SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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S.S.,

Plaintiff,

Part CVA-R
Index No. 900153/2021
Mot. Seq. No. 002

-against-

DECISION AND ORDER

PORT WASHINGTON UNION FREE SCHOOL DISTRICT and PORT WASHINGTON UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION,

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 submitted by the parties, have been reviewed in preparing this Decision and Order:

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

Plaintiff brings this action under New York's Child Victims Act (CVA) alleging that when she was eleven (11) years old she was sexually abused at her public school—the Guggenheim Elementary School in Port Washington—by a janitor employed by defendants (collectively referred to as the "District"). Plaintiff asserts claims for negligence, negligent hiring, supervision, retention and direction and breach of statutory duty to report under social services law.[1] The District now moves for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the motion is granted in part and denied in part.

[1] Other causes of action asserted in the complaint were dismissed as duplicative by decision and order dated February 15, 2022.

BACKGROUND

Plaintiff alleges that approximately 10 times over the course of a two-to-three-month period during the 1974-1975 school year, she was sexually abused in the school building, both during and after school hours.[2] At her deposition, plaintiff described the janitor as having wavy brown or black hair, dark brown eyes, brown skin and a "stocky-ish" build. Plaintiff approximated that the janitor was in his 30's and between 5'5" and 5'7" in height. Plaintiff does not recall the janitor's name.

Plaintiff first met the janitor when she volunteered to help with a "clean-up project" during her free reading time in class. No sexual contact occurred during that time. The janitor then arranged to meet with plaintiff on a different day after school hours, in a large room where he grabbed her breasts. The abuse escalated thereafter.

Other instances of sexual contact occurred in a janitorial office during the school day. On one occasion, a female teacher knocked on the door to the janitor's office while plaintiff was sitting on the janitor's lap. The teacher never entered the office and left after the janitor spoke to her through the door. There is no evidence that the teacher knew plaintiff was in the office. Other than when the janitor "glared" at plaintiff during recess, their interactions were in private.

Plaintiff testified that the instances that occurred during school hours lasted a few minutes and those that occurred after school hours lasted approximately 10 to 15 minutes.

Plaintiff never reported the sexual abuse.[3]

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

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[2] The facts as set forth by the court are consistent with the evidence submitted by plaintiff, including her 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.

[3] Plaintiff testified that she told her mother of the abuse when she commenced this action, approximately 45 years after the events took place.

§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).

Negligence claims

To sustain her 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). "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).

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 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 at 49. "[S]chools and camps owe a duty to supervise their charges and 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).

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.

The District contends that it cannot be held liable for the subject abuse because it had no notice of the janitor's propensity to commit such abuse and no actual or constructive notice that the abuse took place. This may ultimately be proven true. But the District has not submitted sufficient evidence in support of its motion to satisfy its *prima facie* burden.

The District seemingly relies on the acknowledgement by plaintiff that *she* never reported the alleged abuse and does not remember the name of the janitor. But the plaintiff described the physical appearance of her abuser and the District's Directory lists three individuals who were employed as janitors at plaintiff's school during 1974-1975. Nothing in the record suggests that the District searched for personnel files or other records related to the janitors employed in the school at the time of the alleged abuse or made other attempts to

discover which of the three may have been the alleged abuser. The District fails to submit proof evidencing a lack of prior notice or the absence of complaints with respect to the three janitors who may have been the culprit. Ruth Smith, a District secretary produced for deposition on the District's behalf, testified as follows:

> Q. After you were directed to highlight these names on this page, did you conduct any further inquiry or research into their employee files.
> A. No.
> Q. Do you know where either any one of these three employee's personnel files are kept?
> A. No.
> Q. Do you know if they are still maintained by the Port Washington School District?
> A. I do not know.
> Q. Do you know if they are scanned into some sort of computer system that you have in Port Washington School District?
> A. I do not know.

See Plaintiff's Exhibit 2, Smith Transcript at pp. 75-76.

The court is aware that due to the passage of time there may be instances in which there is no available proof to a defendant seeking to defend CVA actions brought decades after the events at issue. In such cases, this court has recognized that it may be appropriate to enter summary judgment in favor of a moving defendant where it is established that a plaintiff cannot prove his or her case. *See Kwitko v. Camp Shane, Inc*., Westchester Co. Index No. 59823/2020, Decision and Order dated February 21, 2023. But the District offers no proof or information concerning the unavailability of records or witnesses. The District cannot simply rely upon plaintiff's apparent 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; instead 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 Co-op. Educational Services*, 4 A.D.3d 387 (2d Dept. 2004).

Therefore, the District failed to meet its *prima facie* burden entitling it to dismissal of plaintiff's negligence-based claims. Accordingly, that branch of the motion seeking summary judgment on these claims is denied.

Breach of duty under Social Services Law

Plaintiff alleges that the District breached its alleged duty to report the subject abuses under New York's Social Services Law §§413 and 420. 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, the janitor was not a person legally responsible for plaintiff's care and this claim is dismissed.

Accordingly, the motion for summary judgment is granted in part and denied in part.[4]

Any other relief requested not specifically addressed herein is denied.

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.

[4] Although not specifically requested, the District is entitled to dismissal of plaintiff's request for punitive damages. 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).