SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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S. K.,

Plaintiff,

- v -

WHITE PLAINS HOSPITAL CENTER, ARCHDIOCESE OF NEW YORK, FATHER JOHN DOE

Defendant.

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INDEX NO. 951256/2021

MOTION DATE 01/28/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 39, 40, 47, 48

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant White Plains Hospital s/h/a White Plains Hospital Center (WPH) moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (7).

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained as a result of alleged sexual abuse inflicted by "Father John Doe" in November of 1971 when plaintiff was a patient in WPH's facility (WPH) (NYSCEF Doc No 1, complaint at ¶ 1). The complaint alleges that plaintiff, then 14 years old, sustained a back injury while playing football and was admitted to WPH's facility for one week. During that time, Father John Doe visited plaintiff's room "dressed in the clerical garb of a Roman Catholic priest, acting as a hospital approved chaplain" and sexually assaulted him (id. at ¶¶ 25-38). Plaintiff asserts claims for assault; battery; negligence; negligent hiring, supervision, and retention; and negligent infliction of emotional distress (NIED).

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 branches of the motion to dismiss the first and second causes of action, assault and battery, which are premised upon vicarious liability is granted. It is well-settled that a sexual assault is not in furtherance of 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]).

"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:[1] (1) the existence of an employee-employer relationship; (2) "that the employer knew or should have

[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]).

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

Defendant argues that this fourth claim must be dismissed because "Father Doe . . . was not hired by WPH" nor "retain, or supervise Father Doe" (NYSCEF Doc No 33, memorandum of law in support at 3, 6). However, writing these words simply does not make it so. Putting aside the glaring deficiency that a memorandum of law is devoid of any evidentiary value, more so than an affirmation of counsel (see, e.g., Martinez v Reiner, 104 AD3d 477, 478 [1st Dept 2013], quoting Beltre v Babu, 32 AD3d 722, 723 [1st Dept 2006]), the complaint alleges that the alleged abuser was an employee or agent of defendant, and the Court is required to accept these allegations as true (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]).

Defendant also argues that this claim must be dismissed because plaintiff cannot identify his abuser by a specific name. However, the complaint asserts that the alleged abuser was under defendants' supervision, employ and/or control — if true, which this Court is required to assume (see id.), the allegation would be sufficient to give rise to the negligent training, supervision, and/or retention claims, as set forth in the complaint. If not true, because of a lack of an employment relationship or sufficient level of control over the alleged abuser, then the claim would be

unsuccessful (see, e.g., Jones v Hiro Cocktail Lounge, 139 AD3d 608, 609 [1st Dept 2016] ["Since the assailant was not identified, plaintiff could not demonstrate that [defendants] knew of the assailant's propensity to commit such attacks"]; see generally Sokola, 78 Misc 3d at 846-847 [stating elements for negligent hiring, retention and/or supervision claim, including requisite employment relationship]). However, that fact has yet to be proven or disproven. Indeed, "[t]he manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, 'the plaintiff need not allege his [or her] evidence'" (Martinez v State, 215 AD3d 815, 819 [2d Dept 2023], quoting Mellen v Athens Hotel Co., 153 AD 891 [1st Dept 1912]). As plaintiff notes in opposition, the abuser's identity may be revealed through minimal discovery (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]; G.T. v Roman Catholic Diocese of Brooklyn, N.Y., 211 AD3d 413, 413-14 [1st Dept 2022] ["While the movant argues that plaintiff fails to allege specific facts that it had notice of the priest's criminal proclivities, at this pre-answer stage of the litigation, such information is in the sole possession and control of the movant"]). Therefore, the Court declines to dismiss the complaint on the basis that the alleged abuser is not identified by name (see, e.g., O'Brien v Archdiocese of New York, index no 950092/2020, NYSCEF Doc No 30 [Sup Ct, NY County August 13, 2021] [Silver, J.] [denying motion to dismiss on similar grounds]).

Defendant also argues that the negligence claim must be dismissed for the same reason. However, the same result applies whether the negligence claim is premised upon having custody of the plaintiff as an infant-patient (see, e.g., Mirand v City of New York, 84 NY2d 44, 49 [1994]; Sokola v Weinstein, 78 Misc 3d 842, 857, n 10 [Sup Ct, NY County 2023] [citing cases]) 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]; see also Scurry v New York City Hous. Auth., 39 NY3d 443, 452 [2023] ["Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct"]). "Plaintiff's inability to identify his assailant . . . does not preclude him from recovery" (Jones v Hiro Cocktail Lounge, 139 AD3d 608, 609 [1st Dept 2016], citing Burgos v Aqueduct Realty Corp., 92 NY2d 544, 550-51 [1998]). The Court finds this particularly applicable where, as here, a negligence claim is asserted based on a duty of care owing directly from defendants to the plaintiff (see generally Sokola, 78 Misc 3d at 845-846, citing, inter alia, Pulka v Edelman, 40 NY2d 781, 782 [1976]; 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"]).

The fifth count for NIED alleges that "Plaintiff suffered an emotional injury from defendants' breaches of duties which unreasonably endangered plaintiff's own physical safety" and "unreasonably caused fear for the plaintiff's physical safety" (NYSCEF Doc No 1, complaint at ¶¶ 153-154). 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]).

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] [internal citations

and quotation marks omitted]). "[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.

Accordingly, it is hereby ORDERED that the motion is granted in part to the extent of dismissing the first, second, and fifth causes of action in the complaint insofar as asserted against the movant; 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.

8/28/2023
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