

**B.C. v Archdiocese of N.Y.**

2023 NY Slip Op 33086(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 950440/2021

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		INDEX NO.	<u>950440/2021</u>
B. C.,		MOTION DATE	<u>11/19/2021, 11/16/2021, 11/16/2021</u>
	Plaintiff,	MOTION SEQ. NO.	<u>002 003 004</u>

- v -

ARCHDIOCESE OF NEW YORK, CATHOLIC CHARITIES  
ARCHDIOCESE OF NEW YORK, ORDER OF FRIARS  
MINOR CONVENTUAL, COVENANT HOUSE, DOES 1-10

Defendant.

**DECISION + ORDER ON  
MOTION**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 40, 41

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 42, 43, 44

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 35, 36, 37, 38, 45, 46, 47

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendant COVENANT HOUSE a/k/a COVENANT HOUSE NEW YORK (Covenant House) moves to dismiss the complaint insofar as against it pursuant to subdivisions (1), (5) and (7) of CPLR 3211 (a) and 3211 (c) converting the motion to summary judgment (motion sequence no. 002). Co-defendants ARCHDIOCESE OF NEW YORK and CATHOLIC CHARITIES s/h/a CATHOLIC CHARITIES ARCHDIOCESE OF NEW YORK move for the same relief on the same grounds, in reliance of the same alleged evidence (motion sequence no. 003) and co-defendants ORDER MINOR CONVENTUALS, INC. and FRANCISCAN FRIARS – OUR LADY OF THE ANGELS PROVINCE, INC. i/s/a ORDER OF FRIARS MINOR CONVENTUAL a/k/a CONVENTUAL FRANCISCANS OF

## OUR LADY OF THE ANGELS PROVINCE OF THE FRANCISCAN FRIARS

CONVENTUAL (the Order) does the same (motion sequence no. 004).

Plaintiff commenced the instant action seeking to recover damages for personal injuries sustained from alleged sexual abuse inflicted by Father Bruce Ritter while plaintiff was a resident at Covenant House from 1981 to 1985 when plaintiff was approximately 13 to 16 years old.

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 the motion to dismiss, Covenant House submits an affidavit from its Chief Legal Officer, John Ducoff, who states that “at some time prior to January 1, 1984, Covenant House implemented a computer database to track youth who have resided at Covenant House” (NYSCEF Doc No 25 at ¶ 3). After performing a search for plaintiff, the results showed that plaintiff resided there only two times, in December of 1988 and in January of 1989, and that plaintiff would have been 19 years old during those times (NYSCEF Doc No 25 at ¶ 5). Consequently, defendants argue that plaintiff’s claims fall outside of the purview of the CVA’s revival window under CPLR 214-g and are therefore barred by the statute of limitations.

Initially, the Court notes that the affidavit submitted does not constitute “documentary evidence” within the meaning of CPLR 3211 (a) (1) (see J.D. v Archdiocese of New York, 214 AD3d 561 [1st Dept 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).

Even if the Court accepted the database printout as documentary evidence, it does not conclusively establish that plaintiff has no cause of action as a matter of law. As plaintiff argues in opposition, although plaintiff may have stayed at the Covenant House when he was 19 years old, it does not mean that he did not stay there during the period alleged in the complaint. Indeed, Ducoff’s affidavit does not conclusively state that this database was in existence when plaintiff first claims he stayed at Covenant House in 1981 — rather, the database was implemented “*at some time prior to January 1, 1984*” (NYSCEF Doc No 25 at ¶ 3) and may not account for the years 1981, 1982, or 1983 alleged in the complaint. “[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate” (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

Defendant’s alternate request for relief pursuant to CPLR 3212 is denied as well as CPLR 3212 (a) explicitly requires that issue be joined and defendant Covenant House has not yet filed an answer (see Alro Builders and Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512, 512 [1st Dept 1980]). Even if the Court treated the motion as one for summary judgment in light of the answers filed by co-defendants, summary judgment would be denied. Plaintiff submitted an affidavit in opposition stating, e.g., “Father Ritter and other employees at Covenant House regularly logged in residents under false names and had a policy that residents were not required to disclose their real names” (NYSCEF Doc No 41 at ¶ 7). Plaintiff goes on to suggest that there is an increased susceptibility to inaccurate recordkeeping given that the residents were “primarily homeless child runaways that frequently moved from place to place” and that Covenant House

was incentivized to “to falsify or simply fail to keep records of individuals residing there as a means of covering up Father Ritter's sexual abuse of these individuals” (id. at ¶¶ 6, 8).

Accordingly, summary judgment would be inappropriate “where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Accordingly, it is hereby ORDERED that the motions are denied; and it is further ORDERED that Covenant House 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 sixty (60) days after issue is joined.

This constitutes the decision and order of the Court.

8/28/2023  
DATE

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ALEXANDER M. TISCH, J.S.C.

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