

**JOHN DOE HK v Roman Catholic Diocese of
Brooklyn**

2023 NY Slip Op 33986(U)

October 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 510605/2020

Judge: Mark I. Partnow

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At an IAS Term, Part CVAP4M of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of October, 2023.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

----- X
JOHN DOE HK,

Plaintiff,

Motion Sequence 4

- against -

Index No. 510605/2020

ROMAN CATHOLIC DIOCESE OF BROOKLYN;
FRANCISCAN BROTHERS, INC. (A/K/A,
CONGREGATION OF THE RELIGIOUS
BROTHERS OF THE THIRD ORDER REGULAR
OF OUR LADY, A/K/A FRANCISCAN BROTHERS
OF BROOKLYN); OUR LADY OF ANGELS
PARISH AND SCHOOL (A/K/A OUR LADY OF
ANGELS SCHOOL, A/K/A HOLY ANGELS
CATHOLIC ACADEMY),

Defendants.
----- X

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	52-58
Opposing Affidavits/Answer (Affirmations) _____	61
Affidavits/ Affirmations in Reply _____	62-63
Other Papers: _____	

Upon the foregoing papers, defendant The St. Francis Monastery a/k/a The Congregation of Franciscan Brothers of Brooklyn s/h/a Franciscan Brothers, Inc. (a/k/a Congregation of the Religious Brothers of the Third Order Regular of Our Lady, a/k/a Franciscan Brothers of Brooklyn) (Franciscan Brothers of Brooklyn) move, in motion

sequence number (mot. seq. no.) 4, for an order dismissing plaintiff John Doe HK's (plaintiff) third, fourth, and fifth causes of action pursuant to CPLR 3211 (a) (7) and an order, pursuant to CPLR 3024 (b), striking scandalous and prejudicial language contained within the complaint.

BACKGROUND

Plaintiff commenced the instant revival action under the pseudonym John Doe HK, based on the Child Victims Act (CVA) (CPLR 214-g; L 2019, ch 11, § 3, as amended by L 2020, ch 130, § 1) and 22 NYCRR § 202.72 by electronically filing a summons and verified complaint on June 18, 2020. Plaintiff, who was born in 1958, was enrolled as a student at Our Lady of Angels Parish that operated as a Catholic church and Catholic school under the auspices of the Diocese (Our Lady) (NYSCEF Doc No. 1 at ¶¶ 4, 44-47). Plaintiff attended grades one through six at the school and alleges that in or around 1966, plaintiff was sexually abused as a minor at the school (*id.* at ¶¶ 44-56).

In or around 1966, when plaintiff was in fifth grade, plaintiff asserts that Brother Cletus Burke, O.S.F. (Burke) was assigned as a brother to teach at Our Lady School (*id.* at ¶ 49). Plaintiff alleges that Burke took a special interest in plaintiff even though plaintiff was not one of the students in his classroom and told plaintiff that he was special and offered to help him become a priest one day (*id.* at ¶ 50). Plaintiff claims that Burke began grooming him for sexual abuse by giving him alcohol and exposing him to pornography in the school basement (*id.* at ¶ 52). Plaintiff asserts that the sexual abuse began shortly thereafter with genital fondling, progressed to forced fellatio, and ultimately sodomy (*id.*

at ¶ 53). Plaintiff alleges that Burke subjected him to physical abuse by throwing things at him and beating him with erasers, yardsticks, and other items (*id.* at ¶ 54). The physical and sexual abuse occurred in the school's basement and cloakroom (*id.* at ¶ 55).

Plaintiff confessed to a priest at Our Lady about the sexual abuse he was subjected to, and the priest responded by yelling at plaintiff, calling him a liar, telling him not to tell anyone, including his parents, and told plaintiff that he would take care of it (*id.* at ¶ 56). A few days later, plaintiff asserts that he was ordered to the school basement by Burke who beat him in the face with a wooden stick (*id.*). During the beating, plaintiff states that Burke told him he would kill plaintiff and his family if he ever told anyone else about the abuse (*id.*). Plaintiff's injuries were so severe, that he was taken to the hospital and suffered permanent loss of his front teeth (*id.*). Burke told plaintiff to tell his parents that the injuries were caused by a bike fall. The plaintiff alleges that the abuse continued until 1970, when plaintiff moved out of state (*id.* at ¶ 57). As a result of the abuse, plaintiff claims to have suffered serious and severe physical and emotional damage of a permanent and lasting nature that includes, among other things, post-traumatic stress disorder, severe mental anguish, severe anxiety, depression, and suicidal ideation (*id.* at ¶ 61). The complaint asserts five causes of action: (1) negligence; (2) negligent supervision, monitoring, training, and retention; (3) breach of fiduciary duty; (4) constructive fraud; and (5) civil conspiracy to commit fraud. In the wherefore clause, plaintiff seeks punitive damages. Franciscan Brothers of Brooklyn filed its answer to the complaint on November 20, 2020 (NYSCEF Doc No. 35).

DISCUSSION

CPLR 3211 (a) (7)

Franciscan Brothers of Brooklyn move, in mot. seq. no. 4, pursuant to CPLR 3211 (a) (7) to dismiss the third, fourth and fifth causes of action and seek to strike scandalous and prejudicial language from the complaint. Specifically, Franciscan Brothers of Brooklyn seek removal, or portions thereof, of paragraphs 17, 32, 43, 44, 70c, 101, and 106 through 116 from the complaint (NYSCEF Doc No. 53 at ¶ 13). As a preliminary matter, plaintiff counsel's affirmation in opposition notes that most of the requested relief in the Franciscan Brothers of Brooklyn's motion is moot as the parties entered into a stipulation discontinuing the fourth and fifth causes of action (NYSCEF Doc No. 61 at ¶ 5; NYSCEF Doc No. 49).¹ Since the plaintiff discontinued the fourth and fifth causes of action, paragraphs nos. 94-122 all relate to the discontinued causes of action and can be considered stricken (*id.* at ¶ 8). Thus, the only portions of Franciscan Brothers of Brooklyn's motion that will be addressed herein are the requests to dismiss the third cause of action and to strike paragraphs 17, 32, 43, 44, and 70c from the complaint (*id.* at ¶ 9).

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" (*Guggenheimer v Ginzburg*, 43 NY2d

¹ The May 28, 2021, stipulation discontinuing the fourth cause of action for constructive fraud and the fifth cause of action for civil conspiracy to commit fraud was so-ordered by the Honorable Justice George J. Silver (NYSCEF Doc No. 49).

268, 275 [1977]). “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” (*Eskridge v Diocese of Brooklyn*, 210 AD3d 1056, 1057 [2d Dept 2022]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Boyle v North Salem Central School District*, 208 AD3d 744 [2d Dept 2022]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*id.*: *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). 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*, 43 NY2d at 275).

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*J.D. v Roman Catholic Diocese of Brooklyn*, 203 AD3d 880, 880 [2d Dept 2022], quoting *Mann v Sasson*, 186 AD3d 823, 824 [2d Dept 2020]). “A cause of action to recover damages for breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b) (*id.*; *see CPLR 3016 [b]*). “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” (*id.*). “Two essential elements of a fiduciary relationship are de facto control and dominance” (*id.*).

In support of its motion, Franciscan Brothers of Brooklyn contends that plaintiff

failed to articulate a relationship of any kind (NYSCEF Doc No. 53 at ¶ 5). Franciscan Brothers of Brooklyn argues that Our Lady may have hired brothers from its religious order to teach at the school, but plaintiff's assertions are directed towards the parish and the school rather than the moving defendant. Franciscan Brothers of Brooklyn states that plaintiff failed to allege sufficient facts to support the claim that his relationship to the parish was unlike the others who attended the school or were members of the parish (*id.* at ¶ 6). Franciscan Brothers of Brooklyn notes that plaintiff did not allege facts that establish any relationship, let alone a special relationship, with the movant (*id.*). Plaintiff argues that the court should not dismiss his breach of fiduciary duty cause of action as he has alleged many facts in the complaint which should be more than sufficient to establish that his relationships with the religious institutions involved with the case were unique and distinct from other parishioners generally (NYSCEF Doc No. 61 at ¶ 18).

The court finds that the third cause of action alleging breach of fiduciary duty should be dismissed as the plaintiff failed to sufficiently plead, with particularity, that a fiduciary relationship existed between plaintiff and Franciscan Brothers of Brooklyn that was somehow unique or different from its relationship with other students and/or parishioners (*J.D.*, 203 AD3d at 880; *see also Doe v Holy See (State of Vatican City)*, 17 AD3d 793, 795 [3d Dept 2005]). In any event, the allegations against Franciscan Brothers of Brooklyn in the third cause of action are duplicative of the plaintiff's negligence and negligent supervision, monitoring, training, and retention causes of action (*Appelbaum v Echo Lake Camp, Inc.*, Sup Ct, New York County, September 14, 2023, Tisch, A., index No. 950171/19).

CPLR 3024 (b)

Next, Franciscan Brothers of Brooklyn argues that paragraphs 17, 32, 43, 44, and 70c of the complaint are improper inflammatory statements that must be stricken as they are unduly prejudicial. Franciscan Brothers of Brooklyn contends that the referenced paragraphs do not make any allegations at any specifically named defendant and are generalized allegations targeted at the Catholic Church in general or the Vatican, both of whom are nonparties (NYSCEF Doc No. 53 at ¶¶ 13-15). In opposition, plaintiff asserts that the courts disfavor motions to strike matter from pleadings and that Franciscan Brothers of Brooklyn have not met the high bar of establishing that the portions of the complaint they want to strike would cause prejudice to the actual parties to the case, are scandalous or otherwise irrelevant (NYSCEF Doc No. 61 at ¶¶ 24-37).

CPLR 3024 (b) enables the court to strike scandalous or prejudicial matter unnecessarily inserted in a pleading (*Pisula v Roman Catholic Archdiocese of NY*, 201 AD3d 88, 96 [2d Dept 2021]). “What qualifies as scandalous or prejudicial matter in a given complaint is sui generis” (*id.*). “Matter that is scandalous or prejudicial will not be stricken if it is relevant to a cause of action in a complaint or petition or its material elements” (*id.* at 97). “However, the mere striking of matter from a pleading under CPLR 3024 (b) does not, ipso facto, preclude related facts or evidence from being admitted at a later trial” (*id.*). “Whether to strike allegedly scandalous or prejudicial matter from a pleading in a given instance is left to the discretion of the trial court” (*id.*). “[N]o appeal lies as of right from an order granting or denying a motion to strike scandalous or

prejudicial matter” (*id.* at 98). Here, the court finds that paragraphs 17 and 44 are scandalous and/or prejudicial and must be stricken from the pleadings. However, the court finds that paragraphs 32, 43, and 70 (c) should not be stricken as the paragraphs are not scandalous or prejudicial.

CONCLUSION

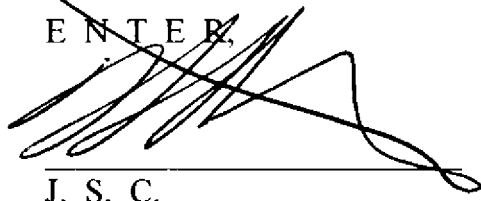
All arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein. Accordingly, it is

ORDERED that Franciscan Brothers of Brooklyn’s motion, mot. seq. no. 4, to dismiss several causes of action insofar as asserted against them is decided as follows:

- (i) The portion of the motion seeking dismissal of the third cause of action alleging breach of fiduciary duty is granted, and the cause of action is dismissed as against Franciscan Brothers of Brooklyn;
- (ii) The portion of the motion seeking dismissal of the fourth and fifth causes of action was withdrawn by the movant as those causes of action were previously discontinued by plaintiff;
- (iii) The portion of the motion seeking to strike scandalous and/or prejudicial paragraphs in the complaint is granted to the extent that paragraphs 17 and 44 are hereby stricken; and
- (iv) The portion of the motion seeking to strike paragraphs 32, 43, and 70 (c) is denied.

This constitutes the decision and order of the court.

~~ENTER~~

A handwritten signature in black ink, appearing to read 'Mark I. Partnow', is written over the word 'ENTER'. The signature is somewhat stylized and scribbled.

J. S. C.

**HON. MARK I PARTNOW
JSC**