SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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T.B., **Part CVA-R**

Plaintiff, **Index No. 609547/2020**

-against- **Mot. Seq. No. 006**

NORTH BABYLON HIGH SCHOOL, NORTH BABYLON UNION FREE SCHOOL DISTRICT, DANNY CUESTA a/k/a DANNY CUESTA RIVERA, **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:

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

In this action plaintiff alleges that in 2004, when she was 16 years old, she was sexually abused by defendant Danny Cuesta Rivera ("Cuesta"), a teacher at the North Babylon High School in the defendant North Babylon Union Free School District. Plaintiff at the time was working at the school and seeks to hold the District liable for damages suffered as a result of Cuesta's abuse.[1] The District now moves pursuant to CPLR 3212 for summary judgment. For the reasons set forth below, the motion is granted in part and denied in part.

[1] Cuesta has not appeared in this action and was held to be in default pursuant to a September 14, 2021 order of this court.

BACKGROUND

Plaintiff attended the high school but dropped out.[2] She then returned to attend school at night and worked in the school during the day. Cuesta was a Spanish teacher at the school and he also supervised students who served detention after school. One day while working at the school after regular school hours, plaintiff visited Cuesta in the school cafeteria where Cuesta was supervising students serving detention. Cuesta and plaintiff proceeded to a copy room, where plaintiff performed oral sex upon Cuesta; they then moved to Cuesta's classroom where they engaged in intercourse. The principal of the school learned within days of the sole sexual encounter, and plaintiff also reported it to her guidance counselor.

Cuesta had a lengthy inappropriate sexual relationship with a female student, MG, at the school prior to his sexual encounter with plaintiff. A fellow teacher observed Cuesta during a particular stretch of the school year alone with MG in Cuesta's classroom at least twice a week.

When plaintiff told her guidance counselor, Jessica Babino, about Cuesta's misconduct, Babino that day wrote a memorandum. The memorandum reflects that Babino had a prior conversation with Lucy Weeks, another guidance counselor, in which they discussed Cuesta's relationship with MG and that Weeks had spoken with MG about that relationship. Purportedly, MG told Weeks that Cuesta was her mentor but Cuesta was not on the school's mentor list.

LEGAL ANALYSIS

[2] 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.

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).

Plaintiff's remaining claims in this action allege negligent hiring, supervision, retention and direction (First Cause of Action); gross negligence (Second Cause of Action); and breach of statutory duties to report (Social Services Law §§413 and 420)(Seventh Cause of Action).[3]

Plaintiff's Seventh Cause of Action must be dismissed pursuant to *Hanson v. Hicksville Union Free School District*, 209 A.D.3d 629 (2d Dept. 2022). In *Hanson*, 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, Cuesta was not a person legally

[3] Plaintiff's other claims contained in her pleading were dismissed pursuant to an order of this court (Jaeger, J.) dated September 8, 2021.

responsible for plaintiff's care and this claim is dismissed. Plaintiff does not contest that, under present law, this claim cannot survive.

To sustain her negligence claims, plaintiff must allege and prove (1) a duty owed by the District 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).

> 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).

"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).

A review of caselaw concerning allegations by a student of teacher abuse reveals that whether a school district was on sufficient notice of the teacher's propensities is a *sui generis* inquiry. For example, in an action brought by MG against the District relating to her abuse by Cuesto, the trial court granted summary judgment dismissing MG's claims because the District was unaware of Cuesto's propensities. *Melissa "G" v. North Babylon Union Free School Dist.*, 2017 WL 2271813 (Sup.Ct. Suffolk Co. 2017). But an important distinction must be drawn here: there is evidence that a guidance counselor—Lucy Weeks—had misgivings concerning the relationship between MG and Cuesto and took steps to investigate

that relationship. That evidence is contained in the Babino memorandum and confirmed by the Babino deposition testimony.[4] The Melissa "G" decision makes no reference to this evidence.

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). "[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 159.

The District did not have notice that Cuesto acted inappropriately with plaintiff prior to plaintiff's abuse. The same cannot be said, however, as a matter of law, with respect to the Cuesto-MG relationship. This depends upon the reasonableness of the steps taken by Weeks once she had concerns relating to this relationship and the extent of such concerns. Although Weeks has testified that she doesn't recall any conversations with MG concerning Cuesto, plaintiff is entitled to every favorable inference and there exists at least a question of fact as to whether Weeks was put on constructive notice of the Cuesto-MG relationship. The Babino memorandum and her transcript were submitted by the District. As a result, the District's motion for summary judgment to dismiss the First Cause of Action is denied since the District failed to meet its *prima facie* burden.

The District is entitled to summary judgment on plaintiff's Second Cause of Action sounding in gross negligence. Gross negligence consists of conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing. *Ryan v. IM Kapco, Inc.*, 88 A.D.3d 682 (2d Dept. 2011). Here, even if plaintiff can establish that Weeks (1) had concerns relating to Cuesta, (2) as a result, spoke with MG about her relationship with Cuesta, and (3) should have investigated further, it cannot be said that Weeks did not

[4] Because Babino confirmed the contents of the memorandum in her testimony, this court need not decide whether the memorandum and all of its contents may properly be introduced into evidence at trial as a past recollection recorded and/or admission exception to the hearsay rule.

"exercise even slight care." *Id.* at 683; *see also Seti v. Carnell Associates, Inc*., 218 A.D.3d 509 (2d Dept. 2023).

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.