Doe v Congregation of the Mission of St. Vincent De Paul in Germantown
2016 NY Slip Op 32061(U)
September 13, 2016
Supreme Court, Queens County
Docket Number: 711854/15
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JANE DOE, a minor, by and through her parents and natural guardians, BASILIO MORA and NELLY CERDAS, her biological parents

Plaintiff,

-against-

CONGREGATION OF THE MISSION OF ST.VINCENT DE PAUL IN GERMANTOWN s/h/a CONGREGATION OF THE MISSION OF ST. VINCENT DE PAUL, EASTERN PROVINCE OF THE CONGREGATION OF THE MISSION OF ST. VINCENT DE PAUL, VICE PROVINCE OF THE CONGREGATION OF THE MISSION OF ST. VINCENT DE PAUL AND THE ROMAN CATHOLIC DIOCESE OF ROCKVILLE CENTRE,

Defendants.

Index No: 711854/15

Motion Date: 5/20/16
Motion Seq. No.: 1

Motion Date: 6/29/16
Motion Seq. No.: 5

The following papers numbered EF3 to EF34 read on this motion by Congregation of the Mission of St. Vincent De Paul in Germantown s/h/a Congregation of the Mission of St. Vincent De Pal, Eastern Province of the Congregation of the Mission of St. Vincent De Paul (herein, "the Vincentians"), to dismiss the complaint, insofar as asserted against it, pursuant to CPLR 3211 (a)(7); motion by Diocese of Rockville Centre (DRC), to dismiss the complaint, insofar as asserted against it, pursuant to CPLR 3211 (a)(7); and cross motion by plaintiffs to deny the motion by the Vincentians, and for a continuance to permit disclosure and discovery of facts solely within the control of the Vincentians.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF3-7, 30-32
Notice of Cross Motion - Affidavits - Exhibits.....	EF 21-EF25
Answering Affidavits - Exhibits.....	EF26-27,33-34
Reply Affidavits.....	EF26-EF27

Upon the foregoing papers it is ordered that the motions are combined herein for disposition. The motions and cross motion are determined as follows:

Plaintiff, Jane Doe, a minor, and her parents Basilio Mora and Nelly Cerdas, bring this action based upon allegations that Augusto Cortez, a Roman Catholic priest, sexually abused Jane Doe during a family celebration at plaintiffs' home on June 28, 2014. Cortez has since fled the country and is not a party to the instant lawsuit. In his absence, plaintiffs have sued the Vincentians, along with the Roman Catholic Diocese of Rockville Centre, alleging various claims of negligence and fraudulent concealment.

Defendants separately move to dismiss the complaint pursuant to CPLR 3211 (a)(7). The motions are opposed by plaintiffs, and plaintiffs cross move to deny the motion by the Order on the ground that it is premature, pursuant to CPLR 3211 (d), and for a continuance to permit disclosure and discovery of information pertaining to the alleged employer/employee relationship between Vincentians and Cortez. The Vincentians oppose the cross motion for a continuance.

Facts

Augusto Cortez was ordained in the Vincentian Order ("the Order"), in Princeton, New Jersey in 2003. One of the parish churches where Cortez was assigned and was otherwise authorized by the Order and the DRC to work as a priest was St. Rosalie Roman Catholic Parish Church ("St. Rosalie"). St. Rosalie is a parish church within the DRC, and is owned by the DRC. The Order and the DRC assigned Cortez to the Hispanic Ministry at St. Rosalie in 2004. He was later transferred to the St. John the Baptist Parish Catholic School, in Brooklyn, New York.

On May 28, 2008, Cortez sexually abused a 12-year old female student by fondling her breasts when he was alone with her in a computer room of St. John the Baptist Roman Catholic Parish Church School ("the School"). On June 6, 2008, Cortez was indicted by a Kings County Grand Jury for forcible touching, endangering the welfare of a child, sexual abuse in the second degree and harassment.

On August 6, 2008, Cortex was arraigned for sexually abusing the girl. A the arraignment hearing, the Judge who presided over the criminal case involving Cortez requested verification of Cortez' residential situation and an explanation of the supervision that would be maintained over him by the Order during any period of probation that may be imposed by the Court. In answer to the Court's inquiries, the Order, by and through its Provincial, submitted a letter to Cortez' defense attorney (Harold Levy), on August 18, 2008. Within the letter, the Order indicated that rather than laicizing Cortez from the priesthood, the Vincentians assigned him to the Order's headquarters in Germantown, Pennsylvania for supervision. The letter from the Order assured the Court of the restrictions that it was placing on Cortez, specifically: that Cortez had been removed by the Order from the public ministry and would never return to public ministry because of the accusation against him; that Cortez would not be allowed by the Order to present himself as a priest; that Cortez was assigned by the Order to the Order's headquarters in Philadelphia where his activities would be supervised and limited; that the large size and nature of the Seminary assured supervision of Cortez; that Cortez would work within the Seminary in a clerical role; that the Vincentians would create for Cortez an active and supervised safety plan that limited his activity and assured that he would have no contact with children; that Cortez' placement at said Seminary would guarantee appropriate supervision and access by Cortez' care team; that Cortez was admitted to St. John Vianney Center in Downington Pennsylvania for residential treatment following intensive evaluation on June 22, 2008; that Cortez' admission at St. John Vianney Center would last for about two to four months and would be followed by continued supervision and out-patient care; that following Cortez' court appearance on August 6, 2008, he would return to St. John Vianney Center for further treatment until his October 22, 2008 court appearance; that the Provincial himself would continue to work with the Province Review Board which advises on matters involving priest sexual abuse of minors; and that the Provincial personally assured Cortez' defense attorney Levy of his continued cooperation with all involved in the matter. Levy then submitted the Order's letter to the Court on August 20, 2008.

On May 15, 2009, Cortez pled guilty to the forcible touching charge. On June 29, 2009, in accordance with the representations that the Order made to the Court in its August 18, 2008 letter, the Order implemented a "Personal Safety Plan: Augusto Cortez, C.M.," hereinafter "Safety Plan." The initials "C.M." following Cortez' name denoted that he was a member of the Congregation of the Mission of St. Vincent de Paul, similar to those initials following the names of the Provincial, Assistant Provincial and other members of the Order.

The Personal Safety Plan stated that prior to Cortez' sexual assault of the female child on May 29, 2008, the Principal at the School–who himself was an employee of the Brooklyn Diocese– had warned Cortez "not to stand so near the girls in the School or be so affectionate with them." The Personal Safety Plan also noted that ". . . the principal had warned him

against going past the right boundaries and yet he acted in a contrary way." The Personal Safety Plan required a once-a-year formal review of Cortez' compliance. The Personal Safety Plan further noted Cortez' "inability to control his impulses" and "poor judgment." The Personal Safety Plan also outlined a series of "Risk Reduction Strategies" to deal with Cortez' "Inappropriate Boundaries with Young Girls," which were ways in which the Order attempted to prevent Cortez from sexually abusing children, including those with whom he came into contact by virtue of being a member of the Order. These "strategies" included ongoing therapy, spiritual direction, support meeting with other members of the Order, a prohibition from Cortez being alone with any minors, a prohibition from Cortez engaging in public ministry or presenting himself as a priest, monthly meetings with his Supervisor to review his progress, and his attachment to De Paul Novitiate, which is located in Philadelphia and is part of the Order. Other confreres at the Order's headquarters were informed of Cortez' situation. Cortez received financial support from the Order, including a car and rent for his apartment. Cortez' Personal Safety Plan further identified as a "Consequence for Non-Compliance with Plan," the potential dismissal from the Congregation.

Cortez returned to the New York City area after leaving Philadelphia in May 2009. On July 8, 2009, the Provincial relayed the details of the Personal Safety Plan to Cortez' defense attorney Levy, who then (on the following day) wrote a letter to the Supreme Court attaching the Provincial's email to answer the Court's questions regarding Cortez' living situation and proposed supervision for the duration of his probation.

On July 23, 2009, as a result of the Order's intervention, Cortez was placed on probation for a period of six (6) years, ending on July 22, 2015. Cortez was then released to the care and custody of the Order, under the supervision plan the Order provided to the Court on August 18, 2008, and pursuant to the Personal Safety Plan that the Order had implemented with Cortez. At the sentencing hearing, Cortez' address was 75 Lewis Avenue, in Brooklyn, New York – the same address of St. John the Baptist Parish Church.

The Personal Safety Plan was reviewed in 2010, 2011 and 2012. As of July 2013, the Order was still directly involved in controlling Cortez' day-to-day activities, continued to supervise him in the ways enumerated by the Personal Safety Plan, and continued to provide financial assistance to Cortez. During the review of the Personal Safety Plan in 2013, the Order updated Cortez' Personal Safety Plan to acknowledge his updated living arrangements, and also acknowledge that Cortez still had "inappropriate boundaries with young girls."

Jane Doe's parents first met Cortez at their oldest daughter's First Communion in 2004, at which Cortez participated in the First Communion Mass at St. Rosalie as a Vincentian priest. Following the First Communion Mass, Cortez attended a party for Jane

Doe's family. Following the First Communion party, Cortez began frequently associating with Jane Doe's family in his capacity as a Vincentian priest.

Jane Doe was born on September 26, 2007. Cortez visited Jane Doe's family home a number of times, all in his capacity as a priest. Cortez performed various Catholic religious ceremonies in Jane Doe's family home, such as conducting mass and blessing meals.

After his arrest in 2008, Cortez remained a member of the Order through the time Jane Doe's parents reported him to Suffolk County police in 2014. Following his arrest in 2014, Jane Doe's mother called her parish priest, Father Stephen Grozio, a member of the Order, and inquired about the charges against Cortez. Plaintiffs allege that Father Grozio represented that Cortez' arrest was an "accident" and not a criminal act. It is alleged that Father Grozio made that representation regarding Cortez' arrest, to Jane Doe's mother twice: first during a phone call, and again in a face-to-face meeting after the call. It is further alleged that Grozio had notice of the relationship between plaintiff's family and Cortez.

Plaintiffs allege that the Order never informed them of any restrictions that the Order had placed on Cortez through the "Safety Plan," including the restrictions that Cortez was supposed to be supervised at all times and could not be alone with any children. Plaintiffs further allege that the Order failed to informed them that Cortez was prohibited from publicly acting as a priest.

Plaintiffs allege that between 2009 and 2014, Cortez sexually abused Jane Doe, and that this abuse was discovered on June 28, 2014, when Cortez was found alone in a room with Jane Doe. Jane Doe's mother called the police and, following his interview with law enforcement, Cortez fled the country.

Motion by the Vincentians and Cross Motion by Plaintiffs

A motion to dismiss for failure to state a cause of action must be denied when a record must be developed to resolve questions of fact (*see Rimberg & Associates, P.C. v Jamaica Chamber of Commerce, Inc.*, 40 AD3d 1066 [2007); *see also Cabibi v Lundrigan*, 7 AD3d 556 [2004]). As discovery has not yet taken place, the application is premature. Pursuant to 3211(d), [s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just (*see Cantor v Levine*, 115 AD2d 453 [1985] (court has broad discretion to grant plaintiff leave to conduct discovery respecting facts necessary to oppose defendant's motion to dismiss). When knowledge of facts is necessary for a party to properly oppose a motion to dismiss, and those facts are within the sole knowledge or possession of the movant, discovery is sanctioned if it has been

demonstrated that such facts may exist (CPLR 3211[d]; *Cosmos Mason Supplies v Lido Beach Assoc.*, 95 AD2d 818 [1983]). In this case, plaintiffs contend that the relationship between Cortez and the Order is within the exclusive knowledge of the Order and that further discovery would reveal the extent (if any), of an employment relationship between the two for purposes of ascertaining liability. This information is solely within the defendants' knowledge. Therefore, this court gives plaintiffs the benefit of the doubt by denying the motion to dismiss, without prejudice, to afford plaintiffs the opportunity to ascertain the relationship between the Order and Cortez through discovery (*see Cantor v Levine*, 115 AD2d 453, 453[1985]).

Motion by the DRC

The court on a dismissal motion pursuant to CPLR 3211 (a) (7) "must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *see also* CPLR 3026 ["(p)leadings shall be liberally construed"]). Furthermore, a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928, 930 [2010]), and must determine "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]). However, "while factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth" (*Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 194 [2009]).

A claimant states a cause of action for negligent hiring and retention by adequately alleging 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 Tr. Auth.*, 47 AD3d 653, 654 [2008] [internal quotation marks and citation omitted]; *see also Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801-802 [2010]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161, 163 [1997], *cert denied* 522 US 967 [1997], *lv dismissed* 91 NY2d 848 [1997] [Appellate Division, Second Department modified Kings County Supreme Court's decision and granted motion to dismiss plaintiffs' claim that the Roman Catholic Diocese of Brooklyn was negligent in hiring and failing to establish proper guidelines and procedures for screening and investigating priests since there is "no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee"]). Here, plaintiffs alleges sufficient facts to permit an inference that DRC knew or should have known

that Cortez would present a sexual threat to the infant plaintiff and young parishioners at the time Cortez was assigned to the church.

Stating a claim for negligent supervision likewise requires that the supervisor must have "kn[own] or should have known of the employee's propensity for the conduct which caused the injury" (*Kenneth R.*, 229 AD2d at 161). Three elements are necessary to state a cause of action for negligent supervision: (1) that the tortfeasor and defendant were in an employer-employee relationship; (2) that the employer knew or should have known of the employee's propensity to commit the act(s) which caused the injury before the injury's occurrence; and (3) that the tort occurred on the employer's premises or with the employer's chattels (*Bouchard v New York Archdiocese*, 719 F Supp 2d 255, 261 [2010], citing *Ehrens v Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004]). An employer-employee relationship is not required under New York case law (*see e.g. Connell v Hayden*, 83 AD2d 30, 50 [1981]). Prevailing on a negligent supervision claim, though, requires a claimant to prove that the defendant knew or should have known about his subordinate's propensity for the conduct that caused the plaintiff's injury (*see e.g. Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d at 801; *Bumpus*, 47 AD3d at 654; *Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 586 [2006]; *Kenneth R.*, 229 AD2d at 161). No statutory requirement exists that negligent supervision claims be pleaded with specificity (*id.* at 162) but "bare legal conclusions and/or factual claims which are flatly contradicted by documentary evidence should be dismissed pursuant to CPLR 3211 (a) (7)" (*id.* [internal quotation marks and citation omitted]).

The Appellate Division, Second Department in *Kenneth R.* upheld denial of a defendant's motion to dismiss the plaintiffs' negligent supervision claim. There, the appellate court considered the allegations made in plaintiffs' bill of particulars that the defendant diocese received actual or constructive notice of the codefendant priest's propensity to sexually abuse minors through alleged complaints made to the defendant diocese. The decision held that these allegations, if true, would sustain a cause of action sounding in negligent retention and negligent supervision (*id.* at 164).

Here, plaintiffs allege that the church administrators had, on occasions prior to the subject incident, expressed concern about Cortez's excessive physical contact with the school's children, and had warned Cortez against such conduct. The court also considers the Safety Plan wherein defendant was to monitor Cortez because of their concern for his alleged propensity to commit crimes against children. The Personal Safety Plan stated that prior to Cortez' sexual assault of the female child on May 29, 2008, the Principal at the School–who himself was an employee of the Brooklyn Diocese– had warned Cortez "not to stand so near the girls in the School or be so affectionate with them." The Personal Safety Plan also noted that ". . . the principal had warned him against going past the right boundaries and yet he

acted in a contrary way." The Personal Safety Plan required a once-a-year formal review of Cortez' compliance. The Personal Safety Plan further noted Cortez' "inability to control his impulses" and "poor judgment." The Personal Safety Plan also outlined a series of "Risk Reduction Strategies" to deal with Cortez' "Inappropriate Boundaries with Young Girls," which were ways in which the Order attempted to prevent Cortez from sexually abusing children, including those with whom he came into contact by virtue of being a member of the Order. These "strategies" included ongoing therapy, spiritual direction, support meeting with other members of the Order and a prohibition from Cortez being alone with any minors. The court takes these allegations as true, because defendants have not conclusively proved otherwise, and views them, as required, in the light most favorable to plaintiffs (*Samiento v World Yacht Inc.*, 10 NY3d at 79; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). Consequently, the facts alleged in the plaintiffs' complaint may be reasonably construed to demonstrate that DRC knew or should have known of Cortez's propensity to commit the sexual abuse that plaintiffs allege occurred. Thus, plaintiffs sufficiently allege a cause of action sounding in negligent supervision and negligent retention.

The branch of the motion which is to dismiss the cause of action for negligent training and supervision, is also denied. The evidence in the record relevant to the issue of defendants' negligence in training its staff and supervising Cortez indicates that Cortez had, on occasions prior to the incident with the plaintiff, sexually assaulted a child and had been warned against his inappropriate physical contact with other children. With regards to this cause of action, plaintiffs allege that the Order failed to train its managers and employees who allowed Cortez to have access to Jane Doe and her family and who failed to warn them that Cortez was a sexual predator who might have been incarcerated but for the Order's agreement to supervise him and keep him away from children. This evidence suggests not only that Cortez had a history and propensity for the crime(s) he is alleged to have committed, but also that defendant had knowledge of the same.

An employer may, of course, be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm *(see, e.g., Vanderhule v. Berinstein*, 285 App Div 290, *amended on other grounds* 284 App Div 1089; *see also*, 37 NY Jur, Master and Servant, § 164.) The employer's negligence lies in his having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of his employees (*Detone v Bullit Courier Serv., Inc.*, 140 AD2d 278, 279 [1988]).

Finally, on this issue, it is noted that although defendant asserts First Amendment protection, there is no suggestion that the alleged sexual misconduct of defendant Cortez is

a part of the tenets or practices of the Roman Catholic Church, or that restraint on it by the imposition of civil liability will in any way intrude on the free exercise of religion to an extent protected by the First Amendment. Indeed, inasmuch as it is conduct, and not creed, that underlies plaintiffs' action, and that the potential for civil consequences exists equally as to religious and non-religious persons, and as to clergy and lay persons of all religions alike, the Free Exercise aspect of the First Amendment does not come into play to preclude plaintiffs' action (*Employment Div., Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 reh'g. denied 496 U.S. 913).

The branch of the motion which is to dismiss the fraudulent concealment cause of action, is denied. Defendant contends that this claim should be dismissed because it is incidental to the claims arising out of Cortez' sexual abuse. The court disagrees. The fraudulent concealment claim results from purported direct conversations with the infant's parent (s) and therefore is not incidental to the claims arising out of Cortez' sexual abuse.

Conclusion

The motions by the Vincentians and DRC to dismiss the complaint pursuant to CPLR 3211(a)(7) are denied, and, thus, the plaintiffs' cross motion is denied as unnecessary .

Dated: September 13, 2016

J.S.C.

FILED
SEP 21 2016
COUNTY CLERK
QUEENS COUNTY