

<b>Ark271 Doe v Archdiocese of N.Y.</b>
2022 NY Slip Op 32539(U)
July 19, 2022
Supreme Court, New York County
Docket Number: Index No. 950303/2020
Judge: Laurence Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

-----X

ARK271 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, SALESIANS OF DON BOSCO, SALESIAN HIGH SCHOOL, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

Defendant.

-----X

**INDEX NO.** 950303/2020

**MOTION DATE** 02/10/2021,  
04/20/2021

**MOTION SEQ. NO.** 002 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 30, 31, 32

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendant, Salesian Society (the “Salesians”) motion to dismiss pursuant to CPLR 3211(a)(5) and (7) under motion sequence 002, the decision on defendant, and The Archdiocese of New York’s, (“Archdiocese”) motion to dismiss pursuant to CPLR 3211(a)(1) and (7) under motion sequence 003 is as follows:

Plaintiff commenced the instant action by filing a summons and complaint in this Child Victims Act action on July 16, 2020 alleging that in approximately 1981, when Plaintiff was approximately 17 years old, Brother Eugene Walter, S.D.B. engaged in unpermitted sexual contact engaged in unpermitted sexual contact with Plaintiff in violation of a criminal statute which qualifies under the CVA, while plaintiff was a student at Salesian High School in New York. Arising from same, plaintiff pleads causes of action of 1) Negligence, 2) Negligent Training and Supervision of Employees, and 3) Negligent Retention of Employees.

Archdiocese seeks dismissal of this action pursuant to CPLR §3211(a)(1). Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept. 2002]; see *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]). When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR §3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (see *Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept. 2004]; CPLR §3026).

Here, the Archdiocese has shown through documentary evidence that it had no affiliation with the Salesians of Don Bosco a/k/a Salesians of St. John Bosco a/k/a Salesians of St. Don Bosco Province of St. Philip the Apostle a/k/a Salesian Society, Province of St. Philip the Apostle, Inc. (hereinafter collectively the “Salesian Society”) or the Salesian High School, where the abuse alleged by Plaintiff occurred, and that the Archdiocese employ or supervise the Salesian Society or Salesian High School staff. As established by a deed dated March 22, 1919, The Missionary Society of the Salesian Congregation, Inc. purchased the property where the Salesian High School was located. On January 5, 1939, The Missionary Society of the Salesian Congregation changed

their name to Salesian Society. Said deed establishes that the Archdiocese did not own the property where the alleged abuse occurred. Movant also submits the Missionary Society of the Salesian Congregation of the State of New York Certificate of Incorporation which establishes that the School was not and is not owned, operated, managed or controlled by the Archdiocese. Likewise, the Salesians are an independent religious order that is separate and distinct from the Archdiocese. The Archdiocese affixes the Affidavit of Roderick Cassidy, Esq., the Associate General Counsel for the Archdiocese of New York, in further support of its motion. That affidavit avers that the Archdiocese did not own the property where the alleged abuse occurred and that Salesian High School and the Salesian Society are wholly independent from the Archdiocese and that the Archdiocese had no supervisory control over Salesian High School and Brother Eugene Walter, S.D.B., the alleged abuser. In light of the proffered evidence, the Archdiocese has established that it had no connection to the allegations alleged, and therefore had no duty to plaintiff.

In opposition, plaintiff submits several affidavits and supporting documents raising issues of canon law, having no bearing on the instant action, which utterly fail to rebut movant's showing. Considering the documentary evidence submitted, and the lack of evidence rebutting it, dismissal is warranted as against the Archdiocese.

Salesian's first argument in support of its motion to dismiss is that CPLR 214-g, violates the Due Process clause of the New York Constitution. Since the submission of the instant motion, multiple 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 Constitutions, See, *Farrell v. United States Olympic & Paralympic Comm.*, No. 120CV1178FJSCFH, 2021 WL 4820251, at \*7 (N.D.N.Y. Oct. 15, 2021), holding that "[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.” *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 400, 67 N.Y.S.3d 547, 89 N.E.3d 1227 (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 Sch.*, No. 20-CV-03628 (DG) (SJB), 2021 WL 4310891 \*3, 2021 U.S. Dist. LEXIS 181254 \*7 (E.D.N.Y. Sept. 22, 2021) (collecting cases); *Giuffre v. Dershowitz*, No. 19 Civ. 3377 (LAP), 2020 WL 2123214 \*2, 2020 U.S. Dist. LEXIS 78596 \*5-\*6 (S.D.N.Y. Apr. 8, 2020); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, No. E172556/2020, 72 Misc.3d 1052, ————, 152 N.Y.S.3d 242, ————, 2021 N.Y. Slip. Op. 21188, \*6-\*7 (N.Y. Sup. Ct., Niagara Cnty. July 19, 2021); *ARK3 Doe v. Diocese of Rockville Ctr.*, No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, \*15 (N.Y. Sup. Ct., Nassau Cnty. May 11, 2020); *Torrey v. Portville Cent. Sch.*, No. 88476, 66 Misc. 3d 1225(A), 2020 N.Y. Slip. Op. 50244(U), \*11, 2020 WL 856432 (Cattaraugus Cnty. Feb. 21, 2020).”

“[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]). CPLR 214-g having been found repeatedly to be constitutional, the branch of defendant’s motion seeking to dismiss plaintiff’s complaint pursuant to CPLR §3211(a)(5) as time-barred, is denied in its entirety.

“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]).

Plaintiff's complaint alleges causes of action for i. Negligence; ii. Negligent Training and Supervision of Employees, and iii. Negligent Retention of Employees. Redemptorists contends that plaintiff has failed to sufficiently plead a separate duty of care owed beyond its duty to use reasonable care in hiring, retaining, supervising and training employees and do not owe a separate general duty to prevent conduct by its subordinate that is illegal, outside of its control, and unforeseeable (see *Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 163 [2d Dept 1997]). Salesians further contend that "plaintiff fails to plead the essential elements of a negligent training, retention or supervision claim. In addition to the standard elements of negligence, Plaintiff must show that the defendant "knew, or should have known, of the [subordinate's] propensity for the sort of conduct which caused the injury," and that the "tort was committed on the employer's premises with the employer's chattels" (see *Ehrens v Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004]."

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 defendants knew

or should have known of Br. Eugene’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]). Moreover, discovery will be necessary before the parties’ significant disputes on the issue of notice can be evaluated.

ORDERED that defendant, Archdiocese’s motion (Seq. 003) seeking dismissal of this action as against the Archdiocese is GRANTED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in defendant ARCHDIOCESE OF NEW YORK’s favor accordingly; and it is further

ORDERED that defendant, Salesian Society’s motion seeking dismissal of this action is DENIED in their entirety.

7/19/2022  
DATE

  
LAURENCE LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE