

**T.B. v Big Bros. Big Sisters of N.Y. City**

2023 NY Slip Op 31295(U)

April 17, 2023

Supreme Court, New York County

Docket Number: Index No. 452864/2021

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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T.B.,

Plaintiff,

- v -

BIG BROTHERS BIG SISTERS OF NEW YORK CITY and  
DOES 1-10,

Defendants.

-----X

**INDEX NO.** 452864/2021

**MOTION DATE** 3/23/2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS

Upon the foregoing documents, Big Brothers Big Sisters of New York City (BBBSNYC or defendant) moves for dismissal of this action pursuant to CPLR 3211 (a) (7) (Motion Seq. 001).

Plaintiff alleges that when he was approximately 9 or 10 years old, he was sexually abused by Earl Eaton (Eaton), who was a volunteer with BBSNYC. The complaint asserts one count of negligence against BBBSNYC. Defendant’s motion in opposition seeks to have the complaint as it pertains to BBBSNYC dismissed for failure to state a cause of action as to foreseeability.

**DISCUSSION**

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” (*Siegmund Strauss, Inc.*, 104 AD3d 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “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]).

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).

Defendant contends that the entire complaint against BBBSNYC should be dismissed because foreseeability was not pleaded with specificity. Here, Defendant argues,

“Plaintiff does not claim that this abuse ever occurred on BBBSNYC property or under BBBSNYC’s supervision, that he (or anyone else) told BBBSNYC about this purported abuse, that anyone ever informed BBBSNYC of any other instances of abuse by Eaton, or that BBBSNYC was aware of even one incident

or fact that would suggest to a reasonable person that Eaton posed any risk to children, let alone a risk of sexual abuse”

(NYSCEF doc no 48, defendant mem of law at 12).

The facts in this matter are nearly identical to the facts in *Herrmann v Big* (2022 N.Y. Misc. LEXIS 3119 [Sup Ct, NY County June 15, 2022, No. 950396/2020]) where that Court held that Plaintiff had sufficiently pleaded a cause of action against BBBSNYC where the complaint did not allege that Plaintiff told BBBSNYC of the abuse, the allegations occurred offsite and did not specify how BBBSNYC knew of the allegations.

Defendant also cites several New York cases to support their argument that Plaintiff must plead specific propensity, the most recent of which is *Waterbury v New York City Ballet, Inc.* (2020 NY Slip Op 33132[U], 2020 NYLJ LEXIS 1624 [Sup Ct, NY County 2020]). However, that case was overturned as to many of the claims including negligent hiring and retention holding that “[t]he cause of action does not need to be pleaded with specificity” (*Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 160 [1st Dept 2022]).

Additionally, the Second Department recently overturned another dismissal on a motion to dismiss regarding a Child Victim Act case, holding that the pleadings were sufficient. In the underlying case, the complaint was dismissed because, amongst other things, plaintiff fails to allege notice, the alleged abuser was not an employee of defendant and the abuse happened off the premises (*see Sullivan v St. Ephrem Roman Catholic Parish Church et al.*, Sup Ct, Kings County, index No. 505326/2021, Kaplan, J., December 14, 2021, NYSCEF doc no 34).

The Second Department held that the pleadings were sufficient in part because “[t]he complaint alleges, among other things, that the defendant knew or should have known of the priest's propensity to molest children” (*see Sullivan v St. Ephrem R.C. Parish Church*, \_\_\_AD3d\_\_\_, 2023 NY Slip Op 01207 [2d Dept Mar. 8, 2023]).

This Court finds that the propensity element was sufficiently pled, as “[t]here is no statutory requirement” that such cause of action “be pleaded with specificity” (*Kenneth R.*, 229 AD2d at 161-162). The allegations in the complaint, which are to be taken as true, adequately state this element. Discovery from the Defendant is likely to shed light on this issue and others (*see generally Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410, 411 [1st Dept 2021]). Plaintiff is not required to provide proof at this juncture in the litigation, and BBBSNYC has introduced no evidence conclusively establishing that the allegations are false. Plaintiff has thus sufficiently alleged, at this juncture, that BBBSNYC may have had actual knowledge of Eaton’s propensity to sexually abuse minors and did nothing to prevent Plaintiff’s abuse from occurring.

Defendant’s arguments regarding duty rely on the issue of foreseeability which has already been addressed.


**CONCLUSION**

Accordingly, it is ORDERED that the motion of Defendant to dismiss the action insofar as asserted against it is denied; and it is further

ORDERED that Defendant shall serve an answer to the complaint within 30 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).

This constitutes the decision and order of the Court.

<u>4/17/2023</u> DATE					 ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE