SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOHN DOE 42, JOHN DOE 43, JOHN DOE 44, JOHN DOE 45,

Plaintiffs,

- v -

YESHIVA UNIVERSITY, MARSHA STERN TALMUDICAL ACADEMY-YESHIVA UNIVERSITY HIGH SCHOOL FOR BOYS, PAT DOE 1-30, MEMBERS OF THE BOARD OF TRUSTEES OF YESHIVA UNIVERSITY, JAMES DOE 1-30, MEMBERS OF THE BOARD OF TRUSTEES OF MARSHA STERN TALMUDICAL ACADEMY-YESHIVA UNIVERSITY HIGH SCHOOL FOR BOYS, ROBERT HIRT,

Defendants.

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INDEX NO. 951363/2021

MOTION DATE 05/27/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants Yeshiva University ("YU"), Marsha Stern Talmudical Academy-Yeshiva University High School For Boys ("YUHS"), Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University ("YU Trustees"), James Doe 1-30, Members of the Board of Trustees of Marsha Stern Talmudical Academy- Yeshiva University High School for Boys ("YUHS Trustees"), and Robert Hirt move for dismissal of this action pursuant to CPLR § 3211(a)(5), (a)(7) and (a)(11).

Plaintiffs allege that while students at YUHS they were sexually abused by George Finkelstein ("Finkelstein"), an employee or agent of the defendant entities. Plaintiffs' complaint asserts three causes of action: (1) negligent supervision; (2) negligent retention; and (3) negligent failure to provide a safe and secure environment. Defendants argue that the Child Victims Act

("CVA") is unconstitutional under New York State's Due Process clause. Defendants also argue that the complaint should be dismissed in whole or in part because it fails to state a cause of action.

DISCUSSION

Constitutionality of the Child Victims Act

Defendants argue CPLR § 214-g violates the Due Process clause of the New York State Constitution. However, since the filing of the instant motion, numerous state and federal courts have found that the claim revival provision of New York's Child Victims Act does not violate the due process clauses of the New York and United States Constitution (*see Farrell v United States Olympic & Paralympic Comm.*, 567 F Supp 3d 378, 391-93 [NDNY 2021] ["a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice"]; *see also Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 400 [2017]).

Multiple New York courts and two federal district courts in the Second Circuit have held that the CVA does not run afoul of due process because it remedies an injustice (*see, e.g., PC-41 Doe v Poly Prep Country Day School*, 590 F Supp 3d 551, 558-65 [EDNY 2021] [collecting cases]; *Giuffre v Dershowitz*, No. 19 Civ. 3377 [LAP], 2020 WL 2123214 *2, 2020 U.S. Dist. LEXIS 78596 *5-*6 [SDNY Apr. 8, 2020]; *PB-36 Doe v Niagara Falls City Sch. Dist.*, No. E172556/2020, 72 Misc. 3d 1052, 2021 NY Slip. Op. 21188, *6-*7 [Sup Ct, Niagara County, July 19, 2021]; *ARK3 Doe v Diocese of Rockville Ctr.*, No. 900010/2019, 2020 NY Misc. LEXIS 1964, *15 [Sup Ct, Nassau County, May 11, 2020]; *Torrey v Portville Cent. Sch.*, 66 Misc 3d 1225 [A], 2020 NY Slip Op 50244[U], *11 [Sup Ct, Cattaraugus County, Feb. 21, 2020]). As CPLR 214-g has been found repeatedly to be constitutional, the branches of defendants' motion seeking to dismiss plaintiffs' complaint on the grounds that the CVA violates the New York

State Constitution are denied.

Failure to State a Claim

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see CPLR 3026; *Siegmund Strauss, Inc.*, 104 AD3d 401). In deciding such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs 'the benefit of every possible favorable inference,'" and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc.*, 104 AD3d 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], aff'd 94 NY2d 659 [2000]; *Kliebert v*

McKoan, 228 AD2d 232 [1st Dept 1996], lv denied 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon*, 84 NY2d at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]. "In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Rather, where a motion to dismiss is directed at the sufficiency of a complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings. "The scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, citing *P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [1st Dept 2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id.* at 376; *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiffs, the pleading states no legally cognizable cause of action (*see Leon*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Salles*, 300 AD2d at 228).

Negligent Supervision and Retention

A claimant can maintain a cause of action for negligent hiring, retention, or supervision by adequately alleging that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury" and nevertheless continued the employee's

service (*see Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654 [2d Dept 2008] quoting *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]). Although defendants claim the notice or propensity element was insufficiently pleaded, "[t]here is no statutory requirement" that such cause of action "be pleaded with specificity" (*Kenneth R.*, 229 AD2d at 161-162). This Court finds the allegations in the complaint, which are to be taken as true, adequately state this element. Discovery from defendants is likely to shed light on this issue and others (*see generally, Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410, 411 [1st Dept 2021]). Furthermore, two recent Appellate Division, Second Department cases have held that complaints alleging a defendant knew or should have known of the alleged abuser's propensity for abuse sufficiently pleads the notice element (*see Sullivan v St. Ephrem R.C. Parish Church*, 214 AD3d 751, 753 [2d Dept 2023]; *Kaul v Brooklyn Friends Sch.*, 220 AD3d 936, 939 [2d Dept 2023]). Plaintiffs have sufficiently alleged, at this juncture, that defendants may have had actual knowledge, or should have had knowledge, of Finkelstein's alleged propensity to sexually abuse minors and did nothing to prevent plaintiffs' abuse from occurring. Accordingly, the Court finds that the allegations are adequately pleaded with regards to the "knew or should have known" element of the negligent supervision and retention causes of action for all plaintiffs.

Negligent Failure to Provide a Safe and Secure Environment

The Court declines to dismiss the third cause of action. It is well settled that "[s]chools are under a duty to 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]). The defendant's "duty to students arises from its physical custody over them. When that custody ceases, and the child passes out of the school's authority

such that the parent is free to reassume control, the school's custodial duty ceases" (*Colon v Board of Educ. of City of NY*, 156 AD2d 131 [1st Dept 1989], citing *Pratt v Robinson*, 39 NY2d 554, 560 [1976]; see *Stephenson v City of New York*, 19 NY3d 1031, 1034 [2012]). Thus, the cause of action described as negligent failure to provide a safe and secure environment adequately alleges a breach of the duty of care owed to plaintiffs under an *in loco parentis* doctrine. Although the same allegations are asserted under negligent supervision and retention, the court declines to dismiss the claim because it concerns distinctly different legal duties of care, one between the defendants and the tortfeasors and the other between defendants and the plaintiffs (*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"]).

Accordingly, the branches of defendants' motion seeking to dismiss plaintiffs' claims for negligent failure to provide a safe and secure environment are denied.

Claims of Off-Premises Abuse

Defendants argue that John Doe 42's claims should be dismissed because all the abuse alleged by that plaintiff occurred off-premises. There is no requirement, however, for the allegations to have occurred on the premises. Only "a 'nexus' is required between the tort and the employment relationship, which is not limited to an employer's premises or chattels, but is instead a fact-intensive analysis as to how the employer or the employment relationship is involved or connected with the tort; including the ability of the employer to control the employee and its knowledge of the need to exercise such control" (*Sokola v Weinstein*, 78 Misc 3d 842, 856 [NY Sup Ct, New York County 2023], *appeal withdrawn*, 219 AD3d 1185 [1st Dept 2023] [internal

citations omitted]; *see also K.G. v Speonk Congregation of Jehovah's Witnesses*, 2023 N.Y. Slip Op. 30842[U], 6 [NY Sup Ct, Kings County 2023] [declining to dismiss negligence claims where alleged abuse occurred in the home of the employee]).

The Second Department also recently overturned the dismissal of a Child Victims Act case where the complaint was dismissed because, amongst other things, plaintiff failed to allege notice, the alleged abuser was not an employee of defendant and the abuse happened off the premises (*Sullivan v St. Ephrem R.C. Par. Church*, 214 AD3d 751, 753 [2d Dept 2023]). The Second Department held the pleadings were sufficient, in part because "[t]he complaint alleges, among other things, that the defendant knew or should have known of the priest's propensity to molest children" (*id.*; citing *Boyle v North Salem Cent. Sch. Dist.*, 208 AD3d 744, 744-745; *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d at 596; *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2d Dept 2020]). In a Child Victims Act case involving Big Brothers Big Sisters of New York City, the court similarly held that plaintiff had sufficiently pleaded a cause of action against BBBSNYC despite a lack of allegations that plaintiff told BBBSNYC of the abuse, when the alleged abuse occurred offsite and when the complaint did not specify how BBSNYC knew of the alleged abuse (*see Herrmann v Big*, 2022 N.Y. Misc. LEXIS 3119 [Sup Ct, New York County June 15, 2022, No. 950396/2020]).

In contrast to the above cases, most of the cases cited by defendants involve negligence due to acts of other students or injuries that occurred off campus and are not related to negligent acts of employees. Defendants cite *Doe v NY City Dept. of Educ.*, (126 AD3d 612 [1st Dept 2015]) and *Stephenson v City of NY* (19 NY3d 1031 [2012]) to support their argument that the complaint should be dismissed because the allegations occurred off premises. However, as explained in *Sokola*, *Doe v NY City Dept. of Educ.* misconstrued the holding in *Stephenson*,

where the perpetrator was another student not an employee (*Sokola v Weinstein*, 78 Misc 3d at 862, footnote 10).

Here, plaintiffs allege Finkelstein's sexual abuse of John Doe 42 "occurred after numerous complaints and allegations had been made against Finkelstein to various YU administrators" (Complaint, ¶ 34). Further, plaintiff John Doe 42 alleges Finkelstein lured him into Finkelstein's home to discuss school matters, in his capacity as an employee of the defendants. Because Finkelstein is alleged to have used his role as an employee of defendants to have contact with plaintiff John Doe 42 off campus for purposes related to YUHS, plaintiff has sufficiently alleged a nexus. At this stage of litigation, John Doe 42's claims will not be dismissed due to the alleged events occurring off defendants' premises. This branch of the motion is denied at this juncture.

Second and Third Negligence Claims

Defendants argue the claims for negligent retention and negligent failure to provide a safe and secure environment are duplicative of the negligent supervision claim, and so should be dismissed.

While negligent retention and negligent supervision are often brought as a single cause of action (*see, e.g., Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 158 [1st Dept 2022]), here, plaintiff concedes, they are brought in the alternative, and the Court declines to dismiss the alternative claims at this time. Further, the Court declines to dismiss the cause of action described as negligent failure to provide a safe and secure environment as duplicative because the claims concern distinctly different legal duties of care, one between the defendants and the tortfeasors and the other between defendants and the plaintiffs (*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"]).

Claims Against Robert Hirt

Defendants argue that the complaint should be dismissed as to Robert Hirt for failure to state a cause of action. "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). However, in the verified complaint, it is alleged that Hirt was an administrator and had been informed of allegations against Finkelstein before he allegedly abused John Doe 42 (¶ 34) and John Doe 43 (¶ 42). Therefore, plaintiffs have specifically alleged Hirt had knowledge of Finkelstein's alleged abuse before Finkelstein allegedly abused John Doe 42, John Doe 43, and John Doe 44, who was allegedly abused in 1977-80, after John Doe 42's alleged abuse in the Fall of 1976. Plaintiffs also allege YU Defendants knew or should have known of Finkelstein's propensity at all relevant times (Verified Complaint, NYSCEF Doc No. 16, at ¶ 89). Thus, the branch of the motion to dismiss claims against Hirt is denied.

Punitive Damages

Plaintiffs seek punitive damages for each of their three causes of action. "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] *see also Pisula v R.C. Archdiocese of New York*, 201 AD3d 88, 102 [2d Dept 2021] *quoting Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 [3d Dept 2006]). "[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 retention and supervision (which include allegations of egregious conduct) have survived the motion to dismiss, it would be premature to dismiss the request for punitive damages.

Claims Against the Trustees

Defendants also argue the complaint should be dismissed as to the YU Trustees and YUHS Trustees pursuant to CPLR 3211(a)(11). In *Doe v Yeshiva Univ.* (2022 N.Y. Slip Op. 34265[U], 6 [NY Sup Ct, New York County 2022]), a plaintiff filed a similarly pleaded complaint against Yeshiva University and Marsha Stern Talmudical Academy- Yeshiva University High School for Boys. This Court dismissed the complaint as to the trustees, stating the following:

> CPLR 3211 (a) (11) and the Not-for-Profit Corporation (NPC) Law §720-a, which states in relevant part:
> "[In] an action or proceeding against a trustee...no person serving without compensation as a director, officer, key person or trustee of a corporation...described in section 501 (c)(3) of the United States internal revenue code shall be liable to any person...unless the conduct of such director, officer, key person or trustee with respect to the person asserting liability constituted [*9] gross negligence or was intended to cause the resulting harm to the person asserting such liability."
> Upon a motion to dismiss made pursuant to CPLR 3211 (a) (11), "the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law." If so, the next inquiry for the court to determine is "whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm" (id.). Here, the Court finds that the provision is applicable to defendant; however, the complaint fails to contain allegations with respect to any specific trustee and, as such, there cannot be a reasonable probability that any particular trustee's conduct was intentional or constituted gross negligence.

> Therefore, the negligence claim is barred by the qualified immunity conferred upon the trustees (see, e.g., *Drimer v. Zionist Org. of Am.*, 194 AD3d 641, 643 [1st Dept 2021]; cf. *Kamchi v. Weissman*, 125 AD3d 142, 160-62 [2d Dept 2014]).

The instant complaint alleges a fact pattern against YU Trustees and YUHS Trustees similar to the fact pattern alleged against the trustees in *Doe v Yeshiva Univ.* For the same reasons, this complaint is dismissed as to the Trustees. Therefore, the branches of the motion to dismiss this complaint as asserted against Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University and James Doe 1-30, Members of The Board of Trustees of Marsha Stern Talmudical- Academy Yeshiva University High School for Boys pursuant to CPLR § 3211(a)(11) are granted.

CONCLUSION

For the reasons discussed above, it is

ORDERED that the defendants' (Mot. Seq. 002) motion to dismiss this action pursuant to CPLR § 3211 is partially granted to the extent that the complaint is dismissed as to Pat Doe 1-30, Members of the Board of Trustees of Yeshiva University and James Doe 1-30, Members of The Board of Trustees of Marsha Stern Talmudical- Academy Yeshiva University High School for Boys and defendants' motion is otherwise denied; and it is further

ORDERED that the parties shall proceed with discovery and submit a compliance conference order within 20 days.

This constitutes the decision and order of the Court.

3/28/2024
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