SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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ARK249 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, JESUIT FATHERS AND BROTHERS, FORDHAM UNIVERSITY, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

Defendant.

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INDEX NO. 950332/2020

MOTION DATE 12/22/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant, Fordham University's motion seeking dismissal of this action pursuant to CPLR §§ 3211(a)(5), 3211 (a)(7), 3211 (a)(8) and 306-b, and plaintiff's cross-motion seeking an extension of time to serve the summons and complaint pursuant to CPLR 306-b.

Plaintiff commenced the instant action by e-filing the summons and complaint on July 20, 2020, simultaneously with an Order to Show Cause seeking leave to proceed under a pseudonym, which was granted by stipulation on September 9, 2020. On August 12, 2020, plaintiff served defendant, Jesuit Fathers and Brothers, pursuant to CPLR 311. This action has been dismissed as against defendant, Archdiocese of New York. No affidavit of service was filed for defendant, Fordham University, who moves to dismiss for lack of proper service.

Pursuant to CPLR 306-b, "[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or

proceeding… If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

"To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service" (*Bumpus v New York City Transit Authority*, 66 AD3d 26, 31-32 [2d Dept 2009]. "[G]ood cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (*Bumpus*, 66 AD3d at 32). As such, it is hereby

As discussed in *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105–06 (2001), "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

It is undisputed that plaintiff failed to serve defendant, Fordham University, and as such, this Court lacks jurisdiction over said defendant. Said defendant argues that the CVA's revival of previously time-barred sexual abuse claims expired on August 14, 2021, however, the statute of limitations was arguably extended an additional 228 days by executive order, expiring on March 30, 2022. Same is a distinction without a difference as in either case the time to file a new action against Fordham University has expired. As such, "…the court's options [are] limited to either

dismissing the action outright, or extending the time for plaintiff to properly effect service." *Henneberry v. Borstein*, 91 A.D.3d 493, 495 (1st Dept 2012)

In support of its cross-motion seeking an extension of time, plaintiff submits an affidavit of service alleging that on August 13, 2020, plaintiff attempted to serve Fordham University at 441 E. Fordham Road Bronx NY 10458 but was unable to do so as the campus was closed. Thereafter, Plaintiff through counsel, contacted Cullen & Dykman by phone on August 14, 2020, to ask whether the firm, which represented Fordham in other matters would accept service given Fordham's closure. Said firm refused to accept service. Contrary to plaintiff's argument, these attempts utterly fail to establish a diligent attempt at service. Plaintiff's process server's affidavit even specifically states that "Deponent found the campus is closed and will open up little by little starting next week." Plaintiff's initial 120 days to serve defendant expired on November 20, 2020, yet plaintiff failed to re-attempt service during that time and did not move for an extension of time until two years later, filing the instant cross-motion on November 23, 2022. As to an evaluation of the interests of justice standard, the sole factor in favor of plaintiff is that the relevant statute of limitations has expired.

Defendant further seeks dismissal of this action pursuant CPLR §3211(a)(7) and §3211(a)(5), arguing that plaintiff's claim fails to meet the pleading requirements of CPLR §214-g and is therefore untimely. Specifically, said defendants argue that Complaint is entirely devoid of any allegation of specific conduct that would fall within the definition of "sexual offense" within the Penal Law, as required by Section 214-g and that the Complaint fails to allege where such conduct occurred, or more specifically, that such conduct occurred in New York. Contrary to movants' argument, the Complaint states that "Plaintiff and Plaintiff's family came in came in contact with Fr. Rodgers as an agent and representative of Defendants and at Fordham" and that

"From approximately 1966 to 1967, when Plaintiff was approximately 17 years old, Fr. Rogers engaged in unpermitted sexual contact with Plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05, or a predecessor statute that prohibited such conduct at the time of the abuse." Further, any act which violates New York Penal Law Article 130 and/or § 263.05 necessarily occurred within New York State.

Said defendant also seeks dismissal arguing that plaintiff has failed to plead its negligence claims. In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), a court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp*., 104 AD3d 401 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (see *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see CPLR §3026; *Siegmund Strauss, Inc*., 104 AD3d 401, supra). In deciding such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 'the benefit of every possible favorable inference,'" and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc*., 104 AD3d 401, supra; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However,

"allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], aff'd 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], lv denied 89 NY2d 802 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Leon*, 84 NY2d at 88, supra; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]; "In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Rather, where a motion to dismiss is directed at the sufficiency of a complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR §3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, citing *P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [1st Dept 2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (id. at 376; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (see *Leon*, 84 NY2d at 87-88, supra; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Fordham University contends that plaintiff has failed to sufficiently plead a separate duty of care owed beyond its duty to use reasonable care in hiring, retaining, supervising and training employees and do not owe a separate general duty to prevent conduct by its subordinate that is illegal, outside of its control, and unforeseeable (see *Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 163 [2d Dept 1997]. The Jesuits further contend that "plaintiff fails to plead the essential elements of a negligent training, retention or supervision claim. In addition to the standard elements of negligence, Plaintiff must show that the defendant "knew, or should have known, of the [subordinate's] propensity for the sort of conduct which caused the injury," and that the "tort was committed on the employer's premises with the employer's chattels" (see *Ehrens v Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004]." Moving Defendants further contend that Plaintiff's conclusory allegations of notice are not sufficient to state a cause of action.

"[T]here is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]). Instead, to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "A necessary element of a cause of action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct which caused the injury'" (*Bumpus v New York City Transit Authority*, 47 AD3d 653 [2d Dept 2008]).

In this Court's decisions on the issue of sufficient pleading in Child Victims Act cases, the Court has taken a very liberal stance on the issue of whether a negligence cause of action has been sufficiently pled. However, the subject complaint is utterly devoid of any information as to how

plaintiff came into contact with Fr. Rodgers other than citing "youth activities". Plaintiff further fails to detail where the alleged abuse occurred. Specifically, it is unclear how plaintiff was present at Fordham University. It is unclear whether plaintiff was a student, a parishioner or some other class of persons. While the complaint does allege that "Defendants placed Fr. Rodgers in positions where he had access to and worked with children as an integral part of his work" there is no indication what that work was or where he was assigned. As such, plaintiff has failed to state a cause of action.

ORDERED that defendant, Fordham University's motion is GRANTED in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)].

12/23/2022
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE