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

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

*Justice*

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**INDEX NO.** 950297/2020

ARK265 DOE,

Plaintiff,

**MOTION DATE** 01/27/2021, 03/02/2022

**MOTION SEQ. NO.** 002 003

- v -

ARCHDIOCESE OF NEW YORK, CONVENTUAL FRANCISCANS A/K/A FRIARS MINOR CONVENTUAL A/K/A CONVENTUAL FRANCISCANS OUR LADY OF THE ANGELS PROVINCE A/K/A ORDER OF FRIARS MINOR CONVENTUAL IMMACULATE CONCEPTION A/K/A OUR LADY OF THE ANGELS PROVINCE, INC.,MANHATTAN COLLEGE, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant MANHATTAN COLLEGE (MC) moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it (motion sequence no. 2); and defendants ORDER MINOR CONVENTUALS and FRANCISCAN FRIARS-OUR LADY OF ANGELS PROVINCE, INC. i/s/a CONVENTUAL FRANCISCANS a/k/a FRIARS MINOR CONVENTUAL a/k/a CONVENTUAL FRANCISCANS OUR LADY OF THE ANGELS PROVINCE a/k/a ORDER OF FRIARS MINOR CONVENTUAL IMMACULATE CONCEPTION a/k/a OUR LADY OF THE ANGELS PROVINCE, INC. f/k/a FRANCISCAN FATHERS (MINOR CONVENTUALS, IMMACULATE CONCEPTION PROVINCE) (hereinafter "Franciscan Defendants") move for the same relief (motion sequence no. 3).

Plaintiff's complaint alleges that he attended MC in Riverdale and that Father Bruce Ritter (Ritter) "was a Roman Catholic cleric employed by" and "under the direct supervision, employ, and control of" "the Archdiocese, the [Franciscans Defendants], and Manhattan College" (NYSCEF Doc No 1 at ¶¶ 17, 19). The complaint further alleges that "[i]n approximately 1966, when Plaintiff was approximately 17 years old, Fr. Ritter engaged in unpermitted sexual contact with Plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05, or a predecessor statute that prohibited such conduct at the time of the abuse" (id. at ¶ 21). Plaintiff's first cause of action asserts a claim for negligence and the second and third causes of action assert claims for negligent training, supervision, and retention.

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is 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" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

To state a claim for negligent retention, supervision, or training under New York law, a plaintiff must plead, in addition to the elements required for a claim of negligence:[1] (1) the existence of an employee-employer relationship; (2) "that the employer knew or should have

[1] To state 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]).

known of the employee's propensity for the conduct which caused the injury" (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997]); and (3) "a nexus or connection between the defendant's negligence in [hiring, retaining, supervising, or training] the offending employee and the plaintiff's injuries" (Roe v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]). "There is no statutory requirement" that such cause of action "be pleaded with specificity" (Kenneth R., 229 AD2d at 161).

With respect to this type of cause of action, movants contest the second element. However, the Court finds that plaintiff's complaint sufficiently states each of the elements. 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] [noting such facts may be supplemented in a bill of particulars]).

Regarding the general negligence claim, movants take issue with the nature of the duty plaintiff alleges. Plaintiff concedes that the claim is not grounded in vicarious liability of the alleged sexual abuse, nor a breach of fiduciary duty or failure to report. Rather, plaintiff contends in opposition that the claim is premised upon the movant's duty to protect children in their care, that the movants had a special relationship with plaintiff, and the movants had a special relationship with Ritter (see NYSCEF Doc No 27 at 9-13; 47 at 18-21).[2]

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (Pulka v Edelman, 40 NY2d 781, 782 [1976]). "In the absence of duty, there is no breach and without a breach there is no liability"

[2] Plaintiff also argues in opposition to MC's motion that MC had a duty with respect to Ritter being a "dangerous condition" on its premises (see NYSCEF Doc No 27 at 12-13). Aside from treating Ritter, an alleged sexual predator, as an inanimate object, the Court finds that this theory of liability is untenable on the same grounds as the other theories, set forth infra.

(id.). "Whether a duty exists is a question of law for the court" (Talbot v New York Inst. of Tech., 225 AD2d 611, 612-13 [2d Dept 1996]).

There is generally no duty to control the harm-producing conduct of a third party (i.e., the tortfeasor) absent a special relationship either between the defendant and the plaintiff or the defendant and the tortfeasor (see Pulka, 40 NY2d at 783; 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" (Hamilton, 96 NY2d at 233; see, e.g., 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 289 [2001] ["Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk"]). "That duty, however, does not extend to members of the general public"; thus, circumscribing liability "because the special relationship defines the class of potential plaintiffs to whom the duty is owed" (532 Madison Ave. Gourmet Foods, 96 NY2d at 289).

"New York has affirmatively rejected the doctrine of in loco parentis at the college level" (Talbot, 225 AD2d at 612-13). Therefore, the first cause of action to the extent based on the in loco parentis doctrine must be dismissed. Plaintiff's complaint fails to include any other allegations imposing a duty of care, or special relationship, between the defendants and the plaintiff. Instead, the only reasonable duty inferred from the complaint is that which focuses on an employer and employee, or other relationship with sufficient level of control over Ritter (see Waterbury v New York City Ballet, Inc., 205 AD3d 154, 161 [1st Dept 2022]). This is because "[t]he negligence of the employer . . . arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared

had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (Sheila C. v Povich, 11 AD3d 120, 129 [1st Dept 2004]; see Roe, 198 AD3d at 699-702, quoting Johansmeyer v New York City Dept. of Educ., 165 AD3d 634, 634-37 [2d Dept 2018]; see also Doe v Congregation of the Mission of St.Vincent De Paul in Germantown, 2016 NY Slip Op 32061[U] at *6 [Sup Ct, Queens County 2016] [hereinafter Doe v Congregation]). Thus, "the duty of care in supervising an employee extends to any person injured by the employee's misconduct" (Waterbury, 205 AD3d at 162).

Accordingly, the Court finds that the complaint fails to state an independent or separate cause of action for negligence because of a lack of duty separate and apart from duty of care owed as asserted under the second and third causes of action for negligent training, retention, and supervision.

The Franciscan Defendants also move to dismiss the complaint as not within the purview of the Child Victims Act (CVA)'s revival window as set forth in CPLR 214-g. Defendant MC also touched upon this in its motion to dismiss, noting that the complaint failed to include any allegations as to where the alleged abuse took place and/or how old plaintiff was at the time of the alleged abuse. In support of their motion, the Franciscan Defendants submitted plaintiff's bill of particulars,[3] wherein plaintiff stated:

> "Fr. Bruce Ritter, O.F.M. Conv. sexually abused Plaintiff in approximately 1966 when Plaintiff was approximately 17 years old at a party in Virginia.
>
> "Fr. Ritter knew Plaintiff from class at Manhattan College and recognized Plaintiff when they were both at a party in Virginia. At the party, Fr. Ritter touched and manipulated Plaintiff's penis and genitals. Fr. Ritter orally copulated Plaintiff to ejaculation. Fr. Ritter tried to get Plaintiff to orally copulate Fr. Ritter, but Plaintiff refused. Similar instances of abuse occurred approximately 3 times over the course of a weekend" (NYSCEF Doc No 46 at 4).

[3] The Court does not address the propriety of using a bill of particulars in support of a motion to dismiss, as it was not addressed by any party. Consequently, the Court does not address whether the standard of law on the motion changes to "whether the proponent of the pleading has a cause of action, not whether he has stated" (Leon v Martinez, 84 NY2d 83, 87–88 [1994]).

The Franciscan Defendants argue that because the alleged abuse occurred in Virginia, the holding in S. H. v Diocese of Brooklyn (205 AD3d 180, 181-95 [2d Dept 2022]) compels dismissal. However, that case is distinguishable as the Second Department, Appellate Division held that, under the particular circumstances of that case, "CPLR 214-g does not apply extraterritorially, where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York" (id. at 190). Here, both the plaintiff and alleged abuser were New York residents at the time of the alleged abuse, and the S.H. court made repeated reference to the legislative history of the CVA, which supported "a finding that the revival statute was propagated by the New York State Legislature to benefit New York residents" (id. at 187). It further made clear that its ruling was not based upon "territorial limitations imposed by New York's criminal statutes" (id. at 187). To be sure, the Fourth Department, Appellate Division more recently held that where the plaintiffs were New York residents, "a claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of where the claim accrued" (Shapiro v Syracuse Univ., — AD3d —, 2022 NY Slip Op 04835, *3 [4th Dept Aug. 4, 2022]). Therefore, the CVA revival statute applied to the claims of the two New York residents in that case but not the plaintiff who was a resident of New Jersey (id.).

Additionally, this Court finds that the location of the alleged abuse would be a factor in evaluating the third "nexus" requirement set forth above in the second and third causes of action, and is therefore not dispositive of the claim (see, e.g., Roe, 198 AD3d at 699-702; Johansmeyer, 165 AD3d at 634-37; Doe v Congregation, 2016 NY Slip Op 32061[U], *4-5 [finding negligent hiring and retention adequately plead even though the alleged sexual assaults of the infant-plaintiff did not occur on the employer's premises]).

Accordingly, it is hereby ORDERED that the motions are granted solely to the extent that the first negligence cause of action does not assert any duty/duties owed to the plaintiff beyond those asserted in the second and third causes of action, and are otherwise denied; and it is further

ORDERED that defendant Manhattan College shall file and serve an answer to the complaint within (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days from entry of this order.

This constitutes the decision and order of the Court.

9/26/2022
DATE

ALEXANDER M. TISCH, J.S.C.

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| 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 |