J.B. v Monroe-Woodury Cent. Sch. Dist.
2023 NY Slip Op 32916(U)
February 3, 2023
Supreme Court, Orange County
Docket Number: Index No. EF008215/2019
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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J.B.,

Plaintiff,

Part CVA-R
Index No. EF008215/2019
Mot. Seq. 004

-against-

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, MONROE-WOODBURY MIDDLE SCHOOL, AND MONROE-WOODBURY HIGH SCHOOL,

DECISION AND ORDER

Defendants.

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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:

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

In this action brought pursuant to New York's Child Victims Act (CVA), plaintiff alleges that between 1970 and 1973 he was sexually abused multiple times at the Monroe-Woodbury Middle and High Schools during medical examinations performed by Dr. Robert Binenfeld, a physician appointed by defendant Monroe-Woodbury Central School District. Binenfeld was retained by the District to conduct physical examinations of its students at its schools in connection with the students' desire to play school sports. The District now moves, pursuant to CPLR 3212, for summary judgment dismissing the claims against it. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

It is undisputed that Binenfeld was appointed and paid by the District to conduct physical examinations of its students, including plaintiff, at the District's schools. The District's records appear to reflect that Binenfeld was paid on a per-student basis for his

examinations and that he was not a District employee. It is contested whether the District required plaintiff to have his physical exam conducted by Binenfeld or whether he had the option to utilize his own physician on the occassions plaintiff was allegedly abuse.

Plaintiff asserts that when he was 13 years old and in the 7th grade, he was sexually abused by Binenfeld for the first time, during a sports physical that was conducted in the Middle School's nurse's office. Plaintiff was called down to the nurse's office, where he was signed in by the school nurse. Plaintiff alleges he was then left alone with Binenfeld in the examining room of the nurse's office behind a closed door. Binenfeld directed plaintiff to remove his pants and underwear. Binenfeld examined plaintiff's testicles, presumably for a hernia. Binenfeld then instructed the plaintiff to face the examining table and proceeded to penetrate his anus with his finger. Plaintiff believes from sounds that he heard that Binenfeld proceeded to masturbate while leaving his finger in plaintiff's anus for a few minutes. Binenfeld then informed plaintiff that he could leave. Binenfeld performed no tasks—apart from the hernia check—commonly associated with a physical examination for a person of plaintiff's age. Plaintiff never informed anyone what occurred.

Plaintiff testified that the same scenario repeated itself when plaintiff was attending middle school in the 8th grade. This time, when Binenfeld apparently finished masturbating he put three of his fingers in plaintiff's mouth; plaintiff believes that Binenfeld's semen was on his fingers. Binenfeld then warned plaintiff not to tell anyone.

Plaintiff had his third and final similar encounter with Binenfield when he had a sports physical the next year while attending high school in the 9th grade.

LEGAL ANALYSIS

The Complaint asserts causes of action against the defendants for (1) negligent hiring, retention and supervision (Count I); (2) negligence (Count II); (3) negligent infliction of emotional distress (Count III); (4) premises liability (Count IV); breach of fiduciary duty (Count V); breach of duty *in loco parentis* (Count VI); and (7) breach of statutory duties to report (Count VII).

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 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).

Defendants Monroe-Woodbury Middle and High Schools

Although the action names Union Grove Elementary School and Meadow Hill Elementary School as defendants, neither of these schools are legal entities subject to suit. Plaintiff does not contest this. As a result, all claims are dismissed as against these non-entities and the clerk is hereby directed to amend the caption accordingly.

Counts III, IV, V and VI

Plaintiff's claims alleging negligent infliction of emotional distress, premises liability, breach of duty *in loco parentis*, and breach of fiduciary duty are duplicative of plaintiff's claim alleging that the District was negligent in its oversight of plaintiff while he was at school. Each of these claims arise from the same facts and do not allege distinct damages. *Lawrence K. v. Westchester Day School*, 196 A.D.3d 637 (2d Dept. 2021); *Fay v. Troy City*

School District, 197 A.D.3d 1423 (3d Dept. 2021)(plaintiff may recover for emotional distress caused by defendants' alleged conduct under cause of action for negligence); *see also Mulligan v. Long Island Fury Volleyball Club*, 178 A.D.3d 1056 (2d Dept. 2019)(upholding negligent supervision claim but dismissing breach of fiduciary duty cause of action); *Torrey v. Portville Central School*, 66 Misc.3d 1225(A)(Sup.Ct. Cattaraugus Co. 2020). Therefore, these claims are dismissed.

Breach of Statutory Duties to report (Count VII)

Plaintiff alleges that the District breached its alleged duty to report Binenfeld's abuse under New York's Social Services Law §§413 and 420. In *Hanson v. Hicksville Union Free School District*, 209 A.D.3d 629 (2d Dept. 2022), the Second Department held that a schoolteacher generally is not a "person legally responsible" for a student's care and, as a result, a school district has no duty under the Social Services Law to report a teacher's sexual abuse of a student. *Hanson*, 209 A.D.3d at 631. Applying the rationale of *Hanson* to the facts of this action, Binenfeld was not a person legally responsible for plaintiff's care. Furthermore, there is no evidence that the District was notified or aware of the alleged abuse of plaintiff. Plaintiff testified that he told no one of the abuse until many years later. Plaintiff has not contested dismissal of this claim and it is, therefore, dismissed.

Negligent Hiring, Retention and Supervision (Count I); Negligence (Count II)

The District argues that it cannot be held liable for negligence or the negligent hiring, retention and/or supervision of Binenfeld because he was an independent contractor. A principal is not liable for the acts of an independent contractor, the District asserts, since a principal cannot control the manner in which the work is performed (citing *Chainani v. Bd. of Educ. of City of New York*, 87 N.Y.2d 370 (1995). Although this is true as a general proposition, a school district nevertheless has a duty of care while children are in its physical custody or orbit of authority. *Id*. at 378. Furthermore, as recognized in *Chainani* in the context of transportation services, where a "school chooses to provide [medical] services it must do so in a careful and prudent manner including" establishing a proper location and protocol for such services. *Id*. at 378, 379.

Although the District may not be vicariously liable for Binenfeld's conduct—even if he was an employee (*see N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247 (2002); *Montalvo v. Episcopal Health Services, Inc.*, 172 A.D.3d 1357 (2d Dept. 2019))—the District may be liable if its *own* conduct was negligent.

> Although an employer cannot be held vicariously liable "for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business," the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee. . . . 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 respecting the hiring and retention" of the employee.

Johansmeyer v. New York City Dept. of Ed., 165 A.D.3d 634 (2d Dept. 2018) (internal citations omitted); *see also Bellere v. Gerics*, 304 A.D.2d 687, 688 (2d Dept. 2003)("a party may be held liable for a contractor's negligence under theories of negligent hiring, negligent retention, and negligent supervision").

Furthermore, a school district owes a duty to adequately supervise the students in its care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision. S*ee 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).

The court will now separately analyze the two negligence claims.

(a) <u>Negligent Hiring, Retention and Supervision</u>

"To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury." *Weinfeld v. HR Photography, Inc.*, 149 A.D.3d 1014, 1015 (2d Dept. 2017). The District has established, *prima facie*, that it had no knowledge that would lead a reasonable person to believe that Binenfeld had a propensity to sexually abuse the students he examined. It did so by

demonstrating: (1) through its search of board minutes and other available documents that there is no record of any complaint lodged against Binenfeld; (2) through plaintiff's testimony that plaintiff's mother—who worked as a teacher in the middle school during the relevant time period and taught there for 33 years—"spoke very highly of Binenfeld"; and that plaintiff never informed anyone of the abuse and never heard a classmate speak of being abused by Binenfeld.

In opposition, plaintiff has failed to raise an issue of fact that the District knew or should have known of any propensity of Binenfeld to abuse students. *See Shor v. Touch-N-Go Farms, Inc.*, 89 A.D.3d 830 (2d Dept. 2011). Certainly, Binenfeld's style of dress is of no significance. Therefore, this cause of action is dismissed.

(b) Negligence

The District has failed to eliminate all issues of material fact with respect to whether the Board breached its duty to provide its students with adequate supervision and, therefore, it has not satisfied its *prima facie* burden entitling it to summary judgment dismissing plaintiff's negligence claim.

"This duty [of care] derives from the fact that the school, in assuming physical custody and control of the students, 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 school owes its students 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. "[S]chools have a duty to adequately supervise the students in their care, and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision." *Wienclaw v. East Islip Union Free School District*, 192 A.D.3d 945, 946 (2d Dept. 2021).

Plaintiff alleges that on three occasions he was summoned to the school's nurse's office for a physical examination, checked in by the school nurse, and then directed to an examining room in the nurse's office where he was allowed to be examined behind closed

doors with only Binenfeld present—notwithstanding that in each instance the nurse was nearby. On one occasion, the examination was performed in this fashion in the high school's nurse's office, notwithstanding testimony from a nurse who worked at the high school during the relevant time period that it was the school's practice to have a nurse present for the examination. The nurse further testified that this was also the practice in the elementary school and assumed—but had no first-hand knowledge—it was the practice in the middle school. The nurse further testified—as did the District's representative witness—that it generally would be inappropriate to permit a doctor to conduct a physical examination alone with a student behind closed doors.

The testimony concerning the District's practices in the elementary and high schools is sufficient evidence for a jury to draw the conclusion that the same practice was intended to be followed in the middle school. And the policy is evidence that the District foresaw the potential for harm to a student if the student was left alone with an examining physician. *See Ernest v. Red Creek Central School District*, 93 N.Y.2d 664, 672 (1999)(long-standing policy evidenced foreseeability of harm the policy sought to avoid).

As in *Bell v. Bd. of Educ. of the City of N.Y.*, 90 N.Y.2d 944 (1997), it cannot be said here that Binenfeld's abuse of a student was unforeseeable as a matter of law. A fact finder may conclude "that the very purpose of the school supervision was to shield vulnerable schoolchildren from such acts of" abuse. *Id*. at 947. 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." *Id.*, *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).

The Third Department's decision in *Geywits v. Charlotte Valley Central Sch. Dist.*, 98 A.D.3d 804 (3d Dept. 2012), does not mandate a different result. In *Geywits*, first grade students sued their school district alleging that their sexual abuse by a high school sophomore in the school's bathroom resulted from the District's negligence in supervising them. The court found that although there may be a question of fact concerning the

reasonableness of the supervision, it was not foreseeable that the students would be sexually assaulted in the bathroom—no such act had ever taken place previously. In contrast, it cannot be said as a matter of law that it is entirely unforeseeable that harm may befall a student who is instructed by a nurse to strip to his underwear—and here, plaintiff testified that he was instructed by Binenfeld to lower his underwear—and then left alone to be physically examined.

Whether it was negligent in the early 1970s for a school district to allow a student to be examined by a licensed physician alone is a difficult question, perhaps easier to answer in modern times. But the question is best resolved by a jury, hearing the circumstances of the particular case, the practices then followed and the standards of the times. In this case, plaintiff has certainly set forth enough evidence entitling him to hear a jury's answer.

To the extent that Count II of the complaint purports to allege reckless or willful misconduct—or fraud—it is dismissed. No evidence is presented that the failure to supervise plaintiff's examinations rose to the level of willful or reckless conduct. *See* 1 N.Y. PJI 3d 2:278 (act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others).

Due Process Challenge

The District argues that the CVA violates its due process rights under the State's Constitution. For the reasons set forth in this court's prior decisions rejecting due process arguments similar to the one made by the district, the motion is denied.[1] *See, e.g.*, May 11, 2020 Decision & Order in *ARK18 Doe v. Diocese of Rockville Centre*, Index No. 900016/19 (Jaeger, J.). *See also Rubin v. Poly Prep Country Day School*, WL 187905 (Sup.Ct. Kings Co. 2023); *PB-36 Doe v. Niagara Falls City School District*, 72 Misc.3d 1052 (Sup.Ct. Niagara Co. 2022).

[1] This court became the Regional CVA Judge for the 9th and 10th Judicial Districts on January 1, 2022 upon Judge Jaeger's retirement. The doctrine of *stare decisis* compels that this court abide by Justice Jaeger's precedents, particularly since dedicated CVA parts were created in large part to achieve consistency in cases brought under the Act. "[T]he accident of a change of personalities in the Judges of a court is a shallow basis for jurisprudential evolution." *People v. Hobson*, 39 N.Y.2d 479, 491 (1976).

Punitive Damages

The District, as a public entity, may not be held liable for punitive damages. *Dixon v. William Floyd Union Free School Dist.*, 136 A.D.3d 972 (2d Dept. 2016). To the extent plaintiff seeks punitive damages as against it, such request is stricken.

All applications not specifically addressed herein are hereby denied.

This constitutes the Decision and Order of this court.

Dated: February 3, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.