Caroleo v Roman Catholic Diocese of Brooklyn
2021 NY Slip Op 31445(U)
April 28, 2021
Supreme Court, Kings County
Docket Number: 519979/2019
Judge: George J. Silver
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Index №. 519979/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JOSEPH CAROLEO,

Index №. 519979/2019

Plaintiff,

-against-

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,
et al.

Defendant

----------X

HON. GEORGE J. SILVER:

Defendant ROMAN CATHOLIC DIOCESE OF BROOKLYN (hereinafter the "Diocese") moves, pursuant to CPLR §§3211(a)(5), and (7) to dismiss plaintiff JOSEPH CAROLEO's ("plaintiff") complaint as against it. Separately, defendants FRANCISCAN BROTHERS OF BROOKLYN ("Franciscan Brothers") AND ST. FRANCIS PREPATORY SCHOOL ("St. Francis")(collectively "Franciscan defendants") move to dismiss plaintiff's complaint as against them under CPLR §§3211(a)(7). Plaintiff opposes the respective applications.

Plaintiff's complaint alleges that from November 1, 1982 through December 31, 1982, when plaintiff was a minor, plaintiff was sexually abused by nonparty Gaspar Abruzzo ("Dean Abruzzo"), the dean of St. Francis.

The Diocese's Motion

In support of its motion to dismiss, the Diocese argues that insofar as plaintiff's cause of action for negligence alleges that it is vicariously liable for Dean Abruzzo's alleged intentional torts, that cause of action is not revived by the Child Victims Act, (L. 2019 c.11) ("CVA") which, *inter alia*, (1) extends the statute of limitations on criminal cases involving certain sex offenses against children under 18 (*see* CPL §30.10[f]); (2) extends the time which civil actions based upon such criminal conduct may be brought until the child victim reaches 55 years old (*see* CPLR §208 [b]); and (3) opens a one-year window reviving civil actions for which the statute of limitations has already run (even in cases that were litigated and dismissed on limitations grounds), commencing six months after the effective date of the measure, i.e. August 14, 2019 (*see* CPLR §214-g). Indeed, the Diocese argues that the legislature only revived claims based on the Diocese's intentional or negligent acts. As such, the Diocese avers that plaintiff's cause of action for negligence/gross negligence is time-barred.

To the extent that the court finds a time-bar inapplicable, the Diocese argues that the court should dismiss plaintiff's complaint in its entirety insofar as plaintiff has failed to state sufficiently pleaded causes of action. The Diocese highlights that plaintiff's complaint purports to allege the following causes of action: negligent hiring, retention and supervision and/or direction (Count I); negligence/gross negligence (Count II); breach of fiduciary duty (Count III); breach of non-

delegable duty (Count IV); negligent infliction of emotional distress ("NIED")(Count V); breach of duty in *loco parentis* (Count VI); and breach of statutory duty pursuant to New York Social Services Law §§ 413, 420 to report abuse (Count VII).

The Diocese contends that Count I, for negligent supervision, monitoring, training, and retention, should be dismissed because the complaint does not allege facts sufficient to show that the Diocese had actual or constructive notice of Dean Abruzzo's alleged propensity to commit sexual abuse at any point in time until shortly before news articles were published thirty years after the alleged abuse. Additionally, the Diocese argues that Count I should be dismissed to the extent that it is duplicative of Count II. The Diocese also contends that Count II, for negligence, should be dismissed to the extent that it is improperly predicated on vicarious liability and that it asserts that Dean Abruzzo was "a dangerous condition on the property." The Diocese avers that Count III, for breach of fiduciary duty, should be dismissed because it is not pleaded with particularity, and in any event, the Diocese owed plaintiff no such duty. As to Count IV, the Diocese argues that dismissal is warranted because New York law does not recognize breach of non-delegable duty as a cognizable cause of action, but even if it did, any such cause of action is not revived by the CVA. The Diocese goes on to argue that NIED, Count V, should be dismissed as duplicative of the plaintiff's other negligence claims. As for Count VI, the Diocese agues that it owed no special or "in *loco parentis*" duty to plaintiff and even if it did, a duty is not enough to state a cause of action, especially where it is duplicative of a claim for negligent supervision. Finally, the Diocese argues that Count VII should be dismissed because the Diocese is not recognized as a mandated reporter under the New York Social Services Law, and plaintiff's claim predicated on a failure to report is not adequately alleged. For these reasons, the Diocese argues that plaintiff's complaint should be dismissed in full. If the court is not inclined to dismiss the action in full, the Diocese argues in the alternative that plaintiff's demand for punitive damages on his first through seventh causes of action against the Diocese should be stricken.

Franciscan Defendants

In support of their separate motion, the Franciscan defendants argue that Count I of plaintiff's complaint is pleaded in a conclusory fashion and inappropriately states that defendants' acts were willful, wonton, malicious, reckless and/or outrageous and therefore are subject to punitive damages. The Franciscan defendants further state that Count II is a restatement of Count I insofar as plaintiff argues that Dean Abruzzo was carelessly hired and that as a result, plaintiff was not adequately protected from harm. To the extent that plaintiff attempts to assert a claim for vicarious liability under the theory of respondeat superior, the Franciscan defendants argue that Count II must be dismissed because acts of sexual abuse are never considered to be acts committed within the scope of employment. The Franciscan defendants argue that Count III, for breach of fiduciary duty, is improperly pleaded insofar as plaintiff asserts a duty that is no different from a common law duty rather than attempting to assert a separate and distinct duty based upon a special relationship between the student and the school. The Franciscan defendants further posit that "A parent's entrustment of child to the care and supervision of the school does not set forth a claim for breach of fiduciary duty and does not establish any special relationship. It simply states a claim for negligent supervision as set forth in the first cause of action."

The Franciscan defendants go onto argue that Count IV, breach of a non-delegable duty, is once again duplicative and redundant of Count I. They argue that plaintiff improperly repeats the same allegations set forth in Count I in Count IV – namely that while he was a minor he was placed into the care of defendants who had a duty to provide a safe environment. The Franciscan defendants contend that calling the duty "non-delegable" simply defines the duty set forth in Count I. They further assert that plaintiff makes no reference to a potential statutory cause of action which imposes a non-delegable duty upon them. In addition, the Franciscan defendants observe that there is no third-party or subcontractor involved here to whom defendants may attempt to shift the burden. Therefore, they argue that Count IV has no application to the facts and circumstances of this case. With respect to Count V for NIED, the Franciscan defendants argue once again that the Count is duplicative of Count I. Furthermore, they state that such causes of action are routinely dismissed as they fall within the ambit of traditional tort claims asserted by plaintiff. The Franciscan defendants next argue that Count VI, breach of duty *in loco parentis*, is not a separate and distinct cause of action insofar as the term *in loco parentis* is merely used to describe the standard of care owed by the school in determining whether the school is negligent in its supervision of the students. Finally, the Franciscan defendants argue that any breach of duty pursuant to Social Services Law §§ 413 and 420 for failure to report the abuse to child protective services has no application to the facts and circumstances of this case. To be sure, the Franciscan defendants argue that these statutes are a means to further the Family Court Act in its scheme of child safety in the home. The purpose of reporting child abuse to child protective services is so that the home can be investigated and if needs be the child can be removed and placed into foster care. Child protective services does not perform investigations of schools to determine whether a student should be placed in a foster school. Furthermore, the Franciscan defendants contend that there is no allegation that the accused, Dean Abruzzo, acted as the functional equivalent of a parent. Consequently, the Franciscan defendants ask the court to grant their cross-motion to dismiss the second, third, fourth, fifth, sixth and seventh causes of action in their entirety as well as any claims for gross negligence and punitive damages.

Plaintiff's Opposition

In opposition, plaintiff argues that defendants proffered grounds for dismissal of plaintiff's complaint are erroneous and premature insofar as no discovery has been conducted. Notably, plaintiff underscores that plaintiff is not required to provide specific details at this juncture to fully demonstrate the viability of plaintiff's various causes of action. Instead, plaintiff emphasizes that the allegations asserted within plaintiff's complaint should be afforded the benefit of every favorable inference. Here, plaintiff states that plaintiff has more than plausibly alleged that when plaintiff was a minor Dean Abruzzo sexually abused plaintiff from on or about November 1, 1982 to on or about December 31, 1982. As such, plaintiff submits that plaintiff has presented adequate allegations at this stage to allege that defendants knew or should have known of Dean Abruzzo's propensities.

Generally, plaintiff underscores that the CVA allows claims for "intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age" (*see* CPLR 214-g).

Based on this, plaintiff states that plaintiff has properly alleged all seven causes of action enumerated within the complaint.

Specifically, with respect to Count I, plaintiff argues that the court may take judicial notice of the allegations regarding the routine practice of the Catholic Church, including the Diocese, of negligently hiring, supervising, retaining and covering up for abusive priests and other personnel. As to Count II, plaintiff challenges the Diocese and Franciscan defendants' arguments that plaintiff's claim for gross negligence is based on the doctrine of *respondeat superior* and therefore should fail because the sexual abuse of plaintiff by Abruzzo was outside the scope of their employment. To be sure, plaintiff contends that Count II must stand because plaintiff has stated a claim directly against the Diocese and the Franciscan defendants for their own complicity and involvement, and gross negligence, in the actions that damaged plaintiff, not one sounding in vicarious liability.

With respect to Counts III, IV, V, and VI, all of which are predicated duties breached by defendants and the nature of defendants as religious and educational organizations, plaintiff argues that defendants occupy a unique position of trust within society insofar as a parent or guardian entrusting his child to an institution affiliated with the Roman Catholic Church does so with the expectation that the institution will uphold the values of the Church. Because the Diocese and the Franciscan defendants purport to serve a higher, religious purpose, plaintiff contends that their relationship with young people entrusted to their care for seven or more hours each day must be held to a similar standard. Indeed, plaintiff states that "[w]hile there is no legal authority for the proposition that a religious school should be held to a higher standard than a public school, this is no excuse for measuring their behavior by a lower standard." To the extent that Counts III, IV, V and VI are predicated upon the notion that minors entrusted to the Diocese and the Franciscan defendants are taught in no uncertain terms that the adults charged with educating them hold a position of power and authority over them, plaintiff avers that each cause of action must stand at this juncture. Plaintiff further states that while specific breaches by defendants will be unearthed during discovery, plaintiff has satisfied pleading requirements at this early stage in the litigation.

As to Count VII, plaintiff argues the duty to report abuse contained within New York Social Services Law §§ 413, 420 does not only apply to protect minors from abuse by parents or guardians. To be sure, plaintiff emphasizes that a school district may be liable for failing to report abuse by its own employees.

In sum, plaintiff submits that defendants' motions should be denied in all respects. In the alternative, plaintiff requests the opportunity to amend his complaint, should it be found in any way deficient by the court.

In reply, the Diocese argues that plaintiff's opposition fails to fully flesh out the deficiencies contained within plaintiff's complaint. Most notably, the Diocese states that plaintiff does not adequately address the dearth of facts put forward in support of plaintiff's seven causes of action, and that plaintiff provides no grounds upon which punitive damages can be sought. In the Diocese's view, it is plaintiff's task to show that this case is not simply one of ordinary negligence but reflected a pattern of egregious conduct directed at the public at large. Plaintiff's

failure to do so, the Diocese contends, exemplifies why dismissal is warranted here even in the absence of discovery.

DISCUSSION

"[O]n a motion to dismiss a cause of action pursuant to CPLR §3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff (*Benn v Benn,* 82 AD3d 548, 548 [1st Dept 2011] *see also Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290 [1st Dept 1991][defendant bears the burden of proof on an affirmative defense]).

"On a motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7), we accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141-142 [2017] [internal citations omitted]).

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, 660 NYS2d 726 [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, *supra*). 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, *supra*; *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], *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, *supra*; *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 plaintiff, the pleading states no legally cognizable cause of action (*see Leon*, 84 NY2d at 87-88, *supra*; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

CPLR §214-g

Here, as a threshold matter, prior to addressing the individual claims at issue in this lawsuit, the court tackles the argument that plaintiff's complaint should be dismissed in part, pursuant to CPLR §3211(a)(5), as time-barred since some of the specific torts alleged were not revived by CPLR §214-g. CPLR §214-g revives, in relevant part, "every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of" specific child sexual abuse offenses. Nevertheless, it is suggested here that any respondeat superior claim, based on acts of individual perpetrators, and any claim premised on conduct that is not intentional or negligent, such as recklessness or gross negligence, is time-barred.

Upon careful review of CPLR §214-g, the court denies the requested relief . The argument that the CVA did not revive claims based upon the acts and omissions of an employee or agent acting within the scope of his or her authority or any other claim against a party alleging intentional or negligent acts as a result of child sexual abuse ignores the revival statute's careful delineation between those whom a cause of action is brought against, and those alleged to have committed an act. As other courts have observed, the use of different words to describe (1) against whom a cause of action is brought or liability is sought (that is, a "party"), and (2) by whom the tortious act was committed (that is, a "person") is telling (*see Koeneke v. Holy Family Roman Catholic Church*, Index No. 900004/2019 [Nassau Cnty 2020]).

When codifying the CVA, the Legislature expressly revived "every" claim or cause of action brought against a "party" so long as the claim alleges intentional or negligent conduct by a "person" causing injury as a result of specific child sexual abuse offenses. The statute clearly differentiates between two different nouns ("party" and "person") and two different prepositions respectively ("against" and "by"). In doing so, the Legislature recognized that in some instances the "party" held liable, such as the Diocese, and the "person" committing the negligent or

intentional tort, such as an employee or agent, would be different. Here, viewing the Diocese as an employer and Fr. Schuck as the person who committed the torts alleged within the scope of his employment comports with the language of CPLR §214-g (*see Riviello v Waldron*, 47 NY2d 297 ([1979): "[W]e first note what is hornbook law: the doctrine of respondeat superior renders a master vicariously liable for at tort committed by his servant while acting within the scope of his employment" (*id*. at 302). Accordingly, the court finds that CPLR 214-g plainly revives respondeat superior claims.

The court further finds that CPLR §214-g also revives claims alleging negligence/gross negligence and breach of non-delegable duty. To reiterate, CPLR §214-g expressly revives every "claim or cause of action brought against any party" that alleges "intentional or negligent acts or omissions" stemming from child sexual abuse offenses. A finding to the contrary would run athwart of the Legislature's intent when adopting CPLR §214-g. As plaintiff highlights, "[i]n the spectrum of tortious conduct, general or ordinary negligence sits at one end of the scale, while intentional acts sit at the other. To suggest that the New York legislature intended to revive claims only on the opposite ends of the spectrum and exclude claims in the middle of those two extremes would bear a preposterous result." Furthermore, considering that courts within this state define gross negligence as essentially the equivalent of intentional wrongdoing exposes the deficiencies within the Diocese's argument (*see Bennett v State Farm Fire and Cas. Co*., 161 AD3d 926, 929 [2d Dept 2018]["To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others"]). To the extent that gross negligence claims are based on either "negligent" or "intentional" acts, such claims are covered by the revival language within CPLR §214-g.

Accordingly, the portion of the respective motions seeking dismissal of certain claims articulated in plaintiff's pursuant to CPLR §3211(a)(5) as time-barred, is denied in its entirety.

Individual Claims

1. Negligent Hiring, Retention, Supervision

The Diocese and Franciscan defendants claim that plaintiff's cause of action for negligent supervision should be dismissed for failure to state a claim since there are no specific allegations that either entity knew of Dean Abruzzo's propensity to commit sexual abuse of minors. Both entities argue that plaintiff's present allegations, absent more, are insufficient and amount to an attempt surmise that both the Diocese and the Franciscan defendants are strictly liable for Dean Abruzzo's alleged misconduct. The Diocese and the Franciscan defendants also state that any claim of alleged abuse that did not take place on their property is too attenuated and must be dismissed.

However, contrary to these 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]). "A necessary element of a cause of

action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct which caused the injury'" (*Bumpus v New York City Transit Authority*, 47 AD3d 653 [2d Dept 2008]).

Here, plaintiff alleges that the Diocese and the Franciscan defendants had a duty to protect plaintiff from alleged sexual abuse. In this respect, plaintiff has alleged in more than a generalized manner that the Diocese and the Franciscan brothers overtly knew or should have known of Dean Abruzzo's propensity to commit such conduct (*contra Shor v. Touch-N-Go Farms, Inc*., 89 AD3d 830, 831 [2d Dept. 2011][generalized claim that defendant "knew the risk of sexual abuse of minor parishioners by priests and other staff" is insufficient (*Shor v. Touch-N-Go Farms, Inc*., 89 AD3d 830, 831 [2d Dept. 2011]).

Accordingly, defendant's motion to dismiss Count I for negligent supervision is denied.

2. Negligence

Next, the Diocese and Franciscan defendants seek dismissal of Count II for negligence and gross negligence. Contrary to defendants' suggestions, plaintiff is not alleging that the Diocese and Franciscan defendants are vicariously liable under respondeat superior for Dean Abruzzo actions. Rather, the gravamen of plaintiff's negligence claim is that the Diocese and Franciscan defendants owed a duty of care to plaintiff because, among other things, plaintiff was an invitee on property that defendants owned and/or operated. Plaintiff further underscores that the duty that was owed to him was breached by allowing a known perpetrator of sex abuse, Dean Abruzzo, to work on the premises. Although the Diocese and Franciscan defendants arguably cannot be held vicariously liable for the intentional torts committed by Dean Abruzzo, they 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 educational facilities. Moreover, while the Diocese and Franciscan defendants argue that they had no notice of Dean Abruzzo's actions, both defendants failed to conclusively establish their 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, defendants' respective motions to dismiss Count II of plaintiff's complaint are denied.

3. Breach of Fiduciary Duty

Courts have articulated that a fiduciary duty exists when a plaintiff's relationship with a church extends beyond that of an ordinary parishioner (*see Doe v. Holy See [State of Vatican City]*, 17 AD3d 793, 795 [3rd Dept 2005]). That said, a fiduciary relationship is not applicable to all parishioners, and can be established upon a showing that a congregant's relationship with a church entity resulted in "*de facto* control and dominance" when the congregant was "vulnerable and incapable of self-protection regarding the matter at issue" (*Marmelstein v. Kehillat New Hempstead*, 11 NY3d 15, 22 [2008]). The existence of a fiduciary duty is a fact-specific question to be determined by the fact-finder, such that breach of fiduciary duty claims should not generally be dismissed before the parties have the opportunity to conduct discovery (*see Doe v. Holy See [State of Vatican City]*, 17 AD3d 793, *supra*). Here, plaintiff has alleged that a fiduciary duty was owed to all parishioners on account of defendants' position as caretakers and moral authorities. Assuming every fact alleged to be true and liberally construing the pleading in plaintiff's favor,

the allegations for breach of fiduciary duty are insufficient as a matter of law. Plaintiff's breach of fiduciary duty, as pleaded in the complaint, is no different from plaintiff's negligence causes of action. Accordingly, plaintiff has failed to state a cause of action for breach of fiduciary duty, and the Diocese and Franciscan defendants' respective motions to dismiss Count III are granted pursuant to CPLR §3211(a)(7).

4. Beach of non-delegable duty

Likewise, plaintiff does not identify the non-delegable duty within plaintiff's complaint with respect to Count IV for a purported breach of a non-delegable duty. To be sure, plaintiff alleges facts supportive of Count IV that are duplicative of the negligence causes of action. As such, the Diocese and Franciscan defendants' respective motions to dismiss Count IV are granted pursuant to CPLR §3211(a)(7).

5. Negligent Infliction of Emotional Distress

Count V asserts a claim against the Diocese and the Franciscan defendants for NIED. In general, such a cause of action "must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety" (*Padilla v. Verczky-Porter*, 66 AD3d 1481, 1483 [4th Dept 2009]). "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action." (*Wolkstein v. Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). Here, the allegations set forth under Count V are duplicative of the negligence causes of action. As such, the Diocese and Franciscan defendants' respective motions to dismiss Count V are granted.

6. Breach of duty *in loco parentis*

Turning to Count VI for a breach of duty *in loco parentis*, the court notes that there is a branch of case law under which schools are tasked with a duty to adequately supervise the students in their charge and are liable for foreseeable injuries proximately related to their failure to provide adequate supervision (*see Nash v Port Wash. Union Free School Dist*., 83 AD3d 136, 149-150 [2d Dept. 2011]; *Doe v Department of Educ. of City of N.Y.*, 54 AD3d 352 [2d Dept. 2008]; *see aso Palmer v City of New York*, 109 AD3d 526, 527 [2d Dept. 2013], *citing Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *McLeod v City of New York*, 32 AD3d 907 [2d Dept. 2006]). Based on the doctrine that school districts act *in loco parentis* with respect to their minor students (*see Barragan v City Sch. Dist. of New Rochelle*, 120 AD3d 728 [2d Dept. 2014]; *Stinson v Roosevelt U.F.S.D.*, 61 AD3d 847, 847-848 [2d Dept. 2009]) because they take physical custody of them (*see Giresi v City of New York*, 125 AD3d 601, 602-603 [2d Dept. 2015]), schools are responsible for supervising their students with the same degree of care as a parent of ordinary prudence would exercise in comparable circumstances (*id., citing Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "The concept of *in loco parentis* is the fountainhead of the duty of care owed by a school to its students" (*Williams v. Weatherstone*, 23 NY3d 384, 403 [2014] [*citing Mirand v. City of New York*, 84 NY2d 44, 49 [1994] ["(t)he duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians"]). It does not appear, however, that the doctrine of *in loco parentis* can simply be applied to churches by way of analogy to schools, as plaintiff suggests. That would discount the

instant application as to the Diocese on that basis alone. Nevertheless, even if the doctrine were applied to both the Diocese and the Franciscan defendants, in loco parentis defines the duty owed within the context of a negligence cause of action, but does not create an independent cause of action. As such, the Diocese and the Franciscan defendants' respective motions to dismiss Count VI are granted pursuant to CPLR §3211(a)(7).

7. Breach of Statutory Duty pursuant to New York Social Services Law §§ 413, 420

Plaintiff's final claim, Count VII, is premised on the notion that the Diocese and Franciscan defendants breached their statutory duty to report abuse under Social Services Law §§ 413 and 420. Pursuant to Social Services Law §413, school officials, which include but are not limited to school teachers, school guidance counselors, school psychologists, school social workers, school nurses, school administrators or other school personnel required to hold a teaching or administrative license or certificate, are required to report "when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Social Services Law §420(2) states that "Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." "The Legislature enacted Social Services Law §420 which expressly allows a private cause of action for money damages upon the failure of any person, official or institution required by title 6 to report a case of suspected child abuse or maltreatment" (*Rivera v. County of Westchester*, 31 Misc 3d 985, 994 [Westchester Co Sup Ct 2006]). "An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse" (*Young v. Campbell*, 87 AD3d 692, 694 [2nd Dept 2011], lv denied 18 NY3d 801 [2011]). The Diocese and Franciscan defendants argue that this cause of action is duplicative of plaintiff's negligence causes of action and that they are not liable under the Social Services Law, because they lacked notice of the abuse.

The Diocese application is granted, but for a different reason. The Diocese's status as a church does not presuppose that it is recognized as a mandated reporter under the New York Social Services Law. In contrast, the Franciscan Brothers and St. Francis are actively involved in the education of boys and young men. Therefore, the Social Services Law does apply to them, and since this cause of action is not duplicative, their separate application for dismissal is denied. To be sure, the Franciscan defendants have failed to establish that no significant dispute exists on the issue of whether the failure to report was knowing or willful. The Diocese motion to dismiss Count VII is granted, and the Franciscan defendants' application is denied.

Punitive Damages

Punitive damages, awarded on public policy grounds, "may be considered expressive of the community attitude towards one who willfully and wantonly causes hurt or injury to another" (*Home Insurance Co. v. American Rome Products Corp.*, 75 NY2d 196 [1990]). The conduct justifying such an award generally involves "a high degree of moral culpability" and, if not intentionally harmful, is so reckless as to disregard the remaining negligence claim, the standard in tort is "a conscious act that willfully and wantonly disregards the rights of another (citation

omitted)" (*Don Buchwald & Associates, Inc. v. Rich*, 281 AD2d 329, 330 [1st Dept 2001]), or conduct "undertaken with wanton disregard for the public safety" (*Camillo v. Greer*, 185 AD2d 192, 194 [1st Dept 1992]).

At this stage in the litigation, it is unclear whether evidence may surface to substantiate plaintiff's claims for punitive damages. In general, punitive damages are an extraordinary remedy. Nevertheless, where, as here, discovery has yet to be conducted to substantiate the merits of such an award, defendants' respective applications are denied, with leave to renew at a later juncture in the litigation.

Based on the foregoing, it is hereby

ORDERED that the Diocese and Franciscan defendants' respective applications for dismissal pursuant to CPLR §3211(a)(5) based upon a narrow reading of CPLR §214-g, are denied in their entirety; and it is further

ORDERED that Diocese and Franciscan defendants' respective applications for dismissal of Counts I and II of plaintiff's complaint are denied in their entirety; and it is further

ORDERED that the Diocese and Franciscan defendants' respective applications for dismissal of Counts III, IV, V, and VI of plaintiff's complaint are granted in their entirety; and it is further

ORDERED that the Diocese's application for dismissal of Count VII is granted in its entirety; and it is further

ORDERED that the Franciscan defendants' application for dismissal of Count VII is denied in its entirety; and it is further

ORDERED that the Diocese and Franciscan defendants' respective applications to strike plaintiff's demand for punitive damages are denied, with leave to renew; and it is further

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

This constitutes the decision and order of the court.

Dated: 4-28-2021

George J. Silver

GEORGE J. SILVER, J.S.C.