

John Doe v Mesivtha, Inc.
2021 NY Slip Op 32857(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: 520624/2021
Judge: Deborah A. Kaplan
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**-----X
JOHN DOE**Index №. 520624/2021****Plaintiff,****-against-****MESIVTHA, INC. *et al.*****Defendants**
-----X**HON. DEBORAH A. KAPLAN:**

With the instant application plaintiff moves, by Order to Show Cause, for permission from this court to proceed in anonymity during this action. Defendants MESIVTHA, INC., MESIVTA OF LONG BEACH, TORAH HIGH SCHOOL OF LONG BEACH, RABBI MORDECHAI RESPLER, and RABBI YERUCHOM PITTER (together “defendants”) oppose the application and cross-move to direct plaintiff to proceed under his true name, for dismissal should plaintiff refuse to litigate under his true name, and to proceed as “Anonymous.”

ARGUMENT

Plaintiff argues that allowing plaintiff to proceed under a pseudonym would spare plaintiff from the stigmatization and potential embarrassment that may arise as the result of the adjudication of this matter in a public forum. Plaintiff, like other similarly situated plaintiffs, is especially concerned about renewed scrutiny that may ensue due to New York State’s enactment of the 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). Plaintiff further contends that he is entitled to proceed anonymously pursuant to Civil Right Law (“CRL”) § 50-b because the instant action involves allegations of child sex abuse. He also argues that the disclosure of plaintiff’s identity as a victim of child sex abuse on publicly filed court documents will likely exacerbate the emotional and psychological harm he suffered. Plaintiff further claims that defendants will not suffer prejudice because he will disclose his identity to defense counsel and the court.

Defendants make several arguments by cross-motion and in opposition. Defendants argue that plaintiff has failed to comply with statutory and codified rules which require plaintiff to file papers in their true name. Defendants further state that plaintiff’s application should be denied because he failed to submit an affidavit of a person with personal knowledge of the allegations of

sex abuse. Defendants also contend that their due process rights are violated should plaintiff be afforded the protection of anonymity. In addition, defendants claim that plaintiff has not shown good cause to request to litigate this matter anonymously, and that the protection under CRL § 50-b does not apply because there has been no criminal investigation into plaintiff's alleged abuse. Furthermore, defendants contend that they suffer prejudice due to plaintiff's failure to shield defendants' identities, and that they are entitled to a dismissal if plaintiff refuses to litigate under his legal name.

In reply and in opposition to defendants' cross-motion, plaintiff submits an affirmation and maintains that he did not reveal his identity to the members of his community. Plaintiff explains that he fears embarrassment, social isolation, and ostracism from his community if his identity is disclosed. He also asserted that he contacted defendant DAVID DOE, who allegedly knew plaintiff's identity and admitted guilt during the call.

Lastly, in reply to plaintiff's opposition, defendants argue that plaintiff fails to show sufficient facts about his current circumstances and the actual harm that would occur if he litigated this case without anonymity. Defendants also claim that plaintiff voided anonymity when he identified the alleged perpetrator and his father in court papers and then subsequently attempted to shield their identities.

DISCUSSION

In general, "[t]he determination of whether to allow a plaintiff to proceed anonymously requires the court to use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any prejudice to defendant" (*Anonymous v. Lerner*, 124 AD3d 487, 487 [1st Dept 2015] [internal quotation marks and citations omitted]; see *J. Doe No. 1 v. CBS Broadcasting, Inc.*, 24 AD3d 215 [1st Dept 2005]; see also *Doe v. Szul Jewelry, Inc.*, 2008 NY Slip Op 31382 [U] [Sup Ct, NY County 2008]). Among the recognized values of open access to civil proceedings is that "the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud" (*Danco Labs. v. Chemical Works of Gedeon Richter*, 274 AD2d 1, 7, [1st Dept 2000]). Likewise, the very openness of the process should provide the public "with a more complete understanding of the judicial system and a better perception of its fairness" and serves to "ensure that the proceedings are conducted efficiently, honestly and fairly" (*Danco*, 274 AD2d at 7, *supra*).

However, the right of the public, and the press, to access judicial proceedings is not absolute or unfettered, and involves judicial discretion (*Lerner*, 124 AD3d at 487, *supra*). Moreover, access may still be respected in keeping with constitutional requirements while sensitive information is restricted in keeping with "the State's legitimate concern for the well-being" of an individual (*Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 [1982]).

A plaintiff's privacy interests, although not recognized under New York State's common law, are found in the Civil Rights Law ("CRL") (see *Stephano v. News Group Publications, Inc.*, 64 NY2d 174, 182 [1984]; *Arrington v. New York Times Co.*, 55 NY2d 433, 440 [1982]). Indeed, pursuant to CRL §50-b "The identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26, or 255.27 of the penal law, or of an offense involving the alleged transmission of the Human Immunodeficiency Virus, shall be confidential...." However,

this statute does not apply to everyone claiming to have been the victim of a sexual assault. Rather, the statute was enacted to spare victims of sexual assault the embarrassment of being publicly identified in the news media and to encourage such victims to cooperate in the prosecution of sexual offenses (*see* New York Bill Jacket, 1999 S.B. 5539, Ch. 643). Courts have afforded victims of sexual offenses protection under CRL §50-b where there has either been an arrest and prosecution, or there is an investigation (*see People v. McDaniel*, 81 NY2d 10 [1993]).

In addition, while “[i]t is elementary that the primary function of a pleading is to apprise an adverse party of the pleader’s claim” the same does not necessarily apply to a pleader’s name (*Cole v. Mandell Food Stores, Inc.*, 93 NY2d 34, 40 [1999][emphasis added]). CRL §50-b, although criminal in nature, offers guidance on how to proceed in this fashion among civil CVA lawsuits. As such, analogizing how courts treat allegations of sexual abuse under both statutes is appropriate (*see Doe v Yeshiva Univ.*, 2020 NY Slip Op 31707[U], *3 [Sup Ct, NY County 2020]), *aff’d* 195 AD3d 565 [1st Dept 2021]). Likewise, the CVA’s language makes clear that its central focus is to “avoid exposing alleged victims to the lasting scars of broadcasted exposure while help[ing] the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties” (*id.*).

In *Doe v Amherst Cent. School Dist.*, 196 AD3d 9, 13 (4th Dept 2021), the Appellate Division, Fourth Department, observed the following criteria in reviewing a request to proceed using a pseudonym in action brought under CVA:

“[A]mong the factors courts have considered in balancing these competing interests [of the parties, the public, and justice] are: 1) whether the plaintiff is challenging governmental activity or an individual’s actions, 2) whether the plaintiff’s action requires disclosure of information of the utmost intimacy, 3) whether identification would put the plaintiff at risk of suffering physical or mental injury, 4) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously, and 5) the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system . . . Related to the third factor is the concern ‘whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties . . .’ ”

(*Doe v Amherst Cent. School Dist.*, 196 AD3d 9, 13 [4th Dept 2021], citing *Doe No. 2 v Kolko*, 242 FRD 193, 195 [EDNY 2006]).

Considering the foregoing, it is axiomatic that plaintiff should be afforded the protection of anonymity. The instant case involves alleged acts that will no doubt center on information about plaintiff of a sensitive and highly personal nature. While plaintiff’s Order to Show Cause is supported with only counsel’s affirmation, after the filing of the Order to Show Cause plaintiff submitted his own affidavit in his reply papers and describes, *inter alia*, the details of his conversation with Rabbi Kamenetzky about the alleged abuse, his contact with defendant DAVID DOE, and DAVID DOE’s alleged admission of guilt. Plaintiff proceeded to state that he fears backlash in his community and that his, once exposed, would harm his employment, study, and

his chance to get married. Although plaintiff's affidavit was submitted for the first time in reply, defendants did not suffer prejudice as they had an opportunity to respond to plaintiff's affidavit in their own reply papers (*see Amherst Cent. School Dist.*, 196 AD3d 9, 14; *see also Cent. Mortg. Co. v Jahnsen*, 150 AD3d 661, 664 [2d Dept 2017]). Given that plaintiff has submitted an affidavit that lists specific harms that may result from disclosure of plaintiff's name in connection with this lawsuit, defendants' argument that plaintiff's Order to Show Cause should be denied because it was supported solely by an attorney's affirmation fails (*see Doe v Yeshiva Univ.*, 195 AD3d 565 [1st Dept 2021]).

Defendants' reliance on *Doe v McFarland* (66 Misc 3d 604 [Sup Ct Rockland Cnty 2019]), *inter alia*, is also misplaced. Plaintiff's counsel's supporting affirmation indicates that plaintiff's full name will be disclosed to defendants and the court. In fact, the *McFarland* court granted plaintiff's request to proceed anonymously once the underlying allegations and facts had been considered. Confronted by a similar scenario here, the court finds that plaintiff has made the necessary showing to support the instant application. Indeed, as in *McFarland*, this court notes that plaintiff's affidavit highlights real harms that plaintiff is likely to endure if he is not afforded the ability to proceed anonymously (*see McFarland*, 66 Misc 3d 625-26). Moreover, this case has not been brought against a government entity, a factor this court believes would militate in favor of the public's right to know. Therefore, balancing the facts at issue with plaintiff's specific articulation of harms likely to result from the disclosure of his name, the court finds that plaintiff has made a sufficient showing to support proceeding anonymously.

Defendant has failed to advance any legitimate reason why plaintiff should not be afforded the protection of anonymity in this case. Instead, defendant emphasizes that they would endure prejudice while investigating this case if plaintiff is afforded the protection of anonymity. However, contrary to defendants' argument, no prejudice can be alleged where, as here, defendant will be provided with plaintiff's personal identifying information for the purpose of advancing discovery in this matter. Moreover, this case differs from cases such as *Doe v. Good Samaritan Hosp.*, 65 Misc.3d 648 (Sup. Ct. Nassau Cty. 2019), where an application to proceed under a pseudonym was denied because the record consisted of a "bare bones" affirmation of counsel. In contrast, plaintiff, here, has provided a detailed affidavit detailing the harm (*Doe v. Yeshiva University*, 195 AD3d 565 [1st Dept 2021]). As such, there is firm foundation supporting the grant of anonymity in this case.

Defendants falsely assumes they stand on a level playing field with plaintiff. Defendants contend that they should be afforded the same protections of anonymity utilized by the alleged victim of sexual assault. Here, defendants are private citizens and institutions, and while revelation of their names may be perceived as impinging upon their expectation of privacy, courts have long recognized that the protection afforded to a unique subset of plaintiffs oftentimes do not extend to defendants (*see Doe v. Doe*, 189 AD3d 406 [1st Dept 2020]). Among the factors considered in permitting the use of a pseudonym are: "whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature" (*James v. Jacobson* at 238; *see also Doe v. Provident Life & Acc. Ins. Co.*, 176 F.R.D. 464, 467-8 [E.D.Pa.1997]). Although defendants request to proceed under a pseudonym to avoid ridicule and embarrassment within his community as well as reputational damage that may befall them based on the highly sensitive and startling allegations at issue here, defendants fail to measure the level of harm likely to occur. To that end,

defendants fail to provide any affidavit to substantiate such harm. “There is a statutory exception that operates to keep the identity of any victim of a sex offense confidential [Civil Rights Law § 50–b]. However, this exception does not protect the identity of the alleged perpetrator of a sexual offense” (*Doe v Doe*, 189 AD3d 407). The Legislature, in its prudence, codified specific protections for the alleged victims of sexual assault that do not apply to alleged perpetrators of such abuse. Thus, defendants’ assertion that plaintiff voided anonymity when he identified the alleged perpetrator and his father in court papers is also without merit.

In addition, defendants contend that since plaintiff has afforded anonymity to the alleged abusers, the remaining defendants should also be permitted to proceed in anonymity. This argument holds no bearing on the court’s adjudication of this application. Plaintiff’s attempt to offer anonymity protection to the alleged abusers violates the basic tenets of standing (*see Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 773 [1991] [explaining that the “prudential limitations” of standing include “a general prohibition on one litigant raising the legal rights of another”]). It is not in the plaintiff’s discretion to offer anonymity to defendants but this court’s decision. The individual defendants must request such relief.

The defendants’ making this application attempt to use CPLR 2101 (c) to attack the viability of plaintiff’s complaint. In other words, defendants seek to dismiss the complaint based on plaintiff’s use of a pseudonym. Defendants’ argument completely disregards this court’s prior case management and confidentiality orders. Specifically, Case Management Order No. 1 (“CMO No. 1”) (uploaded to every CVA matter on New York State Courts E-Filing system) articulates the procedure for plaintiffs to initiate a CVA matter with a pseudonymous caption:

III. Anonymity

1. If consented to by all defendants to an action, a plaintiff may initiate an action and file a complaint by initials or pseudonym, rather than the person’s legal name, and proceed on the Court’s public docket by initials or pseudonym. If all defendants do not consent, then, together with the filing of the complaint, a plaintiff must file an application by order to show cause seeking permission to proceed by initials or pseudonym.

In drafting the above, the court was cognizant of balancing the protections required on both ends—those who request such relief and those who oppose such applications. To ensure the above directive did not run afoul of due process considerations or unduly prejudice one side, CMO No. 1 required plaintiff to apprise defendants of plaintiff’s personal information.

III. Anonymity

3. Within 14 days of receiving an appearance by a defendant in the matter, a plaintiff who files a complaint using initials or a pseudonym must provide to defense counsel, or if the defendant appears *pro se*, the defendant, the plaintiff’s name (including maiden name, if any), plaintiff’s name at the time of the alleged abuse, date of birth, social security number, parents and/or

guardian's names at the time of the alleged abuse, current address, and address at the time of the alleged abuse, if known.

Such precaution was necessary to align with the basic due process rights of notice and an opportunity to be heard, which are the primary function of a pleading (*Cole v. Mandell Food Stores, Inc.*, 93 NY2d 34, 40 [1999]; *see also E.K. v. New York Hospital-Cornell Med. Ctr.*, 158 Misc. 2d 334, 336 [1992] [allowing plaintiff to proceed using her initials because her identity and claims had been previously disclosed to defendants]). Thus, any argument concerning prejudice occasioned by a lack of due process is unpersuasive. Plaintiff has agreed to share details about plaintiff's identity with defendants so that defendants' due process rights are not violated. In return, plaintiff is simply asking defendants not to reveal those details publicly—an arrangement that has notably been accepted in the lion share of CVA cases litigated before this court.

At the end of the day, a grant of anonymity by this court impacts far less on the public's right to open proceedings than does the actual closing of a courtroom or the sealing of records. Ultimately, in this court's view, the public has an interest in seeing this case determined on its merits, after the parties have had an opportunity to fully and properly litigate the issues presented. Anonymity, at this juncture, will preserve the integrity of that stated objective. Accordingly, plaintiff's application seeking anonymity is granted.

Accordingly, for the reasons stated above, it is hereby

ORDERED that plaintiff's motion for an order permitting him to proceed in this case anonymously by using pseudonym in his publicly filed documents, and requiring the parties refer to him by his pseudonym and refrain from otherwise disclosing his identity to anyone other than their attorneys, is granted; and it is further

ORDERED that defendants' cross motion, among other things, is denied its entirety; and it is further

ORDERED that in accordance with this court's Case Management Orders, plaintiff is directed to provide defendants with his name, date of birth, social security number, parents and/or guardian's names, current address, and address at the time of the alleged abuse within twenty (20) days of this court's decision and order; and it is further

ORDERED that plaintiff serve a copy of this decision, with notice of entry, upon defendants within 20 days of this court's decision and order; and it is further

ORDERED that the court shall issue a separate notice to the parties regarding a future appearance in this matter.

The foregoing constitutes the decision and order of the court.

Dated: December 23, 2021


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