

ARK95 v Archdiocese of N.Y.

2023 NY Slip Op 33903(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 950070/2019

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

ARK95,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, RICE HIGH SCHOOL,
DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO
PLAINTIFF

Defendants.

-----X

INDEX NO. 950070/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISS.

BACKGROUND

This action brought under the Child Victims Act (CPLR 214-g) arises from allegations that from approximately 1960 to 1962, when Plaintiff was approximately 16 to 18 years old, Br. Ronald J. Lasik, C.F.C. ("Lasik") engaged in unpermitted sexual contact with Plaintiff. The Complaint alleges that, Lasik was a Roman Catholic Cleric employed by the Archdiocese of New York ("Archdiocese") and Rice High School and that Plaintiff participated in activities at Rice High School.

PENDING MOTION

The Archdiocese moves 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 relies 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 pursuant to CPLR §§3211(a)(1) and (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.

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 18, 2024, at 3:00 PM; and it is further

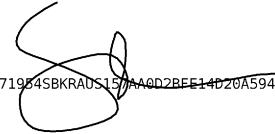
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

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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10/31/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE