

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-16-74

BENJAMIN WHEELER,

Plaintiff,

v.

ORDER

NORTHEAST PROVINCE OF THE
SOCIETY OF JESUS, et al.,

Defendants.

Before the court is a motion to dismiss plaintiff Benjamin Wheeler's complaint as against defendant Cheverus High School.

Wheeler's complaint names four defendants: the Northeast Province of the Society of Jesus, Reverend James Talbot, the Roman Catholic Bishop of Portland, and Cheverus High School. The centerpiece of the complaint is Wheeler's allegation that he was sexually abused on several occasions by Rev. Talbot at St. Jude's Church in Freeport in early 1998 when Wheeler was nine years old. Complaint ¶¶ 13-14.

Cheverus is named as a defendant based on allegations that at the time of the abuse Rev. Talbot was serving on the faculty at Cheverus even though Stephen Dauber, identified as the president or principal of Cheverus, was aware that Talbot had a propensity to sexually abuse minor boys. Complaint ¶ 10. Wheeler alleges that Talbot was suspected of sexually abusing students at Talbot's previous teaching job at Boston College High School and that Dauber, aware of the mounting suspicions against Talbot at BC High, had encouraged Talbot to relocate to Cheverus. *Id.*

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Wheeler alleges that while on the faculty of Cheverus and while under the authority, direction, and supervision of Cheverus as well as that of the Bishop of Portland and the Jesuits, Rev. Talbot was allowed by the Bishop to conduct parish activities at St. Jude's in Freeport, where the sexual abuse allegedly occurred. Complaint ¶¶ 11-12, 15. He further alleges that the Jesuits, the Bishop, and Cheverus were aware of the danger that Rev. Talbot presented to minor boys and that Talbot "used his position" with Cheverus, the Bishop, and the Jesuits to obtain the trust of Wheeler and Wheeler's parents in order to enable the alleged abuse. Complaint ¶¶ 17-19.

In count I of the complaint Wheeler asserts a claim against all defendants for sexual abuse. In count II he asserts a claim against all defendants for intentional infliction of emotional abuse (IIED). In count III he asserts a claim against all defendants for negligent infliction of emotional abuse (NIED). Count IV is a claim against all defendants for fraud. Count V is a claim for punitive damages. Count VI is a claim against all defendants for civil conspiracy. Count VII alleges a claim – nominally against all defendants but presumably excluding Talbot – for respondeat superior.

For purposes of a motion to dismiss, the material allegations of the complaint must be taken as admitted. *Ramsey v. Baxter Title Co.*, 2012 ME 113 ¶ 2, 54 A.3d 710. The complaint must be read in the light most favorable to the plaintiff to determine if it sets forth elements of a cause of action or alleges facts that would entitle plaintiff to relief pursuant to some legal theory. *Bisson v. Hannaford Bros. Co., Inc.*, 2006 ME 131 ¶ 2, 909 A.2d 1010. Dismissal is appropriate only when it appears beyond doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim. *Moody v. State Liquor & Lottery Commission*, 2004 ME 20 ¶ 7, 843 A.2d 43. However, a plaintiff may not proceed if the complaint fails to allege

essential elements of the cause of action. *See Potter, Prescott, Jamieson & Nelson P.A. v. Campbell*, 1998 ME 70 ¶¶ 6-7, 708 A.2d 283.

The court will consider each of the causes of action asserted in the complaint as they apply to Cheverus with the exception of count V (punitive damages). That is not a separate claim but merely a kind of damages that may be recoverable if the complaint otherwise states a claim, if plaintiff prevails at trial, and if the specific prerequisites for punitive damages are proven by clear and convincing evidence.

In considering the claims against Cheverus, the court will assume throughout the truth of Wheeler's allegations that Rev. Talbot sexually abused Wheeler at St. Jude's Church when Wheeler was nine years old.

Count I – Sexual Abuse

Although count I of the complaint is captioned as a claim for "sexual abuse," counsel has clarified that count I constitutes a common law claim for assault and battery. Plaintiff's Opposition to Motion to Dismiss dated April 11, 2016 at 5. Counsel for plaintiff also argues that the liability of Cheverus on Count I is premised on respondeat superior and on civil conspiracy. *Id.* Since civil conspiracy is separately pleaded in count VI, and respondeat superior is separately pleaded in count VII, the court will address those claims below.

In opposing the motion to dismiss, plaintiff also argues at some length that the complaint states a claim for negligently creating a risk of harm to third persons under Restatement (Second) Torts § 302B and for negligent supervision under Restatement (Second) Torts §§ 315 and 317. Plaintiff's Opposition to Motion to Dismiss dated April 11, 2016 at 7-15. Neither of those

theories is expressly mentioned in the complaint,¹ but the court will address them to the extent that the factual allegations can be construed to state those claims.

Restatement (Second) Torts § 302B

Restatement (Second) Torts § 302B, titled “Risk of Intentional or Criminal Conduct,” provides as follows:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

The Law Court has not expressly adopted section 302B but it was willing to consider whether that section should be applied in a case involving sexual abuse by a former summer camp volunteer against a former camper after camp had ended. *Gniadek v. Camp Sunshine*, 2011 ME 11 ¶¶ 28-31, 11 A.3d 308. In that case the Court focused specifically whether section 302B applies when a defendant has “brought into contact or association” with the plaintiff a person who the plaintiff “knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.” Restatement (Second) Torts § 302B, comment e(D). *See id.* illustration 9. Certain of the factual allegations in Wheeler’s complaint track Restatement § 302B. *See* Complaint ¶¶ 11-12, 15, 17-19.

In *Gniadek* the Law Court found that there was no evidence that Camp Sunshine had known that the volunteer had presented a particular risk and that the Camp had not created a “peculiar opportunity” for misconduct. 2011 ME 11 ¶ 31. It therefore affirmed summary judgment in favor of the camp on the § 302B claim.

¹ The only express mention of “negligence” is made in count III (NIED).

In this case, given the allegations in the complaint and the standard to be applied on a motion to dismiss, the court concludes that Wheeler 's claim under Restatement § 302B is not subject to dismissal. In discussing Restatement § 302B, the Law Court in *Gniadek* cited to the Texas case of *Golden Spread Council No. 562 of the Boy Scouts v. Akins*, 926 S.W.2d 287, 289, 290-92 (Tex. 1996), describing it as a case where liability might exist where a boy scout troop recommended a scout master to another organization after becoming aware of some sexual misbehavior by the scout master. 2011 ME 11 ¶ 30. Before the court can consider whether Restatement § 302B could or should be adopted in this case, some factual development is necessary as to the extent of Cheverus's knowledge, if any, of Talbot's propensity for sexual abuse and to what extent, if any, Cheverus was aware of or approved or facilitated Talbot's involvement in parish activities at St. Jude's involving contact with children.

Restatement (Second) Torts § 317

The Law Court has held that Restatement (Second) Torts § 317, which applies to an employer's potential duty to control employees while acting outside the scope of their employment, only applies in cases of this nature if there is a "special relationship" between the defendant employer and the alleged victim of a sexual assault. *Dragomir v. Spring Harbor Hospital*, 2009 ME 51 ¶ 16, 970 A.2d 310; *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57 ¶ 39, 871 A.2d 1208. The Law Court has also required that the existence of a "special relationship" be pled with specificity. *E.g., Bryan R. v. Watchtower Bible and Tract Society*, 1999 ME 144 ¶ 21, 738 A.2d 839.

In this case Wheeler has not alleged any facts that, if proven, could support a finding of the kind of special relationship between Cheverus and Wheeler that would allow the application

of Restatement § 317. Wheeler does not allege that he attended Cheverus or that he had any relationship with Cheverus that even approached the kind of relationship necessary for the potential imposition of liability under Restatement § 317. *See Dragomir*, 2009 ME 51 ¶¶ 18-21, *Fortin*, 2005 ME 57 ¶¶ 31-39. Plaintiff's theory appears to be that Rev. Talbot would not have come to Maine without the involvement of Cheverus and that Cheverus's reputation among Catholics assisted Talbot in gaining access to Wheeler in order to abuse him. This is not sufficient to allege a special relationship, and the complaint therefore does not state a claim under Restatement § 317.

Count II – Intentional Infliction of Emotional Distress

To proceed on a claim of IIED, a plaintiff must establish that:

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct; (2) the conduct was so “extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community”; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was “so severe that no reasonable [person could be expected to endure it.”

Curtis v. Porter, 2001 ME 158 ¶ 10, 784 A.2d 18.

Liability for IIED does not require a special relationship. In this case the court concludes that under the standard applicable to a motion to dismiss, the complaint adequately states a claim for IIED against Cheverus. As with Wheeler's claim under Restatement § 302B, he will have to prove that Cheverus was aware of Rev. Talbot's propensities and the risk Talbot presented to minor children. Moreover, he will also have to prove that Cheverus was sufficiently aware of or was sufficiently involved in approving or facilitating Talbot's involvement in parish activities at

St. Jude's before it could be found that Cheverus played a role in "inflicting" emotional distress upon Wheeler because of Talbot's alleged activity.

Count III – Negligent Infliction of Emotional Distress

As with a claim under Restatement § 317, a NIED claim requires that a special relationship exist between the plaintiff and the person or entity alleged to have negligently inflicted the emotional harm. *Curtis v. Porter*, 2001 ME 158 ¶ 19. For the same reasons discussed above with respect to Restatement § 317, Wheeler's complaint does not allege facts which, if proven, would establish the necessary special relationship between Wheeler and Cheverus. Accordingly, the motion to dismiss is granted as to count III.²

Count IV – Fraud

Wheeler is not alleging any affirmative fraud or misrepresentation by Cheverus. Instead he is alleging that Cheverus was part of a "conspiracy of silence" and is thereby asserting a claim of fraudulent concealment. To prevail on a claim for fraudulent concealment, "a plaintiff must prove, by clear and convincing evidence, (1) a failure to disclose, (2) a material fact, (3) when a legal or equitable duty to disclose exists, (4) with the intention of inducing another to act or refrain from acting in reliance on the non-disclosure, and (5) the plaintiff in fact relied upon the non-disclosure to the plaintiff's detriment." *Picher v. Roman Catholic Bishop of Portland*, 2013 ME 99 ¶ 3, 82 A.3d 101 (*Picher II*).

The threshold issue on this claim is whether the legal or equitable duty to disclose that is necessary for a claim of fraudulent concealment arises only from the kind of special relationship

² The dismissal of his freestanding NIED claim will not prevent Wheeler from recovering damages for emotional distress if he prevails on one or more of his other claims.

required for a claim under Restatement ¶ 317 or a NIED claim.³ The indication in the Law Court's decision in *Picher II* is that such a special relationship is required, at least unless there is an allegation that Cheverus became aware of the abuse while it was happening. See *Picher II*, 2013 ME 99 ¶ 4, citing to *Fortin*, 2005 ME 57 ¶ 29, 32-35.

In this case, as discussed above, Wheeler does not adequately allege a "special relationship" and he does not allege that Cheverus became aware of the abuse while it was happening. In addition, Wheeler does not allege that Cheverus had an intention of inducing Wheeler or other parish children to become involved with Rev. Talbot at St. Jude's in reliance on the non-disclosure of Talbot's alleged proclivities. Accordingly, the motion to dismiss count IV is granted.

Count V – Civil Conspiracy

Civil conspiracy is not a standalone tort. Unless another tort has been adequately alleged, a claim for civil conspiracy cannot be asserted. See *Potter, Prescott, Jamieson & Nelson P.A. v. Campbell*, 1998 ME 70 ¶ 8. Civil conspiracy is a basis to extend liability to "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify his acts done for his benefit." *Cohen v. Bowdoin*, 288 A.2d 106, 111-12 (Me. 1972), quoting Prosser, *Torts*, 3rd Ed. p. 259.

In this case Wheeler alleges that Cheverus, the Bishop of Portland, and the Jesuits – along with perhaps Talbot himself – "acted in concert" in covering up Talbot's inappropriate conduct with minors and his propensity to sexually abuse children. Complaint ¶ 44. This

³ Alternatively, a duty to disclose might be found between parties to a business transaction, but this case does not involve that situation.

conclusory allegation does not adequately allege that Cheverus acted with the other defendants as part of a common plan. Accordingly, as pleaded, Wheeler's civil conspiracy count fails to state a claim.

Count VII – Respondeat Superior

Count VII of the complaint alleges that Talbot was aided in engaging in sexual abuse by the existence of an agency relationship with Cheverus, the Bishop of Portland, and the Jesuits. Complaint ¶ 48. To the extent that this is an allegation that Talbot would not have come to Maine and would not have gone to St. Jude's unless he had joined the Cheverus faculty, count VII does not state a claim. To the extent that Wheeler is arguing that Cheverus is responsible under the standard principle of respondeat superior, it does not state a claim. Wheeler does not allege that the sexual abuse allegedly perpetrated by Talbot fell within Talbot's scope of employment under *Maher v. StoneWood Transport*, 2003 ME 63 ¶ 13, 823 A.2d 540, and Restatement (Second) Agency § 228.

Finally, to the extent that Wheeler is seeking to invoke a theory of "apparent authority," the complaint does not allege that there was any conduct by Cheverus that led Wheeler to believe that Talbot was acting as an agent of Cheverus in connection with Talbot's parish activities at St. Jude's or in connection with Talbot's alleged sexual abuse. See *Gniadek*, 2011 ME 11 ¶¶ 33-36. A close link between the alleged tortious conduct and the alleged apparent authority of the agent must be alleged and proven in order for a principal to be held liable under a theory of apparent authority. 2011 ME 11 ¶ 34.

Accordingly, count VII of Wheeler's complaint fails to state a claim as against Cheverus.

In his papers opposing the motion to dismiss, counsel for plaintiff has requested an opportunity to amend his complaint if the motion to dismiss is granted. Based on the facts already alleged, it would appear unlikely that – as to some of the counts alleged – plaintiff can remedy certain of the allegations that have been found to be insufficient.⁴ However, it may be that plaintiff can amend to allege some of the essential elements of the claims that are subject to dismissal and plaintiff will therefore be given leave to replead.

The entry shall be:

The motion to dismiss by Cheverus High School is denied as to the allegations in the complaint that state a claim under Restatement (Second) Torts § 302B and a claim for intentional infliction of emotional distress. In all other respects, the motion to dismiss by defendant Cheverus High School is granted. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: August 12, 2016



Thomas D. Warren
Justice, Superior Court

⁴ For instance, as to Cheverus, the court doubts that plaintiff can successfully allege the special relationship required to state a claim under certain counts as discussed above.