SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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R. M.,

Plaintiff,

- v -

ROCKEFELLER UNIVERSITY A/K/A ROCKEFELLER UNIVERSITY HOSPITAL F/K/A HOSPITAL OF THE ROCKEFELLER INSTITUTE, MADISON SQUARE BOYS & GIRLS CLUB, INC.,F/K/A MADISON SQUARE BOYS CLUB

Defendant.

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INDEX NO. 950449/2020

MOTION DATE 03/01/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 28, 29, 30, 31, 32, 36, 37, 39, 41, 43, 45

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant Rockefeller University (RU) moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it.

The complaint alleges that co-defendant Madison Square Boys & Girls Club, Inc. (Madison) required all children using its "facilities, including Plaintiff, to undergo a 'physical examination' with Dr. Archibald," a professor and senior physician of defendant RU and also a board member and volunteer for Madison (NYSCEF Doc No 1, complaint at ¶¶ 17, 19, 26). While conducting these examinations, Dr. Archibald sexually assaulted and abused plaintiff, annually, from 1978 to 1987 when plaintiff was between six and fifteen years old (id. at 28-30).

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]).

In support of its motion, RU claims that it does not have a relationship with plaintiff and therefore owes plaintiff no duty of care; that the abuse did not occur on RU's premises or with its chattels; and that there is no nexus between the abuse and the abuser's employment with RU. In opposition, plaintiff argues that it adequately plead a negligence claim against RU, including, e.g., RU's ability and need to control Dr. Archibald from causing harm, and that discovery is needed as to the exact nature of RU's relationship with Madison, among other issues.

"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.). "The question of the scope of an alleged tort-feasor's duty is, in the first instance, a legal issue for the court to resolve" (Waters v New York City Hous. Auth., 69 NY2d 225, 229 [1987]).

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).

However, in the case of the special relationship at issue here, between an employer and employee, the focus is not on the potential plaintiff, but on the employer and its relationship with the defendant-tortfeasor (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 v Domestic & Foreign Missionary Socy. of the Prot. Episcopal Church, 198 AD3d 698, 699-702 [2d Dept 2021], 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], *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).

With these principles in mind and as explained below, this Court finds that, to state a claim for negligent hiring, retention or supervision 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., 11 AD3d at 129-30); and (3) "a nexus

[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]).

or connection between the defendant's negligence in hiring and retaining [or supervising] the offending employee and the plaintiff's injuries" (Roe, 198 AD3d at 701; 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"]; see Waterbury, 205 AD3d at 161-62; Anonymous v Dobbs Ferry Union Free School Dist., 290 AD2d 464, 464-65 [2d Dept 2002]; K.I. v New York City Bd. of Educ., 256 AD2d 189, 189-192 [1st Dept 1998]; see also Farrell v Maiello, 38 AD3d 592, 592-93 [2d Dept 2007]; R. v R., 37 AD3d 577, 578-79 [2d Dept 2007]; Lemp v Lewis, 226 AD2d 907, 907-08 [3d Dept 1996]).

Contrary to RU's contentions, New York law does not require that the tort be conducted with an employer's chattels or on an employer's premises to hold an employer liable for an employee's negligence. Rather, the law, as set forth in the decisions of the courts in this state, have always suggested that a "nexus" is required between the tort and the employment relationship, which is not limited to an employer's premises (i.e., the location of the tort) (e.g., Johansmeyer, 165 AD3d at 634-37; Doe v Congregation, 2016 NY Slip Op 32061[U], *4-8), or chattels (see, e.g., Waterbury, 205 AD3d 154), but is instead a fact-intensive analysis as to how the employer or the employment relationship is involved or connected with the tort; including the ability of the employer to control the employee and its knowledge of the need to exercise such control (see, e.g., Waterbury, 205 AD3d at 161-62; Johansmeyer, 165 AD3d at 634-37; Doe v Congregation, 2016 NY Slip Op 32061[U], *4-8; cf. K.I., 256 AD2d at 189-192).

"The 'nexus' requirement does not mean that the harm suffered must relate to the employer's business activities" (Waterbury, 205 AD3d at 162). Indeed, as the First Department, Appellate Division reasoned, imposing such a requirement may blur the line on what is outside the scope of employment versus what is within the scope of employment and in furtherance of

the employer's business (see id.). "Rather, [nexus] means that the employer's negligence must be a proximate cause of the plaintiff's injury" (id. at 162).

Here, it cannot be said that plaintiff failed to adequately plead the nexus requirement between the alleged assaults and Dr. Archibald's employment relationship with RU. The complaint alleges, inter alia, that RU approved and/or sanctioned his involvement and affiliation with Madison and used Madison as a patient referral source for RU and its affiliates. Whether Dr. Archibald's volunteer and/or board work with Madison was within RU's ability to supervise and control remains to be determined.

The location of the assault is not dispositive (see, e.g., Roe, 198 AD3d at 699-702; Johansmeyer, 165 AD3d at 634-37 ["although the sexual abuse ultimately occurred in the infant plaintiff's home, it was preceded by time periods when the infant plaintiff was alone with [the school employee] during school hours on a regular basis. During these times, [the employee] engaged in inappropriate behavior, including physical touching. Thus, triable issues of fact exist regarding, inter alia, whether the [employer] knew or should have known of such behavior and [the employee's] propensity for sexual abuse"]; Doe v Congregation, 2016 NY Slip Op 32061[U] at *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]; see also Waterbury, 205 AD3d at 161-62 ["In our view, if an employer knows that employees are using its property to injure others, especially during working hours, reasonable steps should be taken to prevent foreseeable harm. Any other outcome would give an employer carte blanche to ignore known employee workplace misconduct, however pervasive and persistent, so long as that misconduct was carried out on employees' personal devices"]).

For example, in Roe v Domestic & Foreign Missionary Society of the Protestant Episcopal Church, "the complaint alleged that when the plaintiff was seven years old, she was

abducted near her home by a man (hereinafter the alleged attacker) who drove her to a secluded area and brutally sexually assaulted her" (198 AD3d 699 [2d Dept 2021]). The Second Department, Appellate Division held that the plaintiff failed to allege a nexus to hold the employer liable under a theory of negligent hiring and retention, "since the sexual assault occurred far from the Church's premises, and there is no allegation in the complaint that the plaintiff had any prior contact with the alleged attacker, any prior relationship with any of the defendants, or even any knowledge, at the time of the sexual assault, that the alleged attacker was employed by the defendants" (id. at 701). Here, it cannot be said that Dr. Archibald's employment as a physician is so far removed from the assaults and his relationship with Madison, given the allegation that Madison required children to undergo physical evaluations with a doctor and selected Dr. Archibald for that very purpose.

Other cases are distinguishable where the facts demonstrate that the location of the tort, being offsite from an employer's premises, was not a significant factor to demonstrate a nexus, particularly where the employer had no duty, opportunity, or ability to control the employee at that distant location (see, e.g., Milosevic v O'Donnell, 89 AD3d 628, 628-29 [1st Dept 2011] [aside from the lack of the employer's notice of the "the CFO's violent propensities when intoxicated or of the possibility of an assault," there were "no allegations or indication that [the employer] controlled the premises such that it could be held responsible for injuries caused by the intoxicated CFO"]; Barley v Burger Keeper LLC 2017 WL 11094980, Index no. 60379/2016 [Sup Ct, Westchester County January 27, 2017] ["the complaint fails to state a cause of action for negligent supervision since it alleges the assault occurred, not at the [employer's] restaurant, but at a location "miles away" from it. In addition, the complaint fails to allege [the employer] had control over [the employee] at that distant location or that [the employer] had a duty to prevent [the employee] from leaving the restaurant"]).

This case is also distinguishable from cases where the tort was not only separated from the employer and employment relationship by "time" and "place," but also because of "intervening independent acts" of the tortfeasor (see, e.g., "John Doe 1" v Board of Educ. of Greenport Union Free Sch. Dist., 100 AD3d 703, 704 [2d Dept 2012] [where "the infant plaintiff repeatedly and unequivocally testified that he first met [the tortfeasor employee] due to his friendship with her son, with whom he shared some classes, and that both the development of his relationship with [the employee], as well as all of their sexual trysts, occurred off of school grounds and outside of school hours"]; Anonymous, 290 AD2d at 464-65 [where the infant-plaintiff's parents invited the employee-teacher to their home for a New Year's Eve party, and the employee was invited to stay over the house because he was allegedly intoxicated, and molested the infant plaintiffs]; K.I., 256 AD2d at 189-192 ["though . . . plaintiff first met [the tortfeasor] through the school, plaintiff's personal encounters with his abuser were not set up through school channels, and occurred in [the tortfeasor's] apartment after his volunteer work at the school had ceased . . . . Accordingly, defendant cannot be held liable because any nexus between [the tortfeasor's] volunteer activities at the school and his assault upon plaintiff was severed by time, distance and [his] intervening independent actions"]; Lemp, 226 AD2d at 907-08 ["The incident wherein plaintiff was injured occurred after [the employee] had left the place of his employment, traveled approximately 20 miles over the course of 30 minutes and confronted plaintiff; [the employee] was off duty and no longer under [the employer's] supervision and control"]; MS v Arlington Cent. Sch. Dist., 128 AD3d 918, 918-20 [2d Dept 2015] ["Although [the infant plaintiff] first met [the employee] through the marching band, [plaintiff's] injuries were not proximately caused by any negligent retention or supervision by the appellants"]).

Here it cannot be said that the "intervening independent acts" of Dr. Archibald render his liability as the sole and only proximate cause of plaintiff's injury. As the First Department, Appellate Division aptly noted in Gonzalez v City of New York: "'An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent' and the occurrence of that act did not approach that degree of attenuation condemned in Palsgraf" (133 AD3d 65, 70-71 [1st Dept 2015], quoting Derdiarian v Felix Contr. Corp., 51 NY2d 308, 316 [1980] and citing Palsgraf v Long Is. R.R. Co., 248 NY 339, 342-344 [1928]; see also Waterbury v New York City Ballet, Inc., 205 AD3d 154, 161-62 [1st Dept 2022] ["The possibility that harm might have occurred if a defendant had not breached its duty does not negate liability for the harm that occurred because the defendant did breach its duty"]).

Accordingly, it is hereby ORDERED that the motion is denied without prejudice; 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.

1/11/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE