SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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C.M., **Part CVA-R**

Plaintiff, **Index No. 614159/2020**

-against- **Mot. Seq. No. 002**

WEST BABYLON UNION FREE SCHOOL DISTRICT, a/k/a WEST BABYLON SCHOOL DISTRICT, WEST BABYLON JUNIOR HIGH SCHOOL, and WEST BABYLON BOARD OF EDUCATION, **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 Affirmation……..…….....3

In this action, plaintiff seeks damages resulting from alleged sexual abuse in 1972 through 1973 beginning when she was approximately 12-13 years old by two different teachers at the West Babylon Union Free School District school that plaintiff attended. Plaintiff asserts claims for negligence, negligent hiring, supervision, retention and direction, and breach of statutory duty to report under social services law against the defendants. The defendants now move for summary judgment pursuant to CPLR 3212. For the reasons set forth below, their motion is granted.

BACKGROUND

Plaintiff met Irving Bard, a band/music teacher within the District, when she was in eighth-grade. They first crossed paths in the band room and Bard offered to provide her with drum lessons. Plaintiff alleges that throughout that school year (1972-1973) she performed

oral sex on bard 1-3 times per week. [1] The acts took place in both the band room and Bard's office, during and after school hours. Plaintiff testified that she would sometimes miss class to meet Bard. Plaintiff did not tell anyone about Bard's abuse.

On one occasion, Bard introduced plaintiff to Joseph Biasi, a teacher at the school. During their introduction in Bard's office, Biasi coordinated to pick plaintiff up after school hours on the corner of the block that she lived on. When Biasi picked plaintiff up, he took her to a motel and they engaged in intercourse. This was the only instance of sexual abuse by Biasi.

Plaintiff claims that sometime after Biasi's abuse, a female teacher who was engaged to Biasi, approached plaintiff in the school hallway and warned plaintiff to stay away from him.[2] In response, plaintiff reported Biasi's abuse to the school's psychologist/therapist. Plaintiff did not report the abuse perpetrated by Bard. A few days later, at the request of Bard, plaintiff recanted her story. The abuse perpetrated by Bard stopped contemporaneously with plaintiff's report to the school psychologist.

The personnel files of Bard and Biasi contain, among other things, pre-hire references/letters of recommendation and positive teacher evaluation reports. No complaints of sexual abuse are contained in either file.[3]

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,

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[1] The facts as set forth by the court are consistent with the 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.

[2] Plaintiff does not argue that this interaction imputed notice to the District. However, even if the argument was made, the exchange would be insufficient to constitute notice to the District since it took place *after* all of the abuse alleged here occurred.

[3] Biasi's file indicates that 2 complaints were made in December 1970 concerning a student being struck on the shoulders and head with a book and another individual being punched by Biasi.

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).

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).

Negligence claims

To sustain her 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. 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 AD3d 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).

Similarly where, as here, a complaint also alleges negligent supervision of a minor 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 at 49. "[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); *see also Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004).

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.*, __N.Y.3d __, WL 3956576 (2023). "[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." *Id*. at *4.

The defendants satisfied their *prima facie* burden entitling it to summary judgment by providing the evidence available that it had no notice that Bard and/or Biasi had a propensity to sexually abuse students prior to plaintiff's alleged abuse in 1972-1973. There are no allegations of sexual abuse in either of their personnel files.

Although in a typical circumstance the absence of a complaint in a personnel file may not satisfy a defendant's *prima facie* burden, institutional defendants in Child Victim Act (CVA) cases may find themselves unable to locate material documents related to the hiring, supervision and retention of employees. This action, like many CVA actions, relate to events that occurred decades ago—here, over half a century ago. Witnesses who could otherwise testify to events from long ago may be no longer employed, impossible to locate or deceased.

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.

Here, plaintiff cannot prove her case. Plaintiff has failed to raise an issue of fact with respect to whether the defendants had actual or constructive notice that Bard and/or Biasi had a propensity to commit sexual abuse prior to the abuses of plaintiff. She has no evidence in this regard. Plaintiff herself testified that she told no one of Bard's abuse. She also testified that no abuse took place after she reported the one incident with Biasi to the school psychologist.

Further, plaintiff's argument that the District's 1969 policies demonstrate that the abuses were foreseeable is unpersuasive. Plaintiff does not argue that the District violated a policy or procedure resulting in her abuse. Rather, plaintiff refers to general policies that called for "conferences" to be conducted in an "appropriate place and manner" and employees of the District to avoid "exploiting" their professional relationship with any student. Although plaintiff argues that Bard was not supervised closely enough since he was able to spend time with plaintiff alone, behind closed doors, there was no District policy which prohibited this practice. And the fact that plaintiff sometimes missed class to meet Bard in the band room is not enough to put the defendants on notice that Bard was sexually abusing her.

With respect to plaintiff's claims concerning Biasi, it is undisputed that the abuse by Biasi consisted of one instance of offensive conduct that is alleged to have occurred in a motel, after school hours. Plaintiff testified that she only interacted with Biasi on one occasion at the school prior to the abuse. Plaintiff does not assert that any physical contact with Biasi took place at the school. Plaintiff asserts that after the abuse, she would sometimes see Biasi in the school hallways where he would "say hi" but the two of them never spent any time alone together at the school. *Cf. Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d at 636. Because all the offending conduct took place off school property and outside of school hours, the claim of negligent supervision over plaintiff with respect to Biasi's abuse must be dismissed. *Doe v. Hauppauge Union Free School Dist.*, 213 A.D.3d 809, 810 (2d Dept. 2023). A school is not liable for injuries that occur off school

property and beyond the orbit of its authority. *See Doe 1 v. Board of Educ. of Greenport Union Free School Dist.*, 100 A.D.3d 703, 705 (2d Dept. 2012); *Vernali v. Harrison Cent. School Dist.*, 51 A.D.3d 782, 783 (2d Dept. 2008).

Breach of duty under Social Services Law

Plaintiff alleges that the defendants breached their alleged duty to report the subject abuses 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, neither Bard nor Biasi were persons legally responsible for plaintiff's care and this claim is dismissed.

Punitive Damages

Even if this action was not dismissed, the defendants would be entitled to the striking of plaintiff's request for punitive damages.[4] 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).

Accordingly, the motion for summary judgment is granted and the complaint is dismissed in its entirety.

Any other relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: September 29, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.
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[4] Plaintiff does not oppose this branch of the defendants' motion.