

**Doe v Newburgh Enlarged City Sch. Dist.**

2023 NY Slip Op 33691(U)

October 16, 2023

Supreme Court, Orange County

Docket Number: Index No. EF005710-2021

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE**

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**JM DOE,**

**Plaintiff,**

**-against-**

**NEWBURGH ENLARGED CITY SCHOOL DISTRICT,  
a/k/a NEWBURGH CITY SCHOOL DISTRICT,  
NEWBURGH ENLARGED SCHOOL DISTRICT  
BOARD OF EDUCATION, BALMVILLE  
ELEMENTARY SCHOOL, MEADOW HILL  
ELEMENTARY SCHOOL, RALPH PETROZELLO,**

**Defendants.**

**Part CVA-R  
Index No. EF005710-2021  
Mot. Seq. No. 005**

**DECISION AND ORDER**

-----X  
**RALPH PETROZELLO,**

**Third-Party Plaintiff,**

**-against-**

**NEWBURGH ENLARGED SCHOOL DISTRICT  
a/k/a/ NEWBURGH CITY SCHOOL DISTRICT,**

**Third-Party Defendant.**

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**LEONARD D. STEINMAN, J.**

The following papers, in addition to any memoranda of law and/or statement of material facts, were reviewed in preparing this Decision and Order:

District Defendants’ Notice of Motion, Affirmation & Exhibit.....	1
Petrozello’s Affirmation in Opposition & Exhibits. . . . .	2
District Defendants’ Reply.....	3

In this action, plaintiff seeks damages for alleged sexual abuse that occurred beginning in 1973 until approximately 1975 when he was 10-12 years old by defendant Ralph Petrozello and Thomas Herman (a deceased non-party), both of whom were employed

by Newburgh Enlarged City School District (the “District”) as teachers. Plaintiff asserts claims against the District and other school defendants for negligent hiring, supervision and retention and direction; negligent, reckless and willful misconduct; and breach of statutory duty to report. As against Petrozello, plaintiff asserts claims for assault and battery.<sup>1</sup>

In March 2023, Petrozello commenced a third-party action against the District for defense and indemnification, common law indemnification and contribution. The District now moves to dismiss the third-party action pursuant to CPLR 3211(a)(7), or in the alternative, convert it into an Article 78 proceeding pursuant to CPLR 103(c) and dismiss such proceeding pursuant to CPLR 404(a) and 3211(a)(7). For the reasons set forth below, the motion is granted.<sup>2</sup>

### **PROCEDURAL HISTORY & RELEVANT BACKGROUND**

This action was commenced in August 2021. In his complaint, plaintiff alleges that Herman and Petrozello sexually abused him on multiple occasions from 1973 through 1975 on and off school property.<sup>3</sup>

On October 5, 2021 Petrozello answered the complaint but did not assert any cross-claims against the District Defendants. That same day, Petrozello sent a demand for defense and indemnification to the District. On May 31, 2022 Petrozello sent a second letter indicating that he did not receive a written response regarding his demand that the District defend and indemnify him in this action.

In March 2023, Petrozello initially filed a motion seeking a declaratory judgment that he was entitled to defense and indemnification, which was voluntarily withdrawn. On March 14, 2023, Petrozello commenced his third-party action against the District asserting that the District owes him a duty of legal defense and indemnification for all legal expenses based

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<sup>1</sup> Other causes of action asserted against the defendants in plaintiff’s complaint were dismissed by decision and order of this court dated August 24, 2022.

<sup>2</sup> The District contends that Petrozello’s contribution claim was improperly asserted in a third-party action in circumvention of CPLR 1007. Since Petrozello does not oppose this branch of the District’s motion, it is granted and the claim for contribution is dismissed.

<sup>3</sup> Plaintiff testified at his deposition that the abuse allegedly perpetrated by Petrozello took place off school grounds, on the weekend, at Petrozello’s apartment.

upon the City School District-Newburgh New York Handbook for Teachers September 1974 (referred to as the “District Handbook”) and New York Education Law §3023.

New York Education Law §3023, prescribes that the District is to

“save harmless...all teachers... from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person, or accidental damage to the property of any person within or without the school building, provided such teacher... at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment or authorized volunteer duties and/or under the direction of said board of education...”<sup>4</sup>

Counsel for the District asserts that the District did not provide a response to Petrozello’s (procedurally defective) demands for defense and indemnification, but rather “constructively” determined that Petrozello did not qualify for such a defense or indemnification. The District contends that since Petrozello’s alleged sexual abuse of plaintiff was not within the discharge of his duties or scope of his employment as an art teacher for the District, its decision was well grounded and neither arbitrary nor capricious.

### **LEGAL ANALYSIS**

On February 14, 2019, New York State enacted the Child Victims Act (L. 2019 c.11) (“CVA”) which, *inter alia*, (1) extended the statute of limitations on criminal cases involving certain sex offenses against children under 18 (see CPL §30.10[f]); (2) extended the time in which civil actions based upon such criminal conduct may be brought until the child victim reaches 55 years old (see CPLR §208 [b]); and (3) opened a one-year window reviving civil actions for which the statute of limitations has already run (even in cases that were litigated and dismissed on limitations grounds), commencing August 14, 2019 (see CPLR §214-g). The “window” period was thereafter extended for an additional one year.

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<sup>4</sup> The District Handbook incorporates the same “save harmless” language and does not appear to afford any additional rights other than what is prescribed “under the law.”

The legislation was primarily intended to revive civil claims by survivors of childhood sexual abuse that were time-barred under the existing statute of limitations, and to provide a more generous statute of limitations for such claims in the future. *See* Vincent Alexander, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR §214-g.

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must determine whether, from the four corners of the pleading, “factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Salvatore v. Kumar*, 45 A.D.3d 560 (2d Dept. 2007), *lv to app den.* 10 N.Y.3d 703 (2008), quoting *Morad v. Morad*, 27 A.D.3d 626, 627 (2d Dept. 2006). Further, the pleading is to be afforded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), we 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. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. 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 N.Y.3d 137, 141-142 (2017) (citations omitted).

With respect to Petrozello’s claim for duty to defend and indemnify, “[a] special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government.” *Gottlieb v. City of New York*, 129 A.D.3d 724 (2d Dept. 2015). The question of whether the District’s determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion is one that must be raised within the context of a CPLR

Article 78 proceeding. *See* CPLR 7803. Pursuant to CPLR 103(c), courts have the discretion to convert specific causes of action alleged in a complaint into a CPLR Article 78 proceeding. And Petrozello does not oppose conversion of his third-party complaint into a special proceeding. Accordingly, Petrozello's third-party claims for defense and indemnification is hereby converted into a petition and this court will direct the District's motion to dismiss as one to the special proceeding under CPLR Article 78. *See Dolce-Richard v. New York City Health and Hospitals Corp.*, 149 A.D.3d 903 (2d Dept. 2017). However, for the reasons stated below, the petition is dismissed.

From a procedural standpoint, Petrozello's claims fail since he did not timely or properly make his demand upon the District pursuant to New York Education Law §3023, which requires that the employee serve the District with a copy of the summons and complaint within ten days of its receipt.

Notwithstanding procedural defects, Petrozello's claims cannot survive on the merits. Petrozello correctly highlights that the duty to defend is broader than the duty to indemnify. *See Swan USA, Inc. v. Westco Insurance Company*, 217 A.D.3d 987 (2d Dept. 2023). A municipal employer's role in deciding whether to defend an employee is similar to that of an insurance company deciding whether a defense is owed under its policy. *Dreyer v. City of Saratoga Springs*, 43 A.D.3d 586 (3d Dept. 2007). And an insurer is required to defend the entire action if any of the claims against the insured arguably arise from covered events. *Salt Construction Corp. v. Farm Family Casualty Insurance Company*, 120 A.D.3d 568 (2d Dept. 2014). But the duty of an insurer is not triggered where it may be concluded, as a matter of law, that there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy. *Bruckner Realty, LLC v. County Oil Co., Inc.*, 40 A.D.3d 898 (2d Dept. 2007).

Here, there is no circumstance under which the District would be obligated to defend and/or indemnify Petrozello, who is accused of sexually abusing plaintiff as a minor. A school district is required to defend and/or indemnify a teacher in civil actions for damages that arise only from acts performed in the school of his or her employment. *See* N.Y. Education Law §§3023, 3811. Further, an employer cannot be held vicariously liable for

torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business. *Johansmeyer v. New York City Dept. of Ed.*, 165 A.D.3d 634 (2d Dept 2018). Sexual abuse does not fall within the scope of Petrozello's employment as an art teacher. *See N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247 (2002). Clearly, if the allegations are true, these acts of sexual abuse were committed solely for personal reasons, and were a departure from the scope of Petrozello's employment unrelated to the furtherance of the District's interests. Therefore, the petition is dismissed.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: October 16, 2023  
Mineola, New York

**ENTER:**

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**LEONARD D. STEINMAN, J.S.C.**