

**J.D. v Orange County**

2023 NY Slip Op 33376(U)

September 29, 2023

Supreme Court, Orange County

Docket Number: Index No. EF005666-2021

Judge: Leonard D. Steinman

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

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**J.D.,**

**Plaintiff,**

**-against-**

**Part CVA-R  
Index No. EF005666-2021  
Mot. Seq. No. 004**

**DECISION AND ORDER**

**ORANGE COUNTY, ENLARGED CITY SCHOOL  
DISTRICT OF MIDDLETOWN, MCQUADE  
FOUNDATION C/O ST. CHRISTOPHER’S INC., and  
MCQUADE CHILDREN’S SERVICES a/k/a  
MCQUADE FOUNDATION BOARDING SCHOOL,  
INC.,**

**Defendants.**

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**LEONARD D. STEINMAN, J.**

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

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

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In 1993, plaintiff J.D. was placed into the custody of Orange County’s Department of Social Services when he was 13 years old. Within a few months thereafter the County placed plaintiff at a boarding school located at 623 Blooming Grove Turnpike in New Windsor, New York, where, he asserts, he was sexually abused by a supervisor. Plaintiff’s complaint alleges claims of (i) negligence; (ii) negligent hiring, retention and supervision; (iii) premises liability; and (iv) breach of the duty to report the abuse pursuant to Social Services Law §§ 413 and 420.

Defendants St. Christopher’s Inc. and The McQuade Foundation d/b/a McQuade Children’s Services (“Moving Defendants”) now move for summary judgment dismissing

the claims against them pursuant to CPLR 3212.<sup>1</sup> For the reasons set forth below, their motion is granted in part and denied in part.

### **BACKGROUND**

Plaintiff was put into the custody of Orange County, which placed him at the boarding school in February 1994. Plaintiff attended and lived at the school, remaining there until the end of August, 1995. A few months after arriving at the school, plaintiff was sexually abused approximately five times in his cottage room by Cliff Webb, the supervisor of the cottage.<sup>2</sup>

Webb slept in the cottage on an alternating basis with other employees. Approximately three to four nights a week, Webb would go into plaintiff's room, sit on his bed and caress plaintiff while they talked. Webb would also go into other students' rooms late at night. Webb would occasionally beat students, including plaintiff, with a pool cue in the view of others, including staff.

During the course of the plaintiff's sexual abuse, Webb showed plaintiff special attention by, among other things, giving him money and allowing him to go out late at night.

Plaintiff did not directly tell anyone at the school of Webb's physical or sexual abuse of him. Webb also physically assaulted at least one other minor resident at the school and grabbed another student "sexually" by the waist.

### **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

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<sup>1</sup> By decision and order dated July 14, 2023, summary judgment was granted in favor of defendants Enlarged City School District of Middletown and Orange County.

<sup>2</sup> The facts as set forth by the court are consistent with the 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.

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).

### **Successor Liability**

Following a review of the Moving Defendants' submissions, it is unclear to the court who operated the school at the time of plaintiff's abuse. Plaintiff alleges and the Moving Defendants' Statement of Material Facts states at paragraph 15 that plaintiff was placed "at McQuade Children's Services a/k/a McQuade Foundation Boarding School." It is unclear if McQuade Children's Services was a legal entity and, if so, what corporate form it took (or its current form, if still in existence).

Plaintiff seeks to hold St. Christopher's liable as a successor to the operator of the school. But the identity of the current operator of the school is also unclear, as are the current and past relationships among St. Christopher's, The McQuade Foundation and McQuade Children's Services. The Moving Defendants argue that it is not a successor and that St. Christopher's is unaffiliated with McQuade Foundation, which it asserts ran the school. St. Christopher's asserts it has managed the school since 2012, when it took over its operations after the school had been closed for a few years. Although all of this is possible, the evidence submitted is far from clear.

As discussed below, Moving Defendants have submitted the affidavit of Robert Maher, a former "Vice President of the Board of Directors" of the defendant McQuade Foundation, who attests that St. Christopher's became the "sole member" of McQuade

Children’s Services in 2011.<sup>3</sup> He also states that the McQuade Foundation operated the boarding school in 1993, but further attests that the Foundation’s *first* board meeting was in 2011.

St. Christopher’s first contends that the action must be dismissed against it because of a pleading deficiency: it argues that the complaint fails to assert allegations specific to St. Christopher’s or adequately plead a theory of successor liability.<sup>4</sup> But these arguments fail. Since the instant motion is not addressed to the face of the complaint but rather is a motion for summary judgment, the sufficiency of the complaint is not in issue. *Tarantelli v. Tripp Lake Estates, Inc.*, 23 A.D.2d 905 (3d Dept. 1965). “A party is not permitted to avail himself of an imperfection in the pleading of his adversary to deprive the latter of a trial on an issue of fact.” *McIntyre v. State*, 142 A.D.2d 856 (3d Dept. 1988). On a motion for summary judgment premised on failure to state a cause of action the relevant criterion is not whether the proponent of the pleading has stated a cause of action, but whether that party has one. *Seidler v. Knopf*, 186 A.D.3d 889 (2d Dept. 2020). Therefore, this court must consider the evidentiary material proffered in addition to the pleadings to analyze whether St. Christopher’s has sufficiently demonstrated that it cannot be held liable under a theory of successor liability. *Id.*

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 has been “a consolidation or merger of seller and purchaser.” *In re New York City Asbestos*

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<sup>3</sup> McQuade Children’s Services originally answered the complaint herein, but in an Amended Answer describes itself as a d/b/a of McQuade Foundation. No evidence has been submitted to support this description and McQuade Children’s Services is a named defendant. Indeed, the Maher affidavit is the only evidence submitted that touches upon the legal existence of McQuade Children’s Services and supports the conclusion that it is or was an entity of some kind.

<sup>4</sup> This court notes that 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). The doctrine of successor liability does not create a new cause of action against the successor so much as it transfers the liability of the predecessor to the successor. *Id.* And plaintiff asserts in the complaint that reference to any defendant entity includes “that entity, its parent companies, subsidiaries, affiliates, predecessors, and successors.” Complaint at ¶14. Further, St. Christopher’s was clearly aware that plaintiff intended to assert a theory of successor liability since St. Christopher’s contends that such a theory does not apply in its own motion.

*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). For a successor corporation to establish entitlement to summary judgment on the ground that it is not liable for the debts of its predecessor, it must demonstrate that *none* of these exceptions applies. *Menche v. CDx Diagnostics, Inc.*, 199 A.D.3d 678 (2d Dept. 2021).

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, St. Christopher’s fails to sufficiently establish that no successor liability exists. St. Christopher’s is not necessarily entitled to summary judgment even if McQuade Foundation did not formally cease to exist, as St. Christopher’s argues. *See Menche v. CDx Diagnostics, Inc.*, 199 A.D.3d at 681 (if predecessor becomes a “shell” successor liability may be found). And it is not clear to the court that McQuade Foundation still exists. St. Christopher’s states at paragraph 17 of its Statement of Material Facts that “McQuade Foundation closed in 2009.” At page 10 of his affidavit, Maher refers to the “former McQuade Foundation.”<sup>5</sup>

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<sup>5</sup> No affidavit or testimony is presented from any active trustee, member, director or employee of the McQuade Foundation.

Maier also attests that at the Foundation's first board meeting it "delineated that St. Christopher's would be the sole member of McQuade's Children Services." The court does not know what this means since, as discussed above, it does not know what business form, if any, McQuade's Children Services operated under and whether *it* actually was the operator of the school. And if McQuade's Children Services operated the school and St. Christopher's took over those operations by effectively acquiring McQuade's Children Services by becoming its "sole member," this court cannot conclude as a matter of law that St. Christopher's is not the school operator's successor.

Finally, to confuse things even more, Liberato Carbone, the Chairman of the Board of St. Christopher's and its designated corporate representative, testified that "McQuade" "is the organization that operates [the] property" and that in 2012 St. Christopher's employees "might have started doing work for McQuade." 11/16/22 Carbone Transcript, pp. 24, 25. When asked if St. Christopher's had any role or responsibility for the residential facilities at the property in 2012, Carbone answered: "Subject to my same answer, through McQuade, I'm not – I don't know the details of how – of whether the employees were St. Christopher employees or McQuade employees, so I don't know." *Id.* at pp. 26, 27. He further stated that "McQuade is the entity that managed the facility and sort of reopened it to the best of my knowledge." *Id.* at 31. And Carbone did not know if any the employees of St. Christopher's previously worked for "McQuade" when St. Christopher's first began its involvement in 2012. *Id.* at 29.

Many facts may support St. Christopher's argument, principally the school's closure for several years prior to its reopening and its hiring of new personnel (assuming this is the case). But since the relationships among the school, McQuade's Children Services, McQuade Foundation and St. Christopher's at the time of the events and in 2012 are unclear from the record, St. Christopher's has failed to establish *prima facie* that it is not liable as a successor to the owners/operators of the school at the time of the alleged abuse.

## Negligence Claims

The Moving Defendants contend that they cannot be held liable for the subject abuse because they had no notice of Webb’s propensity to commit such abuse and no actual or constructive notice that the abuse took place.

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).<sup>6</sup>

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

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<sup>6</sup> Therefore, the Moving Defendants’ argument that they cannot be held liable for the abuse because it was not within the scope of Webb’s employment is unpersuasive.

as a parent of ordinary prudence would observe in comparable circumstances. *Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004).

The Moving Defendants seemingly rely on the acknowledgement by plaintiff that *he* never reported the alleged abuse to dispel potential liability. But the Moving Defendants fail to submit proof evidencing their lack of prior notice or the absence of complaints concerning Webb. The Moving Defendants 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). The Moving Defendants also fail to proffer any information as to McQuade's policies and procedures as it relates to: employees that lived at the school; supervision of residents; interactions between employees and residents etc. And the Moving Defendants offer no proof concerning the unavailability of records or witnesses.

Therefore, the Moving Defendants failed to meet their *prima facie* burden entitling them 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 the Moving Defendants met their *prima facie* burden, a reasonable jury could find them negligent in the supervision of Webb, plaintiff, or both, where: an employee was able to enter the room of a minor resident with behavior issues late at night, multiple times per week, completely undetected, over the course of several months; the minor resident was able to leave the premises late at night, also undetected; the minor resident was able to dispose of his blood-stained sheets, and presumably obtain replacement sheets, with no issue. Further, at plaintiff's request, he was transferred to a different cottage. Although plaintiff admits that he did not reveal the reason for his request – to get away from his abuser – there is no evidence that the Moving Defendants ever inquired with plaintiff about why he sought the transfer.

A defendant is on notice of an employee's propensity to engage in tortious conduct when it knows or should know of the employee's tendency to engage in such

conduct. *Moore Charitable Foundation v. PJT Partners, Inc.*, 40 N.Y.3d 150 ; WL 3956576 (2023). “An employer “should know” of an employee's dangerous propensity if it has *reason* to know of the facts or events evidencing that propensity, and may be liable if it nonetheless “place[s] the employee in a position to cause foreseeable harm.” *Id.* at \*4.

Here, Moving Defendants had actual notice of Webb’s propensity to act violently towards the residents under his charge since his beatings with a pool cue were observed by staff. The sexual acts Webb committed upon plaintiff were non-consensual—they were also acts of violence. Therefore, it cannot be said that a reasonable investigation of Webb’s conduct would not have prevented the harm committed to plaintiff. *Id.* ([T]he notice element is satisfied if a reasonably prudent employer, exercising ordinary care under the circumstances, would have been aware of the employee's propensity to engage in the injury-causing conduct).

Accordingly, that branch of the motion seeking summary judgment on these negligence-based claims is denied.

### **Premises Liability**

Plaintiff also seeks to hold defendants 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, Count III of the complaint is dismissed. *See Steven B. v. Westchester Day School*, 196 A.D.3d 624 (2d Dept. 2021).

### **Social Services Law**

Social Services Law § 413(1)(a) provides that certain officials “are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child.” *Brave v. City of New York*, 216 A.D.3d 728, 729 (2d Dept.2023). Social Services Law § 420(2) provides that “[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be civilly liable for the damages proximately caused by such

failure.” *Id.* Since Moving Defendants have not established that they did not have reasonable cause to suspect plaintiff’s abuse, they are not entitled to dismissal of this claim.

**Punitive Damages**

The Moving Defendants argue that they may not be held liable for punitive damages because there is no evidence or allegations to suggest support such an award. Plaintiff does not oppose defendants’ position. Therefore, plaintiff’s claim for punitive damages against the Moving Defendants is stricken.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: September 29, 2023  
Mineola, New York

**ENTER:**

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**LEONARD D. STEINMAN, J.S.C.**