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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

AMANDA LERNER,
Plaintiff,
-against-
FRIENDS OF MAYANOT INSTITUTE, INC., MAYANOT INSTITUTE OF JEWISH STUDIES, and TANNENBAUM CHABAD HOUSE,
Defendants.

INDEX NO. 159038/12
MOTION DATE 10-05-16
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 14 were read on this motion to/for pursuant to CPLR §3212 for summary judgment and cross-motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5-7, 8-9, 10-11
Replying Affidavits ____	12 - 13 , 14

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that TANNENBAUM CHABAD HOUSE's motion to dismiss this action for lack of jurisdiction pursuant to CPLR §3211 [a],[8] is denied. TANNENBAUM CHABAD HOUSE motion and FRIENDS OF MAYANOT INSTITUTE, INC. and MAYANOT INSTITUTE OF JEWISH STUDIES' cross-motion for summary judgment pursuant to CPLR §3212 dismissing all claims, cross-claims and counterclaims against it, are granted solely as to dismissing plaintiff's cause of action for negligent infliction of emotional distress.

Plaintiff alleges that on December 20, 2009, while on a trip to Israel, she was sexually assaulted at the King Solomon Hotel in Tiberias, Israel. At the time she was a 19 year old student attending Northwestern University in Evanston, Illinois. Plaintiff's trip was part of the Taglit-Birthright Israel program (hereinafter referred to as the "program") organized by Friends of Mayanot Institute, Inc. and Mayanot Institute of Jewish Studies (hereinafter referred to as the "Mayanot defendants"). The Mayanot defendants advertised on their website a "free" "peer education," ten day trip to Israel for Jewish individuals that were 18-26 years old. Plaintiff obtained the consent of her parents to go on the trip after they determined that it would be supervised by Rabbi Dov Klein, President of Tannenbaum Chabad House (hereinafter referred to as "TCH") at Northwestern University, and include an Israeli Defense Force soldier. Rabbi Klein solicited students for the program and acted as plaintiff's unpaid chaperone on the trip.

Plaintiff commenced an action on December 19, 2012, naming Friends of Mayanot Institute Inc., Mayanot Institute of Jewish Studies, and Fiedler Hillel at Northwestern University, asserting causes of action for negligence and negligent infliction of emotional distress for their failure to properly supervise and ensure her safety while on the tour. On April 30, 2013 plaintiff amended the summons and complaint, removing Fiedler Hillel at Northwestern University, and naming Tannenbaum Chabad House as a defendant.

TCH previously sought to dismiss this action pursuant to CPLR §3211[a], [5], [7],[8] under Motion Sequence 001. The January 29, 2014 Decision and Order of this Court, denied the CPLR §3211[a],[8] relief, and permitted plaintiff to proceed with discovery on the issue of TCH's minimal contacts with New York in relation to plaintiff's claims of injury. TCH did not renew or reargue the January 29, 2014 Decision and Order.

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

On a motion to dismiss pursuant to CPLR §3211[a][8], the plaintiff is only required to demonstrate that there are facts that may exist to establish that there is jurisdiction (Peterson v. Spartan Industries, 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974] and Cornely v. Dynamic HVAC Supply, LLC, 44 A.D. 3d 986, 845 N.Y.S. 2d 797 [N.Y.A.D. 2nd Dept., 2007]). The January 29, 2014 Decision and Order filed under Motion Sequence 001, determined that plaintiff asserted sufficient facts to demonstrate jurisdiction exists, and plaintiff established potential unity of interest between TCH and the co-defendants to avoid dismissal pursuant to CPLR §3211[a][8]. There is no need to address dismissal pursuant to CPLR §3211[a][8] on this motion, and that relief is denied.

TCH seeks, pursuant to CPLR §3212, an Order granting summary judgment dismissing plaintiff's causes of action for negligence and negligent infliction of emotional distress, dismissing all claims, cross-claims and counterclaims asserted against it.

The Mayanot defendants partially oppose TCH's motion as to jurisdiction and liability for Rabbi Levi's actions. They cross-move pursuant to CPLR §3212 for summary judgment asserting the same arguments as TCH, and seek an Order dismissing all claims, cross-claims and counterclaims asserted against them.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, speculation, surmise and conjecture without admissible evidence are insufficient to raise any issues of fact (Smith v. Johnson Prods. Co., 75 A.D. 2d 675, 463 N.Y.S. 2d 464 [1st Dept., 1983]).

TCH claims that the doctrine of in loco parentis does not apply to plaintiff, as a 19 year old college student, and that she was an adult responsible for her own conduct on the trip. It is TCH's contention that plaintiff was provided with rules and signed waivers applying to sensible consumption of alcohol on the trip. TCH argues that plaintiff's acknowledgment of the rules and signed waivers establish that there is no negligence on its part because the tour was for educational purposes to guide and teach students, and plaintiff knew in advance that she was drinking outside of a regularly scheduled program event and would be unsupervised.

A cause of action for negligence requires a showing that defendant,"owed the plaintiff a duty and breached that duty, and that the breach proximately caused the plaintiff harm." (Katz v. United Synagogue of Conservative Judaism , 135 A.D. 3d 458, 23 N.Y.S. 3d 183 [1st Dept., 2016]). Colleges have no legal duty to shield students from their own dangerous activity which creates a risk of harm to themselves (Rothbard v. Colgate University, 235 A.D. 2d 675, 652 N.Y.S. 2d 146 [3rd Dept., 1997] and Talbot v. New York Institute of Technology, 225 A.D. 2d 611, 639 N.Y.S. 2d 135 [2nd Dept., 1996]). Colleges and educational institutions do not stand in loco parentis of adult students, because they are presumed to be capable of caring for themselves and making independent decisions (Eiseman v. State, 70 N.Y. 2d 175, 511 N.E. 2d 1128, 518 N.Y.S. 2d 608 [1987], Wells v. Bard College, 184 A.D. 2d 304, 584 N.Y.S. 2d 565 [1st Dept., 1992] and McNeil v. Wagner College, 246 A.D. 2d 516, 667 N.Y.S. 2d 397 [2nd Dept., 1998]).

There is no liability in the absence of a duty running to the plaintiff. A duty of care can be created by the exercise of a sufficient degree of control over an activity but the "specter of limitless liability" should not be present (Katz v. United Synagogue of Conservative Judaism , 135 A.D. 3d 458, supra at p. 459). A duty of care may be imposed under circumstances involving encouragement to participate in the activities and the

taking of affirmative steps to supervise and control the activity (Pasquaretto v. Long Island University, 106 A.D. 3d 794, 964 N.Y.S. 2d 599 [2nd Dept. 2013]).

TCH and the Mayanot defendants encouraged plaintiff's participation, organized, planned and supervised the program and the trip to Israel, the "participant waiver," states:

> "Taglit-Birthright Israel is *not* a college Spring Break trip, and has very strict alcohol rules... You may not buy alcohol anywhere, except from bars on the 2 allocated nights, or at the hotel bar. Drinking alcohol is permitted only at the end of the day, provided that you are responsible and stay in control. You may not drink alcohol during any activities or programs...Your soldiers and staff are not allowed to drink AT ALL. Do not try to persuade them to drink. For the soldiers this is an army rule and is strictly enforced." (Mot. Exh. H).

Plaintiff was of legal drinking age in Israel. She testified at her deposition that on the evening of her assault, she started drinking liquor at a bar after dinner before a one-hour boat ride, during the boat ride, and had an additional drink at the hotel bar after the boat ride; her drink of choice was vodka and orange juice (Mot. Exh. K, pgs. 51-53). Plaintiff testified that a group of guys came over to the her at the hotel bar, one was flirting with her and then tipped a bottle of vodka into her mouth, and she took a small sip (Mot. Exh. K, pgs. 51-53, 64-65).

Under the "participant waiver," plaintiff was aware that Rabbi Levi and the other chaperones, were not obligated to supervise activities at the bar after dinner or at the hotel bar or permitted to drink alcohol with the students as part of the program. However, Rabbi Levi was responsible for ensuring that plaintiff did not drink on the boat ride as part of the supervised trip and neither TCH or the Mayanot defendants have provided an explanation for allowing plaintiff to drink on that supervised part of the trip.

The deposition testimony of Deanna Becker, plaintiff's roomate, that Rabbi Levi had been drinking on the boat trip and was drunk because he was singing, dancing and acting jolly (Mot. Exh. pgs. 62-63) creates an issue of fact. If the lead chaperone, Rabbi Levi was drunk, he would not be able to prevent plaintiff from drinkiing excessively. Deanna Becker's claims of drunkenness, creates an issue of fact as to whether TCH and the Mayanot defendants violated a duty of care.

Plaintiff raises an issue of fact on the issue of negligence through the "Shluchim Responsibilities for Mayanot Taglit-birthright israel Trips" which applies to the chaperones, and the requirement that, "...Those students that drink on their own must be supervised by staff who must ensure drinking remains moderate." (Opp. Exh. G).

TCH and the Mayanot defendants argue that they are not liable because plaintiff's injuries were caused by unforeseeable acts of third parties that do not give rise to liability. A tour operator or individual that, "..assumes a duty, may be held liable for a breach of that duty if the individual's conduct placed the injured party in a more vulnerable position than if the obligation had not been assumed (Cohen v. Heritage Motor Tours, Inc., 205 A.D. 2d 105, 618 N.Y.S. 2d 387 [2nd Dept., 1994] and Maraia v. Church of Our Lady of Mount Carmel, 36 A.D. 3d 766, 828 N.Y.S. 2d 525 [2nd Dept. 2007]). Camp v. Loughran, 285 A.D. 2d 483, 727 N.Y.S. 2d 471 [2nd Dept., 2001], involving the assault in a hotel room by a participant during a ski vacation can be distinguished because there was no issue of supervision. There remains an issue of fact as to whether the actions of both Rabbi Levi and the Mayanot defendants in their supervision of plaintiff, placed her in a more vulnerable position for the assault.

TCH and the Mayanot defendants seek summary judgment on plaintiff's cause of action for negligent infliction of emotional distress arguing that plaintiff has not made allegations that their behavior was such that it could be regarded as outrageous or

extreme, or unreasonably placed her in danger.

The plaintiff asserting a cause of action for the negligent infliction of emotional distress is required to establish a breach of a duty owed directly to the plaintiff that, "...either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." (DaLuise v. Sottile, 40 A.D. 3d 801, 837 N.Y.S. 2d 175 [N.Y.A.D. 2nd Dept., 2007]). Negligent infliction of emotional distress requires allegations of conduct by the defendants, "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." (Shiela C. v. Povich, 11 A.D. 3d 120, 781 N.Y.S. 2d 342 [1st Dept., 2004]).

Plaintiff has not provided any substantiation to support the conclusory allegations that defendants actions caused her to fear for her safety prior to the assault. Plaintiff has not raised an issue of fact and fails to provide proof to substantiate the argument that the TCH or the Mayanot defendants allegedly negligent supervision prior to the assault was so outrageous or extreme as to sustain the claims for negligent infliction of emotional distress.

Accordingly, it is ORDERED that TANNENBAUM CHABAD HOUSE's motion to dismiss this action for lack of jurisdiction pursuant to CPLR §3211 [a],[8], is denied and it is further,

ORDERED, that TANNENBAUM CHABAD HOUSE motion and FRIENDS OF MAYANOT INSTITUTE, INC. and MAYANOT INSTITUTE OF JEWISH STUDIES' cross-motion for summary judgment pursuant to CPLR §3212 dismissing all claims, cross-claims and counterclaims asserted against each of them, is granted solely as to dismissing plaintiff's cause of action for negligent infliction of emotional distress, and it is further,

ORDERED, that the cause of action for negligent infliction of emotional distress asserted against TANNENBAUM CHABAD HOUSE, against FRIENDS OF MAYANOT INSTITUTE, INC. and MAYANOT INSTITUTE OF JEWISH STUDIES, are severed and dismissed, and it is further,

ORDERED, that the remainder of the motion for summary judgment pursuant to CPLR §3212 sought by TANNENBAUM CHABAD HOUSE, is denied, and it is further,

ORDERED, that the remainder of the cross-motion for summary judgment pursuant to CPLR §3212 relief sought by FRIENDS OF MAYANOT INSTITUTE, INC. and MAYANOT INSTITUTE OF JEWISH STUDIES, is denied, and it is further

ORDERED, that the clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C

MANUEL J. MENDEZ,
J.S.C.

Dated: October 24, 2016

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE