

S.K. v Camp Shane, Inc.

2023 NY Slip Op 32910(U)

February 21, 2023

Supreme Court, Westchester County

Docket Number: Index No. 59823/2020

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
S. K.,

Plaintiff,

**Part CVA-R
Index No. 59823/2020
Motion Seq. No. 002**

-against-

DECISION AND ORDER

**CAMP SHANE, INC. and DOES 1-5 whose identities
are unknown to Plaintiff,**

Defendants.

-----X
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:

Defendant’s Notice of Motion, Affirmation & Exhibits.....	1
Plaintiff’s Affirmation in Opposition & Exhibits.....	2
Defendant’s Reply.....	3

Nearly forty years ago, when plaintiff was 11 and 12 years old, a camp counselor engaged in sexual conduct with him at the Camp Shane sleepaway camp during two successive summers. At the time, plaintiff told no one of authority at the Camp of the incidents. When the Camp owners were finally alerted to the abuse several summers later, they removed the counselor from the Camp. Plaintiff returned to the Camp as a counselor for several years thereafter. Following the passage of the Child Victims Act in 2019, plaintiff brought this action against the Camp, alleging that its negligence led to the incidents. The Camp now moves, pursuant to CPLR 3212, for summary judgment dismissing the action against it. For the reasons set forth below, its motion is granted.

BACKGROUND

Plaintiff began attending Camp Shane in the summer of 1983 when he was 10 years old.¹ Peter Zaragoza was a counselor at the Camp. Zaragoza was in plaintiff's bunk that first summer but there was no sexual activity between the two.

The following summer, plaintiff again attended the Camp. During the latter half of that second summer, at Zaragoza's urging, plaintiff and Zaragoza masturbated in each other's presence in an office next to the stage in the Camp's auditorium. There were one or two other similar incidents that summer and, on at least one occasion, Zaragoza touched plaintiff's penis. All of this conduct occurred in the same office. Plaintiff did not tell anyone of these incidents.

Another individual, who attended the Camp in 1984 and 1985, has attested that in 1984 she saw Zaragoza alone with plaintiff in the office, hugging and kissing, and once saw ejaculate in a can in the office after she had walked in on the two of them. But the camper does not state that she informed any Camp employee of what she observed.

Plaintiff and Zaragoza returned to the Camp during the summer of 1985. Plaintiff informed Zaragoza that he did not wish to engage in any further sexual activity. After Zaragoza pleaded, plaintiff agreed to kiss Zaragoza and Zaragoza performed oral sex on him. There were 4 or 5 subsequent sexual interactions between the two, during which Zaragoza would perform oral sex on plaintiff or they would masturbate in each other's presence. On each occasion the acts took place in the same office as before and was not observed by anyone. Towards the end of the summer, plaintiff repelled a sexual advance made by Zaragoza and no further incidents thereafter occurred. Plaintiff did not tell anyone of these episodes in 1985, except he may have discussed them with another camper who informed plaintiff of similar sexual incidents with Zaragoza.

¹ The facts as set forth by the court are consistent with evidence submitted by plaintiff, including his 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. *Sheryll v. L & J Hairstylists of Plainview, Ltd.* 272 A.D.2d 603 (2d Dept. 2000). This court is making no findings of fact.

Zaragoza did not work at the Camp in 1986, although plaintiff attended the Camp that year. During that summer, plaintiff told his girlfriend and another camper of the abuse, but there is no evidence that they informed anyone. Plaintiff did not attend the Camp in 1987.

In the summer of 1988, both plaintiff and Zaragoza attended the Camp. Plaintiff then informed Selma and Irving Ettenberg, the now-deceased owners of the Camp, as well as two head counselors, of the abuse that occurred the previous summers. Zaragoza was removed from the Camp.

Plaintiff thereafter attended the Camp for two more summers after 1988 as a counselor.

LEGAL ANALYSIS

As noted above, plaintiff was able to bring his action long after the claimed events as a result of New York State's enactment in 2019 of the Child Victims Act (L. 2019 c.11) ("CVA") which, *inter alia*, revived civil actions involving certain sex offenses committed against children under 18 for which the statute of limitations had already run. The CVA opened a window for victims of childhood sexual abuse to commence an action against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the abuse. *See, Meyer v. State*, __A.D.3d __, WL 1808072 (2d Dept. 2023).

Plaintiff's complaint against the Camp contains causes of action for negligence; negligent hiring supervision and retention; and negligent infliction of emotional distress. To prevail on each of these claims plaintiff must establish that the Camp was on notice of Zaragoza's propensity to sexually abuse minors at the Camp, such that his acts could be anticipated or were foreseeable. *Nevaeh T. v. City of New York*, 132 A.D.3d 840 (2d Dept. 2015). Because plaintiff has no evidence of such knowledge, actual or constructive, his claims must be dismissed.

A necessary element of a cause of action alleging negligent hiring, retention or supervision of an employee is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury. *Fuller v. Family Services of*

Westchester, Inc., 209 A.D.3d 983 (2d Dept. 2022). 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 regarding the hiring and retention of the employee. *Roe v. Domestic and Foreign Missionary Society of the Protestant Episcopal Church*, 198 A.D.3d 698, 701 (2d Dept. 2021).

Specifically, with respect to plaintiff's claim alleging negligent hiring, "the 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. Center*, 33 A.D.3d 875, 879 (2d Dept. 2006).

Where, as here, a complaint also alleges negligent supervision of a child stemming from injuries related to an individual's intentional acts, "the plaintiff generally must demonstrate that the [defendant] 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 at 842, 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 (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).

Here, plaintiff concedes that the abuse always occurred in an office, generally unobserved, and that he did not alert any Camp employee of the abuse. Plaintiff relies on two evidentiary submissions to support his opposition to the motion: (1) an affidavit from the camper who observed plaintiff and Zaragoza kissing and (2) testimony of the Ettenbergs' son, who worked part-time at the Camp during the relevant time. But the camper does not attest that she informed anyone of what she saw, reported any suspicions to anyone or observed others nearby. The Ettenbergs' son testified that campers were "never alone," they were "always with staff." But this does not assist plaintiff since he was *not* alone—he was

with a Camp staffer, albeit someone who caused him harm, and there is no evidence that any Camp policy concerning his supervision was violated. The son also testified that he was unaware of any abuse by Zaragoza. The testimony submitted by both the Camp and plaintiff is consistent with the Camp's claim of lack of notice of any abuse by Zaragoza and is not contradicted.

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. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *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 regardless of the sufficiency of the opposing papers. *Alvarez*, 68 N.Y.2d at 324; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *US Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Furthermore, as a general rule, a defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof, but must affirmatively demonstrate the merit of its claim or defense. *Reed v. Watts Water Technologies, Inc.*, __A.D.3d __ WL 219927 (2d Dept. 2023); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008). Only when a movant has shown a *prima facie* right to summary judgment does the burden ordinarily shift to the opposing party to show that a factual dispute exists requiring a trial. *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).

Here, it is a close question as to whether the Camp has met its burden. But given the atypical circumstances of this case, the heavy burden ordinarily placed on summary judgment movants must be tempered by the reality that the Camp is required to defend actions that took place nearly 40 years ago. The Camp has been placed in this difficult posture because of the CVA revival window. The CVA has served the salutary goal of providing to victims of sexual abuse an opportunity to hold those responsible for the abuse

accountable. *See, Meyer v. State*, 2023 WL 1808072. But it also brought forth “difficulties inherent in document, deposition and other discovery in matters of this type and age.” 22 NYCRR §202.72 (4). Statutes of limitations typically serve to prevent such difficulties and are enacted to afford protections to defendants. *Flanagan v. Mount Eden General Hospital*, 24 N.Y.2d 427, 429 (1969).

The primary consideration underlying [statutes of limitations] is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the ‘evidence has been lost, memories have faded, and witnesses have disappeared.’

Id., quoting *Developments in the Law Statutes of Limitations*, 63 Harv.L.Rev. 1177, 1185 (1950).

Institutional defendants in CVA actions may find themselves unable to locate material documents related to (1) the hiring, supervision and retention of employees, and (2) their relevant policies and procedures. Witnesses who could otherwise testify to events from long ago may be no longer employed, impossible to locate or deceased. Here, for example, the Camp no longer exists, having terminated its operations before this action was commenced. No records from the 1980s are available to access. The Ettenbergs are deceased. No one could be located who is familiar with the Camp’s hiring practices, protocols or procedures during the relevant period. Indeed, the individual(s) responsible for hiring employees is now unknown.

The summary judgment analysis employed by New York courts is a judicial procedural construct. *See Yun Tung Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 35-36 (2011)(Smith, J. concurrence). Its purpose, as with all interpretations of the requirements of New York’s Civil Practice Law and Rules, is meant “to secure the just, speedy and inexpensive determination” of civil proceedings. CPLR §104. But it would not be just to require a defendant to incur the cost, time and effort to defend an action at trial because, through no fault of its own, time has swept away the proof needed to prevail on summary

judgment. Nor are victims benefitted by prolonging the inevitable dismissal of their suit and requiring their participation in emotionally gut-wrenching trials they cannot win. Granting summary judgment is also consistent with the Legislature's intent that CVA actions be timely adjudicated (as evidenced by its directive that the Chief Administrator of the Courts promulgate rules for the timely adjudication of revived claims). *See* Judiciary Law §219-d.

By weeding out factually insufficient claims and defenses, summary judgment serves as an important tool for accomplishing the primary goal of the CPLR as spelled out in CPLR §104. *See One Step Forward, Two Steps back: Summary Judgment after Celotex*, 40 Hastings L.J 53 (1988)(referring to Fed. R. Civ. P. 1, substantively identical to CPLR §104). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that Rule 56 of the Federal Rules of Civil Procedure—the Federal Rules' equivalent to CPLR 3212—"mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23. The Court further explained that the summary judgment rule "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Our courts are faced with a daunting backlog of actions waiting to be tried. No salutary purpose is served by piling on to this backlog revived cases that cannot be proved. It most certainly does not advance the principles upon which the CVA was based and the rationale of *Celotex* is particularly applicable under the unique circumstances of this case. A just determination can be reached now without putting the litigants through more heartache, delay and expense.

For the aforesaid reasons, the Camp's motion for summary judgment is granted and the action is dismissed.

Dated: February 21, 2023
Mineola, New York

ENTER:

/S

LEONARD D. STEINMAN, J.S.C.
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