

**C.R. v Episcopal Diocese of N.Y.**

2023 NY Slip Op 33851(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 950098/2021

Judge: Sabrina B. Kraus

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. SABRINA B. KRAUS PART 57**

*Justice*

-----X

C.R.

Plaintiff,

- v -

EPISCOPAL DIOCESE OF NEW YORK and THE  
CATHEDRAL SCHOOL OF ST. JOHN THE DIVINE,

Defendants.

-----X

INDEX NO. 950098/2021

MOTION DATE 09/24/21

MOTION SEQ. NO. 002, 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75

were read on this motion to/for SUMMARY JUDGMENT

**BACKGROUND**

Plaintiff commenced this action pursuant to the Child Victims Act seeking damages for alleged sexual abuse that occurred in 2006.

**PENDING MOTIONS**

Defendant the Cathedral School of St. John the Divine (the "School") moves for dismissal of Plaintiff's complaint in its entirety pursuant to CPLR 3211(a)(7).

Defendant the Episcopal Diocese of New York (the "Diocese") moves for dismissal of Plaintiff's complaint in its entirety and for summary judgement in its favor pursuant to CPLR§ 3212. Plaintiff submits opposition to both motions. The motions are consolidated herein and denied for the reasons set forth below.

### **ALLEGED FACTS**

Plaintiff alleges that while a student at the School in 2006, she was sexually abused numerous times by Jose Bravo (Bravo), a teacher employed by the School and assigned to provide educational services at the School by the Diocese. Plaintiff alleges that the School operates under the authority and control of the Diocese. Plaintiff further alleges that the School had notice of Bravo's alleged misconduct with the Plaintiff, in approximately 2006, when Plaintiff reported Bravo's sexual abuse to her friends, whose parents and a therapist then reported it to the School. That despite this knowledge, the School retained Bravo, without conducting a full investigation. The School did meet with Plaintiff, her parents, Bravo, School administrators, and two other students. However, Plaintiff failed to report the sexual abuse at that meeting out of fear. Plaintiff alleges Bravo threatened to cancel her "financial assistance" for the School, if she spoke about what was occurring. The School admonished Plaintiff for "making up the story" and no further action was taken by the School. Plaintiff alleges the sexual abuse continued thereafter, including in Bravo's home, car, and afterschool program. Additionally, Bravo forced Plaintiff to wear his jacket throughout the day in the school hallways and would openly and inappropriately "flirt" with Plaintiff in the hallways.

### **The School's Motion for Dismissal**

In their motion for dismissal, the School argues that all the individual causes of action and the arguments made fail to state a claim and therefore the entire complaint should be dismissed. The School argues that Plaintiff has not alleged facts to support its negligence claims, but rather made "purely speculative" conclusions regarding the School knowing or reasonably should have known (no foreseeability) of Bravo's alleged sexual abuse of Plaintiff.

The School asserts that any alleged abuse also occurred off the School's premises and not while Plaintiff was otherwise under the School's custody and control. Further, that these factors therefore would render Plaintiff's claim for negligence legally insufficient.

Lastly the School argues that the complaint fails to allege facts sufficient to support an award of punitive damages against them. They argue that there are no facts pled that would rise to the level of intentional or malicious misconduct by the School.

Plaintiff opposes the motion and argues that the factual allegations pled in the complaint are sufficient to warrant Plaintiff obtaining discovery consistent with the CPLR, as well as sufficient to support an award for punitive damages.

### **DISCUSSION**

#### **Dismissal Pursuant to CPLR §3211 (a)(7)**

In *Eskridge v Diocese of Brooklyn, et al.*, 210 AD3d 1056, 1058 [2d Dept 2022], the Appellate Division reversed an order of dismissal holding that:

“On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), a 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 within any cognizable legal theory.” (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *see also Boyle v North Salem Cent. Sch. Dist.*, 208 AD3d 744, 745 [2d Dept 2022]; *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d 595, 596 [2d Dept 2021].

It is well settled that a motion for dismissal pursuant to CPLR §3211 (a)(7) “must be denied if from the pleadings' four corners factual allegations are discerned, which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” *See Siegmund Strauss, Inc. v East 149<sup>th</sup> Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]; *African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013].

“Whether a plaintiff can ultimately establish [his or her] 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].

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]).

The court will address each of the grounds upon which the School seeks dismissal in turn.

### **Negligence Claim**

The School argues that Plaintiff’s cause of action for negligence, which is premised on negligence in the hiring, retention, and supervision of Bravo should be dismissed as the allegations are “boilerplate and conclusory”. They allege that there are no specific factual allegations detailing how the School knew of or should have known of a risk of sexual abuse by Bravo.

A necessary element of a cause of action alleging negligent retention or negligent supervision is 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. *See Bumpus v New York City Tr. Auth.*, 47 AD3d 653, 654 [2d Dept 2008]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997], *cert denied* 522 U.S. 967 [1997]; *see also Peter T. v Children’s Vil., Inc.*, 30 AD3d 582, 586 [2d Dept 2006].

There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity. *See Kenneth R., id.* Under this holding, Plaintiffs are not required to provide extensively detailed allegations at this juncture

in the litigation, and the School has not introduced any evidence conclusively establishing that Plaintiff's allegations are false. 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 [1<sup>st</sup> Dept 1994]).

Accordingly, Plaintiff has sufficiently alleged, at this juncture, that the School may have had knowledge of Bravo's propensity to sexually abuse the Plaintiff. The branch of the School's motion to dismiss the claim of negligent hiring, retention, and supervision is denied as premature.

The School further argues for dismissal of the complaint since the alleged sexual abuse did not occur on school property nor while the Plaintiff was in the care and custody of the School, and the School did not breach any fiduciary duty.

"Schools have a duty to adequately supervise the students in their care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision". *Nevaeh T. v City of New York*, 132 AD3d 840, 841 [2d Dept 2015]; *Timothy Mc. V Beacon City Sch. Dist.*, 127 AD3d 826, 827 [2d Dept 2015]. Further, "[a] fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. Mere allegations that a fiduciary exists, with nothing more, are insufficient." (*see AG Capital Funding, LP v State Street Bank and Trust*, 11 NY3d 146, 158 [2008]).

The complaint describes the employer/employee relationship between the School and Bravo, as well as details the relationship between Bravo and Plaintiff. Plaintiff alleged acts of sexual abuse by Bravo which occurred off the school premises including at his home and in his car, when he would transport Plaintiff to and from school. Other incidents of alleged inappropriate

touching of the Plaintiff occurred at the afterschool dance program created by Bravo. Additionally, it is alleged that Plaintiff “openly and notoriously” wore Bravo’s jacket consistently around the school building during school hours at his request. Bravo would repeatedly and openly flirt with and inappropriately touch the Plaintiff in a “flirty” way in the hallways of the School.

“The duty owed by a school to its students stems from the fact of its physical custody over them.” *Pratt v Robinson*, 39 NY2d 554, 560 [1976]. “Under appropriate circumstances a school may be held liable for injuries to students or teachers under a theory of premises liability. . . It is well settled that a school’s duty of care is coextensive with, and concomitant to, its physical custody and control over a child.” *Tarnaras v Farmingdale School Dist.*, 264 AD2d 391, 392 [2d Dept 1999]; *see also Vernali v Harrison Central School District*, 51 AD3d 782 [2d Dept 2008].

It is well settled that “schools are under a duty to adequately supervise the students in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.” *Mirand v City of New York*, 84 NY2d 44, 49 [1994].

Though some of the alleged abuse did not occur on school premises, there were incidents that did. It is well settled in the law however, that events need not only occur on the school property in order to prevail on a negligent hiring and supervision cause of action. The Second Department recently overturned a dismissal of a motion to dismiss regarding a Child Victims Act case that was similarly pleaded, holding that the pleadings were sufficient. In that case, the complaint was dismissed because, amongst other things, Plaintiff failed to allege notice, the alleged abuser was not an employee of defendant and the abuse happened off the premises (*see Peter 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” (*Sullivan v St. Ephrem R.C. Parish Church*, 214 AD3d 751, 753 [2d Dept 2022]; citing *Boyle v North Salem Cent. Sch. Dist.*, 208 AD3d 744, 744-745 [2d Dept 2021]; *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d at 596 [2d Dept 2021]; *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2d Dept 2020]).

In another Child Victims Act case involving Big Brothers Big Sisters of New York City (hereinafter “BBBSNYC”), the 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 (*see Herrmann v Big*, 2022 N.Y. Misc. LEXIS 3119 [Sup Ct, N.Y. County June 15, 2022, No. 950396/2020]).

Plaintiff herein, sufficiently alleges that incidents of sexual abuse and inappropriate behavior on the part of Bravo occurred both on and off the School's premises, but also that the School knew or should have known of that misconduct and failed to protect the Plaintiff.

Accordingly branches of the School's motion seeking to dismiss Plaintiff's breach of fiduciary duty claim and/or premises liability claims are hereby denied.

### **Punitive Damages**

The final branch of the School's motion seeks dismissal of Plaintiff's claim for the relief of punitive damages.

The remedy of punitive damages is awarded only in exceptional cases. “To recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious

and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives” (*Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted]). “Even where there is gross negligence, punitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public.” (*Karen S. “Anonymous” v Streitferdt*, 172 AD2d 440, 441 [1st Dept 1991] [internal quotation marks and citation omitted]).

Punitive damages may be assessed against an employer for an employee’s conduct.

“only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant,’ such that it is complicit in that conduct. Complicity is evident when ‘a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct.’”

(*Borst v Lower Manhattan Dev. Corp.*, 162 AD3d 581, 582 [1st Dept 2018], quoting *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 378 [1986]).

Here, the merits of Plaintiff’s allegations that the School improperly retained Bravo even with knowledge of his alleged propensity for abuse and dismissed the allegations of abuse of the Plaintiff, made by other students and their parents, have not yet been adjudicated. Thus, it is unclear at this juncture whether the School’s conduct amounts to egregious and willful misdoing sufficient to justify an award of punitive damages, As such, it is better left for the trier of fact to determine whether an award of punitive damages is warranted (*see e.g. Laurie Marie M. v Jeffrey T.M.*, 159 AD2d 52, 59-60 [2d Dept 1990], *affd* 77 NY2d 981, 982 [1991] [“the issue of punitive damages was properly submitted to the jury”]).

Therefore, the final branch of the motion is denied, and Plaintiff may pursue the relief of punitive damages along with compensatory damages in conjunction with her surviving claims.

### **The Diocese Motion for Summary Judgment**

In its motion for summary judgment, the Diocese argues several grounds: (1) that it owes no duty to the Plaintiff as it has no affiliation with the School; (2) The Diocese argues that they “do not own, manage, operate or supervise the day to day operations of the School” and did not owe the Plaintiff a duty of care; (3) that they have “no role whatsoever with the School”; (4) that they did not “employ nor supervise the School’s employees” and cannot be held vicariously liable for the actions of a non-party Bravo or the actions or inactions of the School; and (5) punitive damages against the Diocese are not warranted, as there is no conduct or misconduct by the Diocese that rises to that level.

The School argues that the motion of the Diocese for summary judgment is premature and procedurally defective and must be denied pursuant to CPLR §3212. The Diocese concedes the argument of the School and withdrew its request for summary judgment and dismissal of all crossclaims in its reply affirmation to the School’s memorandum in opposition dated June 29, 2023. As to all other claims of the Plaintiff, the Diocese still seeks a summary judgment.

The Plaintiff argues that the Diocese’s motion for summary judgment is premature at this pre-discovery stage as she has not had the opportunity to conduct any meaningful discovery. Plaintiff argues the Diocese’s motion should be denied in its entirety. Plaintiff offered an affidavit of a proposed expert witness to refute the Diocese denial of any affiliation with the School.

### **DISCUSSION**

Summary judgment is granted when “the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B.*

*v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The function of a court in reviewing a motion for summary judgment “is to issue findings, not issue determinations, and if any genuine issue of material fact is found to exist, summary judgment must be denied.” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where “credibility determinations are required, summary judgment must be denied”. (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]) Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding that given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial)).

In support of its motion for summary judgment, the Diocese has submitted an affidavit from Wayne Kempton, an archivist, (annexed to the motion as Exhibit “C”), who is responsible for organizing and maintaining the Diocesan Archives of the Episcopal Diocese of New York.

He describes the School as an “independent private institution” and states that the Diocese is “not responsible for who the School hires, fires, and retains”. He describes the lack of supervision the Diocese has over the school, in that the Diocese does not manage, operate, nor supervise the day-to-day activities of the School and is not responsible for the hiring, retaining, nor training of employees of the School.

In opposition, Plaintiff submitted an affidavit of their expert Thomas Doyle, a Catholic Priest who purports to be knowledgeable of the governmental structure of the Episcopal Diocese of New York and the relationship between the Diocese and the School. Mr. Doyle concluded that Defendant the Episcopal Diocese of New York has a clear affiliation and relationship to the Defendant Cathedral School, and its employees, including teachers.

“On a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim”. (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 [1<sup>st</sup> Dept 2002]). Allegations that are negated by such 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]).

“Affidavits are not documentary evidence and are not appropriate proof on a CPLR 3211 (a)(1) motion to dismiss” (*Johnson v Asberry*, 190 AD3d 491, 492, [1<sup>st</sup> Dept 2021]) [internal citations omitted]). In a recent decision on another CVA matter, *J.D. v Archdiocese of N.Y.*, 214 AD3d 561 [1<sup>st</sup> Dept 2023], the First Department cited *Johnson* to hold that a defendant’s general

counsel's affidavit did not constitute documentary evidence and only consisted of legal conclusions and denials. The Second Department has also maintained that affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" and "will almost never warrant dismissal under CPLR 3211" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2<sup>nd</sup> Dept 2010]). *See also Attias v Costiera*, 120 AD3d 1281, 1283 (2<sup>nd</sup> Dept 2014) (Affidavits submitted by defendants in support of motion "did not constitute documentary evidence within the meaning of CPLR 3211(a)(1) and should not have been relied upon by the Supreme Court in directing the dismissal of the complaint.").

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).

Defendant's alternate request for relief pursuant to CPLR 3212 was withdrawn such that the issue is no longer before the court.

### **CONCLUSION**

Based on the foregoing, it is hereby:

ORDERED that the motion of The Cathedral of St. John The Divine for dismissal of this action pursuant to CPLR 3211(a)(7) is denied in its entirety; and it is further

ORDERED that the motion of Defendant Episcopal Diocese of New York for dismissal of this action and summary judgement in its favor pursuant to CPLR 3212, is denied in its

entirety; and it is further

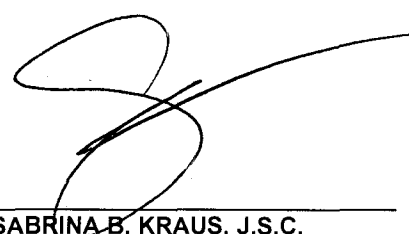
ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that Defendants shall serve and file an answer to the complaint within twenty days from notice of entry of this order; and it is further

ORDERED that the parties shall appear for a virtual compliance conference on December 20<sup>th</sup>, 2023, at 2:00 pm; and it is further

ORDERED that this constitutes the decision and order of the court.



10/17/23

DATE

HON. SABRINA B. KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	