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SHORT FORM ORDER

INDEX No. 06-34179
CAL. No. 12-02227OT

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

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-24-13
ADJ. DATE 6-19-13
Mot. Seq. # 004 - MotD

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JESSICA JAWOROSKI, an infant by her mother and natural guardian, LAURA FONTANE, and LAURA FONTANE, Individually,

Plaintiffs,

- against -

SAYVILLE UNION FREE SCHOOL DISTRICT,

Defendant.

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BLANGIARDO & BLANGIARDO, ESQS.
Attorney for Plaintiffs
P.O. Box 1169
Cutchogue, New York 11935

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER
Attorney for Defendant
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553

Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 26 - 34 ; Replying Affidavits and supporting papers 35 - 36 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaints in this consolidated action is granted to the extent of granting summary judgment dismissing the first complaint, the second complaint, and the second, fourth, fifth, sixth, and so much of the eighth cause of action in the third complaint as seeks to recover for negligent infliction of emotional distress, and is otherwise denied.

The plaintiffs, Jessica Jaworoski, an infant by her mother and natural guardian, Laura Fontane, and Laura Fontane, individually, commenced three separate actions for negligent supervision against the defendant, Sayville Union Free School District ["the defendant"] as a result of three separate incidents. By order dated August 8, 2008, this court granted the defendant's motion to consolidate all three actions into one action.

In the first complaint (index number 34179/2006), the infant plaintiff, Jessica Jaworoski ("the

plaintiff"), seeks to recover damages for personal injuries and emotional distress allegedly sustained by her in December 2003 when she was sexually assaulted by two male students. The plaintiff alleges that after the assault in December 2003, the same male students continued to verbally abuse her for the remainder of that school year (2003-2004). In addition, the plaintiff alleges that on December 19, 2004, malicious rumors were circulated about her by her fellow classmates causing her to suffer harm to her reputation and humiliation, and that she was bullied and harassed during the 2004-2005 and 2005-2006 school years. The plaintiff alleges that all of the aforementioned incidents occurred as a result of the defendant's alleged, *inter alia*, negligent supervision. Additionally, the plaintiff's mother, Laura Fontane, has a derivative claim. The notice of claim in the first action, which is dated October 24, 2005 and was served on the defendant on November 10, 2005, reiterates that the sexual assault occurred in December 2003, and that the plaintiff continued to be bullied and harassed for the remainder of the 2003-2004 school year and during the following school year (2004-2005). In addition, the notice of claim states that the plaintiff continued to be harassed and bullied in September 2005.

In the second complaint (index number 34402/2007), the plaintiff asserts eight causes of action. The first cause of action alleges that the plaintiff was verbally assaulted on October 16, 2006 by another student named Mariah Redlow and physically assaulted on October 17, 2006 by Ms. Redlow as a result of the defendant's failure to provide adequate supervision. The second, third, and fourth causes of action allege that the plaintiff was the subject of repeated harassment and bullying during the 2004-2005 and 2005-2006 school years and that said harassment continued on January 11, 2007 as a result of the defendant's failure to prevent or stop it. The fifth cause of action alleges that the defendant negligently hired its employees and that as a result, the plaintiff was placed in the charge of incompetent and irresponsible persons who failed to intervene on her behalf. The sixth cause of action is for intentional infliction of emotional distress and the seventh cause of action is a derivative claim by plaintiff Fontane which seeks compensation for the medical expenses incurred by her to care for her daughter. In the eighth cause of action, Fontane seeks damages for loss of consortium and for emotional distress that she allegedly suffered as a result of the acts of the defendant.

The notice of claim in the second action, dated January 4, 2007, which was served on the defendant on January 11, 2007, states that on October 16, 2006, Mariah Redlow harassed, threatened, and verbally assaulted the plaintiff. Mediation was attempted by the dean of students but was unsuccessful. On the following day, October 17, 2006, Ms. Redlow physically assaulted the plaintiff while the plaintiff was "on school grounds."

In the third complaint (index number 34404/2007), which is identical to the second complaint with the exception of the first cause of action, the plaintiff asserts eight causes of action. The first cause of action in this complaint alleges that the plaintiff was assaulted on January 12, 2007 by Mariah Redlow as a result of the defendant's failure to provide adequate supervision. The notice of claim in the third action reiterates that the plaintiff was assaulted by Mariah Redlow on January 12, 2007 as she was leaving her classroom.

The defendant now moves for summary judgment dismissing the complaints. The defendant asserts that the first complaint should be dismissed because the plaintiffs failed to serve a timely notice of claim and failed to move for leave to serve a late notice of claim until after the statute of limitations had expired. The defendant contends that the second complaint should be dismissed since the defendant

owed no duty of care to the plaintiff as the incident which gave rise to that complaint occurred off of school property and before the school day began. According to the defendant, the third complaint should be dismissed since the defendant did not breach its duty of supervision and, in any event, any lack of supervision was not the proximate cause of the incident.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 N.Y.2d 223, 413 N.Y.S.2d 141 [1978]; ***Andre v Pomeroy***, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 N.Y.2d 338, 357 N.Y.S.2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 A.D.2d 636, 637, 529 N.Y.S.2d 797, 799 [2d Dept. 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

FIRST COMPLAINT

With respect to the first complaint, it is well settled that in order to maintain an action against the defendant, the plaintiffs were required to serve a notice of claim within ninety days of the alleged injury (*see* Education Law § 3813 [2]; General Municipal Law § 50-I [1]; ***Bazile v City of New York***, 94 A.D.3d 929, 943 N.Y.S.2d 131 [2d Dept. 2012]; ***DeRise v Kreinik***, 10 A.D.3d 381, 780 N.Y.S.2d 773 [2d Dept. 2004]), and that a plaintiff's late service of a notice of claim without leave of court is a nullity (*see* ***Maxwell v City of New York***, 29 A.D.3d 540, 815 N.Y.S.2d 133 [2d Dept. 2006]). While a plaintiff may move for leave of court to file a late notice of claim, he or she must do so within one year and ninety days of the accrual date of his or her claim (*see id.*; General Municipal Law §50-e [5]). This period is tolled with respect to the infant's claim only, until the infant's eighteenth birthday. (CPLR 208; ***Cohen v Pearl River Union Free School District***, 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639; ***Bazile v City of New York***, 94 A.D.3d 929, 943 N.Y.S.2d 131 [2d Dept. 2012]).

Here, it is undisputed that the plaintiffs served a notice of claim on the defendant on November 10, 2005. In the notice of claim, the plaintiffs allege that "[o]n or about December 2003" rumors were circulated about the plaintiff by several of her classmates. In addition, her classmates harassed, humiliated, and physically and sexually assaulted her. The notice of claim alleges that the plaintiff continued to be harassed and bullied throughout the 2003-2004 and 2004-2005 school years and that when she entered ninth grade in September 2005, more rumors were circulated about her. In her complaint, the plaintiff reiterates these allegations. However, during her examination pursuant to General Municipal Law § 50–h and her deposition, the plaintiff testified that when she started the ninth grade, in September 2005, she was not harassed or bullied, and that no incidents occurred during that month. She testified that she voluntarily decided not to return to school for the rest of the year after completing the month of September 2005 simply because she just did not want to go to school. As a result, she was taught at home from October 2005-June 2006.

In light of the plaintiff's testimony, the last possible incident which could have occurred at school before the notice of claim was filed would have been on June 30, 2005. Therefore, the plaintiffs' notice of claim, served on November 10, 2005, was untimely and the plaintiffs were required to move for leave to file a late notice of claim within one year and ninety days of the accrual date of their respective claims. Thus, plaintiff Fontane was required to move to file a late notice of claim by September 28, 2006 (one year and ninety days after June 30, 2005), and the plaintiff was required to move for leave to file a late notice of claim within one year and ninety days of her eighteenth birthday - her eighteenth birthday being August 16, 2009. Thus the plaintiff was required to move for leave to file a late notice by November 14, 2010 (***Henry v City of New York***, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372 [1999]; ***Rowe v Nassau Health Care Corp.***, 57 A.D.3d 961, 871 N.Y.S.2d 330 [2d Dept.2007]). Since the plaintiffs have not, to this day, moved for leave to file a late notice of claim, they failed to make a timely application to file a late notice of claim and, as a result, the defendant is entitled to dismissal of the complaint (*see* ***Maxwell v City of New York***, *supra;* ***Nappi v County of Suffolk***, 79 A.D.3d 990, 914 N.Y.S.2d 247 [2d Dept. 2010]; ***Hardie v New York City Health and Hospitals Corp.,*** 278 A.D.2d 453, 719 N.Y.S.2d 256 [2d Dept. 2000]).

In opposition, the plaintiffs failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). While the plaintiffs assert that the defendant's motion is procedurally defective since the pleadings are not annexed to the moving papers, the court notes that all three summonses and complaints, notices of claim, and answers are annexed to the moving papers. Thus, the defendant's motion is not procedurally defective. Furthermore, contrary to the plaintiffs' contentions, the defendants are not equitably estopped from asserting the plaintiffs' failure to serve a timely notice of claim based on the fact that the defendants conducted three examinations pursuant to General Municipal Law § 50–h prior to making their motion to dismiss (*see* ***Khela v City of New York***, 91 A.D.3d 912, 937 N.Y.S.2d 311 [2d Dept. 2012]). Thus, the first complaint is dismissed.

SECOND COMPLAINT

Turning to the second complaint, with respect to the first cause of action for negligent supervision, it is well settled that "[a] school district owes a duty of care to its students while the children are in its physical custody or orbit of authority, or if a specific statutory duty has been imposed" (*see* ***Begley v City of New York***, ___ A.D.3d ___, 2013 WL 5225242 *11 [2d Dept.]; ***Womack v Duvernay***, 229 A.D.2d 488, 489, 645 N.Y.S.2d 831, 833 [2d Dept. 1996]; *accord* ***Chainani v Board of Educ. of City of N.Y.***, 87 N.Y.2d 370, 639 N.Y.S.2d 971 [1995]). "[W]here a student is injured off school premises, there can generally be no actionable breach of a duty that extends only to the boundaries of school property" (***Maldonado v Tuckahoe Union Free Sch. Dist.***, 30 A.D.3d 567, 568, 817 N.Y.S.2d 376, 377 [2d Dept. 2006]).

Here, the defendant established its *prima facie* entitlement as a matter of law by demonstrating, through the testimony of the plaintiff, that she was not under the physical custody and control of the defendant when she was assaulted by Mariah Redlow on October 17, 2006 (*see* ***Morning v Riverhead Cent. Sch. Dist.***, 27 A.D.3d 435, 811 N.Y.S.2d 747 [2d Dept. 2006]; ***Rowe v Board of Educ. of City of N.Y.***, 12 A.D.3d 494, 783 N.Y.S.2d 860 [2d Dept. 2004]; ***Ramo v Serrano***, 301 A.D.2d 640, 754 N.Y.S.2d 336 [2d Dept. 2003]). Specifically, the plaintiff testified that she and her friends would hang out on the corner across the street from the school until the first bell rang. On October 17, 2006 at

approximately 7:00 a.m., before school started, Fontane dropped the plaintiff off across the street from the school, and while she was standing there, Mariah Redlow came up to her and assaulted her. Thus, the assault did not occur while the plaintiff was under the physical custody and control of the defendant.

With respect to the remaining portion of the first cause of action which seeks damages for negligent supervision stemming from the alleged verbal assault on October 16, 2006, the plaintiff testified and the complaint alleges that "[a] teacher noticed the tension between the two students, and fearing that an altercation may ensue, contacted the Dean of Students." The plaintiff further testified that on that day she and Ms. Redlow were sent down to the main office and the Dean of Students attempted to mediate the dispute between them. The plaintiff testified that during the mediation, she walked out of the office because she was frustrated. After she walked out of the office, a security guard followed her and she was separated from Ms. Redlow for the rest of the day. She had no issues with Ms. Redlow for the rest of that day. Thus, it cannot be said that the defendant negligently supervised the plaintiff on October 16, 2006 as a teacher took action as soon as the teacher realized that there was an issue between the two students.

As for the second, third, and fourth causes of action, in which the plaintiff alleges that she was the subject of repeated harassment and bullying during the 2004-2005 and 2005-2006 school years and again on January 11, 2007 as a result of the defendant's failure to prevent or stop it, the court notes that the notice of claim in the second action was dated January 4, 2007 and was served on the defendant on January 11, 2007. Thus, the plaintiff's notice of claim was untimely as to any claims of harassment and bullying during the 2004-2005 school year. Since no timely application to file a late notice of claim has been made, those claims should be dismissed (*see* ***Robinson v Bd. of Educ. of City School District of City of New York***, 104 A.D.3d 666, 666, 962 N.Y.S.2d 279 [2d Dept. 2013], citing ***Maxwell v City of New York***, *supra*).

Furthermore, the plaintiff's claim regarding bullying and harassment during the 2005-2006 school year should be dismissed since as noted earlier, the plaintiff's testimony revealed that she was not harassed or bullied during the 2005-2006 school year. The plaintiff testified that no incidents occurred in September 2005 and that she was taught at home from October 2005-June 2006 after she voluntarily dropped out of school at the end of September 2005.

As for the plaintiff's claim in the third cause of action regarding bullying and harassment on January 11, 2007, it is noted that the notice of claim, dated January 4, 2007, merely refers to the confrontation which the plaintiff had with Mariah Redlow on October 16, 2006 and the assault by Redlow, which occurred on October 17, 2006. It is well settled "that [c]auses of action for which a notice of claim is required which are not listed in the plaintiff's original notice of claim may not be interposed" (***Finke v City of Glen Cove***, 55 A.D.3d 785, 786, 866 N.Y.S.2d 317, 319 [2d Dept. 2008] [internal quotation marks omitted]). Therefore, since the plaintiff failed to make any reference to the alleged January 11, 2007 harassment/bullying incident in her notice of claim, and since the notice of claim was dated January 4, 2007–presumably before the alleged incident occurred–this claim must be dismissed.

With respect to the fifth cause of action for negligent hiring, as a general rule, "where an employee is acting within the scope of his or her employment, the employer is liable for the employee's

negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (***Talavera v Arbit***, 18 A.D.3d 738, 738, 795 N.Y.S.2d 708, 709 [2d Dept. 2005]). Thus, this claim must be dismissed as well since the evidence establishes that the defendant's employees were not acting outside the scope of their employment during the alleged incidents (*see* ***Eckardt v City of White Plains***, 87 A.D.3d 1049, 930 N.Y.S.2d 22 [2d Dept. 2011]).

Turning to the sixth cause of action for intentional infliction of emotional distress, it has been held that in order "to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society" (***Leonard v Reinhardt***, 20 A.D.3d 510, 799 N.Y.S.2d 118 [2d Dept. 2005] [internal quotation marks omitted]). Here, the defendant established its *prima facie* entitlement to judgment dismissing this cause of action by demonstrating through the evidence submitted, including the deposition testimony of the plaintiff, that the defendant's response to the plaintiff's claims of bullying and harassment did not rise to the level of extreme and outrageous conduct necessary to sustain a cause of action for intentional infliction of emotional distress (*see* ***Rodgers v City of New York***, 106 A.D.3d 1068, 966 N.Y.S.2d 466 [2d Dept. 2013]). Thus, the sixth cause of action must likewise be dismissed.

As for the seventh and eighth causes of action, insofar as plaintiff Fontane's eighth cause of action seeks damages for negligent infliction of emotional distress, in order to recover damages for a cause of action for negligent infliction of emotional distress, Fontane was required to show that the defendant's conduct either unreasonably endangered her physical safety or caused her to fear for her own safety (*see* ***Daluise v Sottile***, 40 A.D.3d 801, 837 N.Y.S.2d 175 [2d Dept. 2007]). Here, there has been no such showing. The evidence submitted, including the deposition testimony of the plaintiff, establishes that Fontane was not even present during the assault on October 17, 2006 as she had dropped the plaintiff off for school before the assault occurred. Thus, Fontane was not in the "zone of danger" at the time of the assault and, as a result, cannot recover for negligent infliction of emotional distress (*see* ***Hickey v National League of Baseball Clubs***, 169 A.D.2d 685, 565 N.Y.S.2d 65 [1st Dept. 1991]). In light of the foregoing, inasmuch as the derivative claims of Fontane, including the remainder of Fontane's eighth cause of action, which seeks damages for loss of consortium, and the seventh cause of action for medical expenses incurred by her to care for her daughter, are related to the claims which have previously been dismissed herein, they must also be dismissed.

In opposition, the plaintiffs failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Thus, the second complaint is dismissed.

THIRD COMPLAINT

With respect to the third complaint, as noted earlier, it mirrors the second complaint with the exception of the first cause of action which alleges that the plaintiff was assaulted on January 12, 2007 by Mariah Redlow as a result of the defendant's failure to provide adequate supervision. It has been held that "[t]he adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff's injury" (***Braunstein v Half Hollow Hills Cent. School Dist.***, 104 A.D.3d 893, 894, 962

N.Y.S.2d 340 [2d Dept. 2013]). After reviewing the evidence submitted, including the deposition testimony of the plaintiff, the court finds that the defendant is not entitled to judgment as matter of law dismissing the first cause of action since, under the circumstances presented, including the history between the plaintiff and Ms. Redlow–especially the assault of the plaintiff by Ms. Redlow three months before this assault–triable issues of fact exist as to whether the defendant had knowledge or notice of the dangerous conduct which caused the plaintiff's injury (*see* ***Smith v Poughkeepsie City School Dist.***, 41 A.D.3d 579, 839 N.Y.S.2d 99 [2d Dept. 2007]; ***Hernandez v City of New York***, 24 A.D.3d 723, 808 N.Y.S.2d 714 [2d Dept. 2005]). Contrary to the defendant's contention, due to the history between the plaintiff and Ms. Redlow, and prior threats of bodily harm made by Ms. Redlow, it cannot be said that this was an unanticipated act (*cf.* ***Siller v Mahopac Cent. School Dist.***, 18 A.D.3d 532, 795 N.Y.S.2d 605 [2d Dept. 2005]; ***Mormon v Ossining Union Free School Dist.***, 297 A.D.2d 788, 747 N.Y.S.2d 586 [2d Dept. 2002]). While the defendant asserts that it was never informed that the day before the assault Ms. Redlow had posted disparaging comments about the plaintiff on the website MySpace, the plaintiff testified that she informed two administrators at the school and was advised to ignore the comments.

Skipping to the third cause of action, which seeks to recover damages for injuries sustained as a result of malicious rumors spread about the plaintiff on January 11, 2007 due to the defendant's failure to take action to stop the continued bullying and harassment of the plaintiff, the defendant asserts that this cause of action should be dismissed since the plaintiff failed to make any reference to the alleged January 11, 2007 harassment/bullying incident in her notice of claim. However, the plaintiff's notice of claim in the third action clearly made reference to the alleged January 11, 2007 harassment/bullying incident and provided factual information with respect thereto. Thus, the defendant has not established its entitlement to judgment as a matter of law dismissing the third cause of action.

For the reasons previously stated in this decision, the defendant is entitled to summary judgment dismissing the second, fourth, fifth, sixth, and so much of the eighth cause of action in the third complaint which seeks to recover for negligent infliction of emotional distress.

Accordingly, the defendant's motion is granted to the extent of granting summary judgment dismissing the first complaint, the second complaint, and the second, fourth, fifth, sixth, and so much of the eighth cause of action in the third complaint as seeks to recover for negligent infliction of emotional distress.

The Court directs that the claims as to which summary judgment were granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 27 Sept. 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION