66 Misc.3d 1225(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Supreme Court, New York,
Cattaraugus County.

Tia L. TORREY, Plaintiff,
v.
PORTVILLE CENTRAL SCHOOL, Richard Haley, Defendants.
88476
|
Decided on February 21, 2020

Attorneys and Law Firms

Daniel Chiacchia, Esq., Chiacchia & Fleming, LLP, Attorneys for Plaintiff

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Opinion

Deborah Chimes, J.

***1** Defendant, Portville Central School, (hereinafter Portville), moved to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(1), (3) and (7) (NYSCEF motion No.2). Plaintiff, Tia Torrey, opposed the motion.

The Complaint alleges that from 1996 to 1998, while plaintiff was a minor and a student at Portville, she was sexually assaulted, sexually abused and/or had unpermitted sexual contact with co-defendant, Haley. At the time, co-defendant was employed by Portville as a band teacher. Plaintiff brought various claims against both Portville and Haley under the Child Victims Act.

Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). A paper qualifies as documentary evidence if it is "unambiguous and of undisputed authenticity." (*Fontanetta v. John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). Except to establish the authenticity of documentary evidence, (*see*, *Muhlhahn v. Goldman*, 93 AD3d 418, 418 [1st Dept 2012]), "an affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit." (*Phillips v. Taco Bell*, 152 AD3d 806, 807 [2d Dept 2017]).

"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 NY3d 137, 141-142 [2017] [internal citations omitted]).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. (*Christ the Rock World Restoration Church Intl., Inc. v. Evangelical Christian Credit Union*, 153 AD3d 1226, 1229 [2d Dept 2017] [citing *Guggenheimer v. Ginzburg*, 43 NY2d 268, 274-275 [1977]]). "[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action." (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

It is initially noted that plaintiff has withdrawn her tenth cause of action for nuisance. The Court therefore need not address Portville's argument under CPLR 3211(a)(3) based on lack of standing.

***2** Plaintiff's first cause of action is for negligent hiring, retention, supervision and direction. Plaintiff's second cause of action is for negligence and gross negligence. Portville argues plaintiff failed to state a cause of action for negligence, because Portville did not have notice that defendant Hadley posed a risk of harm to plaintiff. In support of the argument, Portville submitted the Affidavit of Simon, with attached exhibits including documents Portville collected and reviewed prior to hiring defendant Haley; Haley's evaluations from 1993 to 1998; and plaintiff's student records showing her high school grades and attendance. In response to the motion, plaintiff submitted her own Affidavit; the Affidavit of Dunbar; the Affidavit of Kerling; the Affidavit of Dunning; and the Affidavit of Sponsler, which establish that a significant dispute exists on the issue of notice. Further, the documents submitted by Portville do not conclusively establish a defense to the negligence claims as a matter of law. As such, Portville's motion to dismiss plaintiff's first and second causes of action is denied, both under 3211(a)(1) and (a)(7).

Portville also argues that they are not responsible for the acts of defendant Haley under a theory of respondeat superior, because the acts were outside the scope of his employment. "As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts are within the scope of the employment." (*Adams v. New York City Transit Authority*, 88 NY2d 116, 119 [1996]). Further, "[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." (*Doe v. Rohan*, 17 AD3d 509, 512 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]). Sexual abuse is a clear departure from scope of employment, "committed solely for personal reasons, and unrelated to the furtherance of his employer's business." (*Id.*; *see also*, *Mazzarella v. Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012]; and *Mary KK v. Jack LL*, 203 AD2d 840, 841 [3d Dept 1994]). Therefore, as a matter of law, the doctrine of respondeat superior is not applicable to the present matter. Portville's motion to dismiss plaintiff's second cause of action to the extent it seeks to hold Portville liable for the negligence and/or gross negligence of defendant Haley is granted pursuant to CPLR 3211(a)(7).

Plaintiff's third cause of action is for breach of fiduciary duty. "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." (*AG Capital Funding, LP v. State Street Bank and Trust*, 11 NY3d 146, 158 [2008]). Mere allegations that a fiduciary duty exists, with nothing more, are insufficient. (*id.*) Assuming every fact alleged to be true and liberally construing the pleading in plaintiff's favor, the allegations for breach of fiduciary duty are insufficiently pled. Additionally, plaintiff's cause of action for breach of the fiduciary duty as pled here, is no different than the negligence causes of action. Plaintiff therefore fails to state a cause of action for breach of fiduciary duty and Portville's motion to dismiss the third cause of action is granted pursuant to CPLR 3211(a)(7).

Plaintiff's fourth cause of action is for breach of non-delegable duty. The Complaint does not identify the non-delegable duty and upon review of the allegations, they are duplicative of the negligence causes of action. To the extent that the non-delegable duty to which plaintiff refers is created by the duty to report under Social Services Law § 413, that issue is addressed in the Court's discussion of the tenth cause of action. Portville's motion to dismiss plaintiff's fourth cause of action is granted pursuant to CPLR 3211(a)(7).

Plaintiff's fifth cause of action is for fraudulent concealment. "The required elements of a common-law fraud claim are a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-79 [2018]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so." (Gomez-Jimenez v. New York Law School, 103 AD3d 13, 17-18 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013]). A duty to disclose arises only where "a fiduciary or confidential relationship exists between plaintiff and defendant." (*Mandarin Trading, Ltd. v. Wildenstein*, 16 NY3d 173, 179 [2011]). Here, the Complaint not only failed to sufficiently allege a misrepresentation was made that was known to be false and was relied on by plaintiff but also that Portville owed a duty to plaintiff to disclose the alleged material information and failed to do so. The Complaint fails to state a cause of action for fraudulent concealment and Portville's motion to dismiss plaintiff's fifth cause of action is granted.

***3** Plaintiff's sixth cause of action is for negligent infliction of emotional distress. "The cause of action generally 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]). Here, the allegations set forth under the sixth cause of action are duplicative of the negligence causes of action. As such, Portville's motion to dismiss the sixth cause of action is granted.

Plaintiff's seventh cause of action is for intentional infliction of emotional distress. The elements are "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. Liability has been found only where the conduct has been 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." (*Chanko v. American Broadcast Companies, Inc.*, 27 NY3d 46, 56 [2016]). However, "a cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability." (*Di Orio v. Utica City School District Board of Education*, 305 AD2d 1114, 1115-16 [4th Dept 2003]). Here, plaintiff asserted causes of action against Portville for negligence. Therefore, the cause of action for intentional infliction of emotional distress "should not be

entertained." Portville's motion to dismiss the seventh cause of action is granted pursuant to CPLR 3211(a)(7).

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Pasternack v. Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Plaintiff's eighth cause of action is for "breach of duty in loco parentis." "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*, 84 NY2d 44, 49 [1994] ["(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"]). In loco parentis defines the duty owed by a school district to its students in a negligence cause of action but does not create an independent cause of action. Defendant's motion to dismiss plaintiff's eighth cause of action is granted pursuant to CPLR 3211(a)(7).

In the tenth cause of action, plaintiff alleges that Portville breached its statutory duty to report abuse under 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." 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* 18 NY3d 801 [2011]). Defendant argues that the cause of action is duplicative of the negligence cause of action and that it is not liable under the Social Services Law, because it lacked notice of the abuse. The cause of action is not duplicative, and Portville failed to establish that no significant dispute exists on the issue of whether the failure to report was knowing or willful. Portville's motion to dismiss plaintiff's tenth cause of action is denied.

***4** Portville also argues that the Child Victims Act did not revive plaintiff's claims for breach of statutory duty to report abuse and gross negligence claims. CPLR 208, entitled "Infancy, insanity", was amended by the State Legislature in 2019 in conjunction with the Child Victims Act, to add paragraph (b). In relevant part, that paragraph states:

Notwithstanding any provision of law which imposes a period of limitation to the contrary with respect to *all civil claims or causes of action* brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a sexual offense committed against such person who was less than eighteen years of age *such action may be commenced, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, on or before the plaintiff or infant plaintiff reaches the age of fifty-five years.* (emphasis added).

Based on the language of CPLR 208(b) and the Child Victims Act, plaintiff's claims for breach of statutory duty to report abuse and gross negligence claims have been revived.

Plaintiff's final and eleventh cause of action is based on § 523(a)(6) of the Bankruptcy Code. That section of the Bankruptcy Code lists exceptions to debt discharge. Specifically, plaintiff claims an exception under (a)(6) for "willful and malicious injury by the debtor to another entity." It is noted that Portville has not declared bankruptcy. Even if it had, this Court has no jurisdiction over Bankruptcy proceedings. Portville's motion to dismiss the eleventh cause of action is granted.

Portville also argues that plaintiff is not entitled to punitive damages as a matter of law. "[A] municipality is not liable for punitive damages flowing from its employees' misconduct in the absence of express legislative authorization to the contrary." (*Krohn v. NY City Police Department*, 2 NY3d 329, 336 [2004]). School Districts are public corporations and punitive damages cannot be assessed against them. (*See*, *Dixon v. William Floyd Union Free School District*, 136 AD3d 972, 973 [2nd Dept 2016]; and *Hargraves v. Bath Central School District*, 237 AD2d 977, 978 [4th Dept 1997]). Any claim for punitive damages against defendant Portville is therefore dismissed.

Last, Portville argues that plaintiff's claims made under the Child Victims Act deprives it of its New York constitutional right to due process. "[A] claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." (*In re Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, 30 NY3d 377, 400 [2017]). The Legislative Memorandum for the Bill, which was later passed into law as the Child

Victims Act, justifies passage for the Act as follows:

> New York is one of the worst states in the nation for survivors of child sexual abuse. New York currently requires most survivors to file civil actions or criminal charges against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average. Because of these restrictive statutes of limitations, thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and pose a persistent threat to public safety.
>
> ***5** This legislation would open the doors of justice to the thousands of survivors of child sexual abuse in New York State by prospectively extending the statute of limitations
>
> Passage of the Child Victims Act will finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties.

(Legislative Mem, L 2019, ch 11, McKinney's Session Laws of NY Advance Sheets at A-39).Based on that justification, the Court finds the Child Victims Act a reasonable response to remedy an injustice. As such, it does not violate Portville's right to due process under the New York State Constitution.

Counsel for Portville is to prepare and submit an Order, attaching the Court's decision, in 30 days.

All Citations

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