SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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

Plaintiff, **Index No. 032990/2021**

-against- **Mot. Seq. 003**

CLARKSTOWN CENTRAL SCHOOL DISTRICT; and FELIX FESTA MIDDLE SCHOOL, **DECISION AND ORDER**

Defendants.

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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda or 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.....3

In this action, plaintiff alleges that when he was in the 7th grade in 1984-85 attending defendant Felix Festa Middle School, he was sexually abused by his Spanish teacher, Edward Fitzgerald. The school is part of the defendant Clarkstown Central School District. The defendants now move for summary judgment pursuant to CPLR 3212 on the ground that they had no actual or constructive notice that Fitzgerald had a propensity to sexually abuse the District's students. For the reasons set forth below, the motion is granted and the action is dismissed.

BACKGROUND

Plaintiff alleges that he was one of approximately 25 students attending Fitzgerald's Spanish class in the seventh grade. Plaintiff sat in the rear row near the window. Fitzgerald roamed the classroom and would stand behind plaintiff and rub his back and chest over his shirt. Within a week, the rubbing would be under plaintiff's shirt and, eventually, Fitzgerald began also placing his hands in plaintiff's pants under his underwear. This occurred every

school day during that school year, three or four times per class session. Plaintiff never told anyone of the abuse at the time.

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. 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).

Here, there is no evidence that the District had actual or constructive notice of Fitgerald's propensity to commit sexual abuse at the time plaintiff was abused. 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.

Plaintiff principally relies on two facts to preserve his action: Fitzgerald was known among the students as "Feely Fitz;" and Fitzgerald would have students sit on his lap. But

there is no evidence that the defendants were aware of the nickname. And the evidence that Fitzgerald had students sit on his lap is merely hearsay: no testimony or affidavit is proffered by anyone who observed this. In all events, having students sit on a teacher's lap is not enough evidence to reasonably conclude that the District should have known that the teacher was sexually abusing students. This is particularly so here since Fitzgerald had taught at the District for 13 years prior to plaintiff's abuse and plaintiff does not assert that any complaint was lodged against Fitzgerald prior to his abuse.

Therefore, for the reasons set forth above, defendants' motion is granted and the action is dismissed.[1]

This constitutes the Decision and Order of this court.

Dated: October 16, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.
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[1] Under all circumstances, plaintiff's punitive damages request must be stricken even if the action were not dismissed. The defendants, as public entities, may not be held liable for punitive damages. *Dixon v. William Floyd Union Free School Dist.*, 136 A.D.3d 972 (2d Dept. 2016).