

**Estate of Gallagher v Catholic Foreign Mission Socy.
of Am., Inc.**

2023 NY Slip Op 34955(U)

February 27, 2023

Supreme Court, Westchester County

Docket Number: Index No. 70632/2019

Judge: Leonard D. Steinman

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

**THE ESTATE OF RALPH STEWART GALLAGHER,
by and through CATHERINE GALLAGHER in her
official capacity as Administrator of the Estate of Ralph
Stewart Gallagher,**

**PART CVA-R
Index No. 70632/2019
Mot. Seq. Nos. 006-008**

Plaintiff,

DECISION AND ORDER

-against-

**CATHOLIC FOREIGN MISSION SOCIETY OF
AMERICA, INC., a/k/a MARYKNOLL FATHERS AND
BROTHERS a/k/a THE MARYKNOLL SOCIETY;
MARYKNOLL FATHER MISSION SOCIETY, INC.;
THE ROMAN CATHOLIC ARCHDIOCESE OF
NEW YORK and THE CHURCH OF SAINT JOHN
and SAINT MARY,**

Defendants.

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts, were reviewed in preparing this Decision and Order:

Defendant Saint John & St. Mary’s Notice of Motion (006), Affirmation & Exhibits.....	1
Plaintiff’s Notice of Motion (007), Affirmation & Exhibits.....	2
Defendant Archdiocese’s Affirmation in Opposition & Exhibits.....	3
Plaintiff’s Affirmation in Opposition, Cross-Motion (008), Affirmation & Exhibits.....	4
Defendant Archdiocese’s Affirmation in Opposition to Cross-Motion & Exhibit.....	5
Plaintiff’s Reply to Cross-Motion & Exhibits.....	6
Defendant Saint John & St. Mary’s Reply, Exhibit & Opposition to Cross-Motion.....	7

Plaintiff brings this action, on behalf of the estate of decedent Ralph Stewart Gallagher, pursuant to the Child Victims Act (“CVA”). Plaintiff alleges that when decedent was a minor, he was sexually abused by a non-party, Brother/Father Edward Flanagan, during the time spanning the years of 1962-1969.

Defendant Church of Saint John and Saint Mary (the “Church”) moves for an order quashing the subpoena ad testificandum directed to its employee, Joan Corso Boutross, and granting a protective order pursuant to CPLR §3103. Plaintiff cross-moves to compel Boutross’ deposition and moves to compel an additional deposition of the defendant Archdiocese. For the reasons set forth below, the Church’s motion is denied and plaintiff’s motions are granted.

LEGAL ANALYSIS

Trial courts are vested with broad discretion to issue appropriate orders to limit or grant discovery. *Venables v. Rovegno*, 195 A.D.3d 876, 879 (2d Dept. 2021). “[T]his discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind.” *Id.*; see also *Cascardo v. Cascardo*, 136 A.D.3d 729, 729–730 (2d Dept. 2016). The supervision of disclosure and the setting of reasonable terms and conditions therefore rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed. *Berkowitz v. 29 Woodmere Blvd. Owners’, Inc.*, 135 A.D.3d 798, 799 (2d Dept. 2016).

The touchstone for determining whether information is discoverable in an action is whether the information is “material and necessary.” *Mahoney v. Turner Construction Co.*, 61 A.D.3d 101 (1st Dept. 2009). Pursuant to CPLR §3101, “there shall be full disclosure of all matters material and necessary in the prosecution or defense of an action.” “The words ‘material and necessary’ as used in CPLR §3101 must ‘be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity’.” See *Gould v. Decolator*, 131 A.D.3d 445 (2d Dept. 2015) quoting *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014).

Deposition of Joan Corso Boutross

The party seeking a protective order bears the burden of showing that such relief is warranted. *Bd. of Managers of Fishkill Woods Condominium v. Gottlieb*, 184 A.D.3d 792 (2d Dept. 2020); *Arch Ins. Co. v. Delric Constr. Co., Inc.*, 174 A.D.3d 560, 562 (2d Dept.

2019). “The standard to be applied on a motion to quash a subpoena duces tecum is whether the requested information is ‘utterly irrelevant’ to any proper inquiry. Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed.” *Gertz v. Richards*, 233 A.D.2d 366 (2d Dept. 1996). The Church Defendants have not satisfied their burden.

The Church contends that since it has already provided the deposition of its pastor, Fr. O’Halloran, it should not be required to produce Boutross. The Church underscores that Flanagan was a former Maryknoll priest who was not in the ministry at the Church and that the alleged abuse did not take place at the Church.

Plaintiff contends that she is entitled to Boutross’ deposition because Fr. O’Halloran, the witness produced by the Church, had insufficient knowledge and was inadequately prepared as to the topics delineated in the initial notice of deposition for the Church’s witness. In the notice plaintiff advised that he sought, among other things, the following information regarding Order/Maryknoll priests working and/or placed at the Church:

(a) the role of the Order priests within Sts. John and Mary; (b) the process by which an Order priest is authorized to act within Sts. John and Mary; (c) who supervises the Order priests placed in Sts. John and Mary; (d) how the Order priests are assigned to Sts. John and Mary, and the positions and/or names of anyone involved in making that decision; (e) whether any background checks on Order priests were performed before allowing a priest to be placed at Sts. John and Mary; (f) what kind of information was provided to you about an Order priest who was placed at Sts. John and Mary; and (g) who pays the Order priests for their services at Sts. John and Mary.

The Church does not dispute that Fr. O’Halloran did not have personal knowledge or information about the matters identified by plaintiff. Rather, the Church argues that Boutross too has no knowledge or information about the Church in the 1960s, when the subject abuse took place; does not know any members of the Gallagher family; and did not draft any substantive provisions of the “Parish History,” a document memorializing how the Church

“came to be.”¹ Even if true, that does not mean that Boutross is not the individual best positioned to possess or apprise herself of the information sought by plaintiff. According to her affidavit, Boutross has been employed by the Church as a Pastoral Associate since August of 1987 with duties that include “Youth and Family ministries, teaching, ***administration of parish office including staff, finance and building/grounds.***” (emphasis added). Further, Boutross attests that she became a member of the church in 1970. Plaintiff has demonstrated that Boutross may be able to provide material testimony that Fr. O’Halloran could not.

Accordingly, the Church’s motion is denied and plaintiff’s cross-motion is granted.

Deposition of the Archdiocese

Plaintiff contends that she is entitled to an additional deposition of an Archdiocese witness. A party seeking additional depositions has the burden of demonstrating that: (1) the representatives already deposed had insufficient knowledge or were otherwise inadequate; and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case. *Asprou v. Hellenic Orthodox Community of Astoria*, 185 A.D.3d 638 (2d Dept. 2020).

The Archdiocese produced Deacon Cowan for a deposition, who plaintiff argues was unprepared and had insufficient knowledge of any information relevant to this action or specifically identified in plaintiff’s notice. For example, the notice stated that plaintiff was seeking information such as: the role of the Order priests within a parish; the process by which an Order priest is authorized to act within a parish; who supervises the Order priests placed in the parishes; how the Order priests are assigned to parishes; and who pays the Order priests.

At his deposition, Deacon Cowan was asked:

¹ Notwithstanding an express acknowledgement to Boutross in the body of the Parish History for “curating” images, “both historic and contemporary.”

Q. What can you tell me about Order priests being placed in Archdiocesan parishes and the role in which Order priests played within the parishes in the 1960s?

A. I would not know what that process was in the sixties.

Q. Did you endeavor to review any materials in order to prepare yourself to address such a question?

A. No, I did not.

Deacon Cowan also testified that he has only been a Deacon since 2017 and had no personal knowledge regarding the 1960s and has no experience with Order priests, either during that period or presently.

Further, according to plaintiff, documents produced in the course of discovery support the position that the Archdiocese and Maryknoll possess material information concerning notice of Flanagan's propensity to commit the alleged abuse and the relationship between the Archdiocese and Maryknoll (referred to as the "Orders"). Deacon Cowan could not testify about this information "known or reasonably available" to the Archdiocese.

Based on his deposition testimony, it appears that Deacon Cowan failed to satisfy his obligations to apprise himself of information reasonably available to him through the Archdiocese, notwithstanding the Archdiocese's obligation pursuant to 22 NYCRR 202.20-d(f).

The Archdiocese opposes the motion, arguing that plaintiff's counsel ended the deposition prematurely and made a tactical decision not to fully question Deacon Cowan and is now engaging in witness shopping. Plaintiff's counsel acknowledges that she cut short the deposition, and was ended, but only after it became readily apparent that Deacon Cowan had no relevant information. Deacon Cowan testified:

Q. Deacon, are you here simply to testify based on your experience in the last four years?

A. Yes.

Despite the Archdiocese's contention, plaintiff was not obligated to further depose Deacon Cowan after it became apparent that he made no attempt to possess the information sought. Plaintiff has demonstrated entitlement to an additional witness on behalf of the Archdiocese and therefore, the motion to compel is granted.

The depositions shall be conducted on or before April 3, 2023. The parties' time to file summary judgment motions is extended up to and including May 5, 2023.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: February 27, 2023
Mineola, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.