SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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IRIS PARRA,

Plaintiff,

-against-

BETH ISRAEL MEDICAL CENTER and
DR. BRENT I. CHABUS, M.D.,

Defendants.

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Index No. 805054-2013

DECISION/ORDER

Motion Sequence 003

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Attorney's Affirmation, Collective Exhibits Annexed & Memorandum of Law	1, 2, 3, 4
Notice of Cross-Motion, Affidavit, Attorney's Affirmation & Collective Exhibits Annexed	5, 6, 7, 8
Reply & Affirmation in Opposition to Cross-Motion & Collective Exhibits Annexed	9, 10
Reply Affirmation In Support of Cross-Motion	11

By notice of motion dated June 13, 2016 defendants Beth Israel Medical Center (Beth Israel) and Dr. Brent I, Chabus, M.D. (Chabus) (collectively defendants) move pursuant to CPLR § 3211 [a] [7] for an order dismissing any and all allegations and asserted damages pertaining to the alleged improper reporting of plaintiff Iris Parra's (plaintiff) alleged erroneous mental health diagnosis to various New York City agencies, including New York City Child Protective Services. Plaintiff opposes the motion and cross-moves for leave to amend her complaint.

Plaintiff alleges in her verified complaint that she was brought to the emergency room on August 6, 2010 by New York City police officers due to her being upset over a sexual assault against her that had occurred on a subway on the morning of August 6, 2010. The complaint further alleges that Chabus and Beth Israel personnel improperly and inaccurately diagnosed plaintiff as suffering from schizophrenia, bi-polar and manic depression personality disorders, manic episodes and auditory hallucinations and improperly advised New York City Child Protective Services (CPS) of the improper diagnosis. Plaintiff alleges that as a result of the

misdiagnosis and misinformation, her two infant sons (then ages 4 and 9) were removed from her custody and placed in foster care. Plaintiff's bill of particulars amplifies the allegations in the verified complaint by alleging that defendants committed malpractice by allowing a social worker who was not a licensed physician or otherwise qualified to make a medical evaluation and/or diagnosis of plaintiff's condition to communicate a diagnosis to various New York City authorities, including CPS, thereby causing those authorities to remove plaintiff's two minor children from her care and custody and place them in foster care.

In moving to dismiss these allegations, defendants argue that plaintiff is barred from pursuing a cause of action regarding defendants' reporting of suspected child abuse because defendants, as statutorily mandated reporters under Social Services Law § 413, have qualified statutory immunity from civil liability under Social Services Law § 419. Defendants further contend that their actions did not rise to the level or being wantonly dishonest, egregious or morally reprehensible or malicious and/or reckless and that plaintiff's punitive damages claim must be dismissed.

In opposition, plaintiff argues that there was no evidence or indication upon her presentment to the emergency room that she posed a risk of serious harm to herself or anyone else and defendants therefore did not have an adequate basis to involuntarily admit plaintiff to their CPEP program for 72 hours. Plaintiff also contends that it was improper for defendants to communicate to CPS that plaintiff was going to be so admitted. Plaintiff argues that her mental health diagnosis, which she contends was incorrect and was not made by a doctor, was improperly communicated to CPS by a social worker and that such communication constitutes the illegal practice of medicine. Plaintiff further contends that defendants failed to abide by procedures set forth in Mental Hygiene Law § 9.40 which required written certification by two physicians, the first of the initial diagnosis on admission, and a secondary determination for an extended post 24 hour admission. Plaintiff contends that defendants are not entitled to the qualified immunity of Social Services Law § 419 because their failure to abide by Mental Health Law § 9.40 was in bad faith and in deliberate disregard of legally required procedures and that defendants' communication to CPS was not within the scope of their employment and constitutes willful misconduct or gross negligence.

Plaintiff further argues that the proposed amendment to her complaint merely amplifies and clarifies her claim that defendants's errors were undertaken in bad faith and that defendants are not prejudiced by the amendment because plaintiff's initial verified complaint sought punitive damages, thereby putting defendants on notice that plaintiff was alleging not only medical malpractice but also bad faith on the part of defendants.

In determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR § 3211 [a] [7], the pleading is to be afforded a liberal construction (CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint (*id.*). "In assessing a motion under CPLR § 3211 [a] [7] . . . a court may freely consider affidavits submitted by the [nonmoving party] to remedy any

defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994] [internal quotation marks and citations omitted]).

Social Services Law § 413 requires certain persons, including physicians, teachers, and social workers, to register a report whenever "they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Mandated reporters are provided with qualified immunity from civil liability for reports of suspected child abuse which are made in "good faith" (Social Services Law § 419). The statute presumes "good faith" where the person reporting suspected child abuse is acting in discharge of his or her duties and within the scope of his or her employment, but does not shield such individuals where liability is the result of willful misconduct or gross negligence (*see* Social Services Law § 419). The reporting requirements which trigger the qualified immunity provision contained in Social Services Law § 419 are not predicated upon actual or conclusive proof of abuse or maltreatment. Rather, immunity attaches where there is reasonable cause to suspect that the child might have been abused and where the party has acted in good faith (*see Goldberg v Edson*, 41 AD3d 428 [2d Dept 2007]; *Lentini v Page*, 5 AD3d 914, 915 [3rd Dept 2004]; *Rine v Chase*, 309 AD2d 796, 797 [2d Dept 2003]; *Kempster v Child Protective Servs. of Dept. of Social Servs. of County of Suffolk*, 130 AD2d 623, 625 [2d Dept 1987]).

Accepting as the true the allegations set forth in plaintiff's verified complaint regarding the allegedly improper reporting by defendants of an incorrect mental health diagnosis to various city agencies, plaintiff's complaint nevertheless fails to state a cause of action for "wrongful reporting." The Social Services Law does not require that conclusive proof of child abuse be obtained before a report to protective service officials must be made and mandated reporters need not await conclusive evidence of abuse or maltreatment but must act on their reasonable suspicions (*Isabelle V. v City of New York*, 150 AD2d 312, 313 [1st Dept 1989]). More importantly, "the law allows mandated reporters a degree of latitude to err on the side of protecting children who may be suffering from abuse" (*Rine*, 309 AD2d at 798). Therefore, even if defendants' erroneously diagnosed plaintiff as suffering from schizophrenia, bi-polar and manic depression personality disorders, manic episodes and auditory hallucinations and wrongly advised CP of that improper diagnosis[1], the complaint does not contain sufficient allegations that defendants committed willful misconduct or gross negligence when they discharged their statutory duty to report an incident of suspected child abuse. Defendants are therefore entitled to statutory immunity and to dismissal of plaintiff's "wrongful reporting" cause of action

Defendants are also entitled to dismissal of plaintiff's claim for punitive damages. Punitive damages in medical malpractice actions are not recoverable unless the conduct alleged is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless (*Schiffer v Speaker*, 36 AD3d 520 [1st Dept 2007]). The facts alleged in plaintiff's verified complaint with respect to the alleged erroneous diagnosis of plaintiff's mental health do not demonstrate that defendants engaged in conduct which rose to the high level of moral culpability necessary to support a claim for punitive damages (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014]).

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[1] Plaintiff's allegations that defendant violated Mental Health Law § 9.40 by improperly admitting her for 72 hours are unrelated to plaintiff's allegations of improper reporting.

Similarly, plaintiff's allegations that defendants failed to abide by the mandates of the Mental Hygiene Law when they admitted plaintiff for 72 hours do not evince that the alleged "the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*id.*). Moreover, the deficiencies in plaintiff's verified complaint with respect to her "wrongful reporting" claim and her claim for punitive damages are not cured by plaintiff's proposed pleading which does not allege any new facts not alleged in the original complaint but seeks only to add conclusory allegations that defendants acted in bad faith, willfully, maliciously, wantonly, without reason or probable cause, without legal or social justification, with deliberate intent of injuring plaintiff and with gross indifference to the proper care and treatment of plaintiff (*see generally Nall v Estate of Powell*, 99 AD3d 411 [1st Dept 2012]). While leave to amend a pleading is freely granted in the absence of prejudice or surprise to the opposing party (*Spitzer v Schussel*, 48 AD3d 233 [1st Dept 2008]) because the facts set forth in plaintiff's complaint, even when accepted as true, do not support a claim for "wrongful reporting" or punitive damages, the proposed amendment, which merely sets forth a bare legal conclusion, is palpably insufficient.

In accordance with the foregoing, it is hereby

ORDERED that defendants motion to dismiss is granted to the extent that plaintiff's claim for "wrongful reporting" as set forth in paragraphs 12 and 13 of the verified complaint and plaintiff's claim for punitive damages are dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that the parties are to appear for a status conference on May 24, 2017 at 2:00 p.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendants are to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

George J. Silver, J.S.C.

Dated: 4/17/17
New York County

GEORGE J. SILVER