

<b>John Doe PM v North Arlington High Sch.</b>
2021 NY Slip Op 32491(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 951260/2021
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART CVA

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JOHN DOE PM,

Plaintiff,

- v -

NORTH ARLINGTON HIGH SCHOOL, NORTH  
ARLINGTON SCHOOL DISTRICT, and MICHAEL RAPP,

Defendants.

INDEX NO. 951260/2021

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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**HON. DEBORAH A. KAPLAN:**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

With the instant application plaintiff moves, by Order to Show Cause, for permission from this court to proceed in anonymity during this action. Defendants North Arlington High School and North Arlington School District cross-move, pursuant to CPLR 3211 and 327, to dismiss based on, among other things, lack of jurisdiction and forum non conveniens.

The complaint alleges that, from 1986 to 1988, defendant Michael Rapp (defendant Rapp) sexually abused plaintiff while plaintiff was a student, and Rapp was a teacher, at defendant North Arlington High School located in the defendant North Arlington School District (collectively, the NASD defendants). At the time of the alleged abuse, the plaintiff and defendant Rapp resided in New Jersey, and the school district and high school were also located in New Jersey. It is undisputed that all parties still reside or are located in New Jersey. No parties reside or are located in New York.

The causes of action as against the NASD defendants are: (i) negligence; (ii) negligent retention, and supervision; and (iii) negligent infliction of emotional distress (*see* NYSCEF doc no 1 [complaint]). The causes of action as against defendant Rapp: (i) assault; (ii) battery; and (iii) intentional infliction of emotional distress (*see id.*).

Plaintiff alleges that the sexual abuse occurred a number of times in New York. Plaintiff argues that these events create a substantial nexus to New York, and, therefore, make New York the proper forum. Specifically, New York may extend its long-arm statute, CPLR 302 (a) (2), to obtain jurisdiction over defendants by either defendant's agency or actual conduct. Plaintiff also argues, on procedural grounds, that this court should not entertain NASD defendants' cross-motion or defendant Rapp's affirmation in support because of their late filing. In addition to the late filing, plaintiff points out that defendant Rapp's affirmation in support is not submitted as a proper cross-motion and should be disregarded.

To address plaintiff's procedural arguments, this court will consider both NASD defendants' cross-motion and defendant Rapp's affirmation in support. All defendants were ordered to serve opposition on or before, and what appears to be handwritten as, October 4, 2021. On October 5, 2021, NASD defendants paid a fee and filed a cross motion and opposition to plaintiff's motion (NYSCEF doc nos 16, 17). On October 8, 2021, defendant Rapp's attorneys filed an affirmation in support of the NASD defendants' cross motion (NYSCEF doc no 18). In reply, counsel for the NASD defendants argues that the number four, handwritten on the Order to Show Cause and indicating the day opposition was ordered to be served by, was ambiguous and looked like a nine. Should NASD defendants' reading be correct, then their papers would be timely (*see* CPLR 2215).

NASD Defendants' Cross Motion

It is this court's opinion that the handwritten number is ambiguous and could be read as a nine. Moreover, this court can glean no prejudice from defendants' late filings should the correct day be the fourth rather than the ninth. Contrary to plaintiff's argument, the cross motion is not procedurally flawed since any kind of relief may be sought on a cross motion against the moving party (*see e.g. Coakley v Southside Hosp.*, 196 AD2d 564, 564 [2d Dept 1993]). Pursuant to a stipulation dated October 14, 2021, plaintiff had an opportunity to oppose the cross-motion and, in fact, filed his opposition (NYSCEF doc nos 19-25).

CPLR 302 (a) (2) permits New York courts to exercise personal jurisdiction over any non-domiciliary, who directly or through an agent, committed a tort within New York. In contrast, CPLR 327 (a) permits New York Courts to stay or dismiss an action in whole or in part when, in the interest of substantial justice, New York is an inconvenient forum. It is within the broad discretion of the trial court to apply the doctrine of forum non conveniens, and the movant has the burden to persuade the court to decline retaining the litigation (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984] *cert denied* 469 US 1108 [1985]). In applying the doctrine, the court may consider, among other things: the potential hardship to the defendant; the unavailability of an alternative forum; the residency of the parties; whether the cause of actions arose or occurred primarily in the foreign jurisdiction; the location of evidence and witnesses; the burden on the New York Courts; and the applicability of foreign law -- none of which is controlling (*see id.*; *see also JTS Trading Limited v. Asesores*, 178 AD3d 507, 507 [1st Dept 2019]). The fact-dependent rule allows for flexibility in the interest of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479).

Here, it is in this court's view that the facts surrounding this matter advocate in favor of dismissal. All the parties either reside or are located in New Jersey. Most, if not all, of the evidence and witnesses would be in New Jersey since, as alleged in the complaint, most of the sexual abuse occurred in New Jersey. Plaintiff may seek redress in New Jersey under New Jersey's Child Sexual Abuse Act and may commence this action within the revival window, which is slated to end December 1, 2021 (NJ Statutes §§ 2A:14-2b [a]; 59:8-3 [b]; *see also R.A. a Fictitious Designation v W. Essex Regional Sch. Dist. Bd. of Educ.*, 2021 NJ Super. Unpub. LEXIS 1951, at \*33-39 [Super Ct App Div Aug. 30, 2021, Nos. A-0329-19, A-1846-19]). Other than plaintiff's allegations of some acts of sexual abuse having occurred in New York, the factors balance in favor of New Jersey as the appropriate forum and New York as one of inconvenience. Finally, the plaintiff's action does not arise out of, or relate to, a contract or agreement in which the parties have agreed that New York law shall govern their rights or duties (*see CPLR 327 [b]*).

Pursuant to CPLR 327 (a), the court finds that in the interest of substantial justice, this action should be heard in New Jersey, and the plaintiff's claims as against the NASD Defendants are dismissed on condition, as detailed below, that the NASD defendants stipulate to accept service of process and waive the defense of the statute of limitations if this action is commenced in New Jersey (*see e.g. JTS Trading Ltd. v Asesores*, 178 AD3d at 507).

In light of this determination, the court need not address the NASD Defendants' other arguments.

Defendant Rapp

“A court’s power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” (*Dossous v Corporate Owners Bayridge Nissan, Inc.*, 101 AD3d 937, 938 [2d Dept 2012]).

The court finds that given the nature of the plaintiff’s claims; the relevant statute of limitations considerations in New York and New Jersey; and the fact that the defendant Rapp makes the same arguments as the other two defendants, which the plaintiff addressed in the reply, warrant the dismissal of the complaint against defendant Rapp.

In light of the court’s determination, the plaintiff’s application is denied as moot.

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff’s motion is denied as moot; and it is further

**ORDERED** that the cross of defendants North Arlington High School and North Arlington School District to dismiss this action is granted on condition that these defendants stipulate to accept service of process and waive the statute of limitations in the event that this action is commenced in New Jersey; and it is further

**ORDERED** that this action is dismissed as against defendant Michael Rapp sua sponte on condition that this defendant stipulate to accept service of process and waive the statute of limitations in the event that this action is commenced in New Jersey; and it is further

**ORDERED** that within 5 days from the date of this decision and order, defendants North Arlington High School, North Arlington School District, and Michael Rapp shall file proof of compliance with the above condition with the Clerk of the Court (60 Centre Street, Room 141B),

together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff; and it is further


**ORDERED** that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

**ORDERED** that, upon the timely filing of the foregoing, the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the Clerk of the Court is directed to expedite the entry of this decision and order.

The foregoing constitutes the decision and order of this court.

November 12, 2021  
DATE

  
DEBORAH A. KAPLAN, J.S.C.  
**Hon. Deborah A. Kaplan**  
**J.S.C.**

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT