

<b>M.W. v United Lubavitcher Yeshivoh, Inc.</b>
2022 NY Slip Op 32567(U)
July 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 502627/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK

KINGS COUNTY  
HON. LAURENCE L. LOVE

PRESENT: HON. LAURENCE L. LOVE PART CVA

Justice

-----X  
M.W., INDEX NO. 502627/2020  
Plaintiff, MOTION DATE 08/11/2021  
MOTION SEQ. NO. 002

- v -

UNITED LUBAVITCHER YESHIVOTH, INC.

ORDER

Defendant.  
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31

were read on this motion to/for CHANGE VENUE

Upon the foregoing documents, plaintiff M.W. (“plaintiff”) moves to amend the complaint and add additional causes of actions against defendant United Lubavitcher Yeshivoth, Inc. (“ULY” or “defendant”).<sup>1</sup> Plaintiff seeks to amend the complaint to include a cause of action based on a violation of Social Services Law § 413, a cause of action based on a violation of Educational Law § 83 ( 8 NYCRR 83.1), a cause of action for general negligence, and to include a remedy for punitive damages. Defendant does not oppose the motion.

“In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or is patently devoid of merit” (*Scofield v DeGroodt*, 54 AD3d 1017, 1018 [2d Dept 2008]). “Whether to grant such leave is within the motion court’s discretion, the exercise of which will not be lightly disturbed” (*Pergament v Roach*,

<sup>1</sup> Plaintiff mistakenly moves pursuant to CPLR 305 to amend the complaint. Plaintiff should have moved pursuant to CPLR 3025 (b). Nevertheless, the court will disregard plaintiff’s mistake and address the merits of the application pursuant to CPLR 2001.

41 AD3d 569, 572 [2d Dept 2007]). “A proposed amendment that cannot survive a motion to dismiss should not be permitted” (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 185 [1st Dept 2001]; *Duratech Industries, Inc. v Continental Ins. Co.*, 21 AD3d 342, 346 [2d Dept 2005]).

Here, the cause of action plaintiff seeks to add pursuant to Social Services Law § 413 would not survive a motion to dismiss. The complaint fails to allege that the alleged abuser Rabbi David Wakser (“Rabbi Wakser”) was a legally responsible person for plaintiff during the time of the alleged abuse between 1978 through 1980. Even if plaintiff alleged as much, in accordance with the statutory scheme in effect at that time, Rabbi Wakser, would not qualify as a legally responsible person (*S.E. v Salanter Akiba Riverdale Academy*, Sup. Ct, Bronx County, Apr. 26, 2022, Kaplan, J., index No. 70051/2020E; *PC-41 Doe v Poly Prep Country Day Sch.*, 2021 WL 4310891, \*16-19 [ED NY, Sept. 22, 2021, No. 20-CV-03628 (DG) (SJB)]).

In addition, plaintiff seeks to add a cause of action for a violation of 8 NYCRR 83.1 (“Part 83”). This cause of action has no merit for two reasons. First, a private right of action does not exist pursuant to this section. Second, even if a private right of action does exist, this defendant is not subject to the mandatory reporting requirements delineated.

As for the first reason, “[i]n the absence of an express private right of action, plaintiffs can seek civil relief in a plenary action based on a violation of the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history” (*Cruz v TD Bank, N.A.*, 22 NY3d 61, 70 [2013] [internal quotation marks and citations omitted]). In order to determine whether a private right of action exists, the court must determine “(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme” (*id.*, quoting *Sheehy v Big*

*Flats Community Day*, 73 NY2d 629, 633 [1989]). The Court of Appeals has recognized the third criterion as the most important and has “declined to recognize a private right of action in instances where ‘[t]he Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself’” (*id.*, quoting *Mark G. v Sabol*, 93 NY2d 710, 720 [1999]).

Arguably, plaintiff would be able to satisfy the first two factors here. Plaintiff could demonstrate a student is one of the classes the statute is intended to protect from a teacher with reprehensible moral character. Plaintiff could also show a private right of action for money damages would also promote the purpose of 8 NYCRR 83.1 by holding teachers responsible for acts committed which raise a question to that teacher’s moral character. However, under the most important condition, the creation of a private right of action would be inconsistent with the legislative scheme as it is the enforcement mechanism in instances of a failure to report.

Pursuant to 8 NYCRR 83.1 (a) only the chief school administrator, i.e., the school superintendent, is required to report any conduct which raises a reasonable question as to an individual’s moral character to the professional conduct officer (“PCO”) of the department. Subsection (c) of 8 NYCRR 83.1 states that any other person *may* report such conduct or behavior to the PCO. In *Skiptunas v Mills*, a superintendent failed to report conduct which raised a question as to the moral character of a teacher at the superintendent’s school (a relationship developed between a probationary teacher and a student) (2000 WL 14483, \*1-2 [ND NY, Jan. 5, 2000, No. 98-CV-1813 FJS/GJD]). The teacher later resigned and engaged in sexual intercourse with that student (*id.* at \*1). The teacher was then arrested and pled guilty to rape in the third degree (*id.*).

More than a year after the teacher’s resignation and six months after his conviction, the superintendent reported the incident to the PCO with the State Education Department (*id.*). Due to the span of time that passed before the superintendent reported to the Education Department,

the PCO initiated an investigation into the superintendent's conduct pursuant to 8 NYCRR 83.1 (a) inasmuch as the superintendent's "failure to file a timely report demonstrated a lack of moral character that would cause [the superintendent] to lose his certifications" (*id.*). The PCO prepared a report with charges and presented it to the Teacher Education, Certification and Practice Board (*id.*). The board approved the charges against the superintendent (*id.*). Pursuant to Part 83, the superintendent requested a formal hearing on the charges (*id.* at 2). After the Education Department's case, the hearing panel determined that the delay in reporting raised no moral issue involving the superintendent's character (*id.*).

As a result of this investigation and related charges, the plaintiff brought an action against, among others, the PCO for violations of 42 USC § 1983 and various state law claims (*id.* at \*1). The district court ultimately dismissed the complaint and declined to assert supplemental jurisdiction over the state law claims (*id.* at \*8-9). In its analysis, the court noted that "Part 83 makes clear that a school superintendent has the responsibility to report such behavior to the State Education Department" and "Part 83 sets forth what a superintendent is supposed to report" (*id.* at \*8). *Skiptunas* demonstrates that a superintendent's failure to file a report may result in a part 83 investigation into the moral character of the superintendent and the possible revocation of the superintendent's certifications. As the superintendent is the only person in Part 83 that must report such conduct and incorporates an enforcement mechanism for the failure of a superintendent to report, a private right of action would be inconsistent with the legislative scheme.

As for the second reason, even assuming a private right of action exists pursuant to 8 NYCRR 83.1, plaintiff's claim would be inapplicable against this defendant. As stated previously, only the chief school administrator, i.e., the school superintendent, must report any conduct which raises a reasonable question as to an individual's moral character to the PCO (8 NYCRR 83.1 [a]).

Any other person with information *may* report (8 NYCRR 83.1 [c]). The defendant here is not the chief school administrator or superintendent but rather an entity that has been alleged to have operated a grade school in New York City. The defendant was under no obligation to report the acts committed by Rabbi Wakser that would raise a question as to his moral character. Thus, plaintiff's claim that defendant failed to comply with their statutory obligation to report Rabbi Wakser's conduct which would raise a question as to his moral character, has no merit.

Accordingly, it is

ORDERED that plaintiff's motion to amend the complaint is granted to the extent it seeks to add a cause of action for negligence and to include punitive damages; and it is further

ORDERED that plaintiff's motion to amend the complaint is denied to the extent it seeks to add a cause of action based on violations of Social Services Law § 413 and Education Law § 83 (8 NYCRR 83.1); and it is further

ORDERED that plaintiff is directed to serve an amended complaint in accordance with the directives set forth in this order in accordance with the Civil Practice Law and Rules within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry within 14 days of the date this order; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 30 days from the date of said service.

**HON. LAURENCE L. LOVE**

This constitutes the decision and order of the Court.

7/27/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

LAURENCE L. LOVE, J.S.C.



HON. LAURENCE L. LOVE