

<b>Falzon v Rockefeller Univ. Hosp.</b>
2021 NY Slip Op 32488(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 950247/2019
Judge: Deborah A. Kaplan
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previously time-barred claims that allege injury “as a result of conduct which would constitute” certain specified sexual offenses under the Penal Law against a claimant when the claimant was less than 18 years old (CPLR §214-g). The CVA has a “window,” which opened on August 14, 2019 and closed on August 14, 2021, within which actions based on such revived claims may be commenced.

Madison moves, pursuant to CPLR §3211(a)(7), to dismiss the complaint as against it. In support of its motion, Madison argues that it is not, and never has been, affiliated with Rockefeller. Separately, defendant the Rockefeller Foundation (“Foundation”) moves, pursuant to CPLR §3211(a)(7), to dismiss the complaint as against it. The Foundation argues that it is an unrelated and separate entity from Rockefeller. Likewise, the Foundation underscores that it is not a hospital and it never employed Dr. Archibald or granted him any funds for research. In short, the Foundation submits that it has no connection to this matter.

Finally, Rockefeller moves to dismiss the following claims in the complaint as against it: (1) the negligent hiring claims asserted in plaintiffs’ Second and Ninth Causes of Action; (2) plaintiffs’ Third and Tenth Causes of Action for aiding and abetting assault and battery; (3) plaintiffs’ Fourth and Eleventh Causes of Action to the extent that they allege that Rockefeller is vicariously liable for Dr. Archibald’s alleged conduct; and (4) plaintiffs’ Twelfth Cause of Action brought under Public Health Law §2805-d.

In opposition, plaintiffs argue that Rockefeller’s actions in connection with the abuse alleged are well-documented in a report that was published in 2019 that concluded, based upon information received from and regarding over 900 patients, that Dr. Archibald engaged in acts of sexual abuse and sexual misconduct with several children during the course of his employment. Plaintiffs do not oppose Rockefeller’s application to dismiss plaintiffs’ Third and Tenth Causes of

Action for aiding and abetting assault and battery as against it, but state that their remaining causes of action are viable. Plaintiffs also submit that their claims against Madison and the Foundation satisfy New York's pleading requirements, and are therefore not subject to dismissal at this stage in the litigation.

## DISCUSSION

The court on a dismissal motion pursuant to CPLR §3211(a)(7) “must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory” (*Samiento v. World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *see also* CPLR §3026 [“(p)leadings shall be liberally construed”]). Furthermore, a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]; *see also Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635–636 [1976]; *Uzzle v. Nunzie Court Homeowners Assn., Inc.*, 70 AD3d 928, 930 [2d Dept 2010] ) and must determine “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] ). However, “while factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth” (*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 194, [2d Dept 2009]).

### A. Madison and the Foundation's Motions

Here, plaintiffs have failed to establish a viable connection between Madison and the allegations asserted against it. To be sure, Madison is not related to Rockefeller. Even though

plaintiffs allege that Dr. Archibald sexually abused them at Madison and elsewhere, plaintiffs have failed to establish a link between Dr. Archibald's criminal conduct and Madison's purported responsibility for that abuse. Notably, Dr. Archibald is not a defendant here, because he is deceased. Rockefeller is logically a defendant, because it employed Dr. Archibald and plaintiffs' complaint contains several paragraphs of allegations that Rockefeller was on notice of Dr. Archibald's sexual misconduct in each of the eight years during which plaintiffs allege abuse by Dr. Archibald. Plaintiffs' claims against Madison, by contrast, assert merely that, "upon information and belief, there were reports and other evidence and incidences or misconduct by Dr. Archibald," which should have put Madison on notice of Dr. Archibald's sexual misconduct. But the complaint fails to plead facts, rather than conclusions, that Madison had the requisite notice, before the alleged abuse occurred, of Dr. Archibald's propensity for sexual misconduct that would satisfy the foreseeability element of the negligence claims plaintiffs assert here. Moreover, plaintiffs plead no facts that they or anyone else ever told Madison of this misconduct. Nor do plaintiffs assert that anyone else told Madison about similar abuse by Dr. Archibald – before or after Dr. Archibald allegedly abused Falzon or his Hoffman. Even crediting plaintiffs' allegations of abuse by Dr. Archibald at Madison, the complaint fails to state a cognizable claim against Madison for failing to prevent or halt the abuse. For this reason, the complaint is dismissed as against Madison.

Likewise, the Foundation is an unrelated and separate entity from Rockefeller. The Foundation is not a hospital and it never employed Dr. Archibald or granted him any funds for research. In short, the Foundation has no connection to this matter. Indeed, plaintiffs have failed to plead a single cause of action directly against the Foundation. Instead, all of their claims are brought against a group of defendants with no known connection to the Foundation.

Even if plaintiffs' claims were read to include the Foundation, plaintiffs' reliance on group pleading despite the fact that the Foundation is a separate legal organization with no factual connection to the events at issue in this case, warrants dismissal. As such, the complaint is also dismissed as against the Foundation.

## **B. Rockefeller's Motion**

### **1. Negligent Hiring**

Rockefeller seeks dismissal of plaintiffs' negligent hiring claims asserted in plaintiffs' Second and Ninth Causes of Action for failure to state a claim since there are no specific allegations that it knew of Dr. Archibald's alleged propensity to commit sexual abuse of minors at the time that he was hired. Instead, Rockefeller argues that plaintiffs merely claim that Rockefeller was capable of knowing about the alleged abuse. Rockefeller contends that such allegations, absent more, are tantamount to seeking to hold defendant strictly liable for its employees' alleged misconduct.

However, contrary to Rockefeller's assertions "[t]here is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]). Instead, 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" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]).

Here, plaintiffs have sufficiently alleged, at this juncture, that Rockefeller may have had knowledge of Dr. Archibald's propensity to sexually abuse plaintiffs and other minor patients at the time that he was hired. Plaintiffs are not required to provide extensively detailed allegations at

this juncture in the litigation. As plaintiffs underscore, this is not a summary judgment motion and plaintiffs have not had a fair and full opportunity to obtain discovery from Rockefeller regarding these issues, including their purported knowledge of Dr. Archibald's actions. Liability for negligent hiring is based not on the tortious conduct of the employee but on the negligence of the defendant-employer for failures involving the risk of harm by the employee to others (*see, e.g. Ford v Gildin*, 200 AD2d 224 [1st Dept 1994]). Discovery from Rockefeller is likely to shed light on that issue, and others. Accordingly, Rockefeller's motion to dismiss plaintiffs' Second and Ninth Causes of Action for negligent hiring is denied as premature at this juncture in the litigation.

## **2. Aiding and Abetting Assault and Battery**

Plaintiffs concede that they cannot proceed on their aiding and abetting assault and battery claims. Such claims would require allegations that Rockefeller engaged in overt acts in furtherance of the alleged acts of sexual abuse by Dr. Archibald and that Rockefeller engaged in conduct intentionally or deliberately directed at causing the assault. Because the complaint contains no such allegations, and in light of plaintiffs' concession, plaintiffs' Third and Tenth Causes of Action are dismissed in their entirety.

## **3. Negligence and Vicarious Liability**

Next, Rockefeller seeks dismissal of plaintiffs' Fourth and Eleventh Causes of Action to the extent that plaintiffs seek recovery from Rockefeller on a theory of vicarious liability. Contrary to Rockefeller's assertions, plaintiffs are not alleging that Rockefeller is vicariously liable under *respondeat superior* for Dr. Archibald's actions. Rather, the gravamen of plaintiffs' negligence claim is that Rockefeller owed a duty of care to plaintiffs because, among other things, plaintiffs were invitees on property that Rockefeller owned and/or operated. Plaintiffs further underscore that the duty that was owed to them was breached by allowing a known perpetrator of sex abuse,

Dr. Archibald, to work on the premises. Although Rockefeller arguably cannot be held vicariously liable for the intentional torts committed by Dr. Archibald, it can be held vicariously liable for negligence committed in allowing such abuse to take place when a duty of reasonable care existed to safely manage the subject institution and its patients therein. Moreover, while Rockefeller argues that it had no notice of Dr. Archibald's actions, it fails to conclusively establish a lack of knowledge as a matter of law. Discovery will be necessary before the parties' significant disputes on the issue of notice can be reconciled. As such, Rockefeller's motion to dismiss plaintiffs' Fourth and Eleventh Causes of Action, to the extent that plaintiffs seek recovery from Rockefeller on a theory of vicarious liability, are denied at this juncture.

#### **4. Public Health Law §2805-d**

Finally, plaintiffs' Twelfth Cause of Action, brought under §2805-d of the Public Health Law, is dismissed in its entirety because a claim under §2805-d of the Public Health Law for lack of informed consent is a type of medical malpractice claim and cannot be based on alleged acts of sexual abuse.

Based on the foregoing, it is hereby

ORDERED that Madison and the Foundation's respective motions are granted to the extent of dismissing plaintiffs' claims as against Madison and the Foundation in their entirety; and it is further

ORDERED that Rockefeller's motion to dismiss plaintiffs' Second and Ninth Causes of Action for negligent hiring, is denied; and it is further

ORDERED that Rockefeller's motion to dismiss plaintiffs' Third and Tenth Causes of Action, is granted; and it is further

ORDERED that Rockefeller's motion to dismiss plaintiffs' Fourth and Eleventh Causes of Action, is denied; and it is further

ORDERED that Rockefeller's motion to dismiss plaintiffs' Twelfth Cause of Action, is granted; and it is further

ORDERED that the Clerk of the Court, New York County, is directed to enter judgment in accordance with this court's decision and order.

This constitutes the decision and order of the court.

10/28/2021  
DATE

*Deborah A. Kaplan*  
HON. DEBORAH A. KAPLAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

Hon. Deborah A. Kaplan  
OTHER  
J.S.C.

REFERENCE