chool districts and boards of education are considered municipal entities that can be sued under § 1983" (*Doe v. E. Irondequoit Cent. Sch. Dist.*, 2018 U.S. Dist. LEXIS 76798, at *46-47 [W.D.N.Y. 2018]).

To hold RCSD liable for a violation of 42 USC § 1983, plaintiff is required to plead three elements: "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right" (*Brandon v. City of N.Y.*, 705 F. Supp. 2d 261, 276 [S.D.N.Y. 2010]). A review of the Complaint indicates that plaintiff adequately pled a claim under 42 USC § 1983. RCSD's motion to dismiss plaintiff's fifth cause of action is denied.

Counsel for plaintiff is to prepare and submit an Order, attaching the Court's Decision, in 30 days.

DATED: Buffalo, New York
August 5, 2020



HON. DEBORAH CHIMES, JSC