SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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D.W.,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, ST. PATRICK'S MILITARY ACADEMY, PALLOTINE SISTERS OF THE CATHOLIC APOSTOLATE, IMMACULATE CONCEPTION ROMAN CATHOLIC CHURCH, IMMACULATE CONCEPTION SCHOOL, CAPUCHIN FRANCISCAN TERTIARY PROVINCE OF ST. MARY OF NY, INC.,CAPUCHIN FRANCISCAN FRIARS, PROVINCE OF THE SACRED STIGMATA OF ST. FRANCIS

Defendant.

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INDEX NO. 950625/2021

MOTION DATE 12/21/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants CAPUCHIN FRANCISCAN TERTIARY PROVINCE OF ST. MARY OF NY, INC. and CAPUCHIN FRANCISCAN FRIARS, PROVINCE OF THE SACRED STIGMATA OF ST. FRANCIS (Capuchins or defendants) move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a) (7).

Plaintiff commenced the instant action seeking to recover damages for personal injuries allegedly caused by sexual abuse inflicted by Father Vincent Liuzzo, who is alleged to be a priest under the employ, supervision or control of defendants and co-defendants Immaculate Conception School (School) and Immaculate Conception Roman Catholic Church (Church). In or around 1974 when plaintiff was approximately 10 years old, plaintiff enrolled in the School. The complaint alleges that Liuzzo befriended plaintiff and made him an altar boy and that Liuzzo

sexually abused him in the altar boy changing room of the Church. The complaint contains a single negligence claim against defendants, asserting various theories of liability.

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]).

"[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] (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, 78 Misc 3d 842, 846-847 [Sup Ct, NY County 2023], 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

[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]).

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"]).

Defendants argue that the complaint insufficiently alleges that defendants had the requisite notice or knowledge of the Liuzzo's propensity to sexually abuse minors. However, acknowledging that the Court is required to accept the allegations as true (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]) and that this cause of action is "not statutorily required to be pleaded with specificity" (Belcastro v R.C. Diocese of Brooklyn, New York, 213 AD3d 800, 801 [2d Dept 2023]; see Kenneth R., 229 AD2d at 161), the Court finds that the complaint sufficiently alleges the prior notice/propensity element (see, e.g., NYSCEF Doc No 2, complaint at ¶¶ 98-201). In any event, the allegations 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]; 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"]). 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]).

Defendants also argue that, because the abuse allegedly took place in the Church and not the School, it may not be held liable in negligence based on a special relationship with the plaintiff.[2] While location of the alleged assault may be dispositive under an *in loco parentis*

[2] Defendants also argue that the complaint does not adequately allege a breach of fiduciary duty; however, this claim does not appear to have been asserted in the complaint and therefore the Court declines to address the sufficiency of a putative claim. The Court also finds no need to address defendants' argument that the negligence claim should be dismissed to the extent it is based upon respondeat superior, since it is well-settled that a sexual assault is not in

doctrine[3] (see e.g., Doe v Hauppauge Union Free School Dist., 213 AD3d 809, 809-11 [2d Dept 2023]; Doe v New York City Dept. of Educ., 126 AD3d 612 [1st Dept 2015]; "John Doe 1" v Board of Educ. of Greenport Union Free Sch. Dist., 100 AD3d 703, 705 [2d Dept 2012]; K.I. v New York City Bd. of Educ., 256 AD2d 189, 189-192 [1st Dept 1998]), the Court declines to dismiss the claim under this theory because the complaint adequately alleges that plaintiff was in a special relationship directly with defendants as a parochial school student. It cannot be said that the complaint fails to allege a duty of care owed *in loco parentis* because plaintiff alleges that defendants owed a duty of care by accepting custody over the plaintiff, while on both School and Church grounds and in conjunction with both School and Church related activities (see generally Colon v Board of Educ. of City of N.Y., 156 AD2d 131 [1st Dept 1989] [the defendants' "duty to students arises from its physical custody over them. When that custody ceases, and the child passes out of the [defendants'] authority such that the parent is free to reassume control, the [defendants'] custodial duty ceases"], citing Pratt v Robinson, 39 NY2d 554, 560 [1976]; see Stephenson v City of New York, 19 NY3d 1031, 1034 [2012]).

However, the Court grants only part of the motion dismissing the negligence claim to the extent it is premised upon a failure to adequately train employees "in the prevention of sexual abuse and protection of the safety of students and children in its care" or failed "establish and implement policies and procedures" of the same (NYSCEF Doc No 2 at ¶¶ 79-80). Schools, or entities that accept entrustment and custody over minors, are, of course, "under a duty to

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]). In any event, the Court finds that no such theory can be reasonably inferred from the complaint.

[3] Due care should be given to recognize that there are separate and different duties of care alleged here, and the location of the assault is not dispositive for the negligent hiring, retention or supervision claim (see generally Sokola, 78 Misc 3d at 857-858; id. at 857, 10).

adequately supervise the students in their charge and they will 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]). However, it cannot be said that the defendants were expected to train its employees "regarding all manner of potential criminal or inappropriate behavior by their employees or others" (Higgins v Zenker Corp., 2019 NY Slip Op 30802[U], *7-8 [Sup Ct, Suffolk County 2019]). "Schools are not insurers of safety" (Mirand, 84 NY2d at 49), and this Court declines to extend a duty of care to students "for failure to train regarding a limitless universe of potential illegal or inappropriate actions by employees, resulting in insurer-like liability on the part of any employer" (Higgins, 2019 NY Slip Op 30802[U] at *7-8).

Accordingly, it is hereby ORDERED that the motion is granted in part to the extent of dismissing the negligence claim premised upon an alleged failure to train (see complaint at ¶¶ 79-80), and is otherwise denied; and it is further

ORDERED that defendants shall file and serve an answer to the complaint within (20) days after 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 30 days after issue is joined.

This constitutes the decision and order of the Court.

9/14/2023
DATE

ALEXANDER M. TISCH, J.S.C.

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