Filed 11/6/17 Garcia v. Los Angeles Unified School Dist. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLLATE DISTRICT

DIVISION EIGHT

JORGE GARCIA, Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B279526 (Los Angeles County Super. Ct. No. BC548373)

APPEAL from a judgment of the Superior Court of Los Angeles County. Margaret M. Bernal, Judge. Affirmed.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi | Keese and David R. Lira for Plaintiff and Appellant.

Andrade Gonzalez, Sean A. Andrade, Henry H. Gonzalez, Stephen V. Masterson and Andre Y. Bates for Defendant and Respondent.

SUMMARY

This is an appeal from the grant of judgment on the pleadings in favor of defendant Los Angeles Unified School District (the district). The lawsuit arose after a high school student fatally stabbed his girlfriend, another student, on campus, and also stabbed plaintiff when he tried to intervene to rescue the girlfriend.

Before the district moved for judgment on the pleadings, the trial court granted summary judgment in favor of two administrator defendants on the ground they were immune from liability, and plaintiff did not appeal from the judgment entered in their favor. The district then moved for judgment on the pleadings, arguing it could not be vicariously liable for the acts of the individual defendants because the court had found they were immune; and it could not have direct liability because plaintiff did not allege the violation of any mandatory duty.

On appeal, plaintiff no longer contends the district had a mandatory duty to supervise and protect its students. Plaintiff argues the court erred in finding no vicarious liability based on the previous summary judgment ruling because that ruling was erroneous. Plaintiff has forfeited that contention by failing to appeal the resulting judgment as to the defendant administrators. Plaintiff also contends the district may be vicariously liable for the conduct of the individual defendants on the basis that it negligently hired, retained or supervised them. We hold the district cannot be vicariously liable for the allegedly negligent hiring, retention or supervision of the two administrators who are themselves immune from liability for the very conduct giving rise to the claim against them.

Accordingly, we affirm the grant of judgment on the pleadings.

FACTS

1. The Complaint

Plaintiff Jorge Garcia, a student at South East High School, sued the district, Maria Sotomayor (principal of the school) and Kevin Kilpatrick (vice principal). Plaintiff alleged two causes of action, one for negligence (against all defendants) and the other against the district for negligent hiring, supervision and retention. On September 30, 2011, another student, Abraham Lopez, attacked his former girlfriend, Cindi Santana (also a student), on school grounds. When plaintiff saw Mr. Lopez place Ms. Santana in a chokehold, he ran to help her, and placed Mr. Lopez in a chokehold. Mr. Lopez pulled a knife from his pocket, stabbed plaintiff in the shoulder (causing him to release his hold), and then stabbed Ms. Santana repeatedly, "right in front of plaintiff." Ms. Santana died.

The events leading up to Mr. Lopez's attack on Ms. Santana, according to plaintiff's operative complaint, were these.

Mr. Lopez and Ms. Santana "were in a volatile dating relationship," including "Lopez stalking, threatening, bullying, harassing, intimidating and abusing Santana." On September 25, 2011, Mr. Lopez threatened Ms. Santana "with disseminating compromising photos of her and further warned that if their relationship ended that he would kill her and her family." As a result of this incident, Mr. Lopez was arrested.

The next day, Ms. Santana and her mother met with Ms. Sotomayor and Mr. Kilpatrick at the school, to "disclos[e] the incident with Lopez and the threats facing [Ms. Santana]."

According to the complaint, Ms. Sotomayor later admitted in sworn testimony that, at the time of the meeting, she knew that Mr. Lopez had been arrested "for making criminal threats against [Ms. Santana];" Ms. Santana's mother indicated "she would need to drop off and pick up [Ms. Santana] at the school's office out of concern for her safety;" Ms. Santana "would be seeking a restraining order against Lopez;" Mr. Lopez was then in custody; Mr. Lopez "had threatened to disseminate damaging media against" Ms. Santana, had a history of following her against her will and harassing her; and Ms. Santana "was complaining to [Ms. Sotomayor] about Lopez's conduct." Mr. Kilpatrick likewise admitted under oath that he knew Ms. Santana "was fearful about Lopez getting out of jail," wanted Mr. Lopez's conduct to stop, and would be seeking a restraining order, and also knew Mr. Lopez had been arrested "as a result of his conduct toward" Ms. Santana and was then in custody.

Ms. Sotomayor considered the circumstances "to be unique in that police were involved at the outset." Ms. Sotomayor "has had no formal training in stalking, bullying and/or domestic violence," and "took no action to contact her superiors to see how she should handle" the situation. After the meeting, Ms. Sotomayor "took no action to [contact] Lopez's parents." Her plan "was to 'talk to' Lopez once he returned to school," but she "did nothing to alert any teachers or other school personnel (other than Defendant Kilpatrick who was present at the meeting) to Lopez's conduct, his dangerous propensities, or even to the fact that she wanted to talk with him." She instructed Mr. Kilpatrick "to contact authorities, and particularly the South Gate Police Department and investigate why Lopez had been arrested." She also directed Mr. Kilpatrick to contact Mr. Lopez's guardians.

Mr. Kilpatrick "approached Luis Barraza, a safety officer" at the school, but "only provided him with Abraham Lopez's name to find out if he was arrested." Mr. Barraza learned that "Lopez had been arrested and was likely to be released on or about September 28, 2011." Mr. Kilpatrick "failed to ask Barraza to obtain . . . information" about "the nature of the charges and the facts of the incident . . . ." Mr. Kilpatrick "made no attempts to contact Lopez prior to September 30, 2011, and did not tell any school employees to be on the lookout for Lopez," and he did not contact Lopez's guardians. Ms. Sotomayor "took no further action concerning Lopez's threats."

Mr. Lopez was released from police custody on September 28, 2011, and the next day was a school holiday.

On September 30, 2011, Mr. Lopez "entered the campus of the school unabated" and "was allowed to lurk on campus without being confronted, apprehended, or talked to by employees" of the school. During the 11:00 a.m. hour, while some of the students were at lunch, Mr. Lopez, armed with a knife and a firearm, encountered Ms. Santana, and the unfortunate events already described took place.

2. Trial Court Proceedings

a. The motions for summary judgment

After plaintiff filed the operative complaint, all three defendants filed motions for summary judgment. They argued Mr. Lopez's actions were unforeseeable and so they owed no duty to plaintiff. Plaintiff's opposition contended the defendants had a duty to protect their students and failed to undertake an investigation and to take precautionary measures. Plaintiff enumerated various actions defendants could have taken but did not, instead merely "get[ting] in touch with authorities and

plan[ning] to schedule a meeting with Lopez at some future date."

In their reply, defendants contended plaintiff's "new broad theory of liability is separately without merit because school administrators are not liable for the exercise of discretion in the performance of their official duties," citing Government Code section 820.2.[1] (Section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.")

The trial court (Judge Raul A. Sahagun) denied defendants' motions on February 29, 2016. Among other points, the court observed that defendants' immunity argument "was raised for the first time in the reply papers, and thus cannot be the basis for granting the subject motion."

On June 1, 2016, Judge Sahagun, in response to defendants' motion to disqualify him, voluntarily recused himself and vacated the order denying summary judgment "in its entirety."

The case was reassigned to Judge Margaret M. Bernal, and the motions were scheduled for rehearing on July 13, 2016.

On June 30, 2016, plaintiff filed a supplemental brief in opposition to the motions for summary judgment. Plaintiff's brief addressed two issues: the rescue doctrine, and defendants' "untimely argument regarding . . . § 820.2." On the latter point, plaintiff contended that consideration of the immunity argument

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[1] Further statutory references are to the Government Code unless otherwise specified.

would violate his due process rights because it was not raised in defendants' moving papers. Plaintiff also argued defendants "failed to meet their burden with regard to . . . § 820.2," because they "fail[ed] to present evidence indicating that Sotomayor consciously exercised discretion and assumed certain risks as a result," rather than "[doing] nothing more than wait for Lopez to return to school."

On July 8, 2016, defendants filed a reply to plaintiff's supplemental brief. Defendants contended plaintiff's due process argument was mooted by his filing of the supplemental brief presenting his arguments against section 820.2 immunity. Defendants further argued that consideration was proper in any event because the immunity argument was a legal argument, not evidence, and plaintiff's additional undisputed facts, listing things defendants could have done but failed to do, could not defeat summary judgment. Defendants pointed out the undisputed facts showed Ms. Sotomayor and Mr. Kilpatrick met with Ms. Santana and her mother, who advised them of Mr. Lopez's threats, and "[s]everal proposed precautionary measures were discussed," including Ms. Santana's transfer to another campus (which she rejected). Defendants contended Ms. Sotomayor "used her discretion to take certain actions and postpone any further disciplinary action against Lopez."

After a hearing, the trial court granted summary judgment in favor of defendants Sotomayor and Kilpatrick, concluding that they "were vested with the authority to take whatever steps they deemed appropriate with respect to both Lopez's discipline and Santana's safety (as well as that of the student body). Their decisions are protected under section 820.2 and their motion for summary judgment granted on that basis."

Plaintiff did not appeal from the judgment entered in favor of defendants Sotomayor and Kilpatrick (notice of which was served on September 19, 2016).

The trial court denied the district's motion for summary judgment, rejecting the claim that the attack on Ms. Santana was unforeseeable. The court concluded the evidence supported "a duty of care owed to Santana and, under the rescuer doctrine, to plaintiff," and whether the district breached that duty was a question of fact. As to the negligent hiring claim, the court concluded the district "proffered no evidence regarding the 'fitness' of either Sotomayor or Kilpatrick, so it failed to meet its initial burden" on that claim.

b. The motion for judgment on the pleadings

The district then brought a motion for judgment on the pleadings, on the ground the complaint did not state any viable cause of action against the district. The district contended it could not be held vicariously liable under section 815.2 where the employees whose conduct was at issue were immune from liability. (See § 815.2, subd. (b) ["Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."].)

In addition, the district argued, plaintiff's complaint did not identify any mandatory duty that could support a claim of direct liability. (See § 815.6 ["Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity

establishes that it exercised reasonable diligence to discharge the duty."].)

Plaintiff opposed the motion, contending (1) the district had a mandatory duty to take all reasonable steps to protect its students, "aris[ing] from a variety of different constitutional, statutory, and regulatory enactments," and could be held directly liable for breaching that duty, and (2) its cause of action for negligent hiring, supervision and retention of Ms. Sotomayor and Mr. Kilpatrick was "a claim of vicarious liability for the negligence of those who hired, supervised, and retained" Ms. Sotomayor and Mr. Kilpatrick. Plaintiff did *not* contend the immunity ruling was erroneous. Plaintiff's own opposition papers state, in the introduction: "The District starts out well enough by noting that it cannot be held *vicariously* liable for the negligent conduct of Sotomayor and Kilpatrick if they are immune from liability for their own negligence." Plaintiff continued by arguing the district was *directly* liable for breach of a mandatory duty.

On November 3, 2016, the trial court granted the district's motion for judgment on the pleadings. The court found none of the enactments plaintiff cited imposed a mandatory duty on the district. The court observed that plaintiff "appears to agree with defendant on the issue of vicarious liability as to the named defendants," and its argument for vicarious liability based on negligent hiring of the named defendants by others, "while it may have some theoretical appeal, does not speak to the facts here."

Judgment was entered in favor of the district on December 5, 2016. Plaintiff filed a timely notice of appeal from the "final judgment after order granting judgment on the pleadings . . . ."

DISCUSSION

1. Standard of Review

"The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law." (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216.) Our review is de novo. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

2. This Case

Plaintiff makes two arguments on appeal. (In his reply brief, plaintiff withdrew his contention the district had a mandatory duty to supervise and protect its students.)

First, plaintiff contends, in effect, that the trial court erroneously granted summary judgment to Ms. Sotomayor and Mr. Kilpatrick (the individual defendants). (Plaintiff says the trial court "erred by relying on its erroneous summary judgment order" when it ruled the district could not be held vicariously liable for their conduct.) Second, plaintiff argues the district may be held vicariously liable "for the conduct of those who negligently hired, retained, or supervised Sotomayor and Kilpatrick."

Plaintiff has forfeited his first contention, and the second contention is without merit.

a. The summary judgment in favor of the individual defendants

Plaintiff contends he may challenge the court's summary judgment immunity ruling under Code of Civil Procedure section 906, which permits review of "any intermediate ruling . . .

which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906 (section 906).) Plaintiff is mistaken.

First, plaintiff fails to mention the final sentence of section 906: "The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." Plaintiff could have appealed from the court's order entering judgment on September 15, 2016 in favor of the individual defendants, but did not do so. (Indeed, plaintiff could have appealed from that judgment after receiving the trial court's adverse November 3, 2016 ruling granting the district's motion for judgment on the pleadings, as the time for appeal of the earlier judgment had not yet expired.)

Second, plaintiff cites no authority that supports his claim he could choose not to appeal the judgment in favor of the individual defendants, and instead deem the summary judgment ruling preceding the judgment a "non-appealable, interlocutory order" of which he may now obtain review. The cases plaintiff cites simply hold, for example, that an employer "may be held vicariously liable [for the negligence of an employee] without a judgment against the employee personally" (*Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423 (*Lathrop*)), and a plaintiff seeking to hold an employer liable for injuries caused by employees "is not required to name or join the employees as defendants" (*Perez v. City of Huntington Park* (1992) 7 Cal.App.4th 817, 820). Those principles are correct, but the same cases clearly point out the more pertinent principle: that the employer's vicarious liability "is wholly dependent upon or derived from the *liability* of the employee,"

and the employer "cannot be held vicariously liable *unless* the employee is found responsible." (*Lathrop,* at p. 1423, italics added.)

In short, plaintiff forfeited this claim. He made no effort to argue, in opposition to the motion for judgment on the pleadings, that the court's earlier immunity ruling was erroneous. We are without power to review the immunity ruling, because plaintiff failed to appeal the judgment finding the individual defendants immune from liability for their conduct, and that judgment is final. (See *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8 ["California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited"; "the powers of a reviewing court do not include the power to 'review any decision or order from which an appeal might have been taken' but was not"; "[i]f the . . . order was appealable, it follows that it had to be timely appealed or the right to challenge its particulars be forever lost"].)

That leaves us with the governing principle. A public entity is not liable for injuries resulting from an act or omission of an employee who is immune from liability (§ 815.2, subd. (b)), so the district cannot be liable for the conduct of Ms. Sotomayor and Mr. Kilpatrick.

b. The negligent hiring claim

Plaintiff contends the district "may be held vicariously liable for the conduct of those who negligently hired, retained, or supervised Sotomayor and Kilpatrick," and he was not required to identify those employees by name or position at the pleading stage. For these principles, plaintiff cites *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 875 (*C.A.*). It is immaterial whether or not plaintiff had to specify names or

positions at the pleading stage, because the district cannot be vicariously liable for *any* employee's hiring, supervision or retention of Ms. Sotomayor or Mr. Kilpatrick since they themselves are immune from liability. Simply put, there is no vicarious liability for the conduct of public entity employees who are immune from liability, no matter who hired, supervised or retained them, or how they did it.

C.A. established the principle that a public school district "may be vicariously liable under section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A., supra,* 53 Cal.4th at p. 879.) *C.A.* does not assist plaintiff. We have no quarrel with its holding that a school district may be vicariously liable for an administrator's negligent hiring decision in the circumstances of that case. In *C.A.*, the hiring could be found negligent based on the underlying sexual misconduct of the hiree (and the fact the hirer knew or should have known of the hiree's dangerous propensities) – and, the malefactor hiree was responsible (not immune from liability) for that underlying conduct.

The circumstances here are not comparable. To hold they are would make the district vicariously liable for the negligent hiring of administrative personnel who are *not* liable for the very conduct giving rise to the claim of negligent hiring. That is a step too far. It would require us to hold the district may be vicariously liable for the hiring of an administrator who has exercised the discretion vested in her (and for which conduct she is by statute immunized from liability). We do not think the *C.A.* principle can or should be extended in that way. To do so would be inconsistent with the established principle that an employer's

vicarious liability "is wholly dependent upon or derived from the liability of the employee . . . ." (*Lathrop, supra,* 114 Cal.App.4th at p. 1423.) As one court observed in another context, plaintiff's argument to the contrary "suggests that there is no action by [an administrator] for which a district would not be liable so long as it may be traced back to negligent hiring and supervision. We are unaware of any case law that extends such liability that far . . . ." (*Mosley v. San Bernardino City Unified School Dist.* (2005) 134 Cal.App.4th 1260, 1265.)

There was no error in the trial court's grant of judgment on the pleadings.

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

EPSTEIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.