

# THE DAILY RECORD

Friday, August 9, 2019 / Volume III / Number 154 / \$2.00 • Western New York's trusted source for legal and real estate news

## Trials and TRIBULATIONS

### Child Victims Act lawsuits reject pre-action discovery but allow jurisdiction over alleged perpetrator

Two recent New York State Supreme Court cases have already begun to address the many uncertainties that will need to be resolved when the Child Victims Act officially goes into effect on Aug. 14, 2019.

The first lawsuit, titled *Estate of Gallagher v. Catholic Foreign Mission Society of America, Inc.*, Index No. 58830/2019, 2019 WL 3332606 (July 23, 2019), and venued in Westchester County, involved a claim from an alleged victim of sexual abuse's estate against the Catholic church and his alleged perpetrator, Father Edward Flanagan, who was also deceased. The Petitioner requested pre-action discovery pursuant to CPLR 3102 including the identities and contact information for all minors whom Father Flanagan had access to in his missionary work and through the Archdiocese, and requests for the identities and contact information for all of Father Flanagan's supervisors, subordinates and co-workers.

It further requested a litigation hold, document preservation and logging, and the appointment of a special master to oversee and ensure compliance with the preservation and logging of documents and the identification of witnesses and lists of minors to whom Father Flanagan had access. It also requested that the church be required to provide notice to the minors identified of their rights under the Child Victims Act. Petitioner alleged pre-action discovery was necessary to adequately investigate the victim's claims, draft pleadings and preserve information known to elderly witnesses as soon as possible.

Ultimately, the court denied the Petitioner's



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er's requests, noting that the Petition was not supported by an affidavit from a witness with firsthand knowledge of the allegations that the decedent was abused by Flanagan and such a showing was required to establish Petitioner had a meritorious claim. The Court further noted that Petitioner had not established that pre-action discovery was necessary to frame the pleadings, because it had already identified the alleged perpetrator (Father Flanagan), and could pursue the discovery through standard channels once the lawsuit had been commenced. The court also noted that the Archdiocese was already subject to a broad preservation obligation as a result of a litigation hold served on the Archdiocese by the Charity Bureau Chief of the Office of the New York State Attorney General.

In the most recent lawsuit, *John Doe v. The Roman Archdiocese of New York*, Index No. 59573/2019, 2019 WL 3484392 (July 31, 2019), the Petitioner requested that he be allowed to proceed under the pseudonym "John Doe" to protect his identity and his family's privacy. The Court denied this request, noting "to allow petitioner to proceed without [the Archdiocese] knowing his true identity would be highly prejudicial to respondents' ability to defend themselves against these claims as they would be unable to connect their acts to any

specific persons." *Id.* at \*4.

Petitioner also sought pre-action discovery and evidence preservation for an alleged incident where he was molested by Seminarian (and later priest) Daniel Calabrese and other men sued as "John Does" at St. Joseph's Seminary back in the early 1980s. Petitioner argued that immediate discovery was necessary to preserve documents and to identify and depose elderly witnesses as soon as possible. Specifically, Petitioner sought to immediately depose Defendant Calabrese to determine the other individuals involved in his molestation, as well as the identities of Calabrese's supervisors, faculty, classmates and co-workers at the Archdiocese and at St. Joseph's Seminary.

Petitioner also sought all relevant documents in respondents' possession regarding any molestation by Calabrese and/or the John Doe Respondents, and documents related to investigations or complaints regarding molestations at St. Joseph's Seminary. Similar to the requests in *Estate of Gallagher*, Petitioner requested the preservation of documents, logging and the appointment of a special master. The Court denied Petitioner's request for pre-trial discovery. In reaching its decision, the Court similarly noted that the Petitioner had not provided an affidavit providing a firsthand account of the alleged abuse in support of its petition for pre-action discovery, which was required to establish "a meritorious cause of action" justifying pre-action discovery. The Court also similarly found that pre-action discovery was not necessary because the petitioner

was already aware of the facts he needed to assert his claims.

As indicated above, the Child Victims Act becomes effective on Aug. 14, 2019. Beginning on that date, individuals who were subject to sexual abuse as minors, but for whom the statute of limitations has expired, will have a one-year window (until Aug. 14, 2020) to pursue their claims against their abuser. After the

one-year window, victims will still be allowed to pursue civil claims against their alleged abusers until they reach the age of 55. The new legislation also now allows criminal charges to be filed until the victim is 28 years old for felony cases and 25 years old for misdemeanor charges. The crimes covered by the Child Victims Act generally include all crimes identified in Section 130 of the New York State Penal Code.

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