

**John Doe 147 v Diocese of Brooklyn**

2023 NY Slip Op 32748(U)

June 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 525006/2019

Judge: Alexander M. Tisch

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

P R E S E N T:

HON. ALEXANDER M. TISCH, J.S.C.

JOHN DOE 147,

Plaintiff,

INDEX No.:

525006/2019

- against -

DIOCESE OF BROOKLYN and ST. MARTIN OF TOURS –  
OUR LADY OF LORDES CHAPEL f/k/a ST. MARTIN OF  
TOURS ROMAN CATHOLIC CHURCH,

DECISION & ORDER

Defendant(s).

MOTION SEQ. No. 002

The following NYSCEF Document numbers 37-45, 47-58 read on this motion for leave to amend

Plaintiff commenced the instant action pursuant to CPLR 208-b and/or 214-g of the Child Victims Act (CVA) against the DIOCESE OF BROOKLYN (Diocese) and ST. MARTIN OF TOURS – OUR LADY OF LORDES CHAPEL f/k/a ST. MARTIN OF TOURS ROMAN CATHOLIC CHURCH (the Church) seeking damages for injuries allegedly sustained as a result of sexual abuse suffered while plaintiff was a parishioner at the Church. The complaint alleges that plaintiff and his family were members of the Church and he was “introduced to Father Dwyer and Father Carmelo while serving as an altar boy” (NYSCEF Doc No 2 at ¶¶ 7, 10). “Thereafter, Plaintiff began working in the rectory office to earn extra money for his family” (*id.* at ¶ 10). “In approximately 1977, when Plaintiff was approximately eleven (11) years old, Father Carmelo and Father Dwyer began sexual assaulting and abusing him” (*id.* at ¶ 11). The complaint asserts a count for negligence against the Diocese and the Church, respectively, premised upon each defendant’s duty of care owed to plaintiff (see, e.g., *id.* ¶ 43 [Diocese]; *id.* at ¶ 49 [Church]) and upon the duty of care owed to control the alleged tortfeasor (see, e.g., *id.* at ¶¶ 44-46 [Diocese]; *id.* at ¶¶ 50-52 [Church]).

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Upon the foregoing papers, plaintiff moves for leave to amend the summons and complaint to (1) change the year of abuse from 1977 to 1980; (2) add the XAVERIAN BROTHERS, INC. (the Order) as a defendant, including allegations of sexual abuse allegedly inflicted by another abuser, Brother David Felix Baker (Br. Baker); and (3) add the allegations of the abuser by Br. Baker to, in effect, expand the existing claims asserted against the existing co-defendants, the Diocese and the Church.

“Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017]). “A party opposing leave to amend ‘must overcome a heavy presumption of validity in favor of [permitting amendment]’” (O’Halloran v Metro. Transp. Auth., 154 AD3d 83, 86 [1st Dept 2017], quoting McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012]).

Here, that portion of the motion to amend the complaint about the year(s) the alleged instance(s) of abuse took place is not seriously at issue; therefore, the motion is granted in part to that extent.

Both defendants oppose the branch of the motion to add the Order and/or amend the complaint to include allegations of a newly alleged abuser, particularly to the extent that it increases liability and/or adds new theories of liability against the two existing defendants for Br. Baker’s alleged abuse. All parties acknowledge that the new allegations, new claims, and/or adding the Order as a co-defendant, would be time-barred as past the CVA revival window, unless the relation-back doctrine applies.

“The relation-back doctrine, now codified in CPLR 203 (f), provides that ‘[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or]

occurrences . . . to be proved pursuant to the amended pleading” (O’Halloran, 154 AD3d at 86, quoting CPLR 203 [f]).

As discussed in O’Halloran, there is a difference in the standard of law applied when a plaintiff is seeking to add a new defendant versus a new claim against an existing defendant (see id. at 86-87 [“The Court of Appeals has recognized that a more relaxed standard applies where a plaintiff seeks to use the relation-back doctrine by adding a new claim against a defendant who is already a party to litigation as opposed to adding a new defendant”]).

“[W]here, as here, a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted” (O’Halloran, 154 AD3d at 87). “Simply because defendants may be exposed to greater liability or may be required to spend more time in the preparation of their case does not constitute prejudice to defendants” (Henry v Split Rock Rehabilitation & Health Care Ctr., LLC, 205 AD3d 540, 540-41 [1st Dept 2022]).

The proposed amended complaint here seeks to impose liability against each existing defendant based on Br. Baker’s alleged abuse, impacting both types of duties of care that plaintiff initially asserted against the defendants for abuse related to Frs Dwyer and Carmelo. More specifically, plaintiff still asserts that the Diocese and Church owed plaintiff a direct duty of care while plaintiff was, e.g., in their care/custody and/or participating in youth activities (see NYSCEF Doc No 42, proposed amended complaint at ¶¶16, 17, 117 [Diocese]; id. at ¶¶ 28-29, 125 [Church]). Like the negligent retention, supervision, and hiring claim initially asserted against the defendants with respect to Frs Carmelo and Dwyer, plaintiff also asserts that defendants owed a duty of care by virtue of having control over the alleged tortfeasor and that they were “negligent in the hiring,

supervision, placement, training, and retention of” all three tortfeasors, including Br Baker (see id. at ¶ 20, 62, 120 [Diocese]; id. at ¶¶ 32, 62, 128 [Church]).

The Court finds that the original complaint did not give notice of the occurrences or transactions related to Br. Baker’s abuse with respect to the negligent hiring, supervision, placement, training, and retention claim of Br Baker because the allegations in support of such claim are inherently different with respect to each individual tortfeasor (Fr. Dwyer, Fr. Carmelo, and now Br. Baker). The Court is hardpressed to find that either defendant would have known that a claim, premised upon the ability to control that particular third-party/tortfeasor, could have been expected or anticipated against an entirely separate person (see e.g., Calamari v Panos, 131 AD3d 1088, 1089-90 [2d Dept 2015] [“the Supreme Court erred in determining that the allegations in the original complaint in support of the causes of action alleging medical malpractice and lack of informed consent gave Mid Hudson notice of the ‘transactions, occurrences, or series of transactions or occurrences, to be proved’ with respect to the claims of negligent hiring and supervision”], quoting CPLR 203 [f]; cf. O’Halloran, 154 AD3d at 87-88 [relation-back doctrine applicable for newly-plead sexual orientation discrimination claim where claim was premised upon the underlying employment actions taken against plaintiff, which were all plead in the original complaint]).

However, the negligence claim premised upon a duty of care owed directly to plaintiff, may meet the standard of law to have the allegations about Br. Baker “relate back” to the original claim(s) and theory of liability. Under this alleged duty of care to keep “children and parishioners in its care” safe and to prevent sexual abuse, it is theoretically possible that the duty of care owed to plaintiff existed regardless of whom the alleged abuser was.

To add the Order as a defendant, and have those claims “relate back” to the original defendants, three conditions must be satisfied:

“(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be

charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for [a] mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well” (Buran v Coupal, 87 NY2d 173, 178 [1995], quoting Brock v Bua, 83 AD2d 61, 69 [2d Dept 1981] [internal citations omitted] [alteration supplied]<sup>1</sup>).

The amended complaint asserts the same type of claims against the Order as are asserted against the current defendants — namely, that the Order owed plaintiff a direct duty of care either *in loco parentis* and/or as a participant in the Church and youth-related activities (NYSCEF Doc No 42 at ¶¶ 41-42, 133) and that the Order owed a duty of care to control the conduct of Br Baker (*id.* at ¶¶ 45, 62, 136). Plaintiff also asserts that the Church was an agent of Diocese; the Order was agent of the Diocese; and that the Church was agent of the Order (*id.* at ¶¶ 14-15, 40).

With respect to the first element, plaintiff asserts in reply that the claims against the Order arise out of the same conduct, transaction, or occurrence insofar as they arose from “the special relationship between Plaintiff and the Defendants and the Defendants’ breach of their duty to protect Plaintiff from foreseeable harm while he was a student and child parishioner at St. Martin of Tours and within the Diocese” (NYSCEF Doc No 56 at ¶ 6). By focusing solely on the duty of care owed directly to plaintiff, the Court finds that plaintiff clearly abandoned any potential claim premised upon the alleged duty of care owed by the Order to control the conduct of the alleged tortfeasors. Therefore, any potential new claims asserted against the Order for negligent hiring, supervision, placement, training, and retention claim of Br. Baker, Fr. Dwyer, and Fr. Carmelo should not be permitted.

Though plaintiff claims that he did know the complete legal name of Br. Baker, nor the religious order to which Br. Baker belonged, but only discovered it after “further investigation,” it cannot be said that the failure to include *any* allegations of abuse by a third, separate person, was a reasonable

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<sup>1</sup> The quotation from Brock (83 AD2d at 68) originally read “an excusable mistake”; however, the main purpose of the appeal and explicit holding from Court of Appeals in Buran was to hold that “New York law requires merely mistake--not excusable mistake--on the part of the litigant seeking the benefit of the doctrine” (Buran, 87 NY2d at 176).

“mistake” as to identity of parties — particularly where such information was solely within the plaintiff’s own knowledge (see, e.g., Nemeth v K-Tooling, 205 AD3d 1093, 1095-96 [3d Dept 2022]; Pappas v 31-08 Cafe Concerto, 5 AD3d 452, 453 [2d Dept 2004]). Therefore, the relation-back doctrine does not apply to plaintiff’s claims against the Order with respect to Br Baker, including the negligent hiring, supervision, placement, training, and retention claim of Br. Baker; nor does it apply to the claims related to the abuse by Br. Baker seeking to hold the Order liable as a principal in an agency relationship with the Church, nor the Order as an agent of the Diocese, with respect to Br. Baker.

As the Court has found that claims against the Order pertaining to the allegations about Br Baker do not relate back, the remaining claims against the Order are those concerning Frs. Dwyer and Carmelo and the duty of care owed directly to the plaintiff. However, no explanation, nor argument was made about the putative “mistake” in not naming the Order in connection with the two tortfeasors originally plead in the complaint. More specifically, there is no stated reason as to why claims against the Order should relate back to the abuse inflicted by Fr Dwyer or Carmelo, nor can any connection be plausibly inferred by the Court upon review of the original and proposed pleading (see generally Buran, 87 NY2d at 181 [noting that the “primary consideration” is “whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all ‘and that the matter has been laid to rest as far as he is concerned’”], quoting Brock, 83 AD2d at 70 [emphasis removed]).

In light of the foregoing, the Court need not reach the issue of whether the Order and original co-defendants are united in interest.

Accordingly, it is hereby ORDERED that the motion is granted in part to the extent that plaintiff is permitted leave to amend the complaint to (1) change the year(s) of the alleged abuse(s) to 1980 and (2) include allegations of a third tortfeasor in the negligence claim insofar as asserted against existing

co-defendants, the Diocese and the Church, that are premised upon said defendants' duty of care owed directly to plaintiff; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the oral argument on this motion, currently scheduled for 7/12/2023 is canceled and the parties may submit a new proposed compliance conference order within 60 days or advise the Court as to whether the initial proposed compliance conference order should be submitted for signature.

This constitutes the decision and order of the Court.

6/13/2023

DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE