

ARK630 DOE v Diocese of Brooklyn
2022 NY Slip Op 34292(U)
December 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 520166/2021
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

ARK630 DOE,

Plaintiff,

-against-

Index No. 520166/2021

Mot. Seq. Nos. 002 & 003

DIOCESE OF BOOKLYN a/k/a
THE ROMAN CATHOLIC
DIOCESE OF BROOKLYN,
NEW YORK; BROTHERS OF
ST. FRANCIS XAVIER a/k/a
XAVERIAN BROTHERS U.S.A.
INC. f/k/a SACRED HEART
PROVINCE a/k/a AMERICAN
CENTRAL PROVINCE OF
XAVERIAN BROTHERS INC.;
XAVERIAN HIGH SCHOOL
a/ka XAVERIAN; and DOES 1-5
whose identities are unknown to
Plaintiff,

DECISION & ORDER

Defendants.

LAURENCE L. LOVE, J.S.C.:

In this action, brought pursuant to the New York Child Victims Act (CVA) as codified in CPLR 214-g, in motion sequence number 002, defendant Xaverian High School (Xaverian), pursuant to CPLR 306-b, moves to dismiss the complaint.

In motion sequence number 003, pursuant to CPLR 306-b, plaintiff Ark630 Doe (Plaintiff) cross-moves to extend, nunc pro tunc, the time in which to serve Xaverian with a summons and complaint.

BACKGROUND

Xaverian is a private high school in Brooklyn, New York that, in the 1970s, employed nonparty Brother Kyrin (Edward) Powers (Brother Powers), a Roman Catholic cleric. Plaintiff allegedly attended Xaverian, where, in approximately 1979, when plaintiff was sixteen years old, Brother Powers “engaged in unpermitted sexual contact with Plaintiff” (*see* NYSCEF Doc No. 1 [complaint, ¶ 22]).

Plaintiff claims that Xaverian breached its duty of care that it owed to Plaintiff by failing to create a safe environment for students; failing to train and educate employees and administrators on inappropriate behavior between clerics and children; and negligently retaining Brother Powers without conducting a proper investigation for his suitability in working with children.

The summons and complaint were filed on August 10, 2021 (*see* NYSCEF Doc No. 1). On August 24, 2021, Plaintiff attempted service on Xaverian by emailing a letter and a copy of the pleadings to Wingate, Kearney & Cullen, LLP (WKC), a law firm that represents Catholic defendants in other CVA cases (*see* NYSCEF Doc No. 35; *see also* NYSCEF Doc No. 32 [04/28/2022 Anderson affirmation, ¶ 5]). Pursuant to a stipulation dated September 10, 2021, WKC agreed to accept service on behalf of defendant Diocese of Brooklyn only (*see* NYSCEF Doc No. 36).

On December 17, 2021, Xaverian was served with the summons and complaint at 7100 Shore Road, Brooklyn, New York 11209 (*see* NYSCEF Doc No. 29 [aff of service]). On December 22, 2021, the affidavit of service was filed with the Kings County Clerk (*see id.*; *see also* NYSCEF Doc No. 22).

DISCUSSION

Xaverian argues that Plaintiff failed to serve it with the summons and complaint within the statutorily prescribed 120-day period. Plaintiff cross-moves for an extension of time to serve nunc pro tunc.

The court records reflect that the summons and complaint were filed on August 10, 2021. Accordingly, Plaintiff had 120 days from that date, or until December 8, 2021, to effectuate service upon Xaverian. Plaintiff did not serve Xaverian until December 17, 2021, 9 days after the 120-day deadline expired.

CPLR 306-b, in relevant part, provides:

“[s]ervice of the summons and complaint ... shall be made within one hundred twenty days after the commencement of the action If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or *upon good cause shown or in the interest of justice, extend the time for service*”

(emphasis added).

Under the good cause standard, plaintiffs must establish that they had taken reasonably diligent efforts to effectuate timely service (*see Leader v Maroney Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). As previously stated, on August 24, 2021, Plaintiff first attempted to serve the summons and complaint upon Xaverian by emailing WKC. CPLR 2103 (b) (7) provides that service sent by electronic means shall be served “upon the party’s attorney” and with “the party’s written consent” (*see* CPLR 2103 [b] [7]). Here, the service was ineffective as Plaintiff served the summons and complaint upon an attorney without Xaverian written consent. Although Plaintiff attempted to serve Xaverian once within the 120-day deadline, it fails to meet the reasonably diligent threshold required under the good cause standard (*see e.g. Busler v Corbett*, 259 AD2d 13, 15 [4th Dept 1999]).

However, pursuant to CPLR 306-b, the court can grant an extension of time for service if it would be warranted in the interest of justice. Under this standard, “a plaintiff need not establish reasonably diligent efforts at service as a threshold matter” (*see Leader*, 97 NY2d at 105). Rather, the court must carefully analyze the facts and balance the competing interests of the parties (*see id.*). Such factors may include the expiration of the statute of limitations; the meritorious nature of the cause of action; the length of delay in service; the promptness of a plaintiff’s request for the extension of time; and prejudice to defendant (*see id.* at 105-106).

Here, the revival window pursuant to CPLR 214-g expired, and, given that the alleged abuse took place in 1979, dismissal would bar Plaintiff from refile and pursuing an action against Xaverian entirely. A running statute of limitations and a denial to extend time of service resulting in the end of litigation are factors that support a grant of an extension of time (*see e.g. State v Sella*, 185 Misc 2d 549, 555 [Sup. Ct. Albany Ct. July 31, 2000]). Additionally, Plaintiff has a potentially meritorious negligence claim under the CVA. Plaintiff alleges, among other things, that: (1) Xaverian had a duty of *in loco parentis* to its students and to adequately train and supervise its employees; (2) Xaverian failed to do so; and (3) as a result, Plaintiff suffered sexual abuse from an employee of Xaverian. Dismissing this case would “extinguish potentially meritorious claims without there being an opportunity to have them adjudicated on the merits” (*see AIG Management Market Neutral Fund v Askin Capital Management, L.P.*, 197 FRD 104, 110 [SD NY 2000]). In light of these facts, granting an extension of time for service is in the interest of justice as the CVA revival window closed and Plaintiff has a potentially meritorious claim.

This court must also be mindful of the entire purpose behind the CVA creation in the first place, wherein the legislature carved out a unique opportunity for alleged victims of long ago abuse a one time opportunity to seek justice.

Xaverian argues that because the statute of limitations ran prior to service, this delay would subject it to prejudice. Xaverian's argument is unpersuasive as it has failed to articulate any substantial identifiable prejudice that an extension of time for service would cause it (*see e.g. de Vries v Metro. Tr. Auth.*, 11 AD3D 312, 314 [1st Dept 2004] [respondents made "no showing of prejudice in the event plaintiff is granted leave to re-serve"]).

Further, the length of the delay in service here was a mere nine days. Case law establishes that nine days is considered a short delay (*see e.g. Busler v Corbett*, 259 AD2d at 16-17 [granting the extension to serve where "defendants were served *only 28 days* after the expiration of the statutory period for service"] [emphasis added]; *see also Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 28-29, 37 [2nd Dept 2009] [233-day "delay in service is not particularly egregious under the circumstances"]).

Xaverian argues that Plaintiff's lack of diligence in serving the defendant during the 120-day period should be considered when taking the length of the delay into account. However, "diligence, or lack thereof," is only one factor, among many, under the interest of justice standard (*see Leader*, 97 NY2d at 104-105). Other factors include: "expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*see id.* at 105-106). When balancing the aforementioned factors and competing interests of parties, granting the Plaintiff's extension of time is warranted in the interest of justice. Accordingly, Plaintiff's cross motion is granted.

CONCLUSION

For the foregoing reasons, it is hereby

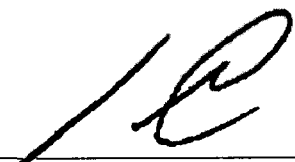
ORDERED that, in motion sequence number 002, the motion of the defendant Xaverian High School is denied; and it is further

ORDERED that, in motion sequence number 003, the cross motion of the plaintiff is granted; and it is further

ORDERED that the time for the plaintiff to serve the summons and complaint on defendant Xaverian High School a/k/a Xaverian is extended nunc pro tunc to December 20, 2021 and service of these pleadings on said defendant on December 17, 2021, as per the affidavit of service (NYSCEF Doc No. 22), is deemed timely; and it is further

ORDERED that said defendant shall interpose its answer within 20 days of the date of service of notice of entry of this decision and entry. Filing said notice of entry on NYSCEF shall be considered adequate service.

Dated: December 12, 2022



LAURENCE L. LOVE, J.S.C.

KINGS COUNTY CLERK
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