

**John Poe v Gerer Yeshiva &
Mesivta Bais Yisroel, Inc.**

2022 NY Slip Op 34520(U)

October 6, 2022

Supreme Court, Kings County

Docket Number: Index No. 500010/2021

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

-----X

JOHN POE, a pseudonym,

Plaintiff,

- v -

GERER YESHIVA AND MESIVTA BAIS YISROEL, INC.;
MACHZIKEI HADATH RABBINICAL COLLEGE, and
AVROHOM MORDECAI LEIZEROWITZ,

Defendants.

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INDEX NO. 500010/2021

MOTION DATE 08/17/2021

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 11, 12, 19, 20, 21

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25,

were read on this motion to/for AMEND.

Upon the foregoing documents, Defendants Gerer Yeshiva and Mesivta Bais Yisroel, Inc., and Machzikei Hadath Rabbinical College (collectively, the “Yeshiva”) move for dismissal of this action pursuant to CPLR 3211(a)(5) and (a)(7) (Motion Seq. 001).

Plaintiff opposes and moves for leave to amend the complaint (Motion Seq. 002).

Plaintiff alleges that in 2004, while he was a ninth-grade student at the Yeshiva’s private religious school, he was abused by Defendant Avrohom Mordecai Leizerowitz, a senior rabbi at the school.

In its motion for dismissal, the Yeshiva does not address the merits of Plaintiff’s individual causes of action. Rather, the Yeshiva argues that the entire-complaint is untimely as the revival mechanism of the Child Victims Act (CPLR 214-g) is unconstitutional and violates Defendants’ Due Process rights under the New York State Constitution. The Yeshiva also argues that the complaint

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Motion No. 001, 002**

does not comport with the pleading requirements imposed by the CVA, and that Plaintiff is not entitled to punitive damages.

DISCUSSION

The Yeshiva's Motion to Dismiss

The Yeshiva primarily argues in support of its motion for dismissal that CPLR 214-g violates the Due Process clause of the New York State Constitution. However, since the filing of the instant motions, numerous state and federal courts have found that the claim revival provision of New York's Child Victims Act does not violate the due process clauses of the New York and United States Constitutions, See, *Farrell v. United States Olympic & Paralympic Comm.*, No. 120CV1178FJSCFH, 2021 WL 4820251, at *7 (N.D.N.Y. Oct. 15, 2021), holding that "[A] claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 400, 67 N.Y.S.3d 547, 89 N.E.3d 1227 (2017). Multiple New York courts and two federal district courts in the Second Circuit have held that the CVA does not run afoul of due process because it remedies an injustice. See, e.g., *PC-41 Doe v. Poly Prep Country Day Sch.*, No. 20-CV-03628 (DG) (SJB), 2021 WL 4310891 *3, 2021 U.S. Dist. LEXIS 181254 *7 (E.D.N.Y. Sept. 22, 2021) (collecting cases); *Giuffre v. Dershowitz*, No. 19 Civ. 3377 (LAP), 2020 WL 2123214 *2, 2020 U.S. Dist. LEXIS 78596 *5-*6 (S.D.N.Y. Apr. 8, 2020); *PB-36 Doe v. Niagara Falls City Sch. Dist.*, No. E172556/2020, 72 Misc.3d 1052, ————, 152 N.Y.S.3d 242, ————, 2021 N.Y. Slip. Op. 21188, *6-*7 (N.Y. Sup. Ct., Niagara Cnty. July 19, 2021); *ARK3 Doe v. Diocese of Rockville Ctr.*, No. 900010/2019, 2020 N.Y. Misc. LEXIS 1964, *15 (N.Y. Sup. Ct., Nassau Cnty. May 11, 2020); *Torrey v. Portville Cent. Sch.*, No. 88476, 66 Misc. 3d 1225(A), 2020 N.Y. Slip. Op. 50244(U), *11, 2020 WL 856432 (Cattaraugus Cnty. Feb. 21, 2020)."

“[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]).

The Yeshiva separately argues that the CVA “does not apply” to certain causes of action, including breach of fiduciary duty or negligence in hiring, and thus, said causes of actions are time-barred. However, CPLR §214-g revives “every 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” specific child sexual abuse offenses.

As CPLR 214-g has been found repeatedly to be constitutional and to have revived every claim against a party alleging intentional or negligent acts, the branch of the Yeshiva’s motion seeking to dismiss Plaintiff’s complaint pursuant to CPLR §3211(a)(5) as time-barred, is denied in its entirety.

The Yeshiva’s argument that the complaint does not satisfy the pleading requirements of CPLR 214-g is similarly unsupported. The Yeshiva states that the complaint “fails to comport with the pleading requirements imposed by the CVA” as Plaintiff merely alleges sexual abuse without identifying specific sections of the then-applicable penal law that were violated. While the CVA revives causes of action for conduct that would constitute a sexual offense under the penal law, there is no particularity requirement with respect to the citation of specific penal code sections. Furthermore, such a strict reading of CPLR 214-g would be completely contrary to the well-documented legislative goals of the CVA. The Legislature intended to “open the doors of justice

to thousands of survivors of child sexual abuse in New York State” because “New York is one of the worst states in the nation for survivors of child sexual abuse,” and established “a one-year window in which adult survivors of child sexual abuse would be permitted to file civil actions, even if the statute of limitations already expired” (NY Committee Report, Senate Bill S2440 § 3 [January 26, 2019]). As Plaintiff was not required to detail more specific allegations at this juncture, the complaint satisfies the requirements of CPLR 214-g.

The final branch of the Yeshiva’s motion seeks dismissal of Plaintiff’s claim for the relief of punitive damages. The remedy of punitive damages is only awarded in exceptional cases. “To recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives” (*Munoz v Poretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted]). “Even where there is gross negligence, punitive damages are awarded only in singularly rare cases such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public” (*Karen S. “Anonymous” v Streitferdt*, 172 AD2d 440, 441 [1st Dept 1991] [internal quotation marks and citation omitted]).

Punitive damages may be assessed against an employer for an employee’s conduct

““only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant,’ such that it is complicit in that conduct. Complicity is evident when ‘a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct’”

(*Borst v Lower Manhattan Dev. Corp.*, 162 AD3d 581, 582 [1st Dept 2018], quoting *Loughry v Lincoln First Bank, N.A.*, 67 NY2d 369, 378 [1986]).

Here, the merits of Plaintiff’s allegations that the Yeshiva improperly retained Rabbi Leizerowitz even with knowledge of his propensity for abuse have not yet been adjudicated. Thus,

it is unclear at this juncture whether Defendants' conduct amounts to egregious and willful misdoing sufficient to justify an award of punitive damages, As such, it is better left for the trier of fact to determine whether an award of punitive damages is warranted (*see e.g. Laurie Marie M. v Jeffrey T.M.*, 159 AD2d 52, 59-60 [2d Dept 1990], *aff'd* 77 NY2d 981, 982 [1991] ["the issue of punitive damages was properly submitted to the jury"]).

Therefore, the final branch of the Yeshiva's motion is denied, and Plaintiff may pursue the relief of punitive damages along with compensatory damages in conjunction with his surviving claims.

Plaintiff's Motion to Amend

Plaintiff moves to amend the caption to substitute his real name for that of the pseudonym John Poe, and requests that the action be sealed.

"In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or is patently devoid of merit" (*Scofield v DeGroodt*, 54 AD3d 1017, 1018 [2d Dept 2008]). "Whether to grant such leave is within the motion court's discretion, the exercise of which will not be lightly disturbed" (*Pergament v Roach*, 41 AD3d 569, 572 [2d Dept 2007]). "A proposed amendment that cannot survive a motion to dismiss should not be permitted" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 185 [1st Dept 2001]; *Duratech Industries, Inc. v Continental Ins. Co.*, 21 AD3d 342, 346 [2d Dept 2005]).

Notwithstanding the liberal standard for motions to amend, the Court finds Plaintiff's motion must be denied. The motion is supported only by a brief attorney's affirmation claiming that the "requested relief speaks for itself." Counsel does not elaborate why Plaintiff wishes to proceed with his real name under a sealed action, rather than publicly under a pseudonym as the

vast majority of CVA actions (including this one)¹ have been proceeding. Furthermore, it is not clear that Plaintiff served his motion papers upon Defendants as no affidavits of service were filed. The Court denies this application without prejudice such that Plaintiff may renew his application with proper legal arguments supporting the relief requested.

Accordingly, it is

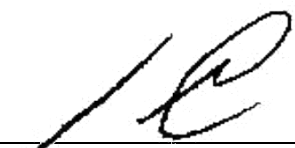
ORDERED that the motion of Defendants Gerer Yeshiva and Mesivta Bais Yisroel, Inc., and Machzikei Hadath Rabbinical College (collectively, the “Yeshiva”) for dismissal of this action pursuant to CPLR 3211(a)(5) and (a)(7) (Motion Seq. 001) is denied; and it is further

ORDERED that Plaintiff’s motion to amend the complaint (Motion Seq. 002) is denied without prejudice; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry within 14 days of the date this order; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1) and submit a first compliance conference order within 60 days after issue is joined.

This constitutes the decision and order of the Court.

<u>10/6/2022</u> DATE			 LAURENCE L. LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

¹ Defendants have not raised any objection to Plaintiff proceeding anonymously under the “John Poe” pseudonym.