SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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M. S.,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, OUR LADY OF SOLACE CHURCH AND SCHOOL, SISTERS OF THE PRESENTATION OF THE BLESSED VIRGIN MARY

Defendant.

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INDEX NO. 950447/2020

MOTION DATE 01/21/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 59, 60, 61, 62

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant Archdiocese of New York (defendant) moves pursuant to CPLR 3211 (a) (7) to dismiss the second cause of action asserting outrage and intentional infliction of emotional distress; all claims premised upon *respondeat superior*; and all causes of action for failing to "allege sufficient facts so as to establish a causal relationship between the alleged physical and emotional abuse and the conduct that would constitute a violation of Article 130 or Sections 225.27, 255.26, 225.25, or 263.05 of the Penal Law" (NYSCEF Doc No 41, notice of motion).

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is 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" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part

of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

To state a claim for intentional infliction of emotional distress, plaintiff must plead "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (Howell v New York Post Co., Inc., 81 NY2d 115, 121 [1993]). Such "cause of action . . . should not be entertained 'where the conduct complained of falls well within the ambit of other traditional tort liability'" (Xiaokang Xu v Xiaoling Shirley He, 147 AD3d 1223, 1226 [3d Dept 2017], quoting Fischer v Maloney, 43 NY2d 553, 558 [1978]). Here, the Court adheres to its prior determinations in the orders dated 9/20/2021 (Silver, J.) and 1/4/2022 (Kaplan, J.) granting dismissal of that claim insofar as asserted against co-defendants, similarly finding that plaintiff failed to plead facts separate or distinctly different from the negligence claim (see NYSCEF Doc Nos 70, 73). This Court finds that the allegations are particularly deficient with respect to the intent or reckless disregard element as it relates to defendant Archdiocese (compared to the conduct of the alleged abusers themselves, or co-defendants).

Defendant moves to dismiss the remaining cause of action asserting negligence solely to the extent that it is premised upon vicarious liability. It is well-settled that a sexual assault is not in furtherance of the defendants' business and cannot be considered as being within the scope of employment (see N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251-52 [2002]). Therefore, the branch of the motion to dismiss the negligence claim insofar as predicated upon vicarious liability of the sexual abuse is granted. The balance of the claim remains unaffected as distinctly different (see generally Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997] ["In instances where an employer cannot be held vicariously liable for its employee's torts,

the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision"]).

For the same reasons, the Court reject's plaintiff's claimed "ratification" argument to the extent that such "ratification" or "approval" of sexual abuse cannot be said to be in furtherance of the employer's business. Plaintiff's theory may also not be maintained as the complaint fails to include any allegations about ratification or approval of a tort.[1] And while it is true that an officer (or person of similar authority) "may be held individually liable to third parties for a corporate tort if he either participated in the tort or else 'directed, controlled, approved, or ratified the decision that led to the plaintiff's injury'" (Fletcher v Dakota, Inc., 99 AD3d 43, 49 [1st Dept 2012], quoting 3A Fletcher, Cyclopedia of Corporations § 1135), no such person has been identified as individually liable for ratifying, approving, directing, a corporate defendant's tort (cf. Dooley v Metro. Jewish Health Sys., 02-CV-4640(JG), 2003 WL 22171876, at *11 [EDNY July 30, 2003] [finding individual board members could be found liable for negligently hiring two employees]).

Lastly, defendant argues that plaintiff failed to plead allegations that "the alleged physical and emotional abuse was sustained as a result of sexually abusive conduct as defined in the CVA" (NYSCEF Doc No 42 at ¶ 22). It is unclear what defendant takes issue with and/or any particular deficiency that would render the complaint outside of the purview of the CVA.

CPLR 214-g, enacted in the CVA, provides for a revival of certain personal injury claims that would have been barred by the then-statute of limitations if the alleged conduct was committed against a minor and constituted either (1) "a sexual offense as defined in article one hundred thirty of the penal law"; (2) "incest as defined in section 255.27, 255.26 or 255.25 of the

[1] It is worthy to note that there is a difference of misfeasance versus nonfeasance.

penal law"; or (3) "the use of a child in a sexual performance as defined in section 263.05 of the penal law."

The complaint alleges that plaintiff "was sexually abused by Father O'Herlihy when he was approximately 13 years old" and that "[t]he sexual abuse included, but was not limited to, Father O'Herlihy raping [plaintiff]" (NYSCEF Doc No 1 at ¶¶ 80-81). Rape is defined in Article 130 of the Penal Law. The complaint also sufficiently alleges defendant's negligence (id. *passim*) and that the negligence caused plaintiff to sustain physical and psychological injuries (id. at ¶ 102). Thus, the allegations in the complaint sufficiently state a claim brought under the revival window of the CVA.

The Court dismisses any arguments in reply with respect to punitive damages as it was not mentioned in the moving papers.

Accordingly, it is hereby ORDERED that the branch of the motion to dismiss the second cause of action asserting intentional infliction of emotional distress is granted; and it is further

ORDERED that the branch of the motion dismissing the remaining first cause of action asserting negligence is granted solely to the extent the claim is premised upon an employer's vicarious liability of an employee's sexual abuse; and it is further

ORDERED that the balance of the motion is denied without prejudice; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days from entry of this order. This constitutes the decision and order of the Court.

9/23/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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

950447/2020 S., M. vs. ARCHDIOCESE OF NEW YORK
Motion No. 004