SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ARK444 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, JESUIT FATHERS AND BROTHERS, FORDHAM PREPARATORY SCHOOL, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

Defendants.

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INDEX NO. 950479/2021

MOTION DATE 11/23/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 46, 48, 50, 51, 52, 53, 54, 55, 67, 68, 69

were read on this motion to/for DISMISS.

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained as a result of alleged sexual abuse by Father Eugene O'Brien, a Roman Catholic cleric employed by defendants the Archdiocese of New York, Jesuit Fathers and Brothers, and Fordham Preparatory School in approximately 1978, when plaintiff was approximately seventeen years old (*see* NYSCEF Doc. No.1, Complaint at ¶¶ 18-24). Plaintiff's Complaint asserts three causes of action against all defendants: 1) negligence; 2) negligent training and supervision of employees; and 3) negligent retention of employees (*see* NYSCEF Doc. No. 1, Complaint).

Defendants The USA Northeast Province of the Society of Jesus, Inc. and The New York Province of the Society of Jesus (together "The Province") move to dismiss plaintiff's Complaint pursuant to CPLR § 3211(a)(5) and (a)(7). The Court will address each of the grounds upon which defendants seek dismissal in turn.

In a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court determines "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, 211 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401,

402-03 [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, 48 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 208 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

Negligence; Negligent Training and Supervision; Negligent Retention

"In order to establish a claim for negligence, a plaintiff must show that the defendant owed the plaintiff a duty and breached that duty, and that the breach proximately caused the plaintiff harm" (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]). 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 sort of conduct which caused the injury" (*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 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]).

The Province first argues that plaintiff fails to state a cause of action against the Province because plaintiff does not assert a legal duty owed by the Province to the plaintiff. "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]). "In the absence of duty, there is no breach and without a breach there is no liability" (*id.*). "The question of whether a defendant owes a legally recognized duty of care to a plaintiff is the threshold question in any negligence action, and it is a legal question for the court" (*On v BKO Exp. LLC*, 148 AD3d 50, 53-54 [1st Dept 2017] [internal quotation marks and citation omitted]). There is generally no duty to control the harm-producing conduct of a third party (i.e., the tortfeasor) absent a special relationship either between the defendant and the plaintiff or the defendant and the tortfeasor (*see Pulka*, 40 NY2d at 783).

"The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" (*Hamilton v*

Baretta U.S.A. Corp., 96 NY2d 222, 233 [2001]; *see, e.g., 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001] ["Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk"]). "That duty, however, does not extend to members of the general public," restricting landlord liability "because the special relationship defines the class of potential plaintiffs to whom the duty is owed" (*532 Madison Ave. Gourmet Foods*, 96 NY2d at 289).

The Province asserts plaintiff fails to establish they had custody and control over the plaintiff at the time of the alleged sexual abuse. The Court finds that the allegations in the Complaint adequately allege the Province owed plaintiff a duty of care (*see e.g.*, Complaint at ¶¶ 13, 20, 21, 23, 27, 28, 29, 49, 50). The Court is required to accept these allegations as true (*see generally, Engelman v Rofe*, 194 AD3d 26, 33-34 [1st Dept 2021]). Moreover, discovery from defendants is likely to shed light on this issue and others (*see generally, Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410, 411 [1st Dept 2021]). Accordingly, the Province was "under a duty to adequately supervise" plaintiff and may "be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*see Hunter v New York City Dep't of Educ.*, 95 AD3d 719, 719 [1st Dept 2012] [internal quotation marks omitted], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

Even if plaintiff and defendants were not in any special relationship, the Province may still be liable to plaintiff for negligence based on their relationship with the tortfeasor (*see supra*, citing *Hamilton*, 96 NY2d at 233; *Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 161 [1st Dept 2022]). "The negligence of the employer . . . arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (*Sheila C.*, 11 AD3d at 129); *see Roe*, 198 AD3d at 700-701, quoting *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 634-37 [2d Dept 2018]). Thus, "the duty of care in supervising an employee extends to any person injured by the employee's misconduct" (*Waterbury*, 205 AD3d at 162). Plaintiff has alleged defendants were negligent in hiring, retaining, directing, and supervising Father O'Brien (*see* Complaint at ¶¶ 30, 44, 50, 52, 53, 56, 57, 58) and "greater specificity is not required at this pre-

answer stage in the litigation" (*Ark 55 v Archdiocese of New York*, 222 AD3d 572, 572 [1st Dept 2023]). Accordingly, the Court finds that the complaint adequately alleges that the Province owed a duty of care.

The Province also contends that the cause of action for negligence/gross negligence cannot be maintained to the extent it is based on a theory of respondeat superior. Paragraph 48 in plaintiff's Complaint alleges: "At all times material, Fr. O'Brien was employed by Defendants and was under each Defendant's direct supervision, employ, and control when he committed the wrongful acts alleged herein. Fr. O'Brien engaged in the wrongful conduct while acting in the course and scope of his employment with Defendants and/or accomplished the sexual abuse by virtue of his job-created authority" (Complaint at ¶ 48). It is well-settled that sexual assault is not in furtherance of a defendant's business and cannot be considered as being within the scope of employment (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251-52 [2002]). "Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring and retention of the employee" (*D.T. v Sports & Arts in Schs. Found., Inc.*, 193 AD3d 1096, 1097 [2d Dept 2021]; *see Waterbury*, 205 AD3d at 162). Thus, to the extent that plaintiff's negligent training and supervision cause of action is based on respondeat superior, it fails.

The Province further argues the Complaint insufficiently pleads the prior notice/propensity element required for the claims of negligent training and supervision, and negligent retention. However, acknowledging that the Court is required to accept the allegations as true (*see Engelman*, 194 AD3d at 33) and "greater specificity is not required at this pre-answer stage in the litigation" (*Ark 55*, 222 A.D.3d at 572), the Court finds that the complaint sufficiently alleges the prior notice/propensity element (*see, e.g.*, Complaint at ¶¶ 40-43, 57). Additionally, the allegations may be amplified in a bill of particulars and subsequent discovery (*see Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410, 411 [1st Dept 2021]; *G.T. v Roman Catholic Diocese of Brooklyn, N.Y.*, 211 AD3d 413, 413 [1st Dept 2022] ["While the movant argues that plaintiff fails to allege specific facts that it had notice of the priest's criminal proclivities, at this pre-answer stage of the litigation, such information is in the sole possession and control of the movant"]). Indeed, "[t]he manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, the plaintiff need not allege

his [or her] evidence" (*Martinez v State*, 215 AD3d 815, 819 [2d Dept 2023] [internal quotation marks and citations omitted]). Accordingly, the Court finds the Complaint adequately alleges that the Province knew or should have known of Father O'Brien's propensity to sexually abuse minors.

Applicability of the CVA

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff's submissions in response to the motion must be given their most favorable intendment" (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017] [internal quotation marks omitted], quoting *Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]).

The Province argues plaintiff's claims may not be revived under the Child Victims Act (CPLR § 214-g) because plaintiff's Complaint fails to state one of the predicate offenses of the Penal Law. CPLR § 214-g provides for a revival of certain personal injury claims that would have been barred by the then-statute of limitations if the injury was allegedly caused by certain conduct committed against a minor and constituted either 1) "a sexual offense as defined in article one hundred thirty of the penal law"; 2) "incest as defined in section 255.27, 255.26 or 255.25 of the penal law"; or 3) "the use of a child in a sexual performance as defined in section 263.05 of the penal law."

Here, plaintiff's complaint alleges: "In approximately 1978, when Plaintiff was approximately 17 years old, Fr. O'Brien engaged in unpermitted sexual contact with Plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05, or a predecessor statute that prohibited such conduct at the time of the abuse" (Complaint at ¶ 22). The Court finds the Complaint is sufficient under New York's liberal notice-pleading standard pursuant to CPLR § 3013, which requires that a pleading be sufficiently particular to give the court and parties notice of the transaction or occurrence (*see Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]), and is therefore not time-barred and subject to revival. The deficiency, if any, will not cause any prejudice to defendants because plaintiff will be required to provide details in their bill of particulars (*cf. Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 80 [1st Dept 2015]). Specifically, the bill of particulars will require plaintiff to describe the act(s) of abuse

and also "identify the specific subdivision of New York's penal law on which his or her claims are brought under the Child Victims Act" (CMO No. 2, Exhibit B, Common Demand for Verified Bill of Particulars Directed at Plaintiffs at ¶¶ 3, 4).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED that the movant shall file and serve an answer to the first amended complaint within twenty (20) days from service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall proceed with discovery pursuant to the direction of the Court during the conference with the Court on Thursday, June 6, 2024.

This constitutes the decision and order of the Court.

6/13/2024
DATE

ALEXANDER M. TISCH, J.S.C.

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