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Plaintiff
Orlando John

Defendant
Camp Stella Maris of Livonia, N.Y. *aka Camp Stella Maris* Larrabee Joseph Edward

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF LIVINGSTON

JOHN ORLANDO,

Plaintiff,

vs.

Index No. 000509-2020

CAMP STELLA MARIS OF LIVONIA, N.Y. A/K/A CAMP STELLA MARIS, and JOSEPH EDWARD LARRABEE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS ON BEHALF OF DEFENDANT CAMP STELLA MARIS

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PRELIMINARY STATEMENT

Named defendant Camp Stella Maris of Livonia, N.Y. a/k/a Camp Stella Maris ("Camp Stella Maris") submits this Memorandum of Law in support of its CPLR 3211(a)(7) Motion to Dismiss plaintiff's Complaint in its entirety. Plaintiff fails to plead facts in support of his stated causes of action and improperly pleads duplicative causes of action.

FACTS

At the times relevant to this action, Camp Stella Maris operated a youth camp located in Livingston County, New York, and was one of the charitable organizations of the Catholic Charities of the Diocese of Rochester ("Catholic Charities"). Catholic Charities is a Special Act Corporation, organized pursuant to Chapter 256 of the Laws of 1917. Through its entire existence, Catholic Charities has operated under the auspices of the Diocese of Rochester. Approximately one year after filing this action, and just before the Child Victims Act filing window expired, plaintiff commenced an identical, separate action against Catholic Charities in Livingston County. (*Orlando v. Catholic Charities of the Diocese of Rochester*, Livingston Co Index No 00694-2021 [Aug 12, 2021]). Catholic Charities has likewise moved to dismiss that action.

Plaintiff alleges he "attended a week-long summer camp at [Camp] Stella Maris" in "approximately 1973 or 1974." (Dkt. 2 at ¶ 9). Plaintiff met his alleged abuser, a seminarian named Joseph Edward Larrabee, through Camp Stella Maris. (*Id.* at ¶¶ 7, 9). Plaintiff alleges that "[o]n at least two occasions during one week in the summer of 1973 or 1974 Joseph Larrabee sexually assaulted, sexually molested, and/or sexually abused [him]." (*Id.* at ¶ 10). Specifically, plaintiff alleges Larrabee sexually abused him at night in his cabin at Camp Stella Maris. (*Id.* at ¶¶ 11-12).

Plaintiff brings four causes of action against Camp Stella Maris, alleging: (1) negligence/gross negligence (*id.* at ¶¶ 37-90); (2) *respondeat superior*/vicarious liability (*id.* at ¶¶ 91-110); (3) negligent hiring, retention, and supervision (*id.* at ¶¶ 111-120); and (4)

negligence/premises liability (*id.* at ¶¶ 121-130). Plaintiff claims he suffered and continues to suffer a number of non-specific physical and mental injuries as a result of the alleged abuse. (*Id.* at ¶¶ 13-15).

ARGUMENT

Although the pleading is to be afforded a liberal construction on a motion to dismiss . . . , the allegations in a complaint cannot be vague and conclusory, and bare legal conclusions will not suffice." (*McFadden v Schneiderman*, 137 AD3d 1618, 1619 [4th Dept 2016] [quotations omitted]; *see also Connaughton v Chipolte Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] ["allegations consisting of bare legal conclusions are not entitled to any such consideration"] [quotation omitted]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton*, 29 NY3d at 142).

I. PLAINTIFF'S FOURTH CAUSE OF ACTION FAILS BECAUSE PLAINTIFF DID NOT ALLEGE A SPECIFIC PRIOR ACT TO PUT CAMP STELLA MARIS ON NOTICE OF LARRABEE'S CLAIMED PROPENSITY TO ABUSE MINORS

In a claim for negligent hiring, retention or supervision, the plaintiff must show "that the employer 'knew or should have known of the employee's propensity for the conduct which caused the injury' prior to the injury's occurrence." (*Ehrens v Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004] [citing *D'Amico v Christie*, 71 NY2d 76, 88 [1987]]). Courts in each of the four appellate departments consistently have recognized the requirement that an employer have *prior and specific knowledge* of an employee's dangerous propensities to state a cause of action for negligent hiring, retention, or supervision. (*A.M. v Holy Resurrection Greek Orthodox Church of Brookville*, 2021 NY App Div LEXIS 131 [1st Dept Jan 12, 2021] [upholding dismissal of plaintiff's negligent hiring, supervision and retention claims where plaintiff was unable to indicate that the parish

defendants had any awareness of the abuser's propensity for sexual violence]; *Doe v New York City Dept. of Educ.*, 126 AD3d 612, 612 [1st Dept 2015] [dismissing negligent supervision claim when plaintiff failed to provide evidence demonstrating school authorities had specific knowledge or notice of sexual abuse or that sexual abuse was foreseeable when the abuser had no prior complaints and no criminal records]; *KM v Fencers Club, Inc.*, 164 AD3d 891, 892 [2d Dept 2018] [same]; *O'Neil v Roman Catholic Diocese of Brooklyn*, 98 AD3d 485, 487 [2d Dept 2012] [holding that actual or constructive knowledge that the priest had sexually abused plaintiff, or was likely to do so, was a necessary element to recover for negligent hiring and supervision causes of action]; *Geywits v Charlotte Val. Cent. Sch. Dist.*, 98 AD3d 804, 805 [3d Dept 2012] [actual or constructive notice of "prior similar conduct" is a prerequisite to school liability]; *Lisa P. v Attica Cent. Sch. Dist.*, 27 AD3d 1080, 1081 [4th Dept 2006] [same]). Not only must the employer have knowledge, that knowledge must be of misconduct "of the same kind that caused the injury; general, unrelated or lesser allegations of prior wrongdoing are insufficient." (*Doe v Abdulaziz Bin Fahd Alsaud*, 12 F Supp 3d 674, 681 [SDNY 2014]).

It is well established that ***factual***, rather than ***conclusory*** allegations, are required to withstand a motion to dismiss. (*Simkin v. Blank*, 19 NY3d 46, 52 [2012] [allegations consisting of bare legal conclusions are not entitled to the presumption of truth on a motion to dismiss]). Applying this standard, negligent hiring, supervision, retention and/or direction claims should be dismissed on a pre-answer motion if the claims are insufficiently pled, and based only on conclusory allegations. (*See Shu Yuan Huang v St. John's Evangelical Lutheran Church*, 129 AD3d 1053 [2d Dept 2015] [granting defendant's motion to dismiss negligent hiring, negligent retention, and negligent supervision claims where the complaint "failed to sufficiently allege that

the defendants knew or should have known of . . . [an employee's] propensity . . . to commit the alleged wrongful acts"]).

In *Herskovitz v Equinox Holdings, Inc.*, the court deemed allegations that defendant "knew or should have known of the employee's propensity to commit injury" to be too conclusory to overcome pre-answer dismissal of a negligent hiring claim. (2013 N.Y. Misc. LEXIS 2371, at *22 [Sup Ct NY Cty June 3, 2013]). Instead, plaintiffs are obligated to allege "facts from which one could infer that defendant knew or should have known of the [alleged abuser's] propensity to commit a lewd act, or that anything transpired before the incident in question to alert defendant to the possibility that such an incident might occur." (*Id.* at *23; *accord Moore Charitable Found. v PJT Partners, Inc.*, 178 AD3d 433 [1st Dept 2019] [upholding pre-answer dismissal when complaint did not allege that "defendants were aware of the facts that plaintiff contends would have put them on notice of employee's criminal propensity"]).

In the Complaint here, plaintiff fails to allege a single ***fact*** that supposedly would have put Camp Stella Maris on notice of Larrabee's claimed propensity to commit sexual abuse against minors.[1] Instead, plaintiff dedicates nearly 15 paragraphs of his Complaint to general allegations asserting the Diocese of Rochester knew "clergy" "were sexually abusing minors." (Dkt. 2 at ¶¶ 17-30). Within those allegations, plaintiff claims Larrabee was removed "from his clerical state" in the 1990's (*id.* at ¶¶ 18-19)—those allegations are of no relevance here because Larrabee's removal occurred long after the abuse at issue in plaintiff's Complaint.

Plaintiff's only allegations directed at Camp Stella's *prior* notice parrot the conclusory language that Camp Stella Maris "knew or . . . should have known" of "Larrabee's dangerous

[1] It is worth noting that the proof will show Camp Stella Maris did not employ the alleged abuser, nor did it have an obligation to supervise the alleged abuser.

propensities." (Dkt. 2 at ¶¶ 45, 113-114). Plaintiff's failure to allege a factual basis for such knowledge, constructive or actual, is fatal to his claims and requires dismissal of the Complaint. (*See, e.g., Falzon v Rockefeller Univ. Hosp.*, 2021 NY Misc LEXIS 6100, at *5 [Sup Ct NY Cty Oct 28, 2021] [dismissing the negligence claims against one defendant because the plaintiffs "fail[ed] to plead facts, rather than conclusions, that [defendant] had the requisite notice, before the alleged abuse occurred, of [the abuser's] propensity for sexual misconduct that would satisfy the foreseeability element of the negligence claims"]).

II. PLAINTIFF'S SECOND CAUSE OF ACTION FOR NEGLIGENCE AND GROSS NEGLIGENCE FAILS TO STATE A VIABLE CLAIM

A. Plaintiff Does Not Allege Any Fact That Would Have Put Camp Stella Maris On Notice Of Larrabee's Claimed Propensity To Commit Sexual Abuse Against Minors

"[I]t is necessary that the person charged with negligence have notice or knowledge of the condition to be held liable." (*White v Long*, 204 AD2d 892, 893 [3d Dept 1994] [quotation omitted]). "[U]nanticipated third-party acts causing injury upon a [plaintiff] will generally not give rise to . . . liability in negligence absent actual or constructive notice of prior similar conduct. It must be established that [the defendant] authorit[y] had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated." (*Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 302 [2010] [quotations omitted]; *D'Amico*, 71 NY2d 76; *see also Taft v Connell*, 285 AD2d 992, 992 [4th Dept 2001] [a defendant landowner's duty to protect a plaintiff on its premises from foreseeable harm caused by third persons is limited to conduct which it had the opportunity to control and *of which it was reasonably aware*]; *Furio v Palm Beach Club*, 204 AD2d 1053, 1054 [4th Dept 1994]).

Like with plaintiff's fourth cause of action for negligent hiring, retention, and supervision, plaintiff's negligence and gross negligence cause of action fails because plaintiff has not pled any

facts to support the allegations that Camp Stella Maris had notice or knowledge of Larrabee's alleged propensity to commit sexual abuse. Plaintiff merely alleges, in conclusory fashion only that Camp Stella Maris "knew" or "should have known" "Larrabee w[as] not safe for children." (Dkt. 2 at ¶¶ 45, 113, 126). Consequently, plaintiff's second cause of action should be dismissed. (*See, e.g.*, *Hale v Holley Cent. Sch. Dist.*, 159 AD3d 1509, 1510-11 [4th Dept 2018] [finding negligence claim based on duty to supervise failed where one student injured another because defendant "did not have sufficiently specific knowledge or notice of the dangerous conduct which caused the injury"] [quotation omitted]; *Nouel v 325 Wadsworth Realty, LLC*, 112 AD3d 493, 494 [1st Dept 2013] [dismissing negligence claim based on premises liability theory "[g]iven defendants' lack of notice" of the abuser's "propensity for [sexual assault]"]; *Geywits v Charlotte Val. cent. Sch. Dist.*, 98 AD3d 804, 805-06 [3d Dept 2012] [finding negligence claim against school based on student-on-student sexual assault failed because school "had no notice of prior similar conduct"]).

B. Camp Stella Maris Cannot Be Held Liable Under The Doctrine Of *Respondeat Superior* Because Sexual Abuse Of A Minor Was Not Within The Scope Of Larrabee's Employment As A Matter Of Law

Although the proof will show that Camp Stella Maris did not employ Larrabee, "[u]nder the doctrine of *respondeat superior*, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2003]). There is no question under the case law that sexual assault is an intentional act, undertaken outside the scope of employment, for wholly personal reasons, and that as a matter of law, the employer cannot be liable on a theory of *respondeat superior*. (*Id.* ["A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of

employment, having been committed for wholly personal motives"]; *see also Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999] [hospital was not vicariously liable for plaintiff's sexual abuse by an orderly when, while performing the assigned task of bathing plaintiff, the orderly sexually assaulted her]; *Mazzarella v Syracuse Diocese*, 100 AD3d 1384, 1385 [4th Dept 2012] ["It is well settled in New York that sexual abuse by clergy is not within the scope or furtherance of the employment."]). In *Torrey v Portville Cent. Sch.*, this Court dismissed a similar cause of action because "[s]exual abuse is a clear departure from scope of employment, 'committed solely for personal reasons, and unrelated to the furtherance of his employer's business.'" (2020 NY Misc LEXIS 748, at *4-5 [Sup Ct Cattaraugus Co, Feb 21, 2020] [Chimes, J.] [citing *Doe v Rohan*, 17 AD3d 509, 512 [2d Dept 2005]]).

Here, plaintiff alleges Larrabee was "employed by . . . [Camp] Stella Maris" (dkt. 2 at ¶¶ 7, 16, 92) and that the "acts . . . of Larrabee were done in the course and scope of his employment . . . for [Camp] Stella Maris" (*id.* at ¶¶ 16, 104, 107). Just as in *Torrey* (2020 NY Misc LEXIS 748, at *4-5), here, on the alleged facts and as a matter of law, sexual assault cannot reasonably be construed as an action taken within the scope of employment and Camp Stella Maris cannot be liable under a theory of vicarious liability. Plaintiff's second cause of action must be dismissed.

III. PLAINTIFF'S THIRD AND FIFTH CAUSES OF ACTION MUST BE DISMISSED

Plaintiff's third cause of action for *respondeat superior*/vicarious liability must be dismissed because "[r]espondeat superior is a legal principle, not an independent cause of action[;] [it is] a theory that must attach to an underlying claim." (*Palmieri v Perry, Van Etten, Rozanski & Prima Vera, LLP*, 2017 NY Misc LEXIS 5174, at *12 [Sup Ct Suffolk Co Dec 7, 2017]; *Alexander v Westbury Union Free Sch. Dist.*, 829 F Supp 2d 89, 112 [EDNY 2011] ["[r]espondeat superior is not an independent cause of action, but a theory that must attach to an underlying claim"]).

Plaintiff's *respondeat superior* theory is subsumed by his negligence causes of action[2] and his independent cause of action for same must be dismissed.

Likewise, plaintiff's fifth cause of action for premises liability must be dismissed because it is duplicative of plaintiff's second and fourth causes of action sounding in negligence. Where "[t]he conduct complained of in [plaintiff's] cause[] of action for premises liability . . . falls entirely within the scope of plaintiff's separate causes of action for negligence, negligent supervision and negligent retention," it "must be dismissed as duplicative." (*Fay v Troy City Sch. Dist.*, 197 AD3d 1423, 1424 [3d Dept 2021]). Here, each of plaintiff's causes of action are based on his allegation that he was sexually abused and Camp Stella Maris was in some way negligent in failing to prevent that abuse. (*See generally* Dkt. 2). As such, plaintiff's fifth cause of action must be dismissed as duplicative of his negligence causes of action. (*See, e.g.*, *Fay*, 197 AD3d at 1424; *Nouel*, 112 AD3d at 494 [dismissing premises liability claim as duplicative of negligent hiring, retention, and supervision claims]; *PB-36 v Niagara Falls City Sch. Dist.*, 72 Misc 3d 1052, 1056 [Sup Ct Niagara Co] [Chimes, J.] [dismissing premises liability cause of action as "duplicative of the negligence causes of action"]).

CONCLUSION

For the reasons set forth above, plaintiff's Complaint should be dismissed pursuant to CPLR 3211(a)(7).

Dated: June 12, 2022

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[2] As noted immediately above, plaintiff cannot succeed on a *respondeat superior* theory.

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To: All Counsel of Record (*via* NYSCEF)

I hereby certify that this Memorandum contains 2,562 words, not including the cover page, tables of contents and authorities, or signature block.

s/ Eric J. Ward
Eric. J. Ward