Waterbury v New York City Ballet, Inc.
2020 NY Slip Op 33132(U)
September 25, 2020
Supreme Court, New York County
Docket Number: 158220/2018
Judge: James E. d'Auguste

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** **PART** **IAS MOTION 55EFM**

Justice

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ALEXANDRA WATERBURY,

Plaintiff,

- v -

NEW YORK CITY BALLET, INC., JARED LONGHITANO, CHASE FINLAY, SCHOOL OF AMERICAN BALLET, AMAR RAMASAR, ZACH CATAZARO

Defendants.

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INDEX NO. 158220/2018

MOTION DATE _____

MOTION SEQ. NO. 005 006 007 008 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 83-96, 145-148, 165-173, 183

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 97, 98, 149, 150, 151, 152, 175, 184

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 100-107, 153-156, 174, 185

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 108-128, 157-160, 181, 186

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 129-132, 161-164, 176-180, 187

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 133-144, 182, 188

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions are resolved as follows:

Motion Sequence Nos. 005, 006, 007, 008, 009, and 010 are consolidated for disposition.

In Motion Sequence No. 005, defendant Chase Finlay ("Finlay") moves for an order, (1) pursuant to CPLR 3211(a)(1) and (a)(7), dismissing plaintiff Alexandra Waterbury's ("Waterbury") fourth cause of action for negligence, sixth cause of action for assault, seventh cause of action for battery, twelfth cause of action for violation of the Administrative Code of the City of New York ("Administrative Code") Section 10-180 ("NYCAC 10-180"),[1] fifteenth cause of action for negligent infliction of emotional distress, sixteenth cause of action for intentional infliction of emotional distress, and nineteenth cause of action for invasion of privacy based on a lack of documentary evidence and for failure to state a cause of action; and (2), pursuant to CPLR 3024(b), striking scandalous and prejudicial material from the Complaint and removing the Complaint from the Court file.

In Motion Sequence No. 006, defendant Amar Ramasar ("Ramasar") moves for an order, pursuant to CPLR 3211(a)(7), dismissing Waterbury's fifth cause of action for negligence, eighth cause of action for assault, and ninth cause of action for battery with prejudice.

In Motion Sequence No. 007, defendant New York City Ballet, Inc. ("NYCB") moves for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the SAC in its entirety as against it, with prejudice, for failure to state a cause of action.[2]

In Motion Sequence No. 008, defendant School of American Ballet ("SAB") moves for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the SAC in its entirety as against it,

[1] The Second Amended Verified Complaint ("SAC") asserts a cause of action under Administrative Code Section 10-177, which was re-codified as Administrative Code Section 10-180 as of March 1, 2019.
[2] The following causes of action in the SAC are alleged against the NYCB: the first cause of action for negligence, second cause of action for negligent hiring and retention, tenth cause of action for assault, eleventh cause of action for battery, thirteenth cause of action for violations of NYCAC 10-180, fourteenth cause of action for aiding and abetting violations of NYCAC 10-180, fifteenth cause of action for negligent infliction of emotional distress, sixteenth cause of action for intentional infliction of emotional distress, seventeenth cause of action for aiding and abetting assault, eighteenth cause of action for aiding and abetting battery, and twentieth cause of action for aiding and abetting invasion of privacy.

with prejudice and for sanctions, pursuant to 22 NYCRR 130-1.1, against Waterbury, her counsel, and her counsel's law firm for filing the instant action.[3]

In Motion Sequence No. 009, defendant Zach Catazaro ("Catazaro") moves for an order, pursuant to CPLR 3211(a)(7), dismissing the SAC in its entirety as against him and awarding costs for defending against the instant litigation.[4]

In Motion Sequence No. 010, defendant Jared Longhitano ("Longhitano") moves for an order, pursuant to CPLR 3211(a)(7), dismissing the SAC in its entirety as against him for failure to state a cause of action.[5]

The Parties

During the relevant time period, Waterbury was a nineteen-year old ballet dancer and former student of SAB. NYSCEF Doc. No. 77, ¶ 12 (SAC).

NYCB is a domestic non-profit corporation that owns, operates, and manages the production company known as The New York City Ballet. *Id.*, ¶¶ 13-14. SAB is alleged to be the official school for NYCB and shares the same founder and owner. *Id.*, ¶ 25. It is also alleged that graduation from SAB is required to perform for NYCB. *Id.*

Finlay, Ramasar, and Catazaro were each employed by NYCB during the relevant time period as principal dancers, also commonly known as "principals" in ballet terms. *Id.*, ¶¶ 18-23. In or about August 2018, Finlay resigned from NYCB. *Id.*, ¶ 120. On August 28, 2018, NYCB suspended Ramasar and Catazaro as principals for their actions alleged herein and on September 15, 2018, NYCB terminated Ramasar and Catazaro as principals. *Id.*, ¶¶ 120-21.

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[3] The following causes of action in the SAC are alleged against SAB: the first cause of action for negligence and second cause of action for negligent hiring. That branch of SAB's motion for sanctions, pursuant to 22 NYCRR 130-1.1, was denied on the record at oral argument on January 21, 2020. Tr. 21:4-8.

[4] Only the SAC's fifth cause of action for negligence is alleged as against Catazaro.

[5] Only the SAC's third cause of action for negligence is alleged as against Longhitano.

Longhitano was a junior board member of the NYCB and a founding junior board member of the Young Patrons Circle at the NYCB. *Id.*, ¶ 54. Longhitano was also a member of the Young Patrons Host Committee for the NYCB and was responsible for hosting, managing, planning, and sponsoring fundraising events for the NYCB. *Id.*, ¶ 56.

Factual and Procedural History

This action arises out of a romantic relationship between Waterbury, a former SAB student who left the SAB in June 2016, and Finlay, a former employee and principal dancer of the NYCB. Waterbury alleges that she met Finlay at the NYCB Fall Gala in September 2016 and the two became romantically involved shortly thereafter. NYSCEF Doc. No. 86, ¶¶ 3, 5 (Waterbury Aff.); NYSCEF Doc. No. 77, ¶ 36.

On or about May 15, 2018, Waterbury allegedly discovered that Finlay was secretly recording, saving, and sharing photographs and videos of her without clothing and/or engaging in sexual activity with him. NYSCEF Doc. No. 77, ¶ 4. In addition, she allegedly discovered that Finlay was encouraged to do so by Ramasar, whom she considered a friend, and that the explicit content was shared among other NYCB dancers, such as Ramasar and Catazaro. *Id.*, ¶¶ 4, 5, 88, 101.

The SAC alleges multiples instances wherein Finlay, while a dancer and employee of NYCB, shared, without consent, nude photographs of Waterbury and other female NYCB dancers, as well as vulgar and demeaning text messages, with Longhitano, Catarzaro, and Ramasar: on September 3, 2017, Finlay sent a naked photograph of Waterbury with a lewd comment (*id.*, ¶ 84); on September 8, 2017, Finlay exchanged multiple photographs of other female NYCB dancers (*id.*, ¶¶ 85, 87); Longhitano and Catazaro exchanged lewd text messages with Finlay about female NYCB dancers, referring to them as “farm animals” and “sluts” (*id.*, ¶¶ 59, 86); on October 9,

2017, Finlay shared photographs of Waterbury wherein Finlay states that "I'm trying to get a sex tape with her cause I know that shit would sell" (*id.*, ¶ 88); Finlay and Catazaro exchanged multiple intimate images of SAB dancers (*id.*, ¶¶ 89-90); Catazaro and Finlay have a lewd exchange about creating a sex tape with a specific female NYCB dancer (*id.*, ¶ 91); Finlay shared multiple intimate images of Waterbury and another NYCB female dancer accompanied by a lewd exchange (*id.*, ¶¶ 92-95); on April 9, 2018, Finlay discussed his sexual experiences with Ramasar and a female NYCB dancer (*id.*, ¶ 96); on May 21, 2018, Ramasar and Finlay exchanged photos of an NYCB female dancer, another female dancer, and multiple photos of Waterbury, undressed and performing a sexual act (*id.*, ¶¶ 97-101); and on May 23, 2018, Finlay shared another photo of Waterbury (*id.*, ¶ 102). As a result, Waterbury has suffered permanent psychological trauma. *Id.*, ¶ 123.

Waterbury alleges that SAB and the NYCB are responsible for the aforementioned conduct of Finlay, Longhitano, Catarzaro, and Ramasar (collectively, the "individual defendants") because SAB and NYCB, "for many years," fostered a "fraternity-like" environment that "allowed, condoned, encouraged and permitted its male dancers to abuse, assault, degrade, demean, de-humanize and mistreat its female dancers and other women" and to "degrade and sexually exploit female students of SAB…." *Id.*, ¶¶ 1, 27-32, 37-39, 44-45. The SAC provides several examples of NYCB and SAB condoning this type of environment. For instance, by allegedly continuing to employ a male principal dancer after he was sent to rehab for substance abuse and domestic violence issues after law enforcement involvement. *Id.*, ¶ 47. In another instance, Finlay and other dancers allegedly had a party in Washington, D.C. that involved alcohol and drug use with underage girls, wherein Finlay and the dancers were fined over $150,000 for destruction of the hotel room. *Id.*, ¶ 51. NYCB, in response, allegedly ordered its employees and principal dancers

to restrict this type of activity to New York City where it would be easier to control, rather than suspend or discipline any of the offending employees. *Id.*, ¶ 52. Further, during an NYCB event, Longhitano's microphone was cut off during a speech because he was allegedly excessively inebriated, but NYCB continued to accept his donations and continued to permit him access to NYCB events and dancers. *Id.*, ¶ 60. The SAC further alleges that NYCB has continued to employ male dancers and directors in spite of complaints of sexual and physical abuse by female dancers. *Id.*, ¶¶ 64, 69.

Waterbury contends that these incidents and failures of the NYCB to take appropriate action not only created an environment that signaled to Finlay and other male NYCB dancers that it was acceptable to sexually degrade and dehumanize female NYCB dancers, but also violated a duty of care that it had to protect these female NYCB dancers, as well as Waterbury. Id., ¶¶ 40-42, 78, 117, 126. The SAC further alleges that SAB and NYCB so dominated one another that they were alter egos of each other, essentially functioning as a single entity, thereby causing each to be liable for the tortious acts or negligence of the other. *Id.*, ¶ 26.

On September 4, 2018, Waterbury commenced this action asserting causes of action against the NYCB and Finlay. NYSCEF Doc. No. 1. Waterbury subsequently amended her complaint twice, adding the following additional defendants: Ramasar, Catazaro, Longhitano, and SAB. *See* NYSCEF Doc. No. 77. Thereafter, Finlay, Ramasar, NYCB, SAB, Catazaro, and Longhitano (collectively, "defendants") each moved to dismiss the SAC. This decision follows.

DISCUSSION

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Under CPLR 3211(a)(7), "the pleading is to be afforded a

liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory." *Grassi & Co. v. Honka*, 180 A.D.3d 564, 564-65 (1st Dep't 2020). "[A] court may freely consider affidavits submitted by the plaintiff 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*, 84 N.Y.2d at 88 (internal citation omitted) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). While the complaint is afforded every favorable inference, "allegations consist[ing] of bare legal conclusions as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence . . . are not entitled to such consideration" and are insufficient to defeat a motion to dismiss. *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep't 1995).

As a threshold matter, it is undisputed that Waterbury was never an NYCB dancer and was never an employee of either NYCB or SAB. It is further undisputed that Waterbury was a student of SAB only until June 2016 and that she was no longer an SAB student when she first met Finlay at NYCB's annual Fall Gala in September 2016. The unconsented-to recordings and dissemination of sexually explicit photographs, videos and text messages that caused the injuries upon which this action is based, therefore, occurred after Waterbury's tenure as a student at SAB. Tr. 21:9–27:23; NYSCEF Doc. No. 86, ¶¶ 3-5.

Additionally, although the SAC describes (in mostly conclusory terms without specifics) a sexually hostile environment at NYCB and SAB for female ballet dancer/employees and students, this is not a sexual harassment action alleging violations of any federal, state or local anti-discrimination or human rights laws by SAB or NYCB. Instead, this is an action alleging specific tortious conduct in the form the unconsented-to recording and sharing of sexually explicit images

of a non-employee and non-student by certain individuals, three of whom were employed at the time by NYCB. In relation to SAB and NYCB, therefore, the question before the Court is whether these institutions can be held legally responsible for the specifically alleged actions by these individual defendants (i.e., secretly recording and then sharing sexually explicit images and videos of Waterbury), either directly by way of their own negligence, or indirectly by way of vicarious liability.

Alter Ego Liability between SAB and NYCB

The SAC asserts that SAB and NYCB so dominated one another that they are alter egos of one another, acting essentially as a single entity. Waterbury asserts, therefore, that any duty owed to her by SAB should be imputed to NYCB, and vice versa. As a result, the SAC generally treats and refers to SAB and NYCB collectively and interchangeably.

According Waterbury the benefit of every possible favorable inference, the SAC fails to meet the standard for alter ego liability. While alter ego liability requires allegations of complete dominion over a corporation, or other entity, which was used to commit a wrong against the plaintiff thereby causing injury to the plaintiff (*see, Baby Phat Holding Co. v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014)), the SAC's allegations in regards to alter ego are mostly conclusory and lacks specific factual support sufficient to form the basis for alter ego liability. *See, Bonanni v. Straight Arrow Publishers, Inc.*, 133 A.D.2d 585, 587 (1st Dep't 1987) ("The pleading cannot be maintained on bare allegations that [the alter ego's] acts were wanton and wrongful, a legal conclusion drawn from unalleged facts."). Accordingly, the Court rejects Waterbury's assertions of alter ego liability between SAB and NYCB.

Negligence against SAB and NYCB

To establish a cause of action for negligence, a plaintiff must allege a duty owed to her by a defendant, the defendant's breach of that duty, and that she suffered injury that was proximately caused by that defendant's breach. *See, Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016). "In the absence of a duty, as a matter of law, there can be no liability." *Id.* "Furthermore, the court cannot recognize a duty based entirely on the foreseeability of the harm at issue, though foreseeability defines the scope of a duty once it has been recognized." *In re New York City Asbestos Litig.*, 27 N.Y.3d 765, 788 (2016).

The SAC asserts that NYCB and SAB were under a duty *in loco parentis* to safeguard Waterbury "and other students," and maintain and operate "the premises" in a safe and proper manner so that plaintiff would not be caused to sustain personal injuries. NYSCEF Doc. No. 77, ¶ 126. Presumably, the premises referred to is the grounds of NYCB and SAB. The SAC claims that NYCB and SAB breached this duty by condoning, encouraging, and permitting its male employees and principal dancers to sexually exploit, abuse, and mistreat female dancers, including Waterbury, which created an environment at SAB and NYCB that was hostile to female dancers. The SAC further alleges that as a result of this environment, the SAB and NYCB negligently permitted the individual defendants to disseminate sexually explicit content and vulgar messages relating to Waterbury without her consent. *Id.*, ¶¶ 128-33.

"*In loco parentis* refers to a person who has fully put himself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations." *Hadden v. Kero-Sun, Inc.*, 197 AD2d 668, 669 (2d Dep't 1993) (emphasis omitted) (quoting *Rutkowski v. Wasko*, 286 A.D. 327, 331 (3d Dep't 1955)). Generally "[s]chools have a duty of care towards students because they act in loco parentis; that is, they take

the place of parents while students are in their custody, and therefore must act with the same care 'as a parent of ordinary prudence would observe in comparable circumstances.'" *Stephenson v. City of New York*, 85 A.D.3d 523, 526 (1st Dep't 2011) (quoting *Hoose v. Drumm*, 281 N.Y. 54, 57-58 (1939)), *aff'd*, 19 N.Y.3d 1031 (2012). However, "the general rule [is] that a school's duty of care does not extend beyond the school premises." *Williams v. Weatherstone*, 23 N.Y.3d 384, 401 (2014); *Sheila C. v. Povich*, 11 A.D.3d 120, 127-28 (1st Dep't 2004) (citing cases holding that a school's duty is "coextensive with and concomitant to its physical custody and control over the child" and ceases when "the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection").

Waterbury was never a student of NYCB, and at the time of the alleged tortious conduct, Waterbury was no longer a student of SAB. Further, there are no facts alleged in the SAC that support the requisite parental relationship or physical custody and control required for this legal theory. Accordingly, liability under this theory of liability fails.

The SAC also asserts that the SAB and NYCB owed Waterbury a duty of care because they "created an unsafe and dangerous condition" for all female dancers, students and others, including Waterbury, by fostering an environment at SAB and NYCB that was demeaning and degrading to women, and because the tortious conduct by the individual defendants (i.e., creating, disseminating and/or exchanging sexually explicit images of, and vulgar messages about, Waterbury) "was foreseeable and incident of employment, its agents, servants and/or employee." The SAC adds that SAB and NYCB "failed in its duty to provide a safe, proper and lawful work environment rather than a place where laws were repeatedly and routinely broken."

Although what Waterbury alleges is reprehensible, there is no caselaw cited by Waterbury that supports a finding of a common law duty of care between Waterbury and SAB and NYCB

under the circumstances described in the SAC. The creation of a dangerous condition alone does not give rise to a duty of care, and Waterbury has not identified any relationship between her and SAB or NYCB that would support such a duty. *See, Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (2001) ("[T]he class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship."); In re N.Y.C. Asbestos Litig., 5 N.Y.3d 486, 491 (2005) (rejecting duty of care based on allegation that wife of defendant's employer "was exposed to asbestos that the [employer] 'negligently permitted to leave its sites'"). In relation to the allegedly tortious conduct on which Waterbury's causes of action are based, Waterbury had no relationship with NYCB other than meeting Finlay at the 2016 NYCB Fall Gala, nor any relationship with SAB other than being a former student.[6] Moreover, "foreseeability may not be relied on to create a duty." *See, On v. BKO Express LLC*, 148 A.D.3d 50, 55 (1st Dep't 2017); *see also, Pulka v. Edelman*, 40 N.Y.2d 781, 785 (1976) ("Foreseeability should not be confused with duty."). Accordingly, the first cause of action alleging negligence against SAB and NYCB must be dismissed.

Negligent Hiring, Training, Retention, and Supervision Against NYCB and SAB

"In those instances where an employer cannot be held vicariously liable for torts committed by its employee, the employer can still be held liable under theories of negligent hiring and negligent retention" (*Sheila C.*, 11 A.D.3d at 129), as well as negligent training and negligent supervision (*see Berkowitz v. Equinox One Park Ave., Inc.*, 181 A.D.3d 436, 437 (1st Dep't 2020)). "An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused

[6] Waterbury alleges, *inter alia*, that but for NYCB and/or SAB, she would not have met Finlay at the NYCB gala, and, therefore, would not have been subsequently subjected to Finlay's tortious conduct. SAC ¶ 38. However, this is not an action alleging sexual misconduct by an NYCB employee of a guest at an NYCB sponsored event. Rather, this is an action alleging misconduct by an NYCB employee of a prior guest at an NYCB event many months and even years after such event.

the injury." *Sheila C.*, 11 A.D.3d at 129-30. Similarly, "it is settled law that a necessary element of a negligent supervision claim requires a showing that the defendant knew of the employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure." *N. X. v. Cabrini Med. Ctr.*, 280 A.D.2d 34, 42 (1st Dep't 2001), *aff'd as mod.*, 97 N.Y.2d 247 (2002). The same standard applies in negligent training cases. *See Dobroshi v. Bank of America, N.A.*, 65 A.D.3d 882, 885 (1st Dep't 2009). Moreover, "[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 163 (2d Dep't 1997).

The allegations in the SAC that SAB and the NYCB were negligent in their hiring, training, retention, and supervision of Finlay, Ramasar, Longhitano, and Catazaro are conclusory and insufficient to sustain this second cause of action. For instance, although the SAC identifies the employees involved and the alleged tortious conduct,[7] the SAC lacks specific allegations indicating how either SAB or the NYCB knew or should have known that those particular individuals had a propensity to engage in the sort of conduct that caused Waterbury's injury.[8] *See, Sheila C.*, 11 A.D.3d at 130. Additionally, the SAC does not contain any factual allegations that indicate that NYCB or SAB were on notice with respect to the sharing of explicit images of female dancers between Finlay, Ramasar, and Catazaro– the source of Waterbury's injury as alleged under

[7] Longhitano was not an employee of either the NYCB or SAB. While Finlay, Ramasar, and Catazaro were employed by the NYCB, this cause of action still fails for the reasons discussed *infra*. As none of these individuals were students or employees of SAB, this second cause of action for negligent hiring, training, retaining, and supervision is also dismissed as against SAB.

[8] The SAC states, without additional supporting facts, that the "NYCB was on notice of relevant tortious propensities" of said individuals (NYSCEF Doc. No. 77., ¶ 148) and that the NYCB and SAB "were required to avoid the employment or retention of employees who were known or should have been known to be unfit by reason of objectionable character, temperament or propensity," thereby rendering them likely to engage in the complained of behavior (*id.*, ¶ 149).

this cause of action. The affidavit submitted in opposition to the instant motions fails to cure this deficiency. *See* NYSCEF Doc. No. 153, ¶ 5 (stating in a conclusory manner that "NYCB knew or should have known that its principals were engaging in the unlawful dissemination of intimate and sexual images of women affiliated with NYCB."). However, neither the SAC nor the affidavit alleges facts from which such an inference can be made.

Even if there were facts supporting an inference of actual or constructive notice regarding a propensity by the individual defendants to share explicit images of female dancers, the negligent hiring/retention/supervision claims would still fail. A plaintiff asserting liability under this theory of negligence must not only show facts related to propensity and actual or constructive notice thereof, but must also allege conduct by an employee that is related to the duties he was hired to perform. Put another way, regardless of whether an employer knew or should have known about an employee's conduct in his personal life, the employer does not assume responsibility for an employee's personal activities that have no connection to his or her work for the employer and fall outside the scope of his or her employment. *See, Detone v. Bullit Courier Serv*., Inc., 140 A.D.2d 278, 279 (1st Dep't 1988); *see also, Claudio v. Sawyer*, No. 104877/2010, 2013 WL 5949874 (Sup. Ct. N.Y. Cty. Oct. 28, 2013), aff'd, 126 A.D.3d 616 (1st Dep't 2015). The SAC does not adequately explain how the actions of employees Finlay, Ramasar and Catazaro in relation to Waterbury were connected to their work as dancers so as to create a specific duty of care, particularly to someone who was neither an employee nor a student of either NYCB or SAB at the time. Accordingly, Waterbury's second cause of action for negligent hiring, training, retention, and supervision is dismissed as against both SAB and NYCB.[9]

[9] Although the Court finds that SAB and NYCB did not owe a specific duty of care to Waterbury in relation to the specific conduct for which Waterbury claims injury, such finding does not mean that the Court concludes that the environments at SAB and NYCB for its employees, students and others are not as described by Waterbury in her SAC. Accordingly, these institutions may wish to consider engaging in, or enhancing, best practices, including training,

Negligence Against the Individual Defendants

Waterbury's third cause of action for negligence against Longhitano and fifth cause of action for negligence against Ramasar and Catazaro both assert identical allegations. The SAC alleges that Longhitano, Ramasar, and Catazaro, each owed Waterbury and other female NYCB dancers a duty not to condone, encourage, or incite the male NYCB dancers to degrade, demean, sexually assault, or abuse and batter women, including, but not limited to, the taking, sending, sharing, and disseminating of explicit images and videos of Waterbury and other female NYCB dancers. NYSCEF Doc. No. 77, ¶¶ 158, 176. According to the SAC, Longhitano, Ramasar, and Catazaro each breached their duty to Waterbury and other female NYCB dancers by condoning, encouraging, inciting, and instigating Finlay to share said images of Waterbury and other female NYCB dancers and by sharing and exchanging explicit images with Finlay and other male dancers. *Id.*, ¶¶ 158, 160, 176, 178.

Waterbury's fourth cause of action for negligence against Finlay alleges that Finlay owed Waterbury a duty, given their romantic and intimate relationship, not to take and share explicit images of her and other female NYCB dancers without their respective consent. *Id.*, ¶ 166. Waterbury alleges that Finlay breached that duty by taking and sharing explicit images of her and other female NYCB dancers without their consent. *Id.*, ¶¶ 166, 170.

The SAC asserts that as a result of Finlay, Ramasar, Longhitano, and Catazaro's negligence, Waterbury has sustained serious and severe psychological and emotional distress, mental anguish, embarrassment, and humiliation. *Id.*, ¶¶ 161, 171, 179.

The SAC fails to allege any facts that support the existence of a duty that Finlay, Longhitano, Ramasar, or Catazaro, individually owed to Waterbury. The allegations in the SAC

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policies and procedures designed to mitigate the possibility of such behavior, to the extent they have not already done so since the commencement of this action.

state in a conclusory fashion that Longhitano, Ramasar, and Catazaro owed Waterbury a duty not to condone, encourage, or incite the male NYCB dancers to treat female NYCB dancers inappropriately, but does not identify the source of that duty. Similarly, the SAC does not identify the source of Finlay's duty to Waterbury and there is no authority cited that would impose a duty on Finlay as a result of his romantic involvement with Waterbury. No other relationship between Finlay and Waterbury is alleged that would create a duty capable of sustaining her cause of action for negligence. It is well established that "[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000). Furthermore, in order to sustain a claim for negligence, the SAC must allege a specific duty Finlay, Longhitano, Ramasar, and Catazaro owed to Waterbury, and not a general duty owed to all female NYCB dancers.[10] *Id.* ("Time and again we have required 'that the equation be balanced; that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him.'" (quoting *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 527 (1984)).

Moreover, the SAC's allegations fail to connect Longhitano, Ramasar, and Catazaro to the injury suffered by Waterbury because they were the recipients of the explicit content, but not the sender. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 240 (2001) ("[A] plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury.").

Thus, the third, fourth, and fifth causes of action for negligence are dismissed as against Longhitano, Finlay, Ramasar, and Catazaro, respectively.

[10] The Court does not consider the negligence claims alleged against the individual defendants with respect to duties owed to other NYCB female dancers as such claims are improperly pled and not before the Court in this action.

Assault and Battery Against Finlay, Ramasar, and NYCB

Waterbury's sixth, eighth, and tenth causes of action, which assert a claim of assault against Finlay, Ramasar, and NYCB, respectively, are dismissed for Waterbury's failure to allege that Finlay's, Ramasar's, or NYCB's actions constituted "physical conduct placing [her in the required] imminent apprehension of harmful contact" necessary to sustain a cause of action for assault. *Holtz v. Wildenstein & Co.*, 261 A.D.2d 336, 336 (1st Dep't 1999).

Waterbury's seventh, ninth and eleventh causes of action for battery against Finlay, Ramasar, and NYCB, respectively, are also dismissed on the basis that Waterbury fails to allege the requisite element of intentional physical contact without her consent. *Hughes v Farrey*, 30 A.D.3d 244, 247 (1st Dep't 2006) ("[T]o establish a civil battery a plaintiff need only prove intentional physical contact by defendant without plaintiff's consent; the injury may be unintended, accidental or unforeseen."), quoting *Tower Ins. Co. of N.Y. v. Old N. Blvd. Rest. Corp.*, 245 A.D.2d 241, 242 (1st Dep't 1997). Finlay's alleged unconsented-to photographing, recording and sharing intimate sexual images of Waterbury does not involve bodily contact as required for a cause of action for battery.[11] *Id.* Additionally, with regard to NYCB, even if Waterbury's assault and battery claims were viable as against former employees Finlay and Ramasar, an employer is not vicariously liable for intentional torts committed by employees for personal reasons outside the scope of their employment. *See, Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932 (1999).

[11] Waterbury also asserts that the sexual activity with Finlay constitutes the requisite unconsented-to bodily contact in that "[h]ad [she] . . . known she was being recorded, she would not have consented to the sexual activity . . ." SAC ¶¶ 224, 250. However, this assertion also fails as a matter of law as it is undisputed that she consented to such activity at the time it occurred (Id. ¶ 4).

As the underlying assault and battery causes of action have been dismissed, the seventeenth and eighteenth causes of action against NYCB for aiding and abetting assault and battery, respectively, are also dismissed. *See, McKiernan v. Vaccaro*, 168 A.D.3d 827, 830 (2d Dep't 2019)

Violations of NYCAC 10-180

The SAC's twelfth and thirteenth causes of action allege that Finlay and NYCB committed violations of NYCAC 10-180, respectively. NYSCEF Doc. No. 77, ¶¶ 261-82. More specifically, plaintiff alleges that Finlay and the NYCB violated NYCAC 10-180(b)(1). *Id.* The SAC's fourteenth cause of action alleges that NYCB aided and abetted Finlay's violation of NYCAC 10-180. NYSCEF Doc. No. 77, ¶¶ 283-91.

NYCAC 10-180, entitled "Unlawful disclosure of an intimate image," provides, in relevant part, as follows:

> It is unlawful for a covered recipient to disclose an intimate image, without the depicted individual's consent, with the intent to cause economic, physical or substantial emotional harm to such depicted individual, where such depicted individual is or would be identifiable to another individual either from the intimate image or from the circumstances under which such image is disclosed.

NYCAC 10-180(b)(1). A "covered recipient" is defined as "an individual who gains possession of, or access to, an intimate image from a depicted individual, including through the recording of the intimate image." *Id.*, § 10-180(a). The term "depicted individual" is defined as

> an individual depicted in a photograph, film, videotape, recording or any other reproduction of an image that portrays such individual (i) with fully or partially exposed intimate body parts, (ii) with another individual whose intimate body parts are exposed, as recorded immediately before or after the occurrence of sexual activity between those individuals, or (iii) engaged in sexual activity.

Id.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should … give effect to the plain meaning of the words used." *Desrosiers v. Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 500

(2017) (alteration in original) (quoting *Patrolmen's Benevolent Ass'n v. City of New York*, 41 N.Y.2d 205, 208 (1976)); *see Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) ("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof."); *Litwin v. Hammond Hanlon Camp, LLC*, 65 Misc. 3d 1202(A), *2 (Sup. Ct. N.Y. County 2019) (Kahn III, J.) ("In construing a legislative edict, when presented with clear and uncontradictory language, the legislative intent is presumed to be expressed in those words and the court is compelled to apply the law in accordance with the letter of the statute.").

Finlay, as the creator of the explicit content, is a covered recipient as he gained possession of and had access to an intimate image of Waterbury, the depicted individual, through the recording of the intimate image itself. *See id.*[12] Furthermore, it is undisputed that Waterbury did not consent to the distribution of her image and that she is identifiable in at least some of the images. *See* NYSCEF Doc. No. 77, ¶¶ 87, 94, 113, 114. Moreover, Finlay was the chief distributor of the images and it is sufficiently alleged from the context in which the images were distributed and the text messages that accompany the images that Waterbury's discovery of same would cause her emotional harm. *Id.*, ¶¶ 87, 103-05, 123. Based on the unambiguous language of NYCAC 10-180(b)(1), each element of the claim is sufficiently alleged in the

[12] Finlay urges that the holding in *Litwin v. Hammond Hanlon Camp, LLC*, 65 Misc. 3d 1202(A), *2-3 (Sup. Ct. N.Y. County 2019) requires dismissal as against him because he had not received the intimate images from the depicted person herself and, therefore, was not a "covered recipient." The Court disagrees. The issue decided by the Court in *Litwin* was whether a defendant who received intimate images indirectly from a depicted person through a covered recipient then became a covered recipient when he re-sent those images. The Court found he was not a covered recipient under those circumstances. However, in the case at bar, Finlay was the creator of the intimate image and thus, he is a covered recipient under NYCAC 10-180(a) on that basis, not by virtue of having received it directly or indirectly from the depicted person.

SAC as against Finlay.[13] Accordingly, Waterbury's twelfth cause of action for violating NYCAC 10-180 survives Finlay's motion to dismiss.[14]

NYCB, on the other hand, is not a covered recipient, as defined under the statute, as the SAC does not allege that NYCB ever created, received, or disclosed the intimate content of Waterbury. Furthermore, NYCAC 10-180 imposes liability only on a covered recipient and does not set forth aiding and abetting liability violations of the statute. *See* NYCAC § 10-180. Thus, the thirteenth and fourteenth causes of action against NYCB are dismissed.

Negligent and Intentional Infliction of Emotional Distress Against NYCB and Finlay

The SAC's fifteenth cause of action asserts a claim for negligent infliction of emotional distress against the NYCB and Finlay and the sixteenth cause of action asserts a claim for intentional infliction of emotional distress against the NYCB and Finlay.

A cause of action for negligent infliction of emotional distress "must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical

[13] This Court acknowledges that its findings with respect to Waterbury's claim against Finlay appears to be at odds with certain portions of the Legislative history of NYCAC 10-180. The Legislative history of NYCAC 10-180 indicates that "this prohibition is intended to apply to intimate images *taken with the knowledge and consent of the parties depicted therein*, as the Penal Law already addresses intimate images taken without a person's knowledge or consent." (emphasis added). New York City Council, Committee on Public Safety, Report of the Governmental Affairs Division on Proposed Int. No. 1267-A, Nov. 15, 2017, at 10 ("Committee Report"), *available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2834718&GUID=EF014C38-03AA-45C7-A7DE-A35F54F4EA61. However, "[w]here, as here, the language is unambiguous, and the result not absurd, [there is] no reason to depart from the legislative text." *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 103 n.1 (1997). The legislature could have included this limiting language, but it did not. The only language related to consent (or lack thereof) concerns the dissemination of the images, not the taking of such images.

[14] The Court notes that Finlay's conduct, as alleged, might also violate the New York Civil Rights Law ("NYCRL") Section 52-b, which provides that

> [a]ny person depicted in a still or video image, regardless of whether or not the original . . . image was consensually obtained, shall have a cause of action against an individual who, for the purpose of harassing, annoying or alarming such person, disseminated . . . such still or video image, where such image : . . . depicts (i) an unclothed or exposed intimate part of such person; or (ii) such person engaging in sexual conduct.

NYCRL § 52-b(1)(b)(i)-(ii). However, this legislation was passed in July 2019 after Waterbury had commenced the instant lawsuit and three months after the SAC was filed in May 2019, in accordance with Gov. Andrew M. Cuomo's Women's Justice Agenda.

safety, or causes the plaintiff to fear for his or her own safety." *Sheila C.*, 11 A.D.3d at 130. The SAC fails to allege that Waterbury's physical safety was unreasonably endangered or that she feared for her own safety in relation to the conduct upon which the claim is based. As such, Waterbury's fifteenth cause of action for negligent infliction of emotional distress against the NYCB and Finlay is dismissed.

A cause of action for intentional infliction of emotional distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 122.

At the outset, the Court finds unavailing defendants' argument that Waterbury's IIED claim fails because Waterbury did not sufficiently allege extreme emotional distress as unavailing. Waterbury has sufficiently pled severe emotional distress and the caselaw cited by defendants that require additional demonstration of emotional distress are in the context of summary judgment and inapplicable here. *See, e.g., Leviston v. Jackson*, 43 Misc. 3d 229, 237-38 (Sup. Ct. N.Y. County 2013) (Wooten, J.) (finding in the context of summary judgment that "[t]he case at bar does not fall within the narrow line of cases where a plaintiff need not submit medical evidence to support her injuries where the claim is inherently genuine for purely emotional harm.").

Although Waterbury may have sufficiently pled severe emotional distress, the SAC does not appear to have sufficiently plead the requisite extreme and outrageous conduct required to sustain a cause of action for intentional infliction of emotional distress, which typically

necessitates "allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v. Bayer*, 272 A.D.2d 263, 264-65 (1st Dep't 2000); *see also, Shannon v. MTA Metro-N. R.R.*, 269 A.D.2d 218, 219 (1st Dep't 2000) (holding that the plaintiff's detailed allegations that "defendants intentionally and maliciously engaged in a pattern of harassment, intimidation, humiliation and abuse, causing [plaintiff] unjustified demotions, suspensions, lost pay and psychological and emotional harm over a period of years, were sufficient to support the cause of action for intentional infliction of emotional distress"); *Warner v. Druckier*, 266 A.D.2d 2, 3 (1st Dep't 1999) ("[P]laintiff's allegations, that defendants, through various specified acts, deliberately, systematically and maliciously harassed him over a period of years so as to injure him in his capacity as a tenant, properly stated a cause of action for intentional infliction of emotional distress."). Finlay's actions, as alleged, in secretly recording and then disclosing intimate images of Waterbury without her knowledge or consent, are deplorable. However, they do not represent the systematic and malicious pattern of harassment required under New York Law for common law intentional infliction of emotional distress. Accordingly, Waterbury's sixteenth cause of action for intentional infliction of emotional distress as against the NYCB and Finlay is dismissed.

Invasion of Privacy Against Finlay and Aiding and Abetting Invasion of Privacy against NYCB

Waterbury's nineteenth cause of action alleges that Finlay invaded her privacy by sharing intimate images and recordings of her, without her consent, to their close friends, peers, and others at NYCB for advertising, publicity, monetary, and/or trade purposes. NYSCEF Doc. No. 77, ¶¶ 323-31. New York State only recognizes a cause of action for invasion of privacy to the extent it falls within New York Civil Rights Law (NYCRL) Sections 50 and 51. *See, e.g., Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 383 (1984). "The statute protects against the appropriation of a

plaintiff's name or likeness for [a] defendant['s] benefit[,] creat[ing] a cause of action in favor of '[a]ny person whose name, portrait or picture is used within this state *for advertising purposes or for the purposes of trade* without [the plaintiff's] written consent.'" (emphasis added) *Id.* (fifth alteration in original) (quoting NYCRL § 50); *see also Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140 (1985) ("[W]e took cognizance of the limited scope of the statute as granting protection only to the extent of affording a remedy for commercial exploitation of an individual's name, portrait or picture, without written consent."). NYCRL Section 51 discusses the procedural aspect of maintaining an action for an injunction and for damages for a violation of NYCRL Section 50.

"In order to establish liability under New York Civil Rights Law, [a] plaintiff must demonstrate each of four elements: (i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the state of New York, (iii) for purposes of advertising or trade, (iv) without plaintiff's written consent." *Molina v. Phoenix Sound Inc.*, 297 A.D.2d 595, 597 (1st Dep't 2002). In regards to the NYCRL claims, the SAC relies upon Finlay's statement: "I'm trying to get a sex tape with [Waterbury] cause I know that shit would sell" (NYSCEF Doc. No. 77, ¶ 88). This statement, by itself, is insufficient to support a cause of action for invasion of privacy under NYCRL Sections 50 and 51 because it only evidences an intent to obtain a recording of Waterbury that he would later profit from, and not a current use or publication of Waterbury's likeness. Accordingly, the nineteenth cause of action for invasion of privacy against Finlay is dismissed.

As the underlying claim of invasion of privacy against Finlay is dismissed, so too is the twentieth cause of action against the NYCB for aiding and abetting Finlay's alleged invasion of privacy. *See, Mascola v. City Univ. of N.Y.*, 14 A.D.3d 409, 410 (1st Dep't 2005) ("As the claims against the [defendant] university were properly dismissed, the court also properly dismissed the claims against the individual defendants for aiding and abetting.").

Based upon the foregoing, it is hereby

ORDERED that Motion Sequence No. 005 containing defendant Chase Finlay's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the SAC as against him is granted in part to the extent of dismissing the fourth, sixth, seventh, fifteenth, sixteenth, and nineteenth causes of action, and is denied in all other respects; and it is further

ORDERED that Motion Sequence No. 006 containing defendant Amar Ramasar's motion, pursuant to CPLR 3211(a)(7), to dismiss the SAC as against him is granted in its entirety; and it is further

ORDERED that Motion Sequence No. 007 containing defendant NYCB's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the SAC as against it is granted in its entirety; and it is further

ORDERED that Motion Sequence No. 008 containing defendant SAB's motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the SAC as against it is granted in part to the extent of dismissing the second amended complaint as against SAB and is denied in all other respects; and it is further

ORDERED that Motion Sequence No. 009 containing defendant Zach Catazaro's motion, pursuant to CPLR 3211(a)(7), to dismiss the SAC as against him is granted to the extent of dismissing the second amended complaint as against him and is denied in all other respects; and it is further

ORDERED that Motion Sequence No. 010 containing defendant Jared Longhitano's motion, pursuant to CPLR 3211(a)(7), to dismiss the SAC as against him is granted in its entirety.

This constitutes the decision and order of this Court.

9/25/2020
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE