

T.B. v City of New York

2023 NY Slip Op 33855(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 950538/2021

Judge: Sabrina Kraus

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

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

Justice

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T. B.,

Plaintiff,

- v -

CITY OF NEW YORK, ARCHDIOCESE OF NEW YORK,
 SAINT DOMINIC'S FAMILY SERVICES, THE NEW YORK
 FOUNDLING, DOES 1-10

Defendant.

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INDEX NO. 950538/2021

MOTION DATE 04/19/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
 MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 62, 65, 68, 69, 70, 71, 72 were read on this motion to/for DISMISSAL.

BACKGROUND

Plaintiff commenced this action under the Child Victims Act seeking damages for alleged sexual and physical abuse she suffered as a child in three consecutive Foster Homes.

PENDING MOTIONS

On January 20, 2022, the Archdiocese of New York (“Archdiocese”) moved for dismissal of the complaint pursuant to CPLR §3211(a)(7) or alternatively for summary judgment pursuant to CPLR §3212.

On March 4, 2022, Plaintiff cross-moved for leave to amend her complaint.

For the reasons set forth below, the motion and the cross-motion are denied.

ALLEGED FACTS

The following alleged facts are taken primarily from Plaintiff’s amended complaint.

In approximately 1981, when Plaintiff was approximately twelve (12) years old, Plaintiff was placed in foster care by the City of New York (“City”) by and through the New York City Administration for Children’s Services (“ACS”). City assigned Plaintiff’s care and custody to the Archdiocese and Saint Dominic’s Family Services (“St. Dominic’s”) for the first two foster homes Plaintiff was placed in.

Plaintiff was placed in a foster home located in Queens, New York . Plaintiff remained there for approximately one month, during which time she was allegedly sexually abused and severely physically abused by her foster father on a nightly basis. Plaintiff alleges that due to the trauma caused by severe abuse, she does not recall the name of the foster father. The foster father’s sexual abuse of Plaintiff included chaining her up in the basement of the foster residence and vaginally penetrating Plaintiff with his penis.

From approximately 1981-1984, Plaintiff was placed into the foster home of Robert and Elsie Loring. During this time Plaintiff was allegedly sexual abused perpetrated by her foster father, Robert Loring (“RL”), as well as the biological son of her foster parents, Greg Loring (“GL”). Plaintiff alleges she immediately reported the sexual to her case worker, Connie Liebeck. Inexplicably, this report was no acted upon, and Plaintiff remained in the Loring’s home for approximately three (3) years where she suffered sexual abuse perpetrated on a daily basis. The alleged acts of sexual assault and abuse perpetrated by RL occurred on a daily basis and included vaginally penetrating Plaintiff with his penis. The alleged acts of sexual assault and abuse perpetrated by GL occurred at least three (3) times per week during Plaintiff’s placement and included vaginally penetrating Plaintiff with his penis.

From approximately 1984-1987, when Plaintiff was approximately fifteen (15) years old to eighteen (18) years old, Plaintiff remained in the foster care of the City. The City assigned

Plaintiff's care and custody to Archdiocese and The New York Foundling F/K/A The New York Foundling Hospital ("Foundling"). Plaintiff was placed in the foster home of JoAnne Reefe. Shortly after such placement, the biological father of JoAnne Reefe, Joseph Mathis ("Mathis"), began sexually assaulting and abusing Plaintiff. The alleged acts of sexual abuse occurred at least once per week from the time that Plaintiff was fifteen (15) to eighteen (18) years old. Plaintiff reported the sexual assaults and abuse by Mathis to her case worker, Janice Bauer, and her case worker's supervisor, Jerry Gannon, in approximately 1984. Inexplicably, they took no action, and Plaintiff remained in the home for approximately three (3) years where she continued to suffer sexual abuse.

DISCUSSION

Plaintiff was entitled to Amend the Complaint as of Right under CPLR § 3025 Rendering The 3211 Motion Moot

Plaintiff commenced this action through a summons and complaint filed on March 1, 2021. On or about February 17, 2022, Plaintiff filed an Amended Complaint, as of right, pursuant to CPLR § 3025(a).

CPLR § 3025(a) provides that a plaintiff may amend its complaint as of right within 20 days after service of a pleading responding to the complaint. A pre-answer motion to dismiss pursuant to CPLR § 3211(a)(7), as filed here by Archdiocese, is filed in lieu of a pleading, and extends the time for a defendant to file a pleading, pursuant to CPLR § 3211(f). It is not itself a "pleading" under the CPLR. *STS Mgmt. Dev. v. New York State Dep't of Taxation & Finance*, 254 A.D. 2d 409 (2d Dep't 1998).

As there has been no pleading filed by movant, Plaintiff was entitled to duly file her Amended Complaint without leave in accordance with CPLR §3025(a).

Based on the foregoing, plaintiff was not required to move for leave to file the amended complaint. As such the motion for leave to amend is denied as moot.

The filing of the Amended Complaint supersedes the original Complaint and renders the Motion to Dismiss the original Complaint moot. *Covert Ave. Apts., Inc. v. Babylon*, 134 A.D.2d 230 (2d Dep't 1987); *Aikens Constr. of Rome, Inc. v. Simons*, 284 A.D.2d 946 (4th Dep't 2001); *Chalasani v. Neuman*, 64 N.Y. 2d 879, 487 N.Y.S. 2d 556 (1985). Based on the foregoing the motion for dismissal pursuant to CPLR §3211(a)(7) is denied.

The Archdiocese Is Not Entitled to Summary Judgment

The Archdiocese moves for summary judgment pursuant to CPLR § 3212 as alternative relief to dismissal under CPLR § 3211. The motion is premature and procedurally defective under CPLR § 3212, and therefore 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).

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 CPLR § 3211(c), it is the Court’s decision - not the choice of the moving party - 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).

Based on the foregoing, the motion for summary judgment is denied.

The Motion to Sever Pursuant to CPLR §603 is Denied

CPLR § 603 governs requests for severance and provides:

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

The court notes that Plaintiff included no request for severance in its notice of motion and on this basis alone the motion must be denied. The court further notes that the motion for a severance is also premature as no answer has yet been filed. *Hamm v. Richards*, 12 A.D.2d 953, 953 (1961).

WHEREFORE it is hereby:

ORDERED that the motion and the cross-motion are denied in their entirety; and it is further

ORDERED that movant is directed to serve a response to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further


ORDERED that counsel for all parties are directed to appear for a virtual compliance conference in on January 3 , 2024 , at 10 AM; 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); 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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10/12/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: