SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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J. J.,

Plaintiff,

Part CVA-R
Index No. EF005705-2021
Mot. Seq. 003

-against-

ORANGE COUNTY, GREENBURGH NORTH CASTLE UNION FREE FACILITY DISTRICT, GREEN NORTH CASTLE UFSD BOARD OF EDUCATION, ST. CHRISTOPHER'S INC., THE MCQUADE FOUNDATION, MCQUADE CHILDREN'S SERVICES, INC., KAPLAN CAREER ACADEMY and DOES 1-10,

DECISION AND ORDER

Defendants.

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LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law and/or statement of material facts, have been reviewed in preparing this 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 1971, when he was approximately 11 years old, he was placed at McQuade Foundation Boarding Facility—a boarding facility— by defendant Orange County. Plaintiff asserts that when he turned 12, he was moved to the main house where Gary Hayes, a house parent, began sexually abusing him. Plaintiff asserts a claim of negligence against defendant Orange County (the "County"). As against defendants The McQuade Foundation, McQuade Children's Services, Inc. and St. Christopher's Inc. (collectively referred to as the "Facility Defendants") plaintiff asserts claims of negligence and negligent hiring, supervision and retention. The Facility

Defendants now move for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the motion is denied.

BACKGROUND

According to plaintiff, when he was approximately 11 years old, he was placed at the facility.[1] When he turned 12 years old, he was transferred to the "main house" where Gary Hayes was a house parent who resided at the facility. Several months later, Hayes began sexually abusing plaintiff.

Plaintiff alleges that on several occasions Hayes would come into plaintiff's room at night, fondle him and force oral sex on plaintiff. Other times, Hayes brought plaintiff to a hotel and to a house in the woods, where plaintiff and Hayes stayed at least overnight, possibly for the entire weekend. The abuse occurred approximately 15-16 times over the course of a couple years. Plaintiff did not tell anyone of the abuse.

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.

[1] 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.

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).[2]

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

[2] Therefore, the defendants' argument that they cannot be held liable for the abuse because it was not within the scope of Hayes' 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).

McQuade and St. Christopher's motion

a. *Successor Liability*

Plaintiff seeks to hold St. Christopher's liable as a successor to the operator of the facility. The Facility Defendants argue that it is not a successor and that St. Christopher's is unaffiliated with the McQuade Foundation, which it asserts ran the facility and is still active. But as discussed below, whether McQuade Foundation actually ran the facility during the relevant time or simply owned the property is unclear, as is the current and past relationships among St. Christopher's, The McQuade Foundation and McQuade Children's Services. And the Facility Defendants submit conflicting evidence on these issues:

- In his complaint, plaintiff alleges that the McQuade Foundation owned and operated "McQuade Children's Services." Complaint, ¶7. It further alleges that Orange County referred plaintiff to McQuade Children's Services, Inc., which obtained custody over him. Complaint, ¶¶28, 33.
- In its answer, McQuade Foundation describes McQuade Children's Services as its d/b/a that was "s/i/h/a McQuade Children's Services, Inc." No evidence has been submitted to support this description of the named defendant. The Notice of Motion reflects, inconsistently, that this motion is brought on behalf of "McQuade Children's Services, Inc."
- According to the Facility Defendants' Statement of Material Facts at paragraph 64, the facility was operated by the McQuade Foundation, until 2009.
- Robert Maher, a former "Vice President of the Board of Directors" of the defendant McQuade Foundation, attests that St. Christopher's became the "sole member" of "McQuade Children's Services" in 2011. Maher appears to use "McQuade Children's Services" and "The McQuade Foundation" interchangeably. He also states that the *McQuade Foundation* operated the facility "prior to 2009-2010" – he is silent as to when it began doing so – but further attests that the Foundation's *first* board meeting was in 2011.

- Sarah Ruback, CEO of St. Christopher's, testified that *McQuade Children's Services* operated the facility prior to it being closed in 2009. *See* 2/27/23 Ruback Transcript, p. 12. Ruback testified that St. Christopher's "is the board of directors" of "McQuade" and when asked if the "McQuade entities, McQuade Children's Services or the McQuade Foundation" had any individual members on the board of directors, Ruback answered "no."
- Finally, to confuse things even more, Liberato ("Larry") Carbone, the Chairman of the Board of St. Christopher's and its designated corporate representative, testified that he believes "the McQuade Board is the same as the St. Chris Board." 12/12/22 Carbone Transcript, p. 22. Despite serving on the McQuade Board, Carbone did not know "the legal name of McQuade," was not "particularly familiar" with "something called the McQuade Foundation," and did not know if McQuade has active employees. *Id.* at pp. 25-26.

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 adequately plead a theory of successor liability.[3] But this argument fails. 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

[3] 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.*

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 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 66 of its Statement of Material Facts that "McQuade

Foundation closed in 2009." Further, it states that "*[p]rior to 2012*, St. Christopher's and McQuade Foundation were two separate not-for-profit corporations…." *Id.* at ¶67. This statement suggests not only that the Foundation no longer exists, but that the two entities merged in some capacity after 2012. At paragraph 10 of his affidavit, Maher refers to the "former McQuade Foundation."[4] Further, according to Ruback, St. Christopher's retained and is in possession of McQuade's records.

Maher also attests that at the Foundation's first board meeting it "delineating [sic.] that St. Christopher's would be the sole member of McQuade's Children Services." The court does not know what this means since it does not know what business form, if any, McQuade's Children Services operated under and whether The McQuade Foundation or McQuade Children's Services (if they are even separate entities) was the operator of the facility. And if McQuade's Children Services/McQuade Foundation operated the facility and St. Christopher's took over those operations by effectively acquiring McQuade's Children Services/McQuade Foundation by becoming its "sole member," this court cannot conclude as a matter of law that St. Christopher's is not the facility operator's successor.

Many facts may support St. Christopher's argument, principally the facility'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 facility, 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 facility at the time of the alleged abuse.

b. *Negligence Claims*

The Facility Defendants contend that they cannot be held liable for the subject abuse because they had no notice of Hayes' propensity to commit such abuse and no actual or constructive notice that the abuse took place. The Facility Defendants primarily rely on the acknowledgement by plaintiff that *he* never reported the alleged abuse to dispel potential liability. But the Facility Defendants fail to submit sufficient proof evidencing their lack of

[4] No affidavit or testimony is presented from any active trustee, member, director or employee of the McQuade Foundation.

prior notice of sexual abuse or the absence of complaints concerning Hayes. *See Charles D.J. v. City of Buffalo*, 185 A.D.3d 1488 (4th Dept. 2020).

The Facility Defendants assert that there are no records of any staff members from the time period in question. But in his affidavit, Maher concedes that some records of former residents were on site when "St. Christopher's opened the new facility" and is silent as to whether personnel files of former employees were searched for and/or exist. Ruback testified that St. Christopher's has records of McQuade's that "appear to start sometime in the 1990's" but admitted that not all have been reviewed by St. Christopher's.[5] No testimony or affidavit was submitted on behalf of McQuade with respect to its record search and/or retention.

The Facility 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.[6] And the Facility Defendants offer no proof concerning the unavailability of witnesses.

The Facility 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 Coop. Educational Services*, 4 A.D.3d 387 (2d Dept. 2004).

Therefore, the Facility Defendants failed to meet their *prima facie* burden entitling them to dismissal of plaintiff's claims for negligence and negligent hiring, retention, supervision, or direction.

Even if the Facility Defendants met their *prima facie* burden, plaintiff has created an issue of fact with respect to constructive notice of plaintiff's abuse and both actual and

[5] Ruback stated that the room of records was from "floor to ceiling" and "many boxes."
[6] When asked if any policies and procedures were located, Ruback testified, "…there may be a procedure binder. I just haven't gone through it all. I'm not certain."

constructive prior notice of a pervasive culture and pattern of sexual abuses perpetrated by the Facility Defendants' employees.

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 159.

A reasonable jury could find the Facility Defendants negligent in the supervision of Hayes, plaintiff, or both, where: an employee was able to enter the room of a minor resident late at night, on multiple occasions, completely undetected, over the course of a couple years; and the minor resident was able to leave the premises overnight (possibly for an entire weekend) also undetected, with no evidence that the facility's policies permitted this conduct. *Peter T. v. Children's Village, Inc.*, 30 A.D.3d 582 (2006)(issue of fact with respect to notice where abuser took plaintiff on regular overnight visits to his residence, in contravention of residential facilities' rules and regulations).

But beyond that, plaintiff contends that the Facility Defendants had actual notice of ongoing sexual abuse of its residents at the facility prior to and during the time-frame of plaintiff's alleged abuse and took no rectifying actions. Plaintiff submits the testimony of five other former facility residents who allege to have been abused by multiple McQuade employees, prior to and contemporaneously with plaintiff's abuse. Of particular significance, most of the alleged perpetrators in those instances were house parents, like Hayes, who abused residents who lived in the "main house" and carried out their abuses in the same manner – by entering residents' rooms in at night and taking residents off facility grounds, either undetected or without issue. These former residents testified that they notified several other McQuade employees of the alleged sexual abuses, including the facility's director Harold Horowitz, on multiple occasions but no action was taken. In fact, former residents testified that they were told by the individuals to whom they reported the abuses to keep the abuse a secret.

The Facility Defendants are also not entitled to the striking of plaintiff's request for punitive damages. If the accounts of plaintiff and these non-parties are believed, a reasonable jury could conclude that the Facility Defendants' acts constituted a "willful or wanton negligence or recklessness evincing a conscious disregard for the rights of others," including plaintiff, so as to warrant punitive damages. *See generally Pisula v. Roman Catholic Archdiocese of New York*, 201 A.D.3d 88 (2d Dept. 2021).

Considering the foregoing, the Facility Defendants' motion for summary judgment is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: October 18, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.