SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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S.A.,

Plaintiff,

-against-

SUFFOLK COUNTY and DOES 1-10,

Defendants.

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Part CVA-R
Index No. 611071/2021
Mot. Seq. No. 005

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:

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

In this action, plaintiff alleges that she was sexually abused as a child while residing in two separate foster homes in which she was placed by the defendant Suffolk County. Plaintiff became pregnant at the age of 11. She now brings this action against the County, alleging it was negligent in its selection of her foster homes and its supervision of her care. The County now moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the action. For the reasons set forth below, its motion is granted in part and denied in part.

BACKGROUND[1]

In August 1973, when she was approximately 11 years old, plaintiff was placed by the County in the home of Mary and Samuel Gibbs. Plaintiff resided in the Gibbs home for approximately three months. At the Gibbs home, Mr. Gibbs sexually abused plaintiff

[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.

numerous times in the home at night when everyone was asleep. The County's foster care records state:

> It quickly became evident that this was not an appropriate placement because Mr. & Mrs. Gibbs have serious drinking and marital problems, and the children did not receive either adequate physical or emotional care. In the beginning we decided to permit the children to remain there with close supervision to see how things would develop… The children and I had long discussions during the period that they were in the Gibbs home because I had to rely on their opinion about how things were progressing. They reported that Mrs. Gibbs would wake them up in the middle of the night to talk and would keep them home from school to protect her from her husband.

Plaintiff told her caseworker, before the last instance of sexual abuse, that Mrs. Gibbs hid liquor bottles in her room, although she did not disclose the sexual abuse. No explanation has been provided by the County as to why plaintiff was not immediately removed from the Gibbs home when it became apparent that the County had made a mistake in placing plaintiff there.

The County finally removed plaintiff from the Gibbs home and placed her in the home of the Olivers, where she lived for approximately 1 ½ years. But the County was aware that the Oliver foster home was, according to the County's records,

> literally packed with children (varies between 8 and 10 of them) and Mrs. Oliver works a full time night shift at a State Hospital. Mr. Oliver is home and supposedly supervising the children when Mrs. Oliver works, but he stays in his room watching television and the children have complete freedom.

Plaintiff and her siblings, who were also placed at the Oliver home, took advantage of this freedom (according to the County caseworker) and informed the caseworker that the Olivers did not provide adequate care.

While at the Oliver home, plaintiff began smoking cigarettes and would meet a neighbor, who was approximately 20 years old in the woods nearby. On five or six

occasions plaintiff and the neighbor would engage in sexual intercourse, resulting in plaintiff becoming pregnant when she was 11 years old.

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).

The County raises various arguments in support of its motion but mainly relies on two: (1) it is immune from liability; and (2) it had no actual or constructive notice of the abuse in either foster home.

The County's Duty

For plaintiff to prevail on her negligence claim she must demonstrate: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting

therefrom. *Ferreira v. City of Binghamton*, 38 N.Y.3d 298, 308 (2022). The existence of a legally recognized duty is the threshold issue that must be determined. *Id*. at 308. [2]

Notwithstanding existing Second Department precedent that, as a general matter, a municipality may be held liable for its negligence in the supervision of foster care (*see e.g., George v. Windham*, 169 A.D.3d 876, 877 (2d Dept. 2019); *Keizer v. SCO Family of Services*, 120 A.D.3d 475 (2d Dept. 2014); *Barnes v. County of Nassau*, 108 A.D.2d 50 (2d Dept. 1985); *Bartels v. County of Westchester*, 76 A.D.2d 517 (2d Dept. 1980)) the County argues that it had no duty to plaintiff concerning the supervision of her care.

A recent Fourth Department decision, *Weisbrod-Moore v. Cayuga County*, 216 A.D.3d 1459 (4th Dept. 2023), held in response to a motion to dismiss under CPLR 3211 that the county therein was not liable for its alleged negligent supervision of a foster child because no duty of the county ran to the child placed in its custody. The court held that plaintiff was required to establish a "special duty" running to her and no such duty could be shown under any of three situations recognized by the Court of Appeals as establishing such a duty. *See Maldovan v. County of Erie*, 39 N.Y.3d 166, 171 (2022). The *Weisbrod-Moore* court recognized that First and Second Department caselaw "would support a contrary conclusion." *Id*. at 1461.

This court is bound by the legal precedent set by the Second Department unless there has been a subsequent change in the law by the Court of Appeals. Given the Fourth Department's decision in *Weisbrod-Moore*, an examination of the continued viability of the Second Department precedent is warranted.

The Court of Appeals has held that where a municipality has acted in its governmental capacity a "special duty" running to the plaintiff must be found before the municipality can be held liable for the plaintiff's injuries. *See Maldovan v. County of Erie*,

[2] Once it is determined that a municipality performed a governmental function (undisputed here) the court need not consider whether an action was ministerial or discretionary unless and until a special duty is found to have existed. *Ferreira v. City of Binghamton*, 38 N.Y.3d at 308.

39 N.Y.3d at 171. The term "special duty" is used to distinguish the relationship between a plaintiff and a municipality to that of the general duty a municipality owes to the public. "The core principle is that 'to sustain liability against a municipality, the duty breached must be more than that owed to the public generally.'" *Applewhite v. Acchealth, Inc.*, 21 N.Y.3d 420, 426 (2013). The reason for the special duty requirement is the fear that exposing municipalities to tort liability "may render them less, not more, effective in protecting their citizens." *Maldovan v. County of Erie*, 39 N.Y.3d at 174, *quoting McLean v. City of New York*, 12 N.Y.3d 194, 204 (2009).

The Court of Appeals has recognized that a special duty can arise where (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition." *Ferreira v. City of Binghamton*, 38 N.Y.3d at 310. The judicial construction of this tripartite test was designed to ensure that a plaintiff's claimed injuries resulted not simply from a municipality's breach of its general duty to provide governmental services to the public.

But where a municipality obtains custody and control over an infant plaintiff the Court of Appeals' test becomes moot: the custody over the plaintiff obtained by the government necessarily distinguishes its relationship to the plaintiff from that of the public at large. Slavishly applying the test in these circumstances does not advance the principle to be served. As recognized by Justice Cardozo, the rule must fit the case; not the case the rule. Certainly the County had a special duty to the plaintiff. In contrast to its general population, the County was responsible for plaintiff's care and upbringing. Therefore, the Second Department precedent remains good law and the County may be held liable for any negligence in its supervision of plaintiff's foster care absent another defense. *See Grabowski v. Orange County*, __A.D.3d__, WL 5943973 (2d Dept. 2023)(counties may be held liable for negligent selection of foster care parents and in supervision of foster home).

Statutory Immunity

The County contends that it is statutorily immune from liability pursuant to Social Services Law §419 and cannot be held liable for negligently failing to learn of plaintiff's abuse. But the Second Department has recently reconfirmed that a county is "not entitled to qualified immunity pursuant to Social Services Law §419, as qualified immunity does not bar recovery for the negligent supervision of children in foster care." *Id*. at 2. As a result, the County may not rely upon Social Services Law §419 to shield it from liability.

Common Law Immunity

The County argues that it is entitled to common law governmental function immunity, but caselaw is unclear as to whether a county may assert such immunity in the foster care context. In *Bartels v. County of Westchester*, 76 A.D.2d at 523, the Second Department held that a county may not rely on common law governmental immunity for two reasons: (1) Social Services Law §420(2) imposes certain statutory liability upon a county, and (2) a negligent failure to prevent injury after notice of facts denoting danger "does not implicate the kind of planning or quasi-judicial acts which are embraced within the area of governmental discretion." *Id*. Furthermore, recognizing such immunity would be contrary to clear Second Department precedent that counties may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home, as recently pronounced in *Grabowski* approximately one month ago.

In all events, the County has not established its *prima facie* burden establishing that it is entitled to common law governmental function immunity here. "[W]hen official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant generally is not answerable in damages for the injurious consequences of that action." *Haddock v. City of New York*, 75 N.Y.2d 478, 484 (1990). But there must be room for the exercise of reasoned judgment by the municipality. *Id*. "[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which

could typically produce different acceptable results." *Id.*, *quoting Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983).

The County has not established that there was an exercise in reasoned judgment that resulted in the delay in plaintiff's transfer out of the Gibbs residence. Plaintiff's then caseworker, Harriet Willing, testified that she could not remember the circumstances of the transfer or the reason for the delay. Nor is there testimony explaining plaintiff's placement and retention in the Oliver home notwithstanding that the County was cognizant that the home was "literally packed with children' who had "complete freedom."

"The immunity afforded a municipality presupposes an exercise of discretion in compliance with its own procedures." *See Haddock v. City of New York*, 75 N.Y.2d 478, 485 (1990). Here, the County has failed to demonstrate such an exercise of discretion and, as a result, this court cannot conclude that it is entitled to common law governmental function immunity as a matter of law.

Notice

To sustain a cause of action for negligent supervision, a plaintiff must establish that the defendant had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated. *George v. Windham*, 169 A.D.3d 876, 877 (2d Dept. 2019). For the County to prevail on its motion it must establish that it had no such notice. But the County has not done so. As noted above, plaintiff's caseworker has no independent recollection of the salient facts. The County has failed to set forth a *prima facie* case entitling it to judgment as a matter of law.

Furthermore, even if the County had satisfied its burden, the County's own records raise an issue of fact as to whether the County had notice that the Gibbs and Oliver homes were unsafe environments for plaintiff. As stated in *Bartels*, if the County "knew of the incompetence of the foster parents or the indifferent discharge by them of their duties, the [County] might be held liable for an ensuing injury to the child, dependent on the evidence at

a trial." 76 A.D.2d at 522. Given the evidence of what the County knew of the untenable situations in which the plaintiff was placed, it is for a jury to determine—not this court—whether the abuse suffered by plaintiff could have been reasonably anticipated. Summary judgment, "rather than resolve issues, … decides whether issues exist and, as is often said of the motion, issue finding rather than issue determination is its function." Siegel, Connors, *New York Practice* (Sixth Ed.) §278, p.524.

Conclusion

For the reasons set forth above, the County's motion for summary judgment is denied. Nonetheless, to the extent that plaintiff seeks punitive damages against the County, that request is stricken. The County is a municipality and may not be held liable for punitive damages. *Dixon v. William Floyd Union Free School Dist.*, 136 A.D.3d 972 (2d Dept. 2016).

All other requested relief, not specifically addressed herein, is hereby denied.

This constitutes the Decision and Order of this court.

Dated: October 18, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.