SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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K.G.,

Plaintiff,

- v -

SPEONK CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; THE GOVERNING BODY OF JEHOVAH'S WITNESSES; and CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES,

Defendants.

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INDEX NO. 520284/2021

MOTION DATE 03/01/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for DISMISS .

Upon the foregoing documents, Defendants Watchtower Bible and Tract Society of New York, Inc., ("Watchtower") and Christian Congregation of Jehovah's Witnesses (CCJW) move for dismissal of this action pursuant to CPLR 3211 (Motion Seq. 002).

Plaintiff alleges that while a member of Speonk Congregation of Jehovah's Witnesses ("Speonk"), he was abused by Arthur Arch ("Arch"), an elder at Speonk and a distant relative of the Plaintiff. Plaintiff alleges that he was sexually abused by Arch on several occasions from 1969 to 1973 and that the abuse occurred in Arch's home or in the community. Plaintiff further alleges that Defendants were aware of the abuse or should have been aware of the abuse as the elders at Speonk were notified by Arch's two daughters that Arch sexually abused them prior to when Plaintiff was sexually abused by Arch.

Plaintiff's complaint asserts seven causes of action: (1) failing to protect Plaintiff from sexual assault and lewd and lascivious acts committed by their agent; (2) failing to establish policies and procedures that were adequate to protect the health, safety and welfare of children and protect them from sexual abuse; (3) failing to implement and enforce policies and procedures that were adequate to protect the health, safety, and welfare of students and protect them from sexual abuse; (4) appointing, promoting, retaining, and/or failing to supervise ARCH when they knew or should have known that he posed a substantial risk of harm to children; (5) failing to adequately monitor and supervise children within the congregation; (6) failing to train elders and other agents, administrators and employees in the prevention of child sexual abuse and the protection of Jehovah's Witnesses' children from foreseeable harm; and (7) failing to warn children and their parents of the danger of sexual abuse posed by ARCH.

Dismissal of Individual Causes of Action

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 [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). 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" (S*iegmund Strauss, Inc.*, 104 AD3d 401; *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 1996], *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; *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; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Salles*, 300 AD2d at 228).

The Court will address each of the grounds upon which Defendants seek dismissal in turn.

"Failing to protect Plaintiff from sexual assault and lewd and lascivious acts committed by their agent"

"[T]he elements of a cause of action based on the failure to protect plaintiff from sexual assaults are '(1) that defendant was provided with actual or constructive notice that such assaults might be made upon the infant plaintiff so as to give rise to a duty to protect him, (2) that defendant was negligent in failing to take reasonable protective measures, (3) that the infant plaintiff sustained actual injury, and (4) that defendant's negligence was a proximate cause of that injury'" (*Jamal P. v. City of N.Y.*, 24 AD3d 301, 303, 808 N.Y.S.2d 609 [1st Dept], citing *Mirand v City of New York*, 84 NY2d 44, 49-50, 637 N.E.2d 263, 614 N.Y.S.2d 372 [1994]). Here, Plaintiff pled the necessary elements to support a cause of action for negligence against Defendants. The complaint alleges that Defendants should have been aware that Arch had previously sexually abused a minor, that no action was taken even though congregants were encouraged to report the abuse to the Church, that Plaintiff was sexually abused, and that

Plaintiff continued to be around Arch because Plaintiff had no knowledge of the abuse. Defendants' motion to dismiss Plaintiff's cause of action for failure to protect is denied.

"Appointing, promoting, retaining, and/or failing to supervise ARCH when they knew or should have known that he posed a substantial risk of harm to children"

A claimant can maintain a cause of action for negligent retention by adequately alleging that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury" and nevertheless continued the employee's service (*Bumpus v. New York City Tr. Auth.*, 47 AD3d 653, 654 [2d Dept. 2008] [internal quotation marks and citation omitted]; *see also Jackson v. New York Univ. Downtown Hosp.*, 69 AD3d 801, 801–02 [2d Dept. 2010]; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept. 1997], *cert. denied* 522 U.S. 967 [1997], *lv. dismissed* 522 91 NY2d 848 [1997] [Appellate Division, Second Department modified Kings County Supreme Court's decision and granted motion to dismiss plaintiff's claim that the Roman Catholic Diocese of Brooklyn was negligent in hiring and failing to establish proper guidelines and procedures for screening and investigating priests since there is "no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee"] [*id.* at 163]).

However, "[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 AD2d 159 [2d Dept 1997]). Liability for negligent hiring is based not on the tortious conduct of the employee but on the negligence of the defendant-employer for failures involving the risk of harm by the employee to others (*see, e.g. Ford v Gildin*, 200 AD2d 224 [1st Dept 1994]).

Defendants contend that Arch is not an employee and that the alleged abuse did not occur on church premises. However, neither needs to be true in order to plead a negligent hiring/retention/supervision claim. "[U]nder a negligent hiring/retention theory, the issue is not whether the employee was acting within the scope of his employment, but whether the employer acted properly in hiring or retaining the employee. As a result, a failure to plead that the party was a church sponsored event does not mean causation could not be found by a trier of fact. In a negligent hiring/retention analysis, the focus is on Watchtower's actions in hiring/retaining [the elder and] the risk of molestation that Watchtower allegedly knowingly created" (*see J.W. v Watchtower Bible & Tract Socy. of NY, Inc.*, 29 Cal App 5th 1142, 1164-1165, Cal Rptr 3d 62, 79-80 [2018]). The facts in *J.W.* are very similar to the allegations by Plaintiff in that the alleged abuse occurred off the premises and an elder was considered an employee for the purposes of negligent hiring/retention cause of action.

To reiterate, Plaintiff's complaint alleges that Defendants were aware of prior sexual abuse by Arch and that he continued to be an elder after that and was an elder during the time period that Plaintiff was sexually abused. The abuse Plaintiff allegedly suffered was thus a wholly foreseeable consequence of the circumstances created by Defendants. While Defendants argue these allegations are without merit, Plaintiff is not required to provide proof at this juncture in the litigation, and Defendants have introduced no evidence conclusively establishing that the allegations are false. Plaintiff has thus sufficiently alleged, at this juncture, that Defendants may have had actual knowledge of Arch's propensity to sexually abuse minor students and did nothing to prevent Plaintiff's abuse from occurring.

Accordingly, the branch of the motion seeking dismissal of Plaintiff's negligent appointment, promotion, retainment and supervision claim is denied as premature at this juncture in the litigation.

"Failing to adequately monitor and supervise children within the congregation"

Plaintiff alleges a neglect cause of action for Defendants failure to monitor and supervise children in the congregation but provides no basis for an independent cause of action for failure to supervise children. Generally, this allegation would fall under breach of fiduciary duty or breach of duty in loco parentis.

A breach of duty in loco parentis generally does not apply to religious organizations but a breach of fiduciary duty may apply. Courts have articulated that a fiduciary duty exists when a plaintiff's relationship with an institution, oftentimes a church, extends beyond that of other similarly situated individuals (see *Doe v. Holy See [State of Vatican City]*, 17 AD3d 793, 795, 793 N.Y.S.2d 565 [3d Dept 2005]). In other words, a fiduciary relationship between a plaintiff and an institution may exist where the plaintiff comes forward with facts demonstrating that the relationship between the plaintiff and the institution is unique or distinct from the institution's relationship with others generally (*id*.). That said, a fiduciary relationship is not applicable to all individuals, and can be established upon a showing that an individual's relationship with the institution resulted in "de facto control and dominance" when the individual was "vulnerable and incapable of self-protection regarding the matter at issue" (*Marmelstein v. Kehillat New Hempstead*, 11 NY3d 15, 22, 892 N.E.2d 375, 862 N.Y.S.2d 311 [2008]).

Here, Plaintiff does not allege a "fiduciary relationship" existed, nor does Plaintiff cite any caselaw recognizing a duty for a church to supervise minor congregants. Additionally, Plaintiff's claim for failure to monitor and supervise children in the congregation as plead in the

complaint, is duplicative of Plaintiff's other negligence-based causes of action that the Court has determined will move forward.

Accordingly, the branches of the motions seeking to dismiss Plaintiff's claim for failure to adequately monitor and supervise children is dismissed.

"Failing to train elders and other agents, administrators and employees in the prevention of child sexual abuse and the protection of Jehovah's Witnesses' children from foreseeable harm," "Failing to establish policies and procedures that were adequate to protect the safety and welfare of children and protect them from sexual abuse," and "Failing to implement and enforce policies and procedures that were adequate to protect the health, safety, and welfare of students and protect them for sexual abuse"

Plaintiff's second, third, and sixth causes of action allege that Defendants failed to properly train and educate employees on how to detect sexual abuse, including establishing policies to address sexual abuse, and that Defendants failed to properly educate Plaintiff on sexual abuse by employees. Plaintiff, however, cites no caselaw recognizing an independent duty under New York law for religious institutions to provide training or implement policies regarding sexual abuse, and detection of abuse, or an independent cause of action for failure to train. "[A]bsent a statutory or regulatory requirement, employers are generally not expected to train their employees in areas outside the scope of their employment, or regarding rare or unforeseen events" (*Higgins v Zenker Corp.*, 2019 NY Slip Op 30802[U], 2019 WL 1504111, at *7 [Sup. Ct., Suffolk Cty. 2019]). Plaintiff also fails to cite caselaw recognizing an independent cause of action for a religious institution to create policies regarding sexual abuse.

Additionally, this claim is premised on the same theory of liability as Plaintiff's

negligent appointing, promoting, retaining, and supervision claims. As the Court has already held that Plaintiff may pursue relief for the alleged abuse and subsequent damages he suffered based on the Defendants' negligence under those claims, this cause of action is needlessly duplicative.

Accordingly, the branches of Defendants' motion seeking dismissal of Plaintiff's second, third, and sixth causes of action are granted.

"Failing to warn children and their parents of the danger of sexual abuse posed by ARCH," (Concealment)

Defendants seek dismissal of Plaintiff's fraudulent concealment claim as Defendants argue that there is no duty to the Plaintiff. A claimant can maintain a cause of action if the complaint alleges that: (i) "defendants 'covered up' and failed to disclose [a priest's] harmful sexual abuse acts to the public, to plaintiff and his parents . . . and/or to law enforcement or appropriate authorities"; (ii) "such failures to disclose were relied upon by the plaintiff as [he] was permitted to continue to see [the priest] and endure further harm/injury and prevented plaintiff from . . . commencing any legal action"; and (iii) "the omission of those material facts was within defendants' knowledge, which was superior to plaintiff's and renders the nondisclosure inherently unfair" (*see Alfredo Correa v. Roman Catholic Archdiocese of New York*, New York County, September 27, 2022, Tisch, J., index No. 950599/2020 (NYSCEF Doc No. 36). Further, "[e]ven in the absence of a fiduciary relationship, a duty to disclose may arise when one party's superior knowledge of essential facts renders nondisclosure inherently unfair" (*Barrett v Freifeld*, 64 AD3d 736, 738 [2d Dept 2009]). In this matter as in *Alfredo*, Plaintiff alleges that (i) Defendants did not disclose Arch's prior sexual abuse of minors, (ii) Plaintiff and his parents relied on this information in that he continued to be around Arch, and

(iii) the omission was within Defendants' knowledge as the allegations of prior sexual abuse were made to the elders of the congregation prior to the alleged sexual abuse of Plaintiff by Arch. Accordingly, Defendants are not entitled to dismissal of Plaintiff's fraudulent concealment claim at this juncture.

CCJW's motion for dismissal

Defendants argue that CCJW is an improper defendant because the organization was not formed until 2021, years after the allegations in the complaint. Plaintiff asserts that CCJW took over the service department, the part of the organization alleged to be neglectful, without consideration and without change and therefore CCJW is a properly named defendant. In essence, Plaintiff argues that there was a de facto merger when the service department moved from under Watchtower to CCJW.

"The de facto merger doctrine is based on the concept that a successor that effectively takes over a corporation in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased, which is consistent with the desire to ensure that a source remains to pay for the victim's injuries" (*Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038 [4th Dept 2022] [internal quotation marks and citations omitted]).

"Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation. (*see Sweatland v Park Corp.*, 181 AD2d 243, 245, 587 N.Y.S.2d 54

[4th Dept 1992]). However, "[not] all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a de facto merger" (*id*. at 246). '[W]hen evaluating the applicability of the de facto merger doctrine, the court should analyze each situation on a case-by-case basis" (*Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038, 1040 [4th Dept 2022]).

Defendants argue that CCJW is a separate entity. However, in a "de facto merger, unlike mere continuation, 'the dissolution criterion . . . may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell' (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 257, 789 NYS2d 484 [1st Dept 2005] [internal quotation marks omitted]). The court correctly found that issues of fact exist whether a de facto merger occurred here" (*Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 526 [1st Dept 2016]).

Both *Ring* and *Dutton* involve non-profit organizations as in the instant matter. In *Dutton* as here, there was no consideration paid for the assets, i.e. service department, yet the Dutton Court found that there were triable issues of fact as to whether or not there was a de facto merger and denied the prima facia motion. In *Dutton*, as in the instant matter, Plaintiff also alleges that the Service Department's location, staffing and operation did not change. It is unclear what is left of Watchtower after the service department was annexed or why CCJW was formed. Although Defendants submitted an affidavit that CCJW did not acquire any assets or revenues the affidavit is non-responsive to Plaintiff's main allegation that CCJW took over control of the service department. Accordingly, at this juncture, where this Court must view the evidence in the light most favorable to the Plaintiff, and where the court has flexibility in determining if a de

facto merger occurred, the branch of the Defendants' motion seeking dismissal of Plaintiff's neglect cause of action against CCJW is denied.

Punitive Damages

The final branch of the Defendants' motion seeks dismissal of Plaintiff's claim for the relief of punitive damages. The remedy of punitive damages is only awarded in exceptional cases. "To recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives" (*Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted]). "Even where there is gross negligence, punitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public" (*Karen S. "Anonymous" v Streitferdt*, 172 AD2d 440, 441 [1st Dept 1991] [internal quotation marks and citation omitted]).

Punitive damages may be assessed against an employer for an employee's conduct

> "'only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant,' such that it is complicit in that conduct. Complicity is evident when 'a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct'"

(*Borst v Lower Manhattan Dev. Corp.*, 162 AD3d 581, 582 [1st Dept 2018], quoting *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 378 [1986]).

Here, the merits of Plaintiff's allegations that Defendants improperly "retained" ARCH even with knowledge of his propensity for abuse and dismissed the allegations of prior abuse by other parishioners have not yet been adjudicated. Thus, it is unclear at this juncture whether Defendant's conduct amounts to egregious and willful misdoing sufficient to justify an award of punitive damages, As such, it is better left for the trier of fact to determine whether an award of

punitive damages is warranted (*see e.g. Laurie Marie M. v Jeffrey T.M.*, 159 AD2d 52, 59-60 [2d Dept 1990], *affd* 77 NY2d 981, 982 [1991] ["the issue of punitive damages was properly submitted to the jury"]).

Therefore, the final branch of the motion is denied, and Plaintiff may pursue the relief of punitive damages along with compensatory damages in conjunction with his surviving claims.

CONCLUSION

Accordingly, it is

ORDERED that the motion of Defendants Watchtower and CCJW for dismissal of this action pursuant to CPLR 3211 (Motion Seq. 002) is partially granted to the extent that:

(i) the second cause of action for negligent failure to establish policies and procedures that were adequate to protect the health, safety and welfare of children is dismissed;

(ii) the third cause of action for negligent failure to implement and enforce policies and procedures that were adequate to protect the health, safety, and welfare of students and protect them from sexual abuse is dismissed;

(iii) the fifth cause of action for failure to monitor and supervise children within the congregation is dismissed;

(iv) the sixth cause of action for failure to train elders and other agents, administrators and employees in the prevention of child sexual abuse and the protection of Jehovah's Witnesses' children from foreseeable harm is dismissed;

and Defendants' motion is otherwise denied; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry within 14 days of the date this order; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint or otherwise respond thereto within 30 days from date of said service; 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.

This constitutes the decision and order of the Court.

3/15/23

DATE

LAURENCE L. LOVE, J.S.C.

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

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