SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JANE DOE,

Plaintiff,

- v -

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, ADRIAN DOMINICAN SISTERS, MOUNT HOPE FOUNDATION, INC., LOGOS CORPORATION, CECILIA MELLET, THE ESTATE OF DR. HERBERT THOMAS SCHWARTZ, DOMINICAN FRIARS PROVINCE OF ST. JOSEPH

Defendants.

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INDEX NO. 950614/2020

MOTION DATE 07/09/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant CECILIA MELLET moves to dismiss the amended complaint (complaint) insofar as asserted against her pursuant to CPLR 3211 (a) (7).

Although not stated in the notice of motion, defendant also moves to dismiss the complaint as untimely because it does not specifically state that the claims are brought pursuant to the Child Victims Act, either CPLR 214-g or 208 (b). The Court finds that defendant failed to meet her burden on this ground and has not pointed to any authority stating that a complaint must allege the appropriate statute of limitations.

Plaintiff's complaint alleges that she was sexually abused by Dr. Herbert Thomas Schwartz and Annie Emmerson while living on co-defendant Mount Hope Foundation's (Foundation) commune located in Middleton, New York in or around 1978-1980 when plaintiff was approximately 4-6 years old. Plaintiff alleges that Mellet owed her a duty of care because Mellet knew of the abuse and failed to keep plaintiff safe, who was allegedly in Mellet's custody; and/or Mellet had the ability to supervise and

control the abusers and failed to take appropriate action with respect to them, despite having knowledge of the abusers' propensity to abuse. The complaint asserts four claims against Mellet for negligence, negligent hiring, retention and supervision, negligent infliction of emotional distress (NIED), and intentional infliction of emotional distress (IIED) (eighteenth through twenty-first causes of action, respectively).

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]). Additionally, "[w]hether 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]).

"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.). "The question of the scope of an alleged tort-feasor's duty is, in the first instance, a legal issue for the court to resolve" (Waters v New York City Hous. Auth., 69 NY2d 225, 229 [1987]).

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).

Negligence

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]).

Under the *in loco parentis* doctrine, a defendant's "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]). Because the complaint alleges that plaintiff attended its school, defendant was "under a duty to adequately supervise" plaintiff and may "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]).

Defendant claims that the complaint fails to plead a cognizable duty and that any duty of care owed under an *in loco parentis* doctrine fails because there are no allegations about the alleged school, or when, how, where eallet assumed custody over plaintiff. However, assuming the facts as true, as a court is required to do on a CPLR 3211 (a) (7) motion to dismiss (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]), the Court finds that the complaint adequately states a negligence claim by alleging that plaintiff attended a school at the Foundation and children of the commune (like plaintiff)

were separated from their parents and placed in the care, custody and control of certain people at the Foundation including Mellet specifically (see NYSCEF Doc No 52 at ¶¶ 31, 36-37). Plaintiff correctly notes that a duty of care under this doctrine does not have to be limited to schools (see, e.g., Wynn v Little Flower Children's Servs., 106 AD3d 64, 69 [1st Dept 2013]; see generally Restatement [2d] Torts § 314A [4]). In any event, details about whether or how Mellet did, in fact, obtain custody over plaintiff may be amplified in a bill of particulars and subsequent discovery (see Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021]).

Negligent Hiring, Retention and Supervision

"[T]o state a claim for negligent hiring, retention or supervision under New York Law, a plaintiff must plead, in addition to the elements required for a claim of negligence: (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'; and (3) 'a nexus or connection between the defendant's negligence in hiring and retaining [or supervising] the offending employee and the plaintiff's injuries'" (Sokola v Weinstein, — Misc 3d —, 2023 NY Slip Op 23047, *3 [Sup Ct, NY County Feb. 7, 2023] [Tisch, J.], quoting Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997] and Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]; see 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).

With respect to this claim, plaintiff alleges that Mellet was in a supervisory capacity, presumably akin to an employer. Specifically, the complaint alleges that the alleged abusers were agents, servants and/or employees of Mellet (NYSCEF Doc No 52 at ¶¶ 2-3), that the alleged abusers were "under the supervision and control of" all defendants including Mellet (id. at ¶¶ 4, 7); and that Mellet "was in a

supervisory position at the Foundation and was responsible for the supervision of the agents, servants, employees, members and children of the Foundation" (id. at ¶ 31), including the "supervision of Annie Emmerson" (id. at ¶ 43).

Accepting the facts as true, the complaint adequately states a claim against Mellet as a putative employer of the alleged abusers (see, e.g., Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]). Moreover, plaintiff adequately stated a claim against Mellet as a co-employee of the co-defendants that act in a supervisory capacity, since it is alleged she was a participant in the wrongful conduct of the co-defendant/employers who failed to adequately supervise or terminate the alleged abusers (see generally Sokola v Weinstein, — Misc 3d —, 2023 NY Slip Op 23047, *4 [Sup Ct, NY County Feb. 7, 2023] [Tisch, J.] [finding that the complaint "adequately alleged a claim against [Robert Weinstein] individually for negligent supervision and retention because of the allegations that [Robert Weinstein] knew about [Harvey] Weinstein's predatory behavior, prior sexual assaults, and actively assisted and/or participated in their settlements or otherwise helped conceal the same"]).

NIED

"A breach of the duty of care 'resulting directly in emotional harm is compensable even though no physical injury occurred' when the mental injury is 'a direct, rather than a consequential, result of the breach' and when the claim possesses 'some guarantee of genuineness'" (Ornstein v New York City Health & Hosps. Corp., 10 NY3d 1, 6 [2008], quoting Kennedy v McKesson Co., 58 NY2d 500, 504, 506 [1983] and Ferrara v Galluchio, 5 NY2d 16, 21 [1958] [internal citations omitted]). "The latter element may be satisfied where the particular type of negligence is recognized as providing an assurance of genuineness, as in cases involving the mishandling of a corpse or the transmission of false information that a parent or child had died" (Taggart v Costabile, 131 AD3d 243, 253 [2d Dept 2015]). "However, in the absence of such specific circumstances, the guarantee of genuineness 'generally requires that the breach of the duty owed directly to the injured party must have at least endangered the

plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety'" (id., quoting 1-2 Warren's Negligence in New York Courts § 2.04 [1] [a]; see Doe v Langer, 206 AD3d 1325, 1331 [3d Dept 2022], quoting A.M.P. v Benjamin, 201 AD3d 50, 57 [3d Dept 2021] ["A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety"] [internal quotations omitted]).

Additionally, unlike intentional infliction of emotional distress, "extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress" (Brown v New York Design Ctr., Inc., — AD3d —, 2023 NY Slip Op 01228, 3-4 [1st Dept Mar. 9, 2023]; Taggart v Costabile, 131 AD3d 243, 253-56 [2d Dept 2015]).

Here, the Court finds that the allegations and theory of negligence are essentially the same for the preceding negligence claims and, because plaintiff may recover for emotional distress in those claims, the NIED cause of action is essentially duplicative (see Fay v Troy City School Dist., 197 AD3d 1423, 1424 [3d Dept 2021]).

IIED

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 finds that plaintiff failed to plead facts rising to such a level, separate and apart from the conduct alleged in the preceding negligence claims.

Accordingly, it is hereby ORDERED the motion is granted in part to the extent that the twentieth and twenty-first causes of action asserted against CECILIA MELLET are dismissed; 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 twenty (20) days from 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 after issue is joined.

This constitutes the decision and order of the Court.

5/10/2023
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