

**C.T. v Diocese of Brooklyn**

2023 NY Slip Op 33997(U)

October 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 525255/2019

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART CVA P2
Justice
INDEX NO. 525255/2019
MOTION DATE 10/19/2021
MOTION SEQ. NO. 002, 003

C.T.,
Plaintiff,

- v -

DIOCESE OF BROOKLYN and ST. MARTIN OF TOURS-
OUR LADY OF LORDES CHAPEL f/k/a ST. MARTIN OF
TOURS ROMAN CATHOLIC CHURCH

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 54, 55, 56, 57, 58, 59, 66,
71, 72

were read on this motion to/for COMPEL

Upon the foregoing documents, plaintiff moves to compel production of the personnel file
of Father John Dwyer and defendant Diocese of Brooklyn cross moves for a protective order
pursuant to CPLR 3103(a), preventing the disclosure of certain documents, which said defendant
argues were redacted based upon the First Amendment, corrective measures, CPLR 4504, 4505,
4507 and 4508, HIPAA, the Americans with Disabilities Act.

This Court conducted an in-camera inspection of the Diocese of Brooklyn's ("Diocese")
personnel file of Father Dwyer.

As discussed in Melfe v Roman Catholic Diocese of Albany (196 AD3d 811 [3d Dept
2021]):

"CPLR 3101 mandates full disclosure of all matter material and
necessary in the prosecution or defense of an action" (Palmatier v
Mr. Heater Corp., 156 AD3d 1167, 1168 [2017] [internal quotation
marks and citations omitted]; see Forman v Henkin, 30 NY3d 656,

661 [2018]). “The words, ‘material and necessary’, are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial” (*Galasso v Cobleskill Stone Prods., Inc.*, 169 AD3d 1344, 1345 [2019] [internal quotation marks and citations omitted]; see *Hayes v Bette & Cring, LLC*, 135 AD3d 1058, 1059 [2016]). The party seeking the discovery bears the burden of proving that the discovery request is reasonably calculated to yield material and necessary information (see *Catlyn & Derzee, Inc. v Amedore Land Devs., LLC*, 166 AD3d 1137, 1141 [2018]). “Supreme Court is vested with broad discretion in controlling discovery and disclosure, and generally its determinations will not be disturbed in the absence of a clear abuse of discretion” (*Gold v Mountain Lake Pub. Telecom.*, 124 AD3d 1050, 1051 [2015] [internal quotation marks and citations omitted]; see *Div-Com, Inc. v Tousignant*, 116 AD3d 1118, 1119 [2014]).

\* \* \*

The party opposing the discovery request bears the burden of showing the requested items are exempt or immune from disclosure (see *NYAHS A Servs., Inc., Self-Ins. Trust v People Care Inc.*, 155 AD3d 1208, 1209 [2017]), and the opposing party cannot satisfy this burden “with wholly conclusory allegations” (*Madison Mut. Ins. Co. v Expert Chimney Servs., Inc.*, 103 AD3d 995, 996 [2013] [internal quotation marks and citation omitted]).

Many of issues in this case are functionally identical to those discussed in *Harmon v Diocese of Albany* (204 AD3d 1270 [3d Dept 2022]) and *Harper Doe v Diocese of Albany* (Sup Ct Albany Cty, Index No. 906168/2019, Mackey, J., November 21, 2022).

Defendant argues that certain documents are protected from disclosure by the First Amendment, citing numerous cases for the proposition that there are constitutional limitations on the discoverability of internal church documents, where they relate to the internal ecclesiastical process of priest discipline and sacramental status. However, as discussed in *Harper Doe*,

The First Amendment proscribes courts from defining the standard of care that a religious practitioner owes a congregant when providing spiritual guidance (see *Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 495 [2000] [“any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion”]; see also *Wisconsin v Yoder*, 406 US 205, 215 [1972] [“to have the protection of the Religion Clauses, the claims must be rooted in religious

belief]). However, courts can, and must, resolve issues where “neutral principles of law ... can be applied without establishing” church doctrine to resolve the dispute (*Kelley v Garuda*, 36 AD3d 593, 595 [2007], quoting *Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440, 449 [1969]).

Here, while the documents at issue are internal church documents, they are not being sought for the purposes of evaluating an internal church dispute or employment matter. Plaintiff claims that he was sexually abused by Father Dwyer, and that the Diocese was negligent in hiring and supervising Father Dwyer. As such, the ultimate issue is whether defendant knew or should have known of Father Dwyer’s propensity to abuse children. The fact that defendant is associated with a religion and protected by the First Amendment is irrelevant for the purposes of discovery central to this matter. Said defendant must be treated as this Court would treat any employer accused of such negligence.

As further discussed in *Harper Doe*,

Courts in other jurisdictions have explicitly rejected First Amendment arguments seeking to preclude the production of documents in child sexual abuse cases (*see, e.g., Roman Catholic Archbishop of Los Angeles v Superior Court*, 131 Cal.App.4th 417, 440 [2005]; *People v Campobello*, 348 Ill.App.3d 619, 627 - 631 [2004] [Catholic diocese must comply with government subpoena in sexual assault prosecution against priest, even if Canon 489 requires bishop to maintain secret archive for files relating to internal church discipline]; *Hutchison v Luddy*, 414 Pa. Super. 138, 152 [1992]; *Lopez v Watchtower Bible and Tract Society of New York, Inc.*, 246 Cal.App.4th 566, 598-599 [2016]; *Thopsey v. Bridgeport Roman Cath. Diocesan Corp.*, No. NNHCV106009360S [Conn. Super. Ct. Feb. 15, 2012]; *see also Society of Jesus of New England v. Commonwealth*, 441 Mass. 662, 667 -- 668 [2004] [the ecclesiastical abstention doctrine did not preclude enforcement of the Commonwealth’s subpoena duces tecum, which sought documents from a religious order regarding the criminal defendant, a priest of that order, who was facing prosecution for sexual assault where the matter did not involve resolving a dispute within the church itself]).

Defendant asserts the protections of CPLR 4505, which creates a statutory privilege of confidential communication between a clergyman and a person seeking spiritual guidance, and the medically associated privileges of CPLR 4504, 4507, HIPAA and the ADA. As discussed in *Krystal G. v Roman Catholic Diocese of Brooklyn*, CPLR 4505 “does not provide defendants with blanket immunity from discovery of documents and other items which might involve religious subject matter” (34 Misc 3d 531, 543 [Sup Ct Kings County, October 14, 2011 [Rothenberg, J.]). “Applying the privilege involves ‘whether the communication in question was made in confidence and for the purpose of obtaining spiritual guidance.’ The privilege ‘may not be invoked to enshroud conversations with wholly secular purposes solely because one of the parties to the conversation happened to be a religious minister’” (*id.*, quoting *People v Carmona*, 82 NY2d 603, 609 [1993]).

The Diocese also seeks to exclude certain records on the basis of corrective measures/relevancy. Many of the documents relate to an investigation of Father Dwyer and are not corrective measures regarding either ecclesiastical matters or implementing new policies or trainings. Disciplinary records, particularly when there is an allegation of negligent supervision, are discoverable (*see Staten v City of NY*, 90 AD3d 893, 895 [2d Dept 2011]; *see also Levin v City of Rochester*, 203 AD3d 1540 [3d Dept 2022]). Many of the records marked as corrective measure were prepared by an independent investigator for Diocesan Review Board, which includes lay and clergy members, and are therefore not internal Church documents (*see Diocese of Brooklyn*, <https://dioceseofbrooklyn.org/protecting-children/diocesan-review-board/> [last accessed September 20, 2023]). The Diocese may rely on or take into consideration the results of the Review Board but the Review Board does not make ecclesiastical decisions. Finally, the Diocese asserts the psychologist-patient privilege for several documents. The Court need not weigh in on

this privilege as those documents were excluded as they are medical records from mental health providers that saw Father Dwyer many years after the alleged incidents in the complaint.

In light of the foregoing, the Court denies that branch of the cross-motion for a protective order, in part, for the following pages:

- JRD000001-JRD000003 should not be redacted as the document concerns an incident of alleged abuse by Father Dwyer.
- JRD000006-JRD000009 contains correspondence regarding an alleged incident with Father Dwyer and therefore should not be redacted, although certain sentences related to ecclesiastical decisions only should be redacted (paragraph five on JRD000006 starting with the second sentence “Bishop Daily also,” the second sentence in paragraph 6 on JRD000007 starting with “Instead,” the last sentence of paragraph 7 on JRD000007 starting with “From the time,” all of paragraph 8 on JRD000007, and the section labeled “Bishop’s Votum” on JRD000009).
- JRD000019- JRD000024 should not be redacted except for the third paragraph on JRD000019 (starting with “I do not foresee”).
- JRD000025-JRD000026 should not be redacted except for the last paragraph which is not relevant and contains information regarding ecclesiastical decisions (paragraph starting with “JD understood”).
- By email to the Court, the Diocese agrees to turn over JRD000027-JRD000028. JRD000030-JRD000032 should not be redacted as it relates to alleged abuse by Father Dwyer.

- JRD000033-JRD000037 should be turned over except the third paragraph on JRD000333 (starting with the paragraph “I do not foresee”).
- JRD000045-JRD000079 should not be redacted as they are interviews by an investigator regarding alleged abuse by Father Dwyer.
- JRD000083 appears to be a copy of JRD000009 and should be turned over except for redaction of the section entitled “Bishop’s Votum.”
- JRD000084-JRD000098 is the investigator’s final report regarding Father Dwyer and should be turned over.
- JRD000107-JRD000108 should be turned over as it is a document from the Review Board.
- Paragraphs one and two through “not admit” as well as the heading on JRD000124 should not be redacted. The remaining paragraphs on JRD000124 are not relevant and should be redacted.
- JRD000138 should be turned over as the Diocese cites no basis for victim confidentiality.
- JRD000155-JRD000158, JRD000367-JRD000370, and JRD000516-JRD000517 are documents from the review board regarding sexual abuse allegations and should be turned over.

The Court notes that a significant number of pages or portions of pages of Father Dwyer’s personnel file sought to be withheld or redacted on First Amendment and or relevancy grounds should be granted. Specifically, the Court grants that branch of the cross-motion for a protective order as it pertains to the proposed redactions in the Privilege Log for the following pages:

JRD000004, JRD000005, JRD000012, JRD000014, JRD000015, JRD000016, JRD000017, JRD000029, JRD000038, JRD000041, JRD000042, JRD000043, JRD000044, JRD000080,

JRD000099, JRD000100, JRD000101, JRD000102, JRD000103, JRD000104, JRD000105, JRD000106, JRD000111, JRD000114, JRD000115, JRD000116, JRD000117, JRD000118, JRD000119, JRD000122, JRD000123, JRD000129, JRD000130, JRD000131, JRD000132, JRD000133, JRD000134, JRD000135, JRD000136, JRD000137, JRD000139, JRD000143, JRD000147, JRD000149, JRD000150, JRD000151, JRD000152, JRD000153, JRD000154, JRD000163, JRD000166, JRD000167, JRD000168, JRD000169, JRD000170, JRD000173, JRD000177, JRD000181, JRD000182, JRD000185, JRD000196, JRD000202, JRD000203, JRD000205, JRD000214, JRD000217, JRD000219, JRD000220, JRD000238, JRD000239, JRD000242, JRD000247, JRD000257, JRD000276, JRD000278, JRD000281, JRD000283, JRD000305, JRD000311, JRD000312, JRD000331, JRD000332, JRD000333, JRD000341, JRD000342, JRD000444, JRD000349, JRD000350, JRD000351, JRD000354, JRD000357, JRD000361, JRD000365, JRD000366, JRD000377, JRD000389, JRD000399, JRD000401, JRD000403, JRD000406, JRD000407, JRD000409, JRD000410, JRD000412, JRD000421, JRD000422, JRD000425, JRD000426, JRD000436, JRD000438, JRD000448, JRD000475, JRD000489, JRD000490, and JRD000519.

The above redactions contain only information as to ecclesiastical decisions or are not relevant for reasons including, they are medical documents regarding Father Dwyer's health, documents regarding Father Dwyer post-retirement, and/or documents regarding other members of the clergy.

Accordingly, it is hereby ORDERED that plaintiff's motion seeking to compel discovery is granted to the extent set forth above (motion sequence no. 002); and it is further

ORDERED that defendant's cross-motion for a protective order is granted in part and denied in part to the extent set forth above (motion sequence no. 003); and it is further

ORDERED that defendant shall exchange the records detailed in this order within thirty days after service of a copy of the order with notice of entry.

This constitutes the decision and order of the Court.

10/30/2023  
DATE

  
ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: