ARK358 DOE v Jesuit Fathers & Bros.

2022 NY Slip Op 33707(U)

October 27, 2022

Supreme Court, New York County

Docket Number: Index No. 950438/2020

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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ARK358 DOE,

Plaintiff,

- v -

JESUIT FATHERS AND BROTHERS, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

Defendant.

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INDEX NO. 950438/2020

MOTION DATE 02/18/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants The New York Province of the Society of Jesus and The USA Northeast Province of the Society of Jesus, Inc. s/h/a Jesuit Fathers and Brothers d/b/a The New York Province of the Society of Jesus a/k/a U.S.A. Northeast Province of Jesus (defendants or SOJ) move to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7).

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]).

Defendants first contend that because the complaint fails to identify conduct constituting a particular penal law offense, the alleged occurrences or conduct fall outside of the purview of the Child Victims Act (CVA) and is therefore time-barred and that such failure also requires dismissal for failing to state a claim pursuant to CPLR 3211 (a) (5) and (7).

CPLR 214-g, enacted in the CVA, provides for a revival of certain personal injury claims that would have been barred by the then-statute of limitations if the alleged conduct was committed against a minor and constituted either (1) "a sexual offense as defined in article one hundred thirty of the penal law"; (2) "incest as defined in section 255.27, 255.26 or 255.25 of the penal law"; or (3) "the use of a child in a sexual performance as defined in section 263.05 of the penal law."

Here, the complaint alleges that Father English, a cleric employed by defendants, "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" (NYSCEF Doc No 1at ¶¶ 12, 16). However, the Court finds that the complaint is sufficient under New York's liberal notice-pleading standard under CPLR § 3013, which requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence (see Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964]), and is therefore not time-barred. The deficiency, if any, will not cause any prejudice to defendants because plaintiff will be required to provide details in his/her bill of particulars (cf. Scholastic Inc. v Pace Plumbing Corp., 129 AD3d 75, 80 [1st Dept 2015]). Specifically, the bill of particulars will require plaintiff to describe the act(s) of abuse and also "identify the specific

subdivision of New York's penal law on which his or her claims are brought under the Child Victims Act" (CMO No. 2, Exhibit B, Common Demand for Verified Bill of Particulars Directed at Plaintiffs at ¶¶ 3, 4).

To state a claim for negligent training, supervision, and/or retention 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 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]; Sheila C. v Povich, 11 AD3d 120, 129-30 [1st Dept 2004]); and (3) "a nexus or connection between the defendant's negligence in [training, supervising and/or retaining] 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]; Gonzalez v City of New York, 133 AD3d 65, 70 [1st Dept 2015] ["what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance"]). "There is no statutory requirement" that such cause of action "be pleaded with specificity" (Kenneth R., 229 AD2d at 161).

The Court declines to dismiss the second and third claims based on the purported lack of allegations concerning notice of the abuser's propensity to commit sexual abuse as 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]).

[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]).

Defendants also move to dismiss the first claim asserting negligence on the grounds that the complaint fails to state defendants owed plaintiff a duty of care and that the claim is duplicative of the second and third causes of action for negligent training, supervision and retention.

"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" (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).

As plaintiff conceded in its opposition, there is no claim that defendants owed a duty of care directly to plaintiff, whether under the *in loco parentis* doctrine or as an invitee on real property (see NYSCEF Doc No 24 at 12-13). Rather, the alleged duty of care focuses on an employer and employee, i.e., where a sufficient level of control exists over the abusers arising out of such employment (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., 11 AD3d at 129; 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]). Thus, "the duty of care in supervising an employee extends to any person injured by the employee's misconduct" (Waterbury, 205 AD3d at 162). The Court finds that the first cause of action should be dismissed as it only contains allegations inferring a duty of care owed directly to the plaintiff (which is concededly not at issue) and because plaintiff failed to plead any other type of special relationship between defendant and Father English.

Accordingly, it is hereby ORDERED that the motion to dismiss is granted in part to the extent of dismissing the first cause of action insofar as asserted against the defendants; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the movants 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.

10/27/2022					ALEXANDER M. TISCH, J.S.C.		
DATE							
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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