Jane Doe-17784 v MercyFirst
2023 NY Slip Op 32915(U)
August 16, 2023
Supreme Court, Nassau County
Docket Number: Index No. 900067/2019
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
---X

JANE DOE-17784,

Plaintiff,

-against-

MERCYFIRST and COUNTY OF NASSAU,

Defendants.

---X

Part CVA-R
Index No. 900067/2019
Mot. Seq. Nos. 003-004

DECISION AND ORDER

LEONARD D. STEINMAN, J.

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

Defendant Mercyfirst's Notice of Motion, Affirmation & Exhibits............................1
Plaintiff's Affirmation in Opposition..2
Defendant Mercyfirst's Reply & Exhibits...3
Defendant Nassau's Notice of Motion, Affirmation & Exhibits.................................4

In this action plaintiff alleges that when she was approximately 13 and 14 years old while in foster care and a resident at defendant MercyFirst (then known as St. Mary's), a foster care group home facility, she engaged in repeated sexual activity with other residents and a staff member.[1] Despite on one occasion being caught engaging in such activity with her roommate, plaintiff's sexual encounters continued. MercyFirst now moves for summary judgment, pursuant to CPLR 3212, dismissing the action against it. But because MercyFirst has failed to demonstrate as a matter of law that, once known, it acted reasonably to prevent future sexual conduct by plaintiff, the motion is denied.[2]

BACKGROUND

[1] Plaintiff was born a male and transitioned to a woman after the events at issue.

[2] Defendant Nassau County has also moved for summary judgment and plaintiff expressly does not oppose such motion. As a result, Nassau County's motion (Mot. Seq. No. 004) is granted.

The salient facts are as follows.[3] Plaintiff was born in 1991. She was placed at MercyFirst in 2003, after staying at various other institutions since she was approximately five or six years old. MercyFirst is an institution for children with behavioral problems. Prior to her placement at MercyFirst, plaintiff was a troubled and defiant child. She was physically abused by her mother. At approximately five or six years old she was hospitalized after acting violently towards her grandmother, who was caring for her. She set fires. She thereafter spent nearly one year at a different hospital receiving psychiatric care. Plaintiff was then again hospitalized for violence towards animals.

While at MercyFirst plaintiff received mental health treatment. Plaintiff remained at MercyFirst until 2006. (She later was again placed in MercyFirst briefly in the Fall of 2006, but all references herein to plaintiff's MercyFirst residence relates to her initial placement.)

While at MercyFirst, at 14 years old, plaintiff often engaged in sexual activity with another resident, who became her roommate. Plaintiff and the roommate were eventually caught by a staff member while plaintiff was performing oral sex on the roommate. The roommate was transferred to another cottage. But that did not end the sexual activity between the two. Furthermore, plaintiff engaged in sexual activity thereafter with several other MercyFirst residents, as well as the staff member who caught her with her roommate.

LEGAL ANALYSIS

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

[3] The facts as set forth by the court are consistent with evidence submitted by plaintiff, including her deposition testimony. In the context of a summary judgment motion, a court is to view the evidence in a light most favorable to the opposing party and give such party the benefit of every favorable inference. *Sheryll v. L & J Hairstylists of Plainview, Ltd*. 272 A.D.2d 603 (2d Dept. 2000). This court is making no findings of fact.

Dept. 1996). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *US Bank N.A. v. Weinman,* 123 A.D.3d 1108 (2d Dept. 2014).

A defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *In re New York City Asbestos Litigation* (*Carriero)*, 174 A.D.3d 461 (1st Dept. 2019); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008).

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

Plaintiff's amended complaint contains causes of action against MercyFirst alleging negligence (Second and Third Causes of Action); negligent hiring (Fourth Cause of Action); negligent training and supervision (Fifth Cause of Action); negligent retention (Sixth Cause of Action); and negligent infliction of emotional distress ("NEID": Seventh Cause of Action). Plaintiff does not oppose MercyFirst's motion to the extent that it is directed at plaintiff's negligent hiring, supervision and retention claims. *See* Plaintiff's Memorandum of Law, p. 13. As a result, the Fourth, Fifth and Sixth Causes of Action are dismissed.

Plaintiff does not address MercyFirst's arguments in favor of dismissal of the NEID claim. This claim is subject to dismissal because it is duplicative of plaintiff's negligence claim (*see Fay v. Troy City School District*, 197 A.D.3d 1423 (3d Dept. 2021) and because plaintiff's safety was never placed in danger. *See Dolgas v. Wales*, WL 2795845 (3d Dept. 2023). "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his [or her] physical safety, or caused him [or her] to fear for his [or her] own safety." *Chiesa v. McGregor*, 209 A.D.3d 963, 966 (2d Dept. 2022), *quoting Borrerro v. Haks Group, Inc.*, 165 A.D.3d 1216, 1219 (2d Dept. 2018). As a result, the Seventh Cause of Action is dismissed.

To sustain her negligence claims, plaintiff must allege and prove (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985); *see also, Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 AD3d 600 (2d Dept 2013). MercyFirst argues that it cannot be held liable for any of the sexual activity engaged in by plaintiff because it had no notice of such activity and, therefore, it was not reasonably foreseeable. *See Danielenko v. Kinney Rent A Car, Inc.*, 57 N.Y.2d 198, 204 (1982). With respect to the incident in which plaintiff was observed engaging in sexual activity, MercyFirst argues that it took appropriate and reasonable steps to prevent further abuse by separating plaintiff from her roommate. But whether it did so or not is a question that a jury should properly determine.

MercyFirst owed a duty to adequately supervise the residents in its care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision. *See Mirand v. City of New York,* 84 N.Y.2d 44, 49 (1994); *Doe v. Rohan*, 17 A.D.3d 509, 511 (2d Dept. 2005); *Doe v. Orange–Ulster Bd. of Coop. Educ. Servs.,* 4 A.D.3d 387, 388 (2d Dept. 2004). "This duty [of care] derives from the fact that the [facility], in assuming physical custody and control of the [residents], takes the place of the parents or guardians, and therefore acts in loco parentis." *Hauberger v. McMane*, 211 A.D.3d 715 (2d Dept. 2022). "It is well settled that 'a [foster care facility] owes its [residents] such care as a parent of ordinary prudence would observe in comparable circumstances.'." *Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004), *quoting Doe v. Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 A.D.3d at 388.

"In order to find that a school or a foster care facility has breached its duty to adequately supervise the children entrusted to its care, a plaintiff must establish that the school or facility 'had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated.'" *Liang v. Rosedale Group Home*, 19 A.D.3d 654, 655 (2d Dept. 2005). MercyFirst has failed

to eliminate all issues of material fact with respect to whether it breached its duty to provide plaintiff with adequate supervision once it knew that she was engaging in sexual activity and, therefore, it has not satisfied its *prima facie* burden entitling it to summary judgment dismissing plaintiff's negligence claim.

In contrast to the facts in *Liang*, here MercyFirst was on actual notice that plaintiff was engaging in sexual conduct. Plaintiff testified that the sexual activity with her roommate was also discussed with a psychiatrist and another MercyFirst staff member. Apart from plaintiff's concession at her deposition that her roommate was transferred to another cottage when they were caught *in flagrante delicto*, MercyFirst has presented no evidence reflecting any other action—therapeutic, physical, administrative or otherwise—taken to protect plaintiff from engaging in future sexual activity.

Given plaintiff's known psycho-social history, it would not be unreasonable for a jury to conclude that it was foreseeable that merely switching roommates would be an ineffective response to the known danger. Because MercyFirst had an obligation to take reasonable measures to prevent future sexual activity by plaintiff, it is not material that it may not have been aware of the identity or history of plaintiff's future sexual partners or have been able to predict the precise nature of future incidents. When "the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs." *Bell v. Bd. of Educ. of the City of N.Y.*, 90 N.Y.2d 944,947 (1997), *quoting Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983); *see also Murray v. Research Foundation of State Univ. of N.Y.*, 283 A.D.2d 995 (4th Dept. 2001). MercyFirst's alleged negligence is akin to the failure of a school to properly ensure that a student does not harm herself while in its care. *See Peuple v. Longwood Cent. School Dist.*, 49 A.D.3d 837 (2d Dept. 2008).

As a result, to the extent that plaintiff's negligence claims rely on the assertion that MercyFirst was negligent in failing to prevent future sexual acts with plaintiff after she was caught engaging in such acts with her roommate, the motion is denied.[4]

All applications not specifically addressed herein are hereby denied.

The foregoing constitutes the Decision and Order of this court.

Dated: August 16, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.

[4] Plaintiff's negligence claims contain a hodgepodge of theories upon which the claims are based. They are hereby limited as discussed herein.