

Doe v Saint Ann's Sch.

2024 NY Slip Op 30729(U)

March 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 520805/2021

Judge: Joy F. Campanelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS:CVAP3M

-----X
JANE DOE, whose initials are A.A.,

Plaintiff,

Index No.: 520805/2021

-against-

DECISION AND ORDER

SAINT ANN’S SCHOOL, its agents, servants,
employees, TONY MELONI,

Hon. Joy F. Campanelli, J.S.C.

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	seq.#2	seq.#3
Opposing Affidavits (Affirmations) _____	30-33	35-40
Affidavits/ Affirmations in Reply _____	35-40	42
Other Papers: <u>Affidavits/Affirmations in Support</u> _____		

Defendant SAINT ANN’S SCHOOL moves by Notice of Motion seq. 002 to dismiss with prejudice the causes of action asserted against it by plaintiff JANE DOE pursuant to CPLR §3211(a)(7). Plaintiff cross moves by Notice of Cross-Motion seq. 003 pursuant to CPLR §3205(b) for leave to file an amended complaint in this matter.

Before reaching the substance of defendants’ arguments in their motions to dismiss, the Court must first address plaintiff’s application for leave to amend the complaint. A party may amend a pleading without leave or with leave of court (see CPLR §3025 [a], [b]). CPLR §3025 (a), in relevant part, permits amendment of a pleading as of right "at any time before the period for responding to it expires." A motion "to dismiss the original complaint extend[s] the defendants' time to answer. . . , and similarly extend[s] the time within which the plaintiffs could serve an amended complaint as of right" (*Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2d

Dept 2013]; *see also Johnson v Spence*, 286 AD2d 481, 483 [2d Dept 2001I [stating same]]. The plaintiff here may amend the complaint as of right and did not need to seek leave of court to do so. (*see Re-Poly Mfg. Corp.*, 109 AD3d at 534-535; *see also Roam Capital, Inc. v Asia Alternatives Mgt. LLC*, 194 AD3d 585, 585 [1st Dept 2021]).

Accordingly, plaintiff's amended complaint submitted with the cross-motion supersedes the original complaint (*see R & G Brenner Income Tax Consultants v. Gilmartin*, 166 AD3d 685, 688 [2d Dept 2018]) and is deemed to be the operative pleading (*see* NYSCEF doc no 40). In the amended complaint, plaintiff asserts the following causes of action against defendants SAINT ANN'S SCHOOL: (i) negligent failure to protect (ii) negligent training; (iii) negligent supervision; (iv) negligent retention.

The court must next consider the impact of the amended complaint on defendants' motion to dismiss. An amended complaint does not defeat a motion to dismiss that is addressed to the merits of the complaint. (*see Hutchins v. Palmer*, 176 AD3d 1037, 1039 [2d Dept 2019]; *see also Livadiotakis v. Tzitzikalakis*, 302 AD2d 369,370 [2d Dept 2003]; *Teruano v. Fine*, 17 AD3d 449, 449 [2d Dept 2005]). When a plaintiff amends a complaint as of right, while a motion to dismiss is pending, the defendants can either withdraw their motion or apply their motion to dismiss to the amended complaint. Here, defendants have not indicated their intention to withdraw their pending motions to dismiss. Defendants oppose plaintiff's cross-motion to amend the complaint and argue that their motion to dismiss the original complaint should be granted as the plaintiff did not defend that complaint. As such, the original complaint is dismissed. As the defendants include arguments that address the amended complaint, and the parties stipulated to extend defendants' time to respond to plaintiff's cross-motion, the court will apply defendants' motion to the amended complaint (amended complaint).

On a motion to dismiss a complaint pursuant to CPLR §3211 (a) (7), the court must "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" (*Leon v. Mortinez*, 84 NY2d 83, 87-88 [994]). "Whether the complaint will be able to survive a motion for summary judgment, or whether plaintiff will be able to prove the claims, is not the inquiry on a motion to dismiss pursuant to CPLR § 3211 (a) (7) (*see Victory State Bank v. EMBA Hylan, LLC*, 169 AD3d 963,965 [2d Dept 2019]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v. Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v. McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996], and the criterion becomes "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]; *see also Leon, supra*, 84 NY2d at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] ["In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v. Chase Manhattan Bank*, 300 AD2d 266 [1st Dept 2002]).

In the Second Department, leave to amend will not be granted if the proposed amended pleading is "palpably insufficient to state a cause of action or defense, or is patently devoid of merit." *Siddiqui v. Smith*, 207 A.D.3d 681, 683 (2d Dep't 2022) (internal quotation marks omitted) (affirming denial of leave to amend). Courts applying this standard when confronted with a cross-motion for leave to amend in response to a motion to dismiss will generally inquire as to whether

the newly added allegations cure the deficiencies in the original complaint addressed by the pending motion to dismiss. See, e.g., *Williams v. REDF Equities, LLC*, 101 N.Y.S.3d 701 (Table), at *4-5 (Sup. Ct. Kings Cnty. 2018).

In the instant matter, the alleged sexual abuse/assault occurred after school hours at defendant TONY MELONI's ("MELONI") apartment. The only allegation in the amended complaint of Defendant SAINT ANN'S SCHOOL's negligence is MELONI's offering to give the plaintiff a ride home during dismissal while still on school premises. Although the location of an assault is not dispositive in this case there is no nexus to hold the SAINT ANN'S SCHOOL liable. (see *Roe v. Domestic & Foreign Missionary Society of Protestant Episcopal Church*, 198 AD 3rd 699 [2d Dept 2021]).


Accordingly, it is hereby

ORDERED that Defendant SAINT ANN'S SCHOOL's motion seq. 002 to dismiss Plaintiff's amended complaint pursuant to CPLR §3211(a)(7) is GRANTED.

ORDERED that Plaintiff's motion seq. 003 to amend the complaint is DENIED as moot.

This constitutes the decision and order of the Court.

Dated: March 7, 2024
Brooklyn, NY


Hon. Joy F. Campanelli, J.S.C.