SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN **PART** CVA
Justice

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JOHN DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, OUR LADY OF MOUNT CARMEL SCHOOL

Defendant.

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INDEX NO. 950210/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ORDERED that this motion is granted in part, and otherwise denied.

In this matter filed under the Child Victims Act ("CVA"), a claim revival statute that, *inter alia*, resuscitates certain civil actions involving alleged sexual abuse against minors for which the statute of limitations has run (*see* CPLR §214-g), plaintiff John Doe II ("plaintiff") moves, pursuant to CPLR §3126, for an order striking defendants ARCHDIOCESE OF NEW YORK ("Archdiocese") and OUR LADY OF MOUNT CARMEL SCHOOL's ("Mount Carmel") (collectively, "defendants") respective answers based on their purported failure to comply with the disclosure and discovery requirements contained within this court's Case Management Order No. 2. In the alternative plaintiff moves, pursuant to CPLR §3124, for an order compelling defendants to serve responses to plaintiff's request for Standard Automatic Disclosures within ten (10 days).

BACKGROUND AND ARGUMENTS

Defendant Mount Carmel filed its verified answer on February 10, 2020. Defendant Archdiocese filed its verified answer on August 3, 2020. On June 18, 2020, this court issued its Case Management Order No. 2, which set out the deadlines for Standard Automatic Disclosures that each party must provide. Pursuant to the Case Management Order No. 2, defendants were required to serve responses to the Standard Automatic Disclosures "no later than 30 days after receiving plaintiff's" responses to Standard Automatic Disclosures and Common Demand for Verified Bill of Particulars. On November 2, 2020, this court signed an Order to Show Cause submitted by the Archdiocese challenging this court's Confidentiality Order and requesting a stay of discovery while the issue was being litigated. On April 6, 2021, this court issued a decision and order resolving the Archdiocese's challenge. Parties in other CVA actions, and the Archdiocese, subsequently appealed this court's decision and order. On December 7, 2021, the Appellate Division, First Department, issued a decision and order resolving those appeals. As a result of the foregoing, any perceived or actual stays of discovery have been lifted.

In support of his instant motion, plaintiff contends that any difficulties defendants may have accessing records from their clients should not impede his right to the timely disclosure of records that have been requested for months. In opposition, the Archdiocese argues that it has provided plaintiff's counsel with its response to the Standard Automatic Disclosures pursuant to CMO 2, Sec IX.C.3, thereby rendering the instant motion moot. The Archdiocese's opposition further underscores that the COVID-19 pandemic has significantly interfered with the Archdiocese's access and ability to search its records. In support of its separate opposition, Mount Carmel adopts the arguments set forth in the Archdiocese's briefs. In reply, plaintiff contends that defendants' Standard Automatic Disclosures are wholly nonresponsive, contain boilerplate non-

answers, provide none of the documents required by Case Management Order No. 2, and include numerous blanket objections that render their answers meaningless.

DISCUSSION

CPLR §3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000]). What is "material and necessary" generally has been left to the sound discretion of the court and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*id.*, *quoting Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).While CPLR §3126 permits a court to issue an order striking pleadings, among other relief, upon a party's failure to obey an order of disclosure or willful failure to disclose information, the drastic remedy of striking a pleading is generally considered unwarranted absent a party first moving to compel compliance with discovery demands and/or a showing that the other party's failure to obey discovery orders was willful or contumacious (*see W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011] ["there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR §3126 premature in this case."]; *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d 406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course was for defendant to move to compel further discovery rather than moving to strike complaint]; *see also, Pehzman v Dept. of Educ. of City of New York*, 95 AD3d 625 [1st Dept 2012] [striking of answer is ultimate penalty that may be imposed only upon extreme conduct]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply was willful, contumacious, or in bad faith, which moving party

must affirmatively establish]; *Commerce & Indus. Co. v Lib-Com, Ltd.*, 266 AD2d 142 [1st Dept 1999] [striking of pleading "not a sanction to be routinely imposed whenever a party fails to comply with any item of discovery"] [emphasis in original]).

Thus, in *Michaluk v New York City Health and Hosps. Corp.*, the Appellate Division, First Department, held that:

> [s]ince defendant never sought to compel disclosure or to have preclusionary language added to any of the parties' compliance conference orders, its motion to dismiss pursuant to CPLR 3126(3) was premature given the lack of evidence that plaintiffs' delay [in providing discovery] was willful, contumacious or in bad faith.
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> (169 AD3d 496 [1st Dept 2019]).

CPLR §3124 provides that a party may seek an order compelling compliance or a response to any request notice, interrogatory, demand, question, or order under CPLR article 31.

Here, defendants' respective counsel have established that they engaged in good faith efforts to locate relevant records for plaintiff, and that their efforts were partially impeded by the ongoing COVID-19 pandemic (*see Heyward v Benyarko*, 82 AD2d 751, 751 [1st Dept 1981] [declining to strike answer of defendants where counsel undertook good faith efforts to locate them, including hiring investigator]; *cf Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004] [striking defendant's answer where counsel only submitted "bald statement that reasonable good faith efforts had been made" to locate defendants, without affidavit from purported investigator]). The record here reflects that defendants responded to all of plaintiff's discovery demands, albeit belatedly. That plaintiff believes that the responses are insufficient does not warrant a finding that defendants willfully and contumaciously refused to provide responses (*see Barber v. Ford Motor Co.*, 250 AD2d 552 [1st Dept 1998]). Rather, the court must turn to the sufficiency of defendants' responses, and determine whether further disclosure is necessary.

Defendants' responses to plaintiff's requests for Standard Automatic Disclosures are replete with general objections that may have been informed by what at the time were unresolved issues related to this court's Confidentiality Order. Based on the Appellate Division, First Department's recent issuance of a decision codifying the disclosure obligations that this court set forth in this court's Confidentiality Order, defendants are directed to re-examine their responses to plaintiff's requests for Standard Automatic Disclosures, and supplement their responses where necessary. To the extent that defendants' objections are not informed by the Appellate Division, First Department's recent decision, defendants' responses are adequate, as several objections leveled by defendants relate to discovery demands that seek information or documents that are not presently within the possession, custody or control of counsel for the responding defendants or the responding defendants themselves.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that defendants are directed to re-examine their responses to plaintiff's requests for Standard Automatic Disclosures, and supplement their responses where necessary, based on the Appellate Division, First Department's recent issuance of a decision codifying the disclosure obligations that this court set forth in its Confidentiality Order; and it is further

ORDERED that supplemental responses by defendants, if any, shall be served no later than January 31, 2022.

This constitutes the decision and order of the court.

12/13/2021
DATE

HON. DEBORAH A. KAPLAN, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

Deborah A. Kaplan
J.S.C.