SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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S.V. H.

Plaintiff,

- v -

GIRL SCOUT COUNCIL OF GREATER NEW YORK, INC.,

Defendant.

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INDEX NO. 950427/2021

MOTION DATE 03/16/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

S. V. H.,

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF EDUCATION FOR THE CITY OF NEW YORK, GIRL SCOUTS OF THE UNITED STATES OF AMERICA, JOHN KANTER, FIRST UNITED METHODIST CHURCH IN FLUSHING, FIRST UNTED METHODIST CHURCH IN FLUSHING, INC., JOHN WILSON, JOHN DOES 1-10,

Defendant.

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DECISION/ORDER
Index No. 950056/2020
(Action #1)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 45, 48, 51, 52, 53 under Index No. 950427/2021, and NYSCEF document number 91, 92, 93, 94, 95, 96, 97, 98, 99, 101 under Index No. 950056/2020

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant, Girl Scout Council of Greater New York, Inc.'s ("Girl Scouts") motion to dismiss pursuant to CPLR §3211(a)(4) and (a)(7) is decided as follows:

Plaintiff commenced the instant action by filing a summons and complaint on June 29, 2021, alleging that beginning in or about 1969 or 1970, when plaintiff was approximately 7-8 years old, she was sexually assaulted by "John" Wilson, the leader of Brownie Troop 4-562, who was employed by defendant, Girl Scouts. Arising from same, plaintiff pleads causes of action for 1)

Negligent Hiring, Retention, Supervision, and Direction; 2) Negligence; 3) Negligent Infliction of Emotional Distress; 4) Breach of Fiduciary Non-Delegable Duty; 5) Breach of Duty In Loco Parentis; and 6) Breach of Statutory Duties to Report. Girl Scouts now moves to dismiss.

The first branch of the Girl Scouts' motion seeks dismissal pursuant to CPLR §3211(a)(4), on the grounds that there is a prior action pending between the parties. In an Order dated March 31, 2023, Index number 950427/2021 was consolidated into Index No. 950056/2020. As such said branch must be denied as moot.

"On a motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7), we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141-142 [2017] [internal citations omitted]).

In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), a court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp*., 104 AD3d 401 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained

(*see Stendig, Inc. v Thorn Rock Realty Co*., 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR §3026; *Siegmund Strauss, Inc*., 104 AD3d 401, *supra*). In deciding such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 'the benefit of every possible favorable inference,'" and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc*., 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996], and the criterion becomes "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]; *see also Leon*, 84 NY2d at 88, *supra*; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]). "In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).Rather, where a motion to dismiss is directed at the sufficiency of a complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR §3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins.*

Co., NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [1st Dept 2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id*. at 376; *see Rovello v Orofino Realty Co*., 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon*, 84 NY2d at 87-88, *supra*; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

A necessary element of a claim based upon negligent hiring, retention, and supervision of an employee "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Doe v. Rohan*, 17 A.D. 509, 512 (2d Dep't 2005); see also *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004). The First Department has held that conclusory allegations of notice are insufficient to sustain a negligent supervision claim because they do not show that the defendant knew or should have known of the propensity of the perpetrator to commit the tortious acts alleged. See *Naegele v. Archdiocese of New York*, 39 A.D.3d 270, 270 (1st Dep't 2007). However, in that action, the Court found that plaintiff failed to establish that additional discovery was necessary.

The issue at this juncture is not whether plaintiff's claims have factual support, but whether they state cognizable causes of action. Although defendant argues that plaintiff's allegations of notice are conclusory, "[t]here is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 162 [2nd 1997]). Giving the complaint the benefit of every favorable inference, as the court must do at this point, plaintiff's

allegations are sufficient to state causes of action for negligence (see *Gray v. Schenectady City School Dist*., 86 A.D.3d 771 [3rd Dept 2011]). Further plaintiff should be allowed to seek evidence "through pre-trial disclosure" (*Nice v Combustion Eng'g*, 193 A.D.2d 1088, 1089 [4th Dept 1993]). Plaintiff has stated the bare minimum to suggest that Girl Scouts knew or should have known of Wilson's dangerous propensities. As such, this action must progress through at least some discovery.

Girl Scouts seeks dismissal of plaintiff's third cause of action for Negligent Infliction of Emotional Distress. In general, such a cause of action "must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety" (*Padilla v. Verczky- Porter*, 66 AD3d 1481, 1483 [4th Dept 2009]). "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action." (*Wolkstein v. Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). Here, the allegations set forth under the third cause of action are duplicative of the negligence causes of action. As such, defendants' respective motions to dismiss are granted.

Moving Defendant contends that plaintiff has failed to allege a fiduciary duty in her fourth cause of action between herself and the Girl Scouts and that said cause of action is duplicative of plaintiff's negligence causes of action. Courts have articulated that a fiduciary duty exists when a plaintiff's relationship with a church extends beyond that of an ordinary parishioner (*see Doe v. Holy See [State of Vatican City*], 17 AD3d 793, 795 [3d Dept 2005]). In other words, a fiduciary relationship between a plaintiff parishioner and church may exist where the plaintiff comes forward with facts demonstrating that the relationship between the plaintiff parishioner and the church is unique or distinct from the church's relationship with other parishioners generally (*id.*). That said, a fiduciary relationship is not applicable to all parishioners, and can be established upon

a showing that a congregant's relationship with a church entity resulted in "de facto control and dominance" when the congregant was "vulnerable and incapable of self-protection regarding the matter at issue" (*Marmelstein v. Kehillat New Hempstead*, 11 NY3d 15, 22 [2008]). The existence of a fiduciary duty is a fact-specific question to be determined by the fact-finder, such that breach of fiduciary duty claims should not generally be dismissed before the parties have the opportunity to conduct discovery (*see Doe v. Holy See [State of Vatican City*], 17 AD3d 793, *supra*).

Here, plaintiff pled solely that "The entrustment of Plaintiff to the care and supervision of the Defendant GIRL SCOUT COUNCIL while Plaintiff was a vulnerable child, imposed upon this Defendant a fiduciary non-delegable duty to act in the best interests of Plaintiff." In attempting to plead a fiduciary relationship, plaintiff has described a relationship that an average Girl Scout would have with the Girl Scouts. Further, said cause of action is entirely duplicative of plaintiff's negligence cause of action.

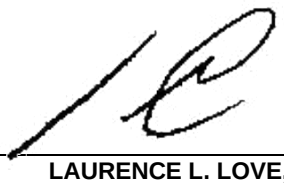
Plaintiff's fifth cause of action, breach of in loco parentis, similarly warrants dismissal as it cannot be an independent cause of action. See *Torrey*, 2020 N.Y. Misc. LEXIS 748, at *9; see also *MCVAWCD-Doe v. Columbus Ave. Elem. Sch.*, 52435/2020, 2020 N.Y. Misc. LEXIS 18221, at *10 (Sup. Ct. Nassau Cty., Aug. 17, 2020).

Plaintiff's sixth cause of action is premised on the notion that the Girl Scouts breached their statutory duty to report abuse under Social Services Law §§ 413 and 420. Pursuant to Social Services Law §413, school officials, which include but are not limited to school teachers, school guidance counselors, school psychologists, school social workers, school nurses, school administrators or other school personnel required to hold a teaching or administrative license or certificate, are required to report "when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Social

Services Law §420(2) states that "Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." "The Legislature enacted Social Services Law §420 which expressly allows a private cause of action for money damages upon the failure of any person, official or institution required by title 6 to report a case of suspected child abuse or maltreatment" (*Rivera v. County of Westchester*, 31 Misc 3d 985, 994 [Westchester Co Sup Ct 2006]). "An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse" (*Young v. Campbell*, 87 AD3d 692, 694 [2nd Dept 2011], lv denied 18 NY3d 801 [2011]). However, as the effective date of Soc. Servs. Law Sections 413 and 420 is September 1, 1973, said cause of action may not be maintained for any alleged abuse occurring before said date.

ORDERED that defendants' motion is GRANTED to the extent that Plaintiff's third, fourth, fifth and sixth causes of action are dismissed; and it is further

This constitutes the decision and order of the court.



5/8/2023
DATE

LAURENCE L. LOVE, J.S.C.

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