

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

2023 NY Slip Op 33854(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 950441/2021

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**

**PRESENT:** HON. SABRINA KRAUS **PART** **57TR**

*Justice*

-----X

S. B.,

Plaintiff,

- v -

CITY OF NEW YORK, GOOD SHEPHERD SERVICES  
F/K/A MCMAHON SERVICES FOR CHILDREN, DOES 2-10

Defendants.

-----X

**INDEX NO.** 950441/2021

**MOTION DATE** 03/03/2023

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISMISS.

**BACKGROUND**

Plaintiff commenced this action, pursuant to CPLR §214-g, known as the Child Victims Act (“CVA”), asserting claims against defendants City of New York, SCO Family of Services f/k/a St. Christopher-Ottilie (“SCO”) and Does 1-10 based upon sexual abuse committed by Plaintiff’s foster parents after being placed in the home by SCO. The complaint was filed on July 1, 2021. The CVA created a look-back window allowing individuals to assert previously untimely causes of action based upon instances of sexual abuse; this window closed on August 12, 2021.

Good Shepherd Services f/k/a McMahon Services for Children (“GSS”), was not named or served in the complaint.

After SCO made a motion to dismiss the action, Plaintiff discontinued as to SCO on March 8, 2022, based upon information that SCO was an improper party and had never been affiliated with any facility in Harlem, New York.

Plaintiff then sought to amend the complaint, on July 11, 2022, seeking to add GSS as a party. The motion was granted without opposition. The amended summons and complaint were filed on August 23, 2022, and served on GSS on or about September 27, 2022.

GSS now moves to dismiss based on the expiration of the statute of limitations. For the reasons stated below, the motion is granted.

### **ALLEGED FACTS**

In 1964, at the approximate age of two (2) years, Defendants placed Plaintiff in foster care at the residence of foster parents Augustine and Carmen Gonzalez, in Brooklyn, New York. Plaintiff lived at the foster home with her sister and with the Gonzalez' biological children.

In 1972 when Plaintiff was approximately nine (9) to ten (10) years old, Plaintiff's foster father Augustine Gonzalez ("A. GONZALEZ") began to sexually abuse and assault Plaintiff. A. GONZALEZ sexually assaulted and abused Plaintiff in his bedroom in the foster home, including in his workshop, in her bedroom, and in a hallway of the foster home on a regular basis. The sexual abuse continued until Plaintiff was removed from the home at the approximate age of fourteen (14) in approximately 1976. The acts of sexual assault and abuse included, but were not limited to: fondling Plaintiff's breasts and genitals over and under her clothing; exposing his penis to Plaintiff; forcefully penetrating Plaintiff's vagina with his penis.

Plaintiff's foster mother ("C. GONZALEZ) physically and sexually abused Plaintiff. On more than one occasion, C. GONZALEZ digitally penetrated Plaintiff's vagina after accusing Plaintiff of having sex with boys and asking Plaintiff if she liked the penetration.

**DISCUSSION**

***Plaintiff's Failure to Satisfy the Jurisdictional Requirements of  
CPLR § 1024 Renders the Claims Against GSS Time Barred***

Pursuant to CPLR §1024, a party who is ignorant, in whole or in part, of the identity of a person who should be made a party to an action may proceed against such unknown party "by designating so much of his name and identity as is known" *See generally, Orchard Park Cent. School Dist. v Orchard Park Teachers Assn.*, 50 AD2d 462, 467 [1976]. To effectively commence an action against an unknown party, (1) Plaintiff must exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name; and (2) a summons and complaint must describe the unknown party in such a manner that the "Doe" defendant would understand that he or she is the intended defendant by a reading of the papers. *See City of Mount Vernon v Best Dev. Co.*, 268 NY 327, 331 (1935); *Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482 (1st Dept 1992).

An action commenced pursuant to filing under CPLR 1024 functionally tolls the statute of limitations so long as both of the aforementioned prongs are satisfied. *Tucker v Lorieo*, 291 AD2d 261, 262 (1st Dep't 2002); *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, (2d Dep't 2009). The court finds that Plaintiff has failed to satisfy both prongs.

There is no description of counsel's diligent efforts or investigation that was done prior to initiating the action to identify the correct foster care agency, beyond having discussions with plaintiff. Instead, counsel claimed, in conclusory fashion, to have conducted an extensive pre-suit investigation, and identified and named SCO as a defendant based on such internal investigation. Plaintiff's counsel should have detailed what efforts were made but failed to do so.

The closest that the complaint comes to referencing GSS is a single sentence stating that Plaintiff was taken to a facility located in Manhattan, a fact which is too general to put GSS on

notice that GSS was intended to be party to the action. Further, the complaint was not served on GSS, and there were no grounds to even perceive that GSS was aware it could be made a defendant, or that it was on any form of notice that the present action commenced prior to the services of the amended summons and complaint.

Plaintiff's description of the DOE defendants is as follows in the complaint:

Defendants DOES 1-10 are persons or entities with responsibilities for Plaintiff's safety, supervision and/or placement in foster care, who have not to date been identified. Plaintiff has made a diligent effort to identify these Defendants prior to the filing of this Complaint and has been unable to do so.

This description could be applicable to any foster care agency or foster care worker in the state and does not adequately apprise GSS that it is an intended defendant. Furthermore, because of this error, the court never obtained jurisdiction over GSS as they were never properly put on notice of the action. *See Lebowitz v Fieldston Travel Bur., Inc.*, 181 AD2d 481 (1st Dep't 1992); *Olmsted v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856 (3d Dep't 2006); *Opont v Duclair Realty Corp.*, 190 AD2d 781, 782 (2d Dep't 1993).

Moreover, the complaint does not name the plaintiff, the allegations relate to an event that occurred over 55 years ago. The complaint does not state GSS's address, any former name of GSS, and never served GSS with any documents prior to the service of the amended complaint. Therefore, GSS would not be made aware by reading the complaint that it was intended as a defendant in the present action.

In opposition, plaintiff fails to refute the arguments concerning their deficient description of the DOE defendants. Instead, Plaintiff argues that because the court granted the prior motion to amend, a motion GSS did not have an opportunity to oppose, the summons and complaint as to GSS relates back to the filing of the original Complaint.

Plaintiff has clearly failed satisfy either prong required by CPLR § 1024. As such, the original summons and complaint was jurisdictionally defective. Due to the core jurisdictional defect in the original summons, the statute of limitations has not been tolled and, instead, has long since expired, making any claim against GSS time barred.

***Plaintiff Has Failed to Satisfy the Elements  
Necessary to Invoke the Relation Back Doctrine***

In order for the relation back doctrine to apply, a plaintiff must establish that “(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant[s], and by reason of that relationship can be charged with such notice of the institution of the action that [it] will not be prejudiced in maintaining [its] defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [it] as well” (*Buran v. Coupal*, 87 N.Y.2d 173, 178, 638 N.Y.S.2d 405, 661 N.E.2d 978 [1995] [internal quotation marks omitted]; see CPLR 203 [b]; *Johanson*, 134 A.D.3d at 1531, 22 N.Y.S.3d 763). Only the second prong is in dispute here. “In [the] context [of this case], unity of interest means that the interest of the parties in the [subject matter] is such that they stand or fall together and that judgment against one will similarly affect the other ... Although the parties might share a multitude of commonalities, ... the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand ... Indeed, unless the original defendant[s] and new [defendants] are vicariously liable for the acts of the other[,] ... there is no unity of interest between them” (*Johanson*, 134 A.D.3d at 1531, 22 N.Y.S.3d 763 [internal quotation marks omitted]; see *Verizon N.Y., Inc. v. LaBarge Bros. Co., Inc.*, 81 A.D.3d 1294, 1296, 916 N.Y.S.2d 377 [4th Dept. 2011]).

*Stepanian v. Bed, Bath, & Beyond, Inc.*, 207 A.D.3d 1182, 1183 (2022).

Plaintiff may not invoke the relation back doctrine, prescribed in CPLR §203(f), to avoid dismissal under CPLR § 3211(a)(5), as two of the three prongs of the doctrine are not satisfied. While the defendant has the initial burden of establishing *prima facie* proof that the plaintiff's claims are time-barred, the burden then shifts to the plaintiff to establish that the case falls within

an exception to the statute of limitations, such as the relation back doctrine. *See Kaczmarek v. Benedictine Hosp.*, 176 A.D.2d 1183, 1184 (3d Dept. 1991).

Under the relation-back doctrine, new parties may be joined as defendants in a previously commenced action, after the statute of limitations has expired on the claims against them, where the plaintiff establishes that each of the following three criteria are satisfied. First, the plaintiff must show that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants. Second, the plaintiff must show that the new defendants are united in interest with the original defendants, and will not suffer prejudice due to lack of notice. Third, the plaintiff must show that the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants. *Higgins v. City of New York*, 144 A.D.3d 511 (1st Dep't 2016).

Plaintiff has failed to meet her burden of establishing that the City of New York is united in interest with GSS. Contrary to the assertions made in opposition, plaintiff has failed to provide any evidence to establish that there is any type of interrelationship between such two entities that would give rise to vicarious liability and entitle her to rely upon the relation back doctrine. Plaintiff acknowledges that her reliance upon such doctrine is based upon the allegations in the amended complaint that there is an agency relationship between the City of New York and GSS, in which GSS acted as agent and that discovery is needed to determine the interconnection between the entities. This is insufficient to establish unity of interest. *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255 (1st Dep't 2005).

Here, the interests of the City of New York and GSS are not identical, as such parties could assert a defense blaming liability on the other. As such, plaintiff has not met her burden of establishing that the City of New York is united in interest with GSS.

For the reasons discussed above, plaintiff also cannot meet the third prong, as GSS was never put on notice of the claims within the relevant statute of limitations period. *Stevens v Winthrop S. Nassau University Health Systems, Inc.*, 89 A.D.3d 835, 836 (2011); *Alvarado v Beth Israel Medical Center*, 60 A.D.3d 981, 982 (2009); *Rivera v. Wyckoff Heights Medical Center*, 175 A.D.3d 522, 524 (2d Dept. 2019).

Based on the foregoing, the motion is granted, and the action is dismissed as to GSS.

WHEREFORE it is hereby:

ORDERED that the motion of defendant Good Shepherd Services f/k/a McMahon Services for Children to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further


ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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)]; and it is further

ORDERED that counsel for the remaining parties appear for a virtual compliance conference on January 4, 2024, at 2pm; and it is further

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

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10/24/2023  
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE