Higgins v Zenker Corp.
2019 NY Slip Op 30802(U)
March 26, 2019
Supreme Court, Suffolk County
Docket Number: 10-32193
Judge: David T. Reilly
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[* 1]

SHORT FORM ORDER

INDEX No. 10-32193
CAL. No. 17-02520OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-11-18
ADJ. DATE 6-27-18
Mot. Seq. # 002 - MotD

AMENDED ORDER[1]

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TREVOR HIGGINS, an infant by his father and natural guardian, RICHARD HIGGINS and RICHARD HIGGINS, individually,

Plaintiffs,

- against -

ZENKER CORP., ZENKER CORP D/B/A EMPIRE STATE KARATE, JOYCE SANTAMARIA and JAMES BONFIGLIO,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9 - 18 ; Replying Affidavits and supporting papers 19 - 22, 23 - 24 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Zenker Corp., Zenker Corp. doing business as Empire State Karate, and Joyce Santamaria for an Order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the plaintiffs' first, third, fourth, fifth,

[1]The Court amends the original Order, dated December 3, 2018, to reflect that the remaining viable causes of action in plaintiff's complaint are the second and eighth, in part, and the fourteenth in its entirety. All other causes of action are dismissed.

sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth causes of action are dismissed, and the plaintiffs' second and eighth causes of action are dismissed in part, as set forth herein, and is otherwise denied with respect to plaintiff's fourteenth cause of action.

This action arises out of a series of incidents which occurred between the infant plaintiff and the defendant James Bonfiglio (Bonfiglio) culminating in Bonfiglio being arrested and convicted of sexual abuse. This action was commenced by the filing of a summons and complaint on August 30, 2010. The defendants Zenker Corp., Zenker Corp. doing business as Empire State Karate, and Joyce Santamaria (Santamaria) joined issue by the service of an answer dated November 5, 2010. By order dated March 5, 2012, the court (Spinner, A.S.C.J.) granted the plaintiffs' motion for a default judgment against Bonfiglio after he failed to appear in this action.

It is undisputed that Santamaria is the president and owner of the defendant Zenker Corp. (Zenker), which operates a karate school under the name Empire State Karate (Empire)(collectively, the defendants). The infant plaintiff was a student at Empire during the time that Bonfiglio was employed by Zenker as a karate instructor, and often took classes with Bonfiglio. On or about December 26, 2003, Bonfiglio left his employment with Zenker to open his own karate school. The infant plaintiff remained a student at Empire until he became a student at Bonfiglio's school in August 2005. The inappropriate contact between Bonfiglio and the infant plaintiff did not begin until after the infant plaintiff joined Bonfiglio's school.

In their complaint, the plaintiffs set forth 14 causes of action against the defendants. In their first cause of action, the plaintiffs allege, among other things, that the defendants knew or should have known that Bonfiglio sexually assaulted students at Empire, and negligently allowed Bonfiglio to engage in activity with the infant plaintiff. In their second and third causes of action, the plaintiffs respectively set forth claims that the defendants negligently hired and retained Bonfiglio, and negligently failed to supervise the infant plaintiff and Bonfiglio. In their fourth cause of action, the plaintiffs set forth a claim for intentional infliction of emotional distress on behalf of the infant plaintiff. In their fifth cause of action, the plaintiffs allege that the defendants had a duty to immediately remove Bonfiglio from contact with students, including the infant plaintiff, and to report Bonfiglio to the legal authorities. In their sixth cause of action, the plaintiffs allege that the defendants negligently failed to supervise Bonfiglio. In their seventh cause of action, entitled "Negligence - Failure to Investigate Child Abuse," the plaintiffs allege that the defendants sought to cover up allegations of sexual abuse by Bonfiglio.

In their eighth cause of action, the plaintiffs allege that the defendants had a duty "to warn plaintiffs, their parents, and prospective victims and their parents" about Bonfiglio and to prevent his future acts of abuse. In their ninth cause of action, the plaintiffs allege that the defendants had a duty to train their instructors and establish procedures to prevent and detect sexual abuse, and to educate students and their parents regarding the issue. In their tenth and eleventh causes of action, the plaintiffs respectively set forth claims for breach of fiduciary duty and "failure to provide a safe and secure environment" for the infant plaintiff. In their twelfth cause of action, the plaintiffs allege that the defendants intentionally, negligently, and recklessly misrepresented the harm to the plaintiffs from interacting with Bonfiglio, and that Santamaria's actions constituted gross negligence and were intended

to harm the plaintiffs. In their thirteenth cause of action on behalf of the infant plaintiff, the plaintiffs allege, among other things, that Bonfiglio injured the infant plaintiff and put him in fear of immediate harm, and that Bonfiglio's actions were in furtherance of his employment with Zenker. The plaintiffs' fourteenth cause of action is a derivative claim on behalf of the infant plaintiff's father, the plaintiff Richard Higgins.

The defendants now move for summary judgment dismissing the complaint on the grounds that the sexual abuse only occurred after Bonfiglio was no longer employed at Empire, that they did not have control or dominion over any location where such interactions took place, and that they did not know about, and were never made aware of, Bonfiglio's improper behavior. In addition, the defendants contend that the plaintiffs have failed to establish a legal basis to pierce the corporate veil and to hold Santamaria personally liable herein.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).
However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In support of their motion, the defendants submit the pleadings, Santamaria's affidavit, and excerpts from the transcripts of the depositions of the infant plaintiff and his father. Initially, the undersigned notes that counsel for the plaintiffs contends that the transcript of the deposition of the infant plaintiff is inadmissible pursuant to CPLR 3116, based upon the failure of the defendants to submit the signature page, and the absence of evidence that the transcript was forwarded to the witness. However, the Court may consider the unsigned deposition transcript submitted in support of the motion as the plaintiffs have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). In addition, considering that the defendants submit the transcript in question in their reply, the consistent nature of the testimony of the infant plaintiff in the excerpts and the full transcript,[2] and the lack of prejudice to the parties, the entire transcript of said deposition will be summarized in consideration of the defendants' motion for summary judgment.

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[2] It is determined that the full transcript of the infant plaintiff's testimony gives background to the excerpts submitted by the defendants, rather than distorting or creating a misleading impression of the testimony.

At his deposition, the infant plaintiff testified that he joined the Empire karate school in August of 1997 when he was five years old, that he remained a student for approximately eight years until 2005, and that he had several instructors at Empire during that time period. He stated that Bonfiglio began instructing him when he graduated from the Empire program for very young children, that, over the years, Bonfiglio built up his confidence and made him feel special with compliments on his performance in karate class, and that Bonfiglio also complimented other students in his classes. He indicated that Bonfiglio only complimented his karate form and ability, that the compliments were made in class front of other students and his parents, and that other Empire instructors behaved similarly in conducting classes. The infant plaintiff further testified that he did not have any complaints about any Empire employee prior to leaving the school, that he waited from December 2003 until 2005 for his contract with Empire to expire to leave to join Bonfiglio's school, and that the first inappropriate contact with Bonfiglio occurred a few months after he joined that school. He stated that Bonfiglio started to make inappropriate overtures in the summer of 2005 by making jokes about masturbation to the instructors and students at his school, that he slept over at Bonfiglio's apartment with other students approximately ten times that summer, and that, the first time he spent the night at the apartment, Bonfiglio and he watched pornography together after the other students were asleep. He indicated that he saw Bonfiglio rubbing his genitals, that Bonfiglio asked him to put his hands down Bonfiglio's pants, that Bonfiglio attempted to touch his genitals but was told not to do so, and that he did not tell his parents about what had happened because Bonfiglio said it was "normal." The infant plaintiff further testified that over time things escalated at Bonfiglio's apartment when Bonfiglio encouraged his students to go into the bathroom alone and masturbate while looking at pornographic magazines. He stated that he did not have sex with the other students or Bonfiglio, though Bonfiglio made advances, that he stayed at Bonfiglio's school until early 2007, and that he later learned that Bonfiglio was arrested and had been videotaping his students masturbating in the bathroom of his apartment.

Richard Higgins (Higgins) testified that he believes that his son left the Empire school at the end of 2004, that the infant plaintiff stayed at Bonfiglio's apartment a number of times in the summer of 2005, and that he had "no reason to believe anything [was] going on" because the infant plaintiff had been around Bonfiglio for eight or nine years and there was never any problem. He stated that, when Bonfiglio was employed at Empire, the students and parents liked him, but that he learned from the detectives and the assistant district attorney handling the criminal matter against Bonfiglio that Bonfiglio had been "grooming" his students for years. He indicated that he learned about how pedophiles groom their victims after Bonfiglio was arrested, and that he was told by said assistant district attorney that Santamaria knew of a prior incident of sexual abuse by Bonfiglio while employed at Empire. Higgins further testified that he did hear about the prior incident prior to his conversation with the assistant district attorney, that he did not know if Bonfiglio was prosecuted for the incident, and that he was told the prior incident involved an Empire student named Patalano.

In her affidavit, Santamaria swears that she established Zenker in 1990, that she never had to deal with deviant sexual behavior in running Empire, and that she was not aware of Bonfiglio's aberrant behavior until he was arrested after leaving her employ. She states that she is not responsible for Bonfiglio's actions, and that she never received any complaints about Bonfiglio's behavior while he was

employed at Empire. She indicates that all of her actions regarding Empire were taken in her capacity as president of Zenker.

First, Third, Sixth and Eleventh Causes of Action Sounding In Negligent Supervision

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (***Mirand v City of New York***, 84 NY2d 44, 49, 614 NYS2d 372 [1994]). Schools are not, however, the insurers of their students' safety and there is no duty to provide constant supervision as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]). The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (***Mirand v City of New York***, *id.*; ***Guerriero v Sewanhaka Cent. High Sch. Dist.***, 150 AD3d 831, 55 NYS3d 85 [2d Dept 2017]). "Where the complaint alleges negligent supervision due to 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" (***Sacino v Warwick Val. Cent. Sch. Dist.***, 138 AD3d 717, 29 NYS3d 57 [2d Dept 2016] quoting ***Timothy McArdle. v Beacon City Sch. Dist.***, 127 AD3d 826, 828, 7 NYS3d 348 [2d Dept 2015]).

The defendants have established their prima facie entitlement to summary judgment as to the causes of action sounding in negligent supervision by showing that any nexus between their employment and supervision of Bonfiglio and their supervision of the infant plaintiff was severed by time, distance, and the intervening independent actions of Bonfiglio (*see* ***S.C. v New York City Dept. of Educ.***, 97 AD3d 518, 949 NYS2d 712 [2d Dept 2012]; ***Farrell v Maiello***, 38 AD3d 592, 831 NYS2d 506 [2d Dept 2007]). Higgins' testimony that an assistant district attorney indicated that the defendants were aware of an alleged prior incident of sexual abuse by Bonfiglio is inadmissible hearsay which is insufficient to warrant the denial of summary judgment (*see* ***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***Stock v Otis Linden. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). In addition, the defendants' submissions establish that the plaintiffs' first, sixth and eleventh causes of action are duplicative of the plaintiffs' third cause of action for negligent supervision, because the enumerated claims arise from the same facts (*e.g.* ***Deer Park Enter., LLC v Ail Sys., Inc.***, 57 AD3d 711, 870 NYS2d 89 [2d Dept 2008]; ***Silverman v Carvel Corp.***, 8 AD3d 469, 778 NYS2d 515 [2d Dept 2004]; ***Mecca v Shang***, 258 AD2d 569, 685 NYS2d 458 [2d Dept 1999]). Each of the duplicative causes of action are merely allegations of negligent supervision recast in different language, or merely address one aspect of the supervision allegedly required to be provided by the defendants, or separately address the lack of supervision of the infant plaintiff or Bonfiglio.

Second, Fifth, Seventh, and Eighth Cause of Action Sounding In Negligent Hiring and Retention

An employer may be liable to a third person for the employer's negligent hiring or retaining an employee who is incompetent or unfit (*see* ***Chichester v Wallace***, 150 AD3d 107, 355 NYS3d 378 [2d Dept 2017]; ***Corbally v Sikras Realty Co.***, 161 AD2d 107, 554 NYS2d 839 [1st Dept 1990]). Liability will not attach for torts committed by an employee acting solely for personal motives unrelated to the furtherance of the employer's business (*see* ***Zwibel v Midway Automotive Group***, 127 AD3d 965, 7 NYS3d 377 [2d Dept 2015]; ***Gui Ying Shi v McDonald's Corp.***, 110 AD3d 678, 679, 972 NYS2d 307 [2d Dept 2013]), or for conduct which could not have been reasonably expected by the employer (*see* ***Yildiz v PJ Food Serv., Inc.***, 82 AD3d 971, 972, 918 NYS2d 572 [2d Dept 2011]). To establish a cause of action based on negligent hiring and supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (***Doe v Chenango Val. Cent. School Dist.***, 92 AD3d 1016 , 938 NYS2d 360 [3d Dept 2012]; ***Jackson v New York Univ. Downtown Hosp.***, 69 AD3d 801, 801, 893 NYS2d 235 [2d Dept 2010]; *see* ***Evans v City of Mount Vernon***, 92 AD3d 829, 830, 939 NYS2d 130 [2d Dept 2012]).

The defendants have established their prima facie entitlement to summary judgment as to the cause of action for negligent hiring and retention by showing that any nexus between their employment of Bonfiglio and the abuse of the infant plaintiff was severed by time, distance, and the intervening independent actions of Bonfiglio (*see* ***S.C. v New York City Dept. of Educ.***, *supra*; ***Farrell v Maiello***, *supra*). The defendants' submissions, including the testimony of the infant plaintiff and Higgins, establish that Bonfiglio's interactions with his fellow employees, the infant plaintiff, other students, and parents of students at Empire were not in any measure unprofessional, and that the defendants were not on notice that Bonfiglio had a propensity for sexual misconduct (*see* ***J.A. v. City of New York***, 34 Misc 3d 1214[A], 946 NYS2d 67 [Sup Ct, New York County 2009]).

In addition, the defendants' submission establishes that the plaintiffs' fifth, seventh, and eighth causes of action for failure to remove Bonfiglio from employment at Empire, failure to investigate child abuse, and failure to warn are duplicative of the plaintiffs' second cause of action because the enumerated claims arise from the same facts (citations omitted), are merely allegations of negligent retention recast in different language, and are only viable claims within, or elements of, the prima facie cause of action for negligent retention.

Fourth Cause of Action For Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). The tort involves four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal relationship between the conduct and the injury; and (4) severe emotional distress (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 121, 596 NYS2d 350 [1993]). The conduct alleged by the plaintiffs is that the defendants failed to adequately supervise the infant plaintiff and Bonfiglio, that they knew or should

have known the Bonfiglio was sexually assaulting students while teaching at Empire, that the defendants negligently permitted Bonfiglio to engage in activity with the infant plaintiff, and that the defendants negligently hired and retained Bonfiglio. This conduct does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see* ***Howell v New York Post Co.***, *id.*), and the defendants have established their prima facie entitlement to summary judgment by showing that the alleged facts are insufficient to indicate that such conduct was intended to cause the infant plaintiff severe emotional distress (*see* ***Klein v Metropolitan Child Servs., Inc.***, 100 AD3d 708, 954 NYS2d 559 [2d Dept 2012]; ***Shelia C. v Povich***, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]; ***Geller v Harris***, 258 AD2d 421, 685 NYS2d 734 [1st Dept 1999]). In addition, the claim against the defendants for 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 the plaintiffs (*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]).

Ninth Cause of Action For Failure to Train

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Pasquaretto v Long Is. Univ.***, 106 AD3d 794, 964 NYS2d 599 [2d Dept 2013]). A duty of reasonable care owed by the alleged tortfeasor to the plaintiff is essential to any recovery in negligence (***Eiseman v State of New York***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 229, 513 NYS2d 356 [1987]).

Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affecting the expansion or limitation of new channels of liability" (***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 586, 611 NYS2d 817, 821 [1994]; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]). With the exception of the special duty owed by the defendants to their students, it is undisputed that the relationship between the defendants and the plaintiffs, as well as other students and parents, involved arms-length commercial transactions. It is determined that, under the specific circumstances herein, neither the students, the parents, nor society expects commercial entities to train individuals with whom they interact or transact business regarding all manner of potential criminal or inappropriate behavior by their employees or others. In addition, absent a statutory or regulatory requirement, employers are generally not expected to train their employees in areas outside the scope of their employment, or regarding rare or unforseen events (*see e.g.* ***Holland v City of Poughkeepsie***, 90 AD3d 841, 935 NYS2d 583 [2d Dept 2011]; ***Johnson v Kings County Dist. Attorney's Off.***, 308 AD2d 278, 763 NYS2d 635 [2d Dept 2003]). To require training in either case would open the floodgates to claims for failure to train regarding a limitless universe of potential illegal or inappropriate actions by

employees, resulting in insurer-like liability on the part of any employer, a disproportionate risk and reparation allocation, and a new channel to find employers liable for the intervening and superceding actions of their employees. Thus, the defendants have established their prima facie entitlement to summary judgment dismissing the plaintiffs' ninth cause of action on the ground that it did not owe the plaintiffs a duty to train its employees or educate the public regarding sexual abuse.

Tenth Cause of Action For Breach of Fiduciary Duty

The defendants have established their prima facie entitlement to summary judgment dismissing the plaintiffs' tenth cause of action. The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (***Varveris v Zacharakos***, 110 AD3d 1059, 973 NYS2d 774 [2d Dept 2013]; ***Palmetto Partners, LP v AJW Qualified Partners, LLC***, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]). A fiduciary owes a duty of "undivided and undiluted loyalty to those whose interest the fiduciary is to protect" (***Birnbaum v Birnbaum***, 73 NY2d 461, 466, 541 NYS2d 746 [1989][citations omitted]). "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (***Birnbaum v Birnbaum***, 73 NY2d at 466, 541 NYS2d at 748). A fiduciary relationship is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (Restatement [Second] of Torts § 874; *see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). The defendants have established prima facie that they had no more than an arm's length business relationship with Higgins. In addition, it has been held that students do not have a fiduciary relationship with the schools that they attend (***Gomez–Jimenez v New York Law Sch.***, 103 AD3d 13, 956 NYS2d 54 [1st Dept.2012]; ***Sweeney v Columbia Univ.***, 270 AD2d 335, 704 NYS2d 617 [2d Dept.2000]). "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 THE RESPONDENTS, Inc.***, 11 Misc 3d 679, 809 NYS2d 434 [Sup Ct, Nassau County 2006]). Moreover, the cause of action 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]).

Twelfth Cause of Action For Negligent Misrepresentation of Risk of Harm

To prevail on a claim of negligent misrepresentation, a party must establish that the other party had a duty to use reasonable care to impart correct information due to a special or privity-like relationship existing between them, that the information provided by the other party was incorrect or false, and that the claimant reasonably relied upon the information provided (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 831 NYS2d 364 [2007]; ***MatlinPatterson ATA Holdings LLC v Federal Express Corp.***, 87 AD3d 836, 929 NYS2d 571 [1st Dept 2011]). Generally, commercial parties dealing at arms length in negotiating a contract are not in a special relationship (***High Tides LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***U.S. Express Leasing, Inc. v Elite Tech. (NY), Inc.***, 87 AD3d 494, 928 NYS2d 696 [1st Dept 2011]). However, a special relationship may exist in a

commercial context where the speaker should be "aware of the use to which the information would be put and supplied it for that purpose" (***Kimmell v Schaefer***, 89 NY2d 257, 264, 652 NYS2d 715 [1996]).

The defendants have established their prima facie entitlement to summary judgment dismissing this cause of action. Santamaria's testimony, and that of the plaintiffs, indicates that the defendants did not make any statements, or impart any information, let alone incorrect information, regarding Bonfiglio's sexual proclivities or the absence of any risk in that area to the plaintiffs. This is the case even if it is assumed, solely for the sake of deciding this motion, that the infant plaintiff and Higgins were in privity or had a special relationship with the defendants.

However, in addition to claiming negligence on the part of the defendants, the plaintiffs allege that the defendants intentionally misrepresented the risk of harm posed to them by Bonfiglio. The elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*e.g.* ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.***, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also* ***Ozelkan v Tyree Bros. Envtl. Servs.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; ***Eades v Tadao Ogura, M.D., P.C.***, 185 AD2d 266, 587 NYS2d 209 [2d Dept 1992]). As noted above, the defendants' submission establishes that they did not make any misrepresentations of fact to the plaintiffs regarding Bonfiglio.

Thirteenth Cause of Action For Placing the Infant Plaintiff in Fear of Imminent Physical Harm

In their thirteenth cause of action, the plaintiffs allege that Bonfiglio injured the infant plaintiff, placed him in fear of imminent physical harm, sexually assaulted him, and did so in furtherance of his employment with Zenker. To sustain a cause of action to recover damages for assault, there must be proof that a defendant intentionally engaged in physical conduct that placed the plaintiff in imminent apprehension of harmful contact (*see* ***Fugazy v Corbetta***, 34 AD3d 728, 825 NYS2d 120 [2d Dept 2007]; ***Cotter v Summit Sec. Servs., Inc.***,14 AD3d 475, 788 NYS2d 153 [2d Dept 2005]). To sustain a cause of action for battery, plaintiff must prove intentional physical contact by defendant without plaintiff's consent (*see* ***Ciminello v Sullivan***, 65 AD3d 1002, 885 NYS2d 118 [2d Dept 2009]; ***Hughes v Farrey***, 30 AD3d 244, 817 NYS2d 25 [1st Dept 2006]).

It appears that the aforesaid allegations should be read to state a cause of action against Bonfiglio. To the extent that this cause of action can be read to assert a cause of action for respondeat superior, the defendants have established their prima facie entitlement to summary judgment herein. It is well settled that employers are vicariously liable for the torts of their employees under the theory of respondeat superior if the acts were committed while the employee was acting within the scope of his or her employment and in furtherance of the employer's business (*see* ***Riviello v Waldron***, 47 NY2d 297, 418 NYS2d 300 [1979]; ***Xin Tang Wu v Ng***, 70 AD3d 818, 894 NYS2d 141 [2d Dept 2010]; ***Carnegie v J.P. Philips, Inc.***, 28 AD3d 599, 815 NYS2d 107 [2d Dept 2006]). However, the employer will bear no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business (*see* ***White v Alkoutayni***, 18 AD3d 540, 794 NYS2d 667 [2d Dept 2005]; ***Brancato v Dee & Dee Purch.***, 296 AD2d 518, 745 NYS2d 564 [2d Dept 2002]). It is

beyond cavil that any improper behavior by Bonfiglio was not in furtherance of the defendants' business. More importantly, it is undisputed that Bonfiglio did not engage in any behavior which would be deemed inappropriate, or objectively suspicious, while employed by the defendants.

Fourteenth Cause of Action For Derivative Injuries and Damages

Inasmuch as the defendants have established their prima facie entitlement to summary judgment dismissing the enumerated causes of action, this cause of action, which is a derivative cause of action on behalf of the infant plaintiff's father, is also subject to dismissal unless the plaintiffs can raise an issue of fact regarding any other cause of action (*see* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]).

Accordingly, the defendants have established their prima facie entitlement to summary judgment dismissing the complaint, and it is incumbent upon the plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Town of Fishkill***, *supra*). In opposition to the motion, the plaintiffs submit, the pleadings, and the transcripts of the depositions of Santamaria, Higgins, and three nonparty witnesses. The relevant portions of Higgins testimony has been summarized above.

At his deposition, nonparty Gerard Patalano (Patalano) testified that he became a student at Empire in 1988, when he was five years old and in kindergarten, that at some point Bonfiglio became one of his instructors, and that, while he was a student at Empire, the defendants had "sleepover Halloween parties" at the school. He stated that Bonfiglio, another male instructor, and a female instructor supervised these parties, that he did not see any of the three go into a separate room with a student at these parties, and that he did not recall being alone with Bonfiglio, or anything of a sexual nature happening, during the period when he was in kindergarten until he was in second grade. He indicated that, during the period when he was in third grade until he was in fifth grade, Bonfiglio was his full time instructor at the school, that Bonfiglio was at the sleepover parties during that period, and that he did not know if Bonfiglio ever took anyone into a separate room by himself during these parties. He stated that he recalled Bonfiglio inviting older students approximately 12 to 17 years of age to watch pornography at these sleepover parties at Empire. Patalano further testified that, from third grade to fifth grade, he attended gymnastics classes at another school at Bonfiglio's suggestion, that Bonfiglio attended the gymnastics classes with him and regularly drove him home from the classes, and that at some point they stopped at Empire after hours before he was dropped off at home and he watched a pornography video together while each masturbated. He stated that, thereafter, they stopped at Empire after every gymnastics class, and eventually Bonfiglio touched him with his hands. He indicated that this conduct continued until he was in fifth grade, when his parents found out and he stopped taking classes at Empire.

Nonparty witness Gennaro Patalano (Mr. Patalano) testified that he enrolled his son, Gerard, in the Empire school in 1988, that Empire sponsored sleep overs supervised by Bonfiglio and another instructor, and that Empire students occasionally competed in tournaments out of state. He stated that his family attended all of his son's out-of-state karate tournaments, that his son stayed in his family's

hotel room, and that other students often stayed with Bonfiglio in his hotel room. He indicated that he or his wife would drive their son to gymnastic classes, that he is not certain that Bonfiglio ever drove his son to or from such classes, and that, at random times, Bonfiglio would take his son to Empire from their home. Mr. Patalano further testified that the felt confident allowing Bonfiglio to take his son to the school during the day time and on weekends because he and his wife trusted Bonfiglio, that their nephew, Joe, knew about Bonfiglio's activities before they did because he had watched pornography at the school with Bonfiglio and Gerard, and that, when they found out about Bonfiglio, he and his wife spoke with Santamaria about Bonfiglio' behavior. He stated that, after some resistance from Santamaria, his wife removed their other son from the school, that sleepovers at Empire stopped, and that he believes that Santamaria's only response to the information about Bonfiglio was to have a psychiatrist and adult student at Empire talk to Bonfiglio. He indicated that his wife wanted to report Bonfiglio to the police, but that his son did not want to do so.

At her deposition, nonparty Kim Snider (Snider) testified that Mr. Patalano's wife is her aunt, that the infant plaintiff is her cousin, and that Mr. Patalano's nephew, Joe, is her brother. She stated that she worked for Santamaria at Empire for a few months when she was in high school, that she knew Bonfiglio always volunteered to drive students home from gymnastics classes, and that she did not observe anything "out of the ordinary" while so employed. She indicated that she did not notice Bonfiglio alone with a student at Empire except when testing a student in a separate room to determine whether the student would receive a higher, or different color, karate belt to wear; that she never observed a student come out of such testing looking upset; and that she attended one local over-night tournament while employed by Empire where everyone knew that students slept in Bonfiglio's hotel room. Snider further testified that years later, in 1995, she rented space at Empire from Santamaria, that Patalano was a student at Empire at the time, and that her brother, Joe, called her to tell her that their cousin, Patalano, told him that Bonfiglio was molesting him. She stated that she believed Joe because he told her that Bonfiglio was molesting him as well, that she immediately told her aunt what she knew, and that her uncle went to Empire to talk to Santamaria about Bonfiglio. She indicated that the next day she went to the space she rented at Empire, that she spoke with Santamaria, who indicated that Bonfiglio needed help, and that she told Santamaria that she could not continue to rent at Empire. Snider further testified that, when she returned the next day, Santamaria acted as if she knew nothing and nothing had happened, and that when she again mentioned that she wanted to end the rental at Empire, Santamaria told her that she would add Snider to the list of disgruntled people she had to deal with.

Santamaria testified that she was born in 1942 and became a student of karate at the age of 27, that she was the only female in the adult karate school which was the predecessor to Empire, and that she eventually was asked to instruct children at that school. She stated that her hope was that her young students would learn respect, discipline, positive social skills, and self-esteem, that her classes included young students of a "higher" rank or color karate belt acting as mentors to less skilled students, and that she acquired that previously operating karate school between 1978 and 1980. She indicated that she incorporated Zenker in 1979, that she changed the name of the school sometime in that period of time, and that Bonfiglio became a student at Empire when he was 18 years old. She stated that he was a student at Empire for approximately 5½ years before he became a part-time employee at the school, and that she did not do a background check, determine whether he had any criminal charges filed against him, or seek any work references before hiring him as an instructor. She indicated that Empire has

always provided karate instruction to children, young adults, and adults, that 99.9% of the time she hired instructors from within Empire, and that she did not remember how long Bonfiglio worked part-time before becoming a fill-time employee at Empire. Santamaria further testified that when she first started her school, Empire students attended "away" tournaments, that she did not recall if Empire had practices and procedures in place with regard to chaperones for those events, and that Bonfiglio attended local and away tournaments as both a student and instructor at Empire. She stated that a karate instructor has the same type of relationship with a student as any school teacher has with a student, that the only complaints she received about Bonfiglio during his employment with Empire was that parents wanted him to spend more time teaching their children or giving more private lessons, and that the parents and students at Empire loved Bonfiglio's "ability and personality." She indicated that Bonfiglio never went into the school after business hours, that no one ever came to her with complaints about Bonfiglio and sexual abuse, and that she did not ask an adult student and instructor who was licensed as a psychologist, and who she considered her in-house psychologist, to speak with Bonfiglio about allegations that Bonfiglio was involved in the sexual abuse of Empire students.

The plaintiffs have failed to raise an issue of fact regarding their cause of action for the negligent supervision of the infant plaintiff and Bonfiglio. Viewing the evidence in the light most favorable to the plaintiffs, as a court must on a defendant's motion for summary judgment (*see* ***Branham v Loews Orpheum Cinemas, Inc.***, 8 NY3d 931, 834 NYS2d 503 [2007]), the court notes that the adduced evidence reveals that Bonfiglio did not engage in any inappropriate behavior, or overt or discernable grooming behavior, towards the infant plaintiff during the time both were present at Empire. In addition, any claim of negligent supervision of Bonfiglio is duplicative of the plaintiffs' cause of action for negligent hiring and retention. Accordingly, the plaintiffs' first, third, sixth and eleventh causes of action are dismissed.

The plaintiffs also have failed to raise an issue of fact regarding their claim that the defendants were negligent in their hiring of Bonfiglio. The adduced evidence reveals that Bonfiglio began as a student at the school, that he was employed as a part-time employee after approximately five and one-half years at the school, and that the defendants did not know, neither should they have known, of Bonfiglio's propensity to engage in inappropriate sexual behavior. "[T]he duty to investigate a prospective employee, or to 'institute specific procedures for hiring employees," is triggered only when the employer "knows of facts that would lead a reasonably prudent person to investigate the prospective employee' " (***Sandra M. v St. Luke's Roosevelt Hosp. Ctr.***, 33 AD3d 875, 879, 823 NYS2d 463 [2d Dept 2006], quoting ***Kenneth R. v Roman Catholic Diocese of Brooklyn***, 229 AD2d 159, 163, 654 NYS2d 791 [2d Dept 1997]). Here, the defendants had no reason to conduct an investigation into Bonfiglio's background prior to his employment at Empire.

The plaintiffs, however, have raised questions of fact requiring a trial of this action regarding their claim that the defendants' negligently retained Bonfiglio as an employee after they allegedly learned of his abuse of Patalano. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). Thus, the plaintiffs have raised issues of fact whether the defendants were

obligated to remove Bonfiglio from his position as an instructor of karate at Empire, to investigate the allegations of the Patalano family that Bonfiglio had engaged in inappropriate behavior with students at Empire, and to warn them of the risk of harm regarding the infant plaintiff's interactions with Bonfiglio while a student at Empire. That is, whether the defendants are liable for negligent retention based upon the enumerated claims, or other prima facie elements of the subject cause of action.

The plaintiffs' opposition also reveals that the undersigned must consider whether Santamaria may have any individual liability regarding the plaintiffs' claims that she had a personal duty to report Bonfiglio to the civil authorities of the State of New York as alleged in their fifth cause of action, or to warn the plaintiffs of the dangers posed by interacting with Bonfiglio as set forth in their eighth cause of action. It is determined that, with respect to every other claim or cause of action brought by the plaintiffs, Santamaria is not personally liable for her actions as president of Zenker absent the piercing of the corporate veil. It is well established that a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability (***Seuter v Lieberman***, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). In order to prevail in an action to pierce the corporate veil, a plaintiff must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d 135, 141, 603 NYS2d 807 [1993]; ***Seuter v Lieberman***, *supra*). New York "does not recognize a separate cause of action to pierce the corporate veil" (***Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.***, 15 AD3d 528, 529, 792 NYS2d 89 [2d Dept 2005]), and the plaintiffs do not set forth any allegations regarding a claim to pierce the corporate veil in this action.

New York also does not recognize a common-law duty to report sexual misconduct to the appropriate authorities (*see* ***Heidt v Rome Memorial Hosp.***, 278 AD2d 786, 724 NYS2d 139 [4th Dept 2000]; *see also* ***Stephenson v City of New York***, 85 AD3d 523, 925 NYS2d 712 [1st Dept 2011]). A review of New York case law reveals that there is no direct authority regarding an individual's duty to warn third parties about the dangers posed by interacting with a sexual predator, or the elements of such a cause of action. The state and federal courts in New York have referred to a duty to warn in the context of sexual misconduct only three times. It has been held that a parent and daughter alleging a failure to warn, both of whom were aware of the perpetrators' prior conviction for sexually molesting an eight-year-old girl, could not recover based upon a lack of proximate cause (***Constantine G. P. v Town of Corning***, 251 AD2d 1065, 674 NYS2d 200 [4th Dept 1998]). It has also been held, without further discussion, that a cause of action for failure to warn is subject to the statute of limitations (*see* ***Zumpano v Quinn***, 6 NY3d 666, 816 NYS2d 703 [2006]; ***John Doe No. 6 v Yeshiva & Mesivta Torah Temimah, Inc.***, 21 Misc 3d 443, 863 NYS2d 891 [Sup Ct, Kings County 2008]).

In addition, a national survey of the current state of the law regarding the duty to warn about sexual misconduct reveals that an individual with actual knowledge or special reason to know of the likelihood of a person engaging in sexually abusive behavior against a particular person or persons, has a duty of care to take reasonable steps to prevent or warn of the harm (*see* ***J.S. v R.T.H.***, 155 NJ 330, 714 A2d 924 [1998]). However, it has been held that public policy considerations may preclude liability in a given case (***Gritzner v Michael R.***, 235 Wis 2d 781, 611 NW2d 906 [2000]; ***Venn v Venn***, 261 Wis 2d 878, 659 NW 2d 507 [2003]). "The public policy reasons that may preclude liability include: (1) the

injury is too remote from the negligence, (2) the injury is too wholly out of proportion to the tortfeasor's culpability, (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, (4) allowing recovery would place too unreasonable a burden on the tortfeasor, (5) allowing recovery would be too likely to open the way for fraudulent claims, and (6) allowing recovery would enter a field that has no sensible or just stopping point" (***Gritzner v Michael R.***, 235 Wis 2d at 794-795, 611 NW2d at 914).

"An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal" (Restatement (Second) of Torts § 302B [1965]). In addition, a defendant can owe a duty to prevent the actions of a third-party if its "affirmative act has created or exposed another to a high degree of risk of harm, or if the parties stand in a special relationship to one another" (***Elsroth v Johnson & Johnson***, 700 F Supp 151 [SD NY 1988]; or a duty to warn of such third-party actions where the defendant "should realize through special facts within his knowledge or a special relationship that an act or omission exposes another to an unreasonable risk of harm" (***In re Agent Orange Product Liability Litigation***, 597 F Supp 740, 832 [ED NY 1984]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]).

The plaintiffs have raised an issue of fact whether Santamaria had actual knowledge of Bonfiglio's prior inappropriate behavior and a duty to warn them about interacting with Bonfiglio. This is true despite the defendants' contention that the interactions between the infant plaintiff and Bonfiglio occurred after Bonfiglio was no longer employed by them. It has been held that, "[g]enerally, issues of proximate cause are for the fact finder to resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 748, 853 N.Y.S.2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 695, 843 N.Y.S.2d 432 [2d Dept 2007]; *see also* ***Derdiarian v Felix Contractor Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). In addition, this is true despite the question, not addressed by the parties, whether public policy would preclude this cause of action against Santamaria.

Accordingly, the plaintiffs' fifth, and seventh causes of action are dismissed, the plaintiffs' second cause of action is dismissed to the extent that the branch of the cause of action for negligent hiring is dismissed, and the plaintiffs' eighth cause of action is dismissed to the extent that it is asserted against the defendants Zenker and Empire. In addition, the plaintiffs have failed to raise issues of fact regarding their fourth, ninth, tenth, twelfth and thirteenth causes of action. In viewing the evidence in the light most favorable to the plaintiffs, the Court finds that the adduced facts are insufficient to show any intention on the part of the defendants to cause the infant plaintiff severe emotional distress (citations omitted), that the defendants had a duty to train their employees or others about sexual abuse (citations omitted), that they owed a fiduciary duty to the plaintiffs, that they misrepresented or

incorrectly imparted any information about Bonfiglio to the plaintiffs, or that they engaged in any physical conduct or contact with the infant plaintiff. Accordingly, the plaintiffs' fourth, ninth, tenth, twelfth and thirteenth causes of action are dismissed.

In demonstrating that there are issues of fact requiring a denial of the defendants' motion for summary judgment as to their second and eighth causes of action, the plaintiffs also have established the viability of Higgins' derivative claim in their fourteenth cause of action.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: March 26, 2019

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**