Vermont Superior Court
Filed 04/01/21
Caledonia Unit

STATE OF VERMONT

SUPERIOR COURT | **CIVIL DIVISION**
Caledonia Unit | **Docket No. 82-5-20 Cacv**

AARON BIHARI,
Plaintiff,
v.

FILED UNDER SEAL

SHAMBHALA USA and JOHN WEBER,
Defendants

DECISION
Defendant's Motion to Dismiss: Non-constitutional Grounds

The matter before the court is Defendant Shambhala USA's Motion to Dismiss the claims brought by Plaintiff Aaron Bihari. Plaintiff filed his Complaint against both Shambhala USA and John Weber, alleging three causes of action related to childhood sexual assault. Defendant Shambhala requests dismissal of all three counts pursuant to V.R.C.P. Rule 12(b)(6) in a motion that was not joined by Defendant Weber. Plaintiff is represented by Attorney Eric G. Parker, Attorney Thomas C. Nuovo, and Attorney Brenda J. Luciano. Defendant Shambhala is represented by Attorney Tristram J. Coffin and Attorney Evan J. O'Brien.

Defendant Shambhala requests dismissal of Plaintiff's Complaint on both constitutional and non-constitutional grounds. This decision considers only the non-constitutional grounds for dismissal. Shambhala has challenged the constitutionality of 12 V.S.A. § 522(d), which authorizes civil actions for childhood sexual abuse irrespective of whether such claims were time-barred under prior statutes of limitations. This constitutional challenge implicates Rule 24(d) of the Vermont Rules of Civil Procedure, which requires the court to notify the Attorney General and "permit the State of Vermont to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality." V.R.C.P. Rule 24(d). As explained in the August 6 and September 9, 2020 entry orders, the court determined to address the non-constitutional grounds first before notifying the Attorney General.

Shambhala briefed both the constitutional and non-constitutional grounds in its Motion to Dismiss (filed July 16, 2020) and Reply in Support of Motion to Dismiss (filed September 28, 2020). Plaintiff submitted separate Oppositions to Defendant Shambhala USA's Motion to Dismiss for the constitutional and non-constitutional grounds (both filed August 31, 2020). Because the court rules only on the non-constitutional grounds for dismissal in this decision, the file and all related filings shall remain under seal in accordance with 12 V.S.A. § 522(b) and the court's June 22, 2020 entry order until the court has also ruled on the constitutional grounds for dismissal. 12 V.S.A. § 522(b) ("[t]he complaint shall remain sealed until the answer is served or, if the defendant files a motion to dismiss . . . until the court rules on that motion. If the complaint is dismissed, the complaint and any related papers or pleadings shall remain sealed").

For the purposes of this motion, the court assumes all factual allegations pleaded in the Complaint are true. *Dernier v. Mortgage Network, Inc.*, 2013 VT 96, ¶ 23, 195 Vt. 113, 121

(2013). Plaintiff is a resident of Ottawa, Canada and Defendant Shambhala USA is a Vermont registered foreign corporation with a principal place of business in Barnet, Vermont. Shambhala is a religious organization with roots in Buddhism that operates in approximately 30 U.S. States and 50 countries. Shambhala owns an approximately 700-acre plot of land in Barnet where the Karme Choling Meditation Center is located. Some of the organization's activities include running teaching facilities, workshops, and retreats.

Plaintiff brings the first of his three counts in the Complaint against both John Weber and Shambhala and focuses the second and third on Shambhala. In Count I for child sexual abuse, Plaintiff claims that John Weber sexually abused him as a fifteen-year-old minor while Weber was a staff member at Karme Choling, and that the abuse Plaintiff suffered was directly caused by Shambhala's grossly negligent breach of duty. In Count II, Plaintiff alleges that Shambhala's activities amount to public and private nuisance. Count III is a cause of action for gross negligent supervision of Weber, including training, retention, and overall direction on the part of Shambhala.

Analysis

Shambhala seeks dismissal of all three of the claims in the Complaint. Dismissal of a claim pursuant to Rule 12(b)(6) may occur only when "it is beyond a doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Dernier*, 2013 VT 96, ¶ 23. The general pleading standard on a motion to dismiss is "exceedingly low," *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576, as "[t]he purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." *Powers v. Off. of Child Support*, 173 Vt. 390, 395 (2002). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1, 6. "We assume that all factual allegations pleaded in the complaint are true" and "accept as true all reasonable inferences that may be derived from plaintiffs pleadings." *Dernier*, 2013 VT 96, ¶ 23.

A. Counts I and III

Defendant Shambhala asserts the same non-constitutional grounds for dismissal of both Count I and Count III. Shambhala does not distinguish between the claims, explaining that "[i]nsofar as Shambhala can only be held liable (if at all) for childhood sexual abuse based on a finding of 'gross negligence,' these two counts should be accorded the same analysis." Mot. to Dismiss at 20 n.9 (filed July 16, 2020). Shambhala argues that both counts should be dismissed for failure to state a claim because the Complaint fails to allege facts that could support a finding of gross negligence on its part.

The civil statute for actions based on childhood sexual abuse, 12 V.S.A. § 522, authorizes damages against a third-party that is "an entity that employed, supervised, or had responsibility for the person allegedly committing the sexual abuse" and as long as "there is a finding of gross negligence on the part of the entity." 12 V.S.A. § 522(d). The claims "may be commenced at any time after the act alleged to have caused the injury or condition." 12 V.S.A. § 522(a). Count I, seeking damages for the abuse itself, and Count III, seeking damages for supervision negligence leading to the abuse, are both within the statute because of the way the Vermont Supreme Court has defined "childhood sexual abuse." While negligent supervision is generally its own "distinct type of liability," *Brueckner v. Norwich University*, 169 Vt. 118, 126

(1999), the scope of the word "act" in § 522 includes sexual abuse as well as related third-party negligence. *Earle v. State*, 170 Vt. 183, 188 (1999) ("In *Sabia v. State*, we clarified that the word 'act' in this context should not be interpreted to refer solely to the alleged act of sexual abuse but could refer also to the alleged act of negligence by a third party").

The factual allegations in the Complaint include the way in which John Weber sexually abused Plaintiff, the circumstances in Shambhala's control surrounding the abuse, and Shambhala's organizational culture. The incident is alleged to have occurred in 1983 at Shambhala's Karme Choling center in Barnet, VT when Plaintiff was fifteen years old, and John Weber was over the age of nineteen. Compl. ¶¶ 35, 44. Plaintiff, living with his mother in New York at the time, alleges that he came to Karme Choling to participate in a solitary retreat during his spring break and arrived the day before his retreat was scheduled to begin. *Id.* ¶¶ 35 – 36. Though the day he arrived was a day off for staff members and he had not yet been assigned a place to sleep, he was offered the opportunity to stay the night by two adult staff members while attending a party at which many of the staff were "abusing alcohol." *Id.* ¶¶ 37 – 39. Weber was one of the staff members who invited him to stay in his room for the night, which was a small student loft with only one bed. *Id.* ¶¶ 37 – 39. Plaintiff alleges that Weber sexually abused him while spending the night in his room:

> Aaron recalls that as he was getting into the bed, Weber reached around and touched Aaron's penis, making skin to skin contact. Weber then grabbed Aaron's hand and placed it on Weber's penis. Aaron was in total shock and told him 'no' and pulled his hand away.
>
> Still in shock, and not really knowing what to think, and with no other sleeping accommodations for the night, Aaron remained in the room and in bed with Weber.
>
> As Aaron was lying in bed trying to go to sleep, Weber then suddenly grabbed him from behind, placed his hands over Aaron's shoulders and around his hips. Then Aaron recalls that he blacked out for a period of time. When Aaron came to, he observed semen everywhere, including on his own stomach. His anus also hurt and it felt warm and wet.

Id. ¶¶ 40 – 42.

Plaintiff alleges that the next time he saw Weber, a couple of years later in the summer of 1985, Weber was working as a guard for a member of Shambhala leadership. Significantly, Plaintiff alleges to have learned at that time that

> it had been widely known in the Shambhala community that Weber engaged in prior sexual acts with minors, while serving as a staff member for the Shambhala organization. During and exchange with a fellow participant in the training program, Aaron was told not to go near a room with Weber alone.

Id. ¶ 47.

Plaintiff contextualizes the abuse he alleges inside a larger culture of sexual abuse perpetuated by Shambhala leadership and staff. In the "background" section of the Complaint, Plaintiff describes "alcohol-fueled" parties that included minors, unaccompanied by their parents and without sleeping arrangements until late in the evening, as part of the community culture.

Id. ¶ 20. Plaintiff also alleges that abuses within the Shambhala community have been the subject of three reports as well as a Facebook post from Shambhala's Kalapa Leadership Council in February of 2018 which acknowledged a failure to properly address reports of abuse and efforts to suppress them. This account of Shambhala's treatment of reports of sexual abuse aligns with Plaintiff's allegations about being encouraged not to go to the police in 2003 and to have a "meditation meeting" with Weber instead. *Id.* ¶ 49.

Duty

Relying on the requirement that Plaintiff must be able to establish gross negligence in order to bring Count I and Count III under 12 V.S.A. § 522, Defendant first argues that Plaintiff has failed to adequately plead the existence of duty. See *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses*, 95 F. Supp. 3d 762, 766 (D. Vt. 2015) ("To hold a defendant liable for negligence, a plaintiff must establish the defendant owed her a particular duty of care, it breached that duty of care, and the breach harmed the plaintiff"). [1]

Duty to control; special relationship (Restatement §§ 317, 319).

While there is generally "no duty to control the conduct of another to protect a third person from harm," duty may exist if there is a "special relationship between two persons which gives one control over the actions of another." *Id.* at 768. While foreseeability alone does not establish a duty to control, it can be a "key consideration" in the analysis of duty. *Kennedy v. Roman Catholic Diocese of Burlington, Vermont, Inc.*, 921 F. Supp. 231, 234 (D. Vt. 1996).

A special relationship can create a duty on the part of one defendant to control the other under Sections 317 and 319 of the Restatement (Second) of Torts in an employment context "'where an off-duty employee's negligent acts occurred on the master's premises or while using his chattels' or 'where the employer voluntarily and knowingly assumes a duty of control.'" *Lewis*, 95 F. Supp. 3d at 768 (quoting *Poplaski v. Lamphere*, 152 Vt. 251, 257 – 258 (1989)). There was a special relationship between John Weber and Shambhala placing Weber under Shambhala's control by virtue of being a resident staff member for Shambhala at Karme Choling. Although he was off-duty at the time of the party, he used Shambhala's property after the staff party, when he invited Plaintiff to stay in his room which was where the incident allegedly occurred. Shambhala was under a duty to exercise reasonable care to control Weber to prevent him from causing harm to another if Shambhala 'knew or should have known' of the need for exercising such control. Restatement (Second) of Torts §§ 317, 319. Shambhala knew or should have known that unaccompanied minors attended its retreats.

Duty to protect; special relationship (Restatement § 324).

Another type of special relationship arises when one "take[s] charge of helpless persons, even when they are not required to do so," creating a duty to protect under Section 324 of the Restatement (Second) of Torts. *Sabia v. State*, 164 Vt. 293, 304 (1995); *Lewis*, 95 F. Supp. 3d at 768 – 769. Section 324 imposes liability on an actor who takes charge of a person in need of aid,

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[1] The court does not suggest that the grounds identified in the following discussion are the only grounds that could be shown to give rise to a duty, nor was it necessary for the purposes of responding to the Motion to Dismiss to consider all of Plaintiff's arguments for imposing a duty on Defendant Shambhala.

such as a minor, for "failure to exercise reasonable care to secure the safety of the other while within the actor's charge." Restatement (Second) of Torts § 324. *Id.* at cmt. b ("[i]t applies also to one who takes charge of another who by reason of his youth is incapable of caring for himself"). Shambhala voluntarily assumed a duty to protect Plaintiff when he arrived from out of state on the premises as a minor, without his parents and with no place to stay, prior to the start of his retreat.

Duty of supervision.

Shambhala is also subject to a duty, relevant to Count III, by virtue of its role as a principal "conducting an activity through servants or other agents" as defined by Section 213 of the Restatement (Second) of Agency. *Lewis*, 95 F. Supp. 3d at 767 ("[i]n Vermont, a claim of negligent supervision is based on the Restatement (Second) of Agency § 213"). The duties related to supervision under Section 213 include exercising due care in relation to employing and retaining employees, giving directions to agents, and preventing negligent conduct on property in the principal's control. Restatement (Second) of Agency § 213. See e.g., *Id.* at cmt. c ("the directions may be negligent because the principal does not anticipate circumstances which he should realize are likely to arise"); *id.* at cmt. d ("[t]he principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him").

Shambhala claims that the Complaint does not support the duty element of negligence because Plaintiff does not sufficiently allege that Shambhala knew or should have known of Weber's alleged propensity for wrongful sexual activity prior to the incident in 1983. Even taking paragraph 47 of the Complaint as true, Shambhala argues that it at most establishes that a "fellow participant in the training program" knew about Weber's prior alleged acts and only that the acts occurred prior to the summer of 1985, not necessarily prior to the incident in 1983. However, while Plaintiff will eventually need to provide more specificity, the purpose of a complaint is to "initiate the cause of action, not to prove the merits of the plaintiff's case." *Colby*, 2008 VT 20, ¶ 13. It can be reasonably inferred that if it was "widely known" that John Weber had engaged in prior sexual acts with minors, then Shambhala leadership also either knew or should have known. The inference is also supported by Plaintiff's allegations about Shambhala's larger culture of abuse and efforts to discourage reporting. Additionally, nothing about the way Plaintiff allegedly learned this information in the summer of 1985 restricts the allegation from referring to a time prior to the 1983 incident.

It is not beyond a doubt that there are no facts or circumstances that Plaintiff could prove to establish that Shambhala knew or should have known that Weber posed a foreseeable danger to minors. See *Sutton v. Vermont Regional Center*, 2019 VT 71A, ¶ 20. Plaintiff has sufficiently alleged that the harm caused by Weber was foreseeable and that Shambala had a special relationship with Plaintiff, and consequently that Shambhala was subject to a duty to control Weber, a duty to protect Plaintiff, and a duty to supervise.

<u>Gross Negligence</u>

The second prong of Shambhala's argument for dismissing Counts I and III is that, even assuming Plaintiff has adequately plead the existence of duty, Plaintiff's allegations fail to satisfy the legal standard for gross negligence. In order for conduct to amount to gross negligence, it must be "more than an error of judgment, momentary inattention, or loss of presence of mind."

Rivard v. Roy, 124 Vt. 32, 35, 196 A.2d 497, 500 (1963). Gross negligence "amounts to a failure to exercise even a slight degree of care and an indifference to the duty owed [to another]." *Hardingham v. United Counseling Service of Bennington Cty., Inc.*, 164 Vt. 478, 481 (1995). "The existence of such negligence in a case turns almost entirely on its own peculiar factual situation" and is generally a question of fact for the jury. *Rivard* 124 Vt. at 35. Consequently, "an allegation of gross negligence may be dismissed by the court only if reasonable minds cannot differ." *Kennery v. State*, 2011 VT 121, ¶ 41, 191 Vt. 44, 64.

Shambhala claims that there are no facts evincing an extraordinarily high lack of care, arguing that any failure to provide a separate room for Plaintiff was not more than an error in judgment. Shambhala also argues that allegations about a drinking culture are not connected to the abuse Plaintiff describes, as Plaintiff does not allege that the staff provided alcohol to him or that he consumed any. However, whether conduct amounts to gross negligence can depend on the surrounding circumstances. See *State v. Carlin*, 2010 VT 79, ¶ 9, 188 Vt. 602, 604 ("[a]lthough a driver's momentary inattention, by itself, is insufficient to warrant a finding of gross negligence, if that inattention occurs in a place where there is great potential for immediate danger, it may be enough to allow a jury to find gross negligence"). The alcohol use by the adults at the staff party Plaintiff attended, the fact that they did not secure a safe place for him to sleep and allowed him to share a single bed with an adult, and the allegations of a context of a larger culture of drinking and sexual activity inside Shambhala, might be considered by reasonable minds as contributing to the severity of Shambhala's negligence.

It would be reasonable to expect Shambhala to anticipate that participants could arrive early for their scheduled retreats and to have a process for dealing with those who do, especially considering that the retreat was open to minors such as Plaintiff. Not only was it foreseeable that staff members would throw an alcohol-fueled party on a day off when doing so was common in the Shambhala community, but it was foreseeable that a minor would be placed in a vulnerable position at such a party without anywhere else to go. Shambhala's failure to appropriately accommodate Plaintiff directly exposed him to the "widely known" harm that Weber posed.

The allegations in the Complaint amount to an extreme lack of care in the context of the foreseeable risks. Reasonable minds could find gross negligence based on the allegations. Shambala has not shown grounds for dismissal of Count I or Count III on Shambhala's non-constitutional arguments.

B. Count II

In Count II, Plaintiff pleads both private and public nuisance on the basis that Shambhala has taken, and continues to engage in, affirmative actions to conceal information about child sexual abuse within the organization along with shaming victims and suppressing reporting of abuse. Compl. ¶ 55. Plaintiff claims that such "predatory tendencies" and "affirmative concealment" amount to grossly negligent and unreasonable interference with the "right and comfortable enjoyment of life common to the general public" as well as specifically injuring Plaintiff's health and mental well-being. *Id.* ¶¶ 56 – 57. While the court acknowledges the seriousness of these allegations, the claims must be dismissed as Plaintiff has failed to show how they fall within the scope of either private or public nuisance.

Private nuisance is "an interference with the use and enjoyment of another's property that is both unreasonable and substantial." *Myrick v. Peck Electric Co.*, 2017 VT 4, ¶ 4, 204 Vt. 128,

131, 164 A.3d 658, 661 (2017) (internal quotations removed). It necessarily concerns the "use and enjoyment of land," Restatement (Second) of Torts § 821D, not property in the more general sense as Plaintiff implies in the Opposition. *Post & Beam Equities Group, LLC v. Sunne Village Development Property Owners Association*, 2015 VT 60, ¶ 24, 199 Vt. 313, 326, 124 A.3d 454, 465 (2015) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land"). Plaintiff does not make any allegations that pertain to an interest in land at any point in the Complaint.

Public nuisance is not predicated on an interference with land, but Plaintiff's allegations still cannot support the claim. See Restatement (Second) of Torts § 821B cmt. h ("[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land"). For conduct to be a public nuisance, it "must impact a right common to the general public." *State v. Howe Cleaners, Inc.*, 2010 VT 70, ¶ 48, 188 Vt. 303, 330 (2010). "There must be some interference with a public right. A public right is one common to all members of the general public." Restatement (Second) of Torts § 821B cmt. g. See also, Dobbs' Law of Torts § 403 (2d ed.) ("[A] public nuisance is actionable under the common law only if the plaintiff's enjoyment of a public right is diminished and her injury differs in kind from injury to the general public").

Plaintiff has not alleged a right common to the general public that is within the meaning of public nuisance law. The public right that Plaintiff appears to have identified as the basis for this claim is the "comfortable enjoyment of life," which Shambhala has allegedly interfered with through concealment and victim shaming. However, the "comfortable enjoyment of life" is little more than a restatement of the public nuisance standard. See *Napro Dev. Corp. v. Town of Berlin*, 135 Vt. 353, 357 (1977) ("to be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest").

Even assuming that this identification is sufficient or that the right includes public safety, neither the "comfortable enjoyment of life" nor public safety in this context fall within the scope of a public nuisance. The type of public right implicated in conduct amounting to a public nuisance is "collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." Restatement (Second) of Torts § 821B cmt. g. See also, *Hagan v. City of Barre*, No. 320-5-09WNCV, 2009 WL 6551407 (Vt. Super. June 29, 2009) ("[a]s the Restatement points out, however, within the arena of the public nuisance doctrine the right 'not to be assaulted' is an 'individual right' as opposed to a 'public right'"). "The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way." *State v. Lead Industries, Association, Inc.*, 951 A.2d 428, 453 (R.I. 2008). Plaintiff's claims are grounded in interference with individual rights and have individual emotional and physical consequences. Regardless of the number of people impacted, individual rights do not become public rights simply because they are aggregated. *Id*. at 488 ("[a]s the Restatement (Second) makes clear, a public right is more than an aggregate of private rights by a large number of injured people").

As Shambhala argues, the only case law Plaintiff cites as legal support for his public nuisance argument is a comparable case in which the New York Supreme Court, Appellate Division dismissed a public nuisance claim for failure to "allege an interference with rights belonging to the general public." *Monaghan v. Roman Catholic Diocese of Rockville Ctr.*, 165 A.D.3d 650, 654, 85 N.Y.S.3d 475 (2018). Considering similar claims regarding the failure to

disclose the names of clergy who had been accused of sexually assaulting children, the Court determined that "the complaint failed to identify any cognizable right common to all members of the general public that the Diocese has interfered with" and that the complaint does not allege that the Diocese violated any laws in failing to disclose the information "or that the Diocese violated any legal duty to report such accusations to appropriate authorities." *Id.* at 653. While Plaintiff argues in his response to the Motion to Dismiss that Shambhala would be subject to a legal duty under 33 V.S.A. § 4913 to report sexual abuse, and further argues that the law reflects a public policy purpose of protecting children and the public, Plaintiff does not explain whether or how this law could apply to Shambhala, or why protecting children should be considered an indivisible resource shared by the public at large sufficient to support a public nuisance action.

Without facts to support an interference with land or a right common to the general public, Plaintiff has not sufficiently alleged either private or public nuisance and the court does not need to consider the question of timeliness. Count II of Plaintiff's Complaint is dismissed.

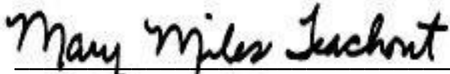
Order

For the foregoing reasons, Defendant's Motion to Dismiss is granted in part and denied in part. The court grants the Motion as it pertains to Count II and denies the Motion as it pertains to the non-constitutional grounds for dismissal of Count I and Count III.

Because all claims have not been dismissed on non-constitutional grounds, Shambala's constitutional challenge to Claims I and III remains pending, and the court is required by V.R.C.P. Rule 24(d) to notify the Attorney General and provide an opportunity to permit intervention. The court will do so on April 15, 2021. The attorneys are invited to prepare a stipulated form of notice for the court to issue.

Pursuant to 12 V.S.A. § 522(b), since portions of the Motion to Dismiss remain pending, the case file remains sealed.

Electronically signed pursuant to V.R.E.F. 9(d) on March 31, 2021 at 4:57 PM.



Mary Miles Teachout
Superior Court Judge