

S.T. v Jewish Bd. of Family & Children's Servs., Inc.
2022 NY Slip Op 33248(U)
September 21, 2022
Supreme Court, New York County
Docket Number: Index No. 950202/2019
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

INDEX NO. 950202/2019
MOTION DATE 01/11/2021
MOTION SEQ. NO. 002

S. T.,

Plaintiff,

- v -

JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, INC., THE CEDAR KNOLLS FOUNDATION, INC., NELSON DOE

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS

Upon the foregoing documents, defendants Jewish Board of Family and Children's Services, Inc. and The Cedar Knolls Foundation, Inc. (Foundation) (collectively defendants or movants) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint. Plaintiff cross moves for leave to amend the complaint and add a defendant.

A motion to dismiss a complaint based upon documentary evidence pursuant to CPLR 3211 (a) (1) "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]). Plaintiff's complaint alleges that he was sexually abused by Nelson "Doe" while attending defendants' boarding school from 1980-1982. Here, the movants submit evidence that the Foundation defendant was not in existence until 2007 (see NYSCEF Doc No 33). Accordingly, that branch of the motion to dismiss the complaint insofar as asserted against the Foundation is granted.

In determining dismissal under CPLR Rule 3211 (a) (7), the “complaint is to be afforded a liberal construction” (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The “allegations are presumed to be true and accorded every favorable inference” (Godfrey v Spano, 13 NY3d 358, 373 [2009]). “[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Additionally, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

To state a claim for negligent retention, supervision, or training under New York law, a plaintiff must plead, in addition to the elements required for a claim of negligence:¹ (1) the existence of an employee-employer relationship; (2) “that the employer knew or should have known of the employee's propensity for the conduct which caused the injury” (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997]); and (3) “a nexus or connection between the defendant's negligence in [hiring, retaining, supervising, or training] the offending employee and the plaintiff's injuries” (Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]). “There is no statutory requirement” that such cause of action “be pleaded with specificity” (Kenneth R., 229 AD2d at 161).

¹ To state a negligence claim, “a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (Solomon v City of New York, 66 NY2d 1026, 1027 [1985]).

Although movants contest only the second element, at this juncture, the Court finds that plaintiff's complaint sufficiently states each of the elements. Discovery from defendants is likely to shed light on this issue and others.

As to the claim based on *respondeat superior*, it is well-settled that a sexual abuse is not in furtherance of the defendants' business and cannot be considered as being within the scope of employment (see N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251-52 [2002]). Therefore, the branch of the motion to dismiss the third cause of action insofar as asserted against the movants is granted.

"Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017]). Defendants do not oppose the amendment to add a defendant. Accordingly, the cross-motion is granted.

It is hereby ORDERED that the branch of the motion to dismiss the third cause of action insofar as asserted against the movants is granted; and it is further

ORDERED that the branch of the motion to dismiss the complaint in its entirety as against defendant THE CEDAR KNOLLS FOUNDATION, INC. is granted with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that plaintiff’s cross-motion for leave to serve a second amended verified complaint in the form annexed to the moving papers (NYSCEF Doc No 46) is granted; and it is further

ORDERED that plaintiff shall separately file a supplemental summons and the second amended verified complaint in the form annexed to the moving papers on NYSCEF within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that service of the supplemental summons and second amended verified complaint shall be deemed served upon all parties that have appeared in this action upon the filing of the same documents onto NYSCEF; and it is further

ORDERED that the supplemental summons and second amended verified complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional/new party in this action within 30 days after such documents are filed onto NYSCEF; and it is further

ORDERED that the action shall bear the following caption:

S.T.,	INDEX No.: 950202/2019
Plaintiff,	
-against-	
JEWISH BOARD OF FAMILY AND CHILDREN’S SERVICES, INC.; HAWTHORNE CEDAR KNOLLS UNION FREE SCHOOL DISTRICT; and NELSON “DOE” (the last name being fictitious),	
Defendants.	

And it is further


ORDERED that counsel for the plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the

change in the caption herein (the deletion of one defendant and addition of another); and it is further

ORDERED that service of this order upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J);² and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days from entry of this order.

This constitutes the decision and order of the Court.

9/21/2022 DATE				
	ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			

² The *Protocol* is accessible at the “E-Filing” page on the court’s website: www.nycourts.gov/supctmanh.