J.M. v Long Beach City Sch. Dist.
2024 NY Slip Op 31292(U)
April 11, 2024
Supreme Court, Nassau County
Docket Number: Index No. 900009/2021
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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J. M.,

Plaintiff,

-against-

LONG BEACH CITY SCHOOL DISTRICT (aka LONG BEACH PUBLIC SCHOOLS) and LONG BEACH CITY SCHOOL DISTRICT BOARD OF EDUCATION (aka LONG BEACH PUBLIC SCHOOLS BOARD OF EDUCATION)

Defendants.
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Part CVA-R
Index No. 900009/2021
Mot. Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts, were reviewed in preparing this Decision and Order:

District's Notice of Motion, Affirmation & Exhibits…………………..........................1
Plaintiff's Affirmation in Opposition & Exhibits..................................……..……2
District's Reply…………...………………….......................3

In this action brought pursuant to the Child Victims Act (CPLR § 214-g), plaintiff alleges that in 1978 when she was 15 years old, she was sexually abused by Edward Kennedy and from approximately 1979 through 1981 she was also sexually abused by Paul McRay. During that time, plaintiff was a high school student in the Long Beach City School District and Kennedy and McRay were teachers employed by the District. Plaintiff asserts claims against defendants Long Beach City School District and Long Beach City School District Board of Education (collectively, "the District") for: (1) statutory liability for violations of Penal Law; (2) negligence; (3) negligent failure to warn and implement child sexual abuse policies; (4) negligent hiring; (5) negligent supervision and training; (6) negligent retention; (7) breach of fiduciary duty; and, (8) statutory liability for failing to

report abuse. The District now moves for summary judgment pursuant to CPLR 3212. For the reasons set forth hereinafter the District's motion is granted in part and denied in part.

BACKGROUND[1]

According to plaintiff, in 1978, during her sophomore year of high school when she was approximately 15 years old, she was in the high school band and Kennedy was the band director. On an almost daily basis, Kennedy would have plaintiff come into his office, at which time he would shut the door and then pull plaintiff between his legs, hug her, rub her back, and kiss her face. Plaintiff reported this sexual abuse to McRay—plaintiff's sophomore English teacher—who told her to stay away from Kennedy and to drop band, which plaintiff did. Plaintiff also had sexual encounters with McRay.

Plaintiff does not recall the circumstances surrounding how the sexual encounters with McRay began, but she recalls that it began sometime in the second semester of her sophomore year (1979) and included sexual intercourse and took place at his home and on his boat. Plaintiff alleges that McRay would regularly invite students and teachers to his house to listen to live jazz, drink beer and smoke marijuana. Plaintiff claims McRay "forced" himself on her on occasion. McRay also touched plaintiff in his office behind a locked door on occasion.

During her sophomore year of high school, plaintiff began living with McRay. The District became aware that plaintiff was living with McRay and the Vice Principal, Elias Stark, spoke with plaintiff and McRay about this arrangement. The attendance administrator, Ruth Kamzan, also knew plaintiff was living with McRay. Frances Waldman, a teacher at the school, made comments to plaintiff regarding McRay's preferential treatment of her. Plaintiff also believes Waldman reported the fact that plaintiff was often in McRay's office, the English Department office and the faculty room despite the fact that students were not

[1] The facts as set forth by the court are consistent with the evidence submitted by plaintiff, including her deposition testimony. In the context of a summary judgment motion, a court is to view the evidence in a light most favorable to the opposing party and give such party the benefit of every favorable inference. *Adams v. Bruno*, 124 A.D.3d 566 (2d Dept. 2015). This court makes no findings of fact.

allowed in these places. According to plaintiff, two other teachers, Tom Patton and Dennis Sullivan, observed McRay touching plaintiff when the four of them went to bars. Plaintiff did not report the abuse to anyone in her family or at the school.

Plaintiff enrolled in accelerated courses so that she skipped her junior year of high school and graduated in 1980. Plaintiff continued to live with McRay throughout the remainder of high school, during the gap year before she began college, and during the summer break following her freshman year of college. The abuse continued throughout that time, ending in 1981 when plaintiff was 18 years old.

LEGAL ANALYSIS[2]

It is the movant who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn*., 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co*., 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *US Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc*., 46 N.Y.2d 1065 (1979).

The District's principal argument is that it cannot be held liable for any cause of action sounding in negligence because it did not have actual or constructive notice of Kennedy or McRay's propensities to commit sexual abuse. The District further argues that it did not have a duty to supervise plaintiff or McRay off school grounds, and that it cannot be

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[2] Contrary to plaintiff's contention, the District's failure to submit a sworn affidavit and/or attorney affirmation is not fatal to its motion because it has submitted verified and certified deposition testimony. *See, e.g.*, *Notskas v. Longwood Assocs., LLC*, 112 A.D.3d 599 (2d Dept. 2013); *Pavane v. Marte*, 109 A.D.3d 970(2d Dept. 2013); CPLR § 3116.

[* 3]

held liable for any misconduct that occurred after plaintiff reached 17 years old, the age of consent.[3]

Negligence-based claims[4]

To sustain his negligence claims, plaintiff must allege and prove (1) a duty owed by the defendants to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985); *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *see also, Turcotte v. Fell,* 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 A.D.3d 600 (2d Dept. 2013).

> Although an employer cannot be held vicariously liable "for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee. . . . The employer's negligence lies in having 'placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention' of the employee."

Johansmeyer v. New York City Dept. of Ed., 165 A.D.3d 634 (2d Dept. 2018) (internal citations omitted).

"A necessary element of a cause of action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct which caused the injury'." *Bumpus v. New York City Transit Authority*, 47 A.D.3d 653 (2d Dept 2008).

A defendant is on notice of an employee's propensity to engage in tortious conduct when it knows or should know of the employee's tendency to engage in such conduct. *Moore Charitable Foundation v. PJT Partners, Inc.*, 40 N.Y.3d 150, 159 (2023)

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[3] Plaintiff turned 17 years old on February 19, 1980, approximately 1 year after the sexual abuse by McRay began.

[4] Plaintiff consents to dismissal of her fourth cause of action alleging negligent hiring. Therefore, this court need only examine the remaining causes of action sounding in negligence: negligence, negligent supervision and training, and negligent retention.

“[T]he notice element is satisfied if a reasonably prudent employer, exercising ordinary care under the circumstances, would have been aware of the employee's propensity to engage in the injury-causing conduct.” *Id*. at 159.

Similarly where, as here, a complaint also alleges negligent supervision of a minor stemming from injuries related to an individual’s intentional acts, “the plaintiff generally must demonstrate that the school knew or should have known of the individual’s propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable.” *Nevaeh T. v. City of New York*, 132 A.D.3d 840, 842 (2d Dept. 2015), *quoting Timothy Mc. v. Beacon City Sch. Dist*., 127 A.D.3d 826, 828 (2d Dept. 2015); *see also Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994). “[S]chools and camps owe a duty to supervise their charges and will only be held liable for foreseeable injuries proximately caused by the absence of adequate supervision.” *Osmanzai v. Sports and Arts in Schools Foundation, Inc.*, 116 A.D.3d 937 (2d Dept. 2014); *see also Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004).

Here, the District has not met its *prima facie* burden entitling it to summary judgment as there are clear issues of fact as to whether it had actual or constructive notice of plaintiff’s alleged abuses and whether the District properly supervised plaintiff while she was in its charge.

Two agents of the District—Patton and Sullivan—observed McRay touching plaintiff inappropriately. It has long been the law in this State that “[a] teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances.” *Hoose v. Drumm*, 281 N.Y. 54 (1939); *see also Garcia v. City of New York*, 222 A.D.2d 192 (2d Dept. 1996); *Lopez v. New York City Department of Education*, 43 Misc.3d 1204(A) (Supreme Ct. Bronx Co. 2014)(school may be liable as a result of guidance counselor’s failure to report issue concerning fellow employee who ultimately abused student).

Teachers are employees of the District with a duty to keep the District's students safe and report abuse to their superiors. *Shaw v. Village of Hempstead*, 20 A.D.2d 663 (2d Dept. 1964); *see also Cherney v. Board of Educ. of City School Dist. Of City of White Plains*, 31 A.D.2d 764 (2d Dept. 1969). A teacher's failure to take action to safeguard students does not negate the notice they received or insulate the District from liability. *See, e.g., Mirand v. City of New York*, 84 N.Y.2d 44 (1994). "Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010); *see Nevaeh T. v. City of New York*, 132 A.D.3d at 840 (Department of Education may be liable for negligent acts of employees in connection with plaintiff's alleged sexual abuse, rejecting the argument that such employees were not acting within the scope of their employment); *see also People v. Gross*, 169 A.D.3d 159, 169 (2d Dept. 2019)(principal bound by knowledge acquired by agent even if information is never actually communicated to it).

The District contends that Patton and Sullivan's knowledge cannot be imputed to it because it was discovered while "drinking in bars," outside of the scope of their employment. Certainly, Patton and Sullivan's knowledge of McRay and plaintiff's inappropriate relationship would be imputed to the District if they gained this knowledge at school. There is no logical basis to conclude that Patton and Sullivan's duty to report to the District McRay's lewd touching of plaintiff varied depending on how or where they learned of this danger. *See Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784 (1985)(agent has "duty to disclose to his principal all the material facts coming to his knowledge with reference to the subject of the agency"); *Skiff-Murray v. Murray*, 17 A.D.3d 807, 810 (3d Dept. 2005)(agent's knowledge is imputable to principal "regardless of when or how it was obtained" and need not be acquired while performing services for the principal); Restatement [Second] of Agency §276. The foreseen danger was no less present simply because it revealed itself off school grounds. The obligation to safeguard the children at school from

the presented risk remained unaltered.[5] Therefore, Patton and Sullivan's knowledge may be imputed to the District.

Further not only were District teachers and administrators aware that plaintiff was living with McRay, many also observed plaintiff with McRay in areas of the school where students were prohibited. A reasonable jury could find that plaintiff and McRay's living arrangement coupled with the open and well-known preferential treatment of plaintiff by McRay, some of which was purportedly against school policies, put the District on constructive notice of the sexual relationship. *See J.B. v. Monroe-Woodbury Central School District*, 224 A.D.3d 722 (2d Dept. 2024).

And with respect to Kennedy, at minimum, an issue of fact remains with respect to whether the District properly supervised plaintiff considering she was behind closed doors in her band teacher's private office on an almost daily basis during school hours. *See MCVAWCD-Doe v. Columbus Avenue Elementary School*, __ A.D.3d __,WL 1290405 (2d Dept. 2024).

<u>*Other causes of action*</u>

This court can summarily dispose of plaintiff's causes of action for statutory liability for violations of penal law, negligent failure to warn and implement child sexual abuse policies and breach of fiduciary duty because they are duplicative of her other negligence claims.[6] These causes of action arise from the same set of facts and do not allege distinct damages. *See, e.g. Fay v Troy City School District*, 197 A.D.3d 1423 (3d Dept. 2021) dismissing claim for negligent infliction of emotional distress in CVA action; *see also Mulligan v. Long Island Fury Volleyball Club*, 178 A.D.3d 1056 (2d Dept. 2019)(upholding negligent supervision claim but dismissing breach of fiduciary duty cause of action); *Afifi v. City of New York,* 104 A.D.3d 712 (2d Dept. 2013); *Wolkstein,* 275 A.D.2d 635 (1st Dept.

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[5] This duty remains even if Sullivan also wanted to have sex with plaintiff, as she testified.

[6] Furthermore, the District may not be held liable for its employees' violation of the penal law absent defendant's negligence.

2000). As a result, the first, third and seventh causes of action of the complaint are dismissed. *See Steven B. v. Westchester Day School*, 196 A.D.3d 624 (2d Dept. 2021).

However, with respect to plaintiff's claim for breach of statutory duty to report under New York's Social Services Law §§413 and 420, issues of fact remain.

Social Services Law § 413(1)(a) provides that certain school officials "are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child." Social Services Law § 420(2) provides that "[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such failure." "For purposes of Social Services Law § 413, an 'abused child' means 'a child under eighteen years of age and who is defined as an abused child by the family court act." *Hanson v. Hicksville Union Free School District*, 209 A.D.3d 629 (2d Dept. 2022), *quoting* Social Services Law § 412(1). The Family Court Act, in turn, defines an "abused child" as a child who is harmed by a "parent or other person legally responsible for his [or her] care." *Id.* Here, considering plaintiff lived with McRay during a significant portion of the relevant time period, it cannot be said as a matter of law that he was not a person legally responsible for plaintiff's care, serving as the functional equivalent of a parent. *See Brave v. City of New York*, 2016 A.D.3d 728 (2d Dept. 2023). Thus, the District would have a duty under the Social Services Law to report the sexual abuse of plaintiff. *Cf. Hanson*, 209 A.D.3d at 631.

All other requested relief, not specifically addressed herein, is denied.[7]

This constitutes the Decision and Order of this court.

Dated: April 11, 2024
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.

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7 Considering the foregoing, this court need not reach the issues concerning alleged misconduct that occurred after plaintiff attained the age of consent, as it would be strictly academic.