

J.S. v City of New York

2024 NY Slip Op 32156(U)

June 18, 2024

Supreme Court, New York County

Docket Number: Index No. 951037/2021

Judge: Alexander M. Tisch

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

PRESENT: HON. ALEXANDER M. TISCH
Justice

PART 18

J. S.,

Plaintiff,

- v -

CITY OF NEW YORK, HOMES FOR THE HOMELESS
SUMMER CAMPS, INC., HOMES FOR THE HOMELESS,
INC., CAMP LANOWA, PATHWAYS FOR YOUTH,
INC., DOES 2-10,

Defendants.

INDEX NO. 951037/2021
MOTION DATE 05/20/2024
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 91, 92, 93, 94, 96, 97, 103, 104, 105, 106

were read on this motion to/for

DISMISS

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained as a result of alleged sexual abuse by three different staff members and/or camp counselors at defendant Camp Lanowa, a summer camp in Harriman, New York in approximately 1967 and 1968, when plaintiff was approximately seven and eight years old. Defendants Homes for the Homeless Summer Camps, Inc. and Homes for the Homeless, Inc. (“Homes Defendants”) move to dismiss plaintiff’s Amended Complaint pursuant to CPLR § 3211(a)(1).

A motion to dismiss a complaint based upon documentary evidence pursuant to CPLR § 3211(a)(1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Not every piece of evidence in the form of a document is properly deemed “documentary evidence.” The appellate courts have noted this distinction, finding that legislative history and supporting cases make it clear that “judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta v Doe*, 73 AD3d 78, 84-85 [2d Dept

2010] [internal quotation marks omitted]; *Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]).

As its documentary evidence, Homes Defendants submit a certificate of incorporation for Homes for the Homeless, Inc. (*see* NYSCEF Doc. No. 83, Exhibit C); a certificate of incorporation for Homes for the Homeless Summer Camps, Inc. (*see* NYSCEF Doc. No. 84, Exhibit D); a cooperative lease agreement between Homes for the Homeless, Inc. and the Palisades Interstate Park Commission from January 2008 (*see* NYSCEF Doc. No. 85, Exhibit E); and an affidavit from Aaron Goodman, Chief Administrative Officer for Homes Defendants (*see* NYSCEF Doc. No. 86, Exhibit F). Homes Defendants argue that, because Homes for the Homeless, Inc. was incorporated in 1986 and Homes for the Homeless Summer Camps, Inc. was incorporated in 1990, decades after the alleged abuse occurred in the late 1960's, neither owed plaintiff a duty of care in the 1960's, and therefore cannot be liable for plaintiff's negligence claims. Homes Defendants further argue they cannot be liable for plaintiff's negligence claims because they never owned defendant Camp Lanowa.

The documentary evidence submitted does not eliminate the possibility of successor liability. "It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Highland Crusader Offshore Partners, L.P. v Celtic Pharma Phinco B.V.*, 205 AD3d 520, 522 [1st Dept 2022] [internal quotation marks omitted], quoting *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). "Exceptions exist where the corporation impliedly assumed its predecessor's liability, there was a consolidation or merger of seller and purchaser, or the transaction is entered into fraudulently to escape the predecessor's obligations" (*Oorah, Inc. v Covista Commc'ns, Inc.*, 139 AD3d 444, 445 [1st Dept 2016] [internal quotation marks and citation omitted], quoting *Schumacher*, 59 NY2d at 245). The de facto merger doctrine provides "that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Abreu v Barkin & Assocs. Real Est., LLC*, 136 AD3d 600, 602 [1st Dept 2016] [internal quotation marks omitted], quoting *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). To determine whether a de facto merger has occurred, courts analyze the following factors: "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the

uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation” (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]).

Plaintiff’s Amended Complaint alleges defendant Camp Lanowa was “owned, operated, supervised, maintained, managed, staffed, funded and/or otherwise controlled” by defendants City of New York, Pathways for Youth, Inc., and Homes Defendants (*see* Amended Complaint, NYSCEF Doc. No. 77 at ¶ 6). Plaintiff also alleges Homes Defendants assumed the liabilities of the original operator of defendant Camp Lanowa when Homes Defendants became the operator of Camp Lanowa in 1992 through either an express or de facto merger (*see* NYSCEF Doc. No. 91, Affirmation in Opposition at ¶¶ 23, 28, 29, 36, 37, 38).

Here, neither the certificate of incorporation for Homes for the Homeless, Inc. nor the certificate of incorporation for Homes for the Homeless Summer Camps, Inc. conclusively refute plaintiff’s allegation that Homes Defendants are successors to the organization that previously owned or operated defendant Camp Lanowa, or could otherwise be liable for the torts of their predecessor (*see generally Engelman v Rofe*, 194 AD3d 26, 33-34 [1st Dept 2021] [the court is required to accept these allegations in the complaint as true]). Additionally, the certificates of incorporation are silent as to the relationship between Homes Defendants and the alleged tortfeasors (*see* Amended Complaint at ¶¶ 6, 8, 15, 16). “Although ... Certificates of Incorporation for defendant ... constitute documentary evidence for the purposes of a CPLR 3211 (a) (1) inquiry, they do not conclusively resolve the allegations in the complaint that plaintiff’s alleged abuser, Father Eugene O’Brien, was an agent of [defendant], that the [defendant] exercised supervision and control over Fr. O’Brien’s appointment or employ, and that there were special relationships between plaintiff, [defendant], and Fr. O’Brien” (*J.D. v Archdiocese of N.Y.*, 214 AD3d at 561, 561 [1st Dept 2023] [internal citations omitted]).

Similarly, the fact alleged in Aaron Goodman’s affidavit in support of Homes Defendants motion, that “Homes for the Homeless Summer Camps, Inc. and Homes for the Homeless, Inc. did not exist at the time of the alleged incident(s)” does not establish they were not successors and/or assumed the liabilities of their predecessor (*see* NYSCEF Doc. No. 86, Defendant’s Affidavit at ¶ 11). While a trial court may use affidavits in its consideration of a motion to dismiss, where the Court declines to convert the motion into one for summary judgment, as it does here, such affidavits “are not to be examined for the purpose of determining whether there


is evidentiary support for the pleading” (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]). Consequently, affidavits submitted from a defendant “will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [petitioner] has no [claim or] cause of action” (*Lawrence v Miller*, 11 NY3d 588, 595 [2008] [internal quotation marks omitted], quoting *Rovello*, 40 NY2d at 636). Therefore, the affidavit of Aaron Goodman does not constitute “documentary evidence” within the meaning of CPLR § 3211(a)(1) (*see J.D.*, 214 AD3d at 561; *Fontanetta*, 73 AD3d at 86 [“it is clear that affidavits and deposition testimony are not ‘documentary evidence’ within the intendment of a CPLR 3211 (a) (1) motion to dismiss”]).

Therefore, Homes Defendants have failed to conclusively demonstrate their defense based on documentary evidence as a matter of law.

Moving defendants’ alternate request for relief pursuant to CPLR § 3212 is denied as well. CPLR § 3212(a) requires that issue be joined and Homes Defendants have not yet filed an answer (*see e.g., Compass Concierge, LLC v 142 Duane Realty Corp.*, 222 AD3d 428, 430 [1st Dept 2023]). Additionally, as noted above, the Court declines to convert this motion into one for summary judgment pursuant to CPLR § 3211(c). Discovery remains outstanding relating to issues such as potential successor liability for Homes Defendants and the exact nature and scope of the relationship between the alleged tortfeasors and Homes Defendants. Therefore, summary judgment is premature (*see Rutherford v Brooklyn Navy Yard Dev. Corp.*, 174 AD3d 932, 933 [2d Dept 2019]; *see Rodriguez Pastor v DeGaetano*, 128 AD3d 218, 227-28 [1st Dept 2015]).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further ORDERED that the movant shall file and serve an answer to the Amended Complaint within (20) days from service of a copy of this order with notice of entry; and it is further ORDERED that the parties shall proceed with discovery pursuant to the First Compliance Conference Stipulation and Order (*see* NYSCEF Doc. No. 102).

This constitutes the decision and order of the Court.

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| <u>6/18/2024</u> DATE |  ALEXANDER M. TISCH, J.S.C. | | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE |
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