

SHC-MG-25 DOE v Archdiocese of N.Y.

2023 NY Slip Op 30356(U)

January 26, 2023

Supreme Court, New York County

Docket Number: Index No. 950743/2020

Judge: Alexander M. Tisch

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

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

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SHC-MG-25 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, THE CHURCH OF ST.
ANTHONY, A/K/A ST. ANTHONY'S R.C. CHURCH -
NANUET, NEW YORK ATHLETIC CLUB OF THE CITY OF
NEW YORK

Defendant.

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INDEX NO. 950743/2020

MOTION DATE 03/19/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 27, 28, 30

were read on this motion to/for DISMISS

Upon the foregoing documents, defendant New York Athletic Club of the City of New York (NYAC or defendant) moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (7).

Plaintiff's complaint alleges that he and his family were parishioners of co-defendant St. Anthony's Church, where he served as an altar boy and met Father Warren. In or around 1975, Warren took plaintiff and other minor children on a trip to NYAC, a private social club, where Warren sexually abused plaintiff. Insofar as asserted against NYAC, the complaint asserts claims for negligent hiring/retention/supervision/direction and negligence/gross negligence (NYSCEF Doc No 1).

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]).

Initially the Court notes that plaintiff attempted to amend the complaint in response to this motion, which withdraws the first cause of action insofar as asserted against NYAC, leaving only the negligence/gross negligence claim.

“[C]ourts have diverged on the effect of the service of an amended pleading upon a pending motion to dismiss. While some courts have held that the amended pleading resulted in the motion being abated, ‘[o]ther courts have held that the amended pleading should be included in [the] record on the pending motion, and that it should be granted or denied based on the sufficiency of the amended pleading’” (Toikach v Basmanov, 31 Misc 3d 615, 618 [Sup Ct, Kings County 2011], quoting Weinstein-Korn-Miller, NY Civ Pract ¶ 3025.07).

In such situation, the First Department has held that the proper course is to give the movant “the option to decide whether its motion should be applied to the new pleadings” (Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1st Dept 1998]). Here, defendant’s reply first contends that the amendment was not permissible as of right (CPLR 3025 [a]) but continues to state that “[n]onetheless, . . . there is nothing in the Amended Complaint that would warrant denial of the NYAC’s Motion to Dismiss” (NYSCEF Doc No 30) at ¶ 4). As such, the Court treats the motion as if defendant elected to move against the amended complaint. Therefore, the branch of the motion to dismiss the first cause of action against NYAC is denied as moot, leaving only the negligence claim.

“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).

The Court finds that the amended complaint alleges a duty of care running directly to the injured plaintiff as a guest on NYAC's private premises. It also alleges that NYAC had a relationship with Warren, although it is unclear whether or to what extent NYAC had any ability to control Warren's conduct as an alleged member of the private social club.

Defendant argues that the amended complaint fails to allege that NYAC was on notice of Warren’s propensity to abuse and could not have foreseen any sexual assault taking place on its property. However, the Court finds that the allegations in the complaint, which are to be taken as true, adequately state that NYAC knew or should have known of the abuse or of Warren’s propensity to abuse and failed to take appropriate action with Warren and/or minors on its premises (see NYSCEF Doc No 29 at ¶¶ 19-20, 35; NYSCEF Doc No 28 at 12-13). Discovery from defendants is likely to shed light on this issue of what NYAC knew and/or its relationship with Warren, among others (see generally Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021]). Therefore, it cannot be said, at this juncture, that the complaint fails to allege a negligence claim as a matter of law.

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

ORDERED that defendant New York Athletic Club of the City of New York 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 after service of the answer. This constitutes the decision and order of the Court.

ALEXANDER M. TISCH, J.S.C.

1/26/2023
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE