

**Doe v Ward**

2024 NY Slip Op 31807(U)

May 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 513846/2021

Judge: Joy F. Campanelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CVAP4M

-----X  
JOHN DOE,

Plaintiff,

Index No.: 513846/2021

-against-

**DECISION AND ORDER**

EDWARD WARD and SURPRISE LAKE CAMP,

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

Seq. #2

Affidavits (Affirmations) Annexed \_\_\_\_\_

24-28

Opposing Affidavits (Affirmations) \_\_\_\_\_

34-35

Affidavits/ Affirmations in Reply \_\_\_\_\_

36

Other Papers: Affidavits/Affirmations in Support \_\_\_\_\_

Defendant SURPRISE LAKE CAMP moves by Notice of Motion seq. 002 to dismiss Plaintiff’s complaint against it pursuant to CPLR 3211(a)(7).

According to the Complaint, Plaintiff was a camper at SURPRISE LAKE CAMP in the summers of 1989 and 1990, when he was a minor. The Complaint asserts that, while at camp, Plaintiff was sexually abused by Defendant EDWARD WARD (hereinafter “WARD”), a counselor for SURPRISE LAKE CAMP. The Complaint asserts nine (9) causes of action against the Defendants: (1) negligence and recklessness; (2) negligent hiring, retention, supervision and/or direction; (3) breach of fiduciary duty; (4) breach of non-delegable duty; (5) in loco parentis; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress (8) breach of statutory duty to report abuse under Social Services Law §§ 413 and 420, and (9) sexual abuse. Plaintiff is also seeking punitive damages.

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), a Court's role is deciding “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), a court must 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” (*Eskridge v Diocese of Brooklyn*, 210 AD3d 1056, 1057 [2d Dept 2022]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Boyle v North Salem Central School District*, 208 AD3d 744 [2d Dept 2022]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*id.*; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon*, 84 NY2d at 87-88; *Guggenheimer*, 43 NY2d at 275). “Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration” (*Krasnow v Catania*, 219 AD3d 1324, 1324 [2d Dept 2023]). This Court will address each cause of action individually, as follows:

**1. Negligence and recklessness:**

The allegations against SURPRISE LAKE CAMP stated in the first cause of action premise liability for negligence and recklessness on the duty to supervise and prevent harm to children. The Court finds that this is duplicative of Plaintiff's negligent supervision, retention and

hiring cause of action, which warrants dismissal. Accordingly, the branch of the motion seeking dismissal of Plaintiff's claims for negligence and recklessness is granted.

**2. *Negligent hiring, retention, supervision and/or direction***

New York Courts have found that "[c]auses of action alleging negligence based upon negligent hiring' retention' or supervision are not statutorily required to be pleaded with specificity" (*Belcastro v Roman Catholic Diocese of Brooklyn, New York*, 213 AD3d 800, 801 [2d Dept 2023]). "An employer can be held liable under theories of negligent hiring, retention, and supervision where it is shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Id.*). "The manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, the plaintiff need not allege his [or her] evidence" (*Martinez v. State*, 2023 NY Slip Op. 01990 [2d Dept 2023])."

This Court finds that Plaintiff has sufficiently plead his cause of action of negligent hiring, negligent retention, and supervision. Accordingly, the branch of the motion seeking dismissal of Plaintiff's claims for negligent hiring, retention and supervision is denied.

**3. *Breach of fiduciary duty***

[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendants' misconduct" (*Mann v Sasson*, 186 AD3d 823, 824 [2020] [internal quotation marks omitted]; see *Siegler v Lippe*, 189 AD3d 903, 905 [2020]). A cause of action to recover damages for breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b) (see *WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1023 [2021]; *Mann v Sasson*, 186 AD3d at 824). "A fiduciary relationship exists between two persons when one of them is under a

duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 21 [2008] [internal quotation marks omitted]; see *WMC Realty Corp. v City of Yonkers*, 193 AD3d at 1023). Two essential elements of a fiduciary relationship are de facto control and dominance (see *Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d at 21).

Here, the Court finds the complaint does not allege facts that would give rise to a fiduciary relationship between the Plaintiff and the Defendant SURPRISE LAKE CAMP. The complaint fails to allege facts that demonstrated that the Plaintiff’s relationship with the Defendant was somehow unique or distinct from the Defendant’s relationships with other [campers] generally (see \*883 *Doe v Holy\_See [State of Vatican City]*, 17 AD3d 793, 795 [2005]; cf. *Martinelli v Bridgeport R.C. Diocesan Corp.*, 196 F3d 409, 429-430 [2d Cir 1999]). Accordingly, the branch of the motion seeking dismissal of the breach of fiduciary duty cause of action is granted.

#### ***4. Breach of non-delegable duty***

This cause of action should be dismissed for the reason stated above warranting dismissal of Plaintiff’s third cause of action.

#### ***5. In loco parentis***

With respect to the doctrine of in loco parentis, the Court notes that there is a branch of case law under which schools are tasked with a duty to adequately supervise the students in their charge and are liable for foreseeable injuries proximately related to their failure to provide adequate supervision (see *Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 149-150 [2d Dept. 2011]; *Doe v Department of Educ. of City of N.Y.*, 54 AD3d 352 [2d Dept. 2008]; see also *Palmer v City of New York*, 109 AD3d 526, 527 [2d Dept. 2013], citing *Mirand v City of New York*,

84 NY2d 44, 49 [1994]; *McLeod v City of New York*, 32 AD3d 907 [2d Dept. 2006]). Based on the doctrine that school districts act in loco parentis with respect to their minor students (see *Barragan v City Sch. Dist. of New Rochelle*, 120 AD3d 728 [2d Dept. 2014]; *Stinson v Roosevelt U.F.S.D.*, 61 AD3d 847, 847-848 [2d Dept. 2009]) because they take physical custody of them (see *Giresi v City of New York*, 125 AD3d 601, 602-603 [2d Dept. 2015]), schools are responsible for supervising their students with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances (id., citing *Mirand v City of New York*, supra). “The concept of in loco parentis is the fountainhead of the duty of care owed by a school to its students” (*Williams v. Weatherstone*, 23 NY3d 384, 403 [2014] [citing *Mirand v. City of New York*, supra] [(t)he duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians”). It does not appear, however, that the doctrine of in loco parentis can simply be applied to camps by way of analogy to schools. In loco parentis defines the duty owed within the context of a negligence cause of action but does not create an independent cause of action. As such, that portion of the Defendant’s motion to dismiss Plaintiff’s in loco parentis claim is granted.

#### **6. Intentional infliction of emotional distress**

“The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress” (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2012]; see *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The complaint alleges that Defendant SURPRISE LAKE CAMP knew and/or disregarded the substantial probability that WARD would cause severe emotional distress to the Plaintiff. The complaint goes on to allege liability under the doctrine of respondeat superior. The intentional

conduct of WARD is not within the scope of his employment, and this does not form the basis of liability of SURPRISE LAKE CAMP for intentional infliction of emotional distress. This matter is distinguishable from *Eskridge* 210 Ad3d 1056 (2d Dept 2022) and *Novak* 210 Ad3d 1104 (2d 2022), as in those matters the complaint alleged that the Diocese had knowledge of the sexual abuse of plaintiff and other children, yet concealed the abuse and permitted it to continue, whereas in this matter the complaint admits that SURPRISE LAKE CAMP first learned of WARD's conduct in 2002. The complaint in this matter fails to sufficiently plead a causal connection between SURPRISE LAKE CAMP's alleged outrageous conduct and plaintiff's injuries. Accordingly, the branch of the motion seeking dismissal of Plaintiff's claim for intentional infliction of emotional distress is granted.

*7. Negligent infliction of emotional distress*

Defendants also seek dismissal of Plaintiff's negligent infliction of emotional distress claim (NIED). Defendants argue that Plaintiff does not articulate a basis for holding them liable under this tort, and that the claim is duplicative of Plaintiff's other negligence-based causes of action. Typically, a cause of action for NIED "must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety" (*Padilla v. Verczky-Porter*, 66 AD3d 1481, 1483 [4th Dept 2009]). "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action." (*Wolkstein v. Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). Plaintiff may recover for emotional distress caused by defendant Ward's alleged conduct under his negligent hiring and retention claim, the NIED claim is unnecessary (*see Wilczynski v Gates Community Chapel of Rochester, Inc.*, 2022 WL 446561, \*3, 2022 US Dist LEXIS 26113, \*8-9 [WD NY, Feb. 14, 2022, No. 6:20-CV-06616 (EAW)] [dismissing an NIED claim as duplicative of the negligence, negligent

supervision, hiring, and retention claims]). As such, Defendants' application to dismiss Plaintiff's NIED claim is granted.

**8. Breach of statutory duty to report Social Services Law §§ 413 and 420.**

Pursuant to Social Services Law § 413, school officials, which include but are not limited to school teachers, school guidance counselors, school psychologists, school social workers, school nurses, school administrators or other school personnel required to hold a teaching or administrative license or certificate, 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.” In addition, Social Services Law § 420(2) states that “Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure.” “The Legislature enacted Social Services Law § 420 which expressly allows a private cause of action for money damages upon the failure of any person, official or institution required by title 6 to report a case of suspected child abuse or maltreatment” (*Rivera v. County of Westchester*, 31 Misc 3d 985, 994 [Westchester Co Sup Ct 2006]). “An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse” (*Young v. Campbell*, 87 AD3d 692, 694 [2nd Dept 2011], lv denied \*\*10 18 NY3d 801 [2011]). Defendants argue that this cause of action should be dismissed as they are not mandatory reporters. Here, the Court finds that, as a camp, the Defendant is entitled to dismissal of this cause of action as it is not an institution that is mandated to report under the Social Services Law. Accordingly, the branch of the motion seeking dismissal of Plaintiff’s claim for breach of statutory duty to report Social Services Law §§ 413 and 420 is granted.

### 9. *Sexual Abuse*

Sexual abuse is not “generally” within the scope of employment, therefore Plaintiff’s cause of action for sexual abuse is dismissed. The law is clear that an employer cannot be held vicariously liable for sexual abuse committed by their employees (see *Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012]). As such, Defendants’ application to dismiss Plaintiff’s sexual abuse claim is granted.

### 10. *Punitive damages*

The only remaining cause of action is for negligent hiring, retention, or supervision. Punitive damages in actions involving negligent hiring, retention, or supervision generally require conduct evincing a high degree of moral culpability, so flagrant as to transcend simple carelessness, or which constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others (see *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744 [2006]). Accordingly, the branch of the motion seeking dismissal of Plaintiff’s claim for punitive damages is granted.

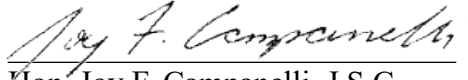
Accordingly, it is hereby ORDERED that the portion of SURPRISE LAKE CAMP’s motion seq. 002 to dismiss pursuant to CPLR 3211(a)(7) the causes of action of negligence and recklessness, breach of fiduciary duty, breach of nondelegable duty, in loco parentis, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of statutory duty to report Social Services Law §§ 413 and 420 and sexual abuse is GRANTED; and it is further

ORDERED that the portion of SURPRISE LAKE CAMP’s motion Seq. 002 pursuant to CPLR 3211(a) (7) to dismiss plaintiff’s cause of action for negligent hiring, retention and supervision is DENIED, and it is further

ORDERED that the portion of SURPRISE LAKE CAMP's motion seeking dismissal of punitive damages is GRANTED.

This constitutes the decision and order of the Court.

Dated: May 21, 2024  
Brooklyn, NY

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