SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MCVAWCC DOE,

Plaintiff,

-against-

TOWN OF CORTLANDT, VILLAGE OF BUCHANAN, HENDRICK HUDSON SCHOOL DISTRICT, and TIMOTHY RIFKIN,

Defendants.

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IAS Part CVA-R
Index No. 60651/2021
Mot. Seq. Nos. 005-008

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:

Defendant Cortlandt's Notice of Motion, Affirmation & Exhibits …….....1
District Defendant's Notice of Motion, Affirmation & Exhibits.....2
Plaintiff's Affirmation in Opposition & Exhibits.....3
District Defendant's Reply.....4
Village Defendant's Notice of Motion, Affirmation & Exhibits.....5
Plaintiff's Affirmation in Opposition & Exhibits.....6
Plaintiff's Notice of Motion, Affirmation & Exhibits.....7

In this action, plaintiff alleges that in 1992 when he was 14 years old, he was sexually abused by defendant Timothy Rifkin, the director of the "Buchanan Teen Center." Rifkin confessed to the abuse, which occurred at his parent's house, and he was convicted of sodomy in the third degree in 1992, after pleading guilty. He was 22 years old.

Defendants Town of Cortlandt, Village of Buchanan and Hendrick Hudson School District move for summary judgment pursuant to CPLR 3212. Plaintiff moves for summary judgment with respect to his claims against defendant Timothy Rifkin (battery, assault & intentional infliction of emotional distress). Plaintiff's motion is unopposed and is granted. Defendant Town of Cortland's motion is unopposed and is granted. For the reasons set forth

below, the motions of the remaining moving defendants ("Moving Defendants") are granted and the action is dismissed as against them.

BACKGROUND

Plaintiff and Rifkin met at the teen center, the activities of which were held in the Old Village Hall in Buchanan and, approximately once a month, the Buchanan-Verplank Elementary School gymnasium.[1] The school is part of the Hendrick Hudson School District. Rifkin was hired as the director of the teen center by the Village, which paid him his salary. The hiring process was informal—Rifkin was recommended by the then-existing director who was leaving the position. The center was open once a week from approximately 7:30 p.m. to 9:00 p.m. and was for children from thirteen to seventeen years old. Typically, eight to twelve children would attend weekly. Rifkin was the only adult supervisor.

Rifkin testified that he never drove or walked any of the teenagers home; they would be picked up by their parents or ride bicycles. Rifkin further testified that he never invited a teenager at the center to his residence, where he lived with his parents. According to Rifkin, some of the teenagers went to the house, however, because they were friends with Rifkin's brother (who was plaintiff's age), who also lived at the residence.

Plaintiff had been to Rifkin's residence three or four times before the evening of the sexual abuse.[2] Plaintiff testified Rifkin would invite some teens to his residence and drive them at the end of the teen center session. On the night in question, Rifkin's brother invited plaintiff to stay overnight at the residence. A small group went to Rifkin's residence from the school. After smoking a joint with Rifkin outside, plaintiff and Rifkin were alone in the basement at which time the abuse took place. Plaintiff does not allege that Rifkin used physical force but, rather, he was too incapacitated to act because he was affected by the joint (which he believes was laced with a chemical).

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[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.

[2] The abuse consisted of Rivkin performing oral sex upon plaintiff.

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's complaint includes claims against the Moving Defendants alleging negligence (First Cause of Action) and negligent hiring, retention and supervision (Second Cause of Action).

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).

Village of Buchanan

Plaintiff's claim against the Village based upon its negligence in supervising the plaintiff must be dismissed for two reasons. First, the abuse did not take place at the teen center or during its activities. The Village's duty to plaintiff arose generally from its physical custody of him—it was not responsible for supervising the plaintiff after he was no longer on its property or engaged in teen center activities. *See, e.g., Stephenson v. City of New York*, 19 N.Y.3d 1031 (2012). Second, plaintiff *was* supervised at the teen center activities—by Rifkin. There is no evidence that Rifkin acted inappropriately at either the Village Hall or the school or that plaintiff suffered any harm at teen center activities. And as

further discussed below, there is no evidence that the Village had any notice of Rifkin's propensity to sexually abuse minors.

Plaintiff's argument that *Rifkin* was not properly supervised concerns his Second Cause of Action, which must also be dismissed because there is no evidence that the Village had notice of Rifkin's propensity to sexually abuse minors. Furthermore, there is no nexus between Rifkin's employment with the Village and the abuse, which was separated by time, place and the intervening independent act of Rifkin. *See Doe v. Hauppauge Union Free School District*, 213 A.D.3d 809 (2d Dept. 2023).

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*. Here, plaintiff has no proof to support a jury finding that the Village was on actual or constructive notice of Rifkin's propensities. Nothing in the record supports the conclusion that Rifkin's act was foreseeable, irrespective of whether the Village should have had policies and procedures in place as plaintiff's expert argues.[3] Furthermore, plaintiff was an overnight guest of Rifkin's brother, *not* Rifkin.

The Village has established its *prima facie* case that it had no notice of Rifkin's propensity to abuse minors by submitting Rifkin's personnel file. There are no allegations of abuse in his personnel file. Although in a typical circumstance the absence of a complaint in a personnel file may not satisfy a defendant's *prima facie* burden, institutional defendants in Child Victim Act (CVA) cases may find themselves unable to locate material documents or witnesses related to the hiring, supervision and retention of employees. This action, like many CVA actions, relate to events that occurred decades ago. Witnesses who could

[3] Plaintiff's expert opines on issues not properly in his province, including the scope of the Village's duty. He further argues in conclusory fashion that "sexual abuse of minors by adults in institutions that take children in their custody was … widespread and predictable." There is no substantive basis given for this opinion. His reference to Title IX of the Educational Amendments of 1972, concerning sex discrimination, and New York's Child Protective Services Act of 1973, concerning child abuse by parents or guardians, do not support the expert's opinion.

otherwise testify to events from long ago may be no longer employed, impossible to locate or deceased.

The summary judgment analysis employed by New York courts is a judicial procedural construct. *See Yun Tung Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 35-36 (2011)(Smith, J. concurrence). Its purpose, as with all interpretations of the requirements of New York's Civil Practice Law and Rules, is meant "to secure the just, speedy and inexpensive determination" of civil proceedings. CPLR §104. But it would not be just to require a defendant to incur the cost, time and effort to defend an action at trial because, through no fault of its own, time has swept away the proof needed to prevail on summary judgment. Nor are victims benefitted by prolonging the inevitable dismissal of their suit and requiring their participation in emotionally gut-wrenching trials they cannot win. Granting summary judgment is also consistent with the Legislature's intent that CVA actions be timely adjudicated (as evidenced by its directive that the Chief Administrator of the Courts promulgate rules for the timely adjudication of revived claims). *See* Judiciary Law §219-d.

By weeding out factually insufficient claims and defenses, summary judgment serves as an important tool for accomplishing the primary goal of the CPLR as spelled out in CPLR §104. *See* One Step Forward, Two Steps Back: Summary Judgment After Celotex, 40 Hastings L.J 53 (1988)(referring to Fed. R. Civ. P. 1, substantively identical to CPLR §104). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that Rule 56 of the Federal Rules of Civil Procedure—the Federal Rules' equivalent to CPLR 3212—"mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 322-23. The Court further explained that the summary judgment rule "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses

to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Our courts are faced with a daunting backlog of actions waiting to be tried. No salutary purpose is served by piling on to this backlog revived cases that cannot be proved. It most certainly does not advance the principles upon which the CVA was based and the rationale of *Celotex* is particularly applicable under the unique circumstances of this case. A just determination can be reached now without putting the litigants through more heartache, delay and expense.

Here, plaintiff cannot prove his case. Plaintiff has failed to raise an issue of fact with respect to whether the Village had actual or constructive notice that Rifkin had a propensity to commit sexual abuse. He has no evidence in this regard.

Plaintiff further alleges that the Village failed to engage in any reasonable hiring process when it retained Rifkin. "There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." *KM Fencers Club, Inc.*, 164 A.D.3d 891, 893 (2d Dept. 2018) *quoting Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d .159, 163 (2d Dept. 1991). Assuming that the Village should have investigated deeper into Rifkin's background before hiring him because he disclosed on his application form that he had previously been arrested for disorderly conduct, there is no evidence that such an investigation would have revealed a propensity to commit a sexual assault. *Id.* Furthermore, Rifkin previously worked for the Village as a recreation attendant without incident.

School District

Rifkin was not an employee of the District at the time of the abuse and it is not asserted that he was acting in a capacity as a substitute teacher (even though an issue of fact may exist as to whether Rifkin was approved by the school board to be an "uncertified substitute teacher" as plaintiff asserts). Instead, plaintiff argues that plaintiff acted in his capacity as the director of the teen center on behalf of the Village. Therefore, the Second

Cause of Action must be dismissed as against the District: it had no duty to supervise or train Rifkin and cannot be held liable for retaining an employee it never hired.

Plaintiff's negligence claim must also be dismissed. The issue is whether the District can be held liable for plaintiff's abuse simply because the teen center occasionally used its facilities after school hours. It cannot. *See Phillipe v. City of N.Y. Bd. of Education*, 254 A.D.2d 239 (2d Dept. 1998). The District had no duty to supervise a program it was not a part of; plaintiff's injuries did not result from the use of the school facilities; and the abuse did not occur at the school. Because there is no nexus between the use of its facilities and the abuse, the First Cause of Action is dismissed.

Therefore, the action is dismissed as to all defendants other than Rifkin. Plaintiff is granted summary judgment on liability against Rifkin. A trial on the issue of the amount of damages plaintiff may recover from Rifkin shall be scheduled.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: October 5, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.