Dispo

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

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CLARICE MARTIN and DOUGLAS RICHARD,

Plaintiff,

-against -

IRVINGTON UNION FREE SCHOOL DISTRICT, DAVID J. SOTTILE and SCOTT PALERMO,

Defendants.

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DECISION & ORDER

Index No. 62732/17

Sequence No. 1
Motion Date 11/3/17

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 3211 dismissing all the causes of the instant action against defendants on the basis that plaintiffs (1) fail to state a cause of action upon which relief can be granted in that plaintiffs fail to set forth facts that establish a special duty existed between the District and plaintiff, Clarice Martin; (2) fail to state a cause of action upon which relief can be granted in that the plaintiffs are barred by Workers' Compensation Law §§10, 11, and 29, as Workers' Compensation is their exclusive remedy; and (3) that documentary evidence conclusively establishes a defense as a matter of law:

PAPERS	**NYSCEF**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-H	31-62
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Plaintiff, Clarice Martin, and her husband, Douglas Martin, bring this action for monetary damages against Ms. Martin's employer, defendant, Irvington Union Free School District (the "School District"), and two of the School District's employees, defendants David Sottile and Scott Palermo, in connection with

injuries sustained by Ms. Martin on March 16, 2017, when during her employment as a special education teacher with the School District, she sustained injuries upon being assaulted by one of her students.

Defendants' pre-answer motion to dismiss the action for failure to state a cause of action (CPLR 3211[a][7]) and upon documentary evidence (CPLR 3211[a][1]) is granted.

> A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Parkoff v. Stavsky, 109 A.D.3d 646, 970 N.Y.S.2d 817; Benson v. Deutsche Bank Natl. Trust, Inc., 109 A.D.3d 495, 970 N.Y.S.2d 794). Further, the evidence submitted in support of a motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "must be 'documentary' or the motion must be denied" (Cives Corp. v. George A. Fuller Co., Inc., 97 A.D.3d 713, 714, 948 N.Y.S.2d 658, quoting Fontanetta v. John Doe 1, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569 [internal quotation marks omitted]; see Rodolico v. Rubin & Licatesi, P.C., 112 A.D.3d at 610, 977 N.Y.S.2d 264). "'[N]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)' " (Cives Corp. v. George A. Fuller Co., Inc., 97 A.D.3d at 714, 948 N.Y.S.2d 658, quoting Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668; see Rodolico v. Rubin & Licatesi, P.C., 112 A.D.3d at 610, 977 N.Y.S.2d 264; Suchmacher v. Manana Grocery, 73 A.D.3d 1017, 900 N.Y.S.2d 686; Fontanetta v. John Doe 1, 73 A.D.3d at 86, 898 N.Y.S.2d 569).

(Rodolico v. Rubin & Licatesi, P.C., 114 AD3d 923, 924-25 [2d Dept 2014]).

> "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (Fontanetta v. John Doe 1, 73 A.D.3d at 84-85, 898 N.Y.S.2d 569 [internal quotation marks omitted]) . . . At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" (Granada Condominium III Assn. v. Palomino, 78 A.D.3d at 997, 913 N.Y.S.2d 668 [internal quotation marks omitted] . . . "

(Cives Corp. v. George A. Fuller Co., Inc., 97 AD3d 713, 714 [2d Dept 2012]).

The Court is satisfied that the documentary evidence before the Court establishes a defense to this action as a matter of law.

> It is well settled that workers' compensation benefits are "[t]he sole and exclusive remedy of an employee against his employer for injuries in the course of employment" (Gonzales v. Armac Indus., 81 N.Y.2d 1, 8, 595 N.Y.S.2d 360, 611 N.E.2d 261 [1993]). This precludes suits against an employer for injuries in the course of employment. "In exchange for the security of knowing that fixed benefits will be paid without the need to resort to expensive and sometimes risky litigation, ... the employee has been asked to pay a price in the form of the loss of his common-law right to sue his employer in tort and perhaps to enjoy a more substantial recovery through a jury award" (Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 159-160, 432 N.Y.S.2d 879, 412 N.E.2d 934 [1980]).

(Lockwood v. City of Yonkers, 57 Misc 3d 728, 731 [Sup Ct 2017]). "[This is] a matter of substantive law and, hence, whenever it appears or will appear from a plaintiff's pleading, bill of particulars or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and, in any event, of proving

noncoverage falls on the plaintiff . . . " (Murray v. City of New York, 43 NY2d 400, 407 [1977]). "Workers' Compensation Law §§ 11 and 29(6) provide that an employee who elects to receive compensation benefits may not sue his or her employer in an action at law for the injuries sustained" (Gonzalez v. Woodbourne Arboretum, Inc., 100 AD3d 694, 697-98 [2d Dept 2012]).

Here, defendants present to the Court the May 22, 2017, "Notice of Retention and Appearance" made in connection with Ms. Martin's claim under the Workers Compensation Law for injuries arising out of the March 16, 2017 incident. In addition, defendants provide the Court with the June 21, 2017 "Notice of Decision" wherein the Workers Compensation Board found, after a hearing held on June 16, 2017, "The claimant Clarice Martin had a work related injury resulting in a head injury." Although the matter was "continued to July 19, 2017 . . . for outcome of IME", there is no indication in the record before this Court that the plaintiff's successful application for "work related" injuries is on administrative appeal as to that issue or as to any argument relating to whether the defendants' acts were intentional.

The only exceptions to the Worker's Compensation bar to a civil action are whether the employer failed to secure workers' compensation or whether the employer intentionally injured the employee (N.Y. Workers' Comp. §11; Realmuto v. Yellow Freight Sys., Inc., 712 F.Supp. 287, 289 (E.D.N.Y.1989) (Wexler, J.) (recognizing exclusion of intentional torts from exclusivity provision); see also Acevedo v. Consolidated Edison Co., 189 A.D.2d 497 [1st Dept. 1993]).

The first is inapplicable, since plaintiff made application for benefits under an existing policy.

> A plaintiff is not limited to relief under the Workers' Compensation Law if he can show that the assault was committed outside the scope of employment and was done with deliberate intent or conscious choice to do the act which results in the injury (see, Maines v. Cronomer Valley Fire Dept., 50 N.Y.2d 535, 429 N.Y.S.2d 622, 407 N.E.2d 466; see also, Werner v. State of New York, 53 N.Y.2d 346, 351 n. 1, 441 N.Y.S.2d 654, 424 N.E.2d 541; Vercruysse v. Alati, 78 A.D.2d 1015, 433 N.Y.S.2d 694; 1 N.Y. PJI2d 2:5 [1992 Supp.]).

(Ralph v. Oliver, 186 AD2d 977, 977 [4th Dept 1992]). Here, the "work related" nature of the injury was necessarily and properly

decided by the Workers Compensation Board. "The Board's decision finally determines the controversy between the parties to the hearing" (Liss v. Trans Auto Sys., Inc., 68 NY2d 15, 21 [1986] citing Workers' Compensation Law §23; Werner v. State of New York, 53 NY2d 346). "[Where the availability of work[ers] compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions (O'Rourke v. Long, 41 NY2d 219, 228 [1976]). Thus, the issue of whether the defendants' acts constitute an intentional act such as would bring her claim outside the ambit of the Workers Compensation Law is not properly before this Court.

In any event, to the extent that it is, the Court finds merit to defendants' CPLR 3211(a)(7) motion:

> On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (see Campaign for Fiscal Equity v. State of New York, 86 NY2d 307, 318 [1995]; see also Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414 [2001]; Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v. Martinez, 84 NY2d at 87-88). Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated (see Campaign for Fiscal Equity v. State of New York, 86 NY2d at 318). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus" (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

(Dee v. Rakower, 112 AD3d 204, 208 [2d Dept 2013]).

Upon application of the above referenced standard and upon a fair reading of the complaint, the Court finds that the allegations of the complaint fail to establish the elements of an intentional tort on the part of the defendants such as would fall under the exception to the exclusivity provisions of Workers' Compensation Law §29.

> . . . "While an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege 'an intentional or deliberate act by the employer directed at causing harm to this particular employee'" (Fucile v. Grand Union Co., 270 A.D.2d 227, 228, 705 N.Y.S.2d 377, quoting Mylroie v. GAF Corp., 81 A.D.2d 994, 995, 440 N.Y.S.2d 67, affd. 55 N.Y.2d 893, 449 N.Y.S.2d 21, 433 N.E.2d 1269). "'In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act; a mere knowledge and appreciation of a risk is not the same as the intent to cause injury'" (Acevedo v. Consolidated Edison Co. of N.Y., 189 A.D.2d 497, 501, 596 N.Y.S.2d 68, quoting Finch v. Swingly, 42 A.D.2d 1035, 1035, 348 N.Y.S.2d 266; see Miller v. Huntington Hosp., 15 A.D.3d 548, 792 N.Y.S.2d 88). Moreover, "[a]llegations that the employer exposed the employee to a substantial risk of injury have been held insufficient to circumvent the exclusivity of the remedy provided by the Workers' Compensation Law" (Gagliardi v. Trapp, 221 A.D.2d 315, 316, 633 N.Y.S.2d 387 [internal citation omitted]).

(Pereira v. St. Joseph's Cemetery, 54 AD3d 835, 836-37 [2d Dept 2008]).

Here, even upon accepting the factual averments of the amended complaint as true and upon according plaintiffs every favorable inference drawn therefrom (Rochdale Vil. v. Zimmerman, 2 A.D.3d 827, 769 N.Y.S.2d 386 [internal citation omitted]), the Court finds that plaintiffs have failed to state a viable claim against the defendants for an intentional tort.

To any further extent, the Court finds no merit to defendants' opposition to plaintiffs' motion (see Lombardo v. Temple Beth-El of Rockaway Park, 31 Misc 3d 1219(A) [Sup Ct 2011][special duty rule is separate and unrelated to whether claims are barred under Worker's Compensation]).

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion is granted and the case is

dismissed.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
January 30, 2018

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