Ark343 Doe v Archdiocese of N.Y.

2023 NY Slip Op 31385(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 950434/2020

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

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ARK343 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, IONA PREPARATORY SCHOOL, DOES 1-5 WHOSE IDENTITIES ARE UNKNOWN TO PLAINTIFF

Defendant.

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INDEX NO. 950434/2020

MOTION DATE 05/07/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant Archdiocese of New York (the Archdiocese or defendant) moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, pursuant to CPLR 3212.

The complaint alleges that plaintiff was sexually abused by Roger Romeo when s/he was approximately 14-15 years old, when he was a student at co-defendant Iona Preparatory School (the School) (NYSCEF Doc No 1 at ¶¶ 16, 19). Plaintiff alleges that Romeo was a teacher and agent or employee of the defendant, and that defendant owned or had sufficient control over him and/or the School (see id. at ¶¶ 14, 16).

In determining dismissal under CPLR Rule 3211 (a) (7), the "complaint is to be afforded a liberal construction" (Goldfarb v Schwartz, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (Godfrey v Spano, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is 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" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). Additionally, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

A motion to dismiss a complaint based upon documentary evidence pursuant to CPLR 3211 (a) (1) "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v Martinez, 84 NY2d 83, 88 [1994]). 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, 86 [2d Dept 2010]; Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431, 432 [1st Dept 2014]).

In support of its motion to dismiss, defendant submits the deed to where the alleged abuse occurred, showing that the property was not owned by defendant and certificates of incorporation and the charter for co-defendant School. Defendant also submits affidavits from defendant's Associate General Counsel, Roderick Cassidy (NYSCEF Doc No 26) and Brother Kevin M. Griffith, the Province Leader of co-defendant Edmund Rice Christian Brothers North America Province (the Christian Brothers) (NYSCEF Doc No. 27).

However, affidavits do not constitute "documentary evidence" within the meaning of CPLR 3211 (a)(1) (see J.D. v Archdiocese of New York, — AD3d —, 2023 NY Slip Op 01588 [1st Dept Mar. 23, 2023]; Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011] citing, inter alia, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Fontanetta v Doe, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and deposition

testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]).

While lack of ownership over the school's premises may negate any duty of care that a landowner has to its tenants or guests and invitees, such a duty is distinctly different from the legal duty asserted here, which is the ability to control a third-party tortfeasor because of special relationship existing between the defendant and tortfeasor, such as an employment relationship (see J.D. v Archdiocese of New York, — AD3d —, 2023 NY Slip Op 01588 [1st Dept Mar. 23, 2023]).

Further, although "a trial court may use affidavits in its consideration of a pleading motion to dismiss," where, as here, the Court declines to convert the motion into one for summary judgment, such affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (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" (Lawrence v Miller, 11 NY3d 588, 595 [2008]) "unless [they] establish conclusively that plaintiff has no cause of action" (Rovello, 40 NY2d at 636).

Here it cannot be said that defendant met its burden establishing that plaintiff has no claim against it as a matter of law because the affidavits are not conclusive (see J.D., 2023 NY Slip Op 01588). It is important to note that an affidavit is not necessarily subject to cross examination and the issue of whether an employment relationship exists sufficient to hold defendant liable for negligence in failing to exercise reasonable care in hiring, supervising, or retaining the alleged abuser may be a fact-intensive analysis as to the extent of defendant's power to order and control the employee's performance of work (see generally Castro-Quesada v Tuapanta, 148 AD3d 978, 979 [2d Dept 2017], quoting Barak v Chen, 87 AD3d 955, 957 [2d Dept 2011]; Griffin v Sirva, Inc., 29 NY3d 174, 185-86 [2017] [noting that factors as to whether one is an employer may include "'(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of

the servant's conduct'"] quoting State Div. of Human Rights v GTE Corp., 109 AD2d 1082, 1083 [4th Dept 1985]).

Defendant's alternate request for relief pursuant to CPLR 3212 is denied as well. First, CPLR 3212 (a) explicitly requires that issue be joined and defendant has not yet filed an answer (see Alro Builders and Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512, 512 [1st Dept 1980]). Second, it is clear that discovery remains outstanding related to the issue mentioned above about the exact nature and scope of the relationship between defendant and the tortfeasor, among others. Accordingly, summary judgment is premature (see Rutherford v Brooklyn Navy Yard Dev. Corp., 174 AD3d 932, 933 [2d Dept 2019]; 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 complaint within twenty (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 CMO No. 2, Section IX (B) (1), and their compliance conference order dated 10/28/2022 (NYSCEF Doc No 50).

This constitutes the decision and order of the Court.

4/25/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE