John Doe v Educational Inst. Oholei Torah
2023 NY Slip Op 33946(U)
November 3, 2023
Supreme Court, Kings County
Docket Number: Index No. 525322/2019
Judge: Sabrina B. Kraus

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

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

Justice

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INDEX NO. 525322/2019

JOHN DOE

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001, 002

EDUCATIONAL INSTITUTE OHOLEI TORAH AND CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITCH

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15 – 20, 22, 37-44 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25 – 29, 36, 42-43, 45 were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff commenced this action pursuant to the Child Victims Act ("CVA") seeking damages for alleged sexual assault he suffered when he was a student at Educational Institute Oholei Torah ("Oholei Torah").

ALLEGED FACTS

The following facts are alleged in the complaint.

Oholei Torah is an educational institution that seeks to offer boys of Chabad-Lubavitch families, ages 3 to 18, a strong and traditional Chassidic education. It has several educational programs to address the needs of various age groups. Oholei Torah does not offer programs leading to the academic degrees authorized by the New York State Board of Regents. Rather, Oholei Torah

immerses its students in Talmudic and Chassidic studies and aims to carry forward the chain of Chassidic learning and outreach.

Oholei Torah students are expected to behave and to conform to Chasidic practice. The study of Torah, Chassidic philosophy, ethics, and law are not meant to be an abstract or theoretical exercise at Oholei Torah.

After the age of 13 to14, a boy begins Junior Yeshiva-called Mesivta-an intense program for studying Torah and Chassidus. At the age for 16 or 17, a boy begins advanced Yeshiva-called Zal-which is extremely intense. In Zal, the students study for 12 to14 hours a day. They do not study any secular courses, but instead devote themselves exclusively to studying Torah and Chassidic teachings. Access to secular materials -books, music, and movies - are banned.

The aim of a yeshiva education is not about academic training for college or life, but it is about immersion in the words and teaching of Torah so that the young man becomes elevated, refined and more godly.

It is in this environment that Plaintiff met Avrohom Charitonov ("Charitonov"), and allegedly suffered repeated sexual abuse, without any intervention from Defendants.

Plaintiff joined the Zal division of Oholei Torah - the division for advanced studies - on or about 1987, at the age of 17. Since Plaintiff's parents did not live in New York, he was assigned to live in the dormitory located at 841-853 Ocean Parkway, Brooklyn, N.Y. 30. From the start, Plaintiff was lonely and needed guidance. His friend suggested that he confide in their young teacher, Charitonov, who was also viewed as a mentor to the students. Charitonov was enrolled in Central Yeshiva Tomchei Tmimim Lubavitch ("Central Yeshiva"), equivalent to college. Charitonov resided at the President Street dormitory.

Plaintiff approached Charitonov and asked him for guidance. This was the start of an allegedly abusive relationship, in which Charitonov used his role as a teacher and role model to sexually abuse Plaintiff, repeatedly, in Central Yeshiva's dormitory, and convince him that this was an appropriate part of his training.

When Plaintiff first asked Charitonov for mentoring, Charitonov invited Plaintiff to meet after the last class of the day, approximately 9:30 p.m., and walk him to his dormitory. When they reached Charitonov's dormitory, he invited Plaintiff to join him in his bedroom. He told Plaintiff that he should follow his advice and lie down on his bed. Once Plaintiff was lying in the bed, Charitonov proceeded to take off Plaintiff's clothing without his approval. Charitonov then began to hug Plaintiff while he was undressed and as he hugged him, he started taking off his own clothes until he was totally undressed. Charitonov then lay down beside Plaintiff, all the time assuring him that this was normal and that this is the way of dealing with confusion and loneliness. Charitonov soon began to stroke Plaintiff all over his body, and forced him to touch his genitals, and then to keep stroking him until he ejaculated on Plaintiff's stomach. After ejaculating, Charitonov promptly fell asleep. When he awoke, he said that Plaintiff should walk home by himself, even though it was approximately 3:00 a.m.

Plaintiff walked back to his dormitory in a daze. No one noticed his late return as the dormitory was unsupervised. Thereafter, Charitonov's alleged sexual abuse escalated. Plaintiff sought guidance and wanted to talk, but each time, Charitonov began coercing him into sexual activity. He began to force Plaintiff to perform oral sex on Charitonov and then Charitonov would forcefully perform oral sex on Plaintiff.

The instances of forced oral sex began to become more and more frequent and always occurred in the President Street dormitory. There were no measures of security at the President

Street dormitory. Central Yeshiva knew, or should have known, of the repeated acts of sexual molestation, since it was taking place at a dormitory under their supervision and control, and Plaintiff would often leave the dormitory at 2:00 or 3:00 a.m.

Once the alleged molestation started, Plaintiff felt trapped. He had no way of stopping the abuse. Further, Charitonov made it clear that if Plaintiff disclosed the sexual molestation, Charitonov would retaliate and shame him publicly. Additionally, Charitonov was physically imposing. When Plaintiff showed reluctance, Charitonov used his psychical strength to dominate Plaintiff. He would arm wrestle with the Plaintiff and demonstrate his strength. This caused Plaintiff to fear Charitonov.

Charitonov's sexual abuse became much more intense and more forceful when he started to take Plaintiff to the mikvah, located at 394 Kingston Avenue, Brooklyn, N.Y. The Mikva was open all night and there was no security there whatsoever. At the Mikva, Charitonov's abuse was more forceful. To demonstrate his complete power over Plaintiff, Charitonov rubbed his genitals on Plaintiff's face and then ejaculated on Plaintiff's face. It was at the mikvah where Charionov started to force Plaintiff's face into his buttocks and force Plaintiff to lick his buttocks and his entire genital area and behind. Plaintiff felt disgusted and confused.

In the past, immersion in a ritual bath had evoked feelings of cleansing and spirituality for the Plaintiff. However, after his encounters with Charitnov in the Mikva, Plaintiff began to associate the mikva with terror, humiliation and disgust.

PENDING MOTIONS

On June 17, 2020, Central Yeshiva moved for an order pursuant to CPLR §3211(a)(7) dismissing the complaint for failure to state a cause of action.

On September 17, 2020, Oholei Torah moved for an order pursuant to CPLR§ 3211(a)(7), dismissing the complaint on the grounds that the complaint fails to state a cause of action; and/or dismissing the complaint on the grounds that the CVA as codified under CPLR 214-g is a violation of due process rights under the New York State Constitution.

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

DISCUSSION

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" (*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]).

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).

The complaint asserts six causes of action: Negligent Hiring, Supervision and Retention; Negligence; Breach of Non-Delegable Duty; Breach of Fiduciary Duty; Negligent Infliction of Emotional Distress; and Breach of Duty *in Loco Parentis*.

Motion Sequence No 1

Plaintiff consents to dismissal of the third, fourth and fifth causes of action as against Central Yeshiva. Plaintiff further consents to dismissal of that portion of the first cause of action as against Central Yeshiva that asserts Negligent Hiring. Therefore, those portions of the motion are granted on consent.

The sixth cause of action for Breach of Duty *in Loco Parentis* is dismissed as to both defendants.

> Here, to the extent that the plaintiff purports to have alleged a cause of action against the district to recover damages for breach of a duty in loco parentis, this is not a cognizable cause of action under New York law. Rather, the concept of in loco parentis forms the basis of the duty owed by a school district to students within its charge in the context of a negligent supervision claim (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see also Boyle v Brewster Cent. Sch. Dist.*, 209 AD3d 619, 619-620 [2022]; *Giresi v City of New York*, 125 AD3d 601, 602-603 [2015]).

Doe v. Hauppauge Union Free Sch. Dist., 213 A.D.3d 809, 810 (2023).

The remaining claims as against Central Yeshiva sound in negligence and negligent retention, supervision, and direction.

The elements of a cause of action for negligence are a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom (*Solomon v. City of New York,* 66 N.Y.2d 1026, 1027 [1985]).

To state a claim for negligent hiring, retention or supervision under New York law, a plaintiff must plead, in addition to the elements required for a claim of negligence: (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 A.D.2d 159, 161, 654 N.Y.S.2d 791 [2d Dept. 1997]).

> Causes of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity (*see Boyle v. North Salem Cent. Sch. Dist.*, 208 A.D.3d at 745, 172 N.Y.S.3d 621; *Doe v. Enlarged City Sch. Dist. of Middletown,* 195 A.D.3d at 596, 144 N.Y.S.3d 639).

Belcastro v. Roman Cath. Diocese of Brooklyn, New York, 213 A.D.3d 800, 801 2023).

Central Yeshiva's primary argument is that it owed no duty to Plaintiff, and that because it is the functional equivalent of a college, the doctrine of *in loco parentis* does not apply as the age and maturity level of its students removes the need for closer supervision concomitant with younger students and lower-level institutions. However, it is well established that a 17-year-old at a college who asserts sexual conduct absent consent is well within the parameters of the CVA and that a duty is still owed (*see eg Shapiro v. Syracuse Univ.*, 208 A.D.3d 958, 959).

> .... (U)nder appropriate circumstances, a college may be held liable for injuries sustained by a student while on campus (*cf. Ayeni v. County of Nassau,* 18 A.D.3d 409, 410, 794 N.Y.S.2d 412; *Ellis v. Mildred Elley School,* 245 A.D.2d at 996, 667 N.Y.S.2d 86; *Adams v. State of New York,* 210 A.D.2d 273, 274, 620 N.Y.S.2d 80). Here, as a property owner/occupier, Gibbs had a duty to exercise reasonable care to protect the plaintiff from reasonably foreseeable criminal or dangerous acts committed by third persons on its

> premises (*see Ayeni v. County of Nassau, supra; Ellis v. Mildred Elley School, supra; Adams v. State of New York, supra*).

Luina v. Katharine Gibbs Sch. New York, Inc., 37 A.D.3d 555, 556 (2007). Central Yeshiva had a duty as the owner of the dormitory to exercise reasonable care for those on premises from reasonably foreseeable dangerous acts of third persons (*Ellis v Mildred Elley School* 245 AD2d 994).

Moreover, to the extent that Central Yeshiva argues that it had no duty to shield one student from the dangerous activity of another student, it ignores Plaintiff's allegations that Charitonov was a teacher and mentor of Plaintiff being supervised and trained by Central Yeshiva.

As such the motion to dismiss the remaining causes of action for negligence and negligent retention, supervision, and direction is denied.

Motion Seq No 2

Plaintiff consents to dismissal of the third and fifth causes of action as to Oholei Torah. Plaintiff further consents to dismissal of that portion of the first cause of action that asserts Negligent Hiring. Therefore, those portions of the motion are granted on consent.

Plaintiff has stated a claim for negligent retention and supervision. As noted above the notice element of such a cause of action need not be plead with specificity. This is a pre-answer motion, no discovery has taken place and facts related to notice are predominantly within defendants' control.

For the same reasons the court finds that the claims for negligence is sufficiently pled.

The court finds that the complaint fails to state a cause of action for breach of fiduciary duty. A fiduciary relationship may exist where "one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge." *Doe v Holy See* (State of

Vatican City), 17 A.D.3d 793 (3d Dep't 2005). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." *Swartz v. Swartz*, 145 A.D.3d 818 (2d Dep't 2016). As a general matter, "[s]exual misconduct is not a breach of fiduciary duty." 92 N.Y. JUR.2d Religious Organizations § 90 (2019). The sexual abuse of a child does not typically implicate "a special 'fiduciary' duty" because what is at issue is "the general duty to refrain from violating penal laws." *Wilson v. Diocese of N.Y. of the Episcopal Church*, No. 96-cv-2400, 1998 WL 82921, at *11 (S.D.N.Y. Feb. 26, 1998) *quoting Schmidt v. Bishop*, 779 F.Supp. 321, 325-26 (S.D.N.Y. 1991)).

"Mere allegations that a fiduciary duty exists, without more, are insufficient" to sustain a cause of action for breach of fiduciary duty. *See Torrey v. Portville Central School*, 66 Misc.3d 1225(A) (Cattaraugus Co., 2020) (an action under the Child Victims Act, where plaintiff alleged that for a two-year period between 1996 and 1998, while she was then a minor and a student at defendant school, she was sexually assaulted and abused by the co-defendant school band teacher. The Court dismissed the breach of fiduciary duty claim find it "no different than the negligence cause of action").

The court finds that the complaint herein fails to plead allegations sufficient to state an independent cause of action for breach of fiduciary duty.

The CVA Meets Dur Process Requirements

"[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.

WHEREFORE it is hereby:

ORDERED that Motion Sequence No 1 is granted to the extent of dismissing the third, fourth, fifth and sixth causes of action as against Central Yeshiva, in addition to that portion of the first cause of action that asserts negligent hiring, and is otherwise denied; and it is further

ORDERED that Motion Sequence No 2 is granted to the extent of dismissing the third, fourth, fifth and sixth causes of action as against Oholei Torah, in addition to that portion of the first cause of action that asserts negligent hiring, and is otherwise denied; and it is further

ORDERED that defendants are 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 on January 29, 2024, at 2:00 PM.

This constitutes the decision and order of the court.

11/3/2023
DATE

HON. SABRINA B. 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