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| <b>Duncan v City of Mount Vernon Sch. Dist.</b>                                                                                                                                                                                |
| 2024 NY Slip Op 35350(U)                                                                                                                                                                                                       |
| June 21, 2024                                                                                                                                                                                                                  |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 62971/2023                                                                                                                                                                                            |
| Judge: Janet C. Malone                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
NICOLE DUNCAN, Individually, and as parent, legal guardian and natural guardian Plaintiff, under the age of 18 years old M.S.,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.:62971/2023

Motion Seq. No. 1 and 2

THE CITY OF MOUNT VERNON SCHOOL DISTRICT, DR. KENNETH HAMILTON as Superintendent of the MOUNT VERNON CITY SCHOOL DISTRICT, MOUNT VERNON CITY SCHOOL DISTRICT, THE CITY OF MOUNT VERNON POLICE DEPARTMENT, THE COMPTROLLER OF THE CITY OF MOUNT VERNON, THE CITY OF MOUNT VERNON RECREATION DEPARTMENT, THE CITY OF MOUNT VERNON, THE MOUNT VERNON UNITED CHEER AND DANCE TEAM F/K/A and/or S.A.S., and "John and Jane" Doe,  
Defendants.

-----X  
MALONE, J.

**WARNING**

Section 202.5 (e) of the Uniform Court Rules sets forth:

Omission or redaction of confidential personal information.

(1) Except in a matrimonial action, or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the Mental Hygiene Law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties **shall** omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information (CPI) means:

[ . . . ]

(ii) the date of an individual's birth, except the year thereof;

(iii) the full name of an individual known to be a minor, except the minor's initials;

[ . . . ]

22 NYCRR § 202.5 (emphasis added).

Accordingly, counsel for the parties are to remove from the public NYSCEF file any and all documents that include the full or partial names of minors mentioned in the filings and then redact same and refile the documents forthwith. Seek the assistance of the Westchester Clerk's Office if necessary.

Overview

This personal injury lawsuit filed by Plaintiffs on June 30, 2023, stems from the stabbing of Plaintiff M.S. on Friday, April 8, 2022 at approximately 4:00pm, during a parade co-sponsored by Defendants the City of Mount Vernon and the City of Mount Vernon School District.

Except for one specific allegation lodged against Defendant the City of Mount for failing to provide proper crowd control, Plaintiffs' Complaint is one omnibus cause of action for negligence against Defendants. Therefore, the Court was left to decipher the causes of actions alleged by reviewing the pleadings, papers in support and opposition to the motions, and the GBL § 50-h transcript.

Plaintiffs allege *inter alia* that M.S. was attacked by members of a rival cheerleading team, Defendant Mount Vernon United Cheer and Dance Team F/K/A and/or A/K/A SAS<sup>1</sup> ("SAS") and that (1) Defendants had actual and constructive knowledge of the alleged perpetrator T.H.'s violent propensities prior to the parade and failed to take any disciplinary action against T.H.; (2) Defendants knew or should have known that additional security was necessary to safeguard attendees at the parade and celebration, including M.S.; (3) all Defendants had a special duty to keep M.S. safe and failed to do so; (4) Defendant the City of Mount Vernon failed to provide proper crowd control; and (5) as a result of Defendants actions or "failures to act, failure to prevent, failure to intercede, negligence, carelessness, recklessness, gross negligence" negligent hiring, negligent supervision, negligent monitoring; negligent care, custody and control of students, M.S. was stabbed and suffered past and future pain and suffering, and trauma (Complaint [NYSCEF Doc. No. 28 ¶¶ 65-89, 91]).

Now, before the Court for determination are the pre-answer<sup>2</sup> motions to dismiss filed by Defendants the City of Mount Vernon Police Department ("MVPD"), the Comptroller of the City of Mount Vernon ("Comptroller"), the City of Mount Vernon Recreation Department ("Recreation") and the City of Mount Vernon ("the City") (collectively "the City Defendants") on July 18, 2023, and Defendants' the City of Mount Vernon School District, Dr. Kenneth Hamilton,

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<sup>1</sup> Although in the Complaint Plaintiffs refer to Defendant Mount Vernon United Cheer and Dance Team F/K/A and/or A/K/A SAS as "MOUNT VERNON UNITED CHEER AND DANCE TEAM F/K/A and/or A/K/A S.A.S. A/K/A SUPREME ALL-STARs ("MVUCD")", there is no evidence that the case caption was amended to conform with the Complaint (NYSCEF Doc. No. 28 at ¶13). Nonetheless, there is no evidence that a defendant has either answered or appeared under either name. At one point the defendant may have been affiliated with the Boys and Girls Club (NYSCEF Doc. No. 25 at 79:19-80:8).

<sup>2</sup> See Stipulations extending the City Defendants' and the School District's respective time to answer the Complaint (NYSCEF Doc. Nos. 8, 19).

as Superintendent of the Mount Vernon City School District and Mount Vernon City School District (collectively “the School District”) on August 31, 2023.

First, the City Defendants’ motion seeks an order pursuant to CPLR R. 3211(a) dismissing Plaintiffs’ Complaint on the basis that (1) defendants MVPD, Comptroller and Recreation are administrative branches of the City and the only proper defendant is the City and (2) Plaintiffs have failed to state a cause of action in that they fail to allege the existence of a special duty owed by the City to Plaintiffs (Motion Sequence No. 1, NYSCEF Doc. Nos. 12-15, 36). Although the City Defendants fail to state under which provision of CPLR R. 3211(a) this motion has been brought (*see* CPLR R. 2214), the Court deems it a motion to dismiss under CPLR R. 3211(a)(7) for failure to state a cause of action. *HSBC Bank USA v Dalessio*, 137 AD3d 860 (2d Dept. 2016)(“CPLR 2001 permits court ...to disregard party’s mistake omission, defect, or irregularity”).

Second, the School District’s motion seeks an order pursuant to CPLR 3211(a)(7) dismissing Plaintiff’s action on the grounds that the Complaint fails to state a cause of action for negligent supervision (Motion Sequence No. 2, (NYSCEF Doc. Nos. 21-29, 35).

Plaintiffs oppose the School District’s motion in full and partially oppose the City Defendant’s motion. (NYSCEF Doc. Nos. 31-32, 34, respectively).

### Background

On April 8, 2022, M.S., a Mount Vernon High School student and member of the Mount Vernon Junior Varsity Cheerleading Team (“MV Cheerleading”) was stabbed at approximately 4:00 p.m. that day, while a parade co-sponsored by Defendants to commemorate the Mount Vernon High School Boys Basketball Team’s New York State Championship win was taking place.

M.S. along with non-party K.G. had been driven, by a friend, non-party D.J, to McDonald’s Restaurant on Prospect Avenue in the City of Mount Vernon, New York. While inside McDonald’s, M.S. noticed T.H., a student at Davis Middle School in Mount Vernon and other members of the rival cheerleading squad SAS outside of McDonalds. Due to past altercations between T.H. and MV Cheerleading members, both on and off school grounds, M.S. went back to D.J.’s car and K.G. called cheerleading Coach Knox, who allegedly advised them not to do anything, stay put and that she was on her way. Although D.J. wanted to leave the area, K.G. and

M.S. told him not to because Coach Knox said she was on her way. (M.S. 50-H Transcript [NYSCEF Doc. No. 25] at 58: 9-14; 61:14-63:3).

When Coach Knox arrived approximately fifteen minutes later, M.S. and K.G. got out of D.J.'s car and Coach Knox tried to talk to the crowd that had formed. When things began to escalate Coach Knox advised M.S. and K.G. to get back into D.J.'s car and drive away. While waiting at a red light in an attempt to leave the area, T.H. walked over to D.J.'s car waiving a knife, opened the car door and stabbed M.S. on her left side and back. When M.S. hopped out of the car, she was "jumped" by other members of SAS. After things had settled down, MVPD police officers arrived and took control of the scene ((*id.* at 63:4-65:15; 66:2-18; 134:14-136:9). M.S. received medical treatment including stitches in her left arm at Mount Vernon Hospital (*id.* at 69:20-71:22).

### Discussion

"On a motion to dismiss the complaint pursuant to CPLR R. 3211 (a)(7) for failure to state a cause of action, the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Cruz v. City of New York*, 211 AD3d 1011, 1011 (2d Dept. 2022) quoting *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Further, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, 84 NY2d 83, 88 (1994). A plaintiff who pleads only conclusory allegations with no factual specificity will not survive a motion to dismiss. *Young v. 101 Old Mamaroneck Rd. Owners Corp.*, No. 2020-01298, 2022 WL 17480796, at \*2 (2d Dept. Dec. 7, 2022). Finally, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *Rogoff v. Long Island Univ.*, 208 A.D.3d 700, 701, (2d Dept. 2022).

### *City Defendant's Motion*

The portion of the City Defendants' motion to dismiss Plaintiffs' cause of action against MVPD and Recreation that is not opposed, is granted as MVPD and Recreation "do not have a legal identity separate and apart from the municipality and thus, cannot independently sue or be sued" *Stevens v. Town of East Fishkill Police Dept.*, 198 AD3d 832, 832 (2d Dept. 2021); *Metwally v. City of New York*, 215 AD3d 820, 823 (2d Dept. 2023). Similarly, Plaintiffs' action against the

Comptroller is dismissed as it is redundant since the City is already named as a Defendant and Plaintiffs lodge no specific allegation in their Complaint against the Comptroller. *Vargas v. City of NY*, 105 Ad3d 834, 837 (2d Dept. 2013) (“where claims are asserted against individual municipal employees in their official capacities ... such claims are tantamount to claims against the municipality itself”). Thus, Plaintiffs’ action against MVPD, Recreation and the Comptroller is dismissed.

As to the remainder of the City Defendants motion, they move to dismiss Plaintiff’s negligence cause of action claiming Plaintiffs have not sufficiently alleged that the City owed a special duty of care to M.S., although the City was acting in a governmental capacity. *Canberg v. County of Nassau*, 214 AD3d 943, 945(2d Dept 2023) (“If the municipality was acting in a governmental capacity, then the plaintiff must prove the existence of a special duty as an element of his or her negligence cause of action”).

Plaintiffs contend that the City assumed a special duty to M.S. “[w]hen the City affirmatively collaborated and coordinated with the School District to hold such a parade[and it ] lured the public including M.S. into such an activity ... ultimately creat[ing] a special duty to the participants including M.S.” (Lauren P. Raysor, Esq. Affirmation in Opposition [NYSCEF Doc. No. 34] at ¶8).

A “municipality owes a general duty to the public, but it does not owe a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created.” *Ferreira v. City of Binghamton*, 38 N.Y.3d 298, 310 (2022). A special duty arises when “the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally” or “the municipality took positive control of a known and dangerous safety condition” *Id.*

To establish that the City voluntarily assumed a special duty to MS, Plaintiffs must allege:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.

*Marino v City of New York*, 223 AD3d 888, 890 [2<sup>nd</sup> Dept 2024] (quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

Plaintiffs alleges that the MVPD was aware that potential violence would occur at the parade because M.S. was attacked at MVHS in July 2021 by a different student, that the City Defendants were aware of prior incidents of violence perpetrated against the MV Cheerleading team and owed them a special duty to protect them from violence and failed to provide adequate security and policing for the parade; and that the City Defendants knew of T.H.'s propensity for violence. However, other than the July 2021 incident involving M.S. reported to the MVPD, Plaintiffs fail to allege any specific instance where any of the City Defendants were notified of T.H.'s alleged violent propensity or that the prior incidents of alleged violence against the MV Cheerleading team was reported to the City Defendants. Plaintiff also fails to allege any specific instance in which the City Defendants assumed an affirmative duty to act on M.S.' behalf specifically that extended beyond what was owed to the general public or even if there were any form of direct contact between the City Defendants and M.S. prior to the events on April 8, 2022.

Here, Plaintiff has not pled sufficient facts establishing the City Defendants had a special duty to MS. Plaintiffs has also failed to establish that M.S. was lulled into a false sense of security to attend the City hosted celebration when she went to McDonald's after school. *Marks-Barcia v Village of Sleepy Hollow Ambulance Corps*, 183 AD3d 883, 885 (2<sup>nd</sup> Dept 2020)(special duty was not owed when "there was nothing in the record to suggest ... that [the municipality] lulled the plaintiff into a false sense of security"). M.S. testified that she did not participate in the parade and "left school and headed to McDonald's with friends like she does every day after school" (M.S. 50H Hearing Testimony [NYSCEF Doc. No. 25] at 51:5- 57:3). Accordingly, the Plaintiffs' negligence cause of action against the City is dismissed.

Additionally, Plaintiff Nicole Duncan's derivative claim for loss of consortium, companionship, and services as mother of M.S. against the City Defendants (NYSCEF Doc. No. 1 at ¶91) must also be dismissed since the cause of action for negligence against the City was dismissed. *Klein v. Metropolitan Child Services, Inc.*, 100 AD3d 708, 711 ("the derivative cause of action cannot survive the dismissal of the main claims for damages). Similarly, Plaintiffs' claim for damages for negligent and/or intentional infliction of emotional distress against the City are dismissed. *Lauer v City of New York*, 240 AD2d 543, 544 (2d Dept 1997)( "It is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity"); *Sacino v Warwick Valley Cent. School Dist.*, 138 AD3d 717, 719 (2d Dept 2016)("A cause of action to recover damages for negligent infliction of emotional distress



generally requires a plaintiff to show a breach of a duty owed to [her] which unreasonably endangered [her] physical safety, or caused [her] to fear for [her] own safety.”)

Plaintiffs’ negligence causes of action against the City Defendants are dismissed.

*Schools District’s Motion*

Accepting the facts as alleged in the Complaint to be true, giving Plaintiffs the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory, the School District’s motion is denied in its entirety.

“Schools are under a duty to adequately supervise the students in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision” *J.S. v Ramapo Cent. Sch. Dist.*, 205 AD3d 947, 948 [2d Dept 2022]. “Although a school cannot be held liable for injuries that occur off school property and beyond the orbit of its authority” (*Davila v. Orange County*, 215 AD3d 632, 634 [2d Dept. 2022]), “the school’s duty continues and is breached if the student is released without further supervision into a foreseeably hazardous setting it had a hand in creating” *Boyle v. Brewster Central School Dist.*, 209 AD3d 619, 621 (2d Dept. 2022). Additionally, “[a]n injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act.” *Khosrova v Hampton Bays Union Free Sch. Dist.*, 99 AD3d 669, 671 [2<sup>nd</sup> Dept 2012]. “The standard for determining whether the school has breached its duty is to compare the school’s supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information.” *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 828 [2<sup>nd</sup> Dept 2015].

Plaintiffs allege in their Amended Complaint that members of the MV cheerleading team were assaulted by Defendants SAS on March 31, 2022 and/or on April 1, 2022 (NYSCEF Doc. No. 1 at ¶¶38-39) and M.S. testified that a fight occurred between T.H. and members of the MV cheerleading team on the same date, approximately a week before her stabbing (NYSCEF Doc. No. 25 at 45:14-46:23).

M.S. further testified that K.G. called Coach Knox when M.S. saw T.H. outside the McDonalds because Coach Knox was aware of prior incidents with T.H. and SAS (*id* at 117:25-120:2); and when Coach Knox was told of T.H.’s presence, it was Coach Knox who instructed



M.S. to stay at the location until Coach Knox arrived. (*id.* at 62:5-63:3; 156:10-24). And it was Coach Knox who instructed M.S. to leave the scene when things escalated (*id.* at 63:4-65:9; 124:7:125:20). Therefore, although M.S.’s assault occurred at 4:00pm on a Friday afternoon, two miles away from the school, it was School District employee Coach Knox, who was aware of prior incidents with T.H., directed M.S.’s action. *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 828 (2d Dept 2015) (“Where the complaint alleges negligent supervision due to injuries related to an individual’s intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual’s propensity to engage in such conduct, such that the individual’s acts could be anticipated or were foreseeable”). Moreover, M.S. also testified that other school administrators, such as Bob Cimmino, head of all sports activities in the school, was also aware of the prior incidents (NYSCEF Doc. No. 25 at 106:18 – 107:24; 117:25-119:18).

Thus, the School District’s motion to dismiss Plaintiffs’ Complaint on the grounds of failure to state a cause of action for negligence is denied.

Based on the foregoing, any issues raised by the parties that are not addressed herein are either without merit or are moot. Accordingly, it hereby

ORDERED, that Defendants the City of Mount Vernon Police Department, the Comptroller of the City of Mount Vernon, the City of Mount Vernon Recreation Department and the City of Mount Vernon’s motion to dismiss (Motion Seq. No. 1) is granted; the Complaint against said Defendants is dismissed in its entirety; and it is further

ORDERED, that Defendants the City of Mount Vernon School District, Dr. Kenneth Hamilton, as Superintendent of the Mount Vernon City School District and Mount Vernon City School District’s motion to dismiss (Motion Seq. No. 2) the Complaint for failure to state a cause of action is denied: and it is further

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ORDERED, that the caption is conformed to reflect the dismissal of the Complaint against the City of Mount Vernon Police Department, the Comptroller of the City of Mount Vernon, the City of Mount Vernon Recreation Department and the City of Mount Vernon as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
NICOLE DUNCAN, Individually, and as parent, legal  
guardian and natural guardian Plaintiff, under the age of  
18 years old M.S.,

Plaintiffs,

-against-

Index No.:62971/2023

THE CITY OF MOUNT VERNON SCHOOL DISTRICT,  
DR. KENNETH HAMILTON as Superintendent of the  
MOUNT VERNON CITY SCHOOL DISTRICT, MOUNT  
VERNON CITY SCHOOL DISTRICT  
THE MOUNT VERNON UNITED CHEER AND DANCE  
TEAM F/K/A and/or S.A.S., and "John and Jane" Doe,

Defendants.

-----X  
and it is further

ORDERED, that Defendants the City of Mount Vernon School District, Dr. Kenneth Hamilton, as Superintendent of the Mount Vernon City School District and Mount Vernon City School District shall answer the complaint within 20 days of the date of this Decision and Order, no later than **July 11, 2024** ; and it is further

ORDERED, that the remaining parties are hereby directed to submit a fully executed proposed preliminary conference stipulation which can be located at [west-general-civil-preliminary-confstip-form.pdf \(nycourts.gov\)](#) no later than **July 19, 2024** or appear for a preliminary conference on **August 2, 2024 at 3:00 pm** via Microsoft Teams – [Click here for the videoconference](#) .

This constitutes the Decision and Order of the Court.

Dated: June 21, 2024  
White Plains, New York

ENTER:



HON. JANET C. MALONE, J.S.C.