

**T. B. v City of New York**

2024 NY Slip Op 33191(U)

September 4, 2024

Supreme Court, New York County

Docket Number: Index No. 951028/2021

Judge: Alexander M. Tisch

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

**PRESENT: HON. ALEXANDER M. TISCH PART 18**

*Justice*

-----X

T. B.,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK FOUNDLING,  
CATHOLIC CHARITIES OF STATEN ISLAND, CATHOLIC  
CHARITIES OF NEW YORK, ARCHDIOCESE OF NEW  
YORK, THE SISTERS OF CHARITY OF SAINT VINCENT  
DE PAUL OF NEW YORK, THE SALVATION ARMY  
GREATER NEW YORK DIVISION, DOES 1-10

Defendants.

-----X

INDEX NO. 951028/2021  
MOTION DATE 01/13/2022,  
01/20/2022  
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 43, 44, 45, 51, 53, 54, 55, 56, 61, 62

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 52, 57, 58, 59, 60, 63, 64

were read on this motion to/for DISMISSAL

In Motion Sequence Number 002, defendant Catholic Charities of Staten Island f/k/a The Mission of the Mt. Loretto for the Protection of Homeless and Destitute Children a/k/a Mount Loretto (“Mt. Loretto”), moves to dismiss the Complaint pursuant to CPLR § 3211(a)(7), for failure to state a claim for which relief can be granted or, in the alternative, to strike prejudicial language from the Complaint pursuant to CPLR § 3024(b). Plaintiff cross-moves for leave to amend the Complaint. In Motion Sequence Number 003, defendants The New York Foundling s/h/a New York Foundling f/k/a New York Foundling Hospital f/k/a St. Agatha Home for Children (“Foundling”) and The Sisters of Charity of St Vincent De Paul of New York a/k/a

Sisters of Charity New York (“Sisters” and together “Movants”) move to dismiss the Complaint pursuant to CPLR § 3211(a)(7), for failure to state a claim for which relief can be granted, or, alternatively to strike prejudicial language.

### **Motion Sequence 002**

Mt. Loretto moves to dismiss the Complaint on the grounds plaintiff has failed to identify the individual who allegedly abused her and also fails to allege Mt. Loretto had the required notice of the alleged abuser’s propensity for this type of conduct. Alternatively, should the Complaint survive the motion to dismiss, Mt. Loretto moves that the term “perpetrators” be struck as prejudicial.

First, the Court will consider the plaintiff’s cross-motion to amend the Complaint. The cross-motion is unnecessary. CPLR § 3205(a) allows amendments without leave of court “at any time before the period for responding to it expires.” That time period is extended by the motions to dismiss by virtue of CPLR § 3211(f), which extends the time for a responsive pleading until ten days after service of notice of entry of an order deciding the motion. Therefore, plaintiff may amend the Complaint as of right (*Roam Capital, Inc. v Asia Alternatives Mgt. LLC*, 194 AD3d 585, 585 [1st Dept 2021]). This Court will consider the Proposed Amended Complaint (NYSCEF Doc. No. 55) to be the active complaint.

In their reply, Mt. Loretto contends the same arguments it makes against the Complaint defeat the Proposed Amended Complaint. Taking this as Mt. Loretto’s consent, this Court will apply the motion to dismiss to the Amended Complaint (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]; *Bavaro v Runway Towing Corp.*, 79 Misc 3d 1208(A) [NY Cty, Sup Ct 2023], *rearg denied*, [NY Cty, Sup Ct 2023]).

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court decides “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is not whether the party has artfully drafted the pleading but whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). The pleadings must be liberally construed (see CPLR § 3026; *Siegmund Strauss, Inc.*, 104 AD3d 401) and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs ‘the benefit of every possible favorable inference,’” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc.*, 104 AD3d 401, 403; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff’d* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996], *lv denied* 89 NY2d 802 [1996]). Further, “[i]n deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). It is the movant

who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]); *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Mt. Loretto contends the Amended Complaint fails to state a claim because it does not name the plaintiff's alleged abuser and lacks factual allegations which would show Mt. Loretto had the required notice of the alleged abuser's propensities. Plaintiff has pled she was abused when she was living at Mt. Loretto by a male employee on the night shift. She provides a physical description of the employee. The employee's identity may be found through discovery. Failure to name the alleged abuser is not fatal at this stage. As to notice, plaintiff alleges abuse at Mt. Loretto was "open, notorious, and endemic for decades prior to Plaintiff's abuse" and that the defendants knew or should have known of the danger to plaintiff (Amended Complaint ¶ 102-05). Greater specificity is not required at this pre-answer stage in the litigation, when "such information is in the sole possession and control of the movant (*G.T. v R.C. Diocese of Brooklyn, New York*, 211 AD3d 413, 413 [1st Dept 2022]). Therefore, the motion to dismiss the Amended Complaint is denied.

As far as Mt. Loretto moves to strike plaintiff's use of the defined term "perpetrator" in the Amended Complaint, the Court considers, pursuant to CPLR § 3024(b), "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). "Matters that are unnecessary to the viability of the cause of action and would cause undue prejudice to defendants should be stricken from the pleading or bill of particulars" (*Irving v Four Seasons Nursing & Rehabilitation Ctr.*, 121 AD3d 1046, 1048 [2d Dept 2014]).

Here, plaintiff's repeatedly referencing various alleged abusers as "perpetrators" without qualification is prejudicial and does not advance any stated cause of action. The Child Victims Act, by its very nature, presupposes an alleged victim suffered physical abuse by a perpetrator. Therefore, as far as the motion seeks to strike use of the unqualified term "perpetrator" for the alleged abusers, it is granted.

### **Motion Sequence Number 003**

In Motion Sequence Number 003, defendants NEW YORK FOUNDLING f/k/a NEW YORK FOUNDLING HOSPITAL, f/k/a ST AGATHA HOME FOR CHILDREN ("Foundling") and THE SISTERS OF CHARITY OF SAINT VINCENT DE PAUL OF NEW YORK a/k/a SISTERS OF CHARITY NEW YORK (the "Sisters" and together "Movants") move together to dismiss the Complaint for failure to state a claim for which relief can be granted pursuant to CPLR § 3211(a)(7); to dismiss the claim against the Sisters, as the alleged perpetrator was not affiliated with the Sisters; and to strike prejudicial language in the Complaint. In their reply, Movants ask the Court to dismiss the Amended Complaint, in the event the amendment is allowed, so this Court will apply this motion to the Amended Complaint, which is the operative complaint, as discussed above.

The motion to strike unqualified use of the word "Perpetrators" for the alleged abusers in the Amended Complaint is the same as the one made in Motion Sequence Number 002, discussed above, and is granted for the same reasons.

The Movants first move to dismiss the Amended Complaint as against the Sisters on the ground that no factual allegations are alleged against the Sisters, as the Amended Complaint states plaintiff was abused at St. Agatha's Home for Children on 68<sup>th</sup> Street in Manhattan, while the home is actually located in Nanuet, New York. However, the issue on

a motion to dismiss pursuant to CPLR § 3211(a)(7) is not whether plaintiff is correct, but whether plaintiff has alleged facts which would constitute a claim. Plaintiff has alleged she was abused while in the care of the Sisters. Movants further argue that even if the plaintiff had been abused at St. Agatha's in Rockland County, New York, the Sisters did not have ownership or control over the facility at the time of the alleged abuse. In support of their argument, Movants provide an affidavit by Sister Donna Dodge and attach an Order of Merger, approving the merger of The New York Foundling Hospital and Saint Agatha Home for Children into The New York Foundling Hospital in May, 1977. Even if Movants had presented this evidence in support of a motion pursuant to CPLR § 3211(a)(1) based on documentary evidence, the motion would fail, as the evidence presented does not "utterly refute[] 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]). Plaintiff alleges the Sisters jointly controlled, managed, and operated St. Agatha's Home after the 1977 merger, during the period while plaintiff was abused (Amended Complaint at ¶77). Further, as far as Movants contend the Amended Complaint should be dismissed as against Sisters because plaintiff does not allege any of the Sisters participated in the sexual abuse, that is irrelevant, as the cause of action against the Sisters sounds in negligent supervision of the employee who abused plaintiff. Plaintiff has stated a claim, and this portion of the motion fails.

Movants also seek to dismiss the claims against defendant Foundling. Movants argue the Amended Complaint is insufficiently specific. However, "[t]here is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [2d Dept 1997]). Further, as discussed above, disputes of fact about where the abuse occurred are

not fatal to the Amended Complaint. Movants also contend plaintiff has failed to allege a claim specifically against Foundling. Plaintiff alleges a claim for negligent supervision against Foundling, including that Foundling owed plaintiff a duty of care, had notice that plaintiff was being sexually abused and failed to protect plaintiff and to properly supervise its employee. This is sufficient to survive a motion to dismiss (*see Hunter v New York City Dep't of Educ.*, 95 AD3d 719, 719 [1st Dept 2012] [internal quotation marks omitted], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994] [a defendant who “was “under a duty to adequately supervise” plaintiff may “be held liable for foreseeable injuries proximately related to the absence of adequate supervision”]). Finally, as far as Movants take the position that the claim fails for lack of notice because the plaintiff did not allege she informed Foundling of the abuse she suffered, plaintiff alleges that abuse of the residents by John was “rampant, open and notorious, and discussed among the juvenile residents” (Amended Complaint at ¶ 100). A pattern of frequent abuse can support a claim of constructive notice of an alleged abuser’s propensities and conduct (*McVawcd-Doe v Columbus Ave. Elementary School*, 225 AD3d 845, 847 [2d Dept 2024]). Therefore, this portion of the motion also fails and this claim will also survive. The Court has considered Movants’ other arguments and found them without merit.

#### **The Cross-Motion of the City of New York (Motion Seq. No. 002)**

The City of New York filed an affirmation (NYSCEF Doc. No. 43) in response to Mt. Loretto’s motion to dismiss (Motion Seq. No. 002) in which the City takes no position on the motion to dismiss but asks the Court to convert the City’s cross-claims into a third-party action against Mt. Loretto in the event Mt. Loretto’s motion to dismiss is successful. As the motion to dismiss is denied, this apparent cross-motion is denied as moot.

For the reasons discussed above, it is hereby

ORDERED that the Motion Sequence Numbers 002 and 003 are GRANTED IN PART and DENIED IN PART. The portion of each motion seeking to strike the unqualified term “perpetrator” as used in plaintiff’s Amended Complaint is granted and the motions are otherwise denied; and it is further

ORDERED that plaintiff shall, within 20 days from service of a copy of this order with notice of entry, file and serve a supplemental summons and the Amended Complaint, which was filed as NYSCEF Document Number 55, except that the Amended Complaint to be filed shall not reference the unnamed alleged abusers by the unqualified term “perpetrator;” and it is further

ORDERED that the defendants shall answer or otherwise respond to the amended complaint within 30 days from service.

This constitutes the decision and order of the Court.

9/4/2024  
DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE