

ARK317 DOE v Diocese of Brooklyn

2023 NY Slip Op 32051(U)

June 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 513001/20

Judge: Robin S. Garson

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At an IAS Term, Part CVA 3 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 20th day of June, 2023.

P R E S E N T:

HON. ROBIN S. GARSON,

Justice.

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ARK317 DOE,

Plaintiff,

-against-

Index No.: 513001/20

DIOCESE OF BROOKLYN a/k/a THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK; ARCHDIOCESE OF NEW YORK; ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK a/k/a SAINT VINCENT CATHOLIC MEDICAL CENTERS OF NEW YORK; ST. SEBASTIAN'S a/k/a ST. SEBASTIAN; and DOES 1-5 whose identities are unknown to plaintiff,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

15-16, 18-19

Opposing Affidavits/Answer (Affirmations) _____

31

Affidavits/ Affirmations in Reply _____

47

Other Papers: _____

Upon the foregoing papers, defendant Archdiocese of New York (Archdiocese) moves for an order: (1) pursuant to CPLR 3211 (a) (1), dismissing plaintiff's complaint based on documentary evidence; (2) pursuant to CPLR 3211 (a) (7), dismissing the complaint for failure to state a cause of action; or alternatively (3) pursuant to CPLR 3212, granting the Archdiocese summary judgment dismissing the complaint (motion sequence number 2).

The Archdiocese's motion (motion sequence number 1) is denied.

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 alleges that, from approximately 1970 to 1972, when he was approximately 13 to 15 years old, he was sexually abused by Father James I.L. Frost, a Roman Catholic priest who was under the employ, supervision and control of the Archdiocese and defendants Diocese of Brooklyn, St. Vincent's Hospital and Medical Center of New York (St. Vincent), and St. Sebastian's (Complaint, at ¶¶ 20, 24). As is relevant to the Archdiocese, plaintiff alleges that, while hospitalized at St. Vincent, he came into contact with Father Frost when he (plaintiff) was participating in youth activities and/or church activities that occurred at St. Vincent, that St. Vincent was under the direct authority, control and province of the Archdiocese, that the Archdiocese had jurisdiction over youth activities and programs within the Archdiocese, and that Archdiocese had the power to appoint, supervise, and remove/terminate each and every person working with children within the Archdiocese, including Father Frost (Complaint, at ¶¶ 11-13, 22-24). Based on these allegations of control, and allegations that plaintiff was a youth in the custody of the Archdiocese when he participated in the youth programs, plaintiff asserts that the Archdiocese had a special relationship with plaintiff and Father Frost and a concomitant duty to control the latter's conduct and protect plaintiff (Complaint, at ¶¶ 28-36). In moving, the Archdiocese contends that it is entitled to

dismissal or summary judgment on the ground that it owed no duty to plaintiff because the Archdiocese did not own, control or supervise St. Vincent or its employees or agents.¹

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 [2d Dept 2017], quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 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*, 152 AD3d at 807). “Conversely, letters, emails, and . . . affidavits, do not meet the requirements for documentary evidence” (*id.*).

On a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), 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*

¹ Although some language in the complaint is ambiguous as to whether plaintiff is seeking to hold the Archdiocese liable for Father Frost’s conduct at St. Sebastian’s, when the complaint is read in its entirety, it is clear that plaintiff is only seeking to hold the Archdiocese liable for Father Frost’s abuse that allegedly occurred while plaintiff was at St. Vincent. Further, plaintiff, in his opposition papers, expressly states that he, “does not allege that the Archdiocese had any control or supervision over the Diocese of Brooklyn or St. Sebastian’s” (Plaintiff’s Memorandum of Law, at 2). As such, this court need not address the Archdiocese’s assertions that it may not be held liable for Father Frost’s conduct associated with St. Sebastian’s or that occurred within the Diocese of Brooklyn.

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 Zwiennen*, 212 AD3d 872, 874 [2d Dept 2023]; *Phillips*, 152 AD3d at 807-808).

In support of its contention that it is entitled to dismissal of the complaint based on documentary evidence under CPLR 3211 (a) (1), the Archdiocese has submitted an affidavit from Roderick J. Cassidy, an associate general counsel of the Archdiocese, who has held his position since 2002, and who asserts, based on his review of the Archdiocese’s records and files and “personal knowledge” that, although St. Vincent was located within the geographical boundaries of the Archdiocese, the Archdiocese did not operate or control St. Vincent or employ, supervise, or train its staff. Cassidy’s affidavit, which is primarily based on a review of documents that are not provided with the Archdiocese’s motion papers, does not constitute documentary evidence for purposes of a CPLR 3211 (a) (1) motion (see *J.D. v Archdiocese of N.Y.*, 214 AD3d 561, 561 [1st Dept 2023]; *Davis v*

Henry, 212 AD3d 597, 598 [2d Dept 2023]; *Phillips*, 152 AD3d at 807).² This court cannot consider the copy of a deed showing that the Archdiocese did not own the property on which St. Vincent was located because it was submitted for the first time in reply (*see Davis*, 212 AD3d at 598; *see also Kogut v Village of Chestnut Ridge*, 214 AD3d 777, 780 [2d Dept 2023]). Even if this court were to consider the deed, the deed, while it would constitute documentary evidence, fails to “utterly refute” the complaint’s allegations that Father Frost was an employee or agent of the Archdiocese or that the Archdiocese supervised or controlled his appointment and employ (*see J.A.F. v Roman Catholic Archdiocese of N.Y.*, ___ AD3d ___, 2023 NY Slip Op 02455, *1 [1st Dept 2023]; *J.D. v Archdiocese of N.Y.*, 214 AD3d at 561; *cf. D.M. v Domestic & Foreign Missionary Socy. of the Protestant Episcopal Church*, 2023 NY Slip Op 31863[U], *8-10 [Sup Ct, Kings County 2023] [documentary proof in the form of national church constitution and canons demonstrated that the national church did not employ, supervise, or control a priest working at a local parish]). This court notes that the Archdiocese’s proffered evidence in support of its motion is similar to the proof that the Appellate Division, First Department found insufficient to warrant dismissal of similar claims against the Archdiocese under CPLR 3211 (a) (1) in both *J.D. v Archdiocese of N.Y.* (214 AD3d at 561) and *J.A.F. v Roman Catholic Archdiocese of N.Y.* (2023 NY Slip Op 02455, *1).

In light of the liberal reading of a complaint under CPLR 3211 (a) (7) and given that negligent employment/supervision/retention causes of action are not statutorily required to

² Although the Archdiocese has appended other documents and an affidavit in support of its motion, these papers only address its relationship with St. Sebastian’s and the Diocese of Brooklyn, and do not address the Archdiocese’s connections with St. Vincent.

be pleaded with specificity (*see Davila v Orange County*, 215 AD3d 632, 635 [2d Dept 2023]; *Boyle*, 208 AD3d at 745; *Doe v Enlarged City Sch. Dist. of Middletown*, 195 AD3d at 596), this court concludes that, at this pre-answer and pre-discovery juncture, plaintiff has sufficiently alleged that the Archdiocese had a relationship with St. Vincent and Father Frost to warrant finding that the Archdiocese owed a duty to protect plaintiff (*see Martinez*, 215 AD3d at 819-820; *Davila*, 215 AD3d at 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]; *Boyle*, 208 AD3d at 745; *cf. Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 811 [2d Dept 2023]).³ In addition, the court finds that Cassidy's affidavit, submitted by the Archdiocese, fails to conclusively establish that plaintiff has no cause of action (*see Cajigas v Clean Rite Ctrs.*, 187 AD3d 700, 701 [2d Dept 2020]; *Yu Chen v Kupoint (USA) Corp.*, 160 AD3d 787, 788-789 [2d Dept 2018]; *Phillips*, 152 AD3d at 807-808; *Jones v Sisters of St. Dominic of Blauvelt*, 2023 WL 3431602[U], *2 [Sup Ct, New York County 2023]; *see also Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Notably, in this respect, without the underlying documents/records upon which Cassidy relied upon in making his averments regarding the Archdiocese's relationship, or lack thereof, with Father Frost and St. Vincent, his affidavit constitutes inadmissible hearsay and lacks probative value (*see Federal Natl.*

³ The Archdiocese, in its initial motion papers, only argued that it was entitled to dismissal based on its assertions regarding the absence of a duty owed to plaintiff. As such this court declines to address the Archdiocese's additional arguments regarding the sufficiency of the complaint that are raised for the first time in its reply papers (*see Ayers v Bloomberg, L.P.*, 203 AD3d 872, 875 [2d Dept 2022]; *Grocery Leasing Corp. v P&C Merrick Realty Co., LLC*, 197 AD3d 625, 627 [2d Dept 2021]).

Mtge. Assn. v Hernandez, 215 AD3d 734, 736 [2d Dept 2023]; *U.S. Bank N.A. v Kahn Prop. Owner, LLC*, 206 AD3d 850, 851 [2d Dept 2022]).

With respect to the Archdiocese's alternative request that this court consider its pre-answer motion a CPLR 3212 motion for summary judgment, the court will consider this portion of the motion a request under CPLR 3211 (c) (*see Matter of Gorelick v Suffolk County Comptroller's Off.*, 186 AD3d 1518, 1519 [2d Dept 2020]; *Ferrera v City of New York*, 164 AD3d 754, 756 [2d Dept 2018]). Under the instant circumstances, where the proceeding is still at its earliest stages and plaintiff has not had an opportunity to conduct discovery, this court declines to convert the motion to one for summary judgment (*see Kelsey v Lenore R.*, 211 AD3d 1361, 1362 [3d Dept 2022], *appeal dismissed* 39 NY3d 1091 [2023]; *Henn v City of New York*, 164 AD3d 766, 767 [2d Dept 2018]; *SPI Communications v WTZA-TV Assoc. Ltd. Partnership*, 229 AD2d 644, 645 [3d Dept 1996]). Even if this court were inclined to deem the motion one for summary judgment, given this court's conclusion that Cassidy's affidavit lacks probative value, this court would find that the Archdiocese has failed to demonstrate its prima facie entitlement to summary judgment, and would deny the motion regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). For the foregoing reasons, it is hereby:

ORDERED that Archdioceses of New York's motion is denied; further it is

ORDERED that Archdiocese of New York shall file and serve an answer within 30 days of the date of this order; further it is

ORDERED that Archdiocese of New York shall serve a copy of this order along with notice of entry on all parties forthwith.

The parties shall submit a First Compliance Conference Stipulation and Order within 60 days of the date of this Order.

This constitutes the decision and order of the court.

ENTER

June 20, 2023



J.S.C.

HON. ROBIN S. GARSON
A.J.S.C.