

**D.M. v Domestic & Foreign Missionary Socy. of the
Protestant Episcopal Church**

2023 NY Slip Op 31863(U)

May 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 514360/2020

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part CVA 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of May, 2023.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X
D.M.,

Plaintiff,

-against-

ms# 54,516 & 7.

Index No.: 514360/2020

THE DOMESTIC AND FOREIGN MISSIONARY
SOCIETY OF THE PROTESTANT EPISCOPAL
CHURCH a/k/a THE EPISCOPAL CHURCH,
EPISCOPAL DIOCESE OF LONG ISLAND, THE
CHURCH OF THE HOLY APOSTLES, and THE
CHURCH OF ATONEMENT,

Defendants.

-----X

The following e-filed papers read herein:

NYSEF Doc. Nos.:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

58-59, 62-63, 66,

108-109, 113, 116, 121-122

Opposing Affidavits/Answer (Affirmations) _____

71, 80

Affidavits/ Affirmations in Reply _____

97, 128-130

Other Papers: _____

Upon the foregoing papers, defendant Episcopal Diocese of Long Island (Diocese) moves for an order, pursuant to CPLR 3211 (a) (7), dismissing plaintiff D.M.'s amended complaint as against it (motion sequence number 4). Defendant the Domestic and Foreign Missionary Society of the Protestant Episcopal Church (DFMS) moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the amended complaint against it

(motion sequence number 5).¹ Plaintiff D.M. moves for an order, pursuant to CPLR 306-b, extending plaintiff's time to serve process on defendant The Church of the Holy Apostles (Holy Apostles) (motion sequence number 6). Holy Apostles cross-moves for an order, pursuant to CPLR 203 (b) and 306-b, dismissing the action as against it (motion sequence number 7).

The Diocese's motion (motion sequence number 4) is denied.

DFMS's motion (motion sequence number 5) is granted and the amended complaint is dismissed as against DFMS.

Plaintiff's motion (motion sequence number 6) is granted, plaintiff's time to serve Holy Apostles is extended, and the service of the amended complaint on Holy Apostles on July 28, 2022, is deemed timely, nunc pro tunc, pursuant to the extension.

Holy Apostles' cross motion (motion sequence number 7) is denied.

In view of the foregoing, the action is severed as against DFMS and the caption is amended to read as follows:

-----X

D.M.,

Plaintiff,

-against-

Index No.: 514360/20

EPISCOPAL DIOCESE OF LONG ISLAND, THE
CHURCH OF THE HOLY APOSTLES and THE
CHURCH OF ATONEMENT,

Defendants.

-----X

¹ The court notes that, after plaintiff filed the amended complaint, the Diocese and the DFMS withdrew their prior motions (motion sequence numbers 2 and 3) made against the original complaint.

In this revival action based on the Child Victims Act (CVA) (CPLR 214-g; L 2019, ch 11, § 3, as amended by L 2020, ch 130, § 1), plaintiff D.M.² alleges that, while he served as an alter boy at the Church of Atonement (Atonement) and later at Holy Apostles, he was sexually abused by Father Timothy Campbell Smith and Father Lavaroni, Episcopal priests who performed ministerial duties at Atonement and Holy Apostles. Atonement and Holy Apostles were parishes located in the Long Island Diocese at the time of the alleged abuse, and the DFMS served as the corporate entity for the Episcopal Church, its unincorporated parent.

In the amended complaint, plaintiff alleges that this abuse began while he served as an alter boy at Atonement in 1965, when plaintiff was approximately 10 years old. While at Atonement, Father Smith allegedly committed several acts of sexual assault and abuse against plaintiff including the fondling plaintiff's genitals, forcing plaintiff to perform oral sex, and the sodomy and rape of plaintiff. Plaintiff represents that he reported this abuse to Father Lavaroni, but that the abuse by Father Smith continued on numerous occasions thereafter. Indeed, after reporting this abuse to Father Lavaroni, Father Lavaroni himself allegedly began to sexually abuse plaintiff by performing acts involving the same kinds of abuse as Father Smith had engaged in. Father Smith and Father Lavaroni were thereafter transferred to Holy Apostles and plaintiff's family then began attending church at Holy Apostles, where plaintiff also served as an alter boy. Father Smith and Father

² The court (Silver, J.), by way of a so-order stipulation dated January 21, 2021 and a decision dated January 25, 2021, granted plaintiff leave to proceed in this action under a pseudonym.

Lavaroni's abuse of plaintiff continued while plaintiff was an alter boy at Holy Apostles until plaintiff was 12 years old.

The court turns first to the respective motions by the Diocese and the DFMS made pursuant to CPLR 3211 (a) (1) and/or (a) (7). Under CPLR 3211 (a) (1), a dismissal is warranted only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]). "To constitute documentary evidence, the evidence must be 'unambiguous, authentic, and undeniable'" (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2017], quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2010]), "such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (*Phillips v Taco Bell Corp.*, 152 AD3d at 807). "Conversely, letters, emails, and . . . affidavits, do not meet the requirements for documentary evidence" (*id.*).

On a motion pursuant to CPLR 3211 (a) (7) to dismiss a complaint for failure to state a cause of action, a 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 within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88; see *Boyle v North Salem Cent. Sch. Dist.*, 208 AD3d 744, 745 [2d Dept 2022]; *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d 595, 596 [2d Dept 2021]). "Whether a plaintiff can ultimately establish [his or her] 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]). “Upon the submission of evidentiary material in support of such a motion, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Klostermeier v City of Port Jervis*, 200 AD3d 866, 867-868 [2d Dept 2021] [internal quotation marks omitted]; see *Yan Ping Xu v Van Zwienen*, 212 AD3d 872, 874 [2d Dept 2023]).

Although plaintiff has identified his claim against defendants simply as a negligence cause of action, he has pleaded facts and alleged duties akin to those at issue in a negligent supervision of a child cause of action and in a negligent hiring, supervision and retention cause of action (see *Davila v Orange County*, 215 AD3d 632, 634-635 [2d Dept 2023]; see also *Willis v Young Men's Christian Assn. of Amsterdam*, 28 NY2d 375, 379 [1971]). Under each such cause of action, liability turns on whether the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see *Davila*, 215 AD3d at 634-635; *Belcastro v Roman Catholic Diocese of Brooklyn, N.Y.*, 213 AD3d 800, 802 [2d Dept 2023]; *Novak v Sisters of the Heart of Mary*, 210 AD3d 1104, 1105 [2d Dept 2022]; *Shu Yuan Huang v St. John's Evangelical Lutheran Church*, 129 AD3d 1053, 1054 [2d Dept 2015]; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 757 [2d Dept 2012]).³ The Diocese, however, contends that plaintiff's allegations

³ As essentially conceded by plaintiff, he may not rely on respondeat superior liability in support of his action since Father Smith and Father Lavaroni's acts of sexual assault cannot be deemed to have occurred within the scope of their employment as priests (see *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252-252 [2002]; *Wagner v State of New York*, 214 AD3d 930, 932 [2d Dept 2023]; *Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1360 [2d Dept 2019]).

regarding its actual or constructive notice of Father Smith and Father Lavaroni's propensity to commit sexual assault are conclusory and insufficient. In evaluating such allegations, courts have emphasized that "[c]auses of action alleging negligent hiring, negligent retention, or negligent supervision are not statutorily required to be pleaded with specificity" (*Davila*, 215 AD3d at 635, quoting *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d at 596; see *Boyle*, 208 AD3d at 755). "The manner in which the defendant acquired actual or constructive notice of [the employee's propensity to commit the alleged] abuse is an evidentiary fact, to be proved by the [plaintiff] at trial" (*Martinez v State of New York*, 215 AD3d 815, 819 [2d Dept 2023]) but, in a pleading, "the plaintiff need not allege his [or her] evidence" (*id.*, quoting *Mellen v Athens Hotel Co.*, 153 App Div 891, 891 [1st Dept 1912]; see also *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]; cf. *Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 811 [2d Dept 2023] [although specificity is not required, pleading must contain more than a bare legal conclusion of knowledge of propensity]).

Here, relevant to defendants' knowledge, plaintiff, in the amended complaint, alleges, among other things, that Father Smith and Father Lavaroni were serial sexual predators who abused multiple minor children during their employment by defendants (Amended Complaint, at ¶ 48), that this fact was common knowledge among agents and/or employees of defendants at Atonement and Holy Apostles (Amended Complaint, at ¶ 49), that plaintiff was observed by agents and/or employees of defendants going with Father Smith and Father Lavaroni to the rectory and other remote locations at the premises of Atonement and Holy Apostles with no legitimate explanation or purpose (Amended

Complaint, at ¶ 50), that Father Smith and Father Lavaroni each knew the other was sexually assaulting and abusing plaintiff (Amended Complaint, at ¶¶ 52-53), that plaintiff reported the abuse by Father Smith and Father Lavaroni to one or more agents and/or employees of defendants (Amended Complaint, at ¶¶ 54-55) and, accordingly, that defendants knew or should have known of Father Smith and Father Lavaroni's propensity to commit such conduct and were in a position to stop such conduct (Amended Complaint, at ¶¶ 56-67). The amended complaint also alleges that defendants fostered a culture of exploiting young children by turning a blind eye to the conduct of its priests (Amended Complaint, at ¶¶ 58-67) (*see Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 161 [1st Dept 2022] [allegations of a culture of exploiting young women were a factor in the court's finding the negligent hiring and retention claim to be sufficient to state a cause of action]). While these allegations are not greatly detailed, they show that the assertions regarding defendants' knowledge of Father Smith and Father Lavaroni's propensity for inappropriate sexual conduct are based on more than bare legal conclusions. As such, this court finds that plaintiff has stated a cause of action for negligence based on a theory negligent hiring/supervision/retention against the Diocese (*see Martinez*, 215 AD3d at 819-820; *Davila*, 215 AD3d at 635; *Belcastro*, 213 AD3d at 802; *Novak*, 210 AD3d at 1105; *Boyle*, 208 AD3d at 745; *cf. Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d at 811).⁴

DFMS, in moving, primarily contends that it is entitled to dismissal of the complaint against it based on documentary evidence demonstrating that it did not have an

⁴ The court notes that the Diocese has made no assertion that Father Smith and Father Lavaroni cannot be deemed its employees or that it did not, otherwise, have sufficient control over their employment to be held liable for their conduct.

employer/employee or principal/agent relationship with the Diocese or Atonement or Holy Apostles and that DFMS did not have a church/penitent relationship with plaintiff such that it may be held liable for the conduct of Father Smith or Father Lavaroni. Initially, there is no real dispute that DFMS, the Diocese, and the parish churches Atonement and Holy Apostles are each distinct legal entities (*see* L 1846, ch 331 [statute incorporating DFMS]; Religious Corporation Law art 3; *Episcopal Diocese of Rochester v Harnish*, 11 NY3d 340, 346-347 [2008]; *see generally Rector, Churchwardens & Vestrymen of Church of Holy Trinity v Melish*, 4 AD2d 256 [2d Dept 1957], *affd* 3 NY2d 476 [1957]; *Fiske v Beaty*, 206 App Div 349 [3d Dept 1923], *affd* 238 NY 598 [1924]), a fact that, in and of itself, generally weighs against a finding of liability (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]; *Goodspeed v Hudson Sharp Mach. Co.*, 105 AD3d 1204, 1205 [3d Dept 2013]; *Serrano v New York Times Co., Inc.*, 19 AD3d 577, 578 [2d Dept 2005]). Nevertheless, separate entities may still be held liable for subordinate entities over which they exercise a significant degree of control (*see Goodspeed*, 105 AD3d at 1205; *see also Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 258 [2008]; *Garcia v Herald Tribune Fresh Air Fund*, 51 AD2d 897, 897-898 [1st Dept 1976]). DFMS, however, contends that its Constitution and Canons constitute documentary proof for purposes of CPLR 3211 (a) (1) and these documents, which govern the relationship amongst DFMS, the Diocese and the parish churches, demonstrate that DFMS does not exercise sufficient control over them to be held liable to plaintiff.

This court agrees with DFMS that its 1964 Constitution and Canons, as authenticated by the affidavit from DFMS's Deputy Registrar, one of the keepers of the

records maintained by DFMS, is the kind of documentary proof that may be considered on a CPLR 3211 (a) (1) motion (*see Harounian v Harounian*, 198 AD3d 734, 736-737 [2d Dept 2021] [LLC operating agreement conclusive proof on CPLR 3211 (a) (1) motion]; *Girande v Episcopal Diocese of New York*, 2022 WL 14590267[U], *2 [Sup Ct, New York County 2022] [addressing the DFMS's constitution and canons]; *see also Parese v Claudio*, ___ AD3d ___, 2023 NY Slip Op 02324, *1 [2d Dept 2023]; *J.D. v Archdiocese of N.Y.*, 214 AD3d 561, 561 [1st Dept 2023]). Undoubtedly, the Episcopal Church has a hierarchical form of church governance and the Constitution and Canons show that DFMS has a degree of ecclesiastical jurisdiction over the Diocese and its parish churches in that the Diocese and the parish churches must agree to the Canons in order to operate as Episcopal Church entities (*see e.g.* Canons 19-25, 44, 51; *E.E.O.C. v Grace Episcopal Church of Whitestone*, 2007 WL 6831007[U], *3 [EDNY 2007]; *see also Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282, 283 n2 [3d Dept 1999]). Nevertheless, the Canons also show that the ordination, hiring, supervision and discipline of Episcopal priests occurs at the parish and diocesan levels (*see* Canons 12-13, 26-37, 44-46, 53-56) and that it is the parish wardens and vestry (effectively the trustees of a parish elected by a congregation) who act as the “legal representatives of the Parish in all matters concerning its corporate property and the relations of the Parish to its Clergy” (Canon 13 [2]).⁵ Given that these provisions show that DFMS does not control the hiring, supervision and retention of the parish clergy and the relationship between the clergy and

⁵ While Canon 13 (2) allows a diocese to provide otherwise, a diocese could not make the DFMS the entity responsible for a parish's relations with its clergy.

a parish's congregation -- the issues of control that are central to plaintiff's claims here -- the Constitution and Canons conclusively demonstrate that DFMS is entitled to dismissal of the amended complaint as against it pursuant to CPLR 3211 (a) (1) (*Harounian*, 198 AD3d at 736-737; *Girande*, 2022 WL 14590267[U], *2; *see also Caceres v Toyota Motor North America, Inc.*, ___ AD3d ___, 2023 NY Slip Op 02492, *1-2 [2d Dept 2023]; *O'Neil v St. Ephrem's Church*, 31 Misc 3d 1219[A], 2011 NY Slip Op 50738[U], *3-4 [Sup Ct, Kings County 2011], *affd* 98 AD3d 485 [2d Dept 2012], *lv denied* 20 NY3d 860 [2013]; *E.E.O.C. v Grace Episcopal Church of Whitestone*, 2007 WL 6831007[U], *3; *cf. J.D. v Archdiocese of N.Y.*, 214 AD3d at 561 [although deed and certificate of incorporation constituted documentary proof, they failed to show that defendant Archdiocese did not supervise or control a priest's appointment and employ]).

Plaintiff, in opposition, has "failed to establish that facts essential to justify opposition to the defendant's motion may exist, but, absent discovery, could not be stated" (CPLR 3211 [d]; *O'Neill v Wilder*, 204 AD3d 823, 824 [2d Dept 2022]; *Beesmer v Besicorp Dev., Inc.*, 72 AD3d 1460, 1461 [3d Dept 2010]; *Cassidy v County of Nassau*, 146 AD2d 595, 597 [2d Dept 1989]).

Turning to plaintiff's motion and Holy Apostles' cross motion relating to service pursuant to CPLR 306-b, this court finds that an extension of time to serve Holy Apostles is warranted in the interest of justice. In this regard, the action was timely commenced, but the Statute of Limitations, as provided in the CVA, has since expired (*see Wells Fargo Bank, N.A. v Boakye-Yiadom*, 213 AD3d 976, 978 [2d Dept 2023]). Plaintiff did make two

attempts to serve Holy Apostles in August 2020⁶ and one attempt in December 2020, and these initial attempts were undoubtedly hindered, at least to some extent, by the Covid-19 pandemic. Although plaintiff delayed in making another attempt to serve Holy Apostles until it was successfully served on July 28, 2022, and plaintiff did not seek leave for an extension under section 306-b until the instant motion, this additional delay cannot be deemed to have severely prejudiced Holy Apostles under the circumstances here. Namely, the current co-rectors of Holy Apostles aver in their affidavit in opposition that they in fact received actual notice that the action had been commenced against them at some time before the CVA's revival window expired on August 14, 2021 (*see Wells Fargo Bank, N.A. v Boakye-Yiadom*, 213 AD3d at 978).⁷ Additionally, since the CVA has allowed this action to be commenced decades after the conduct at issue, it is doubtful that the additional delay by plaintiff in serving Holy Apostles will have any real impact on Holy Apostles' ability to defend itself. As such, it would be improper to presume that Holy Apostles was prejudiced based solely on the additional delay caused by plaintiff (*see T.F. v City of New York*, Sup Ct, New York County, June 14, 2022, Love, J., index No. 950714/20; *cf. Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 107 [2001]; *US Bank N.A. v Fink*, 206 AD3d 858, 861 [2d Dept 2022]). This court also finds the CVA's underlying legislative purpose of remedying an injustice (*see PB-36 Doe v Nagara Falls City Sch. Dist.*, 213 AD3d 82,

⁶ Although plaintiff first submitted the copies of the process server's affidavits relating to the August 2020 attempts at service with its reply papers, Holy Apostles was able to address them in its reply affidavit submitted in support of its cross motion to dismiss.

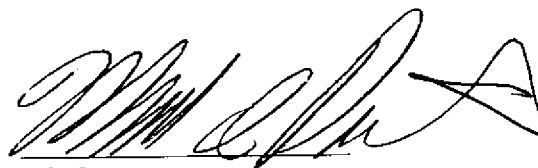
⁷ While the co-rectors note that the Diocese did not provide them with a copy of the complaint at the time the Chancellor of the Diocese alerted them that plaintiff had commenced the instant action, the co-rectors make no assertion that the Diocese would have declined or refused to provide a copy of the complaint on request.

85 [3d Dept 2023]; Bill Jacket, L 2019, ch 11, 7) supports finding that granting the subject extension is in the clear interest of justice (*see T.F. v City of New York*, Sup Ct, New York County, June 14, 2022, Love, J., index No. 950714/20).

Accordingly, plaintiff's motion for an extension is granted, Holy Apostles' cross motion is denied, and, since there is no dispute that the summons and amended complaint were served upon Holy Apostles on July 28, 2022, the service on that date is deemed timely made nunc pro tunc (*see Wells Fargo Bank, N.A. v Boakye-Yiadom*, 213 AD3d at 978).

This constitutes the decision, order and judgment of the court.

ENTER

A handwritten signature in black ink, appearing to read 'Mark I. Partnow', written over a horizontal line.

J.S.C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE