TCVANYCD-DOE v Madison Sq. Boys & Girls Club, Inc.
2023 NY Slip Op 31336(U)
April 19, 2023
Supreme Court, New York County
Docket Number: Index No. 950623/2020
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 CVA**

Justice

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TCVANYCD-DOE,

Plaintiff,

- v -

MADISON SQUARE BOYS & GIRLS CLUB, INC. F/K/A MADISON SQUARE BOYS CLUB, ROCKEFELLER UNIVERSITY A/K/A ROCKEFELLER UNIVERSITY HOSPITAL F/K/A ROCKEFELLER INSTITUTE HOSPITAL,

Defendants.

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INDEX NO. 950623/2020

MOTION DATE 03/22/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 37, 39, 41, 46, 48, 50, 52

were read on this motion to/for DISMISS.

Upon the foregoing documents, Defendant Rockefeller University a/k/a/ Rockefeller University Hospital f/k/a Rockefeller Institute Hospital (hereinafter, "Rockefeller") moves for dismissal of the instant Child Victims Act ("CVA") action as against it pursuant to CPLR 3211(a)(7) (Motion Seq. 003).

Plaintiff alleges that beginning in 1967 when he was approximately eight years old through 1973, he attended activities at a youth center operated by Defendant Madison Square Boys & Girls Club Inc. f/k/a Madison Square Boys Club ("MSBC"). Plaintiff alleges that MSBC required him to attend medical examinations with Dr. Reginald Archibald, a "pool and/or staff doctor at MSBC" who was also "acting in his capacity as a researcher and senior physician" at Rockefeller. Plaintiff alleges that during the medical examinations, he was repeatedly sexually assaulted by Dr. Archibald, and that Dr. Archibald committed the sexual offenses under the guise of his "growth studies" for Rockefeller. Plaintiff alleges that Rockefeller knew or should have

known that Dr. Archibald was using his position with the hospital to abuse minors and yet took no action and continued to arrange his access to children at MSBC.

Rockefeller now moves for dismissal of the complaint, arguing, *inter alia,* that it owed no cognizable duty to Plaintiff, that it cannot be vicariously liable for Dr. Archibald's intentional acts of abuse, and that numerous causes of action are duplicative as asserted.

Rockefeller has filed identical motions for dismissal under two related actions, *SCVANYCP-DOE v Madison Square Boys & Girls Club, Inc. et al.* (Index No. 950249/2020), and *TCVANYCR-DOE v Madison Square Boys & Girls Club, Inc. et al.* (Index No. 950248/2020). Plaintiffs have filed coordinated opposition. As such, the Court will render a substantively identical decision on each motion.

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]). 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," 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" (*P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375-376 [1st Dept 2003]; *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*, 43 NY2d at 275; *Salles*, 300 AD2d at 228).

The Court will address each of the grounds upon which Rockefeller seeks dismissal in turn.

Negligence, Negligent Training and Supervision of Employees, and Negligent Retention of Employees

Rockefeller argues that Plaintiff's negligence-based claims should be dismissed because Plaintiff fails to identify a cognizable duty between it and Plaintiff, given that Plaintiff alleges he encountered Dr. Archibald only at MSBC and not Rockefeller. Rockefeller also argues the claims should be dismissed as Dr. Archibald was not working on the university's premises or using its chattels during the abuse, and that the complaint does not assert a sufficient nexus between Rockefeller's employment of Dr. Archibald and his abuse of Plaintiff. In opposition, Plaintiff argues his negligence claims are sufficiently pled, and that discovery is warranted to ascertain the extent of Rockefeller's arrangement with MSBC and Rockefeller's ability to prevent the abuse.

"To sustain a cause of action alleging negligence, 'a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries" (*Schindler v Ahearn*, 69 AD3d 837, 838 [2d Dept 2010], quoting *Engelhart v County of Orange,* 16 AD3d 369, 371 [2d Dept 2005]). If there is no duty of care owed by the

defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant (*see Pulka v Edelman*, 40 NY2d 781 [1976], *Engelhart*, 16 AD3d at 371).

Whether a duty of care is owed by one person to another is a question of law (*see Purdy v Public Adm'r of County of Westchester,* 72 NY2d 1 [1988]; *Engelhart,* 16 AD3d at 371). In general, an entity has no duty to control a third party's conduct so as to prevent injury to another unless special circumstances exist in which the entity has sufficient authority and control over the conduct of that third party (*see id.*).

In the context of special circumstances between an employer and its employee, the focus is not on the potential plaintiff, but rather the employer and its relationship with the employee/tortfeasor (*see Waterbury v New York City Ballet, Inc.,* 205 AD3d 154, 161 [1st Dept 2022]). This is because "[t]he negligence of the employer . . . arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (*Shelia C v Povich,* 11 AD3d 120, 129 [1st Dept 2004]; *see Roe v Domestic & Foreign Missionary Socy. Of the Prot. Episcopal Church,* 198 AD3d 698, 699-702 [2nd Dept 2021], quoting *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 634-37 [2nd Dept 2018]; see also *Doe v Congregation of the Mission of St. Vincent De Paul in Germantown,* 2016 NY Slip Op 32061[U] [Sup Ct., Qns. Cty., Sept. 13, 2016] [hereinafter *Doe v Congregation*]). Thus, "the duty of care in supervising an employee extends to any person injured by the employee's misconduct" (*Waterbury,* 205 AD3d at 162).

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]).

While a plaintiff must allege that the employer was on actual or constructive notice, "there 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]).

Contrary to Rockefeller's argument that it can have no liability as the abuse is alleged to have occurred at MSBC's facility, the use of an employer's premises or chattels is not required for a negligent hiring claim. Rockefeller repeatedly cites to a Court of Appeals decision, *D'Amico v Christie,* 71 NY2d 76 (1987), for the proposition that an employer's liability in negligence for an employee's acts outside the scope of employment is "limited to torts committed . . . on the employer's premises or with the employer's chattels" (*id.* at 88). Rockefeller argues that *D'Amico* and its progeny, including the Second Circuit's decision on a

negligent hiring claim, *Ehrens v Lutheran Church,* 385 F.3d 232, 236 [2d Cir. 2004]), demonstrate that New York has adapted Section 317 of the Restatement (Second) of Torts, which requires a plaintiff to plead that the tort occurred on the employer's premises or with the employer's chattels. However, the *D'Amico* decision did not formally adapt the Restatement (Second) of Torts § 317, but rather discussed § 317 in the context of a companion appeal case, *Henry v Vann*, which did not involve a negligent hiring, retention, or supervision claim but rather the broader matter of a defendant's duty to control a tortfeasor. Therefore, in relying on *D'Amico,* the *Ehrens* court incorrectly inserted an element into a negligent hiring claim that is not formally recognized under New York law. As recently as 2009, the Appellate Division, Second Department acknowledged that § 317 has not been adopted by the courts of this State (*Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 897 [2d Dept 2009]).[1]

Rather, under New York law, a "nexus" is required between the tort and the employment relationship. However, this nexus is not limited to an employer's premises (i.e., the location of the tort) (*e.g., Johansmeyer,* 165 AD3d at 634-37; *Doe v Congregation,* 2016 NY Slip Op 32061[U], at *4-8), or chattels (*see, e.g., Waterbury,* 205 AD3d 154) but is instead a fact-intensive analysis as to how the employer or the employment relationship is involved or connected with the tort; including the ability of the employer to control the employee and its knowledge of the need to exercise such control (*see, e.g., Waterbury*, 205 AD3d at 161-62; *Johansmeyer,* 165 AD3d at 634-37; *Doe v Congregation,* 2016 NY Slip Op 32061[U], *4-8; *cf. K.I.,* 256 AD2d at 189-192).

[1] For a thorough discussion and analysis of the *D'Amico* and *Ehrens* decisions and the matter of whether the Restatement (Second) of Torts § 317 was ever formally adopted in New York, see this Court's prior decision *Sokola v Weinstein,* --- NYS3d ----, 2023 NY Slip Op. 23047.

"The 'nexus' requirement does not mean that the harm suffered must relate to the employer's business activities" (*Waterbury*, 205 AD3d at 162). Indeed, as the First Department, Appellate Division reasoned, imposing such a requirement may blur the line on what is outside the scope of employment versus what is within the scope of employment and in furtherance of the employer's business (*see id.*). "Rather, [nexus] means that the employer's negligence must be a proximate cause of the plaintiff's injury" (*id.* at 162). The location of the assault is not dispositive (*see, e.g., Roe v Domestic & Foreign Missionary Socy. Of the Prot. Episcopal Church,* 198 AD3d 698 [2nd Dept 2021] at 699-702; *Johansmeyer*, 165 AD3d at 634-37 ["although the sexual abuse ultimately occurred in the infant plaintiff's home, it was preceded by time periods when the infant plaintiff was alone with [the school employee] during school hours on a regular basis. During these times, [the employee] engaged in inappropriate behavior, including physical touching. Thus, triable issues of fact exist regarding, inter alia, whether the [employer] knew or should have known of such behavior and [the employee's] propensity for sexual abuse"]; *Doe v Congregation* at *4-5 [finding negligent hiring and retention adequately plead even though the alleged sexual assaults of the infant-plaintiff did not occur on the employer's premises]).

Rockefeller further argues that even assuming Plaintiff is not required to allege a duty consistent with *D'Amico* (as this Court has now held), Plaintiff's negligence claims should still be dismissed as Rockefeller's conduct was not the proximate cause of Dr. Archibald's abuse, and there is no nexus between Dr. Archibald's employment and the abuse. Rockefeller argues that the abuse is separated from Dr. Archibald's employment not just by its location, but also by multiple intervening acts of Dr. Archibald and MSBC (i.e., MSBS's requirement that members be examined by Dr. Archibald and Dr. Archibald's independent acts of abuse). *See, e.g., John*

Doe I v Board of Educ. of Greenport Union Free Sch. Dist., 100 AD3d 703, 706 (2d Dept 2012) [finding that the infant plaintiff's relationship with the tortfeasor employee developed independently of the tortfeasor's employment with the school, outside of school hours and school grounds].

However, Plaintiff has alleged that the abusive acts Dr. Archibald performed at MSBC are also attributable to Rockefeller "because Dr. Archibald informed his victims and their families that his conduct at MSBC was in furtherance of his growth studies at Rockefeller University . . . During each of these examinations of Plaintiff, Dr. Archibald was also acting on behalf of Rockefeller University and in furtherance of his growth studies with Rockefeller University." Plaintiff has also alleged that Rockefeller should have known of the abuse, and in fact, Rockefeller's leadership was explicitly made aware of Dr. Archibald's abuse following a 1961 investigation conducted by the New York City District Attorney's Office. Plaintiff further alleges that Rockefeller's physician-in-chief received multiple complaints from parents and family members of MSBC members between 1960 and 1974.

Deeming the above allegations true for the purposes of this motion, it cannot be said that the intervening acts of Dr. Archibald or MSBC render them solely liable as the proximate cause of Plaintiff's injury. As the First Department, Appellate Division held in *Gonzalez v City of New York*: "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent' and the occurrence of that act did not approach that degree of attenuation condemned in *Palsgraf*" (133 AD3d 65, 70-71 [1st Dept 2015], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980] and citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342-344 [1928], see also *Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 161-62 [1st

Dept 2022] ["The possibility that harm might have occurred if a defendant had not breached its duty does not negate liability for the harm that occurred because the defendant did breach its duty"]). As Plaintiff has alleged Dr. Archibald's abuse was a foreseeable consequence of the circumstances of Rockefeller's negligent employment and supervision, Dr. Archibald and MSBC's actions are not intervening acts that completely sever proximate cause.

Accordingly, the branches of Rockefeller's motion seeking dismissal of Plaintiff's first three negligence-based causes of action are denied.

Vicarious Liability- Respondeat Superior

Under his fourth cause of action, Plaintiff alleges that Rockefeller is vicariously liable for Dr. Archibald's abuse under a theory of *respondeat superior* because Dr. Archibald was acting within the scope of his employment at the time of the abuse, and the abusive acts were committed while engaged in Rockefeller's business and in furtherance of Rockefeller's business interests.

It is well established under New York law that acts of sexual abuse are generally considered to be "not within the scope or furtherance of the employment" (*Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012] at 1385 [sexual abuse by clergy]; *see also Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005] ["[s]ince the bus driver's acts of sexual abuse and molestation were a clear departure from the scope of his employment, committed solely for personal reasons, and unrelated to the furtherance of his employer's business, neither the bus company nor the School District can be held vicariously liable for his acts"]; *Nevaeh T. v City of New York*, 132 AD3d 840, 843 [2d Dept 2015] [alleged sexual misconduct by a teacher was not committed in furtherance of the DOE's business and not within the scope of employment].

In *N.X. v Cabrini Medical Center,* 97 NY2d 247 (2002), the Court of Appeals considered a case that presented somewhat similar circumstances to those here, to wit: "an egregious abuse of the physician-patient relationship- the conscious use of a doctor's professional position to exploit a patient's vulnerabilities for self-gratification through sexual contact" *(id.* at 249). While recovering from surgery at Cabrini Medical Center, a patient was sexually assaulted by Dr. Andrew Favara, a doctor employed by Cabrini. The plaintiff alleged multiple claims against Cabrini, including vicarious liability on the grounds that Dr. Favara was acting under the scope of his employment. The Appellate Division, First Department granted dismissal of the vicarious liability claim, finding that the doctor was acting outside the scope of his authority (280 AD2d 34 [2001]). The Court of Appeals affirmed:

> "We reject plaintiff's assertion that Cabrini is vicariously liable for Favara's misconduct. Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment. A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives (*see, Judith M. v. Sisters of Charity Hosp.,* 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67, 715 N.E.2d 95). In *Judith M.,* this Court rejected a claim of vicarious liability on similar facts. There, an orderly assigned to bathe a patient sexually abused her while doing so. We held that the employee 'departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business' (*id.* at 933)."
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> (97 NY2d at 251–52 [additional citations omitted]).

Plaintiff argues that *Cabrini* and *Judith M* are inapplicable because *Cabrini* involved a doctor that was not even the patient's physician assaulting her while under anesthesia, and *Judith M* involved a "low level orderly" without high responsibility. In contrast, Dr. Archibald was Plaintiff's assigned medical examiner, and was a high level employee with a "significant degree of responsibility" at Rockefeller. It is true that the Court of Appeals noted *Cabrini* presented a "more compelling basis" for dismissal than *Judith M* because "unlike the employee in *Judith M.*,

who committed a sexual assault while engaged in his assigned duties, Favara was not charged with plaintiff's care." (*id.* at 252). However, as quoted *supra*, the Court of Appeals still held that the employee in *Judith M* deviated from his duties when he committed the sexual assault. While Rockefeller's case for dismissal here may be less compelling than if a Rockefeller employee other than Dr. Archibald committed the abuse, it does not mean this Court should accept Plaintiff's vicarious liability claim in contravention of precedent.

Regarding Plaintiff's argument about the nurse in *Judith M* being a low level employee, a reading of *Judith M* does not indicate that the employee's ranking status played any role in the Court of Appeals' determination that the employer could not be vicariously liable for the sexual assault. Plaintiff relies on *Becker v City of New York,* 2 NY2d 226, 231 (1957) for the proposition that the "degree of responsibility conferred upon the employee is an important consideration in determining scope of employment." However, *Becker* did not involve sexual assault but rather an alleged botched intravenous injection. The Court of Appeals found that Plaintiff sufficiently alleged the hospital conferred responsibility to the nurse, and thus the vicarious liability claim against the hospital was not subject to dismissal. In contrast, it cannot be argued that a hospital conferred responsibility for sexual assault.

Plaintiff also argues that Dr. Archibald's abuse fell under his scope of employment because it was "foreseeable" that Dr. Archibald would exploit his exams of children to commit sexual abuse. However, in support Plaintiff similarly relies on cases that did not involve sexual assault. Plaintiff cites to *Galasso, Langione, & Botter LLP v Galasso,* 176 AD3d 1176 [2nd Dept 2019], a case in which a law firm was alleged to be vicariously liable for a firm employee's theft of client funds. The Second Department affirmed summary judgment on vicarious liability against the law firm, holding that "[w]hile such vicarious liability does not arise from acts that

are committed for the employee's personal motives unrelated to the furtherance of the employer's business, those acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to liability under the doctrine of respondeat superior, even where those acts constitute an intentional tort or a crime" (*id.* at 1182-83, quoting *Holmes v Gary Goldberg & Co., Inc.*, 40AD3d 1033, 1934 [2nd Dept 2007] [a case involving a financial advisor's alleged embezzlement of client funds]).

However, as the *Galasso* court also noted, embezzlement of client funds by an employee entrusted with the money is a "general type of conduct that may have been reasonably expected" by an employer (176 AD3d 1176 at 1183). In contrast to embezzlement, which is foreseeable within the scope of employment, sexual assault, as discussed *supra,* has been repeatedly held to be outside the scope of employment as a matter of law (*see Noonan v City of New York*, 2015 WL 3948836, at *7 [SDNY June 26, 2015) ["New York courts consistently have held that sexual misconduct and related tortious behavior arise from personal motives and do not further an employer's business, even when committed within the employment context."]. In *Cabrini,* the Court of Appeals discussed foreseeability, but only in the context of the plaintiff's direct negligence claim against the hospital (92 NY2d at 253). Similarly, here this Court discussed, *supra*, Rockefeller's alleged notice of Dr. Archibald's abuse in the context of Plaintiff's negligence-based claims. However, as sexual assault has repeatedly been held outside the scope of employment as a matter of law, Plaintiff's foreseeability argument is misplaced under his vicarious liability cause of action.

Plaintiff also cites to a case from Virginia, *Our Lady of Peace, Inc. v Morgan*, 297 Va. 832 (2019), wherein the Supreme Court of Virginia held that a nursing home could potentially be held vicariously liable for the rape of one of its residents by a nursing home assistant. As

Rockefeller notes in opposition, this case has no bearing on New York jurisprudence. A reading of *Our Lady of Peace* also reflects that Virginia employs a different test for respondeat superior liability than New York. Citing an earlier case, *Parker v Carilion Clinic,* 296 Va. 319, 335 (2018), the Court explained that

> "In Virginia . . . the first principle of respondeat superior is that vicarious liability may be imposed on an employer when '*the service itself*, in which the tortious act was done, was within the ordinary course of the employer's business,' meaning 'when the employee committed the tort while 'performing a normal function' of his assigned job.' We have consistently applied this test in our jurisprudence."
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> (297 Va. At 844 [emphasis original] [citations omitted]).

The Court underscored that given this "job-related-service principle," vicarious liability in Virginia "is not limited to those acts of the servant which promote the object of the employment" (*id.,* quoting *Parker,* 296 Va. At 336-37). Therefore, since the employee committed the rape while performing his assigned duties, the matter of the nursing home's vicarious liability was a proper question for a jury. However, as discussed, New York requires both that the act be committed in the context of employment and in furtherance of the employer's business.

Plaintiff maintains throughout his papers that Dr. Archibald's abuse satisfies both of New York's vicarious liability requirements because the abuse "was sufficiently associated with the medical examinations and recruiting work Rockefeller authorized him to do at MSBC" and it was "foreseeable that Dr. Archibald would misappropriate and abuse" the minors while examining them. Plaintiff appears to infer that because Dr. Archibald examined the minors' genitals for his growth studies, the sexual abuse during the examinations can be deemed to have been committed under the scope of his research work for Rockefeller. However, this type of

argument was raised on dissent in the First Department's *Cabrini* opinion and was soundly rejected by the majority:

> ". . . .[T]the dissent asserts that because doctors, by virtue of their profession, are sometimes authorized to examine the most intimate portions of the human body, a sexual assault committed by a doctor may be within the scope of his employment. The dissent then reaches the conclusion that the sexual assault in this case was the equivalent of a medical procedure, namely, a pelvic examination--even though it is uncontroverted that Dr. Favara was sexually assaulting plaintiff, and not conducting a pelvic examination. According to the dissent, this conclusion is warranted because the doctor's violation of plaintiff's most private parts 'would be, under other circumstances, a medical procedure.' This analysis does not bear scrutiny.
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> Once it is determined that Dr. Favara. . . committed a sexual assault, his acts were, as a matter of law, 'wholly personal in nature, outside the scope of his employment, and not in furtherance of defendant hospital's business,' which, of course, is to provide medical treatment. *A sexual assault committed by a physician can never be considered a mere deviation from the physician's role as a provider of medical care*."
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> (280 AD2d at 38 [emphasis added] [citations omitted]).

This Court also notes that at the federal level, vicarious liability claims against Dr. Archibald's employers have already been rejected. In *Poppel v Estate of Archibald*, No. 1:19-CV-01403 (ALC), 2020 WL 2749719 (S.D.N.Y. May 27, 2020), two patients brought an action against Dr. Archibald's estate and asserted vicarious liability against Rockefeller. The *Poppel* plaintiffs similarly argued that Dr. Archibald's abuse was "inextricability intertwined and inseparable from" his medical treatment such that their case should be deemed an 'exception" to the standard scope of employment requirement (*id.* at *5). This argument was rejected, with the Court concluding that Dr. Archibald "was acting in a personal, not a professional, capacity during the alleged misconduct." (*id.*). More recently, the Southern District, citing *Poppel,* dismissed a vicarious liability claim against MSBC, finding that plaintiff's claim could not survive the fact that Dr. Archibald's abuse was committed outside the scope of employment (*See*

C.M. v. Est. of Archibald, No. 20-CV-751 [VSB], 2022 WL 1030123, at *4 [S.D.N.Y. Apr. 6, 2022]).

It is therefore abundantly clear that under New York law, Dr. Archibald's acts constituted "an egregious abuse of the physician-patient relationship" (97 NY2d at 249) but cannot form the basis of a proper vicarious liability claim against Dr. Archibald's employer. Accordingly, the branch of Rockefeller's motion seeking dismissal of Plaintiff's fourth cause of action for vicarious liability predicated on a theory of respondeat superior is granted.

Vicarious Liability- Apparent Authority

Under his fifth cause of action, Plaintiff argues that Rockefeller is also liable under a theory of apparent authority because its actions created the appearance that Dr. Archibald had authority to perform his examinations and commit the abuse under the guise of his medical research for Rockefeller.

In *Hallock v State of New York,* 64NY2d 224, the Court of Appeals held:

> "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. 'Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent.' (Ford v Unity Hosp., 32 NY2d 464, 473; see, also, Restatement, Agency 2d, § 27.)"
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> (*id.* at 231).

Plaintiff's complaint alleges under this claim that Rockefeller "through words and conduct, communicated to Plaintiff that Dr. Archibald was an employee or agent of Rockefeller University authorized to conduct each examination of Plaintiff" at MSBC. Plaintiff describes these "communications" as "forms and other indica that Dr. Archibald presented to Plaintiff during these examinations and that indicated Dr. Archibald was performing these examinations

on behalf of" Rockefeller. Plaintiff also describes a "referral system" that Rockefeller created wherein MSBC recruited minors, such as children, for his studies, which Plaintiff charges is conduct attributable to Rockefeller. However, Plaintiff does not allege that he ever was in communication with Rockefeller or had any sort of contact with Rockefeller about Dr. Archibald. Plaintiff also does not dispute that he underwent Dr. Archibald's examinations in connection with MSBC's requirements for its members, which indicates that he agreed to the examinations independently of any representations made by Rockefeller. "The apparent authority for which the principal may be held liable must be traceable to him; it cannot be established by the unauthorized acts, representations or conduct of the agent" (2 NY Jur., Agency, § 89, p. 253).

More critically, given that, as discussed extensively, sexual assault is outside the scope of employment and not committed in furtherance of an employer's business, the doctrine of apparent authority appears misplaced here. This Court is unaware of any case where a New York court held that a principal could have cloaked an agent with authority to commit sexual assault. Plaintiff cites to the case of *Baldassarre v Morwil* (203 AD2d 221 [2nd Dept 1994]), wherein the plaintiff sued a supermarket chain after she was sexually assaulted by a store delivery man, and the Second Department reversed summary judgment for the supermarket chain on grounds of apparent authority. However, the issue before the Court in *Baldassare* was whether the defendant supermarket chain clothed the individual supermarket as its subsidiary with apparent authority (i.e., holding out to the public that the store belonged to its chain), not whether the employer was liable for the sexual assault under apparent authority (*id.* at 221-22).

In *Cabrini,* the plaintiff also asserted a claim against the hospital based on apparent authority. The Court of Appeals held the plaintiff's reliance on said doctrine was "unavailing" given that the doctrine is "usually raised in a business or contractual dispute context" (97 NY2d

at 252). Similarly, in *Bowman v State,* 10 AD3d 315 (1st Dept 2004), the First Department held that an employer could not be held liable for the rape of an employee at its office under apparent authority. The First Department noted that under *Hallock*, a person "may rely on an appearance of authority only to the extent that such reliance is reasonable" (64 NY2d at 231) and nothing under the instant circumstances "warranted any reasonable conclusion that" the employee was acting in "a representative, as opposed to purely personal, capacity" (10 AD3d at 317).

Here, while it can be argued Rockefeller authorized Dr. Archibald to perform medical examinations, it does not follow that Rockefeller authorized Dr. Archibald to commit sexual assault that was for his own personal interests and not under the scope of his employment as a matter of law. Sexual assault is in no way analogous to a "transaction" that a third party may believe an agent has authority to enter under principal-agent law. Plaintiff argues that "public policy" considerations warrant liability because as a principal, Rockefeller ". . .by virtue of its ability to select its agents and exercise control over them. . .[was] in a better position than third parties to prevent the perpetration of fraud by such agents through the misuse of their positions" (*Parlato v. Equitable Life Assur. Soc. of US.,* 299 AD2d 108, 113 [1st Dept 2002]). However, this Court has now held that as Dr. Archibald's employer, Rockefeller can be held liable under Plaintiff's negligence claims notwithstanding the intervening acts of third parties. Public policy would not be served by allowing Plaintiff to shoehorn a corporate law doctrine as a superfluous theory of liability.

Accordingly, the branch of Rockefeller's motion seeking dismissal of Plaintiff's fifth cause of action for vicarious liability predicated on a theory of apparent authority is granted.

Vicarious Liability- Aided-in-Agency

Plaintiff alternatively argues that even if Rockefeller is not liable under respondeat superior or apparent authority, it is still vicariously liable under the theory of aided-in agency liability. As set forth in the Restatement (Second) of Agency § 219(2)(d), a master is not liable for the torts of his servants outside the scope of his employment unless ". . .he was aided in accomplishing the tort by the existence of the agency relation."

Plaintiff argues that Dr. Archibald's abuse of children at MSBC was aided by his powerful position as a medical doctor with Rockefeller. However, Plaintiff cites to no New York caselaw recognizing this section of the Restatement as a theory of vicarious liability for employers. Rather, Plaintiff cities to out-of-state cases that have no bearing on this Court. When the First Department dismissed plaintiff's apparent authority claim in *Bowman*, *supra*, it cited the Restatement (Second) of Agency § 219(2)(d) and specifically held that "[r]esearch has disclosed no cases of this State's courts applying this provision" (10 AD3d at 317). As with Plaintiff's other vicarious liability claims, the Court finds this claim is misplaced here, and sees no reason to adopt a completely novel theory of liability under New York law when it has already held Rockefeller can be held liable under Plaintiff's negligence claims as Dr. Archibald's employer.

Accordingly, the branch of Rockefeller's motion seeking dismissal of Plaintiff's sixth cause of action for vicarious liability predicated on a theory of aided-in agency is granted.

Intentional and Negligent Infliction of Emotional Distress

Plaintiff asserts causes of action against Rockefeller for both Negligent Infliction of Emotional Distress (NIED) and Intentional Infliction of Emotional Distress (IIED).

Typically, a cause of action for NIED "must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical

safety" (*Padilla v. Verczky- Porter*, 66 AD3d 1481, 1483 [4th Dept 2009]). However, New York courts have held that "a cause of action for infliction of emotional distress is not allowed if [it is] essentially duplicative of tort . . . causes of action." (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). Here, the allegations set forth under Plaintiffs' NIED claim are duplicative of the negligence causes of action- namely, that Rockefeller breached its duty to Plaintiff by failing to supervise Dr. Archibald and protect Plaintiff from danger. Given that Plaintiff may recover for emotional distress caused by this breach under his first three negligence causes of action, the NIED claim is unnecessary (*see Wilczynski v Gates Community Chapel of Rochester, Inc.*, 2022 WL 446561, *3, 2022 US Dist LEXIS 26113, *8-9 [WD NY, Feb. 14, 2022, No. 6:20-CV-06616 (EAW)] [dismissing an NIED claim as duplicative of the negligence, negligent supervision, hiring, and retention claims]).

Under his claim for Intentional Infliction of Emotional Distress (IIED), Plaintiff argues that Rockefeller "engaged in reckless, extreme, and outrageous conduct by providing Dr. Archibald access to children" despite their knowledge or "willful blindness" of Dr. Archibald's propensity.

The elements of IIED 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, as with NIED, "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]).

Plaintiff argues IIED is a "unique tort" that addresses a separate type of misconduct from his negligence-based claims. However, the allegation under Plaintiff's IIED claim, that Rockefeller was on notice of Dr. Archibald's abuse and took no action, still essentially mirrors the allegations under his other claims. It is well settled that any causes of action based on the same facts and theories, and seeking identical damages, are duplicative of one another and, as such, must be dismissed. (*See Wolkstein,* 275 AD2d at 636-37). Given that that the allegation under Plaintiff's IIED claim is based on the same set of facts and circumstances as those under Plaintiff's first three negligence claims which are moving forward, the cause of action for IIED should also not be entertained.

Accordingly, the branches of Rockefeller's motion seeking dismissal of Plaintiff's causes of action for NIED and IIED are granted.

Assault and Battery

Plaintiff's final cause of action alleges assault and battery against Rockefeller. As Plaintiff asserts this claim under vicarious liability, it is wholly duplicative of Plaintiff's fourth, fifth, and sixth claims and is thus dismissed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion of Defendant Rockefeller University a/k/a/ Rockefeller University Hospital f/k/a Rockefeller Institute Hospital ("Rockefeller") for dismissal of the instant action as against it pursuant to CPLR 3211(a)(7) (Motion Seq. 003) is granted to the extent that:

(i) The fourth cause of action for Vicarious Liability- Respondeat Superior is dismissed;

(ii) The fifth cause of action for Vicarious Liability- Apparent Authority is dismissed;

(iii) the sixth cause of action for Vicarious Liability- Aided-in-Agency is dismissed;

(iv) the seventh cause of action for Intentional Infliction of Emotional Distress is dismissed;

(v) the eighth cause of action for Negligent Infliction of Emotional Distress is dismissed;

(vi) the ninth cause of action for Assault and Battery is dismissed;

and the motion is otherwise denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order, along with notice of entry, on all parties within 10 days; 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 from entry of this order.

This constitutes the decision and order of the Court.

4/19/2023
DATE

ALEXANDER M. TISCH, 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