SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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J.S.,

Plaintiff,

-against-

DUTCHESS COUNTY, DUTCHESS COUNTY DEPARTMENT OF BEHAVIORAL AND COMMUNITY HEALTH, DUTCHESS COUNTY DEPARTMENT OF COMMUNITY AND FAMILY SERVICES, NEWBURGH ENLARGED CITY SCHOOL DISTRICT, and ANDERSON CENTER FOR AUTISM a/k/a ANDERSON CENTER SERVICES INC. a/k/a ANDERSON SCHOOL a/k/a ANDERSON SPECIAL EDUCATION SCHOOL,

Defendants.

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Part CVA-R
Index No. 2021-53466
Mot. Seq. No. 002

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:

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

In this action, plaintiff alleges in or about 1968, he was sexually abused while attending defendant The Anderson Center for Autism a/k/a Anderson Center Services Inc., a/k/a Anderson School a/k/a Anderson Special Education School's specialized education program.[1] Plaintiff asserts claims against Anderson for: negligence (First Cause of Action); negligent hiring, retention, supervision, or direction (Second Cause of Action); breach of statutory duty to report abuse under N.Y. Social Services Law §§ 413 and 420 (Third Cause of Action); and premises liability (Fourth Cause of Action). Anderson now moves for

[1] At the time of the alleged abuse, the school was operated under the name "The Anderson School." It is undisputed that The Anderson School later became the "Anderson Center for Autism." For the purposes of this motion, the moving defendant entity will be referred to as "Anderson."

summary judgment pursuant to CPLR 3212, dismissing the complaint against it. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

In or about 1968, when he was approximately 13 to 14 years old, plaintiff was enrolled in the school for behavioral issues. Plaintiff lived in a private room at the school dormitory. During this time, a male staff member named "John" lived in the dormitory, working as a residential assistant. John, who was in his late 30s or early 40s, invited plaintiff to his room across the hall, had plaintiff unzip his pants, fondled plaintiff's penis, and proceeded to perform a "hand job" and oral sex on plaintiff.[2] A second sexual encounter occurred within the same week. More instances of sexual abuse ensued over a period of 3 to 6 months thereafter. The abuse always took place in John's room behind closed doors. Plaintiff concedes that he did not report the abuse to anyone at the school.

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 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)*, 1174 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

[2] 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.

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).

Anderson contends that it cannot be found liable for plaintiff's abuse because it had no corporate existence at the time – it was not incorporated until 1978 – and cannot be held liable to plaintiff under a theory of successor liability.[3]

At the time of the abuse, the school was an unincorporated family-owned business operating under the name "The Anderson School." According to Vance Gage, grandson of the founder of The Anderson School and co-operator and/or co-owner during the applicable time period, due to financial hardships, the owners of The Anderson School agreed to sell property and buildings in 1975.[4] A "Certificate of Conducting Business" under an assumed name for The Anderson School was filed on January 29, 1976 in connection with the sale by both the sellers and the buyers. Two days later, a "Certificate of Discontinuance of Business" under assumed name was filed by the sellers. In January of 1978, The Anderson School was incorporated as an educational incorporation. No evidence is presented as to the identity of the incorporators or the then-shareholders, directors or officers of the corporation, which continued to operate the school at the same premises. Nor is it known if the same employees and management operated the school or whether other indicia of goodwill—apart from keeping the name—were maintained, such as phone numbers, literature, logos, customer lists, procedures, etc.[5]

It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. However, there is an exception for cases in which there

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[3] Anderson also contends that plaintiff cannot rely on a successor-in-interest theory regardless because it is not properly plead in the complaint. But this argument fails. Successor liability need not be plead as a separate cause of action. *See Marcum LLP v. Fazio, Mannuzza, Roche, Tankel, Lapilusa, LLC*, 65 Misc.3d 1235(A)(Sup. Ct., Suffolk Cty. 2019). And plaintiff asserts in the complaint that reference to Anderson includes "that entity, its parent companies, subsidiaries, affiliates, predecessors, and successors." Complaint at ¶10.

[4] A representative of Anderson testified that the "property was sold to – not the business, not the school – but the property was sold to Delmar Properties…." January 6, 2023 Deposition Transcript of Patrick D. Paul, p.42.

[5] Plaintiff highlights that Anderson provided plaintiff's 1970-1971 school records in discovery and asserts that this demonstrates that Anderson (as it exists today) is a mere continuation of The Anderson School.

has been "a consolidation or merger of seller and purchaser." *In re New York City Asbestos Litig.*, 15 A.D.3d 254, 255–56, 789 N.Y.S.2d 484, 486 (2005). "A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of the seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction was entered into fraudulently to escape such obligations." *In re New York City Asbestos Litig.* at 256; *see also Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 245 (1983).

To determine whether a de facto merger took place, or whether a defendant is a mere continuation of a predecessor business, courts examine the following factors: continuity of ownership; cessation of ordinary business and dissolution of the predecessor as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and a continuity of management, personnel, physical location, assets, and general business operation. *See Menche v. CDx Diagnostics, Inc.*, 199 A.D.3d 678 (2d Dept. 2021); *Nationwide Mut. Fire Ins. Co. v. Long Island Air Conditioning, Inc.*, 78 A.D.3d 801 (2010).

Here, Anderson fails to sufficiently establish that no successor liability exists. Anderson proffers no legal authority to support the contention that because the business was not formally incorporated at the time of the abuse, it is shielded from liability. *See Samoleski v. Revival Home Health Care Agency*, 206 A.D.3d 678 (2d Dept. 2022)(summary judgment denied notwithstanding defendant's showing that defendant entity was not incorporated at time of alleged wrongdoing). It is immaterial whether the school previously was run as a sole proprietorship, partnership, joint venture or other business form; successor liability relates to the continuation of a *business*, not its form.

Since it is unclear from the record whether Anderson's ownership, operations, staff, and/or clientele were changed, or even interrupted, upon the sale of the "buildings" and "property," Anderson has failed to establish *prima facie* that it is not liable as a successor to the owners of the school at the time of the alleged abuse.

Anderson also contends that it cannot be held liable for the subject abuse because there was no notice of John's propensity to commit such abuse.

To sustain his negligence claims, plaintiff must allege and prove (1) a duty owed by the defendants to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985); *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *see also*, *Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 A.D.3d 600 (2d Dept 2013). "A necessary element of a cause of action alleging negligent retention or negligent supervision is that the 'employer knew or should have known of the employee's propensity for the conduct which caused the injury'." *Bumpus v. New York City Transit Authority*, 47 A.D.3d 653 (2d Dept 2008).

> 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).[6]

Similarly, 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 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." *Nevaeh T. v. City of New York*, 132 A.D.3d 840, 842 (2d Dept. 2015), *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, 49 (1994). 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).

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[6] Therefore, Anderson's argument that it cannot be held liable for the abuse because it was not within the scope of John's employment is unpersuasive.

Anderson seemingly relies on the acknowledgement by plaintiff that *he* never reported the alleged abuse to dispel potential liability. But Anderson fails to submit proof evidencing its lack of prior notice or the absence of complaints concerning its employee, John. Anderson cannot simply rely upon plaintiff's purported lack of ability to prove notice since, as noted above, as a general rule a defendant's burden on summary judgment cannot be satisfied merely by pointing to gaps in the plaintiff's proof, but rather a defendant must affirmatively demonstrate the merit of its defense. *Reed v. Watts Water Technologies, Inc.*, 212 A.D.3d 740 (2d Dept. 2023); *Vittorio v. U-Haul Co.*, 52 A.D.3d 823 (2d Dept. 2008); *Doe v. Orange-Ulster Bd. of Co-op. Educational Services*, 4 A.D.3d 387 (2d Dept. 2004). Anderson also fails to proffer any information as to its policies and procedures as it relates to: employees that lived at the school; supervision of residents; interactions between employees and residents etc.

Therefore, Anderson has failed to meet its *prima facie* burden entitling to dismissal of plaintiff's claims for negligence (First Cause of Action) and negligent hiring, retention, supervision, or direction (Second Cause of Action). And even if Anderson met its *prima facie* burden, a reasonable jury could find Anderson negligent in its supervision of John, plaintiff, or both, where a minor resident with behavior issues was able to leave his room undetected and spend time in an employee's private room, completely undetected, multiple times, over the course of several months, and that this negligence resulted in plaintiff's abuse. Accordingly, that branch of Anderson's motion seeking summary judgment on these negligence-based claims is denied.

With respect to plaintiff's claims for breach of duty under New York's Social Services Law §§413 and 420, there is no evidence that the abuse was reported to the school. Therefore, plaintiff's Third Cause of Action is dismissed. Plaintiff also seeks to hold Anderson liable under the theory of premises liability. However, this claim is duplicative of plaintiff's negligence claims since they arise from the same set of facts and does not seek distinct damages. They all allege that defendants acted negligently in allowing plaintiff to be sexually abused. As a result, plaintiff's Fourth Cause of Action is dismissed. *See Steven B. v. Westchester Day School*, 196 A.D.3d 624 (2d Dept. 2021).

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: August 16, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.