Torpe v Thorn
2010 NY Slip Op 33826(U)
November 15, 2010
Supreme Court, Nassau County
Docket Number: 7942/10
Judge: Michele M. Woodard

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL J. TORPE,

Plaintiff,

-against-

KELSEY THORN, TIMOTHY J. WELSH, STEVEN C. KEADY, CHRISTOPHER A. CROWLEY, JOSEPH FORSTBAUER, THOMAS TRAPANI, as agent of SKIDMORE COLLEGE, SKIDMORE COLLEGE and SUPREME CUISINE, INC. d/b/a GAFFNEY OFF BROADWAY,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 7942/10
Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

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In motion sequence number one, defendants Thomas Trapani ("Trapani"), Skidmore College ("Skidmore") move to dismiss the plaintiff's complaint. In motion sequence number two, Defendant Kelsey Thorn ("Ms. Thorn") cross moves to dismiss the plaintiff's complaint as to her, pursuant to CPLR §3211(a)(7).

In motion sequence number three, defendant Steven C. Keady ("Keady") moves to dismiss the plaintiff's action as to Keady due to the alleged improper service of the summons and complaint, or, in the alternative, schedule a traverse hearing.

Plaintiff commenced this action to recover for injuries allegedly sustained when defendants Timothy P. Welsh, Steven Keady, Christopher A. Crowley and Joseph Forstbauer, the "hockey

defendants", all Skidmore students and members of the Skidmore hockey team allegedly broke into plaintiff's apartment at 146 Church Street, Saratoga Springs, New York and attacked and beat plaintiff.

Plaintiff, then a full-time student at Skidmore, and a member of the lacrosse team, had a party on February 28, 2009 in his apartment. Plaintiff met Ms. Thorn at the party. Allegedly, Ms. Thorn was romantically involved with Welsh. Welsh and plaintiff had a verbal and physical altercation on this day and on two subsequent days (March 17, 2009 and April 18, 2009). On April 19, 2009, plaintiff alleges an unnamed member of the Skidmore lacrosse team told plaintiff individuals at Skidmore made threats against plaintiff (allegedly they were on the Skidmore hockey team). On April 26, 2009 when in a pub/bar, the plaintiff suspected that certain individuals were about to assault him. Plaintiff told Trapani, the assistant coach/trainee of the Skidmore men's lacrosse team, of the threats and Trapani allegedly told plaintiff that he was "on his own." Plaintiff returned to his apartment and alleges he was then assaulted by Welsh, Keady, Crowley and Forstbauer.

Plaintiff alleges Ms. Thorn spread false rumors that plaintiff had stalked Ms. Thorn. Plaintiff alleges these false statements helped fuel the attack by the "hockey defendants."

Plaintiff contends that Trapani and Skidmore failed to use ordinary and reasonable care in order to avoid injury to plaintiff since plaintiff contends Trapani and Skidmore aided and abetted and ratified the conduct of the attacking defendants by not taking action to prevent the assault.

Trapani and Skidmore alleged that they had no duty to protect plaintiff since the incident occurred off campus in a private apartment not controlled or owned by Skidmore (see Exhibit B annexed to Trapani/Skidmore motion).

Ms. Thorn states she did not participate in any overt acts by defendants against plaintiff, and the alleged false statements (of plaintiff's stalking) were not the proximate cause of plaintiff's injuries. Ms. Thorn states she never requested anyone to harm plaintiff.

Keady contends the plaintiff's summons and complaint were delivered to Keady's mother's

house at Hunter Lane, Canton, Massachusetts by placing the summons and complaint in the mailbox. Keady alleges the papers were not mailed per U.S. Post Office, just placed in the mailbox. Keady alleges this is improper service per CPLR §308(2).

To establish a *prima facie* case of negligence, a plaintiff must demonstrate a duty owed by the defendant to the plaintiff *(Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]), a breach of that duty, and an injury proximately resulting therefrom (*Solomon v City of New York*, 66 NY2d 1026 [1985]; *Mojica v Gannett Co., Inc.*, 71 AD3d 963 [2d Dept 2010]).

A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others even when as a practical matter the defendant can exercise such control (*D'Amico v Christie*, 71 NY2d 76 [1987]; *Cook v Shapiro*, 58 AD3d 664 [2d Dept 2009].

A duty and the corresponding liability it imposes do not rise from the mere foreseeability of the harm (*Pulka v Edelman*, 40 NY2d 781 [1976]). Thus, foreseeability of the injury does not determine the existence of duty (*Strauss v Belle Realty Co.*, 65 NY2d 399 [1985]), it merely determines the scope of the duty once it is determined to exist (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 [2001]).

As a property owner, a college had a duty to exercise reasonable care to protect the plaintiff from reasonably foreseeable criminal or dangerous acts committed by third persons on its premises (emphasis added) (*see Ayeni v County of Nassau*, 18 AD3d 409 [2d Dept 2005]).

In general, colleges have no legal duty to shield their students from the dangerous activity of other students (*Luina v Katharine Gibbs School New York, Inc.*, 37 AD3d 555 [2d Dept 2007]; *Ellis v Mildred Elley School, Inc.*, 245 AD2d 994 [3d Dept 1997]).

When a student leaves school premises and is injured, there can be no actionable breach of a duty (*Tarnaras v Farmingdale School District*, 264 AD2d 391).

When a student is injured off school premises, generally there is not actionable breach of duty since such duty extends only to the school district boundaries (*see Maldonado v Tuckahoe Union Free*

School District, 30 AD3d 567 [2d Dept 2006]).

Skidmore did not have the ability to confine defendants to the college property or control their conduct while outside Skidmore's property campus *(see Morgan v Whitestown American Legion Post No. 113*, 309 AD2d 1222 [4th Dept 2003]).

The duty of the defendant to protect plaintiff from foreseeable harm caused by third persons was limited to conduct on its premises which it had the opportunity to control and of which it was reasonably aware (see *Taft v Connell*, 285 AD2d 992 [4th Dept 2003], *lv den.* 97 NY2d 604 [2001]).

To recover in a negligence action, the injured party must show that a defendant owed not merely a general duty but a specific duty to him or her (*Hamilton v Baretta U.S.A. Corp., supra*).

Absent a special relation between an action and a third person, there is no duty to control conduct of this third person so as to prevent him from causing physical harm to another (*Purdy v Public Administration of the County of Westchester,* 72 NY2d 1 [1988]).

Here, plaintiff alleges the coach/student relationship rose to the point that Trapani, as assistant coach to the lacrosse team, owed Trapani the role of "sage, counselor, and protector."

Such allegations are not reflected in plaintiff's complaint nor does plaintiff attempt to provide affidavits (from teammates, students, etc.) to support his "special" bond with Trapani.

Clearly, plaintiff and the alleged offending students were outside the orbit of the school's authority.

Nothing prevented the plaintiff from contacting the police in the area if he, the plaintiff, felt threatened. Plaintiff was aware of his prior encounters with Welsh and the other defendants.

Plaintiff decided not to involve the police in his problems with the "hockey defendants" (see Exhibit A, ¶ 44 annexed to Trapani/Skidmore motion).

If, as alleged, plaintiff's teammate heard Welsh and Keady discuss an attack on plaintiff on April 26, 2009, (see Exhibit A ¶ 49 annexed to Trapani/Skidmore motion), plaintiff or one of his

teammates should have notified the local police.

Plaintiff lived off campus. The court assumes he provided for his food, traveled to class on his own, etc. In other words, he provided for himself as a young adult and an off-campus student, and thus was responsible for his own security and safety in his off-campus apartment.

In loco parentis does not apply at the college level (*Eiseman v State*, 70 NY2d 175 [1987]).

Could plaintiff have justifiably relied on Trapani and Skidmore to protect the plaintiff at his residence after school hours? Did Trapani and Skidmore have an affirmative duty to protect the plaintiff outside the school premises?

The answer is "no" to both questions.

Of course, the "hockey defendants" may be subject to the behavioral rules of Skidmore (*Krasnow v Virginia Polytechnic Institute and State University*, 414 F. Supp. 55, *affd.* 551 F 2d 591 [D.C., Va., 1976]) and any consequent threats (suspension, expulsion, etc.).

As to Ms. Thorn, the record reveals no evidence that Thorn committed any overt act in furtherance of the alleged assault on plaintiff, that she acted in concert with the "hockey player defendants" in planning the assault or that she, Ms. Thorn, had asked any of the hockey defendants to commit the alleged assault *(see Gaige v Kepler*, 303 AD2d 626 [2d Dept 2003]).

Ms. Thorn's giving tacit approval to the "hockey defendants" acts against plaintiff cannot be deemed aiding or abetting the assault *(see Shea v Cornell University*, 192 AD2d 857 [3d Dept 1993]).

The record is devoid of overt acts by Ms. Thorn in furtherance of the alleged assault (*see Offenhartz v Cohen*, 168 AD2d 268 [1st Dept 1990]).

Ms. Thorn's knowledge of the "hockey defendants" attitude toward plaintiff does not establish that she furthered the assault.

As to plaintiff's contentions that Ms. Thorn falsely spread rumors of plaintiff stalking Ms. Thorn, Ms. Thorn has offered a sworn affidavit (see Exhibit B annexed to Ms. Thorn's cross-motion)

stating she was not in plaintiff's apartment on the date of the incident, she did not strike or threaten to strike plaintiff, and she did not request anyone nor conspire with anyone to harm plaintiff.

Even if the "stalking" rumors alleged by plaintiff as Ms. Thorn were true, the record reveals no evidence that Ms. Thorn committed any overt act in the furtherance if the assault or that she acted in concert with Welsh, Ms. Thorn's boyfriend, in planning the assault or requesting the assault take place *(see Fariello v City of New York Board of Education*, 199 AD2d 461 [2d Dept 1993]).

As to Keady, he alleges that he was never properly served with plaintiff's summons and complaint.

It is well settled that service is only effective when it is made pursuant to the appropriate method authorized by the CPLR (*Markoff v South Nassau Community Hospital*, 61 NY2d 283 [1984]).

Here, Keady contends that on May 25, 2010 the plaintiff's summons and complaint were placed directly in the mailbox of Keady's mother's residence in Canton, Massachusetts (Keady's last known residence). Keady states they were not mailed through the U.S. Post Office nor properly served as per CPLR §308(2).

Plaintiff failed to oppose Keady's motion, and he did not proffer any proof of service to show that the service of the summons and complaint had been properly effected in compliance with the statute (*see Munoz v Reyes*, 40 AD3d 1059 [2d Dept 2007]) with both delivery and or mailing under CPLR §308(2). As such, the plaintiff's complaint against defendant Keady is dismissed without prejudice.

On a motion to dismiss a complaint, the court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory (*Farber v Breslin*, 47 AD3d 873 [2d Dept 2008]).

While it is true that on a motion pursuant to CPLR §3211(a)(7), allegations are to be liberally

construed and documentary evidence must conclusively disposes of a plaintiff's claim (*Manfro v McGivney*, 11 AD3d 662 [2d Dept 2004]; *Jorjill Holding Ltd. v Grieco Associates, Inc.*, 6 AD3d 500, 501 [2d Dept 2004]), it is also true that "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Maas v Cornell University*, 94 NY2d 87, 91 [1999]; *Morris v Morris*, 306 AD2d 449 [2d Dept 2003]; *Giustino v County of Nassau*, 306 AD2d 376 [2d Dept 2003]; *Tal v Malekan*, 305 AD2d 281 [1st Dept 2003]; *Sesti v North Bellmore Union Free School Dist.*, 304 AD2d 551 [2d Dept 2003]; *Olszewski v Waters of Orchard Park*, 303 AD2d 995 [4th Dept 2003]; *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]; *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 [1st Dept 1994]).

Based on the above, all three applications are ***granted*** and the causes of action against Trapani, Skidmore, Thorn and Keady are ***dismissed***. It is hereby

ORDERED, that the remaining parties are directed to appear for a Preliminary Conference on December 2, 2010 at 9:30 a.m. in DCM.

This constitutes the Decision and Order of the Court.

DATED: November 15, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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