[*1] SCANNED ON 3/8/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich, Shirley Werner PART 54
Justice

DAVID SIMONS

- v -

LYCEE FRANCAIS

INDEX NO. 109177/04

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO. 001

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision + Order.

FILED
MAR 08 2005
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/24/2005

SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DAVID SIMONS, Parent to Minor
Cody Simons,

Index No.: 109177/04

Plaintiff Pro Se,

DECISION and ORDER

-against-

LYCÉE FRANCAIS DE NEW YORK and
RAYMONDE KAVANAGH,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action by plaintiff against his son Cody's former school, defendant the Lycée Francais de New York (the "Lycée"), seeking recovery for: (1) negligence; (2) gross negligence; (3) breach of fiduciary duty; (4) intentional infliction of emotional distress; and (4) fraud. Defendant the Lycée now moves to dismiss the complaint in its entirety (CPLR § 3211(a)(7)), submitting the affirmation of counsel, as well as a copy of the complaint. Plaintiff, pro se, opposes defendant's motion, submitting his affidavit and copies of: a transcript from the Family Court proceeding David Simons v. Martine Abitbol, dated December 28, 2001 (the "Transcript"); fourth-grade test scores for Cody; and an order of the Family Court (Jurow, J.), dated December 28, 2001. Defendant the Lycée has replied.

I. Statement of Facts

Plaintiff's complaint alleges the following. Cody Simon ("Cody"), plaintiff's infant son, was enrolled in the Lycée, a French school licensed by the State of New York, from 1996 until January 2002. See Compl. at ¶ 1. When Cody was in the second grade, Mr. Simon learned that the Lycée was taught, predominantly in French, and Cody received but forty-five minutes of

English instruction each day. Id. at ¶ 2. The following year, Cody received extremely low grades in his third grade classes and plaintiff expressed his concern regarding these grades; defendants assured plaintiff that Cody would be promoted to the fourth grade. Indeed, Cody did move up into fourth grade and, thereafter, into fifth grade, all the while "receiving very poor grades in both French and English." Compl. at ¶¶ 3-5.

In March 2001, while Cody was still in fourth grade, plaintiff commenced an action against Martine Abitbol, Cody's mother from whom he was divorced, in Family Court, seeking to have Cody transferred to a school where English was the primary language (the "Family Court action"); Ms. Abitbol, who is French, wanted to keep Cody in the Lycée. Compl. at ¶ 7, 8. While Cody's teachers expressed their reluctance to promote Cody into the fifth grade, defendants did so anyway "due to the fact that [defendant Kavanagh] was very well aware of the legal action taken by Plaintiff in regard to having Cody legally removed from [the Lycée] against his mother's wishes." Id. at ¶ 8.

Hal Silverman, Cody's Family Court law guardian, testified at a Family Court hearing on December 28, 2001, that the Lycée had informed him that Cody was "not doing as well as previously was stated [by the Lycee] . . . and that it's [the Lycée's] intent to leave him back." See Aff. of David Simons, Ex. A, "Transcript," (hereinafter, "Transcript") at 3; Compl. at ¶¶ 9-12. However, it had been Juctice Jurow's understanding that, according to information given to him on December 4th, 2002, "[Cody's] grades had all improved[.]" Transcript at 5. To explain the conflict, Mr. Silverman testified that the discrepancy was due to "the same people giving [him] different information." Id. According to Mr. Silverman, the Lycée had simply changed their assessment, after a conference with Cody's teachers, and that the Lycée's "final

recommendation" was, come September, Cody would not be promoted to the sixth grade. Id. During the course of the hearing, Justice George L. Jurow concluded that it would be in Cody's best interests to be transferred to an English-taught school, viz., P.S. 51. See id.

Plaintiff contends that Cody is presently two years behind grade-level in his English studies, as is demonstrated by Cody's score on the "Gates McGanite Test [sic]" (hereinafter, the "Gates test") a national test, administered in the fourth grade. See Compl. at ¶ 20. The Lycée did not inform Mr. Simons, Mr. Silverman or Ms. Abitbol of the Gates test results. See Transcript at 10-11; Compl. at ¶ 20.

II. Conclusions of Law

A party may move to dismiss a cause of action asserted where "the pleading fails to state a cause of action[.]" CPLR 3211(a)(7). When addressing such a motion to dismiss, the Court must accept as true the facts as alleged in the complaint as well as submissions in opposition to the motion, according plaintiff the benefit of every possible favorable inference. Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 (2001). However, allegations that consist only of bare legal conclusions are not entitled to such consideration. Kliebert v. McKoan, 228 A.D.2d 232 (1st Dept. 1996) (citations omitted). Dismissal obligates a defendant to demonstrate that the facts as alleged by plaintiff fit within no cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350, 352 (1st Dept. 2000), citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The CPLR 3211 viability of plaintiff's various causes of action is assessed below.

A. Negligence

A cause of action for negligence requires: (1) the existence of a duty owed to plaintiff by defendant; (2) failure of defendant to uphold that duty; and (3) an injury to plaintiff proximately

resulting from said failure. Peresluha v. New York, 60 A.D.2d 226, 230 (1st Dept. 1977). There can be no liability for negligence where a duty does not exist. Pina v. New York Paving, Inc., 266 A.D.2d 120 (1st Dept. 1999); see also Hoffman v. Board of Education, 49 N.Y.2d 121, 125 (1979) (where cause of action for negligence is, essentially, "an attack upon the professional judgment of the board of education's alleged failure to properly assess a plaintiff's intellectual status, the cause of action may not be entertained by the Court."). As a matter of public policy, the Court will not "enter the classroom to determine claims based upon educational malpractice[.]" Paladino v. Adelphi University, 89 A.D.2d 85, 87 (2nd Dept. 1982) (determining that quality of education qualifications of teachers employed by private school are "concerns not for the courts, but rather for the State Education Department and its commissioner"); see also Torres v. Little Flower Children's Services, 64 N.Y.2d 119, 125 (1984).

Here, as in Paladino v Adelphi University, supra, plaintiff seeks to have the Court evaluate a private school's judgments and decisions, as they relate to a child's education. According plaintiff every favorable inference, public policy prevents the Court from evaluating a school's allegedly negligent judgment. Plaintiff's claims for negligence, which are in effect claims for education malpractice, thus, must be dismissed. See Hoffman, supra; see also Donohue v. Copiague Union Free School Dist., 64 A.D.2d 29, 35 (2nd Dept. 1978) (educators may not be sued for damages by student for their alleged failure to reach certain educational objectives); De Rosa v. New York, 132 A.D.2d 592, 594 (2nd Dept. 1987) (claim of educational malpractice is one based on allegations that public or private school failed to properly educate student) (internal citation omitted).

B. Gross Negligence

When a cause of action is addressed to a public school's administration, the Court will intervene "only in the most exceptional circumstances involving gross violations of defined public policy." Hoffman v. Board of Education, supra, at 126. Gross negligence differs from ordinary negligence as it consists of "reckless conduct that borders on intentional wrongdoing[.]" Lemoine v. Cornell Univ., 2 A.D.3d 1017, 1020 (3rd Dept. 2003); see also Stuart Rudnick, Inc. v. Jewelers Protection Servs., 194 A.D.2d 317 (1st Dept. 1993) (gross negligence cause of action requires conduct that "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing") (internal citations omitted).

Here, plaintiff has not sufficiently alleged that the Lycée's conduct rises to the level of gross negligence. When taking plaintiff's version of the facts in the light most favorable to him, he has not shown that the Lycée's conduct evinced a reckless disregard for his, or Cody's, rights, nor has he demonstrated that the Lycée's actions border on "intentional wrongdoing."

C. Breach of Fiduciary Duty

A breach of fiduciary duty claim arising from a defendant's alleged educational malpractice may not stand, since there is "no cognizable cause of action in New York for educational malpractice[.]" Alligood v. County of Erie, 299 A.D.2d 840, 840-841 (4th Dept. 2002) citing Hoffman v. Board of Education, supra; see also Andre v. Pace Univ., 170 Misc. 2d 893, 899 (App. Tm., 2nd Dept. 1996) (finding breach of fiduciary claim to be a "mere reformulation[] of an educational malpractice claim, which was improperly entertained by the court"). Since plaintiff's breach of fiduciary duty claim is founded upon its claim of educational malpractice, this cause of action must be similarly dismissed. See Alligood, supra.

D. Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress must contain the following four elements: "(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[.]" Cohn-Frankel v. United Synagogue of Conservative Judaism, 246 A.D.2d 332 (1st Dept. 1998) (citations omitted). This cause of action is properly dismissed where plaintiff fails to allege conduct "so outrageous in character, and so extreme in degree, by defendant[], as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community[.]" Kliebert v. McKoan, 228 A.D.2d 232, 233 (1st Dept. 1996). Recovery for this tort may occur where defendant has inflicted "severe mental pain or anguish . . . through a deliberate and malicious campaign of harassment or intimidation[.]" Kasachkoff v. New York, 107 A.D.2d 130, 137 (1st Dept. 1985).

In the instant action, the Lycée's conduct, as alleged by plaintiff, does not rise to the level of outrageousness sufficient to sustain a cause of action for intentional infliction of emotional distress. Taking the version of the facts most favorable to plaintiffs, the Lycée's conduct in failing to promote Cody to the next grade and to provide plaintiff with Cody's accurate indications of Cody's progress is not so outrageous in character as to sustain the instant cause of action.

E. Fraud

To recover damages for fraudulent misrepresentation, plaintiff must prove that: (1) defendant made a false representation; (2) in making such representation, defendant intended to defraud plaintiff; (3) plaintiff reasonably relied on the misrepresentation; and (4) as a result of his reliance, plaintiff suffered damages. Swersky v. Dreyer & Traub, 219 A.D.2d 321, 326 (1st Dept. 1996). In addition, CPLR 3016(b) requires that a cause of action based upon misrepresentation

must state, in detail, the circumstances constituting the wrong. However, CPLR 3016 (b) does not require that plaintiff allege "details of the asserted fraud that [he] may not know or that may be peculiarly within the defendant's knowledge at the pleading stage." P.T. Bank Cent. Asia v. ABN AMRO Bank N.V., 301 A.D.2d 373, 377 (1st Dept. 2003) citing CPLR 3016(b) (statute only requires that pleading provide sufficient detail of alleged misconduct "to clearly inform a defendant with respect to the incidents complained of").

Here, when affording the facts set forth in support of plaintiff's fraud claim every favorable inference, the action, although inartfully pleaded, alleges the basis for a fraud claim. Plaintiff has alleged that: (1) the Lycée made false representations as to Cody's progress, viz., it suppressed Cody's low test scores on the Gates test; (2) the Lycée misled plaintiff, Cody's law guardian and Ms. Abitbol with the intent to keep Cody enrolled in the Lycée; (3) Cody was reasonably kept in the Lycée, by Mr. Silverman's recommendation, based on the information–or lack thereof–provided by the Lycée; and (4) as a result of this reliance, plaintiff, and Cody, suffered damages, including, but not limited to, the costs of tutors and additional lessons required to get Cody caught up to his current grade-level.

While plaintiff, pro se, has not pled his fraud cause of action with the sufficient particularity required by CPLR 3016(b), the Court will grant plaintiff leave to amend his complaint to the extent that he may conform his fraud cause of action to the requirements of the CPLR. See CPLR § 3025(b) (Court may grant party leave to amend his pleading at any time and such leave "shall be freely given upon such terms as may be just") (emphasis supplied). The Court may deny a defendant's motion to dismiss and, sua sponte, allow a plaintiff to amend his complaint so that it meets with the CPLR's particularity requirements. Leitner v. Jasa Hous. Mgmt. Servs. for the Aged, Inc., 6 A.D.3d 667, 668 (2nd Dept. 2004) (denying defendant's motion

to dismiss pursuant to CPLR 3013 and sua sponte granting plaintiff leave to amend complaint where "there was no surprise or prejudice to the defendant").

In the instant action, defendant will neither be surprised nor prejudiced since, although plaintiff's pro se complaint has not met with the technical requirements of CPLR 3016(b), it has apprised defendant of the facts and circumstances from which the fraud cause of action springs. Further, the fraud case of action is timely. See CPLR § 213 (fraud cause of action must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it"). Accordingly, it is

ORDERED that defendant the Lycée's motion to dismiss is granted to the extent that plaintiff's causes of action sounding in negligence, gross negligence, breach of fiduciary duty and intentional infliction of emotional distress are dismissed; and it is further

ORDERED that the complaint's cause of action sounding in fraud, as against the Lycée, is severed and continued; and it is further

ORDERED that the remainder of the action, as against Raymonde Kavanagh, shall continue; and it is further

ORDERED that plaintiff is directed to serve an amended complaint as to the cause of action for fraud within 30 days after service upon him of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Date: February 23, 2005
New York, New York

SHIRLEY WERNER KORNREICH