

D.V. v Roslyn Union Free Sch. Dist.

2024 NY Slip Op 32557(U)

July 8, 2024

Supreme Court, Nassau County

Docket Number: Index No. 900033/2021

Judge: Leonard D. Steinman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
D.V.,

Plaintiff,

**Part CVA-R
Index No. 900033/2021
Mot. Seq. No. 003**

-against-

DECISION AND ORDER

**ROSLYN UNION FREE SCHOOL DISTRICT and
ROSLYN HIGH SCHOOL,**

Defendants.

-----X
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

Plaintiff alleges that in 1986, when she was a junior and senior at Roslyn High School, her English teacher, James Carter, sexually abused her. Plaintiff seeks damages resulting from her abuse from defendant Roslyn Union Free School District, which now moves pursuant to CPLR 3212 for summary judgment dismissing the action. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND¹

Plaintiff was born in October 1969. Sixteen years later she was a junior at Roslyn High School. It was in September of that year, 1986, that plaintiff and Carter became

¹ 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. *Adams v. Bruno*, 124 A.D.3d 566 (2d Dept. 2015). This court makes no findings of fact.

friends. The friendship turned into a sexual relationship at the end of September/early October in that year prior to plaintiff's 17th birthday and continued for approximately three years thereafter. Plaintiff and Carter engaged in sexual activity on and off school grounds. Plaintiff believes that at least one teacher observed them engaging in a sex act in the parking lot of the school, but that occurred after she was 17. Carter would also rub against plaintiff during class. Plaintiff never reported Carter's sexual abuse to a school official or teacher.

In the mid to late 1980's, Carter was spoken to by a guidance counselor after a student complained that Carter had inappropriately touched her. Carter was also spoken to during this time period by the high school's English Department Chair who instructed him to keep his distance from the female students. Carter believes this conversation resulted from the same incident.

LEGAL ANALYSIS

It is the movant who has the burden to establish an entitlement to summary judgment. *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).

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).

To sustain her negligence claim, plaintiff must allege and prove (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985); *see also, Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 A.D.3d 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 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 44, 49 (1994). “[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). Prior knowledge of an individual’s propensity to engage in criminal conduct is not required to establish a breach of a school’s duty to supervise its students, however, since a school may be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction. *Blanchard v. Moravia Central School District*, __ A.D.3d __, WL 3287003 (4th Dept. 2024); see *Basile v. Board of Education of Glen Cove City School District*, 221 A.D.3d 645 (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, 159 (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 is correct that plaintiff may not support her action by seeking to rely upon consensual sexual activity between her and Carter that occurred off of school premises after plaintiff turned 17. *See Fain v. Berry*, __ A.D.3d __, WL 2837587 (2d Dept. 2024).

Nonetheless, the District has failed to sustain its burden of establishing that it lacked constructive notice of Carter’s’ alleged abusive propensities and that its supervision of both Carter and plaintiff was not negligent. *See Fain v. Berry, supra; Sayegh v. City of Yonkers*, __ A.D.3d __, WL 2837443 (2d Dept. 2024). The submissions in support of the motion fail to eliminate an issue of fact given plaintiff’s testimony that at least one teacher observed plaintiff and Carter walking together outside towards a school bus area where they engaged in sexual activity; they engaged in sexual activity approximately a dozen times before plaintiff turned 17, including on school grounds; Carter would openly sit in the school’s “library” or alcove area with female high school students between his legs who would rub up against him; plaintiff did drugs with Carter at the school during school hours, including cocaine; according to plaintiff, the students knew Carter was “into drugs”; and Carter was warned by his supervisor to keep his distance from female students.² *See Hammill v. Salesians of Don Bosco*, __ A.D.3d __, 212 N.Y.S.3d 200 (2d Dept. 2024); *MCVAVCD-Doe v. Columbus Avenue Elementary School*, 225 A.D.3d 845 (2d Dept. 2024).³ As a result, the

² The District has not established this occurred after plaintiff turned 17.

³ In *McVawcd-Doe*, the Second Department found that the defendants had not satisfied their *prima facie* burden by establishing their lack of constructive notice of the teacher’s abusive propensities given the frequency of abuse over a significant period. 225 A.D.3d at 847-48. In *Hammill*, the Second Department found that defendant *had* met its *prima facie* burden but that the frequency of the abuse raised a triable issue of fact.

District's motion for summary judgment with respect to the plaintiff's negligence claim is denied.

The District does not separately seek dismissal of plaintiff's negligence claim to the extent it relies upon a negligent hiring theory. The court notes that in plaintiff's personnel file submitted with the District's submission an applicant evaluation summary apparently filled out in 1972 states: "I do feel he is quite the ladies man – he gave me that impression – but I think that he would go for the older women and not students." (Bate Stamp No. RSD000116.)

The 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 8, 2024
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C