SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LCVANYCW,

Plaintiff,

- v -

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, FORDHAM PREPARATORY SCHOOL, USA NORTHEAST PROVINCE OF THE SOCIETY OF JESUS,

Defendants.

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INDEX NO. 950033/2021

MOTION DATE 06/22/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 45, 46, 54, 56, 57

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant Fordham Preparatory School (defendant or School) moves to dismiss certain claims insofar as asserted against it pursuant to CPLR 3211 (a) (1) and (7). Plaintiff withdrew the fourth, fifth, and sixth claims against defendant (NYSCEF Doc No 42) and therefore this Court only considers whether plaintiff adequately states the claims set forth in the second, third, and seventh causes of action, which assert claims for negligent training and supervision, negligent retention, and premises liability, respectively.

Plaintiff's complaint alleges that he was sexually abused by Father Eugene O'Brien while he was a student at the School from 1971 to 1974. The complaint also alleges that O'Brien interacted with plaintiff off school grounds and that the sexual assaults occurred on school grounds on a weekly basis over the course of 2.5 years. O'Brien is alleged to have been employed by defendant as a teacher and the School's president and principal.

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]).

A motion to dismiss a complaint based upon documentary evidence pursuant to CPLR 3211 (a) (1) "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]). Not every piece of evidence in the form of a document is properly deemed "documentary evidence" (see Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010]; Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431, 432 [1st Dept 2014]).

In support of the motion, defendant submits an affidavit from Michael Higgins, the Chief Financial Officer of the School who states that O'Brien was an independent contractor and not an employee of the School (see NYSCEF Doc No 34). However, the affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211 (a) (1) (see J.D. v Archdiocese of New York, — AD3d —, 2023 NY Slip Op 01588 [1st Dept Mar. 23, 2023]; Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011] citing, inter alia, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and

deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]).

Further, although "a trial court may use affidavits in its consideration of a pleading motion to dismiss," where, as here, the Court declines to convert the motion into one for summary judgment,[1] such affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976]). Consequently, affidavits submitted from a defendant "will almost never warrant dismissal under CPLR 3211" (Lawrence v Miller, 11 NY3d 588, 595 [2008]) "unless [they] establish conclusively that plaintiff has no cause of action" (Rovello, 40 NY2d at 636).

Aside from the well-settled principle of law that a Court is required to accept the facts as true on a CPLR 3211 (a) (7) motion, which, here, allege that O'Brien was an employee (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]), it cannot be said that defendant met its burden establishing that plaintiff has no claim against it as a matter of law because the affidavit is not conclusive (see J.D., 2023 NY Slip Op 01588). Even if O'Brien was an independent contractor, defendant may still be liable for negligent training, supervision and/or retention dependent upon the level of ability to control the tortfeasor, among other factors (see generally Sokola v Weinstein, — Misc 3d —, 2023 NY Slip Op 23047, *3-4 [Sup Ct, NY County Feb. 7, 2023] [discussing requisite employment relationship]).

Even if O'Brien is considered as defendant's employee, defendant argues that the second and third claims must be dismissed against it because there can be no vicarious liability for sexual assaults. This Court agrees as it is well-settled that a sexual assault is not in furtherance of

[1] Defendant's request to convert the motion to one for summary judgment (see NYSCEF Doc No 35 at 4, n 1) is denied as well. No notice was given as required in CPLR 3211 (c) and CPLR 3212 (a) explicitly requires that issue be joined and defendant has not yet filed an answer (see Alro Builders and Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512, 512 [1st Dept 1980]).

a defendant's 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]). However, there is no need to grant any portion of the motion for dismissal on this ground because the only allegation regarding *respondeat superior* is in the sixth cause of action (see NYSCEF Doc No 2 at ¶ 140), which has been withdrawn against the movant. Plaintiff's memorandum of law in opposition does not suggest otherwise (see generally NYSCEF Doc No 54).

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring and retention of the employee" (D.T. v Sports & Arts in Schs. Found., Inc., 193 AD3d 1096, 1097-98 [2d Dept 2021]).

To 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:[2] (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. v Povich, 11 AD3d 120, 129-30 [1st Dept 2004]); 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" (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

[2] 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]).

the defendant's malfeasance"]; see Waterbury v New York City Ballet, Inc., 205 AD3d 154 [1st Dept 2022]).

As to the second and third claims asserting negligent training, supervision, and retention, defendant argues that they should be dismissed because some of the abuse occurred off school grounds. However, plaintiff clearly alleges that the sexual abuse occurred on school grounds (see NYSCEF Doc No 2 at ¶ 48) and, in any event, the location of the tort is not dispositive (see Roe, 198 AD3d at 699-702; Johansmeyer v New York City Dept. of Educ., 165 AD3d 634, 634-37 [2d Dept 2018] ["although the sexual abuse ultimately occurred in the infant plaintiff's home, it was preceded by time periods when the infant plaintiff was alone with [the school employee] during school hours on a regular basis. During these times, [the employee] engaged in inappropriate behavior, including physical touching. Thus, triable issues of fact exist regarding, inter alia, whether the [employer] knew or should have known of such behavior and [the employee's] propensity for sexual abuse"]; Doe v Congregation of the Mission of St.Vincent De Paul in Germantown, 2016 NY Slip Op 32061[U], *4-5 [Sup Ct, Queens County 2016] [finding negligent hiring and retention adequately plead even though the alleged sexual assaults of the infant-plaintiff did not occur on the employer's premises]; see also Waterbury, 205 AD3d at 161-62 ["In our view, if an employer knows that employees are using its property to injure others, especially during working hours, reasonable steps should be taken to prevent foreseeable harm. Any other outcome would give an employer carte blanche to ignore known employee workplace misconduct, however pervasive and persistent, so long as that misconduct was carried out on employees' personal devices"]).

Finally, the Court disagrees with defendant's contention that the second, third, and seventh causes of action are duplicative of the first cause of action. While it is true that the first

cause of action for negligence is broadly stated, and may include allegations or theories of liability that overlap with the second, third, and seventh, there is a distinct difference between a duty of care owed by defendant directly to the plaintiff under, e.g., the *in loco parentis* doctrine premised upon plaintiff's status as a student at the School (see, e.g., Mirand v City of New York, 84 NY2d 44, 49 [1994]); or as a guest or invitee on defendant's premises (see, e.g., 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 289 [2001]); and a duty of care owed by defendant based on defendant's ability to control the alleged tortfeasor (see, e.g., Waterbury., 205 AD3d at 161; Sheila C. v Povich, 11 AD3d 120, 129 [1st Dept 2004]) (see generally 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"]; Sokola, 2023 NY Slip Op 23047 at *9, n 10). Therefore, the Court finds it appropriate to permit all three claims to proceed.

Accordingly, it is hereby ORDERED that the motion is 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.

5/16/2023
DATE

ALEXANDER M. TISCH, J.S.C.

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

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Motion No. 002