P.O. v Jewish Bd. of Family & Children's Servs., Inc.
2023 NY Slip Op 33514(U)
October 10, 2023
Supreme Court, Westchester County
Docket Number: Index No. 57585/2020
Judge: Leonard D. Steinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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P. O.,

Plaintiff,

-against-

THE JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, INC. f/k/a JEWISH BOARD OF GUARDIANS; and THE BOARD OF TRUSTEES OF THE JEWISH BOARD OF FAMILY AND CHILDREN'S SERVICES, INC.; and THE HAWTHORNE CEDAR KNOLLS UNION FREE SCHOOL DISTRICT; and THE BOARD OF EDUCATION OF THE HAWTHORNE CEDAR KNOLLS UNION FREE SCHOOL DISTRICT,

Defendants.

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Part CVA-R
Index No. 57585/2020
Mot. Seq. Nos. 002-003

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 District's Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
School District's Reply.....3
JBFCS's Notice of Motion, Affirmation & Exhibits.....4
Plaintiff's Affirmation in Opposition & Exhibits.....5
JBFCS's Reply.....6

In this action, plaintiff alleges that between the years of 1982 or 1983 through 1985, when he was approximately 12 to 15 years old, he was sexually abused by Scott Mendelson, an employee at the Hawthorne Cedar Knolls Residential Treatment Facility– a residential facility (hereinafter the "facility") and seeks damages for his injuries. Plaintiff asserts claims against defendants for negligence and negligent supervision and retention.[1] Defendants The

[1] All other causes of action asserted in plaintiff's complaint were dismissed by Decision and Order dated April 1, 2021 (J. Jaeger).

Hawthorne Cedar Knolls Union Free School District and The Board of Education of the Hawthorne Cedar Knolls Union Free School District (hereinafter the "District defendants") and Jewish Board of Family and Children's Services, Inc. s/h/a The Jewish Board of Family and Children's Services, Inc. f/k/a Jewish Board of Guardians and The Board of Trustees of the Jewish Board of Family and Children's Services, Inc. ("JBFCS") now move for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the District defendants' motion is granted and JBFCS' motion is denied.

BACKGROUND

Plaintiff claims that beginning in 1982 when he was approximately 12 years old, and lasting through 1985, he was sexually abused by Mendelson, a "duty officer" in the cottage where plaintiff resided.[2] Plaintiff claims that Mendelson always touched him – rubbed his hair, squeezed his butt and put his hands between plaintiff's legs and "on [his] butt like a credit card swipe." Plaintiff observed Mendelson touching other minor residents the same way.

One weekend, when plaintiff was temporarily moved to a different cottage, Mendelson's abuse escalated. Mendelson brought plaintiff to an upstairs room in the cottage, closed the door, forcibly put his mouth on plaintiff's genitals and then used plaintiff's hand to masturbate himself. When Mendelson was done, plaintiff ran out of the room yelling. Mendelson bribed plaintiff with cigarettes to be quiet. Mendelson threatened that if plaintiff reported the abuse, plaintiff would never go home to his family.

During the course of the sexual abuse and after the last incident, Mendelson showed plaintiff special attention by, among other things, giving him cigarettes, alcohol, candy and food.

Plaintiff heard rumors from other counselors at the facility that Mendelson abused another resident.

[2] 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.

Plaintiff may have reported the abuse to a counselor. Soon after the abuse, plaintiff also reported the abuse to his biological brother while on a "home visit." Because of the abuse, plaintiff ran away from the facility on multiple occasions.

At the time of plaintiff's abuse, the facility was owned and/or operated by JBFCS. Although plaintiff attended a school operated by the District on the same property as the facility, the school was in a different building. The District did not have any management role at the facility.

With its opposition, JBFC submitted Mendelson's personnel file which contains, among other things, pre-hire reference letters/communications, post-hire performance evaluations and a November 1984 letter from the New York State Department of Social Services advising of a report of suspected child abuse or mistreatment.

In a November 1983 "telephone reference," a prior co-worker described Mendelson as having "problems establishing professional boundaries and presenting himself as an adult to the youngsters in his care" and "difficulties with other staff members due to his lack of discretion." The telephone reference indicated that Mendelson *might* work out [at JBFC] if he had "intense supervision."

In a November 29, 1984 inter-office memorandum, it is reported that Mendelson had an inappropriate conversation with a child in the infirmary which resulted in Mendelson ordering the child to take down his pants and Mendelson masturbating him. The incident was memorialized (to some degree) in a December 1984 grievance hearing evaluation by Norman E. Friedman, Director of the facility, who stated that Mendelson became involved with a minor without being directed to by any member of the supervisory staff, which resulted in Mendelson discussing with him "issues of sexuality, including the size of his penis, masturbation, and other matters."

In a November 1985 evaluation, Mendelson's supervisor reported that his focus for the future was to explore ways that Mendelson can "more appropriately handle his anger."

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)*, 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).

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).

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 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).

The District defendants' motion

The District contends that it cannot be held liable because it had no duty to supervise plaintiff at the time of the abuse and did not employ or have control over the abuser or the facility.

First, the District defendants have sufficiently demonstrated they did not hire, employ or supervise plaintiff's abuser. Raymond Raefski, Superintendent of the District, attests that, in accordance with its charter, the District solely provided educational services in the school building to students residing at the facility. The District defendants never supervised the students when they were at the facility and did not provide staffing or supervise staff at the facility.

Further, since all the offending conduct took place off school property and outside of school hours, the claim alleging negligent supervision of plaintiff 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). *Cf. Anglero v. New York City Bd. Of Educ.*, 2 N.Y.3d 784 (2004)(court found issue of fact as to whether school was liable for an off-premises assault where several teachers and a safety officer witnessed a previous attack on the victim on school grounds).

In opposition to the District's motion, plaintiff fails to raise an issue of material fact. There is nothing in the record to suggest that the District knew or should have known about abuse that took place off school grounds, after school hours and perpetrated by an individual not employed by the District. Therefore, the District defendants' motion for summary judgment is granted and the complaint is dismissed against them.

JBFCF's motion

JBFCF has failed to meet its *prima facie* burden entitling it to dismissal of plaintiff's negligence and negligent retention and supervision claims. JBFCF seemingly asserts that since there is no evidence that any of its employees saw the abuse perpetrated on plaintiff, notice cannot be established. But that is not the standard. 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 (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 158.

Here, JBFCF's personnel file of Mendelson reveals that it had actual notice of sexual abuse of another resident prior to plaintiff's abuse ceasing. Further, JBFCF also had actual notice of Mendelson's inability to handle his anger at work. The sexual acts Mendelson committed upon plaintiff were non-consensual—and constituted acts of violence. Therefore, it cannot be said that a reasonable investigation of Mendelson's conduct would not have prevented the harm committed to plaintiff. *Id.* at 159 ("[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, JBFCF's motion is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: October 10, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.