

Wilder v City of Long Beach

2018 NY Slip Op 34071(U)

October 29, 2018

Supreme Court, Nassau County

Docket Number: Index # 609330/17

Judge: Jeffrey S. Brown

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X		TRIAL/IAS PART 12
RACQUEL WILDER, as Parent and Natural Guardian of M.C.P. and RACQUEL WILDER, individually,		INDEX # 609330/17
	Plaintiffs,	Mot. Seq. 2
-against-		Mot. Date 9.25.18
		Submit Date 10.25.18
THE CITY OF LONG BEACH, THE LONG BEACH PUBLIC SCHOOLS, MANDY KOVEL and CABRINA TASEVOLI,		
	Defendants.	
-----X		

The following papers were read on this motion:	Documents Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	40
Answering Affidavit	47
Reply Affidavit.....	50

Defendant the City of Long Beach (the City) moves pursuant to CPLR 3211(a) (7) or CPLR 3212 to dismiss this personal injury action and cross-claims asserted against it.

The infant plaintiff was alleged to have been injured while a student at the Long Beach City School District’s Lido Elementary School. In support of this motion is an affidavit from Michael Tangney, the Acting City Manager of the City of Long Beach. He has been employed by the City in excess of 30 years. His testimony is based upon his personal knowledge and a review of the records of the City kept in the ordinary course of its business. Mr. Tangney states that the City and the Long Beach School District are two separate and distinct entities. The City has no ownership interest in any property owned by the Long Beach City School District. More specifically, it has no interest in the Lido Elementary School where the incident occurred. Further, the Lido Elementary School is not located within the confines of the City of Long Beach.

Rather, it is located in a hamlet known as Lido Beach in the Town of Hempstead. Mr. Tangney has also checked the payroll records of the City, and neither of the individual defendants, Mandy Kovel nor Cabrina Tasevoli, were employed by the City. Finally, according to Mr. Tangney, the City does not control or oversee the behavior of Long Beach School District employees.

Attached to the motion is the Charter for the City of Long Beach. The Charter does not indicate any authority for the City to create or maintain a school district or a school.

Finally, movant points to plaintiff's supplemental summons and amended complaint. Paragraph 2 of the complaint is the only allegation relating to the City of Long Beach. It alleges only that the City was and still is a municipal corporation duly organized and existing under and by virtue of the laws of the state of New York, with a place of business at 1 West Chester Street, Long Beach, New York, 11561. Nowhere in the complaint does plaintiff allege any control or wrongdoing by the City. As a result, movant argues that the complaint fails to state a cause of action against the City of Long Beach.

In opposition, counsel for plaintiff submits his own affirmation, albeit in improper form. In particular, counsel failed to subscribe and affirm the statements contained therein under the penalties of perjury (CPLR2106[a]). Nonetheless, counsel acknowledges that the City Charter is silent with respect to a city school district. Counsel explains that he has been making attempts to independently get information as to whether or not the Long Beach City School District, s/h/a The Long Beach Public Schools, is affiliated with the City of Long Beach and, if so, what degree of autonomy the School District has. He points to "Wikipedia" as a source of information and refers to The City of Long Beach Public Schools web page wherein a history is provided, stating that "in 1922 Long Beach was incorporated as a City, with the schools under municipal administration and the mayor appointing the Board of Education. The independent Long Beach Union Free School District was formed in 1924, and in 1951 it became a City School District" Counsel argues that the legal relationship between the two entities is unclear and discovery has not been held to date. Thus, such an application is premature.

In reply, movant argues that even accepting the single allegation as true, the complaint fails to allege any wrongdoing against the City of Long Beach, and thus it fails to state a cause of action.

"It is well established 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 evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993]).

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; see also *Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

Here, defendant City of Long Beach has made a prima facie demonstration that it is entitled to summary judgment as a matter of law. In opposition, counsel for plaintiff submits an affirmation in opposition to the defendant City of Long Beach's motion. However, this document is not in proper form or admissible and cannot be considered by this court since it was not subscribed and affirmed to be true under penalties of perjury (*Barouh v Law Offices of Jason L. Abelove*, 131 AD3d 988, 991 [2d Dept 2015]). Rather, counsel affirms on "information and belief," which is insufficient to raise and issue of fact.

[Additionally,] "[a] complaint is required to contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action (CPLR 3013). While "material facts" need no longer be pleaded ' . . . under the (Civil Practice Law and Rules), the statements in pleadings are still required to be factual, that is, the essential facts required to give 'notice' must be stated.' (*Foley v. D'Agostino*, 21 A.D.2d 60, 63). A complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations (*Taylor v. State of New York*, 36 A.D.2d 878). The test to be applied to the sufficiency of pleadings is not whether the complaint has stated a cause of action but rather, upon examination of the four corners of the pleading, do the factual allegations contained therein indicate the existence of a cause of action (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268). Using this yard stick, and accepting those factually supported allegations in plaintiff's complaint as true, he has failed to state a cause of action against defendant"

(*Melito v Mut. Indem. Ins. Co.*, 73 A.D.2d 819, 820 [4th Dept 1979]).

Here, the complaint states only that the City of Long Beach is a municipal entity. All allegations concerning ownership, management, and control of the school are asserted with

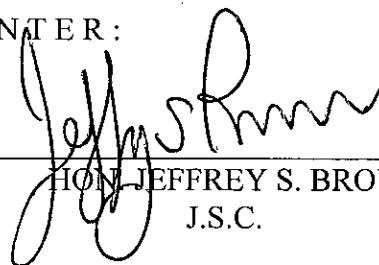
respect to the school district. Despite plaintiff's assertion that it is "unclear what the actual legal relationship is between the City of Long Beach and the School District," the complaint fails to actually allege control or wrongdoing by the City. Moreover, the school district has answered and appears to be its own juridical entity.

Therefore, the motion is **granted** and the complaint against the City of Long Beach is dismissed due to plaintiffs' failure to state a cause of action against that entity.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 29, 2018

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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