SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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MARTHA EDWARDS,

Plaintiff,

- v -

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ANAISE FERNANDEZ, JAMES MCCABE

Defendant.

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INDEX NO. 155634/2022

MOTION DATE 10/24/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This is an action by plaintiff, Martha Edwards, to recover damages for the injuries and accompanying pain and suffering she allegedly sustained as a result of an accusation of corporal punishment and subsequent disciplinary proceedings. Plaintiff is asserting claims of malicious prosecution, slander, intentional infliction of emotional distress, negligence, prima facie tort, and a violation of Article I, § 11 of the New York State Constitution.

Defendants, The Department of Education of the City of New York ("DOE"), the Board of Education of the City School District of the City of New York ("Board"), and Anaise Fernandez ("Fernandez") (collectively "defendants")[1], move pursuant to CPLR

[1] Plaintiff also named James McCabe, sued in his individual capacity and on behalf of DOE, as a defendant in this action. However, there is no indication that James McCabe was ever properly served with the summons and complaint, nor has yet to appear in this action. Nonetheless, defendants assert that the basis of the motion to dismiss is applicable to him as well (*see* defendants' memo of law in support, footnote 1).

§§ 3211(a)(2) and (7) to dismiss the complaint in its entirety for the failure to state a cause of action.

Factual Background:

In September 2017, plaintiff worked as a pre-K teacher at PS. 191, the Riverside School for Makers and Artists. Plaintiff alleges that during this time, Fernandez was a paraprofessional at PS. 191 and, at plaintiff's request, Fernandez was assigned to work in plaintiff's classroom. Plaintiff further alleges that one of her students, Student A, was a four-year-old with severe and aggressive behavioral issues. Plaintiff contends that throughout the 2017-2018 school year, Student A had multiple incidents per week which involved physical acts towards both plaintiff and Fernandez. The principal at PS. 191, Lauren Keville ("Keville"), was aware the school was on the "VADIR list", a list of schools that had Violent or Disruptive Incident Reporting data, yet allegedly failed to provide appropriate support to plaintiff.

Plaintiff also contends that during her assignment with the student, Fernandez exhibited frustration and anger. Plaintiff claims that despite having a cordial professional relationship at the beginning of the school year, the relationship with Fernandez deteriorated after the plaintiff spoke to the administration about Fernandez using her phone in class and leaving without informing her. It is alleged that on or about December 10, 2017, Keville received a call from Fernandez who accused plaintiff of having slapped Student A across the face two months prior, on or about October 27, 2017. It is further alleged that Fernandez informed Keville that the plaintiff had put her finger to her mouth as if to tell Fernandez to remain silent. However, plaintiff claims that she was absent from school on both October 26, 2017, and October 27, 2017.

As a result of this accusation, Keville filed a report with the Online Occurrence Reporting System ("OORS") and the DOE agency, the Office of Special Commissioner of Investigations, began an investigation. Plaintiff alleges that she was interviewed in connection with the investigation on or about February 27, 2018. On April 22, 2019, plaintiff alleges that she received 3020-a charges, which included a charge that plaintiff had slapped Student A and indicated Fernandez should stay quiet. On the same date, plaintiff allegedly received a letter which determined there was probable cause. However, plaintiff contends that the DOE did not follow the applicable procedures, codified in Education Law 3020 and 3020-a(2)(a).

Thereafter, on January 9, 2021, plaintiff was subjected to a 3020-a hearing where it is alleged that the DOE sought her termination. Fernandez provided testimony at that hearing. Plaintiff contends that the Board's Special Investigator who was in charge of the investigation, James McCabe ("McCabe"), never attempted to verify or confirm whether the plaintiff was present at school on the date of the alleged incident. On April 09, 2021, the arbitrator dismissed all charges/specifications and held that DOE did not have just cause under Education Law 3020-a to discipline or discharge the plaintiff (NYSCEF Doc. No. 14).

Plaintiff claims that despite this favorable award, she received an email, on June 21, 2021, notifying her that she was reassigned and could not get summer positions, per session pay, and other benefits (NYSCEF Doc. No. 15). Plaintiff allegedly filed a notice of claim on June 25, 2021, and filed the summons and complaint on July 06, 2022.

Discussion:

Defendants now move, pursuant to CPLR §§ 3211(a)(2) and (7), to dismiss the complaint as time-barred and for failing to state a cause of action. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, accord plaintiffs the benefit of every favorable inference, and determine whether the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Malicious Prosecution:

Plaintiff has alleged a claim of malicious prosecution, arising out of the 3020-a charges and administrative proceeding. The one-year statute of limitations for a malicious prosecution claim begins to run upon the favorable termination of the proceeding which serves as the basis of the claim (*Syllman v Nissan*, 18 AD3d 221, 222 [1st Dept 2005]). On April 9, 2021, the arbitration award was issued in plaintiff's 3020-a proceeding and the statute of limitations period commenced (*see* NYSCEF Doc. No. 14). Plaintiff filed a notice of claim on June 25, 2021, and the summons and complaint on July 6, 2022. The malicious prosecution claim is timely as it was brought within the applicable one-year and ninety-day period (Gen. Munic. Law § 50-i [1] [c]).

Defendants allege that the malicious prosecution claim should be dismissed as there was no criminal prosecution. Contrary to defendants' contention, a malicious prosecution claim can be premised on prior civil proceedings, (*People's Capital and Leasing Corp. v 1 800 Postcards, Inc.*, 162 AD3d 560, 560 [1st Dept 2018]) as well as

prior administrative proceedings (*Perryman v Vil. of Saranac Lake*, 41 AD3d 1080, 1081 [3d Dept 2007]).

The tort of malicious prosecution requires a showing that, (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the plaintiff, (3) the absence of probable cause for the proceeding, (4) actual malice (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015]). A plaintiff must allege and prove a special injury (*Id.*).

Plaintiff has adequately alleged the first two elements of commencement of a proceeding and a favorable termination. Plaintiff has alleged that Fernandez made a report of child abuse, corporal punishment, neglect, and mistreatment and based on these accusations, Keville reported the incident and contacted the Special Commissioner of Investigation. Plaintiff has adequately alleged that McCabe commenced an investigation, albeit incomplete and unprofessional, yet substantiated the charges. Finally, plaintiff has sufficiently alleged that based on the accusations by Fernandez, a 3020-a proceeding was commenced and was ultimately terminated in her favor.

However, as to the DOE, the Board, the City, and McCabe, the plaintiff has failed to establish the third element of showing the absence of probable cause. With respect to probable cause, a plaintiff must allege that the underlying action was filed with a purpose other than the adjudication of a claim and that there was *an entire lack of probable cause in the prior proceeding* (*Engel v CBS, Inc.*, 93 NY2d 195, 204 [1999] [*emphasis added*]). Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable person in the belief that he has lawful grounds for

proceeding in the manner complained of (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 614 [1st Dept 2015]). The burden of proof to establish a want of probable cause is on the plaintiff, and the lack of probable cause must be patent (*Id.*). In the complaint, plaintiff alleges that the claim lacked probable cause, and was brought out of actual malice. Plaintiff alleges that the 3020-a charges and proceeding were commenced against her based on the false statements and false information provided by Fernandez. Notably, the falsity of one allegation of a complaint does not support an inference of malice where there existed probable cause for the underlying action as a whole (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 270 [1st Dept 2005]). Plaintiff has not included any allegations sufficient to demonstrate the patent and entire lack of probable cause underlying the defendants' investigation and institution of the prior proceeding based on the accusations and charges.

The same cannot be said regarding defendant Fernandez. The complaint alleges that Fernandez falsely told the principal that the plaintiff had slapped student "A" in the face, and that it was a "made-up incident." The complaint further alleges that plaintiff's relationship had deteriorated with Fernandez, thereby providing at least some scant support to the malice element. Therefore, accord plaintiff the benefit of every favorable inference, the malicious prosecution claim against Fernandez should not be dismissed at this early stage of litigation.

Slander:

Plaintiff claims that Fernandez intentionally and maliciously said and published a false report of child abuse, corporal punishment, neglect and mistreatment. Plaintiff also includes allegations that Fernandez lied under oath and published numerous false

statements. The statute of limitations for slander and libel is one year, which begins to run on the date the statement is first uttered or published (*Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 920 [1st Dept 2010]; *Egleston v Kalamarides*, 58 NY2d 682, 684 [1982]).

Plaintiff's claim of slander is time-barred. The actionable statement was made on December 10, 2017, when Fernandez first reported the incident to Keville. On April 22, 2019, plaintiff alleges that she received the 3020-a charges which contained the accusations in writing. As the statement was first made and first published more than a year before the suit was commenced, these claims are untimely.

Plaintiff claims that the republication of a statement may give rise to a new cause of action when the following factors have been met: the subsequent publication is intended to and actually reaches a new audience, the second publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or content, and the defendant has control over the decision to republish (*Martin v Daily News L.P.*, 121 AD3d 90, 103 [1st Dept 2014]). However, plaintiff has failed to include allegations to demonstrate that these factors were met. Plaintiff's allegation that, the "corporal punishment allegations must have been repeated post April 9, 2021...because [p]laintiff was unable to obtain per session work and summer work and still unable to obtain these benefits even after the positive arbitration award", is speculative and conclusory (*see* complaint ¶¶ 37-39). Considering, this allegation is insufficient to support a cause of action based on a republication (*see Smulyan v New York Liquidation Bur.*, 158 AD3d 456, 457 [1st Dept 2018] [motion to dismiss was properly granted when the alleged instance of defamation within the limitations period

was speculative and based on conjecture]). Therefore, plaintiff's slander claim is dismissed.

Prima Facie Tort:

Plaintiff is alleging a claim of prima facie tort, claiming that defendants acted deliberately, wantonly, willfully, recklessly, negligently, grossly negligently and in bad faith in filing a false report, initiating an investigation and subjecting plaintiff to a 3020-a hearing (complaint ¶ 72). Plaintiff further claims that as a direct and proximate result of these actions, plaintiff suffered damage to their reputation, suffered mental pain, anguish and suffering, and other damages as a result of the defendants' actions (*Id.* ¶ 73).

Defendants allege that the prima facie tort claim is untimely as the claim is predicated on alleged wrongdoing and mirrors other intentional torts, the statute of limitation is one year (*see Havell v Islam*, 292 AD2d 210 [1st Dept 2002]). Alternatively, plaintiff contends that as her claim involves loss of employment opportunities or benefits, the three-year statute of limitations applies (*see Singer v de Blasio*, 74 Misc 3d 1233(A) [Sup Ct 2022], *affd as mod,* 215 AD3d 440 [1st Dept 2023] [a three-year statute of limitations applies to claims of prima facie tort that involve the intentional interference with prospective opportunities and when the injury alleged is based on economic loss]; see also *Susman v Commerzbank Capital Markets Corp.*, 95 AD3d 589, 590 [1st Dept 2012]).

Notwithstanding the statute of limitations and the nature of the claim being duplicative of the other causes of action, plaintiff has failed to adequately allege a claim of prima facie tort (*see Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917,

921 [1st Dept 2010]). The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm; (2) which results in special damages; (3) without excuse or justification; (4) by an act or series of acts that would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142 [1985]). Prima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which there is no traditional tort remedy and not to provide a catch all alternative for every cause of action which is not independently viable (*Epifani v Johnson*, 65 AD3d 224, 232 [2d Dept 2009]). Therefore, the plaintiff must allege that disinterested malevolence was the sole motivation for the conduct of which he or she complains (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]).

Plaintiff failed to plead defendants' actions were motivated by disinterested malevolence. In opposition to the motion, plaintiff attempts to establish the motivation was disinterested malevolence by claiming there is no other reason or justification for alleging baseless child abuse charges, reassigning her, and denying per session work after being exonerated. However, these allegations do not establish the motivation requirement and are contrary to other allegations in the complaint (*see Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]; see also complaint at 6, 10, 11). Further, plaintiff failed to allege that she suffered special damages with the required specificity (*Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]). Accordingly, plaintiff's prima facie tort claim must be dismissed.

Intentional Infliction of Emotional Distress:

Plaintiff is alleging claims against defendant Fernandez for intentional infliction of emotional distress ("IIED") based on the false accusations of corporal punishment.

Claims of intentional infliction of emotional distress have a one-year statute of limitations (*Forbes v Merrill Lynch, Fenner & Smith, Inc.*, 957 F Supp 450, 455 [SDNY 1997]). Plaintiff alleges that the Fernandez's actions were intentional, extreme and outrageous and that but for these actions, "providing false information that caused a 3020-a proceeding to be commenced against her", plaintiff would never have the 3020-a proceeding initiated against her (*see* complaint ¶¶ 62-64). Plaintiff's IIED claim is time-barred as the intentional and outrageous conduct on which the claim is based, Fernandez making a false accusation, occurred more than a year before the action was commenced.

Accordingly, absent an allegation that took place within the one-year period prior to the commencement of the action, sufficient on its own to state a claim, plaintiff's IIED claim must be dismissed (*see Spinale v Guest*, 270 AD2d 39, 40 [1st Dept 2000]). The alleged conduct must be "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" (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]). The extreme and outrageous conduct must be clearly alleged for the pleadings to survive dismissal under this strict standard (*Id.*; see also *Murphy v Am. Home Products Corp.*, 58 NY2d 293, 303 [1983]). Plaintiff claims that she has suffered extreme emotional distress due to the incident (complaint ¶ 65). Therefore, to the extent that the plaintiff is alleging the actionable conduct was the resulting 3020-a investigation and proceeding based on the accusation, this conduct is insufficient to support a claim for IIED. This conduct fails to meet the requirement of extreme and outrageous, which is "rigorous and difficult to satisfy" (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 122

[1993], quoting Prosser and Keeton, Torts § 12, at 60–61 [5th ed]). Therefore, plaintiff's IIED claim is dismissed.

Negligence:

Plaintiff is alleging claims of negligence arising from the negligent hiring, supervision, and retention of the DOE's SCI investigator McCabe. Under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside of the scope of his or her employment (*Gonzalez v City of New York*, 133 AD3d 65, 67 [1st Dept 2015]). Plaintiff alleges that the defendants acted negligently in investigating charges of child abuse, corporal punishment, neglect and mistreatment that resulted in initiating a 3020-a hearing based on the negligent investigation conducted.

Defendants contend that plaintiff cannot assert common law claims for negligent hiring, training, and retention as McCabe was acting within the scope of his employment. Where an employee is acting within the scope of their employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]).

Defendants correctly assert that as the negligence claim is based on McCabe's actions, allegedly undertaken while conducting the investigation into the plaintiff's charges, plaintiff cannot recover under a theory of negligent hiring and retention. Further, plaintiff's negligence claims should be dismissed as New York does not recognize a cause of action for negligent investigation (*see P.A. v New York and*

Presbyt. Hosp., 211 AD3d 482, 484 [1st Dept 2022]; see also *Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]).

New York State Constitution: Article I, §11:

Plaintiff is alleging that she suffered discrimination and adverse treatment by the defendants, violating her equal protection rights, pursuant to Article 1, § 11 of the New York State Constitution. Article I, § 11 of the New York State Constitution provides that, "[n]o person shall be denied the equal protection of the law of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by a firm, corporation or institution, or by the state or any agency or subdivision of this state".

The Court of Appeals has held that a cause of action to recover damages may be asserted against the State for the violation of the State Constitution (*Brown v State*, 89 NY2d 172, 188 [1996]). However, the private right of action for a constitutional tort is available only where the plaintiff has no alternative remedy (*Sullivan v City of New York*, 17 CIV. 3779 (KPF), 2018 WL 3368706, at *20 [SDNY July 10, 2018]). An action for damages under common law is considered an adequate alternative remedy that precludes the assertion of a claim for damages under the New York State Constitution (*Biswas v City of New York*, 973 F Supp 2d 504, 522 [SDNY 2013]). Here, plaintiff had alternative remedies available under both state and common law and is therefore unable to bring a constitutional tort claim. Additionally, plaintiff has failed to allege any facts to support an equal protection claim based on discrimination or adverse treatment. Therefore, the New York State Constitution claims are dismissed.

Conclusion:

For the reasons set forth hereinabove, it is hereby

ORDERED that the motion of defendants The Department of Education of The City of New York, The Board Of Education of The City School District of The City of New York, and James McCabe to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that defendants' motion to dismiss is denied as to the malicious prosecution claim against defendant Fernandez ; and it is further

ORDERED that the motion of defendant Fernandez is otherwise granted and all claims against Fernandez except for malicious prosecution are dismissed; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the

Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website)].

This constitutes the decision and order of the court.

10/13/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE