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SHORT FORM ORDER

INDEX No. 12-27376
CAL. No. 19-00131OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 6-20-19
ADJ. DATE 10-8-19
Mot. Seq. # 004 - MG; CASEDISP

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COLIN BURDO,

Plaintiff,

- against -

COLD SPRING HARBOR CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 39 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 36 - 37 ; Replying Affidavits and supporting papers 38 - 39 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Cold Spring Harbor Central School District for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Colin Burdo on or about June 6, 2011, at approximately 11:00 p.m., during an overnight school trip to a YMCA facility known as Greenkill, located in Hueguenot, New York. The overnight school trip was organized by Lloyd Habor School (Lloyd Harbor), which is located within defendant Cold Spring Harbor School District. Plaintiff, a sixth grade student at the time of the incident, allegedly was assaulted, bullied, and harassed by fellow sixth grade students. Plaintiff alleges claims for negligent supervision, negligent training, negligent investigation, and negligent reporting.

Defendant now moves for summary judgment dismissing the complaint. Defendant argues, in part, that it provided adequate supervision on the trip. Defendant contends that there were no prior incidents of

similar conduct on its previous overnight trips. It also contends that the students involved in the alleged incident did not have a disciplinary history or prior reported incidents with plaintiff. Defendant also contends that it cannot be held liable for negligent training, arguing, in part, that its employees did not cause or contribute to the subject incident. Further, defendant argues that the claims for negligent investigation and negligent reporting must be dismissed. It argues, in part, that any alleged failure to investigate was not the proximate cause of plaintiff's injuries, and that it had no duty to report the subject incident to any authority or agency. In support of its motion, defendant submits, among other things, the transcripts of the testimony from plaintiff and William Burdo's hearings held pursuant to General Municipal Law § 50-h, and the transcripts of the deposition testimony of plaintiff, Valerie Rose Massimo, Carolyn Christ, Robin DeLuca-Acconi, Kurt Simon, and Christine Burdo. In opposition, plaintiff contends that triable issues of fact remain as to whether defendant provided adequate supervision, and whether the alleged incident was foreseeable. In support of his opposition, plaintiff submits copies of school records.

Plaintiff appeared for a statutory hearing on August 16, 2012. Plaintiff testified that the Greenkill trip was an overnight trip, which lasted for three days and two nights. Plaintiff also testified that before leaving for the trip, each student wrote the names of students who he or she requested to be in his or her assigned rooms for the trip. Plaintiff stated that he requested that Lucas Ciriello, JD Patti, Jack Reilly, and JP Gaccione be assigned to his room, and that those four students were assigned to share a room with him on the field trip. Plaintiff allegedly had no concerns regarding the trip prior to the incident.

At his statutory hearing, plaintiff testified that the chaperones advised the students on appropriate behavior in the dorm upon their arrival. Prior to the incident, students allegedly were instructed to turn off the lights in their dorms at approximately 10:30 p.m. According to plaintiff's testimony, the lights remained turned on in his dorm after 10:30 p.m. Plaintiff testified that no other students entered his room before he fell asleep at approximately 11:30 p.m. Plaintiff further stated that he did not hear any yelling or noise coming from other rooms in the dorm. Plaintiff allegedly did not wake up during the night and had no independent recollection of the incident. According to plaintiff's testimony, he had no prior bullying incidents or other problems involving Patti, Reilly, Gaccione, Macoy Marion, Christian Tartaglia, and Jack Demayo.

Plaintiff appeared for a deposition on January 20, 2016. Plaintiff testified that prior to the incident, he considered the students assigned to his room on the Greenkill trip to be his friends. Plaintiff testified that although he had prior problems with"mainly JD Patti" before the alleged incident, he was not concerned that there would be a problem during the trip. Plaintiff stated that the incidents involving Patti occurred in fourth, fifth, and sixth grade. According to plaintiff's deposition testimony, a chaperone verified that students were in their assigned room at 10:30 p.m. Plaintiff stated that he had no prior problems, such as bullying, on the trip. Plaintiff allegedly did not recall any students, teachers, or monitors coming into his assigned room after 10:30 p.m.

At his statutory hearing, plaintiff's father, William Burdo, testified that he had discussed bullying incidents involving plaintiff and fellow students with the school's psychologist, Dr. Moss, and the school's social worker, Robin DeLuca-Acconi after plaintiff had been bullied in the fourth grade. He further testified that he did not recall whether he had discussed any incidents involving Patti to school officials. Mr. Burdo

allegedly was unaware of any prior history between plaintiff and Reilly or Gaccione. Mr. Burdo stated that he did not make any requests regarding room assignments for the Greenkill trip.

Valerie Rose Massimo testified that she has been employed as the principal of Lloyd Harbor since approximately 2008. According to her testimony, a sixth grade trip to Greenkill had been held during the first three years of her tenure as Lloyd Harbor's principal. Massimo stated that there were no disciplinary issues arising from prior Greenkill trips. Massimo explained that all sixth graders were permitted to attend the Greenkill trips. Students allegedly were required to complete a code of conduct form before attending the trip.

Massimo testified that approximately 100 sixth graders from Lloyd Harbor and approximately 50 students from another elementary school known as West Side attended the 2011 Greenkill trip. Massimo also testified that there were approximately 15 chaperones supervising Lloyd Harbor students. The chaperones allegedly consisted of Massimo, the assistant principal, teachers, teachers' assistants, and teachers' aides. Massimo stated that there were both male and female chaperones.

According to Massimo's testimony, Lloyd Harbor students were assigned to one of three buildings. Female Lloyd Harbor students allegedly were assigned to a building, which included rooms occupied by 8 to 10 students. Male Lloyd Harbor students allegedly were assigned to a building, which included rooms occupied by 8 to 10 students, or a building, which included rooms occupied by 4 to 5 students. Massimo stated that plaintiff was assigned to the building which included rooms occupied by four to five students. Massimo stated that there were between four and six chaperones in the building, which included rooms occupied by four to five students. She allegedly did not recall the chaperone assigned to monitor plaintiff's room. When asked to describe that particular building, Massimo stated that the rooms were not adjoining, and that each room had a door leading to the hallway. She further stated that the rooms had windows, which could be opened and closed as desired by the students.

Massimo explained that the students were directed to return to their assigned room at a specified time in the evening, and that the chaperones were required to verify that all students had returned to their assigned room at such time before returning to their own rooms for the evening. Massimo stated that there were no chaperones present in the hallway from the time that all students were verified to be present in their assigned room until the time that the students were required to be awake. There allegedly was no tape placed across the door or placed on the handle of students' rooms.

Massimo testified that there were no other disciplinary incidents which occurred on the trip. She explained that incidents of student misbehavior would have been reported to her. Massimo allegedly learned about the subject incident from an unknown parent after returning to the school from the trip. According to Massimo's testimony, an investigation was conducted by the school as a result of the incident. Massimo allegedly participated in the investigation by questioning certain students regarding the incidents.

Carolyn Christ testified that she has been employed as a special education teacher by defendant since 2007. She also testified that she was one of four chaperones assigned to the building known as Maple. Christ allegedly has no independent recollection of plaintiff. Christ stated that she only returned to her room

after she verified that students were in their assigned rooms, and she heard no noise coming from the students' rooms.

Robin DeLuca-Acconi testified that she was employed as a social worker for Lloyd Harbor in 2001. She stated that her job responsibilities included crisis management and counseling. She allegedly worked closely with Dr. Moss. DeLuca-Acconi testified that she had several interactions with Dr. Moss and plaintiff. She also testified that she was aware that plaintiff had difficulties controlling his emotions since second or third grade, which persisted until sixth grade. According to DeLuca-Acconi's testimony, DeLuca-Acconi attended prior sixth grade trips to Frost Valley and Greenkill, and she did not recall any disciplinary incidents occurring on these trips.

DeLuca-Acconi testified that she was a chaperone on the 2011 Greenkill trip. DeLuca-Acconi allegedly chaperoned students in the dorm known as Maple, along with Susan McManus, Laura Cervino, and Carolyn Christ. She allegedly did not recall seeing plaintiff in the dorm. When asked to describe the evening protocol on the trip, DeLuca-Acconi explained that the she verified that all students were in their assigned rooms, that she shut the door and instructed students to go to sleep, and that she reminded them of the time that they were required to wake up in the morning. DeLuca-Acconi testified that the rooms were not monitored all night, and that she was unaware of measures in place to prevent students from moving from one room to another room during the course of the night. According to her testimony, DeLuca-Acconi participated in the investigation conducted as a result of the incident. She allegedly did not recall any of the students who were suspended as a result of the investigation having a disciplinary history.

Kurt Simon stated that he was employed as assistant principal of Lloyd Harbor on the date of the incident. He further stated that his responsibilities as assistant principal included supporting the principal with disciplinary proceedings. Simon testified that he had attended all of defendant's overnight trips since 2003. According to Simon's testimony, he chaperoned the 2011 Greenkill trip. He testified that he had no independent recollection of the subject incident. He allegedly did not recall the chaperones assigned to plaintiff's room.

Plaintiff's mother, Christine Burdo, testified that she had discussions with Massimo regarding bullying instances involving plaintiff since plaintiff was a third grader. She allegedly never discussed bullying instances involving Patti or Tartaglia. Mrs. Burdo testified that there were no prior physical altercations involving plaintiff and Patti or Tartaglia. According to her testimony, plaintiff continued to have problems with other students in sixth grade prior to the Greenkill trip. She testified that prior to the trip, she did not recall any students in particular who had bullied him. Mrs. Burdo allegedly was informed about the incident by another parent before 3:00 p.m. the day after the students returned from the Greenkill trip. She stated that the principal called her before 3:30 p.m. that same day regarding the incident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once

the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; *see* ***M.P. v Central Islip Union Free Sch. Dist.***, 174 AD3d 636, 101 NYS3d 898 [2d Dept 2019]; ***Jackson v Brentwood Union Free Sch. Dist***, 173 AD3d 985, 104 NYS3d 148 [2d Dept 2019]; ***B.T. v Bethpage Union Free Sch. Dist.***, 173 AD3d 806, 103 NYS3d 99 [2d Dept 2019]). Schools must exercise the degree of care as an ordinary parent would under the same circumstances (*see* ***Stephenson v City of New York***, 19 NY3d 1031, 954 NYS2d 782 [2012]; ***Mirand v City of New York***, *supra*; ***Palopoli v Sewanhaka Cent. High Sch. Dist.***, 166 AD3d 639, 87 NYS3d 207 [2d Dept 2018]). However, schools are not insurers of safety and cannot reasonably be expected to continuously supervise and control all of their students' movements and activities (*see* ***B.J. v Board of Educ. of the City of N.Y.***, 172 AD3d 693, 100 NYS3d 51 [2d Dept 2019]; ***Chiauzzi v Sewanhaka Cent. High Sch. Dist.***, 170 AD3d 1106, 94 NYS3d 880 [2d Dept 2019]; ***Ponzini v Sag Harbor Union Free Sch. Dist.***, 166 AD3d 914, 87 NYS3d 566 [2d Dept 2018]).

Where the complaint alleges negligent supervision in the context of injuries caused by a fellow student's intentional acts, the plaintiff must generally demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the fellow student's conduct could be anticipated or was foreseeable (*see* ***Meyer v Magalios***, 170 AD3d 1163, 97 NYS3d 265 [2d Dept 2019]; ***Palopoli v Sewanhaka Cent. High Sch. Dist.***, *supra*; ***Guerriero v Sewanhaka Cent. High Sch. Dist.***, 150 AD3d 831, 55 NYS3d 85 [2d Dept 2017]). Actual or constructive notice to the school of prior similar conduct is generally required (*see* ***M.C. v City of New York***, 173 AD3d 728, 102 NYS.3d 702 [2d Dept 2019]; ***Meyer v Magalios***, 170 AD3d 1163, 97 NYS3d 265 [2d Dept 2019]; ***Gaston v East Ramapo Cent. Sch. Dist.***, 165 AD3d 761, 85 NYS3d 525 [2d Dept 2018]). Schools generally will not be held liable for the impulsive, unanticipated act of a fellow student (*see* ***Gaston v East Ramapo Cent. Sch. Dist.***, *supra*; ***K. J. v City of New York***, 156 AD3d 611, 65 NYS3d 522 [2d Dept 2017]; ***RT v Three Vil. Cent. Sch. Dist.***, 153 AD3d 747, 59 NYS3d 483 [2d Dept 2017]). Reports of prior incidents at a school may be material and necessary to determine whether school officials had actual or constructive notice of conduct similar to the subject incident (*see* ***M.C. v City of New York***, *supra*; ***Culbert v City of New York***, 254 AD2d 385, 679 NYS2d 148 [2d Dept 1998]). A plaintiff must also establish that the alleged breach of the duty to provide adequate supervision was a proximate cause of his or her injuries (*see* ***Mirand v City of New York***, *supra*; ***Gaston v East Ramapo Cent. Sch. Dist.***, *supra*; ***SM v Plainedge Union Free Sch. Dist.***, 162 AD3d 814, 79 NYS3d 215 [2d Dept 2008]). The adequacy of a school's supervision of its students and whether inadequate supervision was the proximate cause of the plaintiff's injury are generally questions of fact for

the fact finder to resolve (*see* ***Gaston v East Ramapo Cent. Sch. Dist.***, *supra*; ***K.J. v City of New York***, *supra*; ***RT v Three Vil. Cent. Sch. Dist.***, *supra*).

Here, defendant established, prima facie, that the alleged incident was unforeseeable, and that it had no actual or constructive notice of prior conduct similar to subject incident (*see* ***Sacino v Warwick Val. Cent. Sch. Dist.***, 138 AD3d 717, 29 NYS3d 57 [2d Dept 2016]; ***Maldari v Mount Pleasant Cent. Sch. Dist.***, 131 AD3d 1019, 17 NYS3d 48 [2d Dept 2015]; ***Harrington v Bellmore-Merrick Cent. High Sch. Dist.***, 113 AD3d 727, 978 NYS2d 868 [2d Dept 2014]). Defendant submitted evidence that the students involved in the incident did not have a disciplinary history, and that they had never been involved in a prior physical altercation with plaintiff (*see* ***Brandy B. v Eden Cent. School Dist.***, 15 NY3d 297, 907 NYS2d 735 [2d Dept 2010]; ***Braun v Longwood Jr. High Sch.***, 123 AD3d 753, 997 NYS2d 744 [2d Dept 2014]; ***Diana G. v Our Lady Queen of Martyrs Sch.***, 100 AD3d 592, 953 NYS2d 640 [2d Dept 2012]). According to plaintiff's statutory hearing testimony, he had no prior incidents with the students involved in the subject incident. Although plaintiff later testified at his deposition that he had prior incidents with Patti, such testimony contradicted his previous testimony and raised only a feigned factual issue, which was insufficient to defeat defendant's motion for summary judgment (*see* ***Ventura v County of Nassau***, 175 AD3d 620, 107 NYS3d 369 [2d Dept 2019]; ***Johnson v Braun***, 120 AD3d 765, 991 NYS2d 351 [2d Dept 2014]; ***Mallory v City of New Rochelle***, 41 AD3d 556, 836 NYS2d 426 [2d Dept 2007]). In opposition, plaintiff failed to raise a triable issue of fact *(see* ***Alvarez v Prospect Hosp.***, *supra*).

The complaint must be dismissed to the extent that it alleges a claim for negligent investigation. New York does not recognize causes of action sounding in negligent investigation (*see* ***Juerss v Millbrook Cent. Sch. Dist.***, 161 AD3d 967, 77 NYS3d 674 [2d Dept 2018], *lv denied* 32 NY3d 903, 84 NYS3d 857 [2018]; ***Hines v City of New York***, 142 AD3d 586, 37 NYS3d 136 [2d Dept 2016]; ***Coleman v Corporate Loss Prevention Assoc.***, 282 AD2d 703, 724 NYS2d 321 [2d Dept 2001]). The claim for negligent reporting must also be dismissed. By his complaint, plaintiff alleges that defendant was negligent in failing to report the incident to authorities and/or agencies. Social Services Law § 420 does not impose civil liability based on negligent reporting (*see* Social Services Law § 420 [2]). As all other causes of action asserted in the complaint have been dismissed, the remaining cause of action alleging negligent training must be also dismissed (*see* ***Zetes v Stephens***, 108 AD3d 1014, 969 NYS2d 298 [4th Dept 2013]; ***Cotter v Summit Sec. Servs., Inc.***, 14 AD3d 475, 788 NYS2d 153 [2d Dept 2005]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint is granted.

Dated: February 25, 2020

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION