IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY FLORIDA
CIVIL DIVISION

JOHN VB DOE,

Plaintiff,

vs. CASE NO.: 2024-CA-002138-O

FLORIDA MULTICULTURAL DISTRICT COUNSEL OF THE ASSEMBILIES OF GOD, INC. and IGNITE LIFE CENTER, INC.,

Defendant.
_____/

DEFENDANT IGNITE'S MOTION TO DISMISS
COUNTS II – IV OF PLAINTIFF'S AMENDED COMPLAINT

Defendant, IGNITE LIFE CENTER, INC. ("Ignite"), by and through undersigned counsel, hereby moves to dismiss Counts II – IV of Plaintiff's Amended Complaint for failure to state a cause of action. In support thereof, Defendant states:

1. This is a negligence action brought by JOHN V.B. DOE (a 20 year old, born in 2003) against Defendant Ignite and the Florida Multicultural District Counsel of the Assemblies of God, Inc. stemming from alleged abuse by a volunteer, Gabriel Hemenez, during a summer program in July 2021.

2. On March 12, 2024, Plaintiff filed a 6 count Complaint, which alleges 4 causes of action against Defendant Ignite: I) negligence, II) vicarious liability for the intentional criminal actions of the volunteer, III) intentional infliction of emotional distress, and IV) fraud.

3. On April 8, 2024, Defendant Ignite filed an Answer and Affirmative Defenses in response to Count I. This instant Motion seeks dismissal of Counts II – IV.

4. First, Count II of the Amended Complaint must be dismissed because Defendant Ignite, as a matter of law, cannot be held vicariously liable for the tortious actions of a volunteer that occurred outside the scope of his agency with the organization.

5. In addition, Plaintiff's causes of action for intentional infliction of emotional distress (Count III) and fraud (Count IV) fail to state a cause of action, as the Plaintiff failed to plead the ultimate facts necessary to support such claims, and the claims, on their face, fail, as they do not meet the requisite pleading requirements.

6. For the reasons set forth above, and discussed in greater detail below, Counts II – IV of the Plaintiff's Amended Complaint must be dismissed with prejudice.

MEMORANDUM OF LAW

I. LEGAL STANDARD

A complaint must state a cause of action and include a short and plain statement of the ultimate facts showing why the Plaintiff is entitled to relief. Fla.R.Civ.P. 1.110(b). A Complaint, which does not state a cause of action must be dismissed as a matter of law. *See* Fla.R.Civ.P. 1.140(b)(6). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not due." Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement." *Ashcroft v. Eqbal*, 129 S.Ct. 1937, 1949, 173 L.ED.2d 868 (2009) (internal citations omitted).

II. COUNT II MUST BE DISMISSED BECAUSE THE ALLEGED ABUSE WAS OUTSIDE THE VOLUNTEER'S SCOPE

The facts, as alleged by Plaintiff within the four-corners of the Complaint, do not support an action for vicarious liability against Defendant Ignite.

In order for liability to be imputed on Defendant Ignite under a vicarious liability / respondeat superior theory, it must be shown that Gabriel Hemenez was an agent of Defendant Ignite's and was acting in the scope of his agency when he committed the abuse. *See Special Olympics Florida, Inc.*

v. Showalter, 6 So.3d 662 (Fla. 5th DCA 2009). In the Complaint, Plaintiff alleges that Gabriel Hemenez, was an agent of Defendant Ignite, as he was a volunteer for the Ignite Summer Internship program, and that as a volunteer, Gabriel Hemenez's duties were to provide spiritual guidance, counseling and mentoring to children, including Plaintiff. *See* Pla. Complaint, ¶ 18. The abuse is not alleged to have occurred during Gabriel Hemenez's guidance or counseling of Plaintiff. *Id*. at ¶ 19.

The doctrine of respondent superior does not impose vicarious liability upon an employer for the tortuous acts of an employee unless "the acts were committed during the course of the employment." *Iglesias Cristiana La Casa Del Senor, Inc. v. L.M.*, 783 So.2d 353, 356 (Fla. 3d DCA 2001). "An employee's conduct is within the scope of his employment, where (1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed and (3) the conduct is activated at least in part by a purpose to serve the master rather than the employee's own interests." *Id*. at 356-357.

"Generally, sexual assaults and batteries by employees are held to be outside the scope of an employee's employment, and therefore, insufficient to impose vicarious liability on the employer." *Iglesias* at 357 (quoting *Nazareth v. Herndon Ambulance Sev., Inc.*, 467 So.2d 1076, 1078 (Fla. 5th DCA 1985)(under the doctrine of respondeat superior, an employer cannot be held liable for the tortious or criminal acts of an employee, unless the acts were committed during the course of the employment and to further a purpose or interest, however excessive or misguided, of the employer); *see also Perez v. Zazo*, 498 So.2d 463, 465 (Fla. 3d DCA 1986)("It is entirely clear that responsibility for the intentional wrongful acts of a servant-employee may be visited upon his master-employer under the doctrine of respondeat superior only when that conduct in some way furthers the interests of the master or is at least motivated by a purpose to serve those interests, rather than the employee's own.")(footnote omitted).

The court in *Hennagan v. Department of High. Saf. & Motor Veh.*, 467 So.2d 748 (Fla. 1st DCA 1985) was asked to determine whether the allegations in the complaint, which alleged that a trooper had lured a minor into his car and molested her under the pretext that she was a shoplifting suspect, were sufficient to survive a motion to dismiss. 467 So.2d at 749. The court found that the allegations were sufficient, holding that it could not be said, as a matter of law, that the acts alleged were or were not done in furtherance of the trooper's duties to apprehend a shoplifting suspect. *Id*. at 751. While the trooper's acts resulted in a criminal offense, the court noted that such a result did not preclude a determination that the acts were initiated in the course and scope of the trooper's employment and to serve the interests of the employer. *Id*.

Likewise, in *M.V. v. Gulf Ridge Council Boy Scouts of America, Inc.*, 529 So.2d 1248 (Fla. 2d DCA 1988) the court examined another circumstance in which abuse occurred within the scope of an employee's agency. In that case, the court permitted a vicarious liability claim to go to the jury stemming from an allegation of sexual assault by a first aid attendant on a boy scout. The sole reason given, however, was that the intentional tort involved "medically permitted touching followed by unpermitted touching. This created a jury question of whether the employee's intentional tort was within the scope of his employment with appellee." *Id*. at 1249.

Nothing akin to those facts is alleged in Plaintiff's Complaint. In fact, Plaintiff's own allegations confirm that the alleged abuse was outside the scope of his alleged agency (per Plaintiff's Complaint, Gabriel Hemenez's duties were to provide spiritual guidance, counseling and mentoring[1]). There are no facts alleged which would support a finding that sexual touching, if it did occur, was in anyway, within the scope of Gabriel Hemenez's agency as volunteer.

In *Agriturf Mgmt., Inc. v. Roe*, 656 So.2d 954 (Fla. 2d DCA 1995), the Second District Court of Appeal distinguished *Hennagan*, noting that unlike the defendant in that case, the company

[1] *See* Pla. Complaint, ¶ 18.

president's sexual abuse of a minor did not have as its source or purpose any intent to serve the employer. *Agriturf*, 656 So.2d at 955. In that case, the company president's six-year old granddaughter would often accompany him to work and help him clean and put away equipment. *Id.* On several of these occasions, the company president sexually abused the child. *Id*. The court reversed the trial court's verdict finding the employer company, a landscaping business, was vicariously liable for the company president's illegal acts. *Id*. at 956. The court found that although the acts of cleaning and putting away equipment occurred within the president's course and scope of employment, the sexual abuse did not. *Id*. at 955. As a matter of law, the court held, the president's fondling of his six-year old granddaughter did not occur in furtherance of the company's business objectives. *Id*.

Florida law is clear that the sexual abuse alleged falls outside the scope of Gabriel Hemenez's agency with Defendant Ignite and the allegations are insufficient to impose vicarious liability. Count II of Plaintiff's Complaint, therefore, must be dismissed with prejudice.

III. COUNT III MUST BE DISMISSED BECAUSE PLAINTIFF FAILS TO ALLEGE ULTIMATE FACTS SUPPORTING "OUTRAGEOUS CONDUCT"

Count III of Plaintiff's Amended Complaint fails to state a cause of action, as the claim falls short of the legal standard, which requires "outrageous" conduct on its face. The conduct purportedly causing the emotional distress is not the alleged sexual abuse, but instead, is some type of ongoing harassment and retaliation. *See* Pla. Complaint, ¶ 66-69. However, Plaintiff fails to cite any specific examples of such conduct. The conclusory assertion of "harassing and retaliatory conduct" does not provide the ultimate facts necessary to support the claim, nor does the cause of action, on its face, meet the high pleading standard evidencing "outrageous" conduct required for this type of claim.

In order to state a cause of action for intentional infliction of emotional distress, a plaintiff must show that: 1) the wrongdoer's conduct was intentional or reckless; 2) the conduct was outrageous; 3) the conduct caused emotional distress; and 4) the emotional distress was

severe. *Clemente v. Horne,* 707 So.2d 865, 866 (Fla. 3d DCA 1998). The Florida Supreme Court has defined outrageous conduct as conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277, 279 (Fla.1985) (adopting standard set forth in the Restatement (Second) of Torts, section 46 cmt. d (1965) for evaluating claim for intentional infliction of emotional distress). What constitutes outrageous conduct is a question for the trial court to determine as a matter of law. *Johnson v. Thigpen,* 788 So.2d 410, 413 (Fla. 1st DCA 2001).

The Florida Supreme Court has defined the element of "outrageous conduct," by quoting form the Restatement that:

> It is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. 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. Generally the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, and lead him to exclaim, "Outrageous!"

McCarson, 467 So. 2d at 267-68 (quoting Restatement (Second) of Torts at § 46, comment d).

In determining whether or not the activities of the defendant rise to the level of being extreme and outrageous so as to permit a claim for intentional infliction of emotional distress, the subjective response of the person who is the target of the actor's conduct is not controlling. *See Dependable Life Ins. Co. v. Harris,* 510 So. 2d 985, 988 (Fla. 5th DCA 1987); *Ponton v. Scarfone,* 468 So. 2d 1009, 1011 (Fla. 2nd DCA 1985), *rev. den.,* 478 So. 2d 54 (Fla. 1985); *Vance v. Southern Bell Telephone and Telegraph Co.,* 983 F.2d 1573, 1575 n. 7(11th Cir. 1993), *cert. den.,* 115 S.Ct. 1110

(1995); *Golden v. Complete Holdings, Inc.,* 818 F. Supp. 1495, 1499 (M.D. Fla. 1993). Rather, it is a question for the court to decide as a matter of law. *Id.*

In this case, the "outrageous conduct" alleged by Plaintiff is "harassing and retaliatory conduct", but Plaintiff fails to provide any examples or facts to support this conclusory allegation. Plaintiff claims that he was lied to and deceived in an attempt to coerce him into silence, but this is not outrageous conduct as a matter of law. As discussed above, the test for "outrageous conduct" is an objective one, and it is a legal determination for the Court to make. Based upon the controlling law in Florida, Plaintiff's claim for intentional infliction of emotional distress must be dismissed.

IV. PLAINTIFF'S CLAIM FOR FRAUD FAILS BECAUSE IT WAS NOT PLED WITH PARTICULARITY

Count IV of Plaintiff's Amended Complaint asserts a cause of action for fraud. Plaintiff alleges that Defendant Ignite made false and/or deceptive statements and that he relied on them. Plaintiff failed to provide any specifics as to when the statements were allegedly made or how his reliance on the statements were to his detriment, despite his conclusory allegations that it affected him in some way.

When, as here, fraud is alleged, a plaintiff cannot simply allege the elements of fraud but must also identify certain aspects of the alleged misrepresentations. Fla. R. Civ. P. 1.120(b). This has been construed to mean that the pleader must allege: (1) who made the false statement; (2) what is the substance of the false statement; (3) where/how, or the context in which the statement was made. *Eagletech Communs.,* 79 So. 3d at 861-62 (*quoting Bankers Mut. Capital Corp. v. U.S. Fid. & Guar. Co.,* 784 So. 2d 485, 490 (Fla. 4th DCA 2001). "The factual basis for a claim of fraud must be pled with particularity and must specifically identify misrepresentations or omissions of fact, as well as time, place or manner in which they were made." *Cedars Healthcare Group, Ltd v. Mehta,* 16 So. 3d 914, 917 (Fla. 3d DCA 2009); *see also Blue Supply Corp. v. Novos Electro Mech., Inc.,* 990 So. 2d 1157, 1159-60 (Fla. 3d DCA 2008); *Robertson v. PHF Life Ins. Co.,* 702 So. 2d 555, 556 (Fla. 1st

DCA 1997). "[A]ll essential elements of fraudulent conduct must be stated, i.e., that plaintiff relied to his detriment on a false statement concerning a material fact made with knowledge of its falsity and an intent to induce reliance." *Peninsular Florida Dist, Council of Assemblies of God v. Pan American Inv. & Dev. Corp.,* 450 So. 2d 1231, 1232 (Fla. 4th DCA 1984).

When a plaintiff party fails to allege fraud with the requisite particularity, a defendant can attack the deficient pleading with a motion to dismiss for failure to state a claim. *Eagletech Communs.,* 79 So. 3d at 861-62; *Strack v. Fred Rawn Constr., Inc.,* 908 So. 2d 563, 565 (Fla. 4th DCA 2005). Such an approach is especially appropriate here, fraudulent statements Plaintiff claims Defendant Ignite may have made, and how Plaintiff could have relied on them, are woefully lacking in the requisite specificity. In light of same, Count IV of Plaintiff's Amended Complaint for fraud must also be dismissed.

WHEREFORE, Defendant, IGNITE LIFE CENTER, INC., respectfully requests that this Court dismiss Counts II – IV of Plaintiff's Amended Complaint, and for any other further such relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via E-Service to: Jessica D. Arbour, Esq. (jessica@adamhorowitzlaw.com) and Adam D. Horwitz, Esq. (adam@adamhorowitzlaw.com), Counsel for the Plaintiff, on this 8th day of April 2024.

/s/ Madeline S. Villani

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