

PC-3 Doe v Archdiocese of N.Y.

2023 NY Slip Op 31384(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 950359/2020

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART 18 CVA

Justice

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PC-3 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, ST. JAMES THE
APOSTLE/OUR LADY OF THE LAKE MOUNT CARMEL,
ST. JOSEPH CATHOLIC CHURCH, THE SISTERS OF THE
DIVINE COMPASSION OF THE STATE OF NEW YORK,
JOHN F. KENNEDY CATHOLIC HIGH SCHOOL,

Defendants.

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INDEX NO. 950359/2020

MOTION DATE 05/06/2021,
05/06/2021

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 37, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, 62, 63, 64, 65, 66, 68

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 47, 56, 57, 58, 59, 60, 67

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant Archdiocese of New York moves pursuant to CPLR 3211 (a) (7) to dismiss plaintiff’s third and fourth causes of action, asserting negligent infliction of emotional distress (NIED) and breach of fiduciary duty (BFD), respectively, and “striking any reference to the doctrine of respondeat superior contained within plaintiff’s negligent hiring, retention, supervision and direction cause of action” (NYSCEF Doc No 22) and defendant Sisters of the Devine Compassion of the State of New York cross-moves for the same relief (motion sequence no. 002). Defendants St. James the Apostle/Our Lady of the Lake Mount Carmel, St. Joseph Catholic Church, and John F. Kennedy Catholic High School (Church and School) move pursuant to CPLR 3211 (a) (7) to dismiss the third and fourth causes of action.

Plaintiff's complaint alleges that he was sexually abused by Father Stinner beginning around 1985 when he was approximately 11-12 years old. The complaint alleges that plaintiff was a parishioner with the Church and attended the School, and that the alleged abuser was employed and/or otherwise under the control and direction of the defendants.

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is 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" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Additionally, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

"A breach of the duty of care 'resulting directly in emotional harm is compensable even though no physical injury occurred' when the mental injury is 'a direct, rather than a consequential, result of the breach' and when the claim possesses 'some guarantee of genuineness'" (Ornstein v New York City Health & Hosps. Corp., 10 NY3d 1, 6 [2008], quoting Kennedy v McKesson Co., 58 NY2d 500, 504, 506 [1983] and Ferrara v Galluchio, 5 NY2d 16, 21 [1958] [internal citations omitted]). "The latter element may be satisfied where the particular type of negligence is recognized as providing an assurance of genuineness, as in cases involving the mishandling of a corpse or the transmission of false information that a parent or child had died" (Taggart v Costabile, 131 AD3d 243, 253 [2d Dept 2015]). "However, in the absence of such specific circumstances, the guarantee of genuineness 'generally requires that the breach of

the duty owed directly to the injured party must have at least endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety” (*id.*, quoting 1-2 Warren's Negligence in New York Courts § 2.04 [1] [a]; see *Doe v Langer*, 206 AD3d 1325, 1331 [3d Dept 2022], quoting *A.M.P. v Benjamin*, 201 AD3d 50, 57 [3d Dept 2021] [“A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety”] [internal quotations omitted]).

Additionally, unlike intentional infliction of emotional distress, “extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress” (*Brown v New York Design Ctr., Inc.*, — AD3d —, 2023 NY Slip Op 01228, 3-4 [1st Dept Mar. 9, 2023]; *Taggart v Costabile*, 131 AD3d 243, 253-56 [2d Dept 2015]).

Here, the third count for NIED alleges that the sexual abuse endured by plaintiff “was extreme and outrageous conduct” and that defendants’ negligent, grossly negligent, and/or reckless conduct caused plaintiff severe emotional distress (see NYSCEF Doc No 1 at ¶¶ 83-86). However, the Court finds that the allegations and theory of negligence are essentially the same for the preceding negligence claims and, because plaintiff may recover for emotional distress in those claims, the NIED cause of action is essentially duplicative (see *Fay v Troy City School Dist.*, 197 AD3d 1423, 1424 [3d Dept 2021]).

A fiduciary relationship may exist when 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 may 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]). Here, plaintiff alleges that he was a parishioner with the Church and attended the School, and that Stinner acted as a sports coach. Plaintiff alleges that Stinner assaulted plaintiff under the guise of inspecting an injury that plaintiff incurred from his football practice. However, the Court finds that such relationship fails to demonstrate any unique relationship that differs from other parishioners or students that attended the School and/or participated in sports. As such, the allegations fail to show a viable claim apart from the negligence claims.

Regarding respondeat superior, the complaint does not allege a negligence claim based on this theory. Indeed, such a claim would likely not be viable as it is well-settled that a sexual assault is not in furtherance of a defendant's business and cannot be considered as being within the scope of employment (see N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251-52 [2002]).

Defendants take issue with a single sentence in the complaint, under the negligent hiring, retention, supervision and direction cause of action, which states "At all relevant times, Fr. Stinner acted in the course and scope of his employment with Defendants" (NYSCEF Doc No 1 at ¶ 63). The Court declines to strike the allegation because it is not seriously disputed that plaintiff does not seek to hold defendants vicariously liable for the sexual assault (see NYSCEF Doc No 51, plaintiff's mem in opp at 13 [stating vicarious liability "for an employee's misconduct" was "not at issue here"]]). The claim is against defendants for their own negligence

(see generally Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 161 [2d Dept 1997] [“In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision”]; Sheila C. v Povich, 11 AD3d 120, 129 [1st Dept 2004] [“The 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”]).

Although the Court declines to strike that one sentence, the Court notes that it rejects plaintiff's claimed “ratification” argument to the extent that such “ratification” or “approval” of sexual abuse cannot be said to be in furtherance of the employer's business. First, plaintiff's theory may also not be maintained as the complaint fails to include any allegations about ratification or approval of a tort.¹ And while it is true that an officer (or person of similar authority) “may be held individually liable to third parties for a corporate tort if he either participated in the tort or else ‘directed, controlled, approved, or ratified the decision that led to the plaintiff's injury’” (Fletcher v Dakota, Inc., 99 AD3d 43, 49 [1st Dept 2012], quoting 3A Fletcher, *Cyclopedia of Corporations* § 1135), no such person has been identified as individually liable for ratifying, approving, directing, a corporate defendant's tort (cf. Dooley v Metro. Jewish Health Sys., 02-CV-4640(JG), 2003 WL 22171876, at *11 [EDNY July 30, 2003] [finding individual board members could be found liable for negligently hiring two employees]).

Accordingly, it is hereby ORDERED that motion sequence no. 003 is granted; and it is further

¹ It is worthy to note that there is a difference between misfeasance versus nonfeasance.

ORDERED that motion sequence no. 002 is granted in part to the extent of dismissing the third and fourth claims, and is otherwise denied; and it is further

ORDERED that the third and fourth claims in the complaint are dismissed insofar as asserted against the moving defendants; 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.



4/25/2023
DATE

ALEXANDER M. TISCH, 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