

**Doe v Diocese of Brooklyn**

2024 NY Slip Op 30751(U)

March 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 515600/2021

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  
KINGS COUNTY**

**PRESENT: HON. SABRINA B. KRAUS PART 57/CVA**

*Justice*

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**INDEX NO. 515600/2021**

ARK409 DOE,  
Plaintiff,

**MOTION DATE 3/8/2024**

**MOTION SEQ. NO. 002**

DIOCESE OF BROOKLYN a/k/a THE ROMAN CATHOLIC  
DIOCESE OF BROOKLYN, NEW YORK; RESURRECTION;  
and DOES 1-5 whose identities are unknown to Plaintiff, ,  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002)

were read on this motion to/for VACATE – DECISION/ORDER/JUDGMENT

**BACKGROUND**

On June 25, 2021, the Plaintiff commenced this action pursuant to the New York Child Victims Act (“CVA”), CPLR 214-g, by filing a Summons and Complaint naming defendants the Roman Catholic Diocese of Brooklyn, New York (the “Diocese”) and Defendant Resurrection asserting causes of action for Negligence, Negligent Training and Supervision of Employees, and Negligent Retention of Employees. Plaintiff alleges that in approximately 1994, when Plaintiff was 10 years old and a parishioner at Resurrection, he was sexually abused by non-party James O’Brien (“Fr. O’Brien”), who was then a priest at Resurrection. As a result of the alleged sexual abuse, Plaintiff alleged that he sustained physical and psychological injuries.

**PROCEDURAL HISTORY**

On July 10, 2023, at a Compliance Conference regarding the cases proceeding against Fr. James O’Brien, this Court ordered counsel for Resurrection to provide rosters, yearbooks, and

other parish documents to all Plaintiffs' counsel by October 15, 2023. The Court also ordered Resurrection to produce a witness for deposition on or before November 21, 2023. A Compliance Conference Stipulation and Order to this effect was filed on July 13, 2023.

On August 17, 2023, Resurrection produced its responses to Plaintiff's Standard Automatic Disclosures and Common Combined Demands in this case.

The only documents produced were Resurrection's certificate of incorporation and Plaintiff's sacramental records—six pages in total.

Plaintiff received no other documents or communication from Resurrection in response to this Court's Order.

On November 6, 2023, upon an agreement to postpone the original November deposition date, Resurrection was ordered by this Court to produce a witness for deposition on January 17, 2024. The Court also ordered Resurrection to produce a Jackson Affidavit, over its objection that the deposition of its corporate representative would render production of a Jackson Affidavit moot.

On January 4, 2024, Jessica Arbour of Horowitz Law, counsel for another O'Brien plaintiff, sent an email to Defendants confirming the January 17, 2024 deposition of Resurrection's corporate witness. On January 8, 2024, Ms. Arbour circulated to Defendants and Plaintiffs' counsel the logistics for Resurrection's deposition. On January 10, 2024, with consent of all Plaintiffs with O'Brien cases against Resurrection, Ms. Arbour sent Defendants an email requesting the deposition of the current pastor of Resurrection, Fr. William With. In response to this email, counsel for Resurrection, confirmed that Fr. With is the pastor for Resurrection, but a different witness would be designated for the January 17, 2024, deposition. Resurrection's counsel proposed that additional witnesses be discussed at the upcoming February 16, 2024, Compliance

Conference. In response, Ms. Arbour asked when Plaintiffs would be informed of the witness' identity.

After not receiving a response from Resurrection's counsel, on January 12, 2024, plaintiff's counsel sent a follow-up email requesting the identity of the witness for the January 17, 2024, deposition.

On January 16, 2024, Resurrection's counsel informed Plaintiffs that it was not able to find a witness to produce for the deposition which was to occur the next morning. No explanation was provided.

On February 16, 2024, at a further conference, the Court directed Resurrection to provide the identity of its corporate witness by February 20, 2024. Later that day, Resurrection advised in writing that it would produce Rev. Thomas Doyle as a witness for a deposition to be held on March 11, 2024.

### **THE PENDING MOTION**

Resurrection now moves for an order vacating that part of this Court's prior order directing them to produce a *Jackson* type affidavit, substantiating their claim that they have no further responsive documents to produce other than the six pages of paper discovery already provided.

For the reasons set forth below, the motion is denied.

### **DISCUSSION**

Plaintiff argues that the motion does not lie pursuant to CPLR 5015(a). However, as the order was made at a conference and without notice, Resurrection is entitled to move to vacate the order, so that it will have a vehicle for appellate review *Velasquez v. C.F.T., Inc.*, 267 A.D.2d 229, 230 (1999). Additionally, this Court specifically allowed for such motion in the order to

ensure Resurrection's rights to appellate review would be preserved. As such, the Court will address the merits of the motion.

Resurrection argues that it should not be required to provide a *Jackson* type affidavit because it is not required to by the CPLR. Alternatively, Resurrection argues that, the Court order was vague because it did not specify what is expected to be included in the *Jackson* type affidavit. Finally, Resurrection asserts that it three years into this litigation it is premature for the court to require such an affidavit.

The Court finds these arguments unpersuasive.

*Jackson v. City of New York*, 586 N.Y.S.2d 952 (1st Dep't 1992) has been interpreted to require an affidavit from a record searcher to confirm that documents requested as a part of discovery have been completely searched for and not found.

New York courts have required *Jackson* affidavits in a wide array of cases, and contrary to movant's argument these holdings in no way require that the facts of the case must align with those in *Jackson v. City of New York*, 586 N.Y.S.2d 952 (1st Dep't 1992). Rather the affidavits are generally used when a party asserts that it has no documents in response to a discovery demand. *See eg Bankers Consec Life Ins. Co. v. KPMG LLP*, 185 N.Y.S.3d 651 (Sup. Ct. N.Y. Cnty. 2023); *Agius v. Gray Line Corp.*, 169 N.Y.S.3d 800 (Sup. Ct. N.Y. Cnty. 2022); *Frank v. Morgans Hotel Grp. Mgmt. LLC*, 139 N.Y.S.3d 521 (Sup. Ct. N.Y. Cnty. 2021); *Mesropian v Providence Care, Inc.* 67 Misc.3d 1235Z(A)(Sup. Ct. Kings Cnty. 2020); *WMC Mortg. Corp. v. Vandermulen* 32 Misc.3d 1206(A)(Sup. Ct. Suffolk Cnty. 2011); *Lynx Capital Partners of NJ, LLC v Naves Capital LLC* 217 AD3d 571(2<sup>nd</sup> Dept 2023); *Anuchina v Marine Transport Logistics, Inc.* 216 AD3d 1126 (2<sup>nd</sup> Dept 2023); *Hassn v. Armouth International, Inc.* 74 Misc.3d

1204(a) (Sup. Ct. N.Y. Cnty. 2022); *Matityahu v Miller* 75 Misc3d 1233(A) (Sup. Ct. N.Y. Cnty. 2022).

To the extent Resurrection argues the order requiring a *Jackson* affidavit is vague and it is certain what is required to comply, the Court finds said argument is not raised in good faith. As noted, the order was issued after a conference with the parties. At the conference the affidavit and what it was to include were specifically addressed and discussed at length. Additionally, the case law in the moving papers cited by Resurrection is replete with explanations as to what constitutes a *Jackson* affidavit. But to be clear the Court will now underscore in writing what it expects such an affidavit to contain:

When the response to a discovery request is, in effect, that there are no responsive documents within the party's custody, possession, or control, that party must provide a detailed statement, under oath, by someone with direct knowledge of the facts setting forth the past and present status of the relevant documents; where they were kept; what efforts, if any, were made to preserve them; the circumstances surrounding their disappearance or destruction; and the means and methods used to conduct a search for them (*Jackson v. City of New York*, 185 A.D.2d 768, 770; *Dziegielewsky v. Advanced Integrative Wellness, LLC*, Sup Ct, Nassau County, March 9, 2010, Murphy, J., at 2 [2010 WL 1515585]; *Tower Ins. Co. of New York v. Headley*, Sup Ct, New York County, August 11, 2009, Stallman, J., at 4 [2009 WL 2578547]; *Lazzaro v. MJM Industries, Inc.*, Sup Ct, New York, April 7, 2003, Jones, J., at 3 [2003 WL 25573908] ). In short, the affidavit submitted must provide the court with a basis to find that the search conducted was a thorough one or that it was conducted in a good faith effort to provide the necessary records to the plaintiff (*Jackson v. City of New York, supra* at 770).

*WMC Mortg. Corp. v. Vandermulen*, 32 Misc. 3d 1206(A)(Sup. Ct. 2011).

In the instant case, the documents requested by Plaintiff are part of Court-Ordered Demands contained in the Case Management Orders and are central to the issued raised in this action. Resurrection has asserted it has no documents in response to the majority of Plaintiff's discovery demands. Despite multiple requests, Resurrection has refused to supplement its

responses or provide Plaintiffs with a detailed account of its efforts to preserve, collect, and search for potentially responsive information.

Nor does the Court find that the requirement is premature. We are now three years into this litigation, almost no paper discovery has bene produced and Defendant’s witness has yet to be deposed.

Based on the foregoing, the motion to vacate that part of this Court’s prior order requiring Defendant to provide a *Jackson* type affidavit is denied.

3/8/24  
DATE

  
HON. SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE