SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: **HON. SABRINA B. KRAUS** **PART** **57 - CVA**

Justice

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L.S.,

Plaintiff,

- v -

CITY OF NEW YORK; BROOKWOOD CHILD CARE a/k/a THE BROOKWOOD FOUNDATION; SCO FAMILY OF SERVICES and DOES 1-10

Defendants.

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INDEX NO. 514228/2021

MOTION DATE 10/14/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 4, 55, 56

were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant SCO Family of Services ("SCO") in the above captioned Child Victims Act ("CVA") action moves for dismissal of the matter as against it pursuant to CPLR 3211(a)(1), CPLR 3211 (a)(7), CPLR 3211(c) and CPLR 3212 (Motion Seq. 002). Plaintiff and City of New York oppose.

Plaintiff alleges that from approximately 1991 to 1994 when Plaintiff was approximately 11 to 14 years old, Plaintiff was sexually abused while in foster care by the foster mother's son-in-law. Plaintiff alleges that SCO was an agent affiliate, successor, successor in interest, assignee and/or beneficiary of Brookwood Child Care a/k/a The Brookwood Foundation ("Brookwood").

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 their motion, SCO submits an affidavit from Jessica Hanlon, associate counsel for SCO, which states that neither Plaintiff's name nor the foster parent's name appear in any SCO database. The affidavit also states that SCO is not a successor of Brookwood and their only relationship was as a gift recipient.

Plaintiff argues that SCO is liable as a successor in interest as a de facto merger occurred because "(i) when Brookwood ceased to exist, nearly all of their remaining monetary assets were

given to SCO Family; (ii) SCO Family maintains all assets of Brookwood as the Brookwood Fund; and (iii) Mary Pat Thornton, an officer of Brookwood, continued as an officer of SCO Family" (NY St Cts Elec Filing [NYSCEF] Doc No. 44, affirmation in opposition at 38). "The de facto merger doctrine is based on the concept that a successor that effectively takes over a corporation in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased, which is consistent with the desire to ensure that a source remains to pay for the victim's injuries" (*Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038, 1040 [4th Dept 2022] [internal quotation marks and citations omitted]).

Indeed, whether a corporation can be considered as a successor to be liable for the torts of its predecessor is a fact-intensive inquiry (*see generally Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255-256 [1st Dept 2005]). "De facto" merger factors include "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation" *(Sweatland v Park Corp.*, 181 AD2d 243, 245-246, 587 N.Y.S.2d 54 [4th Dept 1992]). However, "[not] all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a de facto merger" (*id.* at *246).* "[W]hen evaluating the applicability of the de facto merger doctrine, the court should analyze each situation on a case-by-case basis" (*Dutton* at 1040).

The affidavit signed by Jessica Hanlon 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"]). Even if the statements regarding the database search are considered evidence, which the Court is not taking a position on, the conclusory statements regarding successor liability are not.

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).

SCO provides additional exhibits as part of their reply, including judicial documents and affidavits. However, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417, 585 NYS2d 360 [1st Dept 1992]; *see also All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015]). Here, successor liability was alleged in the amended complaint and Plaintiff addressed this issue in both their motion to dismiss and annexed affidavit. A surreply was not authorized by the Court and Plaintiff did not have an opportunity to respond to

the new evidence submitted as part of SCO's reply. As such the additional exhibits will not be considered and dismissal of Plaintiff's actions as against SCO is not warranted.

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]).

Although the motion suggests that SCO is a separate entity with no successor liability as to Brookwood, an inquiry into whether there was a de facto merger is fact intensive and the Court declines to dismiss SCO as a defendant at this juncture without the benefit of discovery given that it appears there was a transfer of the majority of assets from Brookwood to SCO and the possibly of an overlapping board member.

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 a first compliance conference order within thirty (30) days after issue is joined.

This constitutes the decision and order of the Court.

9/7/2023
DATE

SABRINA B. KRAUS, 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

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Motion No. 002