At a Civil Special Term of the Supreme Court, held in and for the County of Erie, State of New York, on the 12th day of November 2019.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

PB-7 DOE Plaintiff,

-vs-

DECISION and ORDER

Index No.812242/2019

AMHERST CENTRAL SCHOOL DISTRICT, AMHERST CENTRAL HIGH SCHOOL and JOHN KOCH a/ka JACK KOCH

Defendants.

Plaintiff seeks, by way of Order to Show Cause, leave to proceed under the pseudonym PB-7. This is an action against defendants Amherst Central School District, Amherst Central High School and John Koch a/k/a Jack Koch, brought under the one-year revival period (CPLR § 214-g) enacted as part of the Child Victims Act (L. 2019 c. 11) (CVA).

In support of her motion, plaintiff submitted an Order to Show Cause, granted October 7, 2019; the Affirmation of Michael DeRuve, Esq., dated October 4, 2019, with attached exhibit; and the Reply Brief of Michael J. DeRuve, Esq., dated November 6, 2019, with attached exhibits.

In opposition to plaintiff's motion, defendants Amherst Central School District and Amherst Central High School submitted the Affirmation in Opposition of Julia M. Hilliker, Esq.,

dated October 25, 2019, with attached exhibit; and the Sur-Reply Affirmation of Julia M. Hilliker, Esq., dated November 18, 2019, with attached exhibit.

In opposition to plaintiff's motion, defendant Jack Koch submitted the Affidavit of Mark P. Della Posta, Esq., sworn to October 25, 2019; and the Sur-Reply Affidavit of Mark P. Della Posta, Esq., sworn to November 15, 2019.

Plaintiff argues that she is entitled to proceed using a pseudonym pursuant to Civil Rights Law §50-b and established caselaw. Defendant Amherst Central School District and Amherst Central High School (collectively, the District) objects to plaintiff's use of a pseudonym, asserting: plaintiff failed to meet the required standard; Civil Rights Law §50(b) does not apply to civil proceedings; the District would be prejudiced in defending this action; the District is a governmental entity; and due to the Districts' obligation under the Freedom of Information Law (FOIL), granting the application for a pseudonym would be impractical. Defendant John Koch also opposes the motion, incorporating those arguments raised by the District.

In reply to defendants' opposition, and in further support of her application, plaintiff submitted the affidavit of a licensed mental health counselor and her own affidavit. Defendants were granted leave to submit a sur-reply. "A court may consider evidence submitted for the first time in reply papers where, as here, the opposing party had an opportunity to respond and submit papers in sur-reply." *Hoffman v. Kessler,* 28 AD3d 718, 719 (2nd Dept 2006); *see also, Fiore v. Oakwood Plaza Shopping Ctr.,* 164 AD2d 737, 739 *affd.* 78 NY2d 572 *rearg. denied* 79 NY2d 916, cert. denied 506 U.S. 823; and *Park Country Club of Buffalo, Inc. v Tower Ins. Co. of New York,* 68 AD3d 1772, 1774 (4th Dept 2009)).

In sur-reply, the District improperly repeated arguments raised in opposition, but in relevant part, argued the affidavits submitted by plaintiff in reply are insufficient and inadmissible. The individual defendant, in his sur-reply, argues that plaintiff, in not disclosing her name, has an advantage in conducting an investigation, especially concerning credibility. Further, the individual defendant maintains that to place court ordered restrictions on the him but not plaintiff would potentially provide a "chilling effect" for witness cooperation with defendants that plaintiff does not bear.

DECISION

This Court recognizes that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system (*see, Press-Enterprise Co v Superior*, 464 US 501; 104 S. Ct 819 (1983)) and courts should be reluctant to seal court records. (*See, Fordham-Coleman v National Fuel Gas Distribution Corp.*, 42 AD 3d 106 (4th Dept 2007)).

The case before this Court however, is not one of sealing records or preventing the public's right of access to the courts. Rather, plaintiff is seeking to maintain anonymity through either the protections of Civil Rights Law 50(b) or New York caselaw.

Civil Rights Law § 50–b (1) reads in pertinent part:

> [t]he identity of any victim of a sex offense * * * shall be confidential. No report, paper, picture, photograph, court file or other documents * * * which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.

The plain language of the statute precludes disclosure by a public official of the identity of the victim of a criminal sex offense. It does not however afford the victim who elects to

proceed by civil litigation the same protections. (*See, Doe v Good Samaritan Hosp.*, 2019 WL 5090617 (Sup. Ct. Nassau Co. 2019); and *Doe v Kidd*, 19 Misc. 3d 782 (Sup Ct. New York Co. 2008)).

Specifically, when read in its entirety, CRL § 50-b (1) is couched in criminal terms. For example, § 50-b (2)(a) refers to "the *public officers and employees* charged with *investigating, prosecuting* and keeping records of *the offense*; § 50-2(b) mentions that notice of an application is to be given to "the *public officer or employee* charged with the duty of *prosecuting* the offense"; and § 50-b (4) states "nothing contained in this section (to wit 50-b) shall be construed to require the court to exclude the public for any stage of the *criminal proceeding*" (emphasis added). The statute is one that addresses the prosecution of a penal law violation as a crime, not as a civil offense. Further, had the legislature intended the Civil Rights Law 50-b to be applicable to civil litigation involving sex offenses, it could have incorporated such language into the statute or incorporated similar protections into the Child Victim's Act. (*See, e.g. New York Civil Liberties Union v New York City Police Department,* 32 NY3d 556, 568 (2018)).

Plaintiff also seeks anonymity pursuant to the standards established under caselaw. Pursuant to CPLR 2102 (c), there is no automatic right for a party to proceed anonymously in a civil action. CPLR 2101 (c) requires the caption of a summons and complaint to include the names of all parties. However, where there is an allegation of a matter implicating a privacy right so substantial it outweighs the customary and constitutionally embedded presumption of openness in judicial proceedings, proceeding pseudonymously may be warranted. (*See, J Doe No. 1 v CBS Broadcasting Inc.*, 24 AD 3d 215 (1st Dept. 2005)). "The determination of whether to allow a party to proceed anonymously requires the court to use its discretion in balancing

plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant." *Anonymous v Lerner,* 124 AD3d 487, 487 (1st Dept. 2015) (internal citations omitted).

The CVA was enacted to "open the doors of justice to the thousands of survivors of child sexual abuse" allowing them to bring "civil actions for physical, psychological or other injury incurred as a result of child sexual abuse." (Legislative Mem in Support of Chapter 11 of the Laws of 2019, McKinney's Session Law News of NY at A-39.)

A number of recent decisions in cases brought pursuant to the CVA have recognized that denial of anonymity would "contravene" the purpose of the statute. (*See, e.g. F.S. v Westhill Central School District* (Sup. Ct., Onondaga County, November 20, 2019); *M. M. v Archdiocese of New York* (Sup. Ct. New York County, October 15, 2019); and *Doe v Ronald McFarland* (Sup. Ct. Rockland County, December 10, 2019)).

Here, plaintiff alleges she was sexually abused over a period of three years and submitted an affidavit attesting to the "long term results of these sexual assaults" which include suicidal thoughts, depression, nightmares, flashbacks, and anxiety as well as physical manifestations of these problems. Plaintiff also attested to a concern that if she is identified, she would suffer additional stress, anxiety, emotional distress and psychological injuries. Additionally, she submitted the affidavit of a Licensed Mental Health Counselor, certified in sex offender treatment, who attested based upon his education, training and experience, that public identification has a dampening effect on the willingness of victims to come forward and that the impact of public disclosure is "tantamount to re-victimization." He further attested that there is a strong stigma attached to victims of sexual abuse.

Defendants argue plaintiff's affidavit is conclusory and the expert's affidavit is not particular to this plaintiff and therefore plaintiff has not provided sufficient proof for her application. The Court recognizes that a general or conclusive affidavit would not suffice for purposes of proving damages at trial or to support summary judgement. However, for purposes of an application for anonymity, where a court must balance the privacy interest of a party against the presumption in favor of open trials and potential prejudice to defendant, the expert affidavit establishing the potential risks of public exposure and plaintiff's affidavit with claimed injuries and a concern for further injury if her name is disclosed, are sufficient. Though public embarrassment and humiliation are insufficient to proceed anonymously (*see*, *Anonymous v Lerner* at 488 , quoting *Doe v Shakur*, 164 FRD 359, 362 (SDNY1996)), here, it has been demonstrated that the matter is highly sensitive, that there is a risk of a re-victimization, and that there is a strong stigma attached to victims of sexual abuse. The privacy interest generated by these concerns is significant.

Defendants argue that there is a public interest in knowing the identity of the alleged victim. Other than assisting in its investigation, defendants failed to identify such interest though the Court specifically asked defendants to do so. It is uncontested that defendants were provided with plaintiff's name. Hence, if the public interest is in defending against the action, the necessary information has been provided and defendants have failed to establish how the public interest in open trials and judicial proceedings is jeopardized by not disclosing the name to the general public. Further, because defendants have been provided with plaintiff's name and allowed to reference plaintiff's name to further their investigation and defend against the claims, defendants have failed to establish prejudice if restricted from publishing the name in traditional

forms of media or in the various platforms of social media. Though the Court is sympathetic to the individual defendant whose name is posted on social media and who has a concern that his reputation is wrongly being called into question, those concerns are outweighed by the privacy interest of plaintiff.

Further, it is significant to note that plaintiff does not seek to preclude the public from reviewing court records or to deny the public access to court proceedings.

In weighing plaintiff's privacy interest against the public's interest in open trials and prejudice to defendants, the Court finds in favor of plaintiff's privacy interest where, as here, the identity is known to defendants and can be used to further the defendants' investigation.

Finally, the Court finds the potential for a FOIL request to be an unpersuasive argument against granting plaintiff's request to proceed anonymously.

WHEREFORE, it is hereby

ORDERED, plaintiff's motion to proceed anonymously is granted nunc pro tunc, and all papers filed are to bear the pseudonym PB-7 Doe; and it is further

ORDERED, the parties, their attorneys and their agents and employees are precluded from publishing or disclosing plaintiff's identity to the general public; and it is further

ORDERED, the parties, their attorneys and their agents and employees are to advise all individuals and/or entities to whom disclosure is necessary that they are to refrain from disclosing plaintiff's identity; and it is further

ORDERED, the District is to advise its employees that they are under the Court's order to not disclose the identity of the plaintiff; and it is further

ORDERED, that the identity of the plaintiff be redacted from any filed papers.

DATED: Buffalo, New York
December 23, 2019

HON. DEBORAH A. CHIMES
Justice of the Supreme Court