

**PC-37 Doe v Herricks Union Free Sch. Dist.**

2023 NY Slip Op 33533(U)

October 10, 2023

Supreme Court, Nassau County

Docket Number: Index No. 900100/2020

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

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

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**PC-37 DOE,**

**Plaintiff,**

**-against-**

**Part CVA-R  
Index No. 900100/2020  
Mot. Seq. No. 006**

**HERRICKS UNION FREE SCHOOL DISTRICT,  
DENTON AVENUE SCHOOL, “JERRY COHEN”,**

**DECISION AND ORDER**

**Defendants.**

-----X  
**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:

School District’s Notice of Motion, Affirmation & Exhibits.....	1
Plaintiff’s Affirmation in Opposition to Motion & Exhibits. ....	2
Defendant Cohen’s Affirmation in Opposition to Motion.....	3
School District’s Reply.....	4

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Plaintiff was a student at defendant Denton Avenue School (“Denton”), located in the defendant Herricks Union Free School District (“District”), and alleges that while there he was abused by a teacher, defendant Jerry Cohen. Plaintiffs further assert that these defendants knew or should have known of the abuse. Denton and the District now move pursuant to CPLR 3212 for summary judgment. For the reasons set forth below the motion is granted in part and denied in part.<sup>1</sup>

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<sup>1</sup> The moving defendants argue that Denton is not an entity separate from the District amenable to suit. Plaintiff does not contest this point and, as a result, the complaint is dismissed as against Denton and the caption shall be amended to reflect the same.

## BACKGROUND<sup>2</sup>

In 1981-82, plaintiff was in fifth grade at the Denton Avenue School. Jerry Cohen was his teacher. Cohen abused plaintiff in his classroom on several occasions by putting a thermometer in plaintiff's rectum. Cohen had singled plaintiff out while plaintiff was having lunch in the cafeteria and brought plaintiff back to his empty classroom (where he locked the door, shut off the lights and covered the door window). Cohen told plaintiff he wanted to take his temperature in connection with a research paper he was writing. A couple of weeks later, Cohen claimed he had lost his results from the first experiment and plaintiff let Cohen rectally take his temperature again. The scenario was repeated a third time.

In the summer between sixth and seventh grades plaintiff was again abused by Cohen, this time at a summer camp at the Denton Avenue School that the District had hired Cohen to co-head. Plaintiff was hired as a counselor at the camp. Cohen took plaintiff into the school's principal office, locked the door, had plaintiff lower his pants and bend over a desk, and attempted to penetrate him anally.<sup>3</sup> This happened on three or four occasions. Plaintiff worked at the camp the next summer—as did Cohen—and the same scenario repeated on one occasion.

When plaintiff was in the eighth grade at the Herricks Middle School, Cohen tutored him at home approximately six times. Cohen was hired by plaintiff's parents. Each tutoring session Cohen abused plaintiff in plaintiff's bedroom. The following school year, plaintiff's parents hired a different tutor. Plaintiff never told his parents or any teacher or school administrator of the abuse before it ceased.

Cohen joined the District from the Deer Park Union Free School District, from which he got positive recommendations. In June 1982, the District received a complaint that Cohen

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<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.

<sup>3</sup> It is unclear from plaintiff's testimony if Cohen succeeded in penetrating plaintiff, but plaintiff's bill of particulars alleges that he did.

had sexually abused another student, DJ, who stated that Cohen had him lower his pants and took his temperature rectally for a purported experiment he was conducting. The District suspended Cohen from the classroom and had him undergo a psychiatric evaluation. Eugene Goldwasser, the principal of the Denton school, was tasked with conducting an investigation. Goldwasser cannot recall what he did. The District's Director of Pupil Personnel Services interviewed the student and believed his account of the incident. The psychiatrist concluded in a report dated June 29, 1982 that he "found no significant psychopathology or other psychological manifestations which would support the allegation or bring Dr. Cohen's fitness as a teacher into question." There is no evidence that Cohen was given any psychological tests.

No further action was taken by the District concerning Cohen at that time. Cohen was hired by the District as the assistant director of the summer camp at the Denton Avenue School in the summer of 1982. Cohen was eventually accused of sexual abuse a few years later and surrendered his teaching license.

### **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).

Plaintiff alleges the following claims: negligent hiring, retention, supervision and direction (First Cause of Action); negligence (Second Cause of Action); premises liability (Fourth Cause of Action); and breach of statutory duties to report (Seventh Cause of Action).

This court may quickly dispatch several claims asserted by plaintiff, which he does not attempt to defend. The premises liability claim is duplicative of plaintiff's negligence claims since they both arise from the same set of facts and the premises liability claim does not seek distinct damages. Both claims allege that defendants acted negligently in allowing plaintiff to be sexually abused. As a result, the Fourth Cause of Action of the complaint is dismissed. *See Steven B. v. Westchester Day School*, 196 A.D.3d 624 (2d Dept. 2021).

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.* Plaintiff alleges that the District breached its alleged duty to report his abuse. But 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, Cohen was not a person legally responsible for plaintiff’s care and the Seventh Cause of Action is dismissed.

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). To the extent plaintiff seeks punitive damages as against it, such request is stricken.

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. 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).

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 entity it seeks to hold responsible 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. An entity responsible for the

supervision of a minor 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).

There is no evidence that the District had actual or constructive notice of Cohen’s propensity to commit sexual abuse prior to the June 1982 complaint of another student. 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.

Clearly, the District was placed on notice that Cohen may have had a propensity to sexually abuse students once it received DJ’s complaint. Whether the steps it took following receipt of that complaint and its conclusion that the complaint was unfounded were reasonable is a question of fact for a jury to decide. At this stage of the action, the burden is on the District to establish as a matter of law that it acted reasonably. But since (i) at least one administrator believed DJ’s accusations, (ii) it is unclear if the District properly interviewed other students concerning potential abuse, and (iii) the weight given by the District to the psychiatrist’s opinion may not have been justified, it has not met that burden.

The District argues that it may not be held liable to plaintiff for the acts of abuse that occurred at plaintiff’s home. With respect to plaintiff’s negligence claim (Second Cause of Action), “[g]enerally, liability may not be imposed upon school authorities where all of the improper acts against a student occurred off school premises and outside school hours.” *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d at 636. The District’s duty to its students arose generally from its physical custody of them—it was not responsible for supervising the plaintiff after the school day ended and he left its premises. *See Stephenson v. City of New York*, 19 N.Y.3d 1031 (2012). The District had no duty to supervise plaintiff

when he was being tutored at home. The Second Cause of Action can only apply to the abuse plaintiff suffered at the school after the school learned of DJ's complaint. Since plaintiff has testified that abuse occurred at the school during the summer camps after the District learned of DJ's abuse complaint, this cause of action survives.

The District may be liable to plaintiff, however, for its negligent supervision and retention of Cohen (First Cause of Action) with respect to both the on-premises and off-premises abuse if it is determined that such negligence was a proximate cause of the abuse.<sup>4</sup> The location of the actual abuse under this analysis is inconsequential. The District may be liable for the foreseeable consequences of its negligence, and Cohen's abuse of plaintiff—wherever it occurred—was the very same risk that a jury could find rendered the District negligent for retaining Cohen. *See Bell v. Board of Educ. of the City of N.Y.*, 90 N.Y.2d 944, 947 (1997) (“[w]hen the intervening act, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs”).

The inappropriate relationship between plaintiff and Cohen had its genesis in the teacher/pupil relationship that the District created and of which Cohen took advantage. The District's inaction may have perpetuated this power dynamic by allowing Cohen to remain a teacher, thus supplying the required nexus and breach of duty. But a jury must find that Cohen's continued role as a teacher in the District was a substantial factor leading to the off-premises abuse for the District to be held liable.

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<sup>4</sup> With respect to plaintiff's claim alleging negligent hiring, “the duty to investigate a prospective employee, or to ‘institute specific procedures for hiring employees,’ is triggered only when the employer ‘knows of facts that would lead a reasonably prudent person to investigate the prospective employee.’” *Sandra M. v. St. Luke's Roosevelt Hosp. Center*, 33 A.D.3d 875, 879 (2d Dept. 2006); *see also KM Fencers Club, Inc.*, 164 A.D.3d 891, 893 (2d Dept. 2018); *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 163 (2d Dept. 1991). There is no evidence that the District was on notice of anything questionable in Cohen's background when they hired him. In all events, there is no evidence that any additional hiring procedure or investigation would have revealed a propensity by Cohen to commit sexual assaults. Therefore, this aspect of the First Cause of Action is dismissed.

Finally, the District argues that summary judgment dismissing the complaint must be granted because the claim revival provisions of New York’s Child Victims Act violates its due process rights under the State’s Constitution. This argument, however, has been rejected by the Appellate Division. *See Schearer v. Fitzgerald*, 217 A.D.3d 980 (2d Dept. 2023); *see also Matarazzo v. Charlee Family Care, Inc.*, 218 A.D.3d 941 (3d Dept. 2023); *PB-36 Doe v. Niagara Falls City School District*, 213 A.D.3d 82 (4th Dept. 2023). As a result, the District is not entitled to summary judgment on this ground.

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.**