

ARK86 v Archdiocese of N.Y.

2023 NY Slip Op 33900(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 950060/2019

Judge: Sabrina Kraus

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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. SABRINA KRAUS **PART** **57TR**

Justice

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ARK86,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, SALESIAN SOCIETY
A/K/A SALESIAN SOCIETY, PROVINCE OF ST. PHILIP
THE APOSTLE, INC. A/K/A SALESIANS OF DON BOSCO
A/K/A SALESIAN SOCIETY OF PROVINCE OF THE ST.
PHILIP APOSTLE, DOES 1-5 WHOSE IDENTITIES ARE
UNKNOWN TO PLAINTIFF, MARIAN SHRINE A/K/A DON
BOSCO RETREAT CENTER AND MARIAN SHRINE

Defendant.

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INDEX NO. 950060/2019
MOTION DATE N/A
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 34, 35, 36
were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff commenced this action under the Child Victim’s Act (“CVA”) seeking damages
for alleged sexual abuse by Brother Thomas Higgs (“Higgs”), S.D.B., a Religious Cleric at
Marian Shrine in Stony Point, in the Archdiocese of New York.

ALLEGED FACTS

The following facts are alleged in the complaint.

Higgs was a Roman Catholic cleric employed by the Archdiocese, Marian Shrine, and the
Salesians.

Plaintiff was raised in a devout Roman Catholic family and attended Marian Shrine in
Stony Point, in the Archdiocese. Plaintiff and his family came in contact with Higgs as an agent
and representative of Defendants, and at Marian Shrine. Plaintiff, as a youth, participated in

activities at Marian Shrine. During and through these activities, Plaintiff, as a minor and vulnerable child, was dependent on Defendants and Higgs. Defendants had custody of Plaintiff and accepted the entrustment of Plaintiff and, therefore, had responsibility for Plaintiff and authority over Plaintiff. From approximately 1983 to 1986, when Plaintiff was approximately 10 to 13 years old, Higgs engaged in unpermitted sexual contact with Plaintiff.

PENDING MOTION

Defendant Salesian Society ("Salesians") move for an order pursuant to CPLR §3211(a)(5) and (7) dismissing the complaint. The motion was fully briefed and marked submitted. The motion is determined as set forth below.

DISCUSSION

The CVA is Constitutional

“[A] claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice.” *In re World Trade Ctr.*, 30 N.Y.3d at 400, 89 N.E.3d 1227; *see also Carroll v. Trump*, No. 22-CV-10016, 2023 WL 185507, at *9 n.40 (S.D.N.Y. Jan. 13, 2023); *Giuffre v. Andrew*, 579 F. Supp. 3d 429, 453 (S.D.N.Y. 2022); *Farrell v. U.S. Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 391 (N.D.N.Y. 2021); *PC-41 Doe*, 590 F. Supp. 3d at 558.

The Legislative Memorandum accompanying the CVA bill, justifies passage for the Act as follows:

New York is one of the worst states in the nation for survivors of child sexual abuse. New York currently requires most survivors to file civil actions or criminal charges against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average. Because of these restrictive statutes of limitations, thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and pose a persistent threat to public safety. This legislation would open the doors of justice to the thousands of survivors of child sexual abuse in New York State by prospectively

extending the statute of limitations.... Passage of the Child Victims Act will finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties.

Legis. Mem. (“CVA Sponsor's Mem.”), 2019, N.Y. Sess. Laws (Advance Sheets A-39)

(McKinney).

It is now well settled that the CVA passes constitutional muster and comports with due process requirements [*see eg Torrey v. Portville Cent. Sch.*, 66 Misc. 3d 1225(A), (N.Y. Sup. Ct. 2020); *Giuffre v Dershowitz*, 19 CIV. 3377 (LAP), 2020 WL 2123214 (S.D.N.Y Apr. 8, 2020)]. Every federal and state court to consider the issue has found it constitutional. *See, e.g., Andrew*, 579 F. Supp. 3d at 453 (“Defendant is not the first litigant to advance this argument [that the CVA is unconstitutional], which has been rejected by every New York state and federal court to have encountered it. And it has been rejected repeatedly for good reason.”); *Farrell*, 567 F. Supp. 3d at 393 (“[T]he Court finds that the CVA is a constitutional revival statute designed to remedy an injustice; and, consequently, it does not violate either the New York or federal Due Process Clauses.”); *PC-41 Doe*, 590 F. Supp. 3d at 558 (“[T]he CVA, which afforded victims of childhood sexual abuse a limited period of time within which to pursue their claims of sexual abuse through the judicial system, was a reasonable, non-arbitrary response to remedy an injustice and therefore satisfies the New York Due Process Clause.”); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, 152 N.Y.S.3d 242, 248, 72 Misc.3d 1052 (N.Y. Sup. Ct. 2021), *aff'd*, 182 N.Y.S.3d 850, 213 A.D.3d 82 (N.Y. App. Div. 2023); *ARK3 Doe v. Diocese of Rockville Ctr.*, No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, *15 (N.Y. Sup. Ct. May 11, 2020) (finding that “the [CVA] is a reasonable response to remedy the injustice of past child sexual abuse” and “does not violate [the defendant's] right to due process under the New York State Constitution”);

Torrey v. Portville Cent. Sch., 125 N.Y.S.3d 531, 66 Misc.3d 1225A (N.Y. Sup. Ct. 2020)

("[T]he Court finds the [CVA] a reasonable response to remedy an injustice. As such, it does not violate [the defendant's] right to due process under the New York State Constitution.").

These courts have concluded, as does this court that the Legislature, in passing the CVA, was responding to the tremendous injustices created by a short limitation period for claims arising out of sexual abuse. Its decision to open a limited window of time to bring claims is a reasonable response to remedy that injustice.

Based on the foregoing, the motion to dismiss the action pursuant to CPLR 3211(a)(5) is denied.

Plaintiff Properly Pled All Causes of Action in The Complaint

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]).

The complaint asserts three causes of action for negligence, negligent supervision and training of employees, and negligent retention of employees.

To the extent that movant asserts that notice is insufficiently pled, the motion is denied.

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) *Belcastro v Roman Catholic Diocese of Brooklyn, N.Y.*, 213 AD3d 800, 801 [2d Dept 2023]).

The cause of action for negligence is also sufficiently pled. Movants argued that plaintiff had failed to identify a duty owed to him by defendant. In its opposition papers, plaintiff asserts four bases for finding such a duty, including that defendant had a duty to properly supervise children participating in their programs and under their care. In reply defendants argue that the Complaint nowhere alleges that the Salesians actually took custody of plaintiff. However, this allegation is clearly made in paragraph 21 of the complaint, which at this early stage of the litigation, the court must construe in a broad light most favorable to plaintiff.

WHEREFORE it is hereby:

ORDERED that the motion to dismiss is denied in its entirety; and it is further

ORDERED that defendant is directed to 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

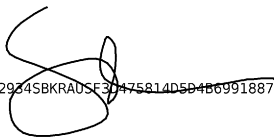
ORDERED that counsel are directed to appear for a virtual compliance conference in, on January 16, 2024, at 2 pm ; and it is further

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 this constitutes the decision and order of this court.


202310311629345BKRAUSE30475814D59466991887AD79DCBC842

10/31/2023
DATE

SABRINA KRAUS, 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