IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ZARATA SCOTT, Plaintiff, v. ANDREW MOFFIT, in his official capacity, DR. DOLAN BLAKEY, in his official capacity, and COLONIAL SCHOOL DISTRICT, Defendants.	)	C.A. No. N18C-11-015 CLS

Date Submitted: May 29, 2019
Date Decided: August 20, 2019

Upon Defendants' Motion to Dismiss
Granted.

Zarata Scott, Plaintiff, *Pro Se*.

Christopher T. Logullo, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, Attorney for Defendants.

SCOTT, J.

Background

In December 2015, the Delaware Department of Education ("DDOE") contracted to have Middlebury Interactive Languages Program implemented in selected schools until June 2017 (the "DDOE Contract") to provide DDOE with "certain services to provide cost effective proficiency focused world language blended online learning experiences for middle school students."[1]

On March 3, 2016, Plaintiff Zarata Scott, working in the scope of her employment with Middlebury Interactive Languages ("Middlebury"), was teaching in a Colonial School District classroom pursuant to the DDOE Contract. On that date, Plaintiff was charged with Offensive Touching after a student in the classroom alleged she pinched his neck. Plaintiff was subsequently found Not Guilty on November 7, 2016.

Nearly two years later, on November 2, 2018, Plaintiff filed a *pro se* complaint against Colonial School District and its agents Superintendent Don Blakey and Principal Andrew Moffit (collectively, "Defendants"). The complaint alleges that Defendants Blakey and Moffit were responsible for carrying out the guidelines, policies, and procedures for the language program, including insuring the protection of Middlebury teachers and the success of the students in the program. It further

[1] Ex. B of Defs.' Resp. to Pl.'s Mot. to Am. Compl. & Reply in Support of Defs.' Mot. to Dismiss (Mar. 13, 2019) (D.I. 14) [hereinafter, "DDOE Contract"].

states that Defendant Moffit, as the principal of the school, was required by Middlebury and DDOE to have a "classroom facilitator" in the classroom with the Middlebury teachers "at all times" throughout the program to protect teachers and students.

Plaintiff claims that Defendants were grossly negligent and breached the Contract by failing to provide a "classroom facilitator." Without a classroom facilitator, Plaintiff says she was left "unprotected" and the students in the classroom were afforded the opportunity to falsely allege that she threw a stack of books at a student and pinched the student until he could not breathe.[2] Plaintiff also claims Defendants violated her due process rights and engaged in malicious prosecution by conducting an unreasonable administrative investigation, namely due to Defendant Moffit's failure to objectively interview students who would have provided an objective account of events.[3] To further support her claim of malicious prosecution, Plaintiff alleges that Defendant Moffit could have terminated the criminal action against her at any time but instead acted with reckless indifference to the falsity of the students' claims.[4]

As a result of the damages from the criminal charge and its stipulation prohibiting her from being around minors, Plaintiff seeks compensatory and punitive

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[2] Am. Compl. at 2-4 (Mar. 22, 2019) (D.I. 16).
[3] *Id.* at 4-5.
[4] Pl.'s Resp. to Defs.' Reply at 2 (May 28, 2019) (D.I. 20).

damages for her unemployment, interference with the teaching positions she had at the time, legal fees associated with the criminal proceedings, emotional distress, and pain and suffering.

Parties' Contentions

Defendants' move the Court to dismiss the complaint for failure to state a claim. Defendants claim that the statute of limitations bars Plaintiff's claims of gross negligence, malicious prosecution,[5] and due process violations. Defendants further argue that Plaintiff's breach of contract claim must also fail because Plaintiff does not have standing to bring a claim under the DDOE Contract between Plaintiff's employer, Middlebury, and the State of Delaware.

Plaintiff opposes dismissal and says the 2-year limitations period for her due process claim commenced November 7, 2016 - the date she discovered the facts constituting the basis of such action. Plaintiff contends that because the facts underlying the claims "were so hidden that a reasonable plaintiff could not timely discover them," in part due to Defendant Moffit's fraudulent concealment, Count III is not time-barred.[6]

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[5] The Court notes that at the oral argument held on May 29, 2019, *counsel for* Defendants conceded that the statute of limitations does not bar Plaintiff's malicious prosecution claim. Nonetheless, Defendants argue it should be dismissed because Plaintiff failed to plead all of the required elements.

[6] Pl.'s Resp. to Defs.' Reply at 1 (May 28, 2019) (D.I. 20).

Standard of Review

When deciding a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim, the court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the nonmoving party.[7] The Court will dismiss the complaint only if "it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief."[8]

Additionally, when appropriate, the Court will hold a *pro se* plaintiff's complaint to a less demanding standard of review.[9] However, the same set of rules applies to *pro se* plaintiffs, and the Court will only accommodate *pro se* litigants to the extent that such leniency does not affect the substantive rights of the parties.[10]

Discussion

Count I - Negligence

Plaintiff contends that Defendants breach of their duty to exercise reasonable care to ensure the protection of teachers led to her arrest. Specifically, Plaintiff alleges that Defendants had a duty to provide a classroom facilitator and, in the absence of providing a classroom facilitator, a duty to visit the classroom to check on classroom management.

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[7] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).
[8] *Id.*
[9] *Anderson v. Tingle*, 2011 WL 3654531, at *2 (Del. Super. Ct. Aug. 15, 2011).
[10] *Id.* (citing *Alston v. State*, 2002 WL 184247, at *1 (Del. Super. Ct. Jan. 28, 2002)).

A cause of action in negligence accrues at the time of the injury to the plaintiff and is subject to the two-year limitations period set forth in 10 *Del. C.* § 8119.[11] The date of Plaintiff's arrest was March 3, 2016. The complaint was filed on November 2, 2018. As a result, Count I for Gross Negligence is **DISMISSED** as time-barred by the two-year statute of limitations.[12]

Count II - Breach of Contract

Along with the complaint, Plaintiff provided the Court with a copy of the Delaware DOE and Middlebury Interactive Languages Program Agreement ("Program Agreement").[13] The Program Agreement "outlines the roles and responsibilities of [Middlebury, DDOE, and the host school] as well as the specific

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[11] *Abdi v. NVR, Inc.*, 2007 WL 2363675, at *3 (Del. Super. Ct. Aug. 17, 2007). *See* 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of two years from the date upon which it is claimed such alleged injuries were sustained."). "Personal injuries" include, "a person's legal and uninterrupted enjoyment of his life, his limits, his body, his health and his reputation." *Pagano v. Hadley*, 553 F. Supp. 171, 177 (D. Del. 1982) (quoting *McNeill v. Tarumianz*, 138 F. Supp. 713, 716 (D. Del. 1956)).

[12] *See Taylor-Bray v. Dep't of Servs. for Children, Youth, & their Families*, 2016 WL 1605589, at *3 (Del. Super. Ct. Apr. 12, 2016) (holding that claims alleging defendant's "gross and wanton negligence on following policies, *procedures*, practices and basic law" as being the "direct and proximate cause of the injuries, damages and harm suffered by Plaintiff" constituted a personal injury claim and were subsequently barred by the statute of limitations under 10 *Del. C.* § 8119).

[13] Am. Compl. at 6-12 (Mar. 22, 2019) (D.I. 16).

implementation details" and contains the signatures of the "District Administration," "School Administration" and "Classroom Facilitator."[14]

Plaintiff asserts that by entering into the "contract" with Middlebury, Defendants created an "implied contract with its teachers and students to adhere to the rules to ensure their safety."[15] According to Plaintiff, Defendants breached this implied contract by "not following the policy" and "procedure put forth in the guidelines" of the contract when Defendants failed to provide a classroom facilitator and, in the absence of providing a classroom facilitator, not visit the classroom to check on classroom management.[16] From the language in the complaint, the Court views Plaintiff's claim as alleging Defendants breached a duty owed to her under to the Program Agreement.[17] Still, the Court reviews both the Program Agreement and the DDOE Contract to determine the viability of Plaintiff's breach of contract claim.

As a general rule, only the contracting parties and intended third-party beneficiaries may enforce a contract's provisions. An intended beneficiary is found to exist where: (1) the contracting parties intended that the third party beneficiary benefit from the contract; (2) the benefit is intended as a gift or in satisfaction of a

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[14] *Id.* at 6.
[15] *Id.* at 4.
[16] *Id.* at 2.
[17] *See Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013, at *4 (Del. Super. Ct. July 25, 2003) ("Since there are no words to comprise the 'provisions' of an implied contract, *ipso facto*, there are no provisions of an implied contract.").

pre-existing obligation; and (3) the intent to benefit the third party beneficiary is material part of the parties' purpose in entering into the contract.[18] The status of the third party is determined solely by the intent of the contracting parties.[19] An intended beneficiary need not be specified in the contract to qualify as such.[20] However, if the promisee did not intend to confer direct benefits upon a third person and instead the third party happens to either coincidentally or indirectly benefit from the performance of the promise, then the third party is deemed an incidental beneficiary and has no right to enforce the contract.[21]

In the present case, the DDOE Contract for Middlebury's services was between DDOE and Middlebury.[22] There is no language in the Contract that indicates an intent to confer a benefit on any person or entity other than the DDOE and Middlebury. As a result, Plaintiff cannot be considered a third-party beneficiary to the DDOE Contract and therefore may not enforce it against Defendants.

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[18] *Madison Realty Partners 7, LLC v. Ag ISA*, LLC, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).
[19] *McClements v. Savage*, 2007 WL 4248481, at *1 (Del. Super. Ct. Nov. 29, 2007).
[20] *Empire Fire & Marine Ins. Co. v. Miller*, 2012 WL 1151031, at *5 (Del. C.P. Apr. 5, 2012).
[21] *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 269 (Del. Ch. 1987); *see also* Restatement (Second) of Contracts § 315 (1981) ("An incidental beneficiary is a person who will be benefited by performance of a promise but who is neither a promisee nor an intended beneficiary.").
[22] DDOE Contract at 1.

Unlike the DDOE Contract, the Program Agreement provides that the "roles and responsibilities" of the District Administrator, School Administrator, School Classroom Facilitator and Middlebury Teacher include, among other things, the following:

> **The District Administrator:** understands the program and oversees its implementation; ensures the District meets the criteria in the Program Agreement.
>
> **The School Administrator:** selects, supervises and delegates duties for the classroom facilitator; performs duties of the classroom facilitator if needed; makes regular classroom visits to check on classroom management and student progress; keeps the District Administrator informed of progress, concerns, and achievements.
>
> **School Classroom Facilitator:** co-teacher for the Middlebury Interactive Languages program; provides strong classroom management and student support; performs all regular classroom duties as directed by the District.[23]

The Program Agreement also states that "[t]he Classroom Facilitator is also expected to be present on days of [Middlebury] Teacher visits to asses with classroom management, continuity, student engagement and behavior, and implementation of school policies."[24]

As discussed, Plaintiff alleges breach of contract against Defendants as a result of Defendants' failure to provide a classroom facilitator for months and failure to either act as or perform the duties of the classroom facilitator or visit the classroom

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[23] Am. Compl. at 12.
[24] *Id.* at 8.

to check on classroom management. But, for a third-party to qualify as an intended beneficiary the contracting parties must have intended for the third party to benefit from the contract and such intent must be a material part of the parties' purpose in entering into the contract. The language of the Program Agreement in its entirety suggests that the primary purpose of the Middlebury Interactive Language Program was to benefit the students by providing foreign language education.[25] In other words, the above-mentioned roles and responsibilities regarding the presence of a classroom facilitator were not intended to benefit Plaintiff but rather to promote student engagement and provide student support. Under these facts, it appears that Plaintiff is an incidental beneficiary of the Program Agreement and not an intended one, and is therefore without a legally enforceable right of action under it.

Accordingly, Defendants' Motion to Dismiss Count II for Breach of Contract is **GRANTED**.

Count III - Due Process Violation

Plaintiff claims that Defendant Moffit violated her procedural due process rights by "conducting biased interviews of select students and failing to conduct objective, unbiased administrative interviews of the students with reasonableness and equity" to ensure her protection in the classroom.

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[25] *See generally id.* at 6-12.

"Delaware has a two-year statute of limitations for personal injury actions, including civil rights actions."[26] The statute governing personal injury actions precludes a plaintiff from bringing such an action "after the expiration of two years from the date upon which it is claimed such alleged injuries were sustained."[27] Plaintiff contends that Defendant Moffit's investigation occurred "[d]ays following the incident."[28] As stated, the "incident" occurred on March 3, 2016 and the complaint was filed November 2, 2018. Thus, it appears that Plaintiff's claim was not timely filed.

However, Plaintiff argues that the limitations period is tolled because the injuries suffered were "inherently unknowable," and because Defendant Moffit "concealed that he had not interviewed students and/or only interviewed biased parties." Plaintiff contends she was unaware of who was responsible for her injuries that and it was practically impossible to discover the existence of a cause of action until November 7, 2016 because she was placed on administrative leave and prohibited from interfering with the investigation.[29]

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[26] *Hall v. Yacucci*, 723 A.2d 839 (Del. 1998) (citing 10 *Del. C.* § 8119).
[27] 10 *Del. C.* § 8119.
[28] Am. Compl. at 3.
[29] Pl.'s Resp. to Defs.' Reply at 1 (May 28, 2019) (D.I. 20) ("All files, names, addresses were deleted from plaintiff's computer, all students, parents information was removed and Plaintiff was sworn not to be involved in the investigation whatsoever. The plaintiff was not to contact, to interfere, or to discuss the allegations with any student, parent, faculty member and or employer.").

The statute of limitations for an inherently unknowable injury accrues "when the harmful effect of an otherwise unknowable injury 'first manifests itself and becomes physically ascertainable.'"[30] Otherwise referred to as the time of discovery rule, the rule provides that "when an inherently unknowable injury has been suffered by one blamelessly ignorant of the act or omission and the injury, then the injury is determined to be sustained when the harmful effect first manifests itself."[31] For the rule to apply, [n]o objective or observable factors may exist that might have put the plaintiff[] on notice of an injury."[32] The plaintiff bears the burden to show they were "blamelessly ignorant" of both the wrongful act and the resulting harm.[33]

Here, the harmful effects of Plaintiff's injury – the violation of her due process rights - manifested when she was charged with Offensive Touching. This Court has previously held that "[o]nce the plaintiff is aware of an injury, whether because the injury was known from the outside, or, if it was inherently unknowable, because the harmful effect has manifested itself and become physically ascertainable, the statute begins to run and continues to run even though the plaintiff may not be aware of any causal connection between the injury and the conduct of a particular potential

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[30] *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1124 (Del. 1987) (quoting *Collins v. Wilmington Med. Ctr., Inc.*, 319 A.2d 107, 108 (Del. 1974)).
[31] *Wilson v. Simon*, 1990 WL 63922, at *2 (Del. Super. Ct. Mar. 22, 1990).
[32] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).
[33] *Id.*

defendant."[34] Consequently, the statute began to run on the date she was charged even if, as Plaintiff claims, she was unaware of who was responsible for her injury.[35] Moreover, the arrest itself created facts sufficient to put a person of ordinary intelligence and prudence on inquiry which would have led to discovery of such facts if pursued.[36] The time of discovery rule is therefore inapplicable to the facts of this case.[37]

Similarly, Plaintiff's position that Defendant Moffit's fraudulent concealment tolls the limitations period must also fail. Fraudulent concealment requires

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[34] *McClements v. Kong*, 820 A.2d 377, 380 (Del. Super. Ct. 2002).
[35] Pl.'s Resp. to Defs.' Reply at 1 (May 28, 2019) (D.I. 20).
[36] *McClements*, 820 A.2d at 381; *see also Mergenthaler v. Asbestos Corp. of Am.*, 500 A.2d 1357, 1361 (Del. Super. Ct. 1985) ("The Court . . . does not recognize mere delay in obtaining discovery ... as [a] circumstance[] which would toll the statute of limitations.").
[37] *See, e.g., Coleman v. Pricewaterhousecoopers*, LLC, 854 A.2d 838, 842 (Del. 2004) ("This Court has applied the above-described 'discovery rule' in cases claiming accounting and attorney malpractice, because of the special character of the relationship between the professional and the client, and the inability of a layperson to detect the professional's negligence."); *Keller v. Maccubbin*, 2012 WL 1980417, at *4 (Del. Super. Ct. May 16, 2012) (applying the time of discovery rule to an action brought by a victim of sexual trauma with repressed memory); *Rudginski v. Pullella*, 378 A.2d 646, 649 (Del. Super. Ct. 1977) (finding the time of discovery rule applied where "[i]t would be harsh and unjust to hold that the cause of action accrued from the date of the allegedly negligent installation of the septic tank when there was no way to know that the buried negligence had taken place."); *Stagg v. Bendix Corp.*, 472 A.2d 40, 43 (Del. Super. Ct.), *aff'd*, 486 A.2d 1150 (Del. 1984) (holding the statute of limitations accrued when plaintiff "was chargeable with knowledge that his physical condition was attributable to asbestos exposure" because of "the prolonged and inherently unknowable latency of plaintiff's disease.").

"something affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to a cause of action-some actual artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry."[38] Plaintiff merely alleges that Defendant Moffit "claimed that he had performed a thorough investigation, completed it and officially closed the investigation" which left Plaintiff unaware that "he did not perform an investigation at all."[39] There are no allegations that Defendant Moffit or any of the Defendants acted affirmatively to conceal or prevent Plaintiff's discovery of the facts which gave rise to this cause of action.[40] As such, the doctrine of fraudulent concealment is inapplicable to the case at bar.

Because neither the discovery rule nor the doctrine of fraudulent concealment act to toll the statute of limitations, Count III is **DISMISSED** as time-barred.

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[38] *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. Ct. 1969).
[39] Pl.'s Resp. to Defs.' Reply at 1 (May 28, 2019) (D.I. 20).
[40] *See Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 176 (Del. Super. Ct. 1986) ("Mere silence or failure to disclose does not constitute such fraudulent concealment as will suspend operation of [a statute of limitations].") (internal citations omitted); *see also Shockley v. Dyer,* 456 A.2d 798, 799 (Del. 1983) ("When the facts are viewed in a light most favorable to plaintiffs, . . . it becomes clear that by an exercise of due diligence plaintiff could have discovered her rights. The failure to exercise this due diligence resulted in the continued running of the statute of limitations.") (internal citations omitted).

Count IV - Malicious Prosecution

Plaintiff similarly alleges a claim of malicious prosecution against Defendant Moffit and argues that his "biased interviews of select students" and "fail[ure] to conduct a reasonable investigation" with the majority of the students who were in the classroom when the incident occurred demonstrates there was "no basis for the [criminal] charge."[41]

A claim for malicious prosecution is generally disfavored by Delaware Courts and is therefore evaluated with careful scrutiny.[42] A cause of action for malicious prosecution requires: 1) a prior institution or continuation of some regular judicial proceedings against the plaintiff in the current action; 2) the former proceedings were by or at the instance of the defendant in the current action; 3) the former proceedings terminated in favor of the plaintiff in the current action; 4) the former proceedings were instituted with malice; 5) there was insufficient probable cause for the institution of the former proceedings; and (6) the former proceedings resulted in injury or damage to the plaintiff in the current proceeding.[43]

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[41] Am. Compl. at 5.
[42] *Quartarone v. Kohl's Dep't Stores, Inc.*, 983 A.2d 949, 954-55 (Del. Super. Ct. 2009).
[43] *Id.* at 955.

A malicious prosecution claim is subject to the two-year limitations period set forth in 10 *Del. C.* § 8119.[44] However, since one of the elements of a cause of action for malicious prosecution is the termination of the proceeding in favor of the accused, the Court finds that Plaintiff met the filing deadline by submitting her complaint within two years of the date she was found not guilty of the charge.[45]

Still, Plaintiff's claim falls short of the required standard, particularly in regard to the malice and probable cause requirements. Malice requires evidence that the action was taken by the defendant with a wrongful or improper motive or with wanton disregard of the plaintiff's rights.[46] Plaintiff must show that Defendant Moffit acted from malicious motives in prosecuting her, and that he had no sufficient reason to believe she was guilty. "While the complaint implicitly alleges that the criminal [] complaint was filed without probable cause, it does not sufficiently allege that it was filed for a wrongful or improper motive or wanton disregard of the rights of the plaintiff."[47] The Court has no facial basis for concluding "malice was even an ancillary motive" of Defendant Moffit in prompting the prosecution of Plaintiff.[48] For that reason, Count IV for Malicious Prosecution is **DISMISSED**.

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[44] *Pagano v. Hadley*, 553 F. Supp. 171, 177 (D. Del. 1982) ("[A] cause of action for malicious prosecution is in the nature of a personal injury claim.").
[45] *Id.*
[46] *Spence v. Spence*, 2012 WL 1495324, at *2 (Del. Super. Ct. Apr. 20, 2012).
[47] *Id.* at *3.
[48] *Nix v. Sawyer*, 466 A.2d 407, 412 (Del. Super. Ct. 1983); *see Read v. Carpenter*, 1995 WL 945544, at *2 (Del. Super. Ct. June 8, 1995).

Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.