

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 05/26/2017

TIME: 10:00:00 AM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack

CLERK: Terry Ray

REPORTER/ERM: R Jerrod Jones CSR# 11750

BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2012-00099849-CU-PO-CTL** CASE INIT.DATE: 06/29/2012

CASE TITLE: **Lopez vs. Doe 1 Linda Vista Church [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Summary Judgment / Summary Adjudication (Civil)

MOVING PARTY: Watchtower Bible and Tract Society of New York Inc

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication, 01/27/2017

EVENT TYPE: Civil Case Management Conference

APPEARANCES

Devin M Storey, counsel, present for Respondent on Appeal,Plaintiff(s).

Francis J McNamara, counsel, present for Defendant(s).

Dean A. Olson, specially appearing for counsel Beth A Kahn, present for Defendant,Appellant,Plaintiff(s).

Dean A. Olson, counsel, present for Watchtower Bible and Tract Society of New York, Inc., Defendant.

The Court orally advises the parties of its tentative ruling, after which oral argument is conducted. Upon completion of oral argument, the court makes the below ruling:

I.

INTRODUCTION

This is a bifurcated motion for summary judgment, or in the alternative, motion for summary adjudication, brought by defendant Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") to an action filed by plaintiff Jose Lopez ("Lopez"). Pursuant to previous court order, the issues addressed in this phase of the motion are limited to retraxit, collateral estoppel, judicial estoppel and ratification.

II.

APPLICABLE LAW

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"Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc. §437c, subd. (c).) Where the defendant is the moving party, it must show that a cause of action has no merit by putting forth evidence that either one or more elements of the cause of action, even if separately pleaded, cannot be established or that a complete defense exists thereto. (Code of Civ. Proc. §437c, subds. (o) & (p)(2); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*.) If the defendant meets this burden, the burden shifts to the plaintiff to establish that a triable issue of material fact exists. (Code Civ. Proc., §437c, subd. (p)(2); *Saelzler*, at p. 768.)" *County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 467.

To defeat a motion for summary judgment, the opposing party must produce evidence showing at least one triable issue of material fact. CCP §437c(c). The opposition papers need not prove the opposing party's case; they only need to disclose the existence of a triable issue. *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 752-753. For a summary judgment motion to be successful, the evidence must leave no room for conflicting inferences as to material facts. *Calvillo-Silva v. Home Grocery* (1988) 19 Cal.4th 714, 735. The trial judge may not weigh the opposing party's evidence or inferences against those of a moving party, as though the judge were sitting as the trier-of-fact. If the judge concludes the opposing party's evidence or inferences raise a triable issue of fact, the judge must deny the motion. 2 California Judges Benchbook: Civil Proceedings Before Trial (Second Edition 2008), §13.52, p. 159; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.

"In order to establish entitlement to summary adjudication, the moving party must establish that the cause of action is without merit by negating an essential element or by establishing a complete defense (§437c, subd. (f); *City of Emeryville v. Superior Court* (1991) 2 Cal.App.4th 21 [2 Cal.Rptr.2d 826].) A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment." *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 324.

III.

ANALYSIS

a. Retraxit/Collateral Estoppel/Judicial Estoppel

Watchtower's retraxit/collateral estoppel/judicial estoppel argument is based on the premise that Lopez voluntarily dismissed former defendant Linda Vista Spanish Congregation of Jehovah's Witnesses ("Congregation") with prejudice, thereby constituting a retraxit, which is a judgment on the merits in favor of the dismissed party which can be asserted by Watchtower through the doctrine of collateral estoppel. See *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Company of America* (2005) 133 Cal.App.4th 1319, 1330 – 1331; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820-823. As such, Watchtower argues, it can have no respondeat superior liability as to any alleged acts or omissions of Congregation.

Watchtower's analysis, while superficially appealing, is flawed, inasmuch it ignores the fact that the dismissal of Congregation was given in good faith pursuant to a settlement --- Congregation agreed to forego costs of more than \$120,000 unless and until Lopez obtained a recovery against Watchtower in exchange for the dismissal with prejudice. Pursuant to CCP §877(a), such a dismissal, including a dismissal with prejudice, "shall not discharge any other such party [Watchtower] from liability unless its terms so provide ..." See also *Ritter v. Technicolor Corp.* (1972) 27 Cal.App.3s 152, 153 ("By California

statute [CCP §877], release of an agent [Congregation] before trial does not discharge his principal [Watchtower] from tort liability, even though the sole basis alleged for recovery from the principal [Watchtower] is vicarious liability for the acts of his agent. [Congregation]").

Accordingly, Watchtower's motion based upon retraxit, collateral estoppel and judicial estoppel is denied.

b. Ratification

Paragraph 9.2 of the first amended complaint alleges ratification:

"Although Defendant Supervisory Organization [Watchtower] was aware through its agents – the Elders of Defendant Linda Vista and La Jolla Spanish Congregation of Jehovah's Witnesses – prior to appointing the Perpetrator [Campos] as a Ministerial Servant in 1988 and an Elder in 1993, that Perpetrator had sexually molested multiple children, the Perpetrator was retained and promoted to more senior leadership positions as an agent of Defendant Supervisory Organization [Watchtower]. By retaining and promoting Perpetrator [Campos] after learning of his past sexual abuse of children, Defendant Supervisory Organization [Watchtower] ratified and authorized Perpetrator's conduct."

Citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) 132 S. Ct. 694, Watchtower argues that, as a religious organization, it has a First Amendment right to control the selection of its own leaders and, therefore, cannot be sued under a theory of ratification premised on Campos' appointment, retention and promoting.

This court believes that Watchtower's interpretation of the *Hosanna-Tabor* decision is overly broad. As the U.S. Supreme Court, itself, noted, the holding in that case was limited to an employment discrimination suit brought on behalf of a minister against her own church:

"The case before us is an employment discrimination suit on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."

(*Id.*, at p. 710.)

Our own *Lopez* court rejected plaintiff's First Amendment contention recognizing that while the ministerial exception may bar an employment action by a clergy member against his religious institution, such would not preclude a third party action against a religious organization for the tortious conduct of its agents:

"...Watchtower relies on a line of cases applying the ministerial privilege doctrine, a constitutionally based rule that exempts religious organizations from liability arising from employment-related claims by a religious figure. [Citations omitted.] This doctrine is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, is an inherently religious function because clergy are such an integral part of the church's functioning as a religious institution. [Citations omitted.] This rule is not applicable here. The ministerial exception applies to barring action by a clergy member against a religious institution. [Citation omitted.] Watchtower has not cited, nor are we aware of, any decisions extending this rule to

preclude a third party action against a religious organization for the tortious conduct of its agents. And the law appears to be to the contrary."

Lopez v. Watchtower Bible and Tract Society of New York, Inc. (2016) 246 Cal.App.4th 566, 599.

Watchtower's argument proves too much. If a religious entity could never be sued for its selection of its religious leaders, then it could never be sued for negligent hiring even if, for example, it hired a known pedophile that would inevitably molest congregational members. Thus, that the issue comes before this court in the setting of an alleged post-abuse ratification as opposed to a pre-abuse hiring decision is a red herring. If one accepts Watchtower's argument, then any claimed negligent hiring *not* involving post-abuse ratification would also be barred. However, California law has already recognized that a church can be sued for negligent hiring. See, e.g., *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828 (church can be sued for negligent hiring of pastor who subsequently molests 13-year-old boy).

This court notes that in the *Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591, our appellate court tacitly recognized the viability of a negligent hiring action against a church for the church's hiring or retention of a clergyman based upon the legal theory of negligent hiring/retention by specifically setting forth the elements that Lopez would need to prove "to prevail on his negligent hiring/retention claim":

Lopez brought several claims against Watchtower, including negligent hiring, supervising and retaining Campos, and failure to warn. To prevail on his negligent hiring/retention claim, Lopez will be required to prove Campos was Watchtower's agent and Watchtower knew or had reason to believe Campos was likely to engage in sexual abuse.

Watchtower's motion as to ratification is denied.

IV.

CONCLUSION

Watchtower's motion as to retraxit, collateral estoppel, judicial estoppel and ratification is denied.

V.

OTHER

a. Court continues CMC to 9/15/17 at 10:00 a.m.

b. Court confirms hearing on Watchtower's phase II motion for summary judgment, limited to the issues of statute of limitations, proximate cause and failure to warn, train and/or educate, for September 15, 2017, at 10:00 a.m.

c. Phase II discovery production due date remains officially June 15, 2017, with the expectation of reasonable periodic rolling productions through August 1, 2017.

Summary Judgment / Summary Adjudication (Civil) is continued to 09/15/2017 at 10:00AM before Judge Gregory W Pollack.

Civil Case Management Conference is continued to 09/15/2017 at 10:00AM before Judge Gregory W Pollack.