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SHORT FORM ORDER

INDEX No. 08-23732
CAL. No. 10-02210OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-27-11
ADJ. DATE 8-17-11
Mot. Seq. # 002 - MotD

AMANDA CURCIO, Plaintiff, - against - MOUNT SINAI SCHOOL DISTRICT, MOUNT SINAI UNION FREE SCHOOL DISTRICT, MOUNT SINAI HIGH SCHOOL and JOHN BORTNOWSKY, Defendants.	ABRAMS, FENSTERMAN, et al. Attorney for Plaintiff 1111 Marcus Avenue, Suite 107 Lake Success, New York 11042 DEVITT SPELLMAN BARRETT, LLP Attorney for Defendants Mount Sinai 50 Route 111, Suite 314 Smithtown, New York 11787 SPADA, ARDAM & SIBENER, PLLC Attorney for Defendant Bortnowsky 64 Smithtown Boulevard Smithtown, New York 11787

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Mt. Sinai H.S., Mt Sinai S.D., Mt Sinai UFSD , dated June 29, 2011, and supporting papers (including Memorandum of Law dated ____); (2) Affirmation in Opposition by the plaintiff , dated July 20, 2011, and supporting papers; (3) Affirmation in Opposition by the defendant John Bortnowsky, dated August 8, 2011, and supporting papers; (4) Reply Affirmation by the defendants Mt. Sinai H.S., Mt Sinai S.D., Mt Sinai UFSD, dated August 9, 2011, and supporting papers; (5) Other Memorandum of Law by defendants Mt. Sinai H.S., Mt Sinai S.D., Mt Sinai UFSD, dated June 29, 2011 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by Mount Sinai Union Free School District for summary judgment dismissing plaintiff's complaint is decided as follows:

Plaintiff Amanda Curcio commenced this action to recover damages for personal injuries allegedly sustained when she was sexually assaulted by her high school teacher, defendant John Bortnowsky. At the time of the alleged assault, plaintiff was a student enrolled in Mount Sinai Union Free School District. Plaintiff filed a notice of claim in connection with the action on May 21, 2007. The notice of claim states, among other things, that the School District negligently employed, trained,

supervised and controlled its employees, agents and /or personnel; that it failed to ensure the safety of the infant claimant by allowing a situation where a teacher made inappropriate, harassing and offensive sexually-charged comments and suggestions; and that it failed to employ adequately skilled personnel to supervise and educate her. Plaintiff's complaint contains claims against Bortnowsky for assault, intentional infliction of emotional distress and false imprisonment, and against the School District for negligent hiring and retention, negligent supervision, and breach of fiduciary duty. Plaintiff also seeks to hold the School District liable for Bortnowsky's alleged conduct under the doctrine of respondeat superior.

The School District now moves for summary judgment dismissing plaintiff's complaint against it. The School District argues that it may not be held vicariously liable under the doctrine of respondeat superior for Bortnowsky's alleged misconduct, as Bortnowsky's acts were not done within the scope of his employment, and plaintiff failed to list the claims for assault, intentional infliction of emotional distress and false imprisonment within her notice of claim. The School District further avers that plaintiff's causes of action for negligent hiring and supervision and breach of fiduciary duty fail as a matter of law, because it was unaware and had no reason to know of Bortnowsky's alleged propensity for sexual abuse, and it shared no fiduciary relationship with plaintiff at the time of the alleged incident. In opposition, plaintiff argues the motion should be denied, as the School District failed to include an affidavit from someone with personal knowledge of the facts, and the deposition transcripts submitted in support of the motion were not signed and certified in accordance with CPLR 3116. Plaintiff further argues that her notice of claim, which specifically sets forth the time and place of Bortnowsky's alleged conduct, provided the School District with sufficient notice of her claims. In addition, plaintiff asserts triable issues exist as to whether Bortnowsky was acting within the scope of his employment at the time of the alleged assault, and whether the School District was aware or had reason to know of his sexually inappropriate conduct toward students. Bortnowsky also opposes the motion and adopts plaintiff's arguments.

During plaintiff's 50-h hearing and examination before trial, she testified that Bortnowsky began harassing her in her junior year of high school, during which time he was her chemistry teacher and lunch aide. She testified that Bortnowsky would stop her in the school's hallway and start conversations about his personal life, including stories about his marriage and his daughters. Plaintiff testified Bortnowsky would stand very close to her during their conversations, and that he began calling her "beautiful" and "attractive." She testified Bortnowsky asked her if she would allow him to look at an eczema outbreak on her hip, and that he touched her inappropriately while teaching her self-defense maneuvers. Plaintiff testified she did not tell anyone about Bortnowsky's inappropriate conduct or ask to be transferred from his chemistry class. Plaintiff testified that during her senior year Bortnowsky would always turn-up at study hall to speak with her. She testified that Ms. Nau-Ritter was in charge of study hall, and that Bortnowsky would occasionally speak with her before coming over. She testified that Bortnowsky never said anything inappropriate to her in the presence of Ms. Nau-Ritter, and that she did not know whether Ms. Nau-Ritter ever questioned him about the frequency of his visits to study hall. Plaintiff further testified that Bortnowsky always stopped her in the hallway to compliment her "nice figure" and occasionally place his arms around her shoulders. Plaintiff testified that Bortnowsky began telling her sexual stories in her senior year, including stories about how his daughter caught him having sex with his wife, and how a girl at his daughter's college invited him into her dorm room while she was

wrapped in a towel. Plaintiff testified she finally reported Bortnowsky to the school's guidance counselor on Mach 20, 2007, after he declared he loved her and "God help [him] if he was 30 years younger," following a story he relayed to her about another student who "wriggled" her breast at him.

During his examination before trial, the School District's superintendent, Anthony Bonasera, testified he first learned of the alleged sexual assault after it was reported to the school's principal. He testified that he immediately contacted the then acting superintendent, who drove to the school and held a conference with the school's principal and guidance counselor. Bonasera testified that Bortnowsky was suspended as a result of the conference, and that he sent him a letter advising him that as the school's sexual harassment compliance officer, he was charged with investigating plaintiff's allegations. Bonasera testified that while plaintiff's complaint was the sole allegation of sexual harassment against Bortnowsky at the time of the incident, he was aware that school officials previously had received complaints from students that Bortnowsky's breath smelled of alcohol, and that some parents were concerned that he made inappropriate contact with students while allegedly teaching them self-defense maneuvers. Additionally, Bonasera testified that the complaints of alleged inappropriate contact with students during the teaching of self defense maneuvers may not have been investigated as a breach of the school's sexual harassment policy, because no one filed an official complaint. He testified that it was the decision of the school's principal to follow-up on these complaints and give parents the appropriate forms to file such a complaints. Bonasera further testified that he was unaware whether a letter from the Commissioner's Office of the State of New York, which states "[a]ttached please find a reporting from a credible student within the Mount Sinai High School indicating the 'contacts' generated by this secondary teacher," referred to Bortnowsky's contact with plaintiff or his previous contact with another student.

Initially, the Court notes that the deposition transcripts submitted by the School District in support of its motion are in admissible form. Significantly, the School District submitted signed copies of the transcripts of deposition testimony by plaintiff and nonparty witness Anthony Bonsera. The submissions also include signed verification pages of the transcripts of plaintiff's 50-h hearing and the deposition testimony of nonparty witness Glynis Nau-Ritter. Moreover, the School District provided copies of letters it sent to the deponents requesting they sign and return the transcripts of their deposition testimony. Where, as in this case, deponents have failed to sign and return the transcripts within 60 days of such request, CPLR 3116(a) permits use of those transcripts as if they were fully signed (*see* ***Franzese v Tanger Factory Outlets Ctrs.***, __AD3d__, 930 NYS2d 900 [2d Dept 2011]; ***Chisholm v Maloney***, 302 AD2d 792, 756 NYS2d 314 [3d Dept 2003]). Furthermore, the affirmation of the School District's attorney, accompanied by documentary evidence such as the notice of claim and the aforementioned deposition transcripts, is sufficient to meet the requirements of CPLR 3212 (b) that a motion for summary judgment be supported by an affidavit of a person with personal knowledge of the facts (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 598, 427 NYS2d 925 [1980]; *see also* ***First Interstate Credit Alliance v Sokol***, 179 AD2d 583, 579 NYS2d 653 [1st Dept 1992]; ***Beagle v Parillo***, 116 AD2d 856, 498 NYS2d 177 [3d Dept 1986]; ***Comptroller of the Sate of N.Y. v Gards Realty Corp***., 68 AD2d 186, 416 NYS2d 821 [2d Dept 1979]).

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist, not to resolve issues of fact or determine matters of credibility (*see* ***Ferrante***

v American Lung Assn., 90 NY2d 623, 665 NYS2d 25 [1997]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Service of a notice of claim pursuant to General Municipal Law §50-e is a condition precedent to a lawsuit against a municipal corporation (*see* Education Law 3813; *see also* ***O'Connor v Huntington U.F.S.D.***, 87 AD3d 571, 571, 929 NYS2d 743 [2d Dept 2011]). It is meant to protect a public corporation against stale or insupportable claims by requiring the municipal authority be given enough information about the incident to conduct a timely investigation and evaluate the merit of a claim (***Brown v City of New York***, 95 NY2d 389, 718 NYS2d 4 [2000]; ***Caselli v City of New York***, 105 AD2d 251, 483 NYS2d 401[2d Dept 1984]). " [I]n determining compliance with the requirements of GML §50-e, courts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time, and understand the nature of the claim" (*see* ***Brown v City of New York***, *supra* at 392, 718 NYS2d 4). Although courts have not interpreted the statute to require that a claimant state a precise cause of action in a notice of claim, a cause of action which substantively alters the nature of the claim, or which was not referred to directly or indirectly in a notice of claim, may not be interposed (*see* ***Trowell v New York City Health & Hosps. Corp.***, 305 AD2d 583, 759 NYS2d 357 [2d Dept 2003]; ***Mazzilli v City of New York***, 154 AD2d 355, 545 NYS2d 833 [2d Dept 1989]). "The fact that [the newly] alleged causes of action arose out of the same incident is not pivotal; rather, the nature of the claim and the theory of liability is determinative" (***Mazzilli v City of New York***, *supra* at 357, 545 NYS2d 833).

Here, the School District established its prima facie entitlement to summary judgment as a matter of law dismissing the portions of plaintiff's complaint alleging that it may be held vicariously liable for Bortnowsky's misconduct. Significantly, the School District submitted proof that plaintiff's notice of claim did not mention, directly or indirectly, vicarious claims against it for assault, intentional infliction of emotional distress and false imprisonment (*see* ***O'Connor v Huntington U.F.S.D.***, *supra*; ***Semprini v Village of Southampton***, *supra*; ***Mazzilli v New York***, *supra*). Moreover, even assuming arguendo, that the notice of claim appraised the School District of such claims, the School District may not be held vicariously liable for Bortnowsky's alleged sexual assault under the doctrine of respondeat superior, as such conduct is regarded as a clear departure from the scope of a teacher's employment, and is unrelated to the furtherance of the school's business (*see* ***N.X. v Cabrini Med. Ctr.***, 97 NY2d 247, 739 NYS2d 348 [2002]; ***Dia CC v Ithaca City School Dist.***, 304 AD2d 955, 758 NYS2d 197 [3d Dept 2003]). Likewise, the claim against the School District for the intentional infliction of emotional distress may not be entertained, where, as in this case, it falls within the ambit of other traditional tort claims asserted by plaintiff (*see* ***Fischer v Maloney***, 43 NY2d 553, 402 NYS2d 991 [1978]; ***Di Orio v Utica City Sch. Dist. Bd. of Educ.***, 305 AD2d 1114, 758 NYS2d 743 [4th Dept 2003]; ***Butler v Delaware Otsego Corp.***, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]).

Plaintiff's claim for breach of fiduciary duty also is dismissed. The claim is duplicative of plaintiff's claim for negligent hiring and supervision (*see* ***Padilla v Verczky-Porter***, 66 AD3d 1481, 885 NYS2d 843 [4th Dept 2009]), and she failed to plead with the required specificity the existence of a fiduciary relationship between herself and the School District (***Palmetto Partners, L.P. v AJW Qualified Partners, LLC***, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). "Mere allegations that a fiduciary relationship exists, with nothing more, are insufficient to withstand summary judgment" (***A.G. Capital Funding Partners, L.P. v State St. Bank & Trust Co.***, 11 NY3d 146, 156, 866 NYS2d 578 [2008]; *see also* ***Fils-Aime v Ryder TRS, Inc.***, 11 Misc 3d 679, 809 NYS2d 434 [Sup. Ct. Nassau County, 2006]).

As for plaintiff's claims against the School District for negligent hiring and retention and negligent supervision of its faculty, a necessary element of such claims is that the defendant knew or should have known of the employee's propensity to commit the tortious act had it conducted adequate hiring procedures (*see* ***Doe v Whitney***, 8 AD3d 610, 779 NYS2d 570 [2d Dept 2004]; ***N.X. v Cabrini Med. Ctr.***, 280 AD2d 34, 719 NYS2d 60 [1st Dept 2001]; ***Keneth R. v Roman Catholic Diocese***, 229 AD2d 159, 654 NYS2d 791 [2d Dept 1997]). Although the School District submitted deposition testimony by Anthony Bonasera that he first learned of the alleged sexual assault at the time when it was reported by plaintiff, it failed to establish its prima facie entitlement to summary judgment dismissing the claim by eliminating triable issues from the case (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Uni. Med. Ctr.***, *supra*). Significantly, the School District's own submission, namely a letter by the school's principal referencing prior complaints that Bortnowsky shared personal information with students and made inappropriate contact with girls while allegedly teaching them self-defense maneuvers, raises significant triable issues as to whether the school had notice of Bortnowsky's propensity for the alleged harmful conduct before plaintiff's complaint (*see* ***Peter v Children's Vil., Inc.***, 30 AD3d 582, 819 NYS2d 44 [2d Dept 2006]; ***Doe v Lorich***, 15 AD3d 904, 788 NYS2d 754 [4th Dept 2005]; ***N.X. v Cabrini Med. Ctr.***, *supra*). Accordingly, the portion of the School District's motion for summary judgment dismissing plaintiff's causes of action for negligent hiring and retention and negligent supervision is denied.

Dated: 2/2/12

PETER H. MAYER, J.S.C.