

ARK644 DOE v Archdiocese of N.Y.

2023 NY Slip Op 32713(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 951179/2021

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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ARK644 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, DIOCESE OF
BROOKLYN, DIOCESE OF BURLINGTON, ST. FRANCES
DE CHANTAL, DOES 1-5 WHOSE IDENTITIES ARE
UNKNOWN TO PLAINTIFF

Defendant.

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INDEX NO. 951179/2021
MOTION DATE 04/07/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 72, 73, 74, 75

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Upon the foregoing documents, defendant, The Diocese of Burlington’s motion seeking leave to renew this Court’s prior Order dated, December 16, 2022 is decided as follows:

This Court previously denied defendant, Diocese of Burlington’s motion which sought dismissal of this action pursuant to CPLR 3211(a)(8) – lack of personal jurisdiction, holding that pursuant to CPLR 302(a)(2), said diocese transacted business in New York through Fr. Courcy who allegedly sexually abused plaintiff at St. Frances De Chantal in the Bronx. Said defendant now moves for leave to renew.

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a

change in the law that would change the prior determination (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, supra).

In support of its motion, movant highlights the orders of this Court in *Ark301 Doe v. Diocese of Brooklyn*, Sup. Ct., Kings Cty. Index No. 512965/2020 and *V.Z. v. Archdiocese of New York*, Sup. Ct. NY Cty. Index No. 950164/2019. As such, leave to renew is granted and upon renewal, the prior motion is decided as follows:

Pursuant to CPLR §302(a)(3), “As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:... commits a tortious act without the state causing injury to person or property within the state...if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state...”

"Where a third party complaint against a foreign principal arises out of the acts of his 'agent' in New York, those acts will suffice for the jurisdictional requirement of 'purposeful activity.'" *FSI Group v. First Federal Savings & Loan Ass'n*, 502 F. Supp. 356. 357 (S.D.N.Y. 1980); accord *Esso Exploration & Prod. Nig. V. Nigerian Nat'l Petroleum Corp.*, 397 F. Supp. 3d 323, 342 n. 10 (S.D.N.Y. 2019) (“[i]n determining whether a defendant has 'minimum contacts' with the forum...courts can take into account the activities of a defendant's co-venturer or agent to determine whether the defendant had minimum contacts with the forum state”). For purposes of specific jurisdiction and due process, the courts apply a "but for" test, i.e., due process is satisfied if the cause of action would not have arisen but for the agent's contacts with the forum. In plaintiff's complaint, and undisputed by movant, plaintiff alleges that Courcy was at all relevant times under

the control of the Diocese of Burlington, who assigned him to New York for a period of fifteen years, which arguably represents a consistent course of conduct within the state.

However, plaintiff does not claim that Courcy's alleged abuse of him was for the benefit of the Diocese, does not allege that the Diocese of Burlington was in any way involved in Courcy's New York ministry or his specific assignments there and, that the Diocese of Burlington did not pay for, sponsor, house, or otherwise support Courcy while he was outside of Vermont and as such, jurisdiction may not be maintained, citing *Doe v. Roman Catholic Diocese of Erie, Pennsylvania*, 3:20-CV-02557, 2021 WL1062570 * 3 (N.D.N.Y March 19, 2021) and *Powers-Barnhard v. Butler*, No. 5:19-cv-01208 (BKS/ATB), 2020 WL 4925333, at *7 (N.D.N.Y. Aug. 21, 2020). As discussed in *Powers-Barnhard*, Section 302(a)(2) "requires the assertion of a colorable cause of action for a tortious act." *Modern Indus. Firebrick Corp. v. Shenango Inc.*, No. 11-cv-959, 2012 WL 2405236, at *6, 2012 U.S. Dist. LEXIS 87875, at *16, (W.D.N.Y. June 25, 2012). Section 302(a)(2) "has been narrowly construed to apply only when the defendant was actually physically present in New York when he performed the allegedly tortious act." *Rescuecom Corp. v. Hyams*, 477 F. Supp. 2d 522, 531 (N.D.N.Y. 2006); *see also Bensusan Rest. Corp. v. King*, 126 F.3d 25, 28–29 (2d Cir. 1997). "For the purposes of personal jurisdiction, an agent is a person or entity that acts for the benefit of, and with the knowledge and consent of, the non-resident principal, and over which that principal exercises some control." *Branham v. ISI Alarms, Inc.*, No. 12-cv-1012, 2013 WL 4710588, at *4, 2013 U.S. Dist. LEXIS 124933, at *12–13 (E.D.N.Y. Aug. 30, 2013)

The recently decided case of *Edwardo v. Roman Cath. Bishop of Providence*, 579 F. Supp. 3d 456, 470 (S.D.N.Y. 2022), involving sexual abuse committed by Father Philip Magaldi, a

Rhode Island Priest, on a trip to New York City, is directly on point and concerns a similar pattern of abuse, holding:

...for an individual to be deemed an “agent” for purposes of Section 302(a)(2), particularly the first requirement that the purported agent act “for the benefit of” the principal. *CutCo Indus., Inc.*, 806 F.2d at 366. To establish that a purported agent acted “for the benefit of” a principal in this context, it is not enough that the purported agent merely engage in some activity that benefits the principal during the time the agent was in the state; rather, the purported agent's tortious act itself must benefit the principal in order for the principal to be deemed responsible for the tort based upon an agency theory. See, e.g., *Barbarotto Int'l Sales Corp. v. Tullar*, 188 A.D.2d 503, 591 N.Y.S.2d 188, 189 (2d Dep't 1992) (explaining that “[t]he activities of a representative of a nondomiciliary in New York may be attributed to it ... if it requested the performance of those activities and the activities benefit it” (emphasis added)); *E. N.Y. Sav. Bank v. Republic Realty Mortg. Corp.*, 61 A.D.2d 1001, 402 N.Y.S.2d 639, 641 (2d Dep't 1978) (noting that activities of a New York agent “will be attributed to the nondomiciliary [for jurisdictional purposes] if ... those activities benefit it” (emphasis added)); see also *Ramgoolie v. Ramgoolie*, No. 16 Civ. 3345 (VEC) (SN), 2016 WL 11281385, at *5 (S.D.N.Y. Dec. 20, 2016) (finding that Section 302(a)(2) could not serve as a basis for personal jurisdiction, even though a tortfeasor was defendant's agent in New York, because the agent's tortious acts were “committed for [his] own benefit,” rather than defendant's), report and recommendation adopted, 2017 WL 564680 (S.D.N.Y. Feb. 10, 2017). This understanding of the proper scope of analysis under Section 302(a)(2) is buttressed by the statute's plain language, which permits jurisdiction over a party who, itself, “through an agent ... commits a tortious act.” C.P.L.R. § 302(a)(2). A principal does not commit a tort “through an agent,” where an agent engages in tortious conduct that does not benefit the principal and did not, in any way, further the principal-agent relationship...

...the law requires the principal to know of and consent to the specific tortious conduct in order to be held liable for that conduct. *Doe v. Roman Cath. Diocese of Erie, Pa.*, No. 20 Civ. 257 (LEK) (ML), 2021 WL 5232742, at (N.D.N.Y. Nov. 10, 2021) (finding the court lacked personal jurisdiction over the Roman Catholic Diocese of Erie, Pennsylvania, where plaintiff's claims stemmed from sexual abuse in New York committed by parish basketball coach)

While this Court disagrees with the holding and would frankly prefer a different outcome as, accepting all of plaintiff's allegations as true, the Diocese of Burlington knew of Courcy's dangerous propensities and, in its control of Courcy, transferred him to New York, where he did allegedly abuse plaintiff, then the Diocese of Burlington should reasonably expect to be called into court in New York. Justice calls out for the Diocese of Burlington to be subject to discovery and address this matter on the merits rather than short circuiting the process. However, as *Edwardo* specifically holds that "Even '[i]f Plaintiff had sufficiently pleaded that [the employer] had direct knowledge of prior sexual misconduct on the part of [the perpetrator] ... that still would not give rise to respondeat superior liability in the absence of an allegation that the misconduct was part of any actual responsibility [the perpetrator] had to [his employer].'" Clearly, the Diocese of Burlington must enjoy the benefit of *Edwardo* ruling.

ORDERED that the motion of defendant Diocese of Burlington to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)].

7/31/23
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE