

I.O. v City of New York

2023 NY Slip Op 33901(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 950063/2020

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**

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

Justice

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I. O.,

Plaintiff,

- v -

CITY OF NEW YORK, THE NEW YORK FOUNDLING F/K/A
THE NEW YORK FOUNDLING HOSPITAL, SISTERS OF
CHARITY NEW YORK, CATHOLIC CHARITIES OF THE
ARCHDIOCESE OF NEW YORK, ARCHDIOCESE OF NEW
YORK

Defendant.

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INDEX NO. 950063/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 39, 40, 41, 43, 44

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff initiated the instant action on or around March 2, 2020, pursuant to the New York Child Victims Act. Plaintiff was placed in foster care by the City of New York (the "City") by and through New York City Administration for Children's Services ("ACS").

Plaintiff alleges that 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 in the physical custody of Edna Hillery.

At all times relevant and material hereto, Edna Hillery's son, Edmund Hillery, resided with his mother and shared a room with Plaintiff. Plaintiff alleges that Edmund Hillery sexually assaulted and abused Plaintiff beginning in the early 1970s.

PENDING MOTION

The Archdiocese of New York (the "Archdiocese") and Catholic Charities Community Services of New York ("Catholic Charities") (collectively "Archdiocese Defendants") move for dismissal of Plaintiff's Complaint pursuant to CPLR § 3211(a)(1), based on documentary evidence, and pursuant to CPLR § 3211(a)(7), for failure to state a cause of action; or alternatively for summary judgment pursuant to CPLR § 3212.

The motion was fully briefed and marked submitted.

For the reasons stated below the motion is denied.

DISCUSSION

The Motion Pursuant to CPLR §§3211(a)(1) and (7) is Denied

“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).

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 movants herein, does not constitute sufficient documentary evidence for the purpose of a pre-answer CPLR 3211(a)(1) motion (*Id.*).

Based on the foregoing the motion to dismiss based on documentary evidence 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.

WHEREFORE it is hereby:

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that movants 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

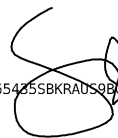
ORDERED that counsel are directed to appear for a virtual compliance conference on January 16, 2024, at 3:00 PM; and it is further

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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<u>10/31/2023</u> DATE			<u>SABRINA KRAUS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE