UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 10-CV-22236-GOLD/McALILEY

HOWARD ADELMAN and JUDITH SCALAWAY ADAELMAN, as Co-Personal Representatives of The Estate of Michael Sclawy-Adelman,

Plaintiffs,

vs.

BOY SCOUTS OF AMERICA, *et al*.

Defendants.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNTS VII AND VIII OF THE AMENDED COMPLAINT [ECF No. 29]

I. Introduction

THIS CAUSE is before the Court on Defendant South Florida Council Inc., Boy Scouts of America's ("Defendant" or "the Council") Motion to Dismiss Counts VII and VIII of the Amended Complaint ("Motion") **[ECF No. 29]** pursuant to Federal Rules of Civil Procedure 12(b)(6) and 15(a)(3). Plaintiffs, Howard Adelman and Judith Sclawy, as Co-Personal Representatives of The Estate of Michael Sclawy-Adelman, ("Plaintiffs") filed a Response and Opposition to Defendant's Motion **[ECF No. 40]** ("Response"), and Defendant filed a Reply to Plaintiffs' Response ("Reply") **[ECF No. 48]**. I have jurisdiction pursuant to 28 U.S.C. § 1331. Having considered the record, the relevant submissions, and the applicable law, I DENY the motion for the reasons set forth below.

II. Procedural history

On July 8, 2010 Defendants removed this case from the Circuit Court for the Eleventh Judicial Circuit, Miami-Dade County, Florida. **[ECF No. 1]**. On July 13, 2010, Defendants Boy Scouts of America and South Florida Council filed amended answers

and affirmative defenses to Plaintiff's complaint originally brought in state court, as well as an Amended Motion to Dismiss Counts VII and VIII or for a More Definite Statement. **[ECF Nos. 3, 4]**. On July 15, 2010, Defendant Plantation United Methodist Church filed its amended answer and affirmative defenses to Plaintiff's complaint. **[ECF No. 7]**. On August 3, 2010, Plaintiffs filed the operative amended complaint. **[ECF No. 20]**. On August 17, 2010, the Council filed a Motion to Dismiss Counts VII and VIII of the Amended Complaint. **[ECF No. 29]**.

III. Factual background[1]

A. The hike

Plaintiffs were the natural and biological parents of their minor son, Michael Sclawy-Adelman, deceased ("Decedent"). **[ECF No. 20 ¶ 13]**. Decedent was a member of Boy Scout Troop 111 of the Pine Island District of the South Florida Council Inc., Boy Scouts of America ("the Council"). *Id.* at ¶ 2. On May 9, 2009, Decedent participated in a 20-mile Boy Scout sanctioned and organized hike in the Big Cypress National Preserve bordering Everglades National Park. *Id.* at ¶ 3. Decedent hiked with two other minor Boy Scouts and two adult Scoutmasters, Defendants Howard K. Crompton and Andrew L. Schmidt (collectively "Scoutmasters"), who organized, planned, and led the hike. *Id.* at ¶¶ 4-5.

At approximately mid-day on May 9, 2009, on approximately the 10th mile of the hike with temperatures around 100 degrees Fahrenheit, Decedent began exhibiting signs of heat illness, but the group continued hiking. *Id.* at ¶ 7. The adult Scoutmasters stopped the height during the afternoon of May 9, 2009, at approximately the 15th mile

[1] For purposes of a motion to dismiss, I accept as true all factual allegations in the complaint. *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006).

of the hike with temperatures around 100 degrees Fahrenheit when Decedent was in a dizzy, disoriented, and delirious state. *Id.* at ¶ 9. Defendant Crompton stayed at the 15-mile point while Defendant Schmidt and the other two minor Boy Scouts went off in search of water. *Id.* at ¶ 10. Plaintiffs allege that Defendant Crompton and Decedent were stopped at mile 15 of the hike for over 1.5 hours before Defendant Crompton made an emergency 911 call. *Id.* at ¶ 11. Plaintiffs further allege that by the time first responders located Decedent, "there was nothing that could be done for him," as Decedent died on mile 15 of the Boy Scout organized and sanctioned hike. *Id.* at ¶ 12.

B. South Florida Council[2]

South Florida Council is a Florida corporation doing business in Broward, Miami-Dade, and Monroe County, Florida. *Id.* at ¶ 20. The Council, as a charter organization of the Boy Scouts of America, administers the programs, guidelines, and policies of Defendant Boy Scouts of America in Broward, Miami-Dade, and Monroe County, Florida, including those of Boy Scout Troop 111. *Id.* at ¶ 22. The Council is divided into districts responsible for operating Boy Scout programs and implementing Boy Scout guidelines, policies, procedures, and protocols, including Boy Scout Troop 111 of the Pine Island District of the South Florida Council. *Id.* at ¶ 23.

IV. Legal standard

For purposes of a motion to dismiss, my review is "limited to the four corners of the complaint" and any documents referred to in the complaint which are central to

[2] In addition to Defendants South Florida Council, Crompton, and Schmidt, Plaintiffs named Boy Scouts of America and Plantation United Methodist Church as Defendants. In addition to counts for negligence against all Defendants, Plaintiffs allege negligent supervision against Crompton and Schmidt; negligent supervision and negligent selection and retention against South Florida Council and Plantation United Methodist Church; and vicarious liability for acts of Crompton and Schmidt against Plantation United Methodist Church.

Plaintiff's claims. *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002). In determining whether to grant a motion to dismiss, I must accept all the *factual allegations*[4] in the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *Hoffend v. Villa*, 261 F.3d 1148, 1150 (11th Cir. 2001). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Of course, 'a formulaic recitation of the elements of a cause of action will not do.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, *supra*, 550 U.S. at 555).

Granting a motion to dismiss is appropriate when a pleading offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, *supra*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of further factual enhancement. *Id.*; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because "it strikes a savvy judge that actual proof of those facts is improbable, the factual allegations must be enough to raise a right to relief above the speculative level." *Watts*, *supra*, 495 F.3d at 1295 (internal citations and quotations omitted).

In other words, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, *supra*, 129 S. Ct. at 1944 (internal citations and quotations omitted). "A

[4] Legal conclusions, on the other hand, need not be accepted as true. *Twombly*, *supra*, 550 U.S. at 555.

claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It follows that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

V. Jurisdiction

A federal court must always determine whether it has jurisdiction to hear a case. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 507 (2006) ("The objection that a federal court lacks subject matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) ("Indeed, it is well-settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking."). As such, even when there is no dispute between the parties with respect to jurisdiction, federal courts have an independent duty to ensure that subject-matter jurisdiction exists. In the instant case, I exercise jurisdiction pursuant to 28 U.S.C. § 1331.

VI. Analysis

Defendant moves to dismiss Counts VII and VIII of the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 15(a)(3). Specifically, Defendant contends that the claims against the Council for negligent selection and retention and negligent supervision fail as a matter of law because the Council has no responsibility for hiring, retaining, supervising, or controlling troop Scoutmasters. **[ECF**

No. 29, p. 2]. I note that this argument is in direct contradiction to the allegations appearing on the face of Plaintiffs' complaint, which I must accept as true for the purposes of Defendant's Motion to Dismiss.

For claims of negligent hiring, supervision, or retention, a plaintiff must allege facts establishing that a defendant was put on notice of its employees' harmful propensities that gave rise to the cause of action. *Willis v. Dade County School Board*, 411 So. 2d 245, 246 n.1 (Fla. 3d DCA 1982). The issue of notice and timing differs for claims for negligent hiring versus negligent supervision or retention, as the Supreme Court of Florida explained:

> The primary distinction between a claim for negligent hiring and a claim for negligent supervision or retention concerns the time at which the employer is charged with knowledge of the employee's unfitness. A claim for negligent hiring arises when, before the time the employee is hired, the employer knew or should have known that the employee was unfit. Liability in these cases focuses on the adequacy of the employer's pre-employment investigation into the employee's background. Liability for negligent supervision or retention, however, occurs after employment begins, where the employer knows or should know of an employee's unfitness and fails to take further action such as investigating, discharge or reassignment.

Malicki v. Doe, 814 So. 2d 347, 362 n.15 (Fla. 2002) (internal citations and quotations omitted).

A. Count VII (Negligent Selection and Retention of Scoutmasters)

An employer may be held liable for its negligence in employing or retaining an employee who may constitute a danger to others. *See Phillips v. Edwin P. Stimpson Co., Inc.*, 588 So. 2d 1071, 1073 (Fla. 4th DCA 1991). To establish a breach of duty in a negligent retention action, the plaintiff must demonstrate that the employer received

actual or constructive notice of the employee's unfitness but did not investigate or take corrective action. *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. 2d DCA 1986).

Although the complaint does not contain specific language alleging an express employer/employee relationship[3], Plaintiffs clearly allege that the Council retained Defendants Crompton and Schmidt to act as Scoutmasters and the Scoutmasters acted as "actual and/or apparent agent[s] or servant[s]" of the Council. **[ECF No. 20 ¶¶ 30, 33]**. Scoutmasters must be approved, commissioned, and registered on an annual basis. *Id.* at ¶¶ 88, 130. Plaintiff expressly alleges that the "Council is directly involved at the Troop level." *Id.* at ¶ 96. The Council is responsible for and approves all applicants for Scoutmaster positions, maintaining records for adult scout leaders, including individual applications. *Id.* at ¶¶ 96, 105. Further, the Council provides training and training materials to all Scoutmasters. *Id.* at ¶ 96. The complaint also alleges that the Council was responsible for reviewing the Scoutmasters' performance, training the Scoutmasters, and assisting and guiding local troop leaders with information on activities, training, advancement, camp reservations, and literature. *Id.* at ¶¶ 102, 136. Moreover, it is clear from the face of Plaintiffs' complaint that the Council supervised the Scoutmasters—despite arguments made in the Council's Motion which I

[3] Although I deny Defendant's Motion to Dismiss, I note that following discovery and in preparation for possible Motion(s) for Summary Judgment, there is potential for Plaintiffs to amend their complaint to more specifically allege the employment relationship between the Council and the Scoutmasters. I also observe that the Council cites my opinion in *Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc.*, 625 F.Supp.2d 1198, 1254 (S.D. Fla. 2008) for the proposition that negligent hiring and negligent supervision claims fail as a matter of law where there is no employment relationship. *See, e.g.*, **[ECF No. 29, pp. 3-4]** and **[ECF No. 48, pp. 3-5]**. However, the issues of negligent hiring and negligent supervision in *Pycsa Panama* were before me on a motion for summary judgment where it was undisputed that there was no employment relationship. *Id.* at 1254. Here, on Defendant's motion to dismiss, the allegations on the face of Plaintiffs' amended complaint do not support a similar finding that no employment relationship exists between the Council and the Scoutmasters.

may not consider in ruling upon the Motion to Dismiss. *Id.* at ¶ 135. Accordingly, I determine that the allegations of the amended complaint, taken as a whole and taken as true, establish a relationship giving rise to Plaintiffs' claims for negligent selection, retention, and supervision. For reasons discussed below, I also determine that Plaintiffs have adequately pled that the Council was on notice of the Scoutmasters' inabilities to lead the troop as alleged in the amended complaint.

B. Count VIII (Negligent Supervision)

A claim for negligent supervision arises where "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment." *Dep't of Envtl. Prot. v. Hardy*, 907 So.2d 655, 660 (Fla. 5th DCA 2005).

Defendant moves to dismiss Count VIII based on Plaintiffs' failure to allege that: (1) the Council became aware or should have become aware of problems associated with the Scoutmasters that indicated their unfitness; and (2) the Council (after notice) failed to take further actions including investigation, discharge, or reassignment.

I find that Plaintiffs have sufficiently pled that the Council knew or should have known of problems associated with the Scoutmasters that indicated their unfitness to serve as Scoutmasters. Plaintiffs incorporate by reference Paragraphs 1 through 34, 96-105, and 113-128 of the Amended Complaint in allegations concerning Count VIII (Negligent Supervision). Among these are numerous allegations setting forth that the Council knew or should have known that the Scoutmasters were: not properly prepared to recognize the signs of distress which Decedent exhibited on the day of his death

[ECF No. ¶ 122]; not properly certified in first aid through the American Red Cross or any other recognized agency or organization (*Id.* at ¶ 123); unfit to competently and safely plan and conduct a 20 mile Boy Scout hike through the Florida Everglades (*Id.* at ¶ 124); not properly trained in appropriate emergency planning, procedures, and medicine (*Id.* at ¶ 125); lacked the appropriate level of experience and training to properly lead Boy Scouts (*Id.* at ¶ 126); and that Defendant Schmidt "had a reputation for pushing minor Boy Scouts beyond their limits." *Id.* at ¶ 127.

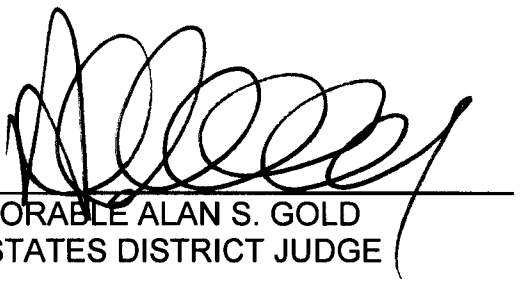
Further, Plaintiffs allege that the Council breached its duty of care by failing to undertake an appropriate investigation into the suitability of Defendants Crompton and Schmidt to act as Scoutmasters. **[ECF No. 20 ¶ 130(a)]**. Plaintiffs allege that the Council maintains records for adult scout leaders such as the Scoutmasters (*Id.* at ¶ 105), which supports the inference that information regarding the Scoutmasters' abilities to lead were readily available to the Council. Given Plaintiffs' extensive pleading of what the Council knew or should have known, in addition to the Council's supervisory role and direct involvement with local troops and approval of Scoutmaster positions, Plaintiffs have adequately pled that the Council had constructive notice of the Scoutmasters' unfitness and failed to take appropriate action.

VII. Conclusion

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1. Defendant's Motion to Dismiss Amended Complaint **[ECF No. 29]** is DENIED.
2. The parties are ORDERED to carefully review my August 30, 2010 Order Setting Pretrial and Trial Dates **[ECF No. 39]** and comply forthwith.

DONE AND ORDERED in at Miami, Florida, this 12 day of October, 2010.



THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Chris M. McAliley
Counsel of record