SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

P R E S E N T:

HON. ALEXANDER M. TISCH, J.S.C.

ARK 572 DOE, Plaintiff(s), - against - DIOCESE OF BROOKLYN a/k/a THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK, et al. Defendant(s).	INDEX NO.: 519807/2021 DECISION & ORDER MOTION SEQ. NO. 002

The following NYSCEF Document numbers 22 to 32 read on this motion to dismiss

Upon the foregoing papers, defendants Redemptorist Fathers a/k/a Redemptorist Fathers Province of Baltimore a/k/a Redemptorist Fathers of New York (Redemptorist Fathers) and Our Lady of Perpetual Help a/k/a Our Lady of Perpetual Help Basilica (Our Lady of Perpetual Help) (defendants or movants) move to dismiss plaintiff's complaint insofar as asserted against them pursuant to CPLR 3211 (a) (7).

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained as a result of alleged sexual abuse inflicted by "John Doe," "a Roman Catholic sacristan employed by the Diocese, Redemptorist Fathers, and Our Lady of Perpetual Help" between 1957 to 1961, when plaintiff was approximately 9 to 13 years old (NYSCEF Doc No 1, complaint at ¶¶ 17, 21). The complaint alleges that plaintiff attended and participated in youth and/or church activities at Our Lady of Perpetual Help, and therefore had custody and accepted entrustment of plaintiff, and that John Doe was under the direct supervision, employ and/or control of all defendants (id. at ¶¶ 17, 19-20, 22).

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]).

Contrary to defendants' contentions, the Court finds that plaintiff's failure to specifically identify the alleged abuser is not fatally insufficient as to warrant dismissal of the complaint. The complaint alleges that plaintiff was in defendants' custody and/or control, and may therefore be owed a duty of care (see generally Mirand v City of New York, 84 NY2d 44, 49-50 [1994]; Sokola v Weinstein, 78 Misc 3d 842, 857, n 10 [Sup Ct, NY County 2023] [citing cases]). "Plaintiff's inability to identify his assailant . . . does not preclude him from recovery" (Jones v Hiro Cocktail Lounge, 139 AD3d 608, 609 [1st Dept 2016], citing Burgos v Aqueduct Realty Corp., 92 NY2d 544, 550-51 [1998]). The Court finds this particularly applicable where, as here, a negligence claim is asserted based on a duty of care owing directly from defendants to the plaintiff (see generally Sokola, 78 Misc 3d at 845-846, citing, inter alia, Pulka v Edelman, 40 NY2d 781, 782 [1976]; Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 233 [2001], op after certified question answered, 264 F3d 21 [2d Cir 2001]).

Further, the complaint asserts that the alleged abuser was under defendants' supervision, employ and/or control — if true, which this Court is required to assume (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]), the allegation would be sufficient to give rise to the negligent training, supervision, and/or retention claims, as set forth in the complaint. If not true,

because of a lack of an employment relationship or sufficient level of control over the alleged abuser, then the claim would be unsuccessful (see, e.g., Jones v Hiro Cocktail Lounge, 139 AD3d 608, 609 [1st Dept 2016] ["Since the assailant was not identified, plaintiff could not demonstrate that [defendants] knew of the assailant's propensity to commit such attacks"]; see generally Sokola, 78 Misc 3d at 846-847 [stating elements for negligent hiring, retention and/or supervision claim, including requisite employment relationship]). However, that fact has yet to be proven or disproven. Indeed, "[t]he manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, 'the plaintiff need not allege his [or her] evidence'" (Martinez v State, 215 AD3d 815, 819 [2d Dept 2023], quoting Mellen v Athens Hotel Co., 153 AD 891 [1st Dept 1912]). As plaintiff notes in opposition, the abuser's identity may be revealed through minimal discovery (see generally Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021] [noting such facts may be supplemented in a bill of particulars]; G.T. v Roman Catholic Diocese of Brooklyn, N.Y., 211 AD3d 413, 413-14 [1st Dept 2022] ["While the movant argues that plaintiff fails to allege specific facts that it had notice of the priest's criminal proclivities, at this pre-answer stage of the litigation, such information is in the sole possession and control of the movant"]). Therefore, the Court declines to dismiss the complaint on the basis that the alleged abuser is not identified by name (see, e.g., O'Brien v Archdiocese of New York, index no 950092/2020, NYSCEF Doc No 30 [Sup Ct, NY County August 13, 2021] [Silver, J.] [denying motion to dismiss on similar grounds].

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED that the movants shall file and serve an answer to the complaint within (20) 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) and submit a first compliance conference order within 60 days from entry of this order.

This constitutes the decision and order of the Court.

8/24/2023
DATE

ALEXANDER TISCH, J.S.C.

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