SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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JOHN DOE,

Plaintiff,

- v -

EDWARD WARD, SUPRISE LAKE CAMP

Defendants.

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INDEX NO. 950544/2021

MOTION DATE 04/29/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

BACKGROUND

In this action Plaintiff seeks damages pursuant to various causes of action stemming from the alleged sexual abuse he suffered as a minor between 2002 and 2004 at Surprise Lake Camp by Edward Ward ("Ward"), who was a youth leader and camp counselor.

On January 26, 2022, Surprise Lake moved to dismiss the action pursuant to CPLR §3211(a)(7). In April 2022, the motion was marked submitted. Since the submission date, the action has been reassigned to this Court.

The motion is granted to the extent set forth below.

ALLEGED FACTS

The complaint alleges the following facts.

Plaintiff was repeatedly sexually abused by Ward from 1999-2004.

In the Spring of 2002, Plaintiff was taken to Surprise Lake at 382 Lake Surprise Road, Cold Spring, New York 10516, by Ward, in order to help prepare the camp for the upcoming

summer. Ward was acting in his capacity as an affiliate or employee of United Synagogue of Conservative Judaism, United Synagogue Youth and/or Surprise Lake.

Plaintiff was a minor at the time.

DISCUSSION

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]).

The complaint alleges the following causes of action: Negligence; Negligent Hiring, Retention, and Supervision; Breach of Fiduciary Duty; Breach of Non-delegable Duty; *In Loco Parentis*; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Breach of Statutory Duty to Report Abuse under the Social Services Law; and Sexual Abuse. The complaint also asserts a claim for punitive damages.

The Negligence Causes of Action

"In order to prevail on 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" (*Pasternack v. Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]).

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: (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]; *see Waterbury v New York City Ballet, Inc*., 205 AD3d 154 [1st Dept 2022]).

The complaint herein sets forth sufficient allegations, which if proven true would establish a cause of action for these claims.

Surprise Lake argues there are insufficient factual allegations in the complaint to establish that it knew or should have known of Ward's propensity to commit sexual abuse. However, there is no statutory requirement that a cause of action for negligent hiring, retention and/or supervision be pled with specificity. *Kenneth R. v. Roman Catholic Diocese*, 229 A.D.2d 159 (2nd Dept. 1997).

Plaintiff is not required to establish at this early stage the specific facts which give rise to putting defendant on notice. Moreover, while not required, plaintiff did supply an affidavit further expanding upon its basis to allege that Surprise Lake had notice of Ward's abusive conduct.

Based on the foregoing, the motion to dismiss the causes of action for negligence and negligent retention supervision and hiring is denied.

The Causes of Action for Intentional and Negligent Infliction of Emotional Distress are Dismissed

A cause of action for negligent infliction of emotional distress requires plaintiff "to show a breach of duty owed to her which unreasonably endangered her physical safety, or caused her to fear for her own safety" (*Graber v. Bachman,* 27 A.D.3d 986, 987, 812 N.Y.S.2d 659 [2006]; *see Miller v. Chalom,* 269 A.D.2d 37, 40, 710 N.Y.S.2d 154 [2000]).

The elements of a claim for intentional infliction of emotional distress are: extreme and outrageous conduct; an intent to cause—or disregard of a substantial probability of causing—severe emotional distress; a causal connection between the conduct and the injury; and the resultant severe emotional distress. *Lau v. S & M Enterprises*, 72 A.D.3d 497, 498 (2010).

Generally, a cause of action for infliction of emotional distress is not allowed if it is duplicative of a tort cause of action. *Wolkstein v Morgenstern* 275 AD2d 635,637 (1st Dept., 2000). Here, the allegations of plaintiff's causes of action for intentional and negligent infliction of emotional distress are duplicative of his negligence causes of action. Accordingly, these causes of action are dismissed. (*see Fay v Troy City School Dist.*, 197 AD3d 1423, 1424 [3d Dept 2021]).

In Loco Parentis

A summer camp is duty-bound to supervise its campers as would a parent of ordinary prudence in comparable circumstances (*see Mirand v. City of New York,* 84 N.Y.2d 44, 49–51, 614 N.Y.S.2d 372, 637 N.E.2d 263). *Phelps v. Boy Scouts of Am.*, 305 A.D.2d 335, 335 (2003). *In loco parentis* defines the duty owed by the camp to its campers in a negligence cause of action but does not create an independent cause of action. *Torrey v. Portville Cent. Sch.*, 66 Misc. 3d 1225(A), 125 N.Y.S.3d 531 (N.Y. Sup. Ct. 2020). Plaintiff tacitly acknowledges this in his

request that the allegations in the complaint remain, even if merged with the negligence cause of action.

Based on the foregoing the cause of action for *In Loco Parentis* is dismissed as duplicative of the negligence cause of action.

Breach of Fiduciary Duty & Breach of Non Delegable Duty

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *AG Capital Funding, LP v State Street Bank and Trust*, 11 N.Y.3d 146, 158 (2008). "The essential elements of a fiduciary relation are the concepts of reliance, and de facto control and dominance; that is, [a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." *Ne. Gen. Corp. v. Wellington Advert.*, 82 N.Y.2d 158, 172-73 (1993).

The Court of Appeals has declined to recognize a non-delegable or a fiduciary duty of care for institutions, such as Surprise Lake, that take temporary physical custody of a child. See, e.g., *Chainani ex rel. Chainani v. Bd. of Educ.*, 87 N.Y.2d 370, 381 (1995).

Additionally, the Court finds that these claims are duplicative of the negligence cause of actions (*see MCVAWCD-Doe v Columbus Ave. Elementary Sch.*, 2020 NY Slip Op 34559[U], [Sup Ct, Nassau County 2020]) as such the claims are dismissed.

Breach of Statutory Duty to Report Under New York Social Services Law §§ 413 & 420

In his eighth cause of action, Plaintiff alleges Surprise Lake violated N.Y. Social Services Law § 413, and is, therefore, liable under New York Social Services Law § 420. At the time of the alleged abuse, however, camps were not mandatory reporters under N.Y. Social Services Law § 413.

Social Services Law § 413, introduced through the enactment of the New York State Child Protective Services Act of 1973, imposes upon certain professionals a duty to report instances of child abuse or maltreatment "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." N.Y. Soc. Serv. Law § 413. It goes on to catalogue the list of persons who are classified as mandated reporters. Camp counselors or directors are not among them.

Plaintiff's opposition that there may have been some unidentified employee who was a mandated reporter at the time is nothing more then speculation and is not encompassed in the allegations of the complaint.

As such this cause of action is dismissed.

Sexual Abuse

Plaintiff's ninth cause of action is dismissed as it claims Surprise Lake is vicariously liable for the alleged sexual abuse of Ward.

> "Although the issue whether a particular act is within the scope of employment is usually one of fact for the jury . . . , there is no liability as a matter of law if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business"

(*Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012] [internal quotation marks and citations omitted]).

Typically, acts of sexual abuse are not considered to be within the scope or furtherance of the employment (*see id.* at 1385; *see also Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005] ["[s]ince the bus driver's acts of sexual abuse and molestation were a clear departure from the scope of his employment, committed solely for personal reasons, and unrelated to the furtherance of his

employer's business, neither the bus company nor the School District can be held vicariously liable for his acts"].

Based on the foregoing, this cause of action is dismissed.

Punitive Damages

Finally, that branch of the motion to dismiss the request for punitive damages is denied. "To recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives". (*Munoz v Puretz*, 301 AD2d 382, 384 (1st Dept 2003). "[P]unitive damages can be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, *or deliberately retained the unfit servant . . .*" (*Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 378 [1986] [emphasis added]).

As the claims for negligent hiring, retention and/or supervision (which include allegations of egregious conduct) have survived the motion to dismiss, it would be premature to dismiss the request for punitive damages.

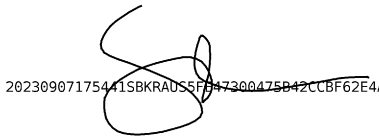
WHEREFORE it is hereby:

ORDERED that the motion is granted only to the extent of dismissing the third, fourth, fifth, sixth, seventh and eighth causes of action as against Surprise Lake Camp and 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 a first compliance conference order within thirty (30) days after issue is joined.

This constitutes the decision and order of the Court.



9/7/2023
DATE

SABRINA KRAUS, J.S.C.

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