SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** 18

Justice

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L. A., M. R.,

Plaintiffs,

- v -

CITY OF NEW YORK, ARCHDIOCESE OF NEW YORK, CATHOLIC CHARITIES COMMUNITY SERVICES, ARCHDIOCESE OF NEW YORK, CARDINAL MCCLOSKEY SCHOOL AND HOME FOR CHILDREN, DOES 1-10

Defendants.

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INDEX NO. 950886/2021

MOTION DATE 02/28/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants Archdiocese of New York and Catholic Charities Community Services (movants) move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a) (7), alternatively to sever the plaintiffs' respective claims into two separate actions pursuant to CPLR 603, and to strike scandalous or prejudicial matter pursuant to CPLR 3024. Co-defendant Cardinal McCloskey School and Home for Children (Cardinal) cross moves to sever for the same reasons articulated by movants and co-defendant City of New York (City) cross moves to dismiss that part of the complaint seeking punitive damages insofar as asserted against it and to have the same relief applied to it if the Court grants movants' and co-Cardinal's motions to dismiss and/or for severance.

Initially, the Court notes that the cross motions were improper because they seek relief against a nonmoving party (see Kershaw v Hosp. for Special Surgery, 114 AD3d 75, 87-89 [1st Dept 2013]). However, with respect to the branches of the cross-motions regarding severance,

plaintiffs are not prejudiced by the defective nature of the cross-motions because they had the opportunity and did in fact oppose the motions on the merits (see Sheehan v Marshall, 9 AD3d 403, 404 [2d Dept 2004]). With respect to the branch of the City's cross-motion requesting the same relief be applied to it if the Court grants movants' motion to dismiss for failing to state a claim (see NYSCEF Doc No 33 at ¶¶ 2-3), the Court finds the requested relief is improper because the allegations and theories of liability against the movants may be different from the potential liability or allegations against the City.

Plaintiffs' complaint alleges that plaintiff L.A. and her sister plaintiff M.R. were placed in a foster home by defendants in 1956 where they were both sexually abused by their foster father, Mr. Lopez (first name unknown), until 1962. The complaint also alleges that another foster child in Lopez's home, Angel (last name unknown) also sexually abused both plaintiffs while in foster care. The complaint refers to the alleged abusers as "perpetrator 1" and "perpetrator 2" (see NYSCEF Doc No 2 at ¶¶ 38-60).

Failure to State a Claim

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer, 43 NY2d at 275).

In support of their motion, movants argue that plaintiffs "have not provided any evidence to suggest that the Perpetrators were supervised or controlled by the moving defendants" and that

"there is no evidence that the Perpetrators existed or worked for the moving defendants from 1957 to 1962" (NYSCEF Doc No 25 at ¶¶ 9-10). However, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). Therefore, the Court finds that movants failed to show that plaintiffs' complaint does not otherwise sufficiently state a negligence cause of action against them.

Movants also assert that plaintiffs failed to sufficiently plead that they had notice of the alleged abuse. While it could be said that such argument should not be considered as raised for the first time in reply papers (see Dannasch v Bifulco, 184 AD2d 415, 417 [1992]), the Court finds that the contention is without merit. The complaint sufficiently alleges notice (see NYSCEF Doc No 2 at ¶¶ 61-63) and, in any event, those allegations, as well as more specific facts with respect to each defendant, may be amplified in a bill of particulars and subsequent discovery (see Doe v Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021]).

That branch of the City's cross motion pursuant to CPLR 3211 (a) (7) to dismiss that part of the complaint seeking punitive damages insofar as asserted against it is unopposed and granted (see Clark-Fitzpatrick, Inc. v Long Is. R. Co., 70 NY2d 382, 386-88 [1987]; Karoon v New York City Tr. Auth., 241 AD2d 323, 324-25 [1st Dept 1997]).

Severance

CPLR 603 provides in part that "the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" "[i]n furtherance of convenience or to avoid prejudice." Although severance is within the Court's discretion, it "should be exercised sparingly" (Shanley v Callanan Indus., Inc., 54 NY2d 52, 57 [1981]). Movants cite to the alleged inconvenience because the plaintiffs reside in two different states and alleged prejudice because

a jury could be confused between the two plaintiffs and may be inclined to believe that Lopez and Angel did in fact commit the alleged abuse because there are two accusers. The Court finds those arguments unavailing and do not constitute prejudice of a substantial right and is therefore an insufficient basis for severance. Rather, the plaintiffs were allegedly abused by the same people, in the same places, during similar periods of time, and have asserted claims against the same defendants — therefore there are common questions of both fact and law (see, e.g., Cason v Deutsche Bank Group, 106 AD3d 533 [1st Dept 2013]). Further, each plaintiff would be a witness in the other plaintiff's action and the same testimony would be heard by a jury anyway. Accordingly, severance here would not be convenient for any party, nor the courts, as such "[f]ragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one" (Shanley, 54 NY2d at 57 [1981]).

Scandalous or Prejudicial Matter

In reviewing a motion pursuant to CPLR 3024 (b), "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (Soumayah v Minnelli, 41 AD3d 390, 392 [1st Dept 2007]). "Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading or bill of particulars" (Irving v Four Seasons Nursing & Rehabilitation Ctr., 121 AD3d 1046, 1048 [2d Dept 2014]).

The Court finds plaintiffs' repeated reference to the alleged abusers as "perpetrator[s]" does not advance any cause of action stated and is unduly prejudicial. The Child Victims Act ("CVA") (CPLR § 214-g), the claim revival statute by which plaintiffs asserts their allegations of sexual abuse, by its very nature presupposes that an alleged victim has suffered physical abuse by a perpetrator and therefore the term could also be considered superfluous.

That branch of the motion and/or cross motions seeking to strike "reference to reckless and wanton conduct or claim for punitive damages" (NYSCEF Doc No 25 at ¶ 19) is denied, as that language is relevant and necessary to support the punitive damages sought against all defendants, except the City as set decided above (see Irving, 121 AD3d at 1048).

Accordingly, it is hereby ORDERED that the branch of the motion by defendants Archdiocese of New York and Catholic Charities Community Services to strike scandalous or prejudicial matter is granted in part to the extent that the term "perpetrator" shall be stricken from the complaint as set forth below; and it is further

ORDERED that the same motion is otherwise denied; and it is further

ORDERED that the cross-motion by Cardinal McCloskey School and Home for Children for severance is denied; and it is further

ORDERED that the cross-motion by City of New York is granted in part to the extent of dismissing the request for punitive damages insofar as asserted against it, and to the extent of striking the term "perpetrator," and is otherwise denied; and it is further

ORDERED that plaintiffs shall, within 20 days from service of a copy of this order with notice of entry, file and serve an amended complaint that shall not include the scandalous term(s) "perpetrators," "perpetrator 1" and "perpetrator 2" and the abusers shall instead be identified by their respective known names; and it is further

ORDERED that the parties shall proceed with discovery pursuant to CMO No. 2, Section IX (B) (1).

This constitutes the decision and order of the Court.

3/10/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE