SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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ARK470 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, IONA GRAMMAR SCHOOL, IONA PREPARATORY SCHOOL, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF,

Defendants.

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INDEX NO. 950516/2021

MOTION DATE 02/15/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISSAL.

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

The complaint alleges as follows: In or around 1974 to 1976, when plaintiff was approximately 5 to 7 years old, plaintiff participated in youth activities and/or church activities at Iona Grammar. During said years, Brother Robert F. Siccone, a Roman Catholic cleric employed by the Archdiocese and Iona Grammar, engaged in unpermitted sexual contact with plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05. Moreover, in or around 1982 to 1983, when plaintiff was approximately13 to 14 years old, Brother Gerald Gaffney, a Roman Catholic cleric employed by the Archdiocese and Iona Prep, engaged in unpermitted sexual contact with plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05.

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 property deed for Iona Preparatory School; the Iona Preparatory School Charter of Incorporation; the property deed for Iona Grammar School; the Certificate of Incorporation of the Christian Brothers Institute; the affidavit of Roderick

Cassidy, Esq., the general counsel for the Archdiocese; and the affidavit of Brother M. Griffithg, Trustee of Iona Preparatory School and Province Leader of the Edmund Rice Christian Brothers North American Province. Defendant argues that the evidence shows that they did not create, oversee, supervise, manage, control, direct, or operate Iona Grammar school or Iona Preparatory School, nor its faculty, staff, employees, or students. Moreover, that the Archdiocese did not own the properties where Iona Grammar School and Iona Preparatory School were located, did not employ, supervise, or train the faculty, staff, or any other employees at Iona Grammar School and Iona Preparatory School, and did not provide funding or insurance coverage to Iona Grammar School and Iona Preparatory School.

The fact that the co-defendants are separately formed entities does not negate the possibility that, as alleged in the complaint, the Archdiocese had any control over the Iona Grammar school or Iona Preparatory School, 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]).

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 co-defendants and/or the alleged abusers (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 any defendant's negligence in failing to exercise reasonable care in hiring, supervising, or retaining the alleged abusers, may be a fact-intensive analysis as to the extent of defendant's power to order and control the agents' or employees' 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-defendants, and the tortfeasors, 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.

9/29/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE