

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

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NORFOLK SUPERIOR COURT
DOCKET # 2282CV1197
CLERK OF THE COURT
NORFOLK COUNTY

DARLENE SMITH as the PERSONAL
REPRESENTATIVE OF
THE ESTATE OF SANDRA BIRCHMORE

V.

MATTHEW FARWELL, WILLIAM FARWELL,
ROBERT DEVINE, and JOSHUA HEAL Individually,
THE TOWN OF STOUGHTON, and THE
STOUGHTON POLICE DEPARTMENT

MEMORANDUM IN SUPPORT DEFENDANT ROBERT DEVINE'S MOTION TO DISMISS
ALL COUNTS AND CLAIMS AGAINST HIM

Now comes the Defendant, Robert Devine and moves that the complaint against him be dismissed. As reasons therefore the Defendant, Robert Devine submits that pursuant M.R.Civ.P. 12(b)(6), the plaintiff has failed to properly state claims against him.

Pursuant M.R.Civ.P. 12(b)(6) the Defendant's motion is appropriate when the plaintiff has failed to plead a claim sufficiently recognizable under Massachusetts law or the applicable law (e.g., federal law) providing the right of action. In *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008), the Supreme Judicial Court adopted the "clarified standard" of the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to evaluate motions to dismiss under Rule 12(b)(6). Under that standard, [w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the

assumption that all the allegations in the complaint are true (even if doubtful in fact) What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[] the threshold requirement of [Fed. R.Civ. P.] 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief.

When deciding Rule 12(b)(6) motions, the court will take the allegations of the complaint as true and draw every reasonable inference in favor of the plaintiff. *Galiastro v. Mortg. Elec. Registration Sys., Inc.*, 467 Mass. 160, 164 (2014) (citing *Lopez v. Commonwealth*, 463 Mass. 696, 700 (2012)). The court does not accept as true, however, legal conclusions masked as factual allegations in a complaint. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). Nor does the court consider factual assertions the defendant makes in its Rule 12(b)(6) motion to dismiss. *Fraelick v. Perket PR*, 83 Mass. App. Ct. 698, 700 (2013). If the face of the complaint and its incorporated materials conclusively demonstrate an affirmative defense, dismissal is appropriate. *State Room, Inc. v. MA-60 State Assocs., L.L.C.*, 84 Mass. App. Ct. 244, 248 (2013). When a Rule 12(b)(6) motion is made to dismiss a complaint alleging fraud, the Rule 9(b) requirements of pleading with particularity must also be considered in determining the sufficiency of the complaint. *Equip. & Sys. for Indus., Inc. v. Northmeadows Constr. Co., Inc.*, 59 Mass. App. Ct. 931, 932 (2003).

Argument:

The Second Amended Complaint and Demand for Jury Trial is devoid of any specific facts drawing the Defendant, Robert Devine into the labels and conclusions raised by the Plaintiff. The complaint incorporates no materials. The Second Amended Complaint is wholly unsupported by facts. Plaintiff drafted the Second Amended Complaint to give the

impression that Sandra Birchmore was involved in some sort of sexual encounter with Devine and others. The complaint tries to pull on the heart strings of its reader by inferring the outrageous allegation that Sandra Birchmore was some sort of underaged sex toy passed around between police officers.

However, there is not a single date identified by Plaintiff in the complaint to support this or any of its claims. There is not a single witness who is cited to having seen any event. Not even a year is provided for any act(s) for which labels and conclusions are speculated. Plaintiff raised the term “grooming” but provides absolutely no dates on which it is alleged that Devine engaged in inappropriate activity. The complaint is devoid of facts concerning what Devine actually did that constitutes the label “grooming.”

The Second Amended Complaint claims an “ongoing pattern of sexual abuse and behavior” but gives no supporting dates for that alleged conduct. Absent from the Second Amended Complaint is the age of the decedent at any particular point in time. More importantly is the absence of the fact that the decedent, was an adult for more than 5 years at the time of her passing at age 23. It is clear that Plaintiff is trying to hide the basic fact that Ms. Birchmore was an adult at the time of her untimely passing on February 2, 2021. There are no facts presented that Devine did anything to or against Ms. Birchmore, at any specific time, while she was a minor or an adult.

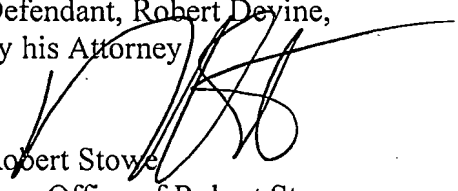
There are no facts presented to support a claim of a deliberate indifference to training or that it was obvious there needed to be more or different training.

There are facts to support a claim that subordinates were hired with deliberate indifference toward the possibility that deficient performance of their tasks eventually may contribute to a civil rights deprivation. In-fact, Devine had no hiring authority.

There are no facts to support a claim that a Devine failed to exercise due care in the selection of an employee, evidence that the he knew or should have known that an employee who was hired was unfit and posed a danger to others and that such a failure proximately caused the injury of which the plaintiff complains.

The Second Amended Complaint presents no set of facts that support its speculative allegations against Devine and must be dismissed as to the Defendant, Robert Devine.

Respectfully submitted,
Defendant, Robert Devine,
by his Attorney



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