SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JANE DOE,

Plaintiff,

- v -

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, ADRIAN DOMINICAN SISTERS, MOUNT HOPE FOUNDATION, INC., LOGOS CORPORATION, CECILIA MELLET, THE ESTATE OF DR. HERBERT THOMAS SCHWARTZ, DOMINICAN FRIARS PROVINCE OF ST. JOSEPH

Defendants.

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INDEX NO. 950614/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 49, 64, 65, 66, 67, 68, 69, 77, 87, 92, 93, 94

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant Adrian Dominican Sisters (ADS or defendant) moves to dismiss the complaint and/or amended complaint[1] pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, pursuant to CPLR 3212.

Plaintiff's complaint alleges that she was sexually abused by Dr. Herbert Thomas Schwartz and Annie Emmerson while living on co-defendant Mount Hope Foundation's (Foundation) commune

[1] After the moving papers were filed and served, plaintiff filed and served an amended complaint adding another defendant and included more allegations (NYSCEF Doc No 52). "While the lower court cases are in conflict over whether the filing of an amended pleading automatically abates a motion to dismiss that was addressed to the original pleading, [the Appellate Division, First Department] prefer[s] the rule set forth in Sholom that the moving party has the option to decide whether its motion should be applied to the new pleadings" (Sage Realty Corp. v Proskauer Rose, 251 AD2d 35, 38 [1st Dept 1998], citing Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, 138 Misc 2d 799, 801 [Sup Ct, Queens County 1988]). Here, defendant acknowledges that the amended complaint did not substantially change the nature of the action insofar as asserted against it (see NYSCEF Doc No 92 at ¶ 5). Additionally, although defendant did not make any specific election, defendant's reply papers went on to consider the merits of the amended complaint and party affidavit in opposition to the motion, both of which contain allegations not found in the original complaint. Therefore, the Court finds no prejudice to defendant in treating this motion as if it were addressed to the amended complaint (see, e.g., Sage Realty Corp., 251 AD2d at 38).

located in Middleton, New York in or around 1978-1980 when plaintiff was approximately 4-6 years old. The complaint alleges that co-defendant Cecilia Mellet, Schwartz, and Emmerson "were leaders of the [Foundation] commune, operating under the direction and control of defendant [ADS], and its agents, servants and/or employees" (NYSCEF Doc No 52 at ¶ 17). The complaint asserts three claims against ADS for negligence, negligent hiring, retention and supervision, and negligent infliction of emotional distress (fourth through sixth causes of action, respectively).

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 v Ginzburg, 43 NY2d 268, 275 [1977]). Additionally, "[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]).

A motion to dismiss a complaint based upon documentary evidence pursuant to CPLR 3211 (a) (1) "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]). Not every piece of evidence in the form of a document is properly deemed "documentary evidence." The appellate courts have noted this distinction, finding that legislative history and supporting cases make it clear that "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010]; Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431, 432 [1st Dept 2014]).

In support of its motion, defendant submits the certificates of incorporation for co-defendant(s) and the affidavit of Sister Patricia Sieman, a prioress of ADS (NYSCEF Doc No. 38). With respect to the certificates of incorporation, the fact that the Foundation and/or co-defendant Logos Corporation are separately formed entities does not negate the possibility that, as alleged in the complaint, the ADS owed plaintiff a duty of care *in loco parentis* or was involved with the commune and had the requisite ability to supervise and control any of its staff or leaders.

Sieman's affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211 (a) (1) (see J.D. v Archdiocese of New York, — AD3d —, 2023 NY Slip Op 01588 [1st Dept Mar. 23, 2023]; Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011] citing, inter alia, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]).

Further, although "a trial court may use affidavits in its consideration of a pleading motion to dismiss," where, as here, the Court declines to convert the motion into one for summary judgment, such affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976]). Consequently, affidavits submitted from a defendant "will almost never warrant dismissal under CPLR 3211" (Lawrence v Miller, 11 NY3d 588, 595 [2008]) "unless [they] establish conclusively that plaintiff has no cause of action" (Rovello, 40 NY2d at 636).

Here it cannot be said that defendant met its burden establishing that plaintiff has no claim against it as a matter of law because the affidavit is not conclusive (see J.D., 2023 NY Slip Op 01588). Sieman admits that ADS was involved with the commune in an "unofficial capacity" "between the years 1968 and 1974" (NYSCEF Doc No 38 at ¶ 5). However, Sieman states that "[b]y 1974, all ADS Sisters

had withdrawn from the Commune with the exception of Sister Dolores Smolke, who was granted dispensation from being a member of the ADS in 1974" (id. at ¶ 7). The affidavit further states "ADS did not create, oversee, supervise, manage, control, direct, or operate the Commune or its staff or employees at any time. ADS did not participate in the hiring of any employees of the Commune, including Schwartz, Mellet, or Emmerson" nor any of the other co-defendants (id. at ¶ 8).

In opposition, plaintiff submitted an affidavit stating, inter alia, that an alleged ADS sister named Dolores "would sometimes be responsible for taking me to Schwartz to be sexually abused" (NYSCEF Doc No 65 at ¶ 23). However, "if the motion has not been converted to a CPLR 3212 motion for summary judgment" plaintiff's affidavit may be received "to remedy pleading defects and *not* to offer evidentiary support for properly pleaded claims" (Nonnon v City of New York, 9 NY3d 825, 827 [2007] [emphasis added]; see Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635-36 [1976]).

Here, given the foregoing, the Court finds that there is ample support for concluding that the issues of ADS's liability cannot be resolved at this juncture. It is important to note that both affidavits are not necessarily subject to cross examination and the contention that ADS withdrew from the commune prior to plaintiff's abuse (and therefore did not owe plaintiff a duty of care) is not otherwise supported by sufficient evidence proving the same as a matter of law. Even after the alleged withdrawal from the commune, there is insufficient proof showing that Dolores was in fact "granted a dispensation from being a member of the ADS in 1974" and/or what significance that has, if any. Whether ADS had the ability to supervise and/or control Dolores or Loretta and consequently owed a duty of care to plaintiff and/or a duty to adequately supervise and have the requisite ability to control the sisters and/or the alleged abuser(s) cannot be resolved at this juncture.

Defendant's alternate request for relief pursuant to CPLR 3212 is denied as well. First, CPLR 3212 (a) explicitly requires that issue be joined and defendant has not yet filed an answer (see Alro Builders and Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512, 512 [1st Dept 1980]). Second, it is

clear that discovery remains outstanding related to the issue mentioned above about the exact nature and scope of the relationship between defendant and the tortfeasor(s), among others. Accordingly, summary judgment is premature (see Rutherford v Brooklyn Navy Yard Dev. Corp., 174 AD3d 932, 933 [2d Dept 2019]; Rodriguez Pastor v DeGaetano, 128 AD3d 218, 227-28 [1st Dept 2015]).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED that the movant shall file and serve an answer to the complaint within twenty (20) days from service of a copy of this order with notice of entry; 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.

5/9/2023
DATE

ALEXANDER M. TISCH, J.S.C.

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