Q.G. v City of New York
2022 NY Slip Op 33426(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 950104/2020
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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Q. G.,

Plaintiff,

- v -

CITY OF NEW YORK, SPENCE-CHAPIN SERVICES TO CHILDREN AND FAMILIES F/K/A SPENCE-CHAPIN ADOPTION SERVICES, DOES 1-10

Defendant.

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INDEX NO. 950104/2020

MOTION DATE 01/18/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendant, The City of New York's motion to dismiss is as follows:

Plaintiff commenced the instant Child Victims Act action by e-filing a summons and complaint on May 27, 2020, alleging that when plaintiff was a minor she "was sexually assaulted and abused on multiple occasions while in the legal custody and care of the City of New York via the New York City Administration for Children and Family Services. Specifically, Plaintiff was sexually assaulted and abused in a foster home operated, maintained, controlled and/or funded by Spence-Chapin, Services to Children and Families" ("Spence-Chapin"). As relevant to the instant motion, plaintiff alleges that the City of New York ("City") through its Administration for Children's Services ("ACS") "had a non-delegable duty to use reasonable care in the investigation, licensing, supervision and/or monitoring of foster care facilities, homes and/or families with whom it placed foster children, and to develop or implement programs, guidelines, procedures and/or training to prevent the abuse of foster children placed within foster care facilities, homes and/or

families" and breached said duty and is vicariously liable for acts and omissions of the private non-profit organizations with which it through ACS contracted to provide foster care services. Specifically, plaintiff alleges that she was placed in foster care by the City through its contractor, Spence-Chapin from age four to eleven covering the years 1969 to 1976. During that time period plaintiff alleges she was sexually assaulted by three separate individuals while assigned to two foster homes. Arising from same, plaintiff pleads one count of negligence against the City (as well as one against Spence-Chapin and one against Does 1-10).

Defendant, City now moves to dismiss the instant action as asserted against it pursuant to CPLR 3211(a)(7). "On a motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7), we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141-142 [2017] [internal citations omitted]).

In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), a court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp*., 104 AD3d 401 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action

is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (see *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see CPLR §3026; *Siegmund Strauss, Inc*., 104 AD3d 401, supra). In deciding such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 'the benefit of every possible favorable inference,'" and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc*., 104 AD3d 401, supra; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp*., 257 AD2d 76, 81 [1st Dept 1999], aff'd 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], lv denied 89 NY2d 802 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Leon*, 84 NY2d at 88, supra; *Ark Bryant Park Corp. v Bryant Park Restoration Corp*., 285 AD2d 143, 150 [1st Dept 2001]; "In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally

construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (see *Leon*, 84 NY2d at 87-88, supra; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Plaintiff initially objects to the instant motion on procedural grounds arguing that pursuant to CPLR 3211(a)(7), "A motion to dismiss pursuant to this Rule may be made 'at any time before service of the responsive pleading is required,'" apparently ignoring the following sentence which states "A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted." Thus this argument fails.

The City seeks dismissal of this action as asserted against it based upon plaintiff's failure to plead a "special duty." As discussed in *Applewhite v. Accuhealth, Inc*., 21 N.Y.3d 420, 425 (1st Dept. 2013),

> When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties (see *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 446-447 [2011], cert denied sub nom. *Ruiz v Port Auth. of New York & New Jersey*, 568 US —, 133 S Ct 133 [2012]). A government entity performs a purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises" (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999] [internal quotation marks omitted]). In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are "undertaken for the protection and safety of the public pursuant to the general police powers"

As discussed *supra*, plaintiff contends that the City "had a non-delegable duty to use reasonable care in the investigation, licensing, supervision and/or monitoring of foster care facilities, homes and/or families with whom it placed foster children, and to develop or implement

programs, guidelines, procedures and/or training to prevent the abuse of foster children placed within foster care facilities, homes and/or families." As such, the issue is whether the City manages its Foster Care agencies in a governmental or proprietary capacity. Plaintiff contends that based upon *Sean M. v. City of New York*, 20 A.D.3d 146 (1st Dep't 2005) ("liability may be imposed upon a state or its subdivisions for injuries sustained by children due to negligent oversight of the foster homes that care for them."); *Phillips v. City of New York*, 453 F. Supp. 2d 690 (S.D.N.Y. 2006) (rejecting argument that Soc. Servs. Law § 419 confers qualified immunity on municipality for negligent supervision of child in foster care, and noting that the defendants "underestimate the strength of the analysis in Sean M."); *Merice v. County of Westchester*, 305 A.D.2d 383, 383 (2d Dep't 2002) ("[i]t is well settled that a claim of qualified immunity cannot be raised to bar inquiry into an agency or county's alleged negligent supervision of children in foster care"), that a custodial relationship is undertaken by the municipality when the child is placed in foster care. However, all of those cases have been overruled by *McLean v City of New York*, 12 N.Y.3d 194, 203 (2009).

Said foster care cases having been overruled, the analysis of this case is functionally identical to the Court of Claims' analysis in *J.J. v. State of New York*, 73 Misc.3d 1003 (2021). In that action, plaintiff sought to recover against the State of New York based upon alleged sexual misconduct perpetrated against him at McQuade Foundation Boarding School, an approved residential school for children with special needs or in need of supervision, overseen by the State of New York as set forth in Executive Law article 19-G. Here, the relevant statutory scheme is article 6 of the Social Services Law, relating to the placement of children in foster care, but the analysis is unchanged.

As the instant claim is premised on the manner in which the City oversaw the activities of Spence-Chapin, the inescapable conclusion is that the City was engaged in a government function, that of oversight of foster care agencies, and as such, plaintiff must plead a special duty. As discussed in *Applewhite*, 21 N.Y.3d at 426, "[A] special duty can arise in three situations: (1) the [claimant] belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the [government entity] took positive control of a known and dangerous safety condition" Here, there is no allegation that the second or third methods are applicable and as such, the sole applicable method to establish a "special duty" is the breach of a statutory duty, which itself requires that "the governing statute must authorize a private right of action. One may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme (see *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633 [1989]). If one of these prerequisites is lacking, the claim will fail." *McLean v. City of New York*, 12 N.Y.3d 194, 200, (2009), *citing*, *Pelaez v. Seide* 2 N.Y.3d 186 (2004).

McLean continues:

> We addressed a similar issue in *Mark G. v. Sabol*, 93 N.Y.2d 710, 695 N.Y.S.2d 730, 717 N.E.2d 1067 (1999). The plaintiffs there, children alleging that they had suffered abuse or neglect in the foster homes where they had been placed by New York City child welfare officials, sought recovery from the City, relying on provisions of the Social Services Law designed to protect foster children and to prevent child abuse generally. Emphasizing the detailed, comprehensive nature of the statutes the plaintiffs relied on, we rejected their claim that those statutes implied a private right of action. "[I]t would be inappropriate," we said, "for us to find another enforcement mechanism beyond the statute's already 'comprehensive' scheme.... Considering that the statute gives no

> hint of any private enforcement remedy for money damages, we will not impute one to the lawmakers" (93 N.Y.2d at 720–721, 695 N.Y.S.2d 730, 717 N.E.2d 1067).

J.J. also raises this argument holding that:

> Decisions involving the supervision of children in foster care decided after *McLean* follow that decision in determining the parameters of governmental liability in this area (see e.g. *Rivera v City of New York*, 82 AD3d 647, 648 [1st Dept 2011]; *Albino v New York City Hous. Auth.*, 78 AD3d 485, 487-492 [1st Dept 2010]; *Kochanski v City of New York*, 76 AD3d 1050, 1051-1052 [2d Dept 2010]; see also *Avila v State of New York*, 39 Misc 3d 1064 [Ct Cl 2013] [recognizing Sean M. to be implicitly overruled by the Court of Appeals decision in McLean]). Thus, contrary to claimant's contention, he must establish a special duty. Although claimant appears to advance a statutory duty, he fails to demonstrate a private right of action. Notably, the statutory scheme for foster care placement and supervision upon which claimant relies is no different than article 19-G of the Executive Law relating to juvenile detention centers in that both do not create nor imply a private right of action (see Social Services Law art 6; *Mark G. v Sabol*, 93 NY2d 710, 718-722 [1999]; *Albino*, 78 AD3d at 488-489).

This Court, using the same analysis of *McLean*, is left with no choice but to reach the same conclusion. A special duty does not exist herein.

The Court is also cognizant of the core principal behind the enactment of the CVA which removed statue of limitation and notice of claims provisions, however the CVA did not occur in a vacuum and the other fundamental rules of law still must be followed. Issues such as "special duty", notice and discovery issues just to name a few. While the Court is certainly sympathetic to plaintiff's plight the established rules of law including those of special duty must be preserved. Accordingly, it is hereby

ORDERED that defendant, The City of New York's motion is GRANTED in its entirety and the complaint is dismissed in its entirety as against said defendant, 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 counsel for the moving party 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; and it is further

ORDERED that such service 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 (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

10/4/22
DATE

LAURENCE L. LOVE, J.S.C.

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