S.H. v Diocese of Brooklyn
2020 NY Slip Op 32648(U)
August 14, 2020
Supreme Court, Kings County
Docket Number: 517999/2019
Judge: George J. Silver
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Index No. 517999/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
---X
S.H.,

Index №. 517999/2019

Plaintiff,

-against-

DIOCESE OF BROOKLYN

Defendant
---X

HON. GEORGE J. SILVER:

With the instant motion defendant DIOCESE OF BROOKLYN ("defendant") moves, pursuant to CPLR §§202, 3211(a)(1) and 3211(a)(5), for dismissal of plaintiff S.H.'s ("plaintiff") amended complaint in its entirety, with prejudice.[1] Plaintiff opposes the motion.

BACKGROUND AND ARGUMENTS

Plaintiff commenced this action under New York State's Child Victims Act (L. 2019 c.11) ("CVA") which, *inter alia*, (1) extends the statute of limitations on criminal cases involving certain sex offenses against children under 18 (*see* CPL §30.10[f]); (2) extends the time which civil actions based upon such criminal conduct may be brought until the child victim reaches 55 years old (*see* CPLR §208 [b]); and (3) opens a one-year window reviving civil actions for which the statute of limitations has already run (even in cases that were litigated and dismissed on limitations grounds), commencing six months after the effective date of the measure, i.e. August 14, 2019 (*see* CPLR §214-g).[2] However, unlike most CVA lawsuits that are predicated upon alleged conduct that occurred within the state of New York, here plaintiff's lawsuit is grounded in claims that arose outside of New York. To be sure, plaintiff is seeking to recover against defendant based on negligence that accrued nearly forty years ago—in Florida.

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[1] The parties submitted one set of opening motion papers, one set of opposition papers, and one set of reply papers in connection with this matter to cover similar motions filed in the following actions: *C.O. v. Diocese of Brooklyn*, Index 500013/2020 (Sup. Ct. Kings Cty); *E.F. v. Diocese of Brooklyn*, Index 528187/2019 (Sup. Ct. Kings Cty); *E.F. v. Diocese of Brooklyn*, Index 507952/2020 (Sup. Ct. Kings Cty); and *R.F v. Diocese of Brooklyn*, Index 513803/2020 (Sup. Ct. Kings Cty). The parties stipulated that the court's rulings in this matter (inclusive of appellate disposition) would govern in all of the coordinated motion actions.

[2] Due to the COVID-19 public health emergency, on May 8, 2010, New York Governor Andrew Cuomo ("Governor Cuomo") issued an executive order extending the look back window for victims to file claims under the Child Victims Act until January 14, 2021. On August 3, 2020, Governor Cuomo signed into law an additional extension of the special filing period by a full year. Claims under the statute can now be until August 14, 2021.

Specifically, plaintiff alleges that Father William Authenrieth ("Fr. Authenrieth") repeatedly sexually abused and assaulted plaintiff when he was an altar boy at All Souls Church in Sanford, Florida, within the Diocese of Orlando, in approximately 1983 and/or 1984. Because of this alleged abuse by Fr. Authenrieth, plaintiff previously sued the Diocese of Orlando for the same alleged wrongful conduct at issue in this lawsuit in Florida (the "Florida Action"). In the Florida Action, plaintiff was represented by the same law firm, and alleged facts identical to those pleaded in this action, including claims that:

- the sexual abuse and/or assaults occurred while plaintiff was an altar boy, before or after mass, at All Souls Church in Sanford, Florida;
- the abuse and/or assaults were committed by Fr. Authenrieth; and
- the abuse and/or assaults occurred in approximately 1983 and/or 1984.

In support of the instant motion, defendant argues that the CVA necessarily applies to violations of the New York Penal Law, and therefore does not implicate criminal conduct that occurred outside of New York. In addition, even if this court were to find that the plain language of the CVA does not preclude plaintiff's instant lawsuit, defendant argues that the application of CPLR §202, New York's longstanding borrowing statute, requires that plaintiff's present lawsuit be timely under both Florida and New York's statutes of limitations. While plaintiff's lawsuit is timely under the CVA, defendant contends that it is untimely under any Florida statute of limitations. Consequently, defendant submits that proper application of CPLR §202 compels dismissal of this lawsuit. Defendant also underscores plaintiff's status as a citizen and resident of the state of Florida as a factor that militates against a compelling rationale for allowing this lawsuit to proceed in New York. To be sure, defendant maintains that the CVA was enacted to protect New York state residents from alleged tortious conduct that occurred within the state. Accordingly, defendant avers that application of the statute to a Florida resident based on a claim that arose in Florida is inapposite to the legislative intent of the CVA.

In opposition, plaintiff contends that defendant's construal of the CVA is in derogation of a plain reading of the statute, and is intended to deny victims access to a remedy they are entitled to. Likewise, plaintiff argues that the legislative history of the CVA "does not demonstrate an intent to limit the statute by excluding the claims of nonresidents where, as alleged here, a New York defendant harbored a known sexual predator and then affirmatively transferred him to prey on children in another state." Notably, plaintiff highlights that Fr. Authenrieth worked as a priest in defendant's parish prior to being transferred to the Diocese of Orlando. As such, plaintiff reasons that allowing defendant to be sued in New York is consistent with the legislature's intent to hold New York defendants accountable for their alleged acts and omissions that purportedly led to child sexual abuse. Finally, plaintiff states that defendant's argument that CPLR §202 supersedes application of the statute of limitations under the CVA in favor of Florida's statute of limitations, is erroneous. Indeed, plaintiff affirms that the CVA makes clear that any other statute imposing a limitations period, which necessarily includes the borrowing statute, yields to the CVA.

In reply, defendant reiterates that the CVA was enacted to protect New York residents from New York crimes, and was not intended to encourage forum shopping by non-resident plaintiffs. Therefore, even before applying New York's borrowing statute, defendant contends that the CVA

does not reach criminal conduct alleged to have occurred in Florida. Even if it did, defendant underscores that CPLR §202, New York's long-standing borrowing statute, complements the CVA by applying the limitation period of the state where a tort accrued in order to make New York less advantageous to non-resident plaintiffs. Here, defendant restates that plaintiff's lawsuit is untimely when applying CPLR §202. Defendant also emphasizes that, consistent with existing case law, the "notwithstanding" clause in the CVA does foreclose CPLR §202's application. As such, defendant accents its argument that it is entitled to judgment in its favor.

DISCUSSION

Application of CPLR §214-g

The CVA requires that a revived action be based upon conduct "which would constitute a sexual offense as defined in article [130] of the penal law." Indeed, the CVA enumerates violations of specific sections of New York's penal law – Article 130 §§255.25, 255.26, 255.27 and 263.05 as predicates that trigger the statute's application. As such, the CVA's application is prompted by specific criminal acts within New York, as defined by New York's Legislature.

Absent an express intent otherwise, a New York statute does not apply extraterritorially (*see Global Reinsurance Corp. U.S. Branch v. Equitas Ltd*., 18 NY3d 722 [2012]). To be sure, "[n]o legislation is presumed to be intended to operate outside the territorial jurisdiction of the state enacting it" (*Goshen v. Mut. Life Ins. Co. of N.Y.*, 262 AD2d 229, 230 [1st Dept. 2001] *aff'd*, 98 NY2d 314 [2002]). Where criminal laws are implicated, "[a] state only has power to enact and enforce criminal laws within its territorial borders" (*People v. McLaughlin*, 80 NY2d 466, 471 [1992]). As such, "there can be no criminal offense unless it has territorial jurisdiction" (*id*.). Aptly, New York Penal Law § v.(1) defines "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state." Under Crim. Proc. Law § 20.10(1), "this state" is defined as "New York State as its boundaries are prescribed in the state law, and the space over it."

Here, for the CVA to apply, plaintiff's civil claims would have to allege intentional or negligent acts or omissions suffered as a result of a violation of at least one of four specifically identified sections of the New York Penal Law. More specifically:

> "[E]very civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual *offense* as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law, or a predecessor statute that prohibited such conduct at the time of the act[.]" (CPLR §214-g).

As none of the identified sections of New York's Penal Law apply to criminal conduct that occurred in Florida, plaintiff's instant claims are improper under the CVA. To be sure, the sexual assault at issue in this lawsuit indisputably occurred in Florida and violates Florida's penal law. While plaintiff argues that the CVA was enacted to hold New York defendants accountable for their alleged acts and omissions that led to child sexual abuse, the CVA's legislative history illustrates that New York lawmakers were focused on providing relief to New York residents whose claims in connection with childhood sex abuse were otherwise time-barred under New York's prior statutes of limitation. To be sure, the bill that was later enacted into law was justified 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*" (Sponsor's Mem, L. 2019 ch. 11 [emphasis added]).

Accordingly, the CVA's legislative history confirms that the bill, as drafted and subsequently enacted, was intended to benefit New York residents alleged to have suffered wrongs committed within the state. To be sure, within the legislative history of the CVA, there is repeated reference to the legislation having a profound impact on the lives of New Yorkers. Conversely, no record can be found evincing the New York Legislature's desire to revive claims of non-New York residents. Were this court to issue a finding to the contrary, such a determination would run athwart of New York state's long-standing aversion to forum shopping. Likewise, applying the CVA to non-resident plaintiffs would upset the policy rationale that underscores tailoring the laws of each sovereign jurisdiction to the specific needs of the citizens residing within that jurisdiction. The CVA was adopted by New York's Legislature with New York's citizens in mind. As such, the court finds that it does not apply to the claims asserted in this lawsuit.

Dismissal Under CPLR §3211(a)(5) and §202

Even if this court could find that the CVA applies to plaintiff's claims, this lawsuit would still be dismissed as time-barred. "[O]n 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 (*Benn v Benn,* 82 AD3d 548, 548 [1st Dept 2011] *see also Brignoli v Balch, Hardy & Scheinman, Inc.*, 178 AD2d 290 [1st Dept 1991][defendant bears the burden of proof on an affirmative defense]).

Here, defendant properly cites New York's borrowing statute, CPLR §202, as controlling on this court's determination over the timeliness of plaintiff's claims. CPLR §202 provides as follows:

> "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued" (CPLR §202).

Under New York's borrowing statute, when a cause of action accrues outside New York and the plaintiff is a non-resident, CPLR §202 borrows the statute of limitations of the jurisdiction where the claim arose, if shorter than New York, to determine whether the action was timely filed (*Norex Petroleum Ltd.v Blavatnik*, 23 NY3d 665 [2014]). CPLR §202 further provides that a cause of action is timely if it is timely under both the statute of limitations of New York and of the jurisdiction in which the cause of action accrued (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410 [2010]; *Antone v General Motors Corp*., 64 NY2d 20 [1983]). Furthermore, the general rule is that "when borrowing foreign law pursuant to CPLR §202, foreign tolls and extensions must be imported, too" (*Norex Petroleum Ltd*, 23 NY3d at 676, *supra*; *see also Martin v Dierck Equip. Co*., 43 NY2d583 [1978]; *Childs v Brandon*, 60 NY2d 927, 929 [1984]; *Portfolio Recovery Assoc., LLC, supra*; *GML, Inc. v Cinque & Cinque, P.C*., 9 NY3d 949 [2007]).

Professor Siegel has explained the workings of the borrowing statute as follows:

> "The 'borrowing' takes place only when the foreign claim accrues to a nonresident, which includes a foreign corporation .... The New York period is looked to on the one hand, and, on the other, the period applicable under the laws of the place 'where the cause of action accrued.' The two are then compared and the shorter of the two is the one applied. If the claim has expired under either the New York or foreign period, in other words, it's barred. Note that there is not necessarily a 'borrowing,' therefore; the statute really dictates a comparison, with a 'borrowing' of the foreign period only if it is the shorter of the two compared ....
>
> The periods that are compared are the 'net' periods. That is, the New York period, with all relevant New York extensions and tolls integrated, is one prong of the comparison, and the foreign period, with the foreign tolls and extensions integrated, is the other. The New York tolls are not superimposed on the foreign period, or vice versa ...." (Siegel, NY Prac. § 57 [5th ed. 2011]).

Contrary to plaintiff's argument, the "notwithstanding" clause found within the CVA does not override CPLR §202. Indeed, the Appellate Division, First Department, has swiftly rejected disregarding a borrowing statute simply because a revival statute bestows its benefits "[n]otwithstanding any other provision of law" (*Besser v. E.R. Squibb & Sons, Inc*., 146 AD2d 107, 113 [1st Dept. 1989] *aff'd* 75 NY2d 847 [1990]). In *Besser*, the Appellate Division, First Department, found that the "notwithstanding" language contained within a revival statute regarding exposure to the herbicide Agent Orange did not displace the application of CPLR §202.

Rather, the *Besser* court concluded that "[a] law [here CPLR §214-g] will not be interposed so as to modify preexisting law [here CPLR §202] by implication" (*id*. at 114). Without "some manifestation of intent to limit the borrowing statute, the revival statute should not be interpreted to override CPLR §202" (*id*.). Accordingly, within the confines of the present lawsuit, the CVA must be narrowly construed. Indeed, as evidenced by *Besser*, the Appellate Division, First Department, has rebuffed use of the phrase "notwithstanding any other provision of law" to support the proposition that application of a revival statute predominates CPLR §202. Hence, the court finds that CPLR §202 applies here.

Applying CPLR §202 to the instant action, the court finds that plaintiff's claims are time-barred, as defendant has met its initial burden and set forth a prima facie showing entitling it to dismissal. The injuries plaintiff allegedly suffered occurred between 1983 and 1984 in Sanford, Florida. Therefore, plaintiff's negligence claims accrued at that time and place—regardless of the location where any other, even related, claims of negligent or otherwise tortious conduct might have occurred. Indeed, even if – as plaintiff alleges – defendant received notice of Fr. Authenrieth's alleged abuse of child victims in New York, the actual alleged abuse at issue here unquestionably occurred in Florida. Likewise, plaintiff admits that he is a resident of Florida. As such, to properly proceed within this state, let alone within this court, plaintiff's claims would have to be timely under both the applicable Florida statute of limitations and New York's statute of limitations. Florida has a four-year statute of limitations applicable to negligence claims (*see* Fla. Stat. § 95.11[3][a]). Under Florida law, "an action for negligence does not accrue until the plaintiff suffers an actual loss or damages" (*Companion Prop. & Cas. Grp. v. Built Tops Bldg. Servs., Inc*., 218 So. 3d 989, 991 [Fla. Dist. Ct. App. 3d Dist. 2017]). Plaintiff's negligence claims accrued in 1984 when the last alleged assault occurred and plaintiff suffered injuries as a result thereof. While plaintiff argues that the doctrines of fraudulent concealment and equitable estoppel toll his claims under Florida's statute of limitations, even if this court affords plaintiff every favorable inference and applies such a toll up to 2012, Florida's four-year statute of limitations subsequently expired in 2016, well before plaintiff commenced this action in 2019. Consequently, plaintiff cannot overcome the burden that defendant has met. As such, plaintiff's lawsuit is time-barred under Florida law, making it time-barred under New York law.

While this outcome may seem unfair to plaintiff, it is nonetheless in accord with the policy rationales that underscore both the CVA and CPLR §202. The alleged sexual assault at issue here indisputably occurred in Florida, and violates Florida's penal law. New York does not have an interest in policing conduct that occurred in Florida. In fact, any such interest would offend the notion of comity with a sister state. In addition, in view of the application of CPLR §202, defendant has a vested, constitutionally protected, right to rely on Florida's imposition of a time-bar. A failure to apply CPLR §202 would strip defendant of that vested right.

And perhaps most fundamentally, no record exists here evincing the New York Legislature's intent to import out-of-state liability into New York so as to weaken the position of New York residents and New York taxpayers seeking to redress New York grievances within the state. Affording out-of-state claimants the same rights as in-state citizens would invariably delay the adjudication of the meritorious claims of New Yorkers. Such an outcome would invariably

circumvent the New York Legislature's intent to avoid prolonging the suffering of thousands of child victims who have patiently waited to adjudicate their claims in New York courthouses. Moreover, non-residents filing lawsuits in New York for grievances that accrued outside of New York could reduce the funds available to compensate New Yorkers with meritorious claims. Finally, allowing this lawsuit to proceed in New York would encourage forum shopping by nonresident plaintiffs by giving those plaintiffs an incentive to take advantage of a more favorable statute of limitations in New York than is available to them elsewhere, including their state of residence. From a policy perspective, such an outcome would be odds with the CVA's stated objective to protect the ability of New York residents to pursue meaningful relief within New York as alleged victims of child sex abuse. As such, dismissal of this lawsuit is appropriate under CPLR §3211(a)(5) and §202.

Having made that determination, this court need not reach the merits of defendant's request for dismissal pursuant to CPLR §3211(a)(1). Based on the foregoing, it is hereby

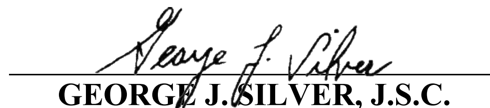
ORDERED that defendant's motion is granted, and this action is dismissed, with prejudice; and it is further

ORDERED that defendant is directed to file and serve a copy of this decision and order, with notice of entry, within twenty (20) days of its issuance; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant, and dismissing this lawsuit in its entirety.

This constitutes the decision and order of the court.

Dated: August 14, 2020



GEORGE J. SILVER, J.S.C.