

**E.I. v City of New York**

2023 NY Slip Op 31695(U)

May 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 520660/2021

Judge: Laurence L. Love

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

**PRESENT: HON. LAURENCE L. LOVE PART 63M**

*Justice*

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E.I.,

Plaintiff,

- v -

CITY OF NEW YORK, ROMAN CATHOLIC  
DIOCESE OF BROOKLYN, ST. JOSEPH SERVICES FOR  
CHILDREN AND FAMILIES a/k/a CATHOLIC CHILD  
CARE SOCIETY OF THE DIOCESE OF BROOKLYN,  
SISTERS OF CHARITY OF ST. VINCENT de PAUL OF  
NEW YORK, CATHOLIC CHARITIES OF BROOKLYN  
AND QUEENS, GRAHAM WINDHAM f/k/a GRAHAM  
HOME and DOES 1-10,

Defendants.

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INDEX NO. 520660/2021

MOTION DATE 11/17/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21-25, 30-31, 34-37 were read on this motion to/for DISMISS.

Upon the foregoing documents, Defendant Sisters of Charity of Saint Vincent de Paul of New York (“Sisters of Charity”) moves for an order dismissing this action pursuant to CPLR 3211(a)(7) or in the alternative, dismissing Paragraphs 87-89 of Plaintiff’s complaint pursuant to CPLR 214-g (Motion Seq. 002).

**BACKGROUND**

This is an action commenced pursuant to the Child Victims Act (“CVA”) in which Plaintiff alleges that as minor in the foster care system between 1983 and 1990, Defendants placed her into numerous foster homes where she was abused by various perpetrators. Plaintiff’s complaint alleges a single count of negligence as against each separate Defendant. Plaintiff alleges that Sisters of Charity staffed, controlled, and supervised St. Joseph’s Services for Children and Families f/k/a Catholic Child Care Society of the Diocese of Brooklyn (“St.

Joseph's"). Plaintiff alleges that Sisters of Charity provided foster services through St. Joseph's, and thus owed her a duty of reasonable care to maintain her safety and to use reasonable care in retention and supervision of foster parents.

In moving for dismissal, Sisters of Charity argues Plaintiff fails to state a claim against them as the complaint does not specially name which agency placed Plaintiff in which home, nor does Plaintiff establish how Sisters of Charity was on notice of the alleged abuse. Sisters of Charity has submitted an affidavit from its president stating that Sisters of Charity did not own St. Joseph's and did not place children into foster care, nor does it maintain any records.

Sisters of Charity alternatively argue that Plaintiff's claims against "Perpetrator 6" must be stricken as the alleged abuse does not constitute a revived sexual offense under the CVA.

#### DISCUSSION

In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), a court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (see *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see CPLR §3026; *Siegmund Strauss, Inc.*, 104 AD3d 401, supra). In deciding such a motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs ‘the benefit of every possible favorable inference,’” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc.*, 104 AD3d 401, supra; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

“To sustain a cause of action alleging negligence, ‘a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries’” (*Schindler v Ahearn*, 69 AD3d 837, 838 [2d Dept 2010], quoting *Engelhart v County of Orange*, 16 AD3d 369, 371 [2d Dept 2005]). If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant (see *Pulka v Edelman*, 40 NY2d 781 [1976], *Engelhart*, 16 AD3d at 371).

Whether a duty of care is owed by one person to another is a question of law (see *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1 [1988]; *Engelhart*, 16 AD3d at 371). In general, an entity has no duty to control a third party's conduct so as to prevent injury to another unless special circumstances exist in which the entity has sufficient authority and control over the conduct of that third party (see *id.*).

Here, as mentioned, Sisters of Charity has submitted an affidavit from its president stating that although it provided “assistance” to St. Joseph’s, it did not own St. Joseph’s and did not provide any foster care services. Plaintiff argues the Court should disregard this affidavit as it does not constitute proper documentary evidence under CPLR 3211(a)(1). Sisters of Charity in

reply notes this argument is misplaced, as it has moved for dismissal under CPLR 3211(a)(7), not (a)(1).

While Sisters of Charity is correct that affidavits can be considered on a 3211(a)(7) motion despite not constituting CPLR 3211(a)(1) evidence, the Second Department has nevertheless maintained that affidavits “are not to be examined for the purpose of determining whether there is evidentiary support for the pleading” and “will almost never warrant dismissal under CPLR 3211” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2<sup>nd</sup> Dept 2010]). A motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1<sup>st</sup> Dept 1977]).

Here, Plaintiff has disputed the statements made in Sisters of Charity’s affidavit, and dismissal based solely on the self-serving and uncorroborated statements would be improper. Additionally, the four corners of Plaintiff’s complaint sufficiently state a cause of action for negligence against Sisters of Charity under the liberal standards of CPLR 3211(a)(7). Plaintiff has alleged that Sisters of Charity was directly involved in her foster care placement and that the abuse suffered at various homes was either reported or open and notorious such that Sisters of Charity should have been on notice. More detailed allegations are not required from Plaintiff at this juncture. Affording Plaintiff the benefit of every possible inference, Plaintiff’s complaint sufficiently states a claim for negligence, and discovery will be warranted for Sisters of Charity to establish entitlement to dismissal.

The Court also declines to dismiss Plaintiff’s claims regarding Perpetrator 6 as set forth in Paragraphs 87-89 of the complaint. Plaintiff alleges that when she was approximately nine or

ten years old, one of her foster parent's biological children invited her to watch a pornographic movie, and she was later removed from the home.

CPLR 214-g revived claims for injuries “suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age.” Sisters of Charity argues this claim was not revived, as there are no offenses involving showing pornography codified under Article 130 of the Penal Law. However, the offense codified under § 130.91, “Sexually motivated felony,” is defined as a person committing “a specified offense for the purpose, in whole or substantial part, of his or her own direct sexual gratification.” A “specified offense” is “a felony offense defined by any of the following provisions of this chapter.” Among the listed provisions is “disseminating indecent material to minors in the first degree as defined in section 235.22.”

While Sisters of Charity and other defendants in this action may eventually seek to dismiss this claim with more fleshed out legal arguments, the Court is disinclined to dismiss the claim at this juncture in the litigation solely based on an argument that the claim is not covered by Article 130.

As a final matter, the Court separately notes that as both parties address in their papers, disclosure of Plaintiff's foster care records will be crucial for Plaintiff to pursue her claims. The records also may demonstrate Sisters of Charity's entitlement to dismissal from this action.

A foster child is “presumptively entitled to her own records” that are in the custody of an agency defendant (*K.B. v SCO Family of Service*, 159 AD3d 416 [1<sup>st</sup> Dept 2018], quoting *Wheeler v Commissioner of Social Servs. Of City of N.Y.*, 233 AD2d 4, 12 [2<sup>nd</sup> Dept 1997]). However, pursuant to Social Services Law § 372, such records “shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by

any person other than one authorized ..., after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination.” Accordingly, the Social Services Law requires that the Court conduct an in-camera hearing of the records before they are disclosed to ensure that any confidential information is appropriately redacted (See Carrieri, Practice Commentaries, New York Soc. Serv. Law § 372 [McKinney’s]).

A conference before the Court has been scheduled in this action for June 15, 2023 (see NYSCEF doc No. 46). To the extent the parties wish to schedule an in-camera inspection of Plaintiff’s foster records prior to that date, the parties may jointly contact the Court by email ([SFC-Part63-Clerk@nycourts.gov](mailto:SFC-Part63-Clerk@nycourts.gov)) to request a hearing.

**CONCLUSION**


Accordingly, it is

ORDERED that the motion of Defendant Sisters of Charity of Saint Vincent de Paul of New York for an order dismissing this action pursuant to CPLR 3211(a)(7) or in the alternative, dismissing Paragraphs 87-89 of Plaintiff’s complaint pursuant to CPLR 214-g (Motion Seq. 002) is denied; and it is further

ORDERED that Plaintiff shall serve a copy of this order on all parties with notice of entry within 14 days.

This constitutes the decision and order of the Court.

05/10/2023  
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	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE