

Doe v Patrick

2020 NY Slip Op 35284(U)

November 17, 2020

Supreme Court, Washington County

Docket Number: Index No. EC2020-31696

Judge: Glen T. Bruening

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STATE OF NEW YORK

SUPREME COURT

COUNTY OF WASHINGTON

JOHN DOE, JANE DOE and JAMES DOE,

Plaintiffs,

-against-

STEVEN PATRICK, DAVID WEVER and
GREENWICH CNETRAL SCHOOOL DISTRICT,

Defendants:

DECISION AND ORDER

RJI No. 57-1-2020-0189

Index No. EC2020-31696

APPEARANCES:

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Attorneys for Defendants Steven Patrick and David Wever
(Malcolm B. O'Hara, Esq.)
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P.O. Box 2168
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GLEN T. BRUENING, J.:

James Doe (James) and his parents, John Doe and Jane Doe, commenced this action against defendants Greenwich Central School District (District), Steven Patrick (Patrick), the District's former high school track coach, and David Wever (Wever), a bus driver employed by

the District, alleging five causes of action, including (1) false imprisonment; (2) intentional infliction of emotional distress; (3) negligent infliction of emotional distress; (4) negligence; and (5) loss of consortium.

During the 2016-2017 school year, James was a senior at the District's High School and a member of the indoor track team. Defendant Patrick was the team's coach. On January 27, 2017, the team traveled by bus operated by defendant Wever to participate in a track meet in Utica, New York. Along the New York State Thruway, James asked Patrick if the bus could stop at an upcoming rest area so that James could use the bathroom. Patrick responded by asking if he could hang on for 15 minutes. The bus passed the rest area without stopping.

Approximately 15 miles later, the bus exited the thruway at Utica. As James walked towards the front of the bus, Patrick advised James that he had to hold it for three more minutes. James then returned to his seat. Approximately five minutes later, James approached Patrick and, again, told him that he needed to use the bathroom. Patrick held up a full water bottle and suggested that James not drink anymore. James then returned to his seat. A minute later, James walked to the front of the bus and asked Patrick what would happen if he urinated in a bottle. In response, Patrick told James that he would get in "big trouble" for doing so. James, unable to wait any longer, urinated in his pants and onto the bus floor. The bus reached its parking destination approximately 10 minutes later (see Doe v Patrick, 437 F Supp 3d 160 [NDNY 2020]).

Plaintiffs claim that, as a result of this incident, James was subjected to physical and verbal abuse, public humiliation, 'gaslighting', and suffers from physical, emotional, and mental pain and distress.

Plaintiffs initially commenced an action in the United States Court District Court,

Northern District of New York seeking damages pursuant to 42 USC 1983, 20 USC 1681 and New York State Law, alleging that by failing to stop the bus so that James could use the restroom, mocking James because he needed a bathroom, and failing to adequately follow up after the incident on the bus, defendants violated, among other things, James' rights under the Substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution and committed various torts against him.¹ By Decision and Order of United States District Court, dated February 3, 2020, the federal court granted defendants' motions seeking summary judgment dismissing the complaint with respect to plaintiffs' federal causes of action, and declined to exercise supplemental jurisdiction over plaintiffs' state law causes of action (see Doe v Patrick, 437 F Supp 3d 160 [NDNY,2020]). After the federal court issued its determination, on June 2, 2020, plaintiffs commenced this action.

All defendants now move, pursuant to CPLR 3211 (a) (1), (5) and (7), seeking dismissal of the complaint based on documentary evidence, untimeliness, and for failure to state a cause of action. Defendants also seek to have plaintiffs file a security pursuant to CPLR 8503, pay costs pursuant to CPLR 8303-a, and pay costs and reasonable counsel fees pursuant to 22 NYCRR 130-1.1 (a). Plaintiffs oppose defendants' motion.

In support of its motion, the District argues that 1) plaintiffs' claims for false imprisonment and negligence must be dismissed as untimely as they were not alleged in the federal court action, and are, therefore, not tolled; 2) plaintiffs' claim for intentional infliction of

¹In the federal action, plaintiffs alleged 1) claims pursuant to 42 USC 1983, (2) equal protection violations, (3) claims pursuant to 42 USC 1681, (4) intentional and negligent infliction of emotional distress, and sought punitive damages against defendants Patrick and Wever, and damages for loss of consortium.

emotional distress fails to state a cause of action and is barred by res judicata and collateral estoppel; 3) plaintiffs have failed to state a cause of action for negligent infliction of emotional distress; 4) plaintiffs have failed to state a cause of action for negligence; 5) plaintiffs have failed to state a claim for loss of consortium, and 6) plaintiffs are not entitled to counsel fees as requested in the wherefore clause of the complaint; 7) plaintiffs failed to properly caption this action with the plaintiffs' proper names since all plaintiffs are adults; and 8) plaintiffs failed to post a security as required by CPLR 8501 and 8503.

On a motion to dismiss a cause of action, pursuant to CPLR 3211(a) (5), upon the grounds that an action is barred by the applicable statute of limitations, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (Sciafani v. Kahn, 169 AD3d 846, 848 [2d Dept 2019][internal quotation marks and citations omitted]).

A cause of action based on false imprisonment accrues upon the subject's release from confinement and is governed by a one-year statute of limitations (see CPLR 215 [3]; Bellissimo v Mitchell, 122 AD3d 560, 560 [2d Dept 2014]). A cause of action for negligence, on the other hand, accrues on the date of the injury, and is governed by a three-year statute of limitations (see Torres v Greyhound Bus Lines, Inc., 48 AD3d 1264, 1265, [4th Dept 2018]; CPLR 214 [5]). However, in a tort action against a public corporation such as the District, an action must be filed within one year and 90 days after the accrual of the cause of action (see General Municipal Law § 50-e [5]; § 50-i [1] [e]).

Here, plaintiffs' causes of action for false imprisonment and negligence accrued on January 17, 2017. Plaintiffs commenced their federal court action on August 3, 2017, seeking damages as a result of the same incident that forms the basis of the complaint filed in this action. By Decision dated February 3, 2020, the federal court granted summary judgment to defendants dismissing plaintiffs' federal claims and declining to exercise supplemental jurisdiction over plaintiffs' claims of negligent and intentional infliction of emotional distress and loss of consortium.

The Supplemental Jurisdiction statute, 28 USC 1367, enables federal district courts to entertain claims not otherwise within their adjudicatory authority when those claims "are so related to claims ... within [federal-court competence] that they form part of the same case or controversy" (28 USC 1367 [a]). When district courts dismiss all claims independently qualifying for the exercise of federal jurisdiction, they ordinarily dismiss, as well, all related state claims (see 28 USC 1367 [c] [3]; Artis v District of Columbia, 138 S.Ct 594, 597-598 [2018]). If a district court declines to exercise jurisdiction, and a plaintiff wishes to continue pursuing it, he must refile the claim in state court. Section 1367(d) provides:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

In New York, a federal court's decision to decline to exercise supplemental jurisdiction over pendent State-law claims triggers the protection of CPLR 205 (a), which provides, in part, that

if an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause

of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

Thus, section 205 (a) affords plaintiffs six months from February 3, 2020 -- the date the federal court declined to exercise its supplemental jurisdiction over plaintiffs' state law claims -- within which to bring another action in state court based on the same transaction or occurrence (see Kleinberger v Town of Sharon, 116 AD2d 367, 370 [3d Dept 1986]).

In support of their motions, defendants argue that plaintiffs' false imprisonment and negligence causes of action were not pleaded in the federal action, thus plaintiffs do not get the benefit of CPLR 205 (a), rendering those causes of action untimely. This court disagrees. The federal action involves "the same general allegations and operative facts" as the current action (Ray v Ray, No. 18 CIV 7035 (GBD) [SDNY Mar 28, 2019]), aff'd 799 F Appx 29 [2d Cir. 2020]) namely, the circumstances surrounding James' request to use a bathroom while traveling on a District bus on January 27, 2017. Because the same transactions and occurrences alleged in the federal action are also alleged in this action, CPLR 205(a)'s "same transaction or occurrence" requirement is satisfied. Plaintiffs' complaint was filed within six months of the date the federal court declined to exercise supplemental jurisdiction and, because plaintiffs' claims arise from the "same transaction or occurrence" as the federal action, plaintiffs' first and fourth causes of action -- seeking damages for false imprisonment and negligence -- are not time-barred.

In next addressing plaintiffs' second cause of action, by their motion, defendants argue that the federal court determination granting them summary judgment dismissing plaintiffs' claims under the Substantive Due Process Clause of the Fourteenth Amendment of the United

States Constitution operates as res judicata and collateral estoppel with respect to plaintiffs' cause of action alleging intentional infliction of emotional distress.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (Matter of Hunter, 4 NY3d 260, 269 [2005]). Collateral estoppel, on the other hand, operates to "preclude[] a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 2 NY2d 494, 500 [1984]; see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]). The proponent of collateral estoppel must establish two distinct elements: "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (Kaufman v Eli Lilly & Co., 65 NY2d 449, 456 [1985]). As is relevant to defendants' motions, it has been held that collateral estoppel can apply in the context of a civil rights action made pursuant to 42 USC1983 to bar a subsequent state court action to recover damages for common law torts (see Martinez v City of Schenectady, 276 A.D.2d 993, 995 [3d Dept 2000], affd 97 NY2d 78[2001]).

"Generally, to establish a substantive due process violation, a plaintiff must (1) identify the constitutional right at stake and (2) demonstrate that the government's action were conscience-shocking or arbitrary in the constitutional sense. With regard to the second element, a plaintiff must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" (Doe v Patrick, 437 F Supp 3d 160, 171

[NDNY 2020][internal quotation marks and citations omitted]). “In order to shock the conscience and trigger a violation of substantive due process, official conduct must be outrageous and egregious under the circumstances; it must be truly brutal and offensive to human dignity. In particular, intentionally inflicted injuries are the most likely to rise to the conscience-shocking level” (*id.*, at 172 [internal quotation marks and citations omitted]). The state law tort of intentional infliction of emotional distress has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress” (Conklin v Laxen, 180 AD3d 1358, 1361-1362 [4th Dept 2020][internal quotation marks and citations omitted]). Similar to a substantive due process claim, “[l]iability has been found [for the intentional infliction of emotional distress] only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (Howell v New York Post Co., 81 NY2d 115, 122 [1993][internal quotation marks and citations omitted]).

Defendants argue that the federal court’s finding -- that their conduct was not so outrageous as to shock the conscience --- precludes plaintiffs’ cause of action for intentional infliction of emotional distress. This court agrees.² The court in the federal court action made

²Plaintiffs cite to Sullivan v Board of Education, 131 AD2d 836 (2d Dept 1987) for the proposition that plaintiffs’ cause of action for intentional infliction of emotional distress can survive, notwithstanding the dismissal of a 42 USC 1983 claim. In Sullivan v Board of Education, the Board was alleged to have engaged in a sustained and continued course of conduct, including allegations of false imprisonment, verbal abuse, and threats of prosecution to coerce a tenured teacher to resign. The court dismissed, among other things, the 42 USC 1983 cause of action, finding that the Education Law provided more than adequate procedural

that determination after evaluating the sufficiency of plaintiffs' substantive due process cause of action, with the benefit of a full record. The court found that defendants' actions in failing to stop the bus to allow James to use the restroom and in teasing him for needing to use the bathroom "was not so outrageous as to shock the conscience" (Doe v Patrick, 437 F Supp 3d at 172). Inasmuch as plaintiffs had a full and fair opportunity in the federal action to litigate whether defendants' conduct was extreme and outrageous, plaintiffs' second cause of action for intentional infliction of emotional distress is barred by the doctrine of collateral estoppel.³

Next, in making a determination regarding a motion to dismiss made pursuant to CPLR 3211 (a) (7), "[the] claim is liberally construed and all facts asserted therein, as well as its submissions in opposition to defendant's motion, are accepted as true" (IMS Engrs.-Architects, P.C. v State of New York, 51 AD3d 1355, 1356 [3d Dept 2008], lv denied 11 NY3d 706 [2008]). "[T]he dispositive inquiry is whether [plaintiff] has a cause of action and not whether one has been stated i.e., 'whether the facts as alleged fit within any cognizable legal theory' " (id., quoting Leon v Martinez, 84 NY2d 83, 87-88 [1994]). In making this determination, factual material may be considered for the limited purpose of remedying defects in the pleading (see

safeguards to satisfy plaintiff's due process rights under the Fourteenth Amendment. "In general, procedural due process claims challenge the procedures used by the government in effecting a deprivation of a right, whereas substantive due process claims challenge the action itself" (Mark G. v Sabol, 93 NY2d 710, 723 [1999]). Unlike the present proceeding, in Sullivan v Board of Education, there was no previous finding, on the merits, regarding the Board's behavior and plaintiff's substantive due process rights.

³Further, "public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity," such as the District (Shahid v City of New York, 144 AD3d 1127, 1129 [2d Dept 2016] [internal quotation marks and citations omitted]).

Nonnon v City of New York, 9 NY3d 825, 827 [2007]).

Defendants argue that plaintiffs' third and fourth causes of action seeking damages for defendants' alleged negligent infliction of emotional distress and negligence must be dismissed, contending that James is unable to establish physical harm or fear for his physical safety. Plaintiffs disagree, contending that, at the time of the incident and after, James' suffered from both physical harm and the fear for his physical safety.

A cause of action for negligent infliction of emotional distress, generally requires a plaintiff to show a breach of a duty owed to him which unreasonably endangered his physical safety, or caused him to fear for his own safety (see Graber v Bachman, 27 AD3d 986, 987 [3d Dept 2006]).⁴ A plaintiff may recover damages for emotional distress, even in the absence of a corresponding physical injury (see Johnson v State of New York, 37 NY2d 378, 382, [1975]; Battalla v State of New York, 10 NY2d 237, 242 [1961]). Where there is no physical injury and the only harm in a negligence claim is emotional distress, the claim is one for negligent infliction of emotional distress, rather than pure negligence (see Ewing v. Roslyn High Sch., No 05-CV-1276 (JS) (ARL), 2009 WL 10705995, at *6 [EDNY Mar 31, 2009]).

Plaintiffs allege that, as a result of the January 27th incident, James sustained physical and emotional injuries and feared for his own safety, both at the time of and after the January 27th incident. Counsel argues that, by their actions, defendants unreasonably endangered James'

⁴The Appellate Division, First Department has held that proof of "extreme and outrageous" conduct is an element of a cause of action for negligent infliction of emotional distress, while the Appellate Division, Second Department has rejected that notion. (Xenias v Roosevelt Hosp., 180 AD3d 588, 589 [1st Dept 2020; see Taggart v. Costabile, 131 AD3d 243, 255 [2d Dept 2015]). The Appellate Division, Third Department has not addressed this split.

physical safety and caused him to experience reasonable fear for his physical safety as well as physical pain during the bus ride.⁵ Plaintiffs submit, among other things, the affidavit of forensic psychologist, Terry Peterson, who opines that based on her evaluation of James, he meets the diagnostic criteria for Adjustment Disorder with Anxiety and Depressed Mood and, as a result of the incident he suffers from, among other things, extreme anxiety, sleep disturbance, depressive symptoms, and trauma-related psychological symptoms. Peterson further opines that the trauma of January 27th and the emotional stress associated therewith substantially contributed to James' vasovagal syncope episode that occurred in February 2017, requiring hospitalization. James, in his own affidavit, attests that defendants engaged in a campaign of alienation and gaslighting against him in the days, weeks, and months immediately following the incident, which resulted in him experiencing humiliation and fear.⁶

Accordingly, based on this court's review of the complaint, together with the affidavits submitted in opposition to defendants' motion, plaintiffs have sufficiently stated a cause of action for both negligence and negligent infliction of emotional distress.⁷ Accordingly,

⁵While the District cites to its own Statement of Material Facts submitted with respect to the federal court action, asserting that James did not suffer a physical injury on January 27th, plaintiffs deny that statement in a response (see Quesnel Affidavit, Exhibits D and E). Accordingly, since "documentary" evidence must be unambiguous and of undisputed authenticity, defendants' motion, made pursuant CPLR 3211 (a) (1), seeking dismissal of the negligent infliction of emotional distress and negligence causes of action, is denied (see Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010]).

⁶Courts may consider affidavits submitted in opposition to a motion pursuant to CPLR 3211(a)(7), to cure any defects in the complaint (see Torok v Moore's Flatwork & Foundations, LLC, 106 AD3d 1421, 1421 [3d Dept 2013]).

⁷While defendants argue that plaintiffs are unable to prove certain causes of action, "in the context of this motion to dismiss, the [c]ourt does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims . . . Whether plaintiffs can ultimately establish their allegations is not a part of the calculus in determining a motion to dismiss" (MHB v ECFS, 177 AD3d 479, 480 [1st Dept 2019] [internal

defendants' motions seeking dismissal of the third and fourth causes of action are denied.

The court reaches a different conclusion with respect to plaintiff John and Jane's loss of consortium claims. To the extent that complaint can be read to assert derivative claims based on James' injuries, in New York, there is no cause of action for a parent's loss of a child's affection, companionship or society (see De Angelis v Lutheran Med. Ctr., 84 AD2d 17, 26 [2d Dept 1981], affd 58 NY2d 1053 [1983]; White v City of New York, 37 AD2d 603, 603 [2d Dept 1971]). Accordingly, plaintiffs' fifth cause of action is dismissed.

In addressing defendants' request for a security for costs, pursuant to CPLR 8501(a), out-of-state residents must furnish security for costs if they commence an action within New York and a defendant moves for such relief (see Small v Stern, 65 AD3d 1326, 1326 [2nd Dept 2009]). The minimum amount of the undertaking is \$250.00 in actions in counties outside within the City of New York (see CPLR 8503). As plaintiffs recently moved to New Mexico, defendants are entitled to an order granting defendants a security in the amount of \$250.00.

With respect to defendants' challenge to plaintiffs' use of pseudonyms, CPLR 2101(c) requires that the caption of all actions commenced include the names of all parties. A plaintiff does not have an automatic right to bring an action anonymously, since the primary purpose of a pleading is to apprise an adverse party of the pleader's claim and to prevent surprise. Here, defendants concede that they know the parties' true identities and will not be surprised or prejudiced by the use of pseudonyms. The District, nonetheless, seeks an order dismissing the complaint on this ground. The individual defendants do not object to this motion being filed "under seal" (O'Hara Reply Affidavit). The court denies the District's request.

quotation marks and citations omitted]).

An action may not properly be brought pseudonymously if the plaintiffs have not "alleged a matter implicating a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings" ("J. Doe No. 1" v. CBS Broadcasting Inc., 24 AD3d 215, 215 [1st Dept. 2005]). While plaintiffs have improperly commenced this action, pseudonymously, without first having sought court approval, based on the allegations in plaintiffs' opposition papers and, in particular, those submitted by James outlining the emotional and psychological trauma he has experienced and the fear of humiliation if pseudonyms are not used, the court, in its discretion, will permit plaintiffs to utilize the abbreviations "S.B.," "D.B.," and "C.B.," in place of "John Doe, Jane Doe and James Doe." In so holding, the court will direct the clerk of the court to redact the District's Exhibit K, which uses plaintiffs' given names (see Quesnel Affidavit, Exhibit K). Although not requested, the court declines to seal the record pursuant to 22 NYCRR 216.1(1)(a).

Finally, because an unsuccessful claim does not necessarily equate to a frivolous claim, the court, in its discretion, declines to award any party counsel fees pursuant to CPLR 8303-a or counsel fees, costs, and sanctions pursuant to 22 NYCRR 130-1.1 (a), without prejudice.

Accordingly, it is hereby

ORDERED that defendants' motions, made pursuant to CPLR 3211, seeking dismissal of plaintiffs' second and fifth causes of action, alleging intentional infliction of emotional distress and loss of consortium, are granted, and defendants' motions are otherwise denied; and it is further

ORDERED that defendants' motions, made pursuant to CPLR 8501(a) and 8503, are granted and plaintiffs are directed to post an undertaking in the total amount of \$250.00 within

thirty (30) days of service of this order with notice of entry as security for the defendants' costs pending the conclusion of the action, and it is further,

ORDERED that plaintiffs are permitted to prosecute this action using the abbreviations "S.B.," "D.B.," and "C.B.," in place of "John Doe, Jane Doe and James Doe," instead of using their given names, and the clerk of the court is directed to redact the District's Exhibit K attached to the Affidavit of Scott P. Quesnel, Esq., sworn to on June 23, 2020, which uses plaintiffs' given names; and it is further


ORDERED that defendants' requests for counsel fees, pursuant to CPLR 8303-a, or counsel fees, costs, and sanctions, pursuant to 22 NYCRR 130-1.1 (a), is denied, without prejudice.

This constitutes the Decision and Order of the Court, which will be uploaded to the New York State Court's Electronic Filing System (NYSCEF). Counsel is advised of 22 NYCRR 202.5-b (h) (2) relating to notice of entry.

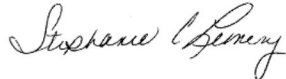
IT IS SO ORDERED.

ENTER.

Dated: November 17, 2020
Saratoga Springs, New York


Glen T. Bruening
Acting Supreme Court Justice

The court considered the following papers: 11/18/2020



By plaintiffs:

Affidavit of Matthew J. Kelly, Esq., sworn to on July 15, 2020, with Exhibit A;
Affidavit of James Doe, sworn to on July 17, 2020;
Affidavit of Trica L. Peterson, sworn to on July 16, 2020, with Exhibit A;
Memorandum of Law, July 17, 2020;
Affidavit of Matthew J. Kelly, Esq., sworn to on July 31, 2020;
Memorandum of Law, dated July 31, 2020;

By defendant District:

Notice of Motion, dated June 23, 2020;
Affidavit of Scott P. Quesnel, Esq., sworn to on June 23, 2020, with Exhibits A-K;
Memorandum of Law, dated June 23, 2020;
Reply Affidavit, sworn to on July 23, 2020, with Exhibits A-C;
Correspondence dated July 21, 2020;
Reply Memorandum of Law, dated July 23, 2020;
Correspondence, dated August 14, 2020.

By defendants Patrick and Wever:

Answer, dated June 15, 2020;
Notice of Motion, dated July 15, 2020;
Affidavit of Malcolm B. O'Hara, Esq., dated July 15, 2020, with Exhibits A-F;
Memorandum of Law, dated July 15, 2020;
Reply Affidavit of Malcolm B. O'Hara, Esq., dated August 4, 2020;
Reply Memorandum of Law, dated August 4, 2020.