

**S.H. v City of New York**

2023 NY Slip Op 33374(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 950006/2020

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

<p><b>PRESENT:</b> <u>HON. SABRINA KRAUS</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>S. H.,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>CITY OF NEW YORK, NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, THE NEW YORK FOUNDLING, SISTERS OF CHARITY, CATHOLIC CHARITIES OF THE ARCHDIOCESE OF NEW YORK, ARCHDIOCESE OF NEW YORK</p> <p align="center">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <u>CVA/57TR</u></p> <p><b>INDEX NO.</b> <u>950006/2020</u></p> <p><b>MOTION DATE</b> <u>07/16/2021, 07/13/2023</u></p> <p><b>MOTION SEQ. NO.</b> <u>002 004</u></p>
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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 46, 47, 48

were read on this motion to/for DISMISS/ SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for DISMISS/ SUMMARY JUDGMENT.

**BACKGROUND**

Plaintiff commenced this action under the Child Victims Act (“CVA”) seeking damages based on allegations that Plaintiff was sexually abused in or around 1993, while in foster care at St. Agatha Home, a foster care facility.

The Archdiocese of New York and Catholic Charities move for dismissal of the action pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7). Alternatively, they move for summary judgment (Mo Seq No. 2).

The Foundling and the Sisters of Charity of New York (“SCNY”) move for the same relief pursuant to the same statutory provisions (Mo Seq. No. 4).

The motions are consolidated herein and determined as set forth below.

### ALLEGED FACTS

The following facts are alleged in the complaint.

Plaintiff was placed in foster care in approximately 1993, when she was about eleven (11) years old by the City of New York (the "City") and New York City Administration for Children's Services ("ACS"). The City and ACS entered into an agreement with The New York Foundling f/k/a The New York Foundling Hospital ("Foundling") for the placement of Plaintiff into foster care. Foundling placed Plaintiff at St. Agatha Home, a foster care facility located in New Rochelle, New York.

At St. Agatha Home, Plaintiff was sexually assaulted by Mr. Lynch, a male counselor alleged to be an employee and/or agent of the Defendants. The acts of abuse alleged include but were not limited to, groping and fondling Plaintiff's breast and forcing Plaintiff to touch Mr. Lynch's penis.

The complaint alleges St. Agatha Home was owned, operated, maintained, staffed, controlled and/or regulated by the Defendants, and that Catholic Charities owned, operated, maintained, controlled and/or were employed by Foundling. Foundling is a member of the federation of agencies under the purview of Catholic Charities.

The complaint further alleges that Catholic Charities and Foundling were in an agency relationship, such that Foundling acted on the Catholic Charities' behalf, in accordance with the Catholic Charities' instructions and directions on all matters, including those relating the conducting of foster care services and the placement of foster children. The complaint alleges that the acts and omissions of Foundling were subject to the Catholic Charities' control, and that Foundling consented to act subject to the Catholic Charities' control.

The complaint further alleges that Catholic Charities owed a duty to Plaintiff to use reasonable care to protect the safety and well-being of Plaintiff while she was under the care, custody or in the presence of the Catholic Charities and its agents and employees.

The complaint alleges that the Archdiocese owned, operated, maintained, controlled and/or were employed by Foundling, and that the Archdiocese and Foundling were in an agency relationship, such that Foundling acted on the Archdiocese's behalf, in accordance with the Archdiocese's instructions and directions on all matters, including those relating the conducting of foster care services and the placement of foster children

The complaint further alleges that the acts and omissions of Foundling were subject to the Archdiocese's control, and that Foundling consented to act subject to the Archdiocese's control. The complaint alleges that the Archdiocese owed a duty to Plaintiff to use reasonable care to protect the safety, care, and well-being of Plaintiff while she was under the care, custody or in the presence of the Archdiocese and/or its agents and employees.

The complaint further alleges that the Archdiocese administers programs and organizations to help children in need of social services and that the Archdiocese encourages visitors to its website to donate to Catholic Charities.

The complaint alleges that Catholic Charities is a federation of approximately 90 Catholic social services agencies and expressly identifies Cardinal Timothy Dolan, the Archbishop of New York, as its leader. Its executive director is Monsignor Kevin Sullivan, another priest ordained by and operating within the Archdiocese. Monsignor Sullivan represents Catholic Charities agencies in public policy discussions on issues such as foster care.

The complaint further alleges that Catholic Charities holds itself out as an organization affiliated with and controlled by the Archdiocese that provides a network of services which aims

to address the physical, emotional, and psychological needs of children and their families.

Catholic Charities expressly acknowledges that its agencies step in when children cannot find stability and safety at home. Catholic Charities has, for more than a century been recognized as a major provider of high-quality foster care throughout New York.

The complaint further alleges that Catholic Charities holds itself out as offering and operating both foster boarding home programs and therapeutic foster boarding programs and advises visitors to its website that affiliated foster parents are trained, screened and certified. For those interested in becoming foster parents, Catholic Charities expressly directs potential foster parents to one of its affiliated agencies.

The complaint alleges that eight affiliated foster care agency websites are accessible through Catholic Charities' website under the heading "Our Agencies", including Foundling, and that the website includes a history of Foundling and provides visitors with contact information and information about the services provided.

The affidavit of Talia Lockspeiser, Associate Director of Catholic Charities, asserts that Catholic Charities offers resources, grants, advice and guidance to agencies such as Foundling that provides various social services within the geographical territory that makes up the Archdiocese of New York.

The complaint further alleges that SCNY staffed, controlled, and supervised St. Agatha Home and that SCNY provided child welfare, child protective and childcare services by providing foster care services through St. Agatha Home. The complaint further alleges that SCNY and Plaintiff, through St. Agatha Home, were in a special relationship of caregiver-child in which SCNY owed Plaintiff a duty of reasonable care to protect her from foreseeable harms,

and a duty to use reasonable care to protect the safety, care, well-being, and health of Plaintiff while she was under its or St. Agatha Home's care and custody.

The complaint further alleges SCNY's duties encompassed using reasonable care in the supervision of children in its custody and control, and in the retention and supervision of foster parents. SCNY acted as principal, and St. Agatha Home, as agent. In this agency relationship, St. Agatha Home acted in accordance with the instructions and directions of SCNY on all matters, including those relating to the conduct of foster care services and the placement of foster children. The acts and omissions of St. Agatha Home were subject to the plenary control of SCNY and St. Agatha Home consented to act subject to their control

## **DISCUSSION**

### ***Motion Sequence No. 2***

“Where, as here, a defendant moves pursuant to CPLR §3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence ‘must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.’” *Berger v. Temple Beth-El of Great Neck*, 303 AD2d 346, 347 (2d Dept. 2003) (citation and internal quotation marks omitted).

In determining a CPLR §3211(a)(7) motion to dismiss, “the 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.” *Wilner v. Allstate Ins. Co.*, 71 AD3d 155, 159 (2d Dept. 2010) (*quoting*, *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977), and *Pacific Carlton Dev. Corp. v. 752 Pac., LLC*, 62 AD3d 677, 679 [2d Dept. 2009]). “On a motion made pursuant to CPLR 3211(a)(7), the burden never shifts

to the nonmoving party to rebut a defense asserted by the moving party” *Sokol v. Leader*, 74 AD3d 1180, 1181 (2d Dept. 2010).

Additionally, “[o]n a CPLR 3211 motion to dismiss, the court will ‘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’” (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Grassi & Co., CPAS, P.C. v. Honka*, 180 AD3d 564, 564-565 [1st Dept. 2020]).

The documents that The Archdiocese and Catholic Charities rely upon are insufficient to warrant dismissal as a matter of law. In a case on point, the First Department held that such documents did not conclusively resolve the allegations in the complaint regarding control, agency, supervision and employment [*J.D. v. Archdiocese of New York*, 214 A.D.3d 561 (2023)]. The Appellate Division also held that the affidavit of the Associate General Counsel for the Archdiocese, relied upon by Defendants on this motion, does not constitute sufficient documentary evidence for the purpose of a pre-answer CPLR 3211(a)(1) motion (*Id.*).

While the motion is also denominated as one based on a failure to state a cause of action. Movants make no specific argument regarding any manner in which any particular cause of action is wanting, and instead lump this argument in with the claims raised under CPLR §3211(a)(1).

Based on the foregoing, the motion for dismissal pursuant to CPLR §3211(a)(1) and CPLR 3211(a)(7) is denied.

***No Motion for Summary Judgment Lies at this Juncture***

Movants also seek summary judgment pursuant to CPLR § 3212 as alternative relief to dismissal under CPLR § 3211. Such a motion is premature and is denied. CPLR § 3212 provides that any party may move for summary judgment "after issue has been joined." "The rule requiring joinder of issue is strictly adhered to." *Shah v. Shah*, 215 A.D. 2d 287, 289 (1st Dep't 1995). The Motion is in response to the Complaint and in lieu of an answer, and issue has not yet been joined.

In limited circumstances, consideration of summary judgment may be ripe where issue has not been joined under CPLR § 3211(c), which allows the Court, in its discretion, to treat a motion to dismiss as one for summary judgment "[w]hether or not issue has been joined," once there has been "adequate notice to the parties." *Shah*, 215 A.D. 2d at 289. Under this Rule, it is the Court's choice whether to treat the motion as one for summary judgment and provide notice accordingly. CPLR § 3211(c) does not allow a movant to unilaterally demand summary judgment where issue has not been joined. *Mihlovan v. Grozavu*, 72 N.Y. 2d 506, 508 (1988); *see also Siegel, New York Practice* § 270 (6th ed. 2018).

The Court finds no basis to proceed under CPLR §3211(c). as such the motion is denied.

***Motion Sequence No. 4 Is Denied***

Again, these defendants seek dismissal based on documentary evidence. However, the documentary evidence provided is insufficient to warrant relief pursuant to CPLR §3211(a)(1) and the affidavits submitted, as noted above, are not documentary evidence within the purview of the statute.

The Court further finds that the motion for summary judgment is premature as Plaintiff has had little to no discovery. The motion for summary judgment is denied without prejudice to renewal after the completion of discovery in this action.

WHEREFORE it is hereby:

ORDERED that Motion Seq Nos 2 & 4 are denied in their entirety; and it is further

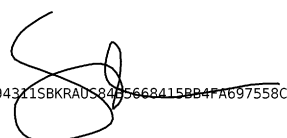
ORDERED that Defendants Catholic Charities of The Archdiocese Of New York, and the Archdiocese Of New York are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, within 20 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

  
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SABRINA KRAUS, J.S.C.

9/27/2023  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: