

**Ark441 Doe v Archdiocese of N.Y.**

2023 NY Slip Op 33088(U)

September 1, 2023

Supreme Court, New York County

Docket Number: Index No. 950473/2021

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*

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ARK441 DOE,

Plaintiff,

- v -

ARCHDIOCESE OF NEW YORK, SISTERS OF CHARITY  
OF ST. VINCENT DE PAUL OF NEW YORK, ST. AGATHA  
HOME FOR CHILDREN, ST. AGATHA HOME OF THE  
NEW YORK FOUNDLING HOSPITAL, DOES 1-5 WHOSE  
IDENTITIES ARE UNKNOWN TO PLAINTIFF,

Defendants.

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INDEX NO. 950473/2021  
MOTION DATE 03/01/2022  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for DISMISSAL.

Upon the foregoing papers, defendant Archdiocese of New York (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 as follows: From approximately 1972 to 1973, when plaintiff was approximately 13 to 14 years old and a resident of St. Agatha in Nanuet, Dr. Llamel, a doctor employed by the Archdiocese, the Sisters of Charity, and St. Agatha, engaged in unpermitted sexual contact with plaintiff in violation of at least one section of New York Penal Law Article 130 and/or § 263.05.

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 defendant submits the certificate of incorporation for the Sisters of Charity of St. Vincent de Paul; the certificate of incorporation for the Foundling Asylum of the Sisters of Charity in the City of New York; the St. Agatha property deed; the amendment of the certificate of incorporation; the certificate of merger; the affidavit of Itohan Omoregie, special counsel to the New York Foundling; and the affidavit of Roderick Cassidy, Esq., general counsel for the Archdiocese of New York. Defendant argues that the evidence shows that they did not create, oversee, supervise, manage, control, direct, or operate either the New York Foundling

Hospital or St. Agatha Home for Children, or its faculty, staff, employees, or residents., including Dr. Llamel, the alleged abuser. That the Archdiocese did not own the property where New York Foundling or St. Agatha Home for Children were located, did not employ, supervise, or train the faculty, staff, or any other employees at the New York Foundling or St. Agatha Home for Children.

The fact that the co-defendants are separately formed entities does not negate the possibility that, as alleged in the complaint, the Archdiocese had any control over the New York Foundling Hospital or St. Agatha Home for Children, and/or its employees or agents (see generally Engelman v Rofe, 194 AD3d 26, 33-34 [1st Dept 2021] [the court is required to accept these allegations in the complaint as true]).

The affidavits submitted 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”]).

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 particularly as to defendant's relationship with the co-defendants and/or the alleged abuser (see J.D., 2023 NY Slip Op 01588; Engelman, 194 AD3d at 33-34). It is important to note that an affidavit is not necessarily subject to cross examination and the issue of whether an agency or employment relationship exists sufficient to hold defendant liable for co-defendants' acts and/or any defendant's 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 agent's or 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, co-defendants, 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 submit a first compliance conference order within sixty (60) days after issue is joined.

This constitutes the decision and order of the Court.



9/1/2023  
DATE

ALEXANDER M. TISCH, J.S.C.

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