John Doe - 18216 v Young People's Chorus of N.Y. City
2023 NY Slip Op 33859(U)
October 27, 2023
Supreme Court, New York County
Docket Number: Index No. 950728/2020
Judge: Sabrina Kraus

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JOHN DOE - 18216,

Plaintiff,

- v -

YOUNG PEOPLE'S CHORUS OF NEW YORK CITY, THE YOUNG PEOPLE'S CHORUS OF NEW YORK CITY, INC.,THE CHILDREN'S AID SOCIETY, D/B/A CHILDREN'S AID, DOES 1-5

Defendant.

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INDEX NO. 950728/2020

MOTION DATE 04/13/2023

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 132, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 152, 162, 163, 164, 165, 166, 167, 168

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 153, 169, 170, 171, 172, 173, 174

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff commenced this action under the Child Victims Act ("CVA") seeking damages for alleged sexual abuse he suffered as a minor.

ALLEGED FACTS

The following facts are alleged in the amended complaint.

When Plaintiff was approximately 6 years old, his parents enrolled him in music classes offered by The Children's Aid Society d/b/a Children's Aid ("CAS") located on 87th Street in New York City. Plaintiff attended the music class approximately 2-3 times per week.

When Plaintiff was 7 years old, he auditioned for the Junior Chorus affiliated with CAS and was accepted. Thereafter Plaintiff attended rehearsals at CAS in the East Village. Plaintiff spent approximately 2 years in the Junior Chorus.

When Plaintiff was 10 years old, he auditioned for and was accepted in the Intermediate Chorus at CAS. He participated in the Intermediate Chorus for about two weeks and was then promoted to the Concert/Chamber Chorus, which was also located at the CAS in the East Village.

Francisco Nunez ("Nunez") was the teacher and chorus director of all the vocal activities at CAS in which Plaintiff participated. On December 09, 1996, Young People's Chorus of New York City a/k/a The Young People' s Chorus of New York City, Inc. ("YPC") filed with the New York State Department of State as an independent corporate entity, separate from CAS.

Nunez was involved in the organization of YPC and was one of the incorporating members of its Board. In early 1997, he met with representatives of CAS and advised them of his intention to form an independent chorus. Nunez continued to work for CAS as chorus director during 1997 as organization of YPC's activities was underway. Nunez was President of the Board of YPC. YPC entered into an agreement with the 92nd St. YMHA ("the Y") for YPC's residence at the Y. Auditions for YPC were held at the Y beginning in June 1997. All choir activities that Plaintiff participated in at the Y were as a member of YPC.

Plaintiff alleges that Jon Holden ("Holden") was an employee, agent and/or representative of CAS and YPC, and the principal pianist for the CAS Concert/Chamber Chorus and YPC. Holden provided piano accompaniment, taught, instructed, supervised, and chaperoned child participants, including Plaintiff.

As a minor, Plaintiff had regular contact with Holden through his participation in CAS Concert/Chamber Chorus and YPC. In or around 1997, while acting as a student chaperone and the lead pianist for CAS at an international choir competition in the Czech Republic, Holden directed Plaintiff to watch Holden engage in unpermitted sexual contact with another minor student participant. On that same trip, Holden initiated and engaged in unpermitted sexual contact with Plaintiff and at least one other minor student, and Plaintiff was assigned to share a room with Holden and another minor student.

By the time of the 1997 competition in the Czech Republic, YPC had become an independent corporate entity, separate from CAS. Nunez was the choir director and Holden was the principal accompanist for the choruses of both Defendants in 1997.

Subsequent to the trip to the Czech Republic, Holden initiated and engaged in unpermitted sexual contact with Plaintiff in a bathroom at the Y during a YPC choir practice break.

PENDING MOTIONS

On February 8, 2023, YPC moved for an order dismissing the amended complaint pursuant to CPLR §§3211(a)(1) and (a)(7), and CAS moved for an order dismissing the amended complaint pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7).

The motions are consolidated herein and determined as set forth below.

DISCUSSION

The amended complaint asserts causes of action for negligence, negligent hiring and investigation, negligent training and supervision, negligent retention of employees, and infliction of emotional distress.

Motion Seq No. 4

In his memorandum of law, Plaintiff acknowledges that he does not contest the dismissal of the cause of action for negligent infliction of emotional distress, nor does he oppose that part of YPC's motion seeking dismissal of any claim of liability against YPC for the alleged sexual abuse that took place during the choral competition in the Czech Republic. As such those portions of YPC's motion are granted on consent.

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]). 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" (S*iegmund Strauss, Inc.*, 104

AD3d 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]*; Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"The scope of a court's inquiry on a motion to dismiss under CPLR § 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, citing *P.T. Bank Central Asia v Chinese Am. Bank*, 301 AD2d 373, 375 [1st Dept 2003]), 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" (*id*. at 376; *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 v Ginzburg*, 43 NY2d 268, 275 [1977]; *Salles*, 300 AD2d at 228).

YPC seeks dismissal based on its assertion that the amended complaint provides no facts supporting the assertion that YPC had notice of Holden's purported propensity to sexually abuse minors. YPC further argues it cannot be held liable for negligence under the doctrine of *respondeat superior* because the misconduct that Holden is alleged to have engaged in was outside the scope of his role at YPC.

The standard to sufficiently plead notice to survive a motion to dismiss pursuant to CPLR §3211(a)(7) in a cause of action involving negligent supervision or retention is well established and has been recently reiterated by both the First and Second Departments. *See e.g., J.D. v. The Archdiocese of New York*, 214 AD3d 561(1st Dept. 2023) and *Novak v. Diocese of Brooklyn, et al*, 210 A.D.3d 1104 (2022).

To survive a motion to dismiss pursuant to CPLR §3211(a)(7) in such a case, a plaintiff need only allege that an employer knew or should have known of its employee or agent's harmful propensities, that it failed to take necessary action, and that this failure caused damage to others. The cause of action does not need to be pleaded with specificity. *See Novak, supra*; *Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229 A.D.2d 159,162 (2d Dept 1997) ("There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity").

> "Here, at the pleading stage of the litigation where the plaintiff's allegations in the complaint are treated as true and are accorded the benefit of every possible favorable inference, the complaint is sufficiently pled as to the causes of action to recover damages for negligence, including the negligent hiring, retention, and supervision of the priest (see Doe v Enlarged City Sch. Dist. of Middletown, 195 AD3d at 596), and inadequate supervision of the plaintiff."

Novak 210 AD3d at 1105.

Furthermore, plaintiff asserts no cause of action based on *respondeat superior* as such the motion seeking dismissal of the complaint based on the arguments pertaining to *respondeat superior* is denied.

Motion Seq No 5

The CVA is a Statute of Limitations not a Condition Precedent

Where a defendant seeks dismissal under CPLR §3211(a)(5) on the ground that the statute of limitations bars a claim, the defendant need only "establish, prima facie, that the time within which to sue has expired." *Flintlock Construction Services, LLC v. Rubin, Fiorella & Friedman, LLP*, 188 A.D.3d 530, 531 (1st Dep't 2020). Once a defendant has made that showing, the "burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period." *Id.*

Plaintiff commenced this action on November 12, 2020. YPC moved to dismiss the original complaint in part on the ground that it could not be liable for abuse Plaintiff may have suffered during the Competition, because he attended the Competition through a CAS program. On August 11, 2021, Plaintiff moved to amend the complaint to add CAS as a defendant. The motion was granted on September 23, 2022, and the amended complaint was filed on October 13, 2022. CAS argues that the action is therefore untimely because this was 14 months after the CVA "look-back" window had closed.

However, this argument is based on the theory that CPLR 214-g is a condition precedent rather than a statute of limitations. A theory that has been rejected in CVA cases.

> CPLR 214-g provides, as relevant here: "Notwithstanding any provision of law which imposes a period of limitation to the contrary . . . , every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age . . . which is barred as of the effective date of this section because the applicable period of limitation has expired . . . is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section." Inasmuch as there is no "clear expression of intent to the contrary," and inasmuch as the causes of action delineated in CPLR 214-g are "cognizable at common law," we conclude that CPLR 214-g is properly regarded as a statute of limitations (*Clark v Abbott Labs.*, 155 AD2d 35, 40 [4th Dept 1990]; *see Matter of M.C. v State of New York*, 74 Misc 3d 682, 701 [Ct Cl 2022]; *see generally Gallewski v Hentz & Co.*, 301 NY 164, 171, 174-175 [1950]).

Shapiro v. Syracuse Univ., 208 A.D.3d 958, 960–61, *leave to appeal denied*, 210 A.D.3d 1456(2022), *and reargument denied*, 210 A.D.3d 1456(2022).

The filing of a motion for leave to amend the complaint to add a defendant to a pending action tolls the Statute of Limitations until entry of the order deciding the motion as against the

party sought to be added when the motion papers include a copy of the proposed supplemental summons and amended complaint. *Perez v. Paramount Commc'ns, Inc.*, 92 N.Y.2d 749 (1999).

Based on the foregoing the action as against CAS was timely commenced.

The CVA covers conduct occurring outside New York where the Plaintiff is a New York Resident

CAS cites *S. H v. Diocese of Brooklyn* 205 A.D.3d 180 (2022) for the general proposition that the CVA does not revive claims based on conduct occurring outside New York. CAS' reliance on this case is misplaced. In *S.H.* the court emphasized the fact that the Plaintiff was a nonresident of New York. "The legislative history supports a finding that the legislature intended that the CVA provide relief to New York residents alone." *Id* at 186. The limited holding of *S.H.* is "(a)ccordingly, under the circumstances of this case, CPLR 214-g does not apply extraterritorially, where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York." *Id* at 190.

Where plaintiff is a New York resident, the CVA cover abuse that occurred outside of New York. *ARK265 Doe v. Archdiocese of New York*, 2022 NY Slip Op 33427(U); *Shapiro supra* at 962.

Based on the foregoing, the motion by CAS to dismiss pursuant to CPLR §3211(a)5) is denied in its entirety.

CAS has no Liability for Abuse that Allegedly Occurred at the Y

The Court dismisses the claims against CAS, to the extent they are based on the second instance in which Holden allegedly abused Plaintiff. The amended complaint concedes that the second alleged incident occurred in a bathroom at the Y but does not allege that CAS owned or controlled those premises. The amended complaint also concedes that all choir activities that

Plaintiff participated in at the Y were as a member of YPC, and expressly asserts that the second alleged incident occurred during a YPC choir practice break.

The elements of negligence are "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v. City of New York*, 66 N.Y.2d 1026, 1027). Plaintiff has failed to identify a duty owed by CAS to plaintiff in relation to the incident at the Y.

Plaintiff argues that if CAS was not negligent in its supervision and or retention of Holden, he would not have been working with children for YPC, implying essentially that CAS had a duty to warn YPC of Holden's proclivities. However, common law imposes no duty to warn those endangered by the conduct of another, in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim. *Cohen v. Wales*, 133 A.D.2d 94, 95 (2d Dep't 1987). No such relationship is alleged here.

Finally, the court denies the balance of CAS' motion to dismiss based on its argument that notice was not sufficiently alleged for the same reasons cited above in relation to Motion Seq No 4.

WHEREFORE it is hereby:

ORDERED that the cause of action for negligent infliction of emotional distress is dismissed as to both Defendants; and it is further

ORDERED that the claims based on alleged abuse in the Czech Republic are dismissed as to YPC, and the claims based on alleged abuse at the Y are dismissed as against CAS; and it is further

ORDERED that the balance of relief sought in motion sequence numbers four and five are denied in their entirety; and it is further

ORDERED that Defendants serve an answer to the amended complaint within twenty days of service of this order with notice of entry; 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);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that counsel appear for a virtual compliance conference on January 5, 2024, at 11:00 am; and it is further

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

20231027115000SBKRAUS3F85C290CB284AB28794E931FFECC489

10/27/2023
DATE

SABRINA KRAUS, 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