SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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JANE DOE,

Plaintiff,

-against-

HAUPPAUGE UNION FREE SCHOOL DISTRICT, HAUPPAUGE HIGH SCHOOL and NORMAN GOLDEN,

Defendants.

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Part CVA-R
Index No. 620844/2019
Mot. Seq. No. 002

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

At the age of 17, while a senior attending Hauppauge High School in 1975/76, plaintiff began engaging in sexual relations with defendant Norman Golden, the school's theatre teacher/director and an employee of defendant Hauppauge Union Free School District. Plaintiff has brought this action pursuant to New York's Child Victims Act (CVA) seeking damages for injuries she allegedly sustained as a result of the sexual encounters. The defendants now move for summary judgment pursuant to CPLR 3212. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND[1]

It is not disputed that the plaintiff and Golden engaged in sexual activity when plaintiff was a senior in high school; plaintiff asserts the acts included fondling, oral sex and vaginal intercourse. Golden was plaintiff's theatre teacher at the time. Golden concedes only that he engaged in oral sex with plaintiff in his car off campus and that he tried to hide the nature of the parties' relationship from others because he feared getting into trouble. Plaintiff contends that not all of the sexual activity between her and Golden took place off of school grounds and was consensual: she claims that Golden once pushed her up against a wall in the school and grabbed her breasts. She also asserts that she did not consent to have intercourse with Golden and that because Golden was her teacher and initiated the sexual conduct she "submitted' and "surviv[ed] it" (although she did not fight it).

Plaintiff asserts that the students and faculty were aware of the parties' relationship. In support of this assertion, plaintiff submits the affidavit of a then-fellow student who avers that he observed plaintiff and Golden kissing in Golden's office and that he reported this conduct to another teacher, Judi Beck (now deceased). The student also avers that the parties' "inappropriate relationship" was "known throughout the high school." Other fellow students attest that the relationship was "a topic of conversation throughout the school," was "too obvious to ignore," and "did not go unrecognized." Plaintiff testified that Beck—a drama teacher in the middle school who helped with the high school musicals—approached her and told her, "You are too young for this, baby." Plaintiff further testified that another high school teacher, Victor Goldie, yelled "Golden's whore" at her while she was walking in the school with two classmates. Goldie's inscription to plaintiff in her high school yearbook started, "You loved Golden, not me…."

[1] The facts as set forth by the court are consistent with 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.

Plaintiff never contemporaneously told anyone of her sexual relationship with Golden. The defendants submit an affidavit from the current Deputy Superintendent of the District who attests that the District found no records reflecting any complaint of sexual misconduct against Golden. The affidavit does not identify what records, if any, concerning Golden were actually located and reviewed. A former teaching colleague of Golden's in the 1975/76 school year testified that he was unaware of any report received by the District that Golden was sexually abusing plaintiff or any other student of the District—or engaged in sexual relations with any student.

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. *U.S. 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 contains claims against the District and High School alleging negligence (First and Second Causes of Action); negligent hiring, supervision and retention

(Third and Fourth Causes of Action); and negligent infliction of emotional distress (Fifth and Sixth Causes of Action).

Although the action names Hauppauge High School as a defendant, plaintiff has failed to address defendants' argument that the school is not a legal entity subject to suit. *See Guerriero v. Sewanhaka Cent. High School Dist.*, 150 A.D.3d 831 (2d Dept. 2017). As a result, all claims are dismissed as against Hauppauge High School and the clerk is hereby directed to amend the caption accordingly.

Plaintiff's Fifth Cause of Action for negligent infliction of emotional distress against the District is subject to dismissal because it is duplicative of plaintiff's negligence claim (*see Fay*, 197 A.D.3d 1423, 1424 (3d Dept. 2021) and because plaintiff's safety was never placed in danger. *See Dolgas v. Wales*, WL 2795845 (3d Dept. 2023). "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his [or her] physical safety, or caused him [or her] to fear for his [or her] own safety." *Chiesa v. McGregor*, 209 A.D.3d 963, 966 (2d Dept. 2022) *quoting Borrerro v. Haks Group, Inc.*, 165 A.D.3d 1216, 1219 (2d Dept. 2018). Plaintiff testified that she had a crush on Golden and did not testify that she ever feared him.

The court now turns to the remaining claims. The District argues that all of plaintiff's claims against it are time-barred because plaintiff was seventeen years old when the parties' sexual activity began. Clearly, the District would be correct if the claim revival provision of New York's Child Victim Act (CVA)—CPLR §214-g—did not apply since the conduct at issue took place in the mid-1970s. But as explained below, plaintiff has at least raised an issue of fact as to whether the CVA's revival provision is applicable.

CPLR §214-g "provides a revival window for civil actions or causes of action alleging intentional or negligent acts or omissions that seek to recover damages for injuries suffered as a result of 'conduct which would constitute a sexual offense as defined in article [130] of the penal law committed against a child less than eighteen years of age'...."

Anonymous v. Castagnola, 210 A.D.3d 940, 941 (2d Dept. 2022). To fit within the revival window it is not necessary that the actor be subject to criminal liability. *Id.*; *See also Schearer v. Fitzgerald*, __A.D.3d __, WL 4219275 (2d Dept. 2023). But the conduct must constitute a sexual offense under article 130. Engaging in consensual sex with someone seventeen years old is not conduct constituting such an offense thereby reviving a time-barred claim. *See Druger v. Syracuse Univ.*, 207 A.D.3d 1153 (4th Dept. 2022)(seventeen year-old plaintiff required to plead factual allegations related to lack of consent to allege conduct which would constitute a sexual offense as defined in Penal Law article 130); *but see SR v. Gates Chili Board of Education*, 78 Misc.3d 934 (Sup. Ct. Monroe Co. 2023).

Nonetheless, plaintiff has raised an issue of fact as to whether at least some of the sexual activity between the parties was non-consensual. Clearly, for example, if Golden surprised plaintiff by suddenly throwing her up against a wall and grabbing her breasts as she asserts, a jury may find that Golden's conduct constituted a sexual offense. Therefore, the District's statute of limitations argument is unpersuasive.

Turning to the specifics of plaintiff's negligence claims, a necessary element of a cause of action alleging negligent retention or supervision of an employee is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury.[2] *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d at 635. 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. *Id.* at 635-36.

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

[2] The court agrees with the District that there is no basis for plaintiff to rely on a negligent hiring theory. The District has proffered evidence relating to Golden's application, credentials and references. Plaintiff has failed to raise an issue of fact as to whether the District had knowledge of a propensity by Golden to engage in sexual misconduct before his hire. *See Ghaffari v. North Rockland Cent. School Dist.*, 23 A.D.3d 342, 343-44 (2d Dept. 2005).

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. A school owes its students such care as a parent of ordinary prudence would observe in comparable circumstances. *Doe v. Whitney*, 8 A.D.3d 610, 611 (2d Dept. 2004).

Here, the District has not presented sufficient evidence to satisfy its *prima facie* burden establishing that it had no actual or constructive notice of Golden's alleged propensities. The District has the burden as the moving party to affirmatively demonstrate that it had no notice, a burden that cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *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). Only when a movant has shown a *prima facie* right to summary judgment does the burden ordinarily shift to the opposing party to show that a factual dispute exists requiring a trial. *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 District attempts to meet its burden by submitting Golden's own testimony that no complaints alleging sexual abuse were ever filed against him. They further seek to rely on the ignorance of a fellow teacher concerning such complaints. Finally, the District provides an affidavit that no complaints against Golden were located but fails to explain what records (apart from an employment application it submits) were located and reviewed. Neither Golden nor his colleague presumably had access to Golden's personnel records—in which it is fair to assume any such complaint would be filed. Nor does the District explain its failure to provide adequate evidence of its lack of notice.[3] As a result, the District has not

[3] 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 Kwitco v. Camp Shane, Inc.*, Westchester Co. Index No. 59823/2020, Decision and Order dated February 21, 2023. But the District has not shown that evidence in support of its defense no longer exists.

met its *prima facie* burden concerning these claims. Even if it had, as explained below, the negligence claims against it would still survive because plaintiff raises an issue of fact concerning the District's notice.

A review of caselaw concerning allegations by a student of teacher abuse reveals that whether a school district was on sufficient notice of the teacher's propensities is a *sui generis* inquiry. Sufficient evidence of notice to survive summary judgment was found in *Doe v. Whitney*, where the teacher/abuser often kept the plaintiff in his first-grade classroom during recess and later removed him from his second and third-grade classrooms without explanation. *Doe v. Whitney*, 8 A.D.3d at 611. In *Murray v. Research Foundation of State University of N.Y.*, 283 A.D.2d 995 (4th Dept. 2001), the court denied the defendant school district's summary judgment motion where a middle school student was let out of classes based upon student passes provided by the abuser, who abused the student in his school office behind closed doors. In *Doe v. Bd. of Educ. of Morris Central School*, 9 A.D.3d 588 (3d Dept. 2004), summary judgment was denied because "inappropriate touching occurred on multiple occasions in two different locations over a period of time [one to three week period]" and, therefore, "it simply [could not] be said, as a matter of law, that there were insufficient facts to put defendants on notice of a potentially harmful situation." *Id.* at 591.

In contrast, in *Dia CC. v. Ithaca City School District*, 304 A.D.2d 955 (3d Dept. 2003), it was held that releasing a student from class to another teacher for one-on-one instruction was not a breach of the duty to supervise as a matter of law. *See also Ghaffari v. North Rockland Cent. School Dist.*, 23 A.D.3d 342 (2d Dept. 2005)(summary judgment granted due to lack of notice where teacher allowed to meet privately with student). It has also been found that a high school student meeting with a teacher "behind locked doors" is not enough to stave off summary judgment "given the degree of trust reposed in teachers and the fact that such meetings are an integral part of the educational process." *Mary KK v. Jack LL*, 203 A.D.2d 840, 842 (3d Dept. 1994). Likewise, an issue of fact is not created simply because a teacher drove a student home from school. *Doe v. N.Y. City Dept. of Education*, 126 A.D.3d 612 (1st Dept. 2015).

As pertinent here, rumors and gossip that do not involve sexual misconduct have been found insufficient to establish constructive notice of such misconduct. *Dolgas v. Wales*, 215 A.D.3d 51 (3d Dept 2023). But here plaintiff does not just rely upon rumors concerning Golden's activities with students in general as in *Dolgas*, but on widespread knowledge of the inappropriate interactions between Golden and plaintiff specifically, as attested to by no less than three fellow students.

Furthermore, there is also an issue of fact as to whether the school was placed on actual notice. Plaintiff has presented evidence that Beck, a District employee, was notified of the sexual nature of the parties' relationship. Evidence has also been submitted allowing a jury to infer that Golden's teaching colleague Goldie was also aware of the sexual nature of the parties' relationship. Therefore, the District's motion is denied as to the First and Third Causes of Action of plaintiff's amended complaint.

Finally, plaintiff's request for punitive damages is stricken. 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).

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: July 5, 2023
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.