

A.S. v Archdiocese of N.Y.

2023 NY Slip Op 32707(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 950174/2021

Judge: Alexander M. Tisch

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

PRESENT: HON. ALEXANDER M. TISCH PART 18

Justice

-----X

A. S.,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, RICE HIGH SCHOOL

Defendants.

-----X

INDEX NO. 950174/2021

MOTION DATE 11/12/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISS.

Upon the foregoing papers, defendant Archdiocese of New York (the Archdiocese or defendant) moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, pursuant to CPLR 3212.

Plaintiff’s complaint alleges that in approximately 1975 to 1976, when plaintiff was approximately fourteen (14) to fifteen (15) years old and was in the ninth grade at Rice High School (the School), that he was sexually assaulted and abused on multiple occasions by Brother Joseph C. Kernan, a catholic priest allegedly employed by the Archdiocese of New York. Plaintiff further alleges that all acts of sexual assault and abuse occurred in and around the School’s swimming pool located in the basement of the School, and the basketball gymnasium located on the School’s top floor.

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 deed to where the School was located; the certificate of incorporation for the Edmund Rice Christian Brothers North American Province (“the Christian Brothers”); an affidavit from Brother Kevin Griffith, C.F.C., the province leader of the Christian Brothers; and an affidavit from its General Counsel, Roderick Cassidy. Defendant argues that the evidence shows that the Archdiocese did not own the School, had no control over or affiliation with the School nor the Christian Brothers, and did not have any relationship with the alleged abuser.

The fact that the co-defendant is a separately formed entity does not negate the possibility that, as alleged in the complaint, the Archdiocese had any control over the School or the Christian Brothers, and/or its employees or agents (see generally Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021] [the court is required to accept these allegations in the complaint as true]). Additionally, while lack of ownership over the premises where the alleged abuse occurred may negate any duty of care that a landowner has to its tenants or guests and invitees, such a duty is distinctly different from the legal duty asserted here, which is the ability to control a third-party tortfeasor because of special relationship existing between the defendant and tortfeasor, such as an employment relationship (see J.D. v Archdiocese of New York, — AD3d —, 2023 NY Slip Op 01588 [1st Dept Mar. 23, 2023]).

The affidavits submitted do 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 affidavits are not conclusive particularly as to defendant’s relationship with the alleged abuser (see J.D., 2023 NY Slip Op 01588; Engelman, 194 AD3d at 33-34). It is important to note that an affidavit is not necessarily subject to cross examination and the issue of whether an agency or employment relationship exists sufficient to hold defendant liable for co-defendants’ acts and/or negligence in failing to exercise reasonable care in hiring, supervising, or retaining the alleged abuser, may be a fact-intensive analysis as to the extent of defendant’s power to order and control the agent’s or employee’s performance of work (see generally Castro-Quesada v Tuapanta, 148 AD3d 978, 979 [2d Dept 2017], quoting Barak v Chen, 87 AD3d 955, 957 [2d Dept 2011]; Griffin v Sirva, Inc., 29 NY3d 174, 185-86 [2017] [noting that factors as to whether one is an employer may include ““(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant’s conduct””] quoting State Div. of Human Rights v GTE Corp., 109 AD2d 1082, 1083 [4th Dept 1985]).

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, co-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 sixty (60) days after issue is joined.

This constitutes the decision and order of the Court.

7/31/2023					
DATE			ALEXANDER M. TISCH, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	
				REFERENCE	