

Jane Doe v Roman Catholic Archdiocese of N.Y.

2023 NY Slip Op 31621(U)

May 9, 2023

Supreme Court, New York County

Docket Number: Index No. 950614/2020

Judge: Alexander Tisch

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ALEXANDER M. TISCH PART 18 CVA

Justice

-----X

INDEX NO. 950614/2020

JANE DOE,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK,
ADRIAN DOMINICAN SISTERS, MOUNT HOPE
FOUNDATION, INC., LOGOS CORPORATION, CECILIA
MELLET, THE ESTATE OF DR. HERBERT THOMAS
SCHWARTZ, DOMINICAN FRIARS PROVINCE OF ST.
JOSEPH

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 50, 55, 56, 57, 58, 59, 60, 61, 62, 63, 70, 90, 91

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant Roman Catholic Archdiocese of New York (the Archdiocese or defendant) moves to dismiss the complaint and/or amended complaint¹ pursuant to CPLR 3211 (a) (1) and (7) or, alternatively, pursuant to CPLR 3212.

¹ After the moving papers were filed and served, plaintiff filed and served an amended complaint adding another defendant and included more allegations (NYSCEF Doc No 52). “While the lower court cases are in conflict over whether the filing of an amended pleading automatically abates a motion to dismiss that was addressed to the original pleading, [the Appellate Division, First Department] prefer[s] the rule set forth in Sholom that the moving party has the option to decide whether its motion should be applied to the new pleadings” (Sage Realty Corp. v Proskauer Rose, 251 AD2d 35, 38 [1st Dept 1998], citing Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, 138 Misc 2d 799, 801 [Sup Ct, Queens County 1988]). Here, while defendant objects to the procedural propriety of serving an amended complaint, the amended complaint did not substantially change the nature of the action insofar as asserted against the Archdiocese. Additionally, although defendant did not make any specific election, defendant’s reply papers went on to consider the merits of the amended complaint and party affidavit in opposition to the motion, both of which contain allegations not found in the original complaint. Therefore, the Court finds no prejudice to defendant in treating this motion as if it were addressed to the amended complaint (see, e.g., Sage Realty Corp., 251 AD2d at 38).

Plaintiff's complaint alleges that she was sexually abused by Dr. Herbert Thomas Schwartz and Annie Emmerson while living on co-defendant Mount Hope Foundation's (Foundation) commune located in Middleton, New York in or around 1978-1980 when plaintiff was approximately 4-6 years old. She also alleges that co-defendant Cecilia Mellet, Schwartz, and Emmerson "were leaders, agents, servants and/or employees of the [Foundation] commune, operating under the direction and control of defendant [Archdiocese], and its agents, servants and/or employees" (NYSCEF Doc No 52 at ¶ 13). The complaint further alleges that purported Archdiocesan priests, Father Tommy Rover, Father Maury, and another priest were assigned to and were actively involved with religious activities and services at the commune and had knowledge of the sexual abuse and failed to stop it. Plaintiff asserts three causes of action against the movant for negligence, negligent hiring, retention, and supervision, and negligent infliction of emotional distress (NIED) (first through third counts, respectively).

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 certificates of incorporation for co-defendant(s) and the affidavit of defendant's Associate General Counsel, Roderick Cassidy. Defendant argues that the evidence shows that the Archdiocese did not own or operate the Foundation commune, nor supervise its staff or leaders, and did not have any relationship with the alleged abuser(s). However, the fact that the Foundation and/or co-defendant Logos Corporation are separately formed entities does not negate the possibility that, as alleged in the complaint, the Archdiocese had any control over the commune or its leaders.

Additionally, the affidavit does 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"]).

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 affidavit is 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(s), 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]).

“A breach of the duty of care ‘resulting directly in emotional harm is compensable even though no physical injury occurred’ when the mental injury is ‘a direct, rather than a consequential, result of the breach’ and when the claim possesses ‘some guarantee of genuineness’” (Ornstein v New York City Health & Hosps. Corp., 10 NY3d 1, 6 [2008], quoting Kennedy v McKesson Co., 58 NY2d 500, 504, 506 [1983] and Ferrara v Galluchio, 5 NY2d 16, 21 [1958] [internal citations omitted]). “The latter element may be satisfied where the particular type of negligence is recognized as providing an assurance of genuineness, as in cases involving the mishandling of a corpse or the transmission of false information that a parent or child had died” (Taggart v Costabile, 131 AD3d 243, 253 [2d Dept 2015]). “However, in the absence of such specific circumstances, the guarantee of genuineness ‘generally requires that the breach of the duty owed directly to the injured party must have at least endangered the plaintiff’s physical safety or caused the plaintiff to fear for his or her own physical safety’” (*id.*, quoting 1-2 Warren’s Negligence in New York Courts § 2.04 [1] [a]; see Doe v Langer, 206 AD3d 1325, 1331 [3d Dept 2022], quoting A.M.P. v Benjamin, 201 AD3d 50, 57 [3d Dept 2021] [“A cause of action for negligent infliction of emotional distress generally requires the plaintiff to show a breach of a duty owed to him or her which unreasonably endangered his or her physical safety, or caused him or her to fear for his or her own safety”] [internal quotations omitted]). Additionally, unlike intentional infliction of emotional distress, “extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of

emotional distress” (Brown v New York Design Ctr., Inc., — AD3d —, 2023 NY Slip Op 01228, 3-4 [1st Dept Mar. 9, 2023]; Taggart v Costabile, 131 AD3d 243, 253-56 [2d Dept 2015]).

Here, the Court finds that the allegations and theory of liability under the NIED (see NYSCEF Doc No 52 at ¶¶ 73-76) are essentially the same for the preceding negligence claims and, because plaintiff may recover for emotional distress in those claims, the NIED cause of action is essentially duplicative (see Fay v Troy City School Dist., 197 AD3d 1423, 1424 [3d Dept 2021]).


Accordingly, it is hereby ORDERED that the motion is granted in part to the extent of dismissing the third cause of action for negligent infliction of emotional distress insofar as asserted against the movant; and it is further

ORDERED that the motion is otherwise 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 submit a first compliance conference order within 60 days after issue is joined.

This constitutes the decision and order of the Court.

| | | | | |
|-------------------------|---|---------------------------------|---|------------------------------------|
| <u>5/9/2023</u> DATE |  ALEXANDER 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 checked="" type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |