

JMKCKD Doe v Yeled V'Yalda
2022 NY Slip Op 33062(U)
September 9, 2022
Supreme Court, New York County
Docket Number: Index No. 950060/2021
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 63M

Justice

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JMKCKD DOE,

Plaintiff,

- v -

YELED V'YALDA, THE JEWISH BOARD OF FAMILY AND
CHILDREN'S SERVICES, NEW YORK CITY
DEPARTMENT OF EDUCATION

Defendants.

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INDEX NO. 950060/2021

MOTION DATE 06/21/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

The Jewish Board of Family and Children's Services ("Jewish Board Services") makes this pre – answer motion to dismiss the complaint per CPLR 3211(a)(7) – failure to state a claim.

Plaintiff alleges abuse per the Child Victims Act, CPLR 214-g, with causes of action for (i) negligence against Yeled V'Yalda, (ii) negligence against the Jewish Board of Family and Children's Services, (iii) negligence against New York City Department of Education, (iv) negligent hiring, retention and supervision against Yeled V'Yalda, (v) negligent hiring, retention, and supervision against the Jewish Board of Family and Children's Services, (vi) negligent hiring, retention and supervision against the New York City Department of Education, (vii) negligent infliction of emotional distress against Yeled V'Yalda, (viii) negligent infliction of emotional distress against the Jewish Board of Family and Children's Services, (ix) negligent infliction of emotional distress against the New York City Department of Education, (x)

premises liability against the Jewish Board of Family and Children's Services, and (xi) violation of New York Social Services Law against all Defendants.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings 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" (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

"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" (see *Pasternack v. Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]).

"An employer may be liable for negligent hiring when it knew or should have known of the employee's propensity to commit injury even if the injury committed was not identical to the prior injury [inflicted by the employee]" (see *Doe v. Goldweber*, 112 A.D.3d 446 [1st Dept. 2013]). "[An] employer's negligence lies in having 'placed the employee in a position to cause foreseeable harm, harm which would most probably have spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee'" (see *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d 634 [2d Dept. 2018]).

The complaint states, “[i]n September 2007, plaintiff attended counseling sessions with [...] at the defendant [Jewish Board Services] Seymour Askin Counseling Center” (see NYSCEF Doc. No. 28 Par. 6). Plaintiff’s complaint further outlines and addresses every element of the negligence cause of action along with the negligent hiring, retention, and supervision claim.

To establish a prima facie claim for negligent infliction of emotional distress (“NIED”), a plaintiff must allege “(1) breach of a duty owed to the plaintiff, which breach either unreasonably endangered the plaintiff’s physical safety or caused the plaintiff to fear for his or her physical safety; (2) extreme and outrageous conduct; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress” (see *Smith v. City of New York*, 2015 U.S. Dist. LEXIS 85224, 87 [E.D.N.Y., June 30, 2015]).

“Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action” (see *Wolkstein v. Morgenstern*, 275 A.D.2d 635 [1st Dept. 2000]).

Defendant addresses the premises liability cause of action. “Plaintiff’s tenth cause of action seeks to apply a legal theory – premises liability – that does not apply to what is, in this case, essentially a negligent hiring, retention, and supervision claim against an employer. We are not aware of any authority in New York that has applied a premises liability analysis to a negligent hiring, supervision, and retention claim arising out of an alleged employee sexual assault” (see NYSCEF Doc. No. 26 Par. 38).

“In a premises liability case, the plaintiff must establish: (1) the existence of a defective condition, and (2) the defendant either created or had actual or constructive notice of the defect” (see *Ingram v. COSTCO Wholesale Corp.*, 117 A.D.3d 685 [2d Dept. 2014]).

“Plaintiff has failed to establish that the facts as alleged in this case for sexual abuse extend to a claim for premises liability, or to provide any authority establishing that claims of sexual abuse extend to premises liability. Based upon the foregoing, that branch of defendants’ application seeking to dismiss plaintiff’s second cause of action [for premises liability] is granted” (see *Albanese v. The Jewish Board of Family and Children’s Services, Inc. et al.* (Sup. Ct. Westchester Cnty., Index No. 56668/2020)).

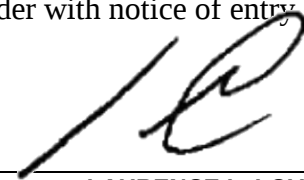
Defendant also addresses New York Social Services Law 430. “In relevant part, the statute mandates that ‘[t]he following persons or officials are required to report ... when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child’: psychologist, social worker, licensed mental health counselor, mental health professional. The statute does not mandate reporting by ‘security guards.’ The complaint does not allege that plaintiff ‘came before’ any mandatory reporting individuals at [Jewish Board Services]. Elsewhere in the complaint plaintiff states, in conclusory fashion, only that ‘[...] closed the door to his office in full view of the other counselors, agents, servants, and/or employees of defendant [Jewish Board Services]. Plaintiff also states that [...] and plaintiff ‘walk[ed] past the security guards and other personnel.’” (see NYSCEF Doc. No. 26 Pars. 40 – 41).

Plaintiff has made valid claims under negligence, and negligent hiring, retention, and supervision. The NIED claim is duplicative of negligence, and the premises liability claim does not show a “defective condition.” Further, plaintiff has not shown fulfillment of the New York Social Services Law.

Hence, it is now

ORDERED that the motion to dismiss is granted and the: (vii) negligent infliction of emotional distress against Yeled V'Yalda, (viii) negligent infliction of emotional distress against the Jewish Board of Family and Children's Services, (ix) negligent infliction of emotional distress against the New York City Department of Education, (x) premises liability against the Jewish Board of Family and Children's Services, and (xi) violation of New York Social Services Law against all Defendants of the complaint are dismissed; and it is further

ORDERED that defendant Jewish Board Services is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry

<u>9/9/2022</u>			
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