

SHORT FORM ORDER

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

Present:

Hon. Thomas Feinman
Justice

JACQUES G. SIMON AND SHERYL L. SIMON
AS LEGAL GUARDIANS OF RACHEL SIMON
AND IN THEIR RESPECTIVE INDIVIDUAL
CAPACITIES,

Plaintiffs,

- against -

BELLMORE-MERRICK CENTRAL HIGH SCHOOL
DISTRICT, JOHN DE THOMASSO IN HIS
OFFICIAL CAPACITY AS SUPERINTENDENT OF
SCHOOLS, MEADOR PRATT IN HIS OFFICIAL
CAPACITY AS PRINCIPAL OF MERRICK AVENUE
MIDDLE SCHOOL,

Defendants.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 13901/13

MOTION SUBMISSION
DATE: 3/14/14

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Memorandum of Law in Support of Motion.....	<u>X</u>
Affirmation in Opposition.....	<u>X</u>
Memorandum of Law in Support of Opposition.....	<u>X</u>
Reply Affirmation.....	<u>X</u>

RELIEF REQUESTED

The defendants, the Bellmore-Merrick Central High School District, (hereinafter referred to as the "District"), John De Thomasso in his official capacity as Superintendent of Schools, (hereinafter referred to as "De Thomasso"), Meador Pratt in his official capacity as Principal of Merrick Avenue Middle School, (hereinafter referred to as 'Pratt'), move for an order pursuant to CPLR §3211(a)(7) and §3211(c), and General Municipal Law §50-h and §50-e, dismissing plaintiffs' complaint and/or granting summary judgment to all defendants. The defendants submit a Memorandum of Law in support of the motion. The plaintiffs, Jacques G. Simon and Sheryl L. Simon, (hereinafter referred to as the minor plaintiff's parent(s)), as legal guardians of Rachel Simon, (hereinafter referred to as "minor plaintiff"), submit opposition and a Memorandum of Law in support of the plaintiffs' opposition. The defendants submit a reply affirmation.

The defendants claim that plaintiffs' complaint must be dismissed for failure to state a cause of action, CPLR §3211(a)(7), request that the motion be treated as one for summary judgment pursuant to CPLR §3211(c), and move to dismiss plaintiffs' complaint upon the grounds that the infant plaintiff's father, who testified at the municipal hearing, refused to produce the infant plaintiff for the municipal hearing. (General Municipal Law §50-h).

At the outset, those branches of the defendants' motion seeking dismissal of plaintiffs' causes of action as and against the individual defendants, De Thomasso, and Pratt, and dismissal of plaintiffs' claim for punitive damages are unopposed and granted. Therefore, plaintiffs' action as and against the defendants, De Thomasso and Pratt, are dismissed and plaintiffs' claim for punitive damages is dismissed.

BACKGROUND

The plaintiffs, by way of summons and complaint, allege causes of action against the District, Pratt, the principal of Merrick Avenue Middle School, (hereinafter referred to as "MAM"), and De Thomasso, the Superintendent, sounding in negligence, defamation of character, violation of state and federal civil rights, willful, malicious and intentional conduct including harassment, bullying and cyber bullying perpetrated by the members of the District's student body upon the minor plaintiff, and punitive damages.

The complaint identifies two MAM minor students who allegedly conspired to circulate an anonymous lewd video depicting an anonymous female engaged in a lewd act and falsely represented to the school body that the female was the minor plaintiff. The complaint provides that the two MAM students' parents and natural guardians are part of a separate action commenced by the plaintiffs to recover damages as a result of their alleged lack of supervision of their minor child entrusted with dangerous instrumentalities. The plaintiffs allege that the two MAM minor students made representations that were knowingly false, reckless, malicious with intent to defame and harm the minor plaintiff's reputation, alleging that the acts took place on and off school premises. The plaintiffs provide that they learned of the circulation of such video on or about April 29, 2013, informed the defendants, and learned the acts took place from April 1, 2013 through April 29, 2013. The allegations include that plaintiffs learned that the District was aware that such a video was circulating approximately six months prior to April 29, 2013, that one of the two MAM minor students was previously accused of being the individual in the lewd act, and in an effort to deflect the attention and spotlight shed on such minor, the two MAM minor students conspired and maliciously and falsely ascribed the identity of the individual in the lewd video as being the minor plaintiff.

The plaintiffs allege that by way of letter dated April 30, 2013, the plaintiffs notified the District of the District's own documented history of bullying on the minor plaintiff to the point where the minor plaintiff's life was threatened to be terminated by a member of the District's student body whereby the minor plaintiff, by emergency transfer, was transferred from the Birch School of Merrick Union Free School District to the Lakeside School at the end of the 2010-2011 academic year. The plaintiffs, by way of such letter, notified the District of the particulars of the bullying acts upon the minor plaintiff by the two MAM minor students and requested the District to take action. A second letter was forwarded by the plaintiffs to the District on May 1, 2013 providing the District with further details concerning the matter further requesting the District to take action to prevent further defamation, bullying, cyber bullying and violation of the minor plaintiff's civil rights.

The plaintiffs allege that the acts which were complained of were perpetrated by MAM's minor students while on school property and while in school, which affected the minor plaintiff's studies. The plaintiffs claim that the District failed to act or respond to the April 29, 2013 incident, failed to discharge its duties imposed by Education Law Secs. 10-18, and attempted to divest its duties to act in accordance with the mandates of Education Law by sharing the results of its investigation with the Nassau County Police Department only and failed to take any action to prevent further incidents. Thereafter, on or about May 6, 2013, plaintiffs learned that the same two MAM minor students continued to discuss the prospect that the individual in the lewd video was the minor plaintiff during school hours, that the plaintiffs continued to advise the District accordingly, and again the District divested its duties. Thereafter, on or about June 29, 2013 a third MAM minor student posted a comment on you tube "this is [minor plaintiff] so everyone knows!!!! she used to live in Merrick. to tell the truth nobody liked her and everyone was happy when her family had to move. We all [k]new she was going to grow up and be nothing and guess whats happening so far nothing!!!" The plaintiffs allege that the June 29, 2013 incident was the proximate result of the District's failure to exercise its statutory duties mandated by Education Law Secs. 10-18 to prevent the continued harassment, bullying, cyber bullying, defamation and violation of civil rights. The plaintiffs claim that the continued circulation of the lewd video, a video the District had actual notice of six months prior to the April 29, 2013 incident to the minor plaintiff, was foreseeable, that the District failed to contain it, and its continued failure to discharge its duties pursuant to Education Law Secs. 10-18 allowed and caused the continued circulation of the lewd video within the circles of the District's student body.

The minor plaintiff's father testified at the municipal hearing that a student contacted the minor plaintiff, who was apparently on a break during school hours at Green Vale School, that there was a lewd video circulating by MAM students who were claiming that the perpetrator was the minor plaintiff, whereby the minor plaintiff was physically shaking, was unable to focus on school, and had to defer her test taking. The minor plaintiff's father submits that neither he, his wife or the minor plaintiff saw the lewd video. The minor plaintiff's mother testified at the municipal hearing that she learned that the female in the video was not identifiable, and did not see the video as it was eventually "taken down."

NEW YORK STATE DIGNITY FOR ALL STUDENTS ACT

The Dignity for All Students Act, ("DASA"), was signed into law on September 13, 2010, effective July 1, 2012, amended July 1, 2013, and is codified in Education Law Secs. 10-18. Section 10, Legislative intent, provides as follows:

§10. Legislative intent

"The legislature finds that students' ability to learn and to meet high academic standards, and a school's ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation. It is hereby declared to be the policy of the state to afford all students in public schools an environment free of discrimination and harassment. The purpose of this article is to foster civility in public schools and to prevent and prohibit conduct, which is inconsistent with a school's educational mission."

Section 12, Discrimination and harassment prohibited, provides in pertinent part as follows:

“No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function.”

Section 11 defines harassment and bullying as follows:

7. “‘Harassment’ and ‘bullying’ shall mean the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Acts of harassment and bullying shall include, but not be limited to, those acts based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. For the purposes of this definition the term ‘threats, intimidation or abuse’ shall include verbal and non-verbal actions.”

DISCUSSION

A. Plaintiffs’ Cause of Action Under DASA, Education Law Secs. 10-18.

The defendants submit that the District owes no duty of supervision for the minor plaintiff’s benefit under DASA as the minor plaintiff is not a student at the District, but rather, a private school student at Green Vale School in Old Brookville, New York, in eighth grade during the academic year of 2012-2013 when the alleged incidents occurred. As the minor plaintiff was not a student in the District at the time of the incident, notwithstanding that she was in the Merrick School District from kindergarten to sixth grade, the District submits that since she was not a registered student in the District at the time of the complained of incidents, it owes no duty to the minor plaintiff under DASA, codified at Education Law §10-18. The District argues, that as the minor plaintiff was not a public school student under its custody and control, was not present on school property or attending a school function, the District has no statutory duty to supervise the District students for the minor plaintiff’s benefit, and therefore, plaintiffs’ second cause of action should be dismissed as a matter of law.

The plaintiffs submit the District narrowly and selectively reads the provisions of the Education Law to apply only to the District’s students declaring that the legislative intent was to not allow harassment only to its own students. The plaintiffs provide that the purpose of the DASA amendments was to “foster civility in public schools and prevent and prohibit conduct which is inconsistent with a school’s educational mission.” (emphasis added) (Education Law §10). The plaintiffs submit that the District’s attempt to narrowly construe the portion of Education Law §10,

by only referring to “all students in public schools an environment free of discrimination and harassment”, the middle part thereto, is selective and not harmonious with the remainder of the sentence in the statute, Section 10, which also provides about schools in general, “a school’s educational mission,” and does not limit the provision to harassed students of public school only.

The matter before the court, as to whether DASA applies to the District at bar, is a case of first impression. It is not disputed that DASA applies to a public school, and does not apply to a private school, but rather, the argument is that DASA does not apply to the District in this case as the minor plaintiff is not the District’s student.

“A court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, but where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. Further, absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute, because no rule of construction gives the court discretion to declare the intent of the law when the words are unequivocal. The courts are not free to legislate and if any unsought consequences result, the Legislature is best suited to evaluate and resolve them.” (*Raritan Development Corp. v. Silva*, 91 NY2d 98).

“Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute, which interpretation, if it is not irrational or unreasonable, will be upheld; however, where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, with little basis to rely on any special competence or expertise of the administrative agency, its interpretive regulations are to be accorded little weight and, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.” (*Kurcsics v. Merchant Mutual Insurance Company*, 49 NY2d 451).

“When presented with an issue of statutory interpretation, the court’s primary consideration is to ascertain and give effect to the intention of the Legislature.” (*Long v. State of New York*, NY3d 369, citing *Riley v. County of Broome*, 95 NY2d 455). “Although statutes will ordinarily be accorded their plain meaning, it is well settled that courts should construe them to avoid objectionable, unreasonable or absurd consequences.” (*Id.*, citing *People v. Santi*, 3 NY3d 234; *Matter of ATM One v. Landaverde*, 2 NY3d 472; McKinney’s Cons Laws of NY, Book 1, Statutes §§141, 143).

Here, the plain reading of legislative intent, pursuant to Section 10 of the Education Law provides that “[t]he legislature finds that a student’s ability to learn . . . and the school’s ability to educate its students are compromised by incidents of . . . harassment including bullying . . . [whereby] the policy of the state [is] to afford all students in public schools an environment free of . . . harassment . . . [t]he purpose . . . is to foster civility in public schools and to prevent and prohibit conduct, which is inconsistent with a school’s educational mission.” Section 12 of Education law provides that “[n]o student shall be subjected to harassment or bullying by employees or students on school property . . .” Harassment and bullying are defined by Section 11 of Education Law as having the effect of substantially interfering with a student’s educational performance, mental, emotional or well-being, “or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption” within the school environment. Section 15 of Education Law requires the commissioner to create a procedure where incidents of harassment and bullying on

school grounds are reported to the department. Section 17 of Education Law provides that nothing in this article shall apply to private educational institutions. Section 18 of Education Law provides that “[t]he provisions of this article shall be severable” and “shall be liberally construed to give effect to the purposes thereof.”

Here, the express language of Education Law Section 10 provides that its purpose is to foster civility in public schools and to prevent conduct inconsistent with “a” schools educational mission. Section 12 of Education Law provides that “no student” shall be subjected to harassment and Section 11 of Education Law takes into account that harassment and bullying can occur off school property. The statute does not limit the regulation of students’ harassment and bullying only when it occurs on school property or only when the victim or intended target is a student who is not registered in the “public school.” Rather, the statute specifically provides that its purpose is to foster civility in public schools “and” prevent conduct inconsistent with “a” school’s educational mission. The clear purpose of the article is to prevent the type of conduct complained of by the plaintiffs herein. While the statute does not apply to a “private, religious or educational institution”, (Sec. 17), the statute does apply to a public school and its purpose is to require that a public school comply with the statute and foster civility and prevent the type of conduct complained of by the plaintiffs herein. The historical and statutory notes provide that the “legislature finds it vital to protect all students from harassment, bullying, cyberbullying and discrimination.” (emphasis added.) The legislature found that “in expanding the provisions of the Dignity for All Students Act, the legislature intends to give school districts tools to address these harmful acts consistent with the emerging research in the field.” The notes provide that “[i]t is imperative to protect every student from such harm regardless of whether the student is a member of a specific category.” (emphasis added.) (L. 2012, c. 102 legislation).

The District’s proposition that its obligations under DASA, codified by Educational Law Sections 10 - 18, do not apply at the case at bar because the MAM minor students’ alleged incidents of harassment, bullying and cyberbullying were targeted to a private school student, and not a public school student, is not in line with this Court’s reading of the statute. The District’s interpretation of the statute would have the effect of an absurd result as the District would, in effect, turn a blind eye to any such incidents occurring on or off school property, regardless of any potential serial harmful acts allegedly conducted or perpetrated by its students, should the targeted student be of a certain class, *sub judice*, a private school student. In any event, the provisions of Educational Law shall be liberally construed to give effect to its purpose. (Ed. Law §18). Here, the statute’s purpose is to prevent the type of conduct complained of perpetrated by the public school students, and under the circumstances herein, the statute applies to the District. The District, under the statute, has a duty to regulate harassment, cyber-bullying and bullying, conduct allegedly perpetrated by the District’s students.

COMMON LAW DUTY

“It is well established that in order to be held liable for negligence, the defendant must owe a duty of care to the plaintiff.” (*Bodaness v. Staten Island Aid, Inc.*, 170 AD2d 637 citing *Palsgraf v. Long Is. R.R. Co.*, 248 NY 339). “Unlike foreseeability and causation, which are factual issues to be determined by the jury, it is for the court to determine whether one member of society owes a duty to another.” (*Id.*, citing *Eiseman v. State of New York*, 70 NY2d 175; *De Angelis v. Lutheran Med. Center*, 58 NY2d 1053). “[T]he question of whether, in any particular set of circumstances, one party owes a duty of care to another is entirely one of law to be determined by the court.” (*Donohue v. Copiague Union Free School Dist.*, 64 AD2d 29). “There can be no negligence if there is no duty.” (*Martinez v. City of New York*, 90 AD3d 718).

The plaintiff, a school bus driver employed by a private company, commenced a personal injury action against the defendant school district when she was injured while breaking up a fight on her bus between two students. (*Goga v. Binghamton City School District*, 302 AD2d 650). The Court found that the defendant school district owed no duty to the plaintiff and stated that in order to invoke the "special duty" exception to the general rule that a public entity is not liable for the negligent performance of its governmental functions, the plaintiff must establish, through affirmative acts, that the municipality lured her into foregoing other available avenues of protection, or has voluntarily assumed a duty separate from that which is owed to the public generally. (*Id.*, citing *Perry v. Board of Educ., Gouverneur Cent. School Dist.*, 189 AD2d 939). An eighty year old plaintiff who was injured by a student while attending an awards ceremony at the school could not recover against the school district and elementary school on the theory of negligent supervision as the plaintiff failed to establish that the defendants owed her a special duty. (*Pendulik v. East Hampton Union Free School District*, 17 AD3d 334). A security guard employed by a private company could not recover against the school district for personal injuries sustained when he intervened in an altercation between two students. (*Stinson v. Roosevelt U.F.S.D.*, 61 AD3d 847). The court reasoned that "although defendant owed [a] duty to its students to adequately supervise them to prevent foreseeable injuries to fellow students, that duty did not extend to adults on premises; nor did [the] defendant assume [a] special duty to plaintiff." (*Id.*)

Here, plaintiffs' action based upon common law negligence must fail as the District has demonstrated that the District has no common law duty to the plaintiffs at bar. The plaintiffs, in opposition, have failed to establish that the District owed a special duty to the plaintiffs based upon a theory of negligent supervision. While plaintiffs seek a judicial recognition of the existence of a duty for preventative considerations as the injuries were allegedly caused by the defendant, and the harm is allegedly foreseeable, (*Donohue v. Copiague Union Free School District*, 64 AD2d 29), the court is mindful that the imposition of a legal duty where none existed before must be exercised with extreme care, as legal duty imposes legal liability. (*Pulka v. Edelman*, 40 NY2d 781).

DEFAMATION

The plaintiffs, by way of complaint, allege that two MAM minor students circulated a lewd video and a third MAM minor student posted a comment on you tube in connection with the acts complained of by the plaintiffs. Plaintiff's complaint pleads particular acts of defamation, however plaintiff has not identified a District employee who has made defamatory comments about the minor plaintiff. In an action for libel or slander "the particular words complained of shall be set forth in the complaint" including who spoke the remarks and to whom they were published. (CPLR §3016(a); *Trakis v. Manhattanville College*, 51 AD3d 778). Here, the complaint does not set forth the particular defamatory statements made by the District.

CIVIL AND FEDERAL RIGHTS

The plaintiffs allege that the District violated the plaintiffs' civil rights under New York Civil Rights Law §50, and violated the plaintiffs' federal rights. Here, the plaintiffs' complaint does not adequately allege facts that would establish that the minor plaintiff's image was used for advertising or trade purposes by the District. (*Abakaporo v. Daily News*, 102 AD3d 815). As to plaintiffs' claim that the District is vicariously liable for the violation of plaintiffs' federal rights, the pleading is inadequate as it fails to plead the specifics as to what provisions of the U.S. Constitution or federal law were violated. (*Ross v. State of Alabama*, 893 F.Supp 1543; *Waldron v. Rotzler*, 862 F.Supp. 763; *Rogers v. Mount Union Borough*, 816 F.Supp. 308).

MUNICIPAL HEARING

The District requests that this Court dismiss the complaint on the grounds that the plaintiffs failed to comply with General Municipal Law (GML) §50-h. Wherever a notice of claim is filed against the school district, it shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages relative to the occurrence. (GML §50-h(1)). The purpose of the municipal hearing is to provide the municipality, or the school district *sub judice*, an opportunity to investigate the circumstances of the claim. (*Nasca v. Town of Brookhaven*, 10 AD3d 415). Here, the two plaintiffs, the minor plaintiff's mother and father, appeared for the municipal hearing. The plaintiffs, by way of Notice of Objection, objected to the "defective demand for a municipal hearing" on the grounds that it was not signed or executed by an authorized agent, and provided that the minor plaintiff does not possess any independent relevant information pertaining to the claims in the Notice of Claim and the demand was made for the purposes of intimidation, embarrassment and harassment. The District has not demonstrated that it is prejudiced by the minor plaintiff's objection to the municipal hearing. The District did not seek this Court's intervention in response to the objection, and upon the foregoing, the District, upon conducting the municipal hearing of the two plaintiffs, has had an opportunity to investigate the circumstances of the claim. Under these circumstances, dismissal is not warranted.

THE DISTRICTS MOTION FOR SUMMARY JUDGMENT

The District moves for summary judgment pursuant to CPLR §3211(c). The District submits the affidavit of Pratt who avers that the District has created policies and guidelines as required by DASA and MAM maintains a character education and anti-bullying curriculum. Pratt provides that an investigation was conducted in response to a phone call received by MAM from the minor plaintiff's father advising that the minor plaintiff was cyber-bullied by MAM students and "[a]fter investigation, disciplinary action was taken as to those students who had circulated an inappropriate video in our school." Additionally, Pratt provides an assembly was held addressing cyber-safety and cyber-bullying and the results were shared with the Nassau County Police Department.

It is axiomatic that a summary judgment motion is properly denied as premature when, as in the instant matter, the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant. (*Metichecchia v. Palmeri*, 23 AD3d 894). Here, the District's motion for summary judgment is premature.

CONCLUSION

In light of the foregoing, it is hereby

ORDERED that branch of the defendants' motion to dismiss the plaintiffs' action as and against De Thomasso and Pratt is hereby granted, and it is hereby further

ORDERED that branch of the defendants' motion to dismiss plaintiffs' causes of action sounding in common law, defamation, violation of New York and federal civil rights, and punitive damages is hereby granted, and it is hereby further

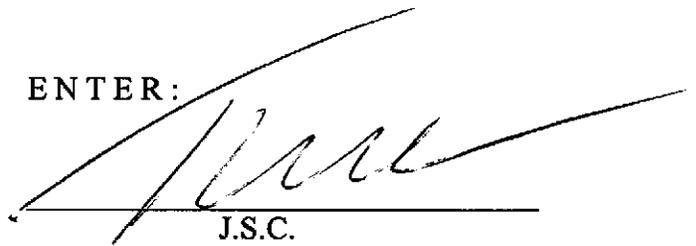
ORDERED that branch of the defendants' motion pursuant to CPLR §3211(a)(7) and (c), to dismiss plaintiffs' cause of action under Education Law Secs. 10-18 on the grounds that it does not apply to the District in the case at bar is denied, and it is further

ORDERED that branch of the defendants' motion to dismiss plaintiffs' complaint pursuant to GML §50-h is denied, and it is hereby further

ORDERED that branch of the defendants' motion to dismiss pursuant to CPLR §3211(c) is denied, and it is hereby further

ORDERED that the parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 18th day of June, 2014, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

ENTER:



J.S.C.

Dated: May 14, 2014

ENTERED

MAY 16 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE