Jim Doe v Ward
2023 NY Slip Op 30357(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 951419/2021
Judge: Laurence L. Love
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 L. LOVE** **PART** **63M**

Justice

----------X

INDEX NO. 951419/2021

JIM DOE,

Plaintiff,

- v -

MOTION DATE 12/21/2021, 12/21/2021, 01/12/2022, 05/27/2022

EDWARD WARD, THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM, UNITED SYNAGOGUE YOUTH, THE USCJ SUPPORTING FOUNDATION INC, SURPRISE LAKE CAMP

MOTION SEQ. NO. 002 003 004 005

Defendant.

DECISION + ORDER ON MOTION

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 37, 38, 39, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 40, 59

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 60, 61, 62, 63, 73, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on The United Synagogue of Conservative Judaism and United Synagogue Youth's ("USCJ") motion to dismiss pursuant to CPLR 3211(a)(7), The USCJ Supporting Foundation, Inc.'s ("USCJSF") motion to dismiss pursuant to CPLR 3211(a)(7), plaintiff's motion seeking leave to file an amended summons and complaint, and Surprise Lake Camp's ("SLC") motion to dismiss pursuant to CPLR 3211(a)(7) is as follows:

Plaintiff commenced the instant Child Victims Act action by filing a summons and complaint on August 13, 2021 alleging that while Plaintiff was a minor, including the years 1993-1998, Defendant, Edward Ward, while acting as a teacher, counselor, adviser, mentor, trustee, director, officer, employee, agent and/or servant of Defendants USCJ and SLC, sexually assaulted, sexually abused, and/or had sexual contact with Plaintiff in violation of the laws of the State of New York, including the New York Penal Law. Plaintiff further alleges that Moving Defendants were aware or should have been aware of said abuse and failed to take reasonable steps to prevent same. Arising from same, plaintiff pled causes of action alleging 1) Negligence; 2) Negligent Hiring, Supervision and Retention; 3) Breach of Fiduciary Duty; 4) Breach of Non-Delegable Duty; 5) In loco parentis; 6) Intentional Infliction of Emotional Distress;7) Negligent Infliction of Emotional Distress; 8) Breach of Statutory Duty to Report under Soc. Servs. Law; 9) Sexual Abuse; and alleging same as against SLC in causes of action ten though eighteen.

It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]); and the proposed amendment is not "palpably insufficient" or "patently devoid of merit" (*Sheila Props., Inc. v. A Real Good Plumber, Inc.*, 59 AD3d 424 [2d Dept 2009]). A review of the proposed amendments reveals that they further detail the allegations relevant to this case and do not assert further causes of action. As such, plaintiff will be granted leave to amend the complaint herein and defendants' motion to dismiss will be evaluated.

"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]).

Moving Defendants seek dismissal of plaintiff's first and second causes of action, A necessary element of a claim based upon negligent hiring, retention, and supervision of an

employee "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Doe v. Rohan*, 17 A.D. 509, 512 (2d Dep't 2005); see also *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004). The First Department has held that conclusory allegations of notice are insufficient to sustain a negligent supervision claim because they do not show that the defendant knew or should have known of the propensity of the perpetrator to commit the tortious acts alleged. See *Naegele v. Archdiocese of New York*, 39 A.D.3d 270, 270 (1st Dep't 2007). However, in that action, the Court found that plaintiff failed to establish that additional discovery was necessary.

The issue at this juncture is not whether plaintiff's claims have factual support, but whether they state cognizable causes of action. Although defendant argues that plaintiff's allegations of notice are conclusory, "[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 A.D.2d 159, 162 [2nd 1997]). Giving the complaint the benefit of every favorable inference, as the court must do at this point, plaintiff's allegations are sufficient to state causes of action for negligence (see *Gray v. Schenectady City School Dist*., 86 A.D.3d 771 [3rd Dept 2011]). Further plaintiff should be allowed to seek evidence "through pre-trial disclosure" (*Nice v Combustion Eng'g*, 193 A.D.2d 1088, 1089 [4th Dept 1993]).

Moving Defendants contend that plaintiff has failed to allege a fiduciary duty between himself and Moving Defendants and that said cause of action is duplicative of plaintiff's negligence causes of action. Courts have articulated that a fiduciary duty exists when a plaintiff's relationship with a church extends beyond that of an ordinary parishioner (*see Doe v. Holy See [State of Vatican City*], 17 AD3d 793, 795 [3d Dept 2005]). In other words, a fiduciary relationship between a plaintiff parishioner and church may exist where the plaintiff comes forward with facts

demonstrating that the relationship between the plaintiff parishioner and the church is unique or distinct from the church's relationship with other parishioners generally (*id.*). That said, a fiduciary relationship is not applicable to all parishioners, and can be established upon a showing that a congregant's relationship with a church entity resulted in "de facto control and dominance" when the congregant was "vulnerable and incapable of self-protection regarding the matter at issue" (*Marmelstein v. Kehillat New Hempstead*, 11 NY3d 15, 22 [2008]). The existence of a fiduciary duty is a fact-specific question to be determined by the fact-finder, such that breach of fiduciary duty claims should not generally be dismissed before the parties have the opportunity to conduct discovery (*see Doe v. Holy See [State of Vatican City*], 17 AD3d 793, *supra*).

Here, plaintiff has pled solely that there "existed a fiduciary relationship of trust, confidence, and reliance between Plaintiff and THE UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM and/or its alter ego, USCJ Foundation." Plaintiff has not pled any facts which would establish that he was in a fiduciary relationship with either of the defendants. The remaining contentions in support of plaintiff's cause of action hinge on negligence, and as such are duplicative of plaintiff's causes of action alleging negligence. Further, plaintiff's fourth and fifth causes of action, "Breach of a non-delegable duty" and "In loco parentis" do not constitute individual causes of action, *See, Torrey v. Portville Cent. Sch.*, 66 Misc. 3d 1225(A), 2020 WL 856432, at *2 (N.Y. Sup. Ct. Cattaraugus Cty. Feb. 21, 2020).

Moving Defendants seeks dismissal of plaintiff's claims premised on intentional infliction of emotional distress ("IIED") and Negligent Infliction of Emotional Distress ("NIED"). "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action." (*Wolkstein v. Morgenstern, 2*75 AD2d 635, 637 [1st Dept 2000]). The elements of that cause of action are "(i) extreme and outrageous conduct;

(ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Chanko v. American Broadcast Companies, Inc.*, 27 NY3d 46, 56 [2016]). However, "a cause of action for intentional infliction of emotional distress should not be entertained where the conduct complained of falls well within the ambit of other traditional tort liability" (*Di Orio v. Utica City School District Board of Education*, 305 AD2d 1114, 1115-16 [4th Dept 2003]). Here, plaintiff has asserted multiple causes of action against defendants for negligence. Therefore, causes of action pleading IIED and NIED "should not be entertained" (*id.*). Likewise, plaintiffs has not alleged any actions on the part of defendants directed at them that rise to the level of "extreme and outrageous conduct."

Plaintiff's eighth cause of action is premised on the notion that the Moving Defendants breached their statutory duty to report abuse under Social Services Law §§ 413 and 420. Pursuant to Social Services Law §413, school officials, which include but are not limited to school teachers, school guidance counselors, school psychologists, school social workers, school nurses, school administrators or other school personnel required to hold a teaching or administrative license or certificate, are required to report "when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Social Services Law §420(2) states that "Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." "The Legislature enacted Social Services Law §420 which expressly allows a private cause of action for money damages

upon the failure of any person, official or institution required by title 6 to report a case of suspected child abuse or maltreatment" (*Rivera v. County of Westchester*, 31 Misc 3d 985, 994 [Westchester Co Sup Ct 2006]). "An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse" (*Young v. Campbell*, 87 AD3d 692, 694 [2nd Dept 2011], lv denied 18 NY3d 801 [2011]). As Defendants are not mandated reporters under the statute at the time of the alleged abuse, they therefore cannot be held statutorily liable.

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers is deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the branches of Moving Defendant's motions seeking dismissal of the First, Second, Tenth and Eleventh Causes of action are DENIED; and it is further

ORDERED that Moving Defendants' application for dismissal of the Third, Fourth, and Fifth, Sixth, Seventh, Eighth, Ninth (as asserted against moving defendants) Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteen, Sixteenth, Seventeenth and Eighteenth (as asserted against moving defendant) causes of action of plaintiff's complaint are GRANTED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in accordance with this court's decision and order.

1/27/2023
DATE

LAURENCE L. LOVE, J.S.C.

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