T.S. v Waldorf Sch. of Garden City

2023 NY Slip Op 34666(U)

July 12, 2023

Supreme Court, Nassau County

Docket Number: Index No. 900062/2021

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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T.S.,

Plaintiff,

-against-

THE WALDORF SCHOOL OF GARDEN CITY, ADELPHI UNIVERSITY and THE WALDORF EDUCATIONAL FOUNDATION,

Defendants.
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Part CVA-R
Index No. 900062/2021
Mot. Seq. Nos. 005 & 006

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 Adelphi's Notice of Motion, Affirmation, & Exhibits…………………..1
Plaintiff's Affirmation in Opposition, Amended Affirmation & Exhibits…………..2
Defendant Adelphi's Affirmation in Reply……………………………….....……3
Defendant Waldorf's Notice of Motion, Affirmation, & Exhibits…………………..4
Plaintiff's Affirmation in Opposition, & Exhibits…………………………….…..5

In this action brought pursuant to the Child Victims Act, plaintiff alleges that, beginning in 1972 when he was approximately 8 years old, he was sexually abused by Berlin, a teacher at The Waldorf School of Garden City (Waldorf), located on the Adelphi University campus. Plaintiff now asserts claims against defendants for negligent supervision of him and negligent supervision and retention of Berlin. Defendants Waldorf and Adelphi each move for summary judgment pursuant to CPLR 3212 seeking to dismiss the action against them. For the reasons set forth below, the motions are denied.

BACKGROUND[1]

Plaintiff attended Waldorf starting in "junior kindergarten" through the beginning of 7th grade. Berlin was plaintiff's teacher for all school years prior to 6th grade.

Plaintiff testified that Berlin was physically and mentally abusive during the time she was his teacher. Between 1st and 4th grade, Berlin made plaintiff sit at his desk in the middle of the soccer field with a dunce cap while class was in session. This happened 15 to 20 times. Berlin often picked plaintiff up by the ear and put him in the corner of the classroom for the entire day. She also slapped plaintiff's hands with an oak pointer and three-foot ruler. On several occasions, Berlin hit plaintiff in the face with such force that she left marks and bruises on his face, even causing his tooth to fall out on one occasion. Plaintiff testified that his mother reported the physical abuse to the principal many times. This abuse took place in front of the other students.

The first instance of sexual abuse occurred after plaintiff was hit in the testicles while playing soccer during recess. When plaintiff told Berlin about the incident, she insisted that she "check" him and then fondled his genitals. Between 4th and 5th grades, Berlin took plaintiff into a music room during recess, locked the door, closed the shades, made him pull down his pants and fondled plaintiff's genitals. The abuse took place for approximately 15 to 20 minutes. This course of abuse happened between five and six times. Two incidents of sexual abuse also included oral sex. On one occasion, Mr. Rose, the music teacher, tried to get into the music room while Berlin was sexually abusing plaintiff, but couldn't because it was locked. When Berlin finally opened the door (after instructing plaintiff to put his pants on), Mr. Rose questioned Berlin concerning the reason for her being in the music room. Plaintiff testified that the school nurse also observed Berlin take plaintiff from the classroom to the music room. Plaintiff did not report the sexual abuse to anyone.

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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.

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).

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. *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d 634, 635(2d Dept. 2018). 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 minor stemming from injuries related to an individual's intentional acts, the plaintiff generally must demonstrate that the school, camp or relevant entity 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 44, 49(1994). An entity responsible for supervising a child 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).

Adelphi contends that it cannot be held liable for plaintiff's abuse because it owed no duty to plaintiff. Adelphi asserts that the nexus between it and Waldorf is insufficient to create liability of Waldorf's employee, particularly since Adelphi was not involved in the day-to-day operations of Waldorf. Adelphi points to its 1954 agreement with Waldorf to dispel liability.[2] But the agreement states that while Waldorf assumed the control of the management, operation, and conduct of the "Waldorf School of Adelphi College," such control will be subject to the overall supervision of Adelphi. The fact that Adelphi may have elected not to exercise its supervisory power over Waldorf goes to the very heart of plaintiff's claim – that the complete lack of proper supervision over him and Berlin lead to plaintiff's abuse.

Both Adelphi and Waldorf fail to sustain their burden of establishing that they lacked notice of Berlin's alleged abusive propensities and that their supervision of both Berlin and plaintiff was not negligent. *See Fain v. Berry*, __A.D.3d __, WL 2837587, (2d Dept. 2024); *Sayegh v. City of Yonkers*, __ A.D.3d __, WL 2837443 (2d Dept. 2024). The submissions in support of the motions fail to eliminate an issue of fact since Berlin spent extensive time with plaintiff alone during recess—which went undetected by any other teacher or recess monitor—and fondled plaintiff in the music room, behind closed doors over a lengthy period of time. Plaintiff testified that another teacher and the school nurse were aware that Berlin

[2] The same argument was asserted and rejected by this court in a prior motion to dismiss.

was alone with plaintiff in the music room. There is no indication that any investigation or follow-up was performed to ascertain why Berlin was alone with plaintiff behind closed doors in the music room. Neither Adelphi nor Waldorf submit an employment or personnel file for Berlin or policies and procedures for the time-period of the alleged abuse.

Further, a clear issue of fact exists with respect to whether defendants had notice of Berlin's propensity to act violently towards students under her charge, particularly plaintiff, since plaintiff testified that his mother reported plaintiff's physical abuse by Berlin many times to the principal. The sexual acts Berlin committed upon plaintiff were non-consensual—they were also acts of violence. Therefore, it cannot be said that a reasonable investigation of Berlin's conduct would not have prevented the harm committed to plaintiff. *Moore Charitable Foundation v. PJT Partners, Inc.*, 40 N.Y.3d 150, 159 (2023)(the 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).

As a result, defendants' motions for summary judgment are denied.

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

This constitutes the Decision and Order of this court.

Dated: July 12, 2023
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.