

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 6

Corcoran, John

INDEX NO. 153374/2019

-v-

MOTION DATE _____

The Rockefeller University, et al.

MOTION SEQ. NO. 1

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 6/21/19



J.S.C.
HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

JOHN CORCORAN,

Petitioner/Plaintiff,

v.

THE ROCKEFELLER UNIVERSITY a/k/a THE
ROCKEFELLER UNIVERSITY HOSPITAL f/k/a
ROCKEFELLER INSTITUTE HOSPITAL f/k/a
THE ROCKEFELLER INSTITUTE FOR MEDICAL
RESEARCH f/k/a THE ROCKEFELLER INSTITUTE;
THE ROCKEFELLER INSTITUTE; DEBEVOISE
& PLIMPTON LLP; MADISON SQUARE BOYS &
GIRLS CLUB, INC. f/k/a MADISON SQUARE BOYS
CLUB; JOHNS HOPKINS UNIVERSITY; RUTH
ARCHIBALD; LAWRENCE ARCHIBALD; EVELYN
ARCHIBALD, individually and in her capacity as
Personal Representative; and the ESTATE OF
REGINALD ARCHIBALD,

Respondents/Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

MARK WAGNER, JOHN D. WAGNER,
CAROLINE WAGNER, and PAUL WAGNER,

Petitioners/Plaintiffs,

v.

THE ROCKEFELLER UNIVERSITY a/k/a THE
ROCKEFELLER UNIVERSITY HOSPITAL f/k/a

Index Nos.

153374/2019
153375/2019

DECISION AND
ORDER

Mot. Seqs. 1, 2

Index Nos.

154315/2019
154318/2019

DECISION AND
ORDER

Mot. Seq. 1, 2

ROCKEFELLER INSTITUTE HOSPITAL f/k/a
THE ROCKEFELLER INSTITUTE FOR MEDICAL
RESEARCH f/k/a THE ROCKEFELLER INSTITUTE;
THE ROCKEFELLER INSTITUTE; DEBEVOISE
& PLIMPTON LLP; MADISON SQUARE BOYS &
GIRLS CLUB, INC. f/k/a MADISON SQUARE BOYS
CLUB; JOHNS HOPKINS UNIVERSITY;
KINSEY INSTITUTE FOR RESEARCH IN SEX
GENDER AND REPRODUCTION, INC. d/b/a
KINSEY INSTITUTE; INDIANA UNIVERSITY;
RUTH ARCHIBALD; LAWRENCE
ARCHIBALD; EVELYN ARCHIBALD,
individually and in her capacity as
Personal Representative; and the ESTATE OF
REGINALD ARCHIBALD,

Respondents/Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Petitioners/Plaintiffs John Corcoran (“Corcoran”), Mark Wagner, John D. Wagner, Caroline Wagner, and Paul Wagner (collectively, “the Wagners”) allege they have been harmed by the sexual abuse of Reginald Archibald, M.D. (“Archibald”), and by the negligence and complicity of the other Respondents/Defendants in covering up the sexual abuse.

Archibald was employed as a pediatric endocrinologist at Rockefeller University Hospital from 1948 to 1982. He died in 2007. In September 2018, Rockefeller University Hospital mailed a letter to Archibald’s former patients, which included Corcoran and the Wagners. The letter advised the recipients that Debevoise & Plimpton LLP (“Debevoise”) was investigating Archibald’s interactions with his former patients. The letter provided the recipients with contact information in the event they wanted to share the interactions they had with Archibald. A second letter was sent in November 2018 which provided an update about the investigation and announced the opening of the Rockefeller Hospital Therapy Fund to support Archibald’s victims.

On February 14, 2019, New York State enacted the Child Victims Act which creates a one year revival window during which victims of childhood sexual abuse can bring claims that were previously barred by the statute of limitations. The one year window commences in August 2019, six months from the effective date of the Act. This Act “[r]equires the Chief Administrator to promulgate rules concerning the timely adjudication of claims revived pursuant to” this Act.

Presently before the Court are Corcoran and the Wagners’ Petitions for Pre-Action Discovery and Orders to Show Cause seeking a preliminary injunction concerning Debevoise’s investigation. Respondents/Defendants oppose the Petitions and Orders to Show Cause. Oral argument was held on May 14, 2019.

On May 23, 2019, after the Petitions and Orders to Show Cause were filed, Debevoise issued its Report on the Investigation of Archibald. Debevoise concluded that “[b]ased upon all the information collected, it is clear that Archibald, taking advantage of this position as a trusted and respected physician and researcher, engaged in a widespread pattern of misconduct and sexually abused many children at the Hospital over the course of many years when offering patients medical care and treatment.”

Pre-Action Discovery

Corcoran and the Wagners filed Verified Petitions for Pre-Action Discovery (Index Nos. 153374/2019 and 154315/2019, respectively) and Orders to Show Cause to compel the pre-action discovery. (See Motion Sequence 1 in each respective proceeding). In their respective Petitions and Orders to Show Cause, Corcoran and the Wagners seek the following pre-action discovery: (1) the identities of all patients treated by Archibald at Rockefeller University Hospital, Madison Square Boys & Girls Club, Inc. f/k/a Madison Square Boys Club (“MSBC”), and John Hopkins University (“JHU”); (2) the identities of all supervisors, subordinates and co-workers of Archibald at Rockefeller University Hospital, MSBC and JHU; and (3) all relevant documents in their custody, possession, or control including but not limited to patient files, medical records, journals, laboratory tests and results, research, notes, photographs, internal investigative memoranda, law enforcement or regulatory agency reports, investigations, complaints of alleged misconduct against Archibald, employee interviews and summaries, and relevant data.

Corcoran and the Wagners also seek an Order: (1) requiring all Respondents/Defendants to preserve and log relevant documents in their custody,

possession or control; (2) appointing an Independent Master to oversee and ensure compliance with the preservation and cataloguing of the requested documents; (3) directing Respondents/Defendants to prepare and file with the Court a report on document preservation and logging; and (4) requiring Respondents/Defendants to pay Corcoran and the Wagners' reasonable costs and attorneys' fees.

CPLR § 3102(c) provides that “[b]efore an action is commenced, disclosure to aid in bringing an action ... [or] to preserve information ... may be obtained, but only by court order...” The First Department has noted that “while pre-action disclosure may be appropriate to preserve evidence or to identify potential defendants, it may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing.” *Uddin v. New York City Tr. Auth.*, 27 A.D.3d 265, 266 (1st Dept. 2006). Where a party “possesses sufficient information to enable him to frame a complaint, the pre-action disclosure he seeks is unavailable to him.” *Ryan v. Marsh & McLennan Int’l, Inc.*, 70 A.D.2d 567, 567 (1st Dept 1979). “[G]enerally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court.” *Bishop v. Stevenson Commons Assocs., L.P.*, 74 A.D.3d 640, 641 (1st Dept 2010).

The following Respondents/Defendants oppose Corcoran and the Wagners' Petitions and Orders to Show Cause for pre-action discovery: The Rockefeller University (f/k/a The Rockefeller Institute, and of which The Rockefeller University Hospital is a department) and The Rockefeller Institute (“the Rockefeller Defendants”); JHU; Rockefeller Foundation¹; Indiana University and Kinsey Institute; Evelyn Archibald (in her individual capacity), Lawrence Archibald, and Ruth Archibald (collectively, “the Archibald Respondents/Defendants”); Debevoise; and MSBC.

Respondents/Defendants argue that Corcoran and the Wagners do not need additional information to frame their Complaints; the requested material is not material and necessary; and the information requested concerning other patients cannot be disclosed based on privacy interests. They also contend that Corcoran and the Wagners should not be permitted to circumvent the new law's six month waiting period to bring their actions and the requirement for the Chief Administrator to promulgate rules governing these cases. They also contend that no cause of action has been asserted against them to warrant the pre-action discovery sought.

¹ Corcoran has discontinued his claims against The Rockefeller Foundation. The Wagners have discontinued their claims against The Rockefeller Foundation in the action bearing Index No. 154318/2019.

The Archibald Respondents/Defendants move to dismiss Corcoran and the Wagners' Petitions for Pre-Action Discovery as against them based on a lack of personal jurisdiction and because the requirements of CPLR §3102(c) are not satisfied. (See Motions Sequence 2). Corcoran opposes the motion to dismiss.

Importantly, while Respondents/Defendants have opposed the portion of Corcoran and the Wagners' Petitions which seek pre-action discovery for various reasons, all of them recognized their duty and the importance of preserving all relevant documents and information in their custody, possession, and control.

As for the portion of Corcoran and the Wagners' Petitions which seek pre-action discovery, the Court finds that Corcoran and the Wagners have not made the requisite showing under CPLR §3102(c) to warrant such discovery. Corcoran and the Wagners do not show that they need pre-action discovery to identify potential defendants or to frame their pleadings.

As for the portion of the Petitions which seek an independent master to be appointed to oversee pre-action discovery, aside from the prematurity, it would not be efficient for this Court to make rules that would then be superseded by those promulgated by the Chief Administrator when the time is right for the Chief Administrator to do so. Additionally, Respondents/Defendants have affirmatively acknowledged that they will preserve all relevant documents and information in their custody, possession, and control.

Corcoran and the Wagners' Orders to Show Cause and Petitions seeking pre-action discovery and an independent master are therefore denied, and the Petitions are dismissed. Archibald Respondents/Defendants' motions to dismiss the Petitions are denied as moot. The Court has made no determination as to whether the Court has jurisdiction over the Archibald Respondents/Defendants.

Declaratory and Injunctive Relief

On April 1, 2019 and April 26, 2019, Corcoran and the Wagners filed Verified Complaints for injunctive and declaratory relief (Index Nos. 153375/2019 and 154318/2019, respectively). Corcoran and the Wagners also moved by Orders to Show Cause pursuant to CPLR § 6301 seeking a preliminary injunction enjoining Respondents/Defendants "Rockefeller, Debevoise, and MSBC from contacting the already identified or yet to be identified victims of Dr. Archibald that are not

represented by legal counsel.” In the alternative, Corcoran and the Wagners seek an Order enjoining Respondents/Defendants “Rockefeller and Debevoise from directing the unrepresented victims of Dr. Archibald to participate in their investigation without counseling them from the start that Defendant Debevoise does not represent any victims, that they are under no obligation to participate in Defendants Rockefeller and Debevoise’s own internal self-serving investigation, and that they should consult independent legal counsel to the extent they choose to participate in said investigation.” Corcoran and the Wagners also seek reasonable costs and attorneys’ fees from Respondents/Defendants Rockefeller, Debevoise, and MSBC.

The following Respondents/Defendants oppose the Orders to Show Cause seeking a preliminary injunction: Debevoise; the Rockefeller Defendants; and MSBC. They argue that Corcoran and the Wagners have failed to show a likelihood of success on merits because they have failed to plead legally cognizable causes of action. They also argue that Corcoran and the Wagners fail to demonstrate standing to obtain the injunction, the relief sought.

The Archibald Respondents/Defendants move to dismiss Corcoran and the Wagners’ Verified Complaints pursuant to CPLR § 3211(a)(7) and CPLR § 3211(a)(8) for failure to state a claim and lack of personal jurisdiction. (Motions Sequence 2). Corcoran opposes the Archibald Defendants’ motion to dismiss Corcoran’s Verified Complaint as against them.² The Wagners do not oppose the Archibald Defendants’ motion to dismiss the Wagners’ Complaint as against them.

CPLR § 6301, in relevant part, provides, “A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual.”

² MSBC moves to dismiss Corcoran and the Wagners’ Verified Complaints pursuant to CPLR § 3211(a)(3) and CPLR § 3211(a)(7) for lack of standing and failure to state a claim. (Motions Sequence 3). The motion is returnable on July 2, 2019. JHU also moves to dismiss the Verified Complaints pursuant to CPLR § 3211(a)(3) and CPLR § 3211(a)(7) for lack of standing and failure to state a claim. (Motions Sequence 3). The motion is returnable on July 8, 2019.

In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position. *See* CPLR § 6301; *Barone v. Frie*, 99 A.D.2d 129, 132 (2d Dept 1984); *Doe v. Axelrod*, 73 N.Y.2d 748 (1988). The determination as to whether to issue a preliminary injunction “is a matter ordinarily committed to the sound discretion of the lower courts.” *Doe*, 73 N.Y.2d at 750.

“[T]o establish a likelihood of success on the merits, ‘a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner’s claims should be left to a full hearing on the merits.’ A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive.” *Barbes Restaurant Inc. v ASRR Suzer 218, LLC*, 140 A.D. 3d 430, 431 (1st Dept 2016). In balancing the equities, the court must weigh the harm that each side would face in the absence or in the face of injunctive relief. *Edgeworth Food Corp. v Stephenson*, 53 AD2d 588, 588 (1st Dept 1976).

This Court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR § 3001. The “allegations [of the pleadings] must demonstrate the existence of a bona fide justiciable controversy, defined as ‘a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect.’” *Salvador v. Town of Queensbury*, 79 N.Y.S.3d 725, 727 (3d Dept 2018).

The outreach movants seek to enjoin was undertaken with the stated purpose of conducting an investigation into a 2018 complaint and the alleged impropriety of Archibald. That investigation has been completed and the Report has been issued and made public on May 23, 2019. (See Report which is available at the following website: <https://archibaldreport.com>). In the face of the Report, it would follow that no further contact with victims or potential victims is necessary or anticipated. Thus, there will be no irreparable injury in the absence of injunctive relief. The application for a preliminary injunction is denied.

Turning to the Archibald Respondents/Defendants’ motion to dismiss the Verified Complaints filed by Corcoran and the Wagners, the Archibald Respondents/Defendants argue that this Court lacks personal jurisdiction over them. The Archibald Respondents/Defendants state that Evelyn Archibald, Lawrence Archibald, and Ruth Archibald do not reside in New York and none of them is alleged to have engaged in any wrongdoing either before or after Archibald’s death.

The Archibald Respondents/Defendants further argue that to the extent the Verified Complaints name Archibald's Estate and Evelyn Archibald in her capacity as personal representative as defendants, Archibald's will was probated in Minnesota. They state that Evelyn Archibald, as personal representative of the Estate, filed a closing statement on May 12, 2009 in Minnesota probate court, and the Estate closed at that time. They argue that in accordance with the applicable Minnesota law, her authority to act on the Estate's behalf terminated on May 12, 2010, one year after the closing statement was filed. Corcoran contends that the Court has jurisdiction over Ruth Archibald, Lawrence Archibald, and Evelyn Archibald as heirs to the Estate of Archibald and Evelyn Archibald as personal representative of the Estate. Corcoran argues that the Estate of Archibald and Evelyn Archibald, as its personal representative, should not be dismissed from the action.

The Archibald Respondents/Defendants also argue that the Verified Complaints filed by Corcoran and the Wagners should be dismissed for failure to state a claim for relief against them.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 (1st Dept 2003) (internal citations omitted); CPLR § 3211(a)(7).

Turning to the four corners of the Verified Complaints of Corcoran and the Wagners, there are no allegations of wrongdoing by Ruth Archibald, Lawrence Archibald, or Evelyn Archibald. Rather, the Verified Complaints allege only that that upon information and belief, Ruth Archibald, Lawrence Archibald, and Evelyn Archibald are in custody, possession or control of Archibald's records. As for Archibald's Estate, the Complaints allege the Estate is also in custody, possession or control of Archibald's records and "responsible for all liabilities associated with Dr. Archibald at the time of his death."

The first counts of the Verified Complaints seek injunctive relief to enjoin Respondents/Defendants Rockefeller, Debevoise, and MSBC from continuing to contact victims and potential victims of Archibald. The first counts also request the Court "appoint an independent Master to immediately oversee and approve all future correspondence from Defendants Debevoise and Rockefeller to victims." The first counts do not contain any allegations against Ruth Archibald, Lawrence Archibald, Evelyn Archibald, or the Estate or seek any specific relief from them.

The second counts of the Verified Complaints seek a declaratory judgment that orders Rockefeller and Debevoise to cease “directing” victims of Archibald “to participate in their investigation without counseling them from the start that Defendant Debevoise does not represent them.” They do not contain any allegations against Ruth Archibald, Lawrence Archibald, Evelyn Archibald, or the Estate or seek any specific relief from them.

As the four corners of the Corcoran and the Wagners’ Verified Complaints fail to state a claim against Ruth Archibald, Lawrence Archibald, Evelyn Archibald, or the Estate or to seek any relief from them, the Complaints are dismissed pursuant to CPLR §3211(a)(7) as against them. Thus, even if the Court has personal jurisdiction over Ruth Archibald, Lawrence Archibald, and Evelyn Archibald, the Verified Complaints do not state a claim for relief against them.

Wherefore, it is hereby

ORDERED that Petitioner/Plaintiff John Corcoran’s Order to Show Cause and Petition for Pre-Action Discovery is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly (Index No. 153374/2019; Motion Sequence 1); and it is further

ORDERED that Respondents/Defendants Evelyn Archibald, Lawrence Archibald, and Ruth Archibald’s motion to dismiss Petitioner/Plaintiff John Corcoran’s Petition for Pre-Action Discovery is denied as moot (Index No. 153374/2019; Motion Sequence 2); and it is further

ORDERED that Petitioners/Plaintiffs Mark Wagner, John D. Wagner, Caroline Wagner, and Paul Wagner’s Order to Show Cause and Petition for Pre-Action discovery is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly (Index No. 154315/2019; Motion Sequence 1); and it is further

ORDERED that Respondents/Defendants Evelyn Archibald, Lawrence Archibald, and Ruth Archibald’s motion to dismiss Petitioners/Plaintiffs Mark Wagner, John D. Wagner, Caroline Wagner, and Paul Wagner’s Petition for Pre-Action Discovery is denied as moot (Index No. 154315/2019; Motion Sequence 2); and it is further

ORDERED that Petitioner/Plaintiff John Corcoran's Order to Show Cause seeking a preliminary injunction is denied (Index No. 153375/2019; Motion Sequence 1); and it is further

ORDERED that Respondents/Defendants Evelyn Archibald, Lawrence Archibald, and Ruth Archibald's motion to dismiss Petitioner/Plaintiff John Corcoran's Verified Complaint is granted and the action is dismissed as against Evelyn Archibald, individually and in her capacity as Personal Representative, Lawrence Archibald, Ruth Archibald, and the Estate of Reginald Archibald, and the Clerk is directed to judgment accordingly (Index No. 153375/2019; Motion Sequence 2); and it is further

ORDERED that Petitioners/Plaintiffs Mark Wagner, John D. Wagner, Caroline Wagner, and Paul Wagner's Order to Show Cause seeking a preliminary injunction is denied (Index No. 154318/2019; Motion Sequence 1); and it is further

ORDERED that Respondents/Defendants Evelyn Archibald, Lawrence Archibald, and Ruth Archibald's motion to dismiss Petitioners/Plaintiffs Mark Wagner, John D. Wagner, Caroline Wagner, and Paul Wagner's Verified Complaint is granted and the action is dismissed as against Evelyn Archibald, individually and in her capacity as Personal Representative, Lawrence Archibald, Ruth Archibald, and the Estate of Reginald Archibald, and the Clerk is directed to judgment accordingly (Index No. 154318/2019; Motion Sequence 2).

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: JUNE 21 2019


EILEEN A. RAKOWER, J.S.C.