ARK344 DOE v Archdiocese of N.Y.
2022 NY Slip Op 33428(U)
September 27, 2022
Supreme Court, New York County
Docket Number: Index No. 950435/2020
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ARK344 DOE,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 950435/2020

MOTION DATE 02/02/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 41, 42, 45, 46

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant The USA Northeast Province of the Society of Jesus, Inc. and The New York Province of the Society of Jesus s/h/a Jesuit Fathers and Brothers d/b/a The New York Province of the Society of Jesus a/k/a U.S.A. Northeast Province of the Society of Jesus (hereinafter SOJ or defendant) moves to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7).

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]).

Defendant first contends that because the complaint fails to identify conduct constituting a particular penal law offense, the alleged occurrences or conduct fall outside of the purview of the Child Victims Act (CVA) and is therefore time-barred and that such failure also requires dismissal for failing to state a claim pursuant to CPLR 3211 (a) (5) and (7)

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

Here, the complaint only states that Father Joseph Rooney and Paul Austin "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" (NYSCEF Doc No 1, complaint at ¶¶ 22-23). Plaintiff argues the complaint is sufficient under New York's liberal notice-pleading standard under CPLR § 3013, which requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence. If the pleading may be said to give notice, no matter what terminology it chooses, it satisfies this requirement (see Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964]).

The Court finds that the complaint is sufficient for purposes of giving adequate notice and also stating a claim that is not time-barred. The deficiency, if any, will not cause any prejudice to defendants because plaintiff will be required to provide details in his/her bill of

particulars (cf. Scholastic Inc. v Pace Plumbing Corp., 129 AD3d 75, 80 [1st Dept 2015]). Specifically, the bill of particulars will require plaintiff to describe the act(s) of abuse and also "identify the specific subdivision of New York's penal law on which his or her claims are brought under the Child Victims Act" (CMO No. 2, Exhibit B, Common Demand for Verified Bill of Particulars Directed at Plaintiffs at ¶¶ 3, 4).

To state a claim for negligent training, supervision, and/or retention under New York law, a plaintiff must plead, in addition to the elements required for a claim of negligence:[1] (1) the existence of an employee-employer relationship; (2) "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997]; Sheila C., 11 AD3d at 129-30); and (3) "a nexus or connection between the defendant's negligence in [training, supervising and/or retaining] the offending employee and the plaintiff's injuries" (Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]; Gonzalez v City of New York, 133 AD3d 65, 70 [1st Dept 2015] ["what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance"]). "There is no statutory requirement" that such cause of action "be pleaded with specificity" (Kenneth R., 229 AD2d at 161).

As to the first element, a predominant factor of whether an employment relationship exists is the extent of the employer's power to order and control the employee's performance of work (Castro-Quesada, 148 AD3d at 979, quoting Barak v Chen, 87 AD3d 955, 957 [2d Dept 2011]; Griffin v Sirva, Inc., 29 NY3d 174, 185-86 [2017]). Factors include "'(1) the selection

[1] To state 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]).

and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct'" (Griffin, 29 NY3d at 186, quoting State Div. of Human Rights v GTE Corp., 109 AD2d 1082, 1083 [4th Dept 1985]).

Rooney is conceded to be a member of the defendant's clergy, but Austin is not. However, as plaintiff point out in opposition, even if Rooney and/or Austin were not directly employed by defendant, the complaint alleges that co-defendant Fordham Preparatory School (Fordham Prep or the school) was "under the direct authority, control, and province of" defendant (complaint at ¶ 13). Therefore, the Court finds it would be premature to dismiss the complaint on this ground as the nature of the relationship between defendant and co-defendant Fordham Prep is yet to be discovered and may be fact intensive. For similar reasons, the Court declines to dismiss the second and third claims based on the alleged lack of allegations concerning notice of the abusers' propensity to commit sexual abuse as discovery from defendants is likely to shed light on this issue and others (see generally Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021] [noting such facts may be supplemented in a bill of particulars]).

Defendant also moves to dismiss the first cause of action as the complaint fails to plead that plaintiff was ever in defendant's custody or control and any allegations about offering programs and activities is insufficient to impose a duty of care *in loco parentis*. In opposition, plaintiff contends that the negligence claim is premised upon (1) defendant's duty to protect children in its care, (2) defendant's special relationship with plaintiff, (3) defendant's special relationship with the abusers, and (4) defendant's failure to protect plaintiff from a dangerous condition on its premises (see NYSCEF Doc No 42 at 11-14).

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (Pulka v Edelman, 40 NY2d 781, 782 [1976]). "In the absence of duty, there is no breach and without a breach there is no liability" (id.). "Whether a duty exists is a question of law for the court" (Talbot v New York Inst. of Tech., 225 AD2d 611, 612-13 [2d Dept 1996]).

There is generally no duty to control the harm-producing conduct of a third party (i.e., the tortfeasor) absent a special relationship either between the defendant and the plaintiff or the defendant and the tortfeasor (see Pulka, 40 NY2d at 783; Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 233 [2001], op after certified question answered, 264 F3d 21 [2d Cir 2001]).

"The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" (Hamilton, 96 NY2d at 233; see, e.g., 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 289 [2001] ["Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk"]). "That duty, however, does not extend to members of the general public"; thus, circumscribing liability "because the special relationship defines the class of potential plaintiffs to whom the duty is owed" (532 Madison Ave. Gourmet Foods, 96 NY2d at 289).

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (Mirand v City of New York, 84 NY2d 44, 49 [1994]). The defendants' "duty to students arises from its physical custody over them. When that custody ceases, and the child passes out of the school's authority such that the parent is free to reassume control, the school's

custodial duty ceases" (Colon v Board of Educ. of City of N.Y., 156 AD2d 131 [1st Dept 1989], citing Pratt v Robinson, 39 NY2d 554, 560 [1976]; see Stephenson v City of New York, 19 NY3d 1031, 1034 [2012]). Here, in arguing only that SOJ "offered educational programs to children through its schools," the Court finds such allegations insufficient to impose a duty of care based on the *in loco parentis* doctrine because it cannot be seriously disputed that the complaint fails to reasonably infer any allegation that SOJ had custody over the plaintiff.

Accordingly, the Court finds that plaintiff's first, second, and fourth points/theories of liability for the negligence claim (see *supra*) are unavailing and insufficient to state a claim for negligence based on the *in loco parentis* doctrine. Further, the Court finds that plaintiff's third point/theory under the negligence cause of action is subsumed within the negligent training, supervision and retention claims, which are not being dismissed as premature, because the duty alleged focuses on an employer and employee, or other relationship with sufficient level of control over the abusers (see Waterbury v New York City Ballet, Inc., 205 AD3d 154, 161 [1st Dept 2022]). This is because "[t]he negligence of the employer . . . arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (Sheila C., 11 AD3d at 129; see Roe, 198 AD3d at 699-702, quoting Johansmeyer v New York City Dept. of Educ., 165 AD3d 634, 634-37 [2d Dept 2018]; see also Doe v Congregation of the Mission of St.Vincent De Paul in Germantown, 2016 NY Slip Op 32061[U] at *6 [Sup Ct, Queens County 2016]). Thus, "the duty of care in supervising an employee extends to any person injured by the employee's misconduct" (Waterbury, 205 AD3d at 162).

Accordingly, it is hereby ORDERED that the motion to dismiss is granted in part to the extent of dismissing the first cause of action insofar as asserted against the defendant SOJ; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the movant shall file and serve an answer to the complaint within (20) days after service of a copy of this order with notice of entry; 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.

9/27/2022
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