ARK55 Doe v Archdiocese of N.Y.
2023 NY Slip Op 33910(U)
November 1, 2023
Supreme Court, New York County
Docket Number: Index No. 950654/2020
Judge: Sabrina Kraus

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ARK55 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, SALESIAN SOCIETY, A/K/A, SALESIAN SOCIETY, PROVINCE OF ST. PHILIP THE APOSTLE, INC.,A/K/A, SALESIANS SOCIETY, INC.,A/K/A, SALESIAN SOCIETY, INC.,NEW ROCHELLE, A/K/A, SALESIANS OF DON BOSCO, MARIAN SHRINE, A/K/A, DON BOSCO RETREAT CENTER AND MARIAN SHRINE, SALESIAN JUNIOR SEMINARY

Defendant.

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INDEX NO. 950654/2020

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 15, 16, 18, 36

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 37, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 58, 61

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 54, 55, 57, 59, 60

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff commenced this action under the Child Victims Act ("CVA") seeking damages for alleged sexual assaults he was subject to as a child by Father Richard McCormick, S.D.B. ("McCormick"). The Amended Complaint asserts causes of action for negligence, negligent retention, and negligent training and supervision.

ALLEGED FACTS

McCormick was a Roman Catholic cleric employed by the Archdiocese, the Salesians, Marian Shrine, and Salesian Junior Seminary. Defendants placed McCormick in positions where he had access to and worked with children as an integral part of his work.

Plaintiff was raised in a devout Roman Catholic family and attended a camp at Salesian Junior Seminary in Goshen, in the Archdiocese. Plaintiff participated in youth activities and/or church activities at Salesian Junior Seminary. Plaintiff developed trust and respect for the Roman Catholic Church, including Defendants and their agents, including McCormick.

During and through these activities, Plaintiff, as a minor and vulnerable child, was dependent on Defendants and McCormick. Defendants had custody of Plaintiff and accepted the entrustment of Plaintiff and, therefore, had responsibility for Plaintiff and authority over Plaintiff.

In approximately 1983, when Plaintiff was approximately 10 years old, McCormick engaged in unpermitted sexual contact with Plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05, or a predecessor statute that prohibited such conduct at the time of the abuse.

PROCEDURAL HISTORY

Plaintiff filed his complaint on September 11, 2020.

On December 23, 2020, Salesian Society (the "Salesians") moved for an order pursuant to CPLR §§3211(a)(5), and (a)(7) dismissing the original complaint (Motion Seq No 1).

On February 16, 2021, the Archdiocese of New York (the "Archdiocese") moved for dismissal of the original complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7), or alternatively for summary judgment (Motion Seq. No. 2).

In March 2021, Plaintiff filed an amended complaint.

On March 24, 2021, the parties executed a stipulation amending the caption of the action and further agreeing that Defendants could withdraw or amend their Motions to Dismiss without prejudice to address the allegations made in Plaintiff's Amended Complaint by April 20, 2021.

On May 6, 2021, the Salesians moved for an order pursuant to CPLR §§3211(a)(5) and (a)(7) dismissing the claims in the Amended Complaint (Motion Seq. No. 3).

The motions are consolidated herein for disposition and determined as set forth below.

DISCUSSION

Motion Seq No 1 is Denied

Motion Seq No 1 is denied as moot as the Salesians moved again with respect to the amended complaint.

The CVA is Constitutional

"[A] claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *In re World Trade Ctr.*, 30 N.Y.3d at 400, 89 N.E.3d 1227; *see also Carroll v. Trump*, No. 22-CV-10016, 2023 WL 185507, at *9 n.40 (S.D.N.Y. Jan. 13, 2023); *Giuffre v. Andrew*, 579 F. Supp. 3d 429, 453 (S.D.N.Y. 2022); *Farrell v. U.S. Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 391 (N.D.N.Y. 2021); *PC-41 Doe*, 590 F. Supp. 3d at 558.

The Legislative Memorandum accompanying the CVA bill, justifies passage for the Act as follows:

> New York is one of the worst states in the nation for survivors of child sexual abuse. New York currently requires most survivors to file civil actions or criminal charges against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average. Because of these restrictive statutes of limitations, thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and

> pose a persistent threat to public safety. This legislation would open the doors of justice to the thousands of survivors of child sexual abuse in New York State by prospectively extending the statute of limitations.... Passage of the Child Victims Act will finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties.

Legis. Mem. ("CVA Sponsor's Mem."), 2019, N.Y. Sess. Laws (Advance Sheets A-39) (McKinney).

It is now well settled that the CVA passes constitutional muster and comports with due process requirements [*see eg Torrey v. Portville Cent. Sch.*, 66 Misc. 3d 1225(A), (N.Y. Sup. Ct. 2020); *Giuffre v Dershowitz*, 19 CIV. 3377 (LAP), 2020 WL 2123214 (S.D.N.Y Apr. 8, 2020)]. Every federal and state court to consider the issue has found it constitutional. *See, e.g., Andrew*, 579 F. Supp. 3d at 453 ("Defendant is not the first litigant to advance this argument [that the CVA is unconstitutional], which has been rejected by every New York state and federal court to have encountered it. And it has been rejected repeatedly for good reason."); *Farrell*, 567 F. Supp. 3d at 393 ("[T]he Court finds that the CVA is a constitutional revival statute designed to remedy an injustice; and, consequently, it does not violate either the New York or federal Due Process Clauses."); *PC-41 Doe*, 590 F. Supp. 3d at 558 ("[T]he CVA, which afforded victims of childhood sexual abuse a limited period of time within which to pursue their claims of sexual abuse through the judicial system, was a reasonable, non-arbitrary response to remedy an injustice and therefore satisfies the New York Due Process Clause."); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, 152 N.Y.S.3d 242, 248, 72 Misc.3d 1052 (N.Y. Sup. Ct. 2021), *aff'd*, 182 N.Y.S.3d 850, 213 A.D.3d 82 (N.Y. App. Div. 2023); *ARK3 Doe v. Diocese of Rockville Ctr.*, No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, *15 (N.Y. Sup. Ct. May 11, 2020) (finding that "the [CVA] is a reasonable response to remedy the injustice of past child sexual abuse" and

"does not violate [the defendant's] right to due process under the New York State Constitution"); *Torrey v. Portville Cent. Sch.*, 125 N.Y.S.3d 531, 66 Misc.3d 1225A (N.Y. Sup. Ct. 2020) ("[T]he Court finds the [CVA] a reasonable response to remedy an injustice. As such, it does not violate [the defendant's] right to due process under the New York State Constitution.").

These courts have concluded, as does this court that the Legislature, in passing the CVA, was responding to the tremendous injustices created by a short limitation period for claims arising out of sexual abuse. Its decision to open a limited window of time to bring claims is a reasonable response to remedy that injustice.

Nor is there anything unconstitutional in the application of the CVA to the facts in the case at bar. The Legislature, in passing the CVA, recognized that survivors, like Plaintiff is alleged to be here, had reasons for not coming forward within the short period of time that applied prior to the CVA.

Based on the foregoing, the motion to dismiss the action pursuant to CPLR §3211(a)(5) is denied.

Plaintiff Properly Pled All Causes of Action in The Complaint

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 asserts three causes of action for negligence, negligent supervision and training of employees, and negligent retention of employees.

To the extent that movant asserts that notice is insufficiently pled, the motion is denied. The standard to sufficiently plead notice to survive a motion to dismiss pursuant to CPLR §3211(a)(7) in a cause of action involving negligent supervision or retention is well established and has been recently reiterated by both the First and Second Departments. *See e.g., J.D. v. The Archdiocese of New York*, 214 AD3d 561(1st Dept. 2023) and *Novak v. Diocese of Brooklyn, et al*, 210 A.D.3d 1104 (2022).

To survive a motion to dismiss pursuant to CPLR §3211(a)(7) in such a case, a plaintiff need only allege that an employer knew or should have known of its employee or agent's harmful propensities, that it failed to take necessary action, and that this failure caused damage to others. The cause of action does not need to be pleaded with specificity. *See Novak, supra*; *Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229 A.D.2d 159,162 (2d Dept 1997) *Belcastro v Roman Catholic Diocese of Brooklyn*, N.Y., 213 AD3d 800, 801 [2d Dept 2023]).

The cause of action for negligence is also sufficiently pled. Movants argued that plaintiff had failed to identify a duty owed to him by defendant. In its opposition papers, Plaintiff correctly asserts four bases for finding such a duty, including that defendants had a duty to properly supervise children participating in their camp and youth programs, as such children were in their custody and control.

Based on the foregoing, Motion Sequence Number 3 is denied in its entirety.

The Motion by The Archdiocese for Dismissal [1] And Summary Judgment Is Denied

"Where, as here, a defendant moves pursuant to CPLR §3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence 'must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" *Berger v. Temple Beth-El of Great Neck*, 303 AD2d 346, 347 (2d Dept. 2003) (citation and internal quotation marks omitted).

The documents that The Archdiocese relies upon are insufficient to warrant dismissal as a matter of law. In a case on point, the First Department held that such documents did not conclusively resolve the allegations in the complaint regarding control, agency, supervision and employment [*J.D. v. Archdiocese of New York*, 214 A.D.3d 561 (2023)]. The Appellate Division also held that the affidavit of the Associate General Counsel for the Archdiocese, relied upon by movants herein, does not constitute sufficient documentary evidence for the purpose of a pre-answer CPLR 3211(a)(1) motion (*Id*).

The Archdiocese also seeks summary judgment pursuant to CPLR § 3212 as alternative relief to dismissal under CPLR § 3211. Such a motion is premature. CPLR § 3212 provides that any party may move for summary judgment "after issue has been joined." "The rule requiring joinder of issue is strictly adhered to." *Shah v. Shah*, 215 A.D. 2d 287, 289 (1st Dep't 1995). The Motion is in response to the Complaint and in lieu of an answer, and issue has not yet been joined.

In limited circumstances, consideration of summary judgment may be ripe where issue has not been joined under CPLR § 3211(c), which allows the Court, in its discretion, to treat a

[1] The court is assuming based on the parties' 3/24/2021 stipulation and the failure of the Archdiocese to withdraw the motion after service of the amended complaint, that the parties intended to treat Motion Seq No 2 as if it pertained to the amended complaint.

motion to dismiss as one for summary judgment "[w]hether or not issue has been joined," once there has been "adequate notice to the parties." *Shah*, 215 A.D. 2d at 289. Under this Rule, it is the Court's choice whether to treat the motion as one for summary judgment and provide notice accordingly. CPLR § 3211(c) does not allow a movant to unilaterally demand summary judgment where issue has not been joined. *Mihlovan v. Grozavu*, 72 N.Y. 2d 506, 508 (1988); *see also Siegel, New York Practice* § 270 (6th ed. 2018).

The Court finds no basis to proceed under CPLR §3211(c), as such the motion is denied.

WHEREFORE it is hereby:

ORDERED that motion sequence numbers 1, 2, and 3 are denied in their entirety; and it is further

ORDERED that Defendants are directed to 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

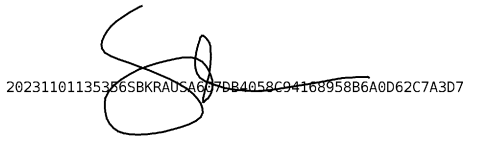
ORDERED that counsel are directed to appear for a virtual compliance conference on January 25, 2024, at 10:00 AM; and it is further

ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



11/1/2023
DATE

SABRINA KRAUS, 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