

Ark 51 v Archdiocese of N.Y.
2021 NY Slip Op 32485(U)
July 1, 2021
Supreme Court, New York County
Docket Number: Index No. 950047/2019
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

X

ARK 51

Index №. 950047/2019

Plaintiff,

-against-

ARCHDIOCESE OF NEW YORK, et al.

Defendants

X

HON. GEORGE J. SILVER:

Defendant SALESIAN SOCIETY (“Salesians”) moves, pursuant to CPLR §3211(a)(5) and (7), to dismiss plaintiff’s complaint in its entirety or certain causes of action that the Salesians argue are improperly pled. Specifically, the Salesians argue that if this action is not time-barred, plaintiff’s causes of action for negligence, negligent supervision, breach of fiduciary duty, and breach “in loco parentis.” must be dismissed. Plaintiff opposes the application.

Plaintiff brings this action seeking to recover against the Salesians seeking to recover against them, among other defendants, for sexual abuse allegedly perpetrated by a Salesian Brother, Thomas Higgs, between 1955 and 1957.

“[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 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 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 and the “person” committing the negligent or intentional tort, such as an employee or agent, would be different. Here, viewing the Salesians as employers or overseers and Thomas Higgs 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 a tort committed by his servant while acting within the scope of his employment” (*id.* at 302). Accordingly, ³ of ⁶ the court finds that CPLR 214-g plainly revives the claims at

issue in this lawsuit. A finding to the contrary would run athwart of the Legislature's intent when adopting CPLR §214-g. As such, the Salesians application for dismissal under CPLR §3211(a)(5) is denied.

Individual Claims

Negligence

Next, the Salesians seek dismissal of plaintiff's negligence claims. Contrary to the Salesians' assertions, they can be held vicariously liable for negligence committed in allowing abuse to take place when a duty of reasonable care existed to safely manage the subject educational facility. Moreover, while the Salesians argue that they had no notice of Thomas Higgs' actions, the Salesians failed 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, the Salesians' motion to dismiss plaintiff's negligence claims is denied.

Negligent Hiring, Retention, Supervision

The Salesians also argue 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 they knew of Richard McCormick's propensity to commit sexual abuse of minors. The Salesians argue that plaintiff's present allegations, absent more, are insufficient and amount to an attempt to surmise that the Salesians are strictly liable for Thomas Higgs' alleged misconduct.

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 Salesians had a duty to protect plaintiff from alleged sexual abuse. In this respect, plaintiff has alleged in more than a generalized manner that the Salesians overtly knew or should have known of Thomas Higgs' 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, the Salesian's motion to dismiss plaintiff's cause of action for negligent supervision is denied.

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 application to dismiss that cause of action is granted pursuant to CPLR §3211(a)(7).

Breach of duty *in loco parentis*

Turning to the issue of 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 also 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. Nevertheless, even if the doctrine were applied here, *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 application to dismiss this cause of action is granted pursuant to CPLR §3211(a)(7).

Based on the foregoing, it is hereby

ORDERED that that Salesians application for dismissal of plaintiff's complaint in its entirety pursuant to CPLR §3211(a)(5) is denied; and it is further

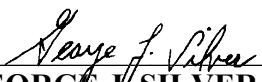
ORDERED that the Salesians' motion to dismiss is granted to the extent that plaintiff's claims based on breach of fiduciary duty and breach of duty *in loco parentis*, are dismissed as against the Salesians; and it is further

ORDERED that Salesians' motion to dismiss is denied to the extent that plaintiff's negligence and negligent supervision claims are not dismissed as against the Salesians; and it is further

ORDERED that the Salesians are directed to serve answers to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: 7-1-21



GEORGE J. SILVER, J.S.C.