

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NO.: 3:12-CV-00114-DRH-SCW

ALEX WALKER,)	
)	Judge David R. Herndon
Plaintiff,)	
v.)	Magistrate Stephen C. Williams
)	
THREE ANGELS BROADCASTING)	
NETWORK, INC., and TOMMY SHELTON)	
)	
Defendants.)	
_____)	

**PLAINTIFF’S MOTION TO EXCLUDE DEFENDANT
THREE ANGELS BROADCASTING NETWORK, INC.’S,
DECLARATIONS AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Alex Walker, by and through undersigned counsel, hereby files this Motion to Exclude Defendant Three Angels Broadcasting Network, Inc.’s, Declarations and Incorporated Memorandum of Law, and states as follows:

1. This case arises from the childhood sexual abuse of the Plaintiff by Tommy Shelton, a minister and employee of Three Angels Broadcasting Network, Inc. (hereinafter “3ABN”).

2. Defendant 3ABN responded to Plaintiff’s Complaint by filing a Motion to Dismiss under Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim upon which relief may be granted). In support of its motion, Defendant filed sworn declarations of Police Chief Chad Pusey and M. Gregory Simpson [DE 12]. Both declarations offer police and court records containing information that 3ABN contends refutes the factual merits of Plaintiff’s federal claim, requiring its dismissal with prejudice, and eliminating the

subject matter jurisdiction of this Court as to all claims.

3. The declaration of Chief Pusey is entirely devoted to refuting specific factual allegations made in Plaintiff's Complaint about the nature, location, and time period of the alleged sexual abuse, as well as authenticating the police report regarding Plaintiff's abuse in Virginia. The declaration of Mr. Simpson attempts to authenticate discovery produced by the Commonwealth of Virginia in the criminal prosecution of Tommy Shelton, which 3ABN claims refutes information contained in Plaintiff's Complaint. They do not offer any assistance to this Court with regard to the issue of the Court's jurisdiction over either the parties or subject matter.

4. By offering this supplemental information to refute Plaintiff's claims, 3ABN is making an indirect attack on the merits of the claims made in Plaintiff's Complaint. The court should therefore treat the Rule 12(b)(1) motion as a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Peckman v. Thompson, 966 F.2d 295, 297 (7th Cir. 1992).

5. On a Rule 12(b)(6) motion to dismiss, the Court must generally confine its inquiry to the factual allegations set forth within the four corners of the operative complaint. Gardunio v. Town of Cicero, 674 F.Supp.2d 976 (N.D.Ill. 2009) (citing Rosenblum v. Travelbybus.com, 299 F.3d 657 (7th Cir. 2002)) (holding that various documents, including police and court records, should not be considered on a motion to dismiss unless specifically referenced in plaintiff's complaint). When a party moving to dismiss a claim under Rule 12(b)(6) submits documents within the motion to dismiss, the Court must either ignore the documents or convert the motion to one for summary judgment. Id. (internal cites omitted). Where a defendant submits a document that requires discovery to authenticate or disambiguate, the judge would be required to convert the defendant's motion to a Rule 56 motion for summary judgment if he were

to consider them in deciding whether to grant the motion to dismiss. Id. (citing Tierney v. Vahle, 304 F.3d 734, 739 (7th Cir. 2002)).

6. In the event that this Court decides to consider the factual information contained within Defendant's affidavits upon this Motion to Dismiss, the Plaintiff must be given an opportunity to respond by conducting discovery and submitting evidentiary materials in support of his Complaint to establish that a genuine issue of material fact exists under Rule 56. Green v. Benden, 281 F.3d 661 (7th Cir. 2002).

7. The police reports and court records attached to the declarations are not referenced anywhere in the instant Complaint, and are therefore not central to Plaintiff's claim or relevant to this Court's analysis of the pending Motion to Dismiss. Plaintiff does not concede that they are, in fact, either authentic or accurate. See Gardunio, 674 F.Supp.2d at 985. Such a determination would require discovery into the underlying facts, as they are far from undisputed and are not contained in Plaintiff's Complaint. Therefore, it would be improper for the Court to consider the information contained in the declarations and attachments upon 3ABN's Motion to Dismiss or to convert 3ABN's motion into a summary judgment.

WHEREFORE, Plaintiff respectfully requests this Court enter an Order excluding the declarations of M. Gregory Simpson and Police Chief Chad Pusey [DE 12] from consideration of 3ABN's Motion to Dismiss, and all other relief this Court deems necessary.

Respectfully Submitted,

/s/ Jessica D. Arbour

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(Admitted *pro hac vice*)

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jessica D. Arbour

