

**Matter of Seiger v Church of St. Ignatius Loyola**

2019 NY Slip Op 32973(U)

October 8, 2019

Supreme Court, New York County

Docket Number: 153672/2019

Judge: George J. Silver

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April 9, 2019, prior to the effective date of the statute, and was subsequently heard on September 5, 2019. Consequently, much of the relief petitioner seeks by pre-action discovery may be better sought through the normal course of discovery, as respondents argue.

CPLR §3102(c) provides that “[b]efore an action is commenced, disclosure to aid in bringing an action [or] to preserve information... may be obtained, but only by court order.” As a vehicle employed by the parties to litigation, CPLR §3102(c) allows for discovery before an action is commenced to aid in bringing the action, to preserve information or to aid in arbitration.

Pursuant to the statute, petitioner’s application includes both a general and fairly detailed account of alleged sexual abuse sufficient to frame a complaint (*see Tarter v State of New York*, 113 AD2d 587 [1st Dept. 1986]; *Matter of Banco de Concepcion v Manfra. Tordella & Brookes. Inc.*, 70 AD2d 840 [1st Dept. 1979]; *Matter of Simpson v Traum*. 63 AD2d 583 [1st Dept. 1978]). Even if a petitioner is seeking information beyond what is necessary to frame a complaint, it is well settled that a “petitioner cannot use pre-action discovery to determine whether he might have additional causes of action or alternative theories of liability” (*Bishop v Stevenson Commons Assocs. LP.*, 74 AD3d 640, 641 [1st Dept. 2010][denying pre-action discovery to tenant who sought names and addresses of individuals who moved his property as information could be obtained during discovery after commencement of action]). Indeed, pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists, and is only available where the petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong, or to determine whether facts exist to support a cause of action (*Champion v. Metropolitan Transit Authority*, 70 AD3d 587 [1st Dept. 2010]). As such, pre-action discovery will be denied where, as here, petitioner has sufficient information upon which to frame a complaint (*Matter of Henry*, 43 AD3d 1145 [4th Dept. 2007]), and the only purpose for pre-action discovery is to explore alternative theories of liability (*Western Investment LLC, v. Georgeson Shareholder Securities Corporation*, 43 AD3d 333 [1st Dept. 2007]).

Although petitioner labors under the assumption that petitioner is entitled to as much information as possible prior to framing a complaint, the law says otherwise. Indeed under CPLR §3102(c), it is evident from the affirmation and affidavit submitted in connection with the instant petition that petitioner already has sufficient information to frame a complaint. To be sure, the petition recites in detail that petitioner intends to file tort claims against the named respondents for sexual abuse he allegedly suffered between 1975 and 1977. That alleged abuse is described with ample specificity, including reference to the times and places of the alleged abuse. Accordingly, this is not a situation where petitioner does not know whether alleged abuse occurred or the nature of it. Rather, as confirmed at oral argument, petitioner seeks pre-action disclosure for the purpose of possibly identifying additional defendants. Where that is the case, pre-action disclosure is generally not available under CPLR §3102(c). Indeed, where a party “possesses sufficient information to enable him to frame a complaint the pre-action disclosure he seeks is unavailable to him” (*Matter of Ryan v Marsh & McLennan Intl.*, 70 AD2d 567, 567 [1st Dept 1979]; *see Matter of Rann v Metropolitan Transp. Auth.*, 22 AD3d 586 [2d Dept 2005]; *Holzman v Manhattan & Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347 [1st Dept 2000]). Here, petitioner has

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identified the name of some of his alleged abusers, their affiliated religious orders, and details concerning the alleged relationship between petitioner and his alleged abusers, including the relative time frame in which the alleged abuse occurred. Hence where, as here, the key defendants are already identified, and petitioner can proceed against them and take discovery in the ordinary course after commencing the action, the court finds that pre-action disclosure is not permissible for the purposes of trying to identify employees of those defendants who may possibly have individual liability (*see Bishop*, 74 AD3d at 641, *supra* [denying application for names and addresses of individual employees, managers, and subcontractors of a company that petitioner intended to sue, because “petitioner does not explain why he cannot commence the action against [the entity defendant] and determine, in the course of discovery, whether any intentional torts might have been committed by the individual employees”]). As I mentioned at oral argument, and will reiterate now, here many of the potential individual defendants sought are not unknown, but rather are unidentified. Moreover, the entity defendants who likely employed the potential individual defendants have been identified. Where that is the case, pre-action disclosure under CPLR §3102(c) is inappropriate for the reasons, both legal and factual, identified (*see Bishop*, 74 AD3d at 641, *supra*).<sup>1</sup>

To the extent, if any, that petitioner seeks pre-action disclosure in an attempt to identify alternative theories of liability, in addition to the causes of action he already specifically identifies in his petition, that too is an impermissible use of CPLR §3102(c) (*Bishop*, 74 A.D.3d at 641, *supra* [“petitioner cannot use pre-action discovery to determine whether lie might have additional causes of action or alternative theories of liability”]); *Holzman*, 271 AD2d at 348, *supra* [denying application where “the only purpose of inspection would be to allow petitioner to determine whether the facts support alternate theories of liability”]). It is settled that pre-action disclosure “may not be used for the purpose of exploring the possibility of alternative theories of liability or whether the prospective plaintiff has a cause of action worth pursuing” (*Thomas v. MasterCard Advisors, LLC*, 74 A.D.3d 464, 465 [1st Dept. 2010]). As such, to the extent that petitioner is seeking the same, the petition is denied on that basis as well.

As for the portion of the petition which seeks to preserve certain documents, respondents have demonstrated that they are aware of the necessity of preserving all relevant documents and information in their custody and control. No additional protections are necessary at this time.

Further, the court notes that even if pre-action disclosure were warranted here, the nature of some of the disclosure sought by petitioner would arguably be improper. For instance, petitioner seeks to compel respondents to provide names and images of “any” males who worked for certain religious congregations many years ago so that petitioner can select, and presumably name, some of those males as defendants who assaulted him. As respondents highlight, the one-sided nature of such disclosure, which presumably would include a broad array of photos of “any” males who may have transiently worked in any capacity at the various religious congregations, implicates various notions of fundamental fairness. To be sure, if respondents are directed to provide such pre-action

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<sup>1</sup> Notably, as petitioner has already identified Father Hoefner and his alleged involvement with the allegations at issue, petitioner withdrew the instant application with respect to respondent CHURCH OF ST. IGNATIUS LOYOLA at oral argument on September 5, 2019.

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disclosure absent an opportunity to depose petitioner and test his independent recollection of the events, identities, and descriptions of his alleged abusers, petitioner will invariably have the ability, whether inadvertently or not, to fit his testimony and identification of the alleged perpetrators to information he receives before filing suit. Respondents recognition of that danger weighs heavily upon this court, and highlights the reasons why pre-action disclosure should only be provided in very limited circumstances.

Finally, it is notable that much of the relief sought by petitioner has been rendered moot by the fact that this application was heard after the effective date of the CVA. Though petitioner bears no responsibility for that delay, it has created a situation whereby the information sought can readily be obtained during the course of regular discovery once the action has been initiated. Indeed, as previously mentioned, any additional attempts for further discovery may be requested as part of post-commencement discovery demands pursuant to article 31 of the CPLR. As such, the instant application is also denied as moot.

Accordingly, upon the foregoing papers, it is hereby

ORDERED and ADJUDGED that the application of petitioner for pre-action discovery pursuant to CPLR §3102[c] is denied; and it is further

ORDERED that petitioner is directed to file a complaint and all necessary accompanying pleadings within 14 days of the issuance of this decision and order; and it is further

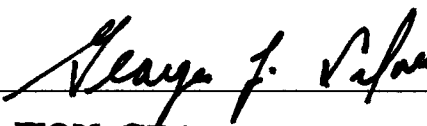
ORDERED that upon filing suit, petitioner is directed to provide any named defendants with bills of particulars specifying the nature of the allegations with respect to each defendant; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on Tuesday December 3, 2019 at the courthouse located at 111 Centre Street, New York, NY, Room 1227 at 2:00 P.M.

The foregoing constitutes the decision, order, and judgment of this court.

Dated:

10/8/19



HON. GEORGE J. SILVER