Monaghan v Roman Catholic Diocese of Rockville Ctr.
2015 NY Slip Op 32748(U)
December 2, 2015
Supreme Court, Nassau County
Docket Number: 600406/15
Judge: F. Dana Winslow

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

KAITLYN MONAGHAN,

Plaintiff,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 7/20/15

ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE; ST. FRANCIS OF ASSISI PARISH; and FATHER GREGORY YACYSHYN; DOES 1-5 whose identities are unknown to Plaintiff,

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Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....1
Affirmation in Opposition.....2
Memorandum of Law.....3
Amended Notice of Motion.....4
Affirmation in Opposition.....5
Reply Affirmation.....6

Motion by defendants Roman Catholic Diocese of Rockville Centre ("the Diocese") and St. Francis of Assisi Parish ("the Parish") pursuant to CPLR 3211(a)(3) and (a)(7), for judgment dismissing the second, third, fourth, and fifth causes of action against them, and limiting the first cause of action to a claim for negligent supervision and/or negligent retention, and plaintiff's informal request for leave to amend the claims against the Diocese are determined as follows.

Motion by defendant Father Gregory Yacyshyn pursuant to CPLR 3211 (a)(5) and (a)(7), for judgment dismissing the complaint is determined as follows. Plaintiff's informal request for leave to amend her claims against defendant Yacyshyn for the limited purpose of alleging a factual basis, if any exists, for the application of CPLR 213-c is determined as follows.

In her complaint plaintiff alleges that she was sexually molested by defendant Fr. Yacyshyn, a Roman Catholic priest, in 2003 when she was

approximately eight years old. She was a member of the defendant Parish at the time of the incident. Shortly thereafter, Fr. Yacyshyn was reassigned to another parish. Upon later learning of the incident, plaintiff's parents reported the incident to defendants and to law enforcement in 2013.

Plaintiff alleges that at all relevant times the Bishop of the defendant Roman Catholic Diocese of Rockville Centre was in charge of the Diocese and had ultimate authority for the training, placement, and discipline of Roman Catholic priests in the Diocese.

In 2003, the Suffolk County Supreme Court Grand Jury issued a Report from its investigation of child sexual abuse in the Diocese of Rockville Centre (complaint, par. 45). Ninety-seven witnesses testified before the Grand Jury. One of the conclusions of the Report is that the Diocese' policy was to avoid scandal by the suppression of information (complaint, par. 46). An unbound copy of the Grand Jury Report is included in the record as Exhibit A to the plaintiff's counsel's affirmation in opposition. The Grand Jury concluded that "officials in the Diocese failed in their responsibility to protect children"(Report, p. 172), and that the conduct of those officials was "more than simple incompetence . . . Diocesan officials agreed to engage in conduct that resulted in the prevention, hindrance and delay in the discovery of criminal conduct by priests" (Report, p. 173).

In 2004, the Diocese allegedly admitted that it knew there were 66 priests who worked in the Diocese who had been accused of sexually molesting minors (complaint, par. 47). However the names of the accused priests have never been released (Id.). Plaintiff alleges that this conduct of concealment of the names of the "clerics credibly accused of sexually molesting minors" (complaint, par. 70), allows child molesters to avoid prosecution and remain living freely in unsuspecting communities, thereby posing a risk of additional abuse to members of the public and plaintiff (complaint, par. 56).

Plaintiff filed her complaint herein by electronic means on January 21, 2015. The first and fifth causes of action are alleged against all defendants for negligence, and negligent infliction of emotional distress, respectively. The second, third, and fourth causes of action are alleged against the Diocese for criminal nuisance pursuant to N.Y.Penal Law §240.45, common law public nuisance, and violation of General Business Law §349, respectively.

The Diocese released a press statement describing the complaint as "an unfortunate publicity stunt," and stated that the allegations against Fr. Yacyshyn were investigated when first made and "never substantiated"(Exhibit I to Anderson affirmation). At this time the Diocese and the Parish move for a judgment dismissing the second, third, fourth and fifth causes of action against them, and limiting the first cause of action pursuant to CPLR 3211 (a)(3) and (a)(7).

Defendant Yacyshyn moves to dismiss the first and fifth causes of action against him pursuant to CPLR 3211 (a)(5) and (a)(7).

On a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing/lack of capacity to sue, the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing as a matter of law (*U.S. Bank N.A. v. Guy*, 125 A.D.3d 845 [2d Dept. 2015]). To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing (*U.S. Bank N.A., supra*).

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired (*Malast v. Civil Serv. Empls. Assn., Inc., Local 830, AFSCME, AFL-CIO,* 128 A.D.3d 650 [2d Dept. 2015], lv app den 26 N.Y.3d 903 [2015]; *State of Narrow Fabric, Inc. v. UNIFI*, Inc., 126 A.D.3d 881 [2d Dept. 2015]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable period (*Marrero v. Sosinsky*, 130 A.D.3d 883 [2d Dept. 2015]; *State of Narrow Fabric, Inc., supra*; *Loiodice v. BMW of N. Am., LLC*, 125 A.D.3d 723 [2d Dept. 2015]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action (*Leon, supra* at 88; *Randazzo v. Nelson*, 128 A.D.3d 935, 936 [2d Dept. 2015]).

The Motion by the Diocese and the Parish

At the outset, this Court rejects the argument of the Diocese and the Parish that this case should be dismissed because it ventures into "forbidden

ecclesiastical terrain." To the contrary, "[r]eligious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct" (*Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 165 [2d Dept. 1997], cert. den. 522 U.S. 967 [1997], lv. app. dsmd. 91 N.Y.2d 848 [1997]). The Court notes that the clergy has been increasingly vigilant about adverse behavior of those having religious control or influence over its members.

In the second cause of action plaintiff alleges that the Diocese's intentional conduct of concealment of the identities of abusive clerics has created a continuing public nuisance, causing injury to the general public and herself. She alleges that such concealment allows abusive priests to remain unchecked in society, thereby creating a danger to children and their families in unsuspecting communities. Plaintiff identifies Penal Law §240.45, the provision for criminal nuisance in the second degree, as the statutory basis of this cause of action.

Penal Law §240.45 does not expressly provide for a private right of action (*Stevens v. Brown*, 2012 WL 2951181 [Sup. Ct., N.Y.Cty., 2012]). This Court, determines however, that a private right of action of action may be implied in certain circumstances.

In the third cause of action plaintiff alleges a claim for common law nuisance, also described as a "continuing public nuisance" (complaint, par. 71). A public or common nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (*Copart Indus. v. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568 [1977])(citations omitted).

In this case plaintiff has alleged concealment by the Diocese of the sexual assaults committed by defendant Yacyshyn and other priests, some of whom are discussed in the Grand Jury Report. She alleges concealment of the identities and "pedophilic/ephebophilic tendencies" of such abusers (complaint, par. 65). She alleges that this concealment causes harm to herself and a considerable number of persons, including "children and residents in the Diocese of Rockville Centre and other members of the general public who live in communities where Defendant's agents live" (complaint, par. 66). She alleges that this conduct of deception and

concealment offends the public morals and impairs the "safety and welfare of children" in the Diocese (complaint, par.67). On their face, these allegations state a claim for public nuisance.

One of the Diocese' objections is that plaintiff lacks the capacity to bring such a claim. Ordinarily a public nuisance is "an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency"(Id.). A municipality may even have implied power relating to the suppression and removal of public nuisances (see *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 85 [1949]).

However, a "public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" (see *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr.*, 96 N.Y.2d 280, 292 [2001].

Nevertheless, physical injuries are generally sufficient to constitute harm different in kind under New York law for the purpose of suing for public nuisance (*Williams v. Beemiller, Inc.,* 103 A.D.3d 1191 [4th Dept. 2013](plaintiffs represented shooting victim and alleged *prima facie* case of public nuisance against handgun manufacturer, distributor, licensee, and resale purchaser); (*Chiapperini v. Gander Mtn. Co.*, Inc., 48 Misc.3d 865 [Sup. Ct., Monroe Cty, 2014](representatives of firefighters killed or seriously injured sufficient for *prima facie* public nuisance claim against assault-style firearms) (*Johnson v. Bryco Arms*, 304 F.Supp.2d 383 [E.D.N.Y. 2004](shooting victim alleged *prima facie* case of public nuisance against gun manufacturer, wholesaler, distributor, and retailer).

Pecuniary injury may suffice so long as it is not common to an entire community (*Johnson*, *supra* at 393; *Matter of Agoglia v. Benepe*, 84 A.D.3d 1072 [2d Dept. 2011](adversely affected property values on streets adjacent to newly constructed sand dunes stated cause of action); *Leo v. General Elec. Co.*, 145 A.D.2d 291 [1989](pollution of river caused diminution or loss of livelihood to commercial fishermen, and was special injury not suffered by everyone who fished in the community at large).

Here, plaintiff alleges that she suffers special injury beyond that of the public because she is a victim, of personal abuse and consequently has sustained pecuniary loss including medical expenses and/or wage loss. She also alleges the

physical/emotional injuries of depression, anxiety and anger (complaint, par. 59), as well as stress, nervousness, loss of sleep and guilt about abuse that could be perpetrated by the unidentified abusers (complaint, par. 70). These allegations suffice for the purposes of a 3211 motion to state special injury to the plaintiff. The remaining objections by the Diocese do not warrant discussion. Accordingly, dismissal of the third cause of action against the Diocese for public nuisance is **denied.**

In the fourth cause of action plaintiff alleges a violation of General Business Law §349 against the Diocese. This statute provides that "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in this state" are unlawful (General Business Law §349(a)). This statute applies to virtually all economic activity (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 [2002] quoting *Karlin v. IVF Am.*, 93 N.Y.2d 282, 290 [1999]; *North State Autobahn, Inc. v. Progressive Ins. Group Co.*, 102 A.D.3d 5 [2d Dept. 2012]). Plaintiff misconstrues the purpose of this statute which is to protect consumers in the marketplace from deceptive business practices. This case does not concern consumers in the marketplace.

Plaintiff's reliance upon *Marcus v. Jewish Natl. Fund (Keren Kayemeth Leisrail)*(158 A.D.2d 101 [1st Dept. 1990]) is misplaced, as the charity at issue there allegedly deceived contributors by using misleading advertisements, circulars, brochures and literature to directly solicit donations.

Thus, plaintiff has no cause of action pursuant to General Business Law §349 for the allegations she makes against the Diocese. Based on the foregoing, dismissal of the fourth cause of action pursuant to CPLR 3211(a)(7) is **granted.**

In the fifth cause of action plaintiff alleges a claim for negligent infliction of emotional distress. The elements of this cause of action are a breach of a duty owed to the plaintiff, which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for her own safety (see *Ferreyr v. Soros*, 116 A.D.3d 407 [1st Dept. 2014]; *Bernstein v. East 51st St. Dev. Co., LLC*, 78 A.D.3d 590 [1st Dept. 2010]). Therefore, negligent infliction of emotional distress is a claim for negligently-caused emotional harm. Under the circumstances presented herein, this fifth cause of action is duplicative of the first cause of action for negligence, and for this reason it must be **dismissed**.

Turning to the first cause of action against the Diocese and the Parish for negligence, the Court notes that an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of the employment, and sexual abuse is a clear departure from the scope of employment (*N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 [2002]; *Mayo v. New York City Tr. Auth.*, 124 A.D.3d 606, 607 [2d Dept. 2015]). Consequently, the Diocese and the Parish cannot be vicariously liable for any sexual abuse that plaintiff proves against defendant Yacyshyn, as such conduct would be an obvious departure from the normal duties of a priest *R. v. R.*, 37 A.D.3d 577 [2d Dept. 2007], lv. app. den. 9 N.Y.3d 802 [2007] see generally *Kenneth R.*, *supra*; see also *Doe v. Rohan*, 17 A.D.3d 509 [2d Dept. 2005]).

To the extent that the plaintiff alleges negligent retention and supervision in the first cause of action, the standard of care for supervision of a minor is "whether a parent of ordinary prudence placed in the identical situation and armed with the same information would invariably have provided greater protection" (*Mayo, supra* at 607). Ultimately, plaintiff will be required to show that the Diocese and the Parish knew or should have known of defendant Yacyshyn's alleged propensity for the conduct which caused plaintiff's alleged injury (*S.C. v. New York City Dept. of Educ.*, 97 A.D.3d 518, 519-520 [2d Dept. 2012]; *Kenneth R.*, *supra* at 161). On this record plaintiff has alleged the elements of a cause of action for negligent retention and negligent supervision for the purposes of CPLR 3211 (*Sharon B. v. Reverend S.*, 244 A.D.2d 878 [4th Dept. 1997]), and accordingly the request by the Diocese to limit the first cause of action to the theories of negligent supervision and/or retention of Father Gregory Yacyshyn is **granted.**

Motion by Defendant Yacyshyn

Defendant Yacyshyn moves for judgment dismissing the first and fifth causes of action against him on the grounds that they are time-barred. He argues that any claim against him in the complaint is for intentional conduct, regardless of how it is pleaded, and that intentional torts are subject to a one-year statute of limitations (*McDonald v. Riccuiti,* 126 A.D.3d 954 [2d Dept. 2015], citing CPLR 215(3)). Although the limitations period was tolled for infancy until plaintiff reached the age of 18 (CPLR 208), plaintiff had one year from her 18th birthday in which to commence this action. As plaintiff was twenty years old (complaint, par. 1) at the filing of the complaint in January 21, 2015, the claims against defendant

Yacyshyn for intentional torts would be untimely.

In opposition, plaintiff relies upon CPLR 213-c, a provision enacted in 2006, pursuant to which the limitations period for serious sexual offenses is now five years (see generally *Cordero v. Epstein*, 22 Misc.3d 161[Sup. Ct., N.Y.Cty, 2008]. Plaintiff argues that she turned 18 in November 2012, and commenced this action well within the new five-year limitations period.

CPLR 213-c expressly identifies the following sexual offenses that it covers:

> (1) rape in the first degree as defined in section 130.35 of the penal law;
> (2) criminal sexual act in the first degree as defined in section 130.50 of the penal law;
> (3) aggravated sexual abuse in the first degree as defined in section 130.70 of the penal law; and
> (4) course of sexual conduct against a child in the first degree as defined in section 130.75 of the penal law.

Plaintiff argues that the incident with defendant Yacyshyn at issue here constituted aggravated sexual abuse in the first degree. This crime takes place where a person "inserts a foreign object in the vagina, urethra, rectum or anus of another person causing physical injury" where "the other person is less than eleven years old" (Penal Law 130.70). Although the complaint does not specifically allege such conduct, the allegation that Fr. Yacyshyn "engaged in unpermitted and harmful sexual contact with plaintiff" is sufficient to invoke the five year statute of limitations set forth in CPLR §213-c. Under the circumstances, the Court finds that the complaint against Fr. Yacyshyn is not time-barred.

Plaintiff informally requests leave to serve an amended complaint pursuant to CPLR 3025(b) in order to address pleading errors. In light of the foregoing, the Court determines CPLR §3025 plaintiff's informal request is **granted** and an amended complaint must be served and submitted to the Court on or before January 18, 2016 or such relief is waived, unless a formal adjournment or leave of Court is obtained.

This constitutes the Order of the Court.

Dated: December 2, 2015

J.S.C.