SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANONYMOUS NMS,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, ST. MARGARET OF CORTONA-ST. GABRIEL CATHOLIC PARISH, FORDHAM UNIVERSITY, SOCIETY OF AFRICAN MISSIONS, INC. D/B/A SOCIETY OF AFRICAN MISSIONS – AMERICAN PROVINCE, AND THE SOCIETY OF AFRICAN MISSIONS TRUSTEES COMPANY LIMITED BY GUARANTEE D/B/A SOCIETY OF AFRICAN MISSIONS – IRELAND PROVINCE,

Defendants.

INDEX NO. 950346/2021

MOTION DATE 7/29/2021
10/8/2021

MOTION SEQ. NO. 002, 003

DECISION + ORDER ON MOTIONS

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 40, 41,

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 55, 56, 57, 58

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants The Society of African Missions, Inc., d/b/a Society of African Missions- American Province and The Society of African Missions Trustees Company Limited by Guarantee d/b/a Society of African Missions- Ireland Province ("SMA") in the above-captioned Child Victims Act ("CVA") action moves for dismissal of the matter as against it pursuant to CPLR § 3211(a)(8), CPLR 3211 § (a)(9) and CPLR §§ 301-301 on the basis that SMA is not subject to this Court's jurisdiction and pursuant to CPLR § 3211(a)(7) for failure to state a cause of action (Motion Seq. 002). Defendant Fordham University ("Fordham") filed to

dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action (Motion Seq. 003).

Plaintiff commenced the present action against defendants Archdiocese of New York, St. Margaret of Cortona-St. Gabriel Catholic Parish ("St. Gabriel"), Fordham, and SMA. Plaintiff alleges (1) negligence and (2) negligent hiring, retention and supervision against defendants in that in or around 1976 through 1977 plaintiff was sexually abused on multiple occasions by Father Bernard J. Lynch ("Lynch") who provided educational and religious instruction to plaintiff. Plaintiff alleges he met Lynch in or around 1975 when plaintiff was an approximately 15 year old parishioner at St. Gabriel and that Lynch introduced himself as a Visiting Priest at St. Gabriel sponsored by SMA. Plaintiff also alleges Lynch claimed to be studying for his Master's degree in counseling at Fordham University.

Dismissal As Against SMA

CPLR §3211(a)(8) provides for dismissal of a suit when "the court has no jurisdiction of the person of the defendant." On a motion brought under CPLR §3211(a)(8), the plaintiff bears the "burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction" (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept. 2017]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR §3211(d) only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011] [*citing Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

In New York, there are two types of personal jurisdiction: CPLR § 301 (general jurisdiction) and CPLR § 302 (specific or long-arm jurisdiction). A court may assert long-arm

jurisdiction over a foreign defendant under CPLR § 302(a)(l) where plaintiff's cause of action arises from the transaction of business in New York by the defendant either directly or through its agent (see CPLR § 302[a][1]). The attachment to New York must be (1) "purposeful"; and (2) "there must be a substantial relationship between the New York transaction of business and the claim asserted" (*see Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Purposeful activities are defined as "those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*see C. Mahendra (N. Y.), LLC v Nat'l Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015] [internal quotations and citations omitted]). Not all "purposeful activity" constitutes a transaction of business within the meaning of CPLR § 302(a)(l) (*see Fischbarg v Doucet,* 9 NY3d 375, 380 [2007]). "It is the nature and quality of these contacts that matter" (*id.* at 382). Even one instance of purposeful activity directed at New York is sufficient to create jurisdiction, whether or not defendant was physically present in the State, as long as that activity bears a substantial relationship to the cause of action (*Corporate Campaign, Inc. v Local 7837, United Paperworkers Int'l Union*, 265 AD2d 274, 274-75, 697 NYS2d 37, 39 [1999]). Even when physical presence is lacking, jurisdiction may still be proper if the defendant "on his [or her] own initiative ... project[s] himself [or herself]" into this state to engage in a "sustained and substantial transaction of business" (*see Fischbarg v Doucet*, 9 NY3d 375, 382 [2007]).

Here, there is no allegation SMA has continuous and/or systematic contacts within the State of New York to allow for the exercise of general jurisdiction. Indeed, SMA has no address, phone number or office within the State of New York. Moreover, SMA has no employees or personnel stationed in New York, does not own, lease, or possess any real or tangible property in the State of New York, and has no ownership interest in any business based within the State of New York.

Rather, as acknowledged by Plaintiff, SMA is an international non-profit organization with its provincial headquarters located in Tenafly, New Jersey. As such, general jurisdiction cannot be exercised over SMA.

Where general jurisdiction cannot be obtained, "what is needed is a connection between the forum and the specific claims at issue" (*Bristol-Myers Squibb Co. v Superior Court of California, San Francisco*, 582 US 255, 256 [2017]) such that specific jurisdiction can be exercised. "It is the defendant's conduct that must form the necessary connection with the forum state that is the basis for its jurisdiction over it. The mere fact that this conduct affects a plaintiff with connections with a foreign state does not suffice to authorize jurisdiction" (*id*; *see also, Walden v Fiore*, 571 US 277, 284 [2014]).

Here, specific jurisdiction does not exist because Plaintiff's allegations against SMA do not arise out of or relate to any alleged activity by SMA in New York. Instead, the allegations relate to the specific actions of a non-party, Lynch. More specifically, Plaintiff alleges that he was sexually abused by Lynch while Plaintiff was attending St. Gabriel from approximately 1976 to 1977. Absent from Plaintiff's allegations is any indication, including during that alleged period, that SMA actually exercised any control or supervision over Lynch's employment at St. Gabriel. As such, Plaintiff has failed to establish a basis for specific jurisdiction over SMA. SMA was not present in New York, did not own any property in New York, was not authorized to do business in New York, and there is no evidence establishing that it derived any revenue from the State of New York. The complaint does not allege facts sufficient to satisfy plaintiff's burden of establishing personal jurisdiction over SMA under CPLR §§ 301 and/or 302. Nor has plaintiff made a "sufficient start" in establishing jurisdiction that would benefit from jurisdictional discovery and an opportunity to amend his pleadings (*see HBK Master Fund L.P.*, 85 AD3d 665,

supra). Due to the absence of contacts between SMA with the State of New York, the instant complaint must be dismissed as against it for lack of jurisdiction.

Even if Plaintiff had established a basis for this court to assert jurisdiction over SMA, a foreign entity that has not purposely availed itself within the State of New York, dismissal of this action would still be countenanced given the existence of unquestionable documentary proof that plaintiff never served SMA with a summons in this action. Plaintiff did not comply with the service requirements of Not-For-Profit Corporation Law § 307, as plaintiff failed to file a timely affidavit of compliance. Further, plaintiff failed to personally serve SMA as the affidavit does not indicate, pursuant to CPLR § 311, that the person served was "an officer, director, managing or general agent, or cashier or assistant cashier or any other agent authorized by appointment or by law to receive service." The affidavit does not specify who was served at The Society of African Missions Trustees Company Limited by Guarantee d/b/a Society of African Missions- Ireland Province. Likewise, the allegations against SMA may state in a conclusory fashion that SMA knew or should have known that Lynch was unfit for the duties assigned to him and otherwise posed a risk to children. However, plaintiff fails to plead facts tending to show that SMA had the requisite notice of a propensity for sexual misconduct by Lynch that would satisfy the requisite foreseeability element to support Plaintiff's conclusions. Even with the liberal pleading requirements, plaintiff's complaint as against SMA is insufficient as a matter of law.

Dismissal of Individual Causes of Action

In deciding 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]).

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" (Siegmund 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 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] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). The plaintiff is afforded the benefit of a liberal construction of the pleadings: "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]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by 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], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez,* 84 NY2d at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001] ["In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

It is the movant who bears 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).

Negligence and Negligent Hiring, Retention and Supervision

The elements of negligence are 1) a duty owed by the defendant to the plaintiff, 2) a breach thereof, and 3) injury proximately resulting (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013]). To state a claim for negligent hiring, retention or supervision under New York law, a plaintiff must also plead (1) the existence of an employee-employer relationship; (2) "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]; *Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]) and (3) "a nexus or connection between the defendant's negligence in hiring and retaining [or supervising] the offending employee and the plaintiff's injuries" (*Roe v Dom. & Foreign Missionary Socy. of the*

Prot. Episcopal Church, 198 AD3d 698, 701 [2d Dept 2021]; *Gonzalez v City of New York*, 133 AD3d 65, 70 [1st Dept 2015] ["what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance"]).

A. Argument that Lynch is an Employee or Agent of Fordham

Both Plaintiff's general negligence cause of action and plaintiff's negligent hiring, supervision and retention cause of action allege that defendants had a duty to plaintiff because Lynch is an employee or agent of defendants. Fordham argues Lynch is neither. First, when determining if a person is an employee, factors include "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct" (*Sokola v Weinstein,* 78 Misc 3d 842, 847 [Sup Ct, NY County 2023] quoting *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082, 1083 [4th Dept 1985][internal citation omitted]). Here, there are no allegations regarding Fordham selecting Lynch to lead a therapy group at St. Gabriel, Fordham paying a salary to Lynch for providing therapy at St. Gabriel, Fordham having the power to dismiss Lynch from his position at St. Gabriel, or Fordham controlling Lynch's position at St. Gabriel. Instead, the complaint alleges that Lynch introduced himself as a visiting Priest and that he was studying at Fordham (NY St Cts Elec Filing [NYSCEF] Doc No. 5, ¶ 114). There are no allegations that Fordham facilitated the therapy group at St. Gabriel or was a Fordham employee. The complaint alleges that only the Archdiocese and St. Gabriel owned and occupied the property where St. Gabriel was located and the therapy sessions were held (Complaint, ¶ 31-37).

As Lynch is not alleged to be an employee of Fordham, the Court will consider if the complaint adequately alleges Lynch to have been an agent of Fordham. Although plaintiff generally states Lynch is an agent, the only alleged facts specific to Fordham are that "Fr. Lynch

informed Plaintiff that he was studying for his Master's degree in Counseling at Fordham University's Lincoln Center Campus[,]. . . [o]n or about 1975, Fr. Lynch solicited Plaintiff to join a therapy group he was forming as part of his Master's degree program, and [o]n or about 1976 . . . Fr. Lynch brought Plaintiff to meet his program supervisor at Fordham University" (Complaint, ¶ 114-116). "[I]t is well settled law that such apparent authority premised only on the actions and words of [a purported] agent does not create liability for a principal. Apparent authority depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal" (*Ford v Unity Hosp.*, 32 NY2d 464, 472-73 [1973] [internal quotations omitted]). "The apparent authority for which the principal may be held liable must be traceable to him; it cannot be established by the unauthorized acts, representations or conduct of the agent" (*Kabakov v Gafni*, 2023 N.Y. Misc. LEXIS 26657, at *5 [Sup Ct, NY County Jan. 24, 2023, No. 950067-2020]). For a duty to exist between plaintiff and Fordham because Lynch is an agent of Fordham, plaintiff must allege representations by Fordham, not just Lynch. Plaintiff makes no factual allegations that Fordham held Lynch out to be its representative, agent, or employee. Nor does plaintiff allege any action by Fordham to encourage plaintiff to join Lynch's therapy group or that this therapy group was hosted by Fordham. Instead, the complaint states that plaintiff joined Lynch's therapy group because "[p]laintiff felt he could not refuse a priest's request" (Complaint, ¶ 115). Lynch's own statements also do not amount to representations that the therapy group was controlled by Fordham. Nor does the complaint allege any relationship between Fordham and the other defendants making Lynch an agent of Fordham. As the complaint lacks allegations supporting plaintiff's contention that Lynch was an employee or agent of Fordham, the complaint fails to allege that Plaintiff was in the care of Fordham via his relationship with Lynch.

B. Fordham in the Best Position to Protect Against Harm

The complaint also alleges Fordham had a duty to plaintiff because defendants were in the best position to protect plaintiff against the risk of harm (*see generally, Davis v S. Nassau Communities Hosp.*, 26 NY3d 563 [2015]). The Court notes the complaint alleges defendants are in the best position to protect against the risk of harm even though Fordham is not alleged to have a legal relationship with any of the other defendants. Only in plaintiff's memorandum of law in opposition to the motion to dismiss, does plaintiff allege that Fordham specifically is in the best position to protect against the risk of harm because Lynch was enrolled in Fordham's Master's program in counseling psychology and Fordham had the power to terminate Lynch from the program (NY St Cts Elec Filing [NYSCEF] Doc No. 55, memorandum in opposition, page 14). Unlike other jurisdictions, "New York has affirmatively rejected the doctrine of in loco parentis at the college level[,] and colleges 'in general have no legal duty to shield their students from the dangerous activity of other students'" (*Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 795 [2d Dept 2013], quoting *Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2007], quoting *Eiseman v State of New York*, 70 NY2d 175, 190 [1987]). It is well settled that "colleges today in general have no legal duty to shield their students from the dangerous activity of other students [even] when a college admits an ex-felon . . . as part of a special program" (*Eiseman v State*, 70 NY2d 175, 190 [1987]). Further, colleges have no duty "to deny matriculation to a student who is alleged to have committed a sexual assault on another. Consequently, plaintiff's claim of negligence against the College must be dismissed" (*Morrison v Shalach*, 2020 NYLJ LEXIS 760, *9). As New York courts have repeatedly held colleges do not owe a duty in admitting or matriculating students, and Plaintiff has provided no caselaw to the contrary, Fordham does not have a duty to plaintiff based on their enrollment of Lynch or failure to terminate Lynch from the

program. "In evaluating duty questions [courts] have historically proceeded carefully and with reluctance to expand an existing duty of care" (*Davis* at 572).

For all the above reasons, the complaint fails to allege facts to support a claim Fordham has a duty to plaintiff as Lynch's employer or because it is in the best position to prevent harm.

C. Allegations Occurred Off Fordham's Premises

Finally, Fordham also argues the complaint should be dismissed because the allegations did not occur at Fordham University. While there is no requirement for the alleged events to have occurred on the premises, "the law, as set forth in the decisions of the courts [of New York], have always suggested that a 'nexus' is required between the tort and the employment relationship, which is not limited to an employer's premises or chattels, but is instead a fact-intensive analysis as to how the employer or the employment relationship is involved or connected with the tort; including the ability of the employer to control the employee and its knowledge of the need to exercise such control" (*Sokola v Weinstein*, 78 Misc 3d 842, 856 [Sup Ct, New York County 2023] [internal citations omitted], *appeal withdrawn,* 219 AD3d 1185 [1st Dept 2023]; *see also K.G. v. Speonk Congregation of Jehovah's Witnesses*, NYLJ, March 28, 2023, LEXIS 746, *8 [Sup Ct, NY County 2023]; declining to dismiss negligence claims where alleged abuse occurred in the home of the employee).

Here, the complaint alleges plaintiff and his family are members of St. Gabriel and were introduced to Lynch as a visiting Priest (Complaint, ¶ 114). The only facts plead regarding the premises of Fordham are that one time plaintiff met Lynch's program supervisor in 1976, approximately one year after therapy began at St. Gabriel (Complaint, ¶ 116). This limited contact is insufficient to find a nexus between Fordham and abuse that occurred off campus. Unlike *Sokola* and *K.G.*, the complaint does not allege Fordham sent plaintiff to meet with Lynch off campus or

that Lynch groomed plaintiff on campus prior to the alleged abuse or that plaintiff was ever in the care of Fordham as a student or otherwise. Plaintiff erroneously compares the allegations in the instant case to a law student interning at a clinic. In the latter case, the clinic would presumably be run by the law school, staffed with faculty from the law school and there would be significant contact with the premises of the law school. None of these factors are alleged in the instant matter.

The instant matter is more analogous to *Stephenson v City of NY* where the court held that the school was not negligent for injury to a student by another student when the assault occurred off premises because "generally, the duty of care does not extend beyond school premises" (19 NY3d 1031, 1034 [2012]). "The extension of a duty of care outside of the school premises is based upon the tortfeasor's employment relationship with the school and is limited to circumstances where the off-premises conduct is an extension of what occurred on school grounds" (*Novak v Sisters of the Heart of Mary* [Sup Ct, New York County 2021], *revd on other grounds sub nom. Novak v Sisters of Heart of Mary*, 2022 N.Y. Slip Op. 06814 [2d Dept 2022]). The argument that Plaintiff is owed a duty in the instant matter is even more tenuous as plaintiff was never a student at Fordham. As there is no nexus between plaintiff and Fordham, the conduct that occurred off campus can not form the basis of a negligence cause of action against Fordham.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants The Society of African Missions, Inc d/b/a Society of African Missions- American Province and The Society of African Missions Trustees Company Limited by Guarantee d/b/a Society of African Missions- Ireland Province's motion to dismiss plaintiff's complaint against it is granted; and it is further

ORDERED that defendant Fordham University's motion to dismiss plaintiff's complaint against it is granted; is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing said defendants from this matter.

This constitutes the decision and order of the Court.

5/8/24
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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