SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** 18

Justice

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E. C.,

Plaintiff,

- v -

FORDHAM PREPARATORY SCHOOL, USA NORTHEAST PROVINCE OF THE SOCIETY OF JESUS, USA EASTERN PROVINCE OF THE SOCIETY OF JESUS, NEW YORK PROVINCE OF THE SOCIETY OF JESUS

Defendant.

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INDEX NO. 950465/2021

MOTION DATE 01/28/2022

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, 35, 36, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant Fordham Preparatory School (defendant or School) moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (1) and (7).

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained as a result of alleged sexual abuse when he was a student at the School. The complaint alleges that he was sexually abused by Brother Roy A. Drake and Father Eugene O'Brien on multiple occasions in an office in the School from 1970 to 1971 when plaintiff was approximately 13 to 14 years old.

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 motion to dismiss a complaint based upon documentary evidence pursuant to CPLR 3211 (a) (1) "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]). Not every piece of evidence in the form of a document is properly deemed "documentary evidence" (see Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010]; Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431, 432 [1st Dept 2014]).

In support of the motion, defendant submits an affidavit from Michael Higgins, the Chief Financial Officer of the School who states that Drake and O'Brien were independent contractors and not employees of the School, and that Drake was not a teacher when the alleged abuse took place (see NYSCEF Doc No 36). However, the affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211 (a) (1) (see J.D. v Archdiocese of New York, 214 AD3d 561 [1st Dept 2023]; Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011] citing, inter alia, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]).

Further, although "a trial court may use affidavits in its consideration of a pleading motion to dismiss," where, as here, the Court declines to convert the motion into one for summary judgment,[1] such affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976]). Consequently, affidavits submitted from a defendant "will almost never warrant dismissal under CPLR 3211" (Lawrence v Miller, 11 NY3d 588, 595 [2008]) "unless [they] establish conclusively that plaintiff has no cause of action" (Rovello, 40 NY2d at 636).

Aside from the well-settled principle of law that a Court is required to accept the facts as true on a CPLR 3211 (a) (7) motion, which, here, allege that Drake and O'Brien were employees (see Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021]), it cannot be said that defendant met its burden establishing that plaintiff has no claim against it as a matter of law because the affidavit is not conclusive (see J.D., 214 AD3d 561). Even if O'Brien and/or Drake were independent contractors, defendant may still be liable for negligent training, supervision and/or retention dependent upon the level of ability to control the tortfeasor, among other factors (see generally Sokola v Weinstein, 78 Misc 3d 842, 847-849 [Sup Ct, NY County 2023] [discussing requisite employment relationship for a negligent hiring, supervision, retention and/or direction claim]).

Even if the alleged abusers were considered defendant's employees, defendant argues that negligence claim must be dismissed against it because there can be no vicarious liability for sexual assaults. This Court agrees 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

[1] Defendant's request to convert the motion to one for summary judgment (see NYSCEF Doc No 31 at 3, n 1) is denied as well. No notice was given as required in CPLR 3211 (c) and CPLR 3212 (a) explicitly requires that issue be joined and defendant has not yet filed an answer (see Alro Builders and Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512, 512 [1st Dept 1980]).

N.X. v Cabrini Med. Ctr., 97 NY2d 247, 251-52 [2002]). However, there is no need to grant any portion of the motion for dismissal on this ground because no claim under this theory can be plausibly inferred from the complaint (see also NYSCEF Doc No 39, plaintiff's affirmation in opposition at ¶ 14).

"Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring and retention of the employee" (D.T. v Sports & Arts in Schs. Found., Inc., 193 AD3d 1096, 1097-98 [2d Dept 2021]). Defendant submits no other arguments in support of dismissal of the negligence claim on this theory.

Additionally, the single negligence claim against the School certainly should not be dismissed where, as here, plaintiff was a student at the School, and the School therefore owed plaintiff a duty of care under, e.g., the *in loco parentis* doctrine premised upon such status as a student (see, e.g., Mirand v City of New York, 84 NY2d 44, 49 [1994]) or as a guest or invitee on defendant's premises (see, e.g., 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 289 [2001]), which is distinctly different from a duty of care owed by defendant based on defendant's ability to control the alleged tortfeasor(s) (see, e.g., Waterbury., 205 AD3d at 161; Sheila C. v Povich, 11 AD3d 120, 129 [1st Dept 2004]; see generally Hamilton v Beretta U.S.A. Corp., 96 NY2d 222, 233 [2001], op after certified question answered, 264 F3d 21 [2d Cir 2001] ["The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm"]; Sokola, 78 Misc 3d at 857, n 10).

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

ORDERED that the movant shall file and serve an answer to the complaint within twenty (20) days from 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 after issue is joined.

This constitutes the decision and order of the Court.

8/28/2023
DATE

ALEXANDER M. 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