

G.O. v City of New York

2023 NY Slip Op 30548(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 950326/2021

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART 63M

Justice

-----X

G. O.,

Plaintiff,

- v -

CITY OF NEW YORK, JEWISH CHILD CARE
ASSOCIATION, INC., DOES 1-10

Defendant.

-----X

INDEX NO. 950326/2021

MOTION DATE 01/30/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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

were read on this motion to/for DISMISS.

Upon the foregoing documents, the decision on defendants, Jewish Child Care Association's ("JCCA") motion pursuant to CPLR §§ 3013 and 3211(a)(7) seeking dismissal or, in the alternative, an Order pursuant to CPLR § 3024(b) striking all paragraphs of Plaintiff's Complaint that refer to the unknown Pleasantville Cottage School counselor as "Perpetrator" and striking the scandalous and prejudicial "background paragraphs of Plaintiff's Complaint is as follows:

Plaintiff commenced the instant action by filing a summons and complaint on June 13, 2021. Plaintiff alleges that from 1974-1975, when plaintiff was approximately 11-12 years old, an unknown counselor at Pleasantville Cottage School sexually abused him. Said complaint repeatedly refers to the unknown counselor as "Perpetrator" as if it were his name, rather than the succinct "Unknown Counselor" or "John Doe".

Defendant seeks dismissal of this action CPLR § 3211(a)(7) alleging that because plaintiff fails to identify his alleged abuser, his complaint fails as a matter of law.

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges. LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004], *Leon v. Martinez*, 84 N.Y.2d 83, 87-88[1994]). 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).

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). In support of its motion, defendant cites *Sheila C. v. Povich*, 11 A.D.3d at 130, as in this action the complaint is “is devoid of any allegations concerning this essential element, or the identity of the employees involved...” However, in that action, the Court found that plaintiff failed to establish that additional discovery was necessary.

At this point in time, the identity of the alleged abuser is unknown; however, plaintiff sufficiently pled that the abuse occurred by a counselor and as such, the identity of this counselor

may or may not be revealed through discovery. As expressly and unambiguously alleged in Plaintiff's Complaint: Defendant JCCA and Plaintiff were in a special relationship of foster child – foster care provider, in which the JCCA owed Plaintiff a duty of reasonable care to prevent foreseeable harm; Defendant JCCA and the offending counselor were in an special relationship of employer-employee, such that JCCA owed a duty to control the acts and conduct of the unidentified counselor to prevent foreseeable harm; Defendant JCCA had a duty to Plaintiff to use reasonable care to protect his safety, care, and well-being while under the custody of or in the presence of the JCCA and/or its agent and/or employees, including the allegedly offending counselor. At least a minimum of discovery will be necessary before the parties' significant disputes on the identity of the priest can be reconciled, specifically as to if there are any records of a counselor assigned to the JCCA and if defendant was aware of any other complaints about said counselor, assuming he can be identified.

In reviewing a motion pursuant to CPLR 3024(b), "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (see *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 [1st Dept. 2007]; see *Wegman v. Dairylea Coop.*, 50 A.D.2d 108, 111 [4th Dept. 1975]). Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to defendants should be stricken from the pleading or bill of particulars (see *Irving v. Four Seasons Nursing & Rehabilitation Ctr.*, 121 A.D.3d 1046, 1048 [2d Dept. 2014]).

As it relates to the use of "Perpetrator" in place of non-party counselor's name, "Here, it is axiomatic that plaintiff's unqualified repeated reference to defendant as an 'abuser' is highly prejudicial and does not advance any particular cause of action stated in plaintiff's complaint. The Child Victims Act ("CVA") (CPLR 214-g), the claim revival statute by which plaintiff asserts his allegations of sexual abuse, by its very nature presupposes that an alleged victim has suffered

physical abuse. As such, repeated reference to a defendant as an ‘abuser’ does nothing to advance the causes of action asserted under the statute and is superfluous” (see *Platt v. Roman Catholic Diocese of Brooklyn*, Index No. 518002/2021).

As it relates to the background paragraphs of plaintiff’s complaint, to be sure, the foster care’s history of chronic and systemic deficiencies is highly scandalous. However, same also clearly bears a rational relationship to plaintiff’s claims regarding the unknown counselor and Defendants’ liability for this alleged abuse *See, W.F. v. Roman Catholic Diocese of Paterson*, case no. 20-7020, 2021 U.S. Dist. LEXIS 111062 (D.N.J. June 7, 2021).


ORDERED that the branch of defendant’s motion seeking dismissal is DENIED for the reasons articulated.

ORDERED that the branch of defendant’s motion seeking to strike the term “Perpetrator” used in plaintiff’s complaint is GRANTED, and the scandalous and prejudicial term is stricken from plaintiff’s complaint; and it is further

ORDERED that plaintiff is directed to file and serve an amended complaint in compliance with this Order; and it is further

ORDERED that the branch of defendant’s motion seeking to strike background paragraphs of plaintiff’s complaint is DENIED.

This constitutes the decision and order of the court.

<p><u>2/21/2023</u> DATE</p>	 <hr/> LAURENCE L. LOVE, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE