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SHORT FORM ORDER

INDEX NO.: 0033034-2011
SUBMIT DATE: 4-3-2013
MTN. SEQ.#: 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

Motion Date: 001: 7-20-2012
002: 12-19-2012
Motion No.: 001:MG 02: MD

----------X
MARLENE PATRELLA,,

Plaintiff,

-against-

DANIEL KELLERHER,

Defendant.
----------X

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Upon the following papers numbered 1 to 69 read on this application for an order dismissing the plaintiff's complaint and on the cross motion for an order for a default judgment against the defendant; Notice of Motion/Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers 14-42; Answering Affidavits and supporting papers 43-57; Replying Affidavits and supporting papers 58-69; Other ___; it is

ORDERED that the application by the defendant, Daniel Kelleher, s/h/a/ Daniel Kellerher, for an order dismissing the complaint pursuant to CPLR 3211, (motion sequence 001), and the cross motion by the plaintiff, Marlene Patrella, for a default judgment (motion sequence 002), are decided together; and it is further

ORDERED that the application by the defendant, Daniel Kelleher, s/h/a/ Daniel Kellerher, for an order dismissing the complaint pursuant to CPLR 3211, (motion sequence 001), is granted; and it is further

ORDERED that the cross motion by the plaintiff for a default judgment (motion sequence 002), is denied.

The Verified Complaint of the plaintiff, Marlene Patrella ["the plaintiff" or "Patrella"], alleges that the defendant, Daniel Kelleher, s/h/a/ Daniel Kellerher, ["the defendant" or "Kelleher"], was the head of the Department of Investigation of the New York State Education Department's Office of Professional Discipline ["OPD"]. On October 9, 2008, the plaintiff filed a complaint with New York State ["the State"], regarding Drs. David Shapiro and David Gozinsky, two chiropractors with whom the plaintiff had treated from September 6, 1999, until October 11, 1999. Patrella claimed that during the trial of a chiropractic malpractice action against these two doctors, one or both chiropractors engaged in forgery and falsification of Patrella's medical records ultimately leading to a jury verdict in their favor and against the plaintiff.

On January 31, 2006, the trial court (Whelan, J.), denied Patrella's post trial motion to set aside the verdict and for a new trial. On June 26, 2007, the Appellate Division affirmed (***Patrella v Atlantic Chiropractic Group***, 41 A.D.3d 806, 839 N.Y.S.2d 177 (2d Dept. 2007). Patrella's motion for leave to appeal to the Court of Appeals was denied (***Patrella v. Atlantic Chiropractic Group***, 9 N.Y.3d 940, 844 N.Y.S.2d 781, N.E.2d [2007]).

In this action, the plaintiff alleges that in October of 2008 she relied upon Kelleher's assurances that he would retain a handwriting expert to investigate the plaintiff's forgery claim against Dr. Shapiro. According to the plaintiff's complaint, had Kelleher hired a handwriting expert, the expert would have been able to determine that alterations had been made on the plaintiff's patient record of chiropractic treatment. Proof that her patient record had been altered would have then provided the basis for a new trial against the chiropractors ultimately resulting in a multi-million dollar award in her favor.

Plaintiff previously filed for leave to serve a late notice of claim against the State of New York in the Court of Claims based on Kelleher's alleged failure to obtain a handwriting expert to review her 1999 patient records. The complaint being moved against by the defendant incorporated by reference the facts set forth in the leave application. According to the leave application, in reliance on Kelleher's assurances in a telephone conversation in October of 2008, the plaintiff did not engage her own handwriting expert or pursue criminal charges against the chiropractors. Ultimately, the period of limitations to criminally prosecute the chiropractors expired.

In a decision in the Court of Claims dated December 12, 2011, (Ferreira, J.), leave to file a late notice of claim against the State based on Kelleher's actions was denied, the court concluding that the claimants (Marlene and Eugene P. Patrella), had not demonstrated an adequate excuse for the delay in seeking leave and their claim sounding in fraudulent and/or negligent misrepresentation was of questionable merit. As here, the claim was based on the telephone conversation between Patrella and Kelleher in October of 2008 where Kelleher allegedly promised to obtain a handwriting expert.

Notably, in support of the defendant's dismissal motion, the defendant attached a copy of Patrella's application for leave to file a late notice of claim that included a copy of a letter dated February 16, 2010, from John McGoldrick, Supervising Investigator with the OPD. The letter

advised the plaintiff that her patient record was reviewed by a handwriting analyst who determined that OPD could not make an identification of the person who made the questionable "strokes" on the subject record.

The instant action against Kelleher was commenced in Supreme Court by the service of a summons with notice filed on October 24, 2011. Kelleher demanded a complaint pursuant to CPLR 3012. A Verified Complaint was served on March 14, 2012. In early June of 2012 the Attorney General attempted to secure the stipulation of plaintiff's counsel agreeing to extend Kelleher's time to file an Answer to the Complaint until June 30, 2012. When the stipulation was not returned, Kelleher moved to dismiss the complaint on June 29, 2012. The Attorney General consented to plaintiff's repeated requests for adjournment of the dismissal motion until the Plaintiff made a cross motion for a default judgment on November 24, 2012. Attached to the cross motion was a tape and transcript of the telephone conversation that purportedly took place between the plaintiff and Kelleher in October of 2008.

The complaint contains seven causes of action against Kelleher: liability based on Kelleher's violation of Penal Law § 20 5.50 (5), prima facie tort, fraud, negligence, gross negligence, recklessness and intentional infliction of emotional distress, and tortious interference with contract. The complaint seeks compensatory and punitive damages against Kelleher.

Kelleher advances three grounds for dismissal of all or part of the complaint. First, the court lacks subject matter jurisdiction over a claim for money damages against the State of New York or any of its officers, departments or agencies. Second, the State Department of Education and its employees are immune from suits for claims arising out of their governmental functions that are discretionary. Finally, the allegations in the complaint insofar as they allege intentional infliction of emotional distress fail to state a cause of action.

The Court of Claims has exclusive jurisdiction over claims for money damages against the State and its agencies, departments, and employees acting in their official capacity in the exercise of governmental functions (*see* **N.Y. CONST.**, Art. VI, § 9; **COURT OF CLAIMS ACT,** §§ 8, 9[2]; ***Morell v. Balasubramanian***, 70 N.Y.2d 297, 300, 520 N.Y.S.2d 530, 514 N.E.2d 1101 [1987]; ***Schaffer v. Evans***, 57 N.Y.2d 992, 994, 457 N.Y.S.2d 237, 443 N.E.2d 485; ***Sinhogar v. Parry***, 53 N.Y.2d 424, 431, 442 N.Y.S.2d 438, 425 N.E.2d 826; ***Dinerman v. NYS Lottery***, 58 A.D.3d 669, 870 N.Y.S.2d 792).

While the State itself may be sued in a tort action only in the Court of Claims (**N.Y. CONST.**, Art VI, § 9; **COURT OF CLAIMS ACT**, §§ 8, 12[3]), the Court of Claims can not entertain tort actions against individual state employees (***Morell v. Balasubramanian***, *supra)*. Where the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest—even though it could be held secondarily liable for the tortious acts under *respondeat superior* (***Morell***, at 301; *see also* ***LAL Leasing Corp. v. Williams,*** 150 A.D.2d 643, 541 N.Y.S.2d 517 [2d Dept. 1989]).

Here, the plaintiff alleges that Kelleher assumed a special duty to her by promising to obtain a handwriting expert and discouraging the plaintiff from doing so. In reliance on Kelleher's assurances that he would retain an expert, the plaintiff allegedly did not go forward with a complaint of her own and thereby lost the opportunity to pursue criminal prosecution of the chiropractors. As the cause of action as stated arises out of the alleged breach of a special duty voluntarily assumed by Kelleher, the Court concludes that it has subject matter jurisdiction over the controversy (*see* ***Colombini v. Westchester County Healthcare Corp.,*** 24 A.D.3d 712, 808 N.Y.S.2d 705 [2d Dept. 2005] [holding that while employer may be vicariously liable for torts of employee acting within scope of employment, claim against employer does not necessarily preclude separate claim against employee]).

However, the second basis to dismiss the complaint based on governmental immunity for discretionary acts by employees mandates dismissal of the complaint. When official action involves the exercise of discretion, the government employee is not liable for the injurious consequences of that action even if resulting from negligence or malice *(**Tango v. Tulevich***, 61 N.Y.2d 34, 471 N.Y.S.2d 73, 459 N.Y.S2d 182; ***Valdez v. City of New York***, 18 N.Y.3d 69, 936 N.Y.S.2d 587, 960 N.E.2d 356 [2011]).

Discretionary actions are to be distinguished from ministerial actions. "[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (***Tango***, 61 N.Y.2d at 41, 471 N.Y.S.2d 73, 459 N.E.2d 182).

Ministerial acts, those requiring adherence to a governing rule with a compulsory result, may subject a government employer to liability, provided that the conduct was tortious and involved a breach of a duty owed to the injured party *(**Lauer v. New York***, 95 N.Y.2d 95, 711 N.Y.S.2d 112, 733 N.E.2d 184; ***Tango v. Tulevich***, *supra).*

The complaint alleges that Kelleher assumed a duty to the plaintiff to retain a handwriting expert to analyze Patrella's patient record with a view toward OPD taking professional discipline against the plaintiff's treating chiropractors. The allegation that while conducting an official investigation Kelleher assumed a duty to Patrella to retain a handwriting expert and discouraged the plaintiff from doing so, even if true, is based on Kelleher's exercise of discretion as to how he would proceed with the OPD investigation for which there can be no liability, whether or not Kelleher assumed a special duty to Patrella (***Mon v. City of New York,*** 78 N.Y.2d 309, 574 N.Y.S.2d 529, 579 N.E.2d 689 [1991]; ***Gabriel v. City of New York***, 89 A.D.3d 982, 933 N.Y.S.2d 360 [2d Dept. 2011]). Government action, if discretionary, may not be a basis for liability (***McLean v. City of New York***, 12 N.Y.3d 194, 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167 [2009]). Therefore, the defendant's motion to dismiss the complaint is granted.

The plaintiff cross moves for an order granting her a default judgment. Even if the defendant did default in answering, the defendant established a justifiable excuse therefor, and meritorious defenses to the action which require dismissal (*see* ***McNamara v. Banney***, 227 A.D.2d 892, 643

N.Y.S.2d 800). The plaintiff did not respond to the defendant's request for an extension of time to file an Answer. Considering the lapse in time between filing of the summons with notice and service of the complaint upon the defendant's demand, and the additional delay between the instant motion and cross motion occasioned at the plaintiff's request, the plaintiff has shown no prejudice from the defendant's relatively brief delay in responding to the complaint (*see* ***Vellucci v. Home Depot U.S.A., Inc.***, 102 A.D.3d 767, 957 N.Y.S.2d 874 [2d Dept. 2013]). Plaintiff's cross motion for leave to enter a default judgment is denied.

DATED: 28 May 2013

HON. JOHN J. J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION