To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

BCVAWCH-DOE,

Plaintiff,

-against-

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK; THE CHURCH OF ST. BERNARD and WESTCHESTER COUNTY PUBLIC ADMINISTRATOR as Administrator of the Estate of EDWIN GAYNOR,

Defendants.

----------X

DECISION AND ORDER
Index No.: 69676/2019
Motion Date: July 8, 2024
Seq. Nos. 3, 4

GONZALEZ, J.:

PAPERS	**NUMBERED**
Sequence No. 3	71-78, 104-193, 284
Sequence No. 4	79-101, 194-283, 285-286

In Motion Sequence No. 3, defendant THE CHURCH OF ST. BERNARD (hereinafter, "St. Bernard") moves for an Order granting summary judgment dismissing all claims against it.

In Motion Sequence No. 4, defendant ARCHDIOCESE OF NEW YORK s/h/a/ THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, (hereinafter, "Archdiocese") moves for an Order granting summary judgment dismissing all claims against it.

Plaintiff commenced this action pursuant to the New York Child Victims Act (hereinafter CVA) (*see* CPLR § 214-g) alleging that during the calendar years, 1958 - 1960, he was sexually abused by EDWIN GAYNOR (hereinafter, "Gaynor") an athletic director, physical education

teacher and children's sports coach at co-defendant St. Bernard School, in White Plains, New York. This action was consolidated for discovery with 32 actions alleging abuse by Gaynor at St. Bernard, as well as Immaculate Heart of Mary (hereinafter, "IHM") and Holy Rosary Roman Catholic Church (hereinafter, "Holy Rosary"). Plaintiff alleges the following causes of action: (1) Negligence; (2) Negligent Training and Supervision of Employees; and (3) Negligent Retention of Employees.

Facts

Plaintiff attended St. Bernard from kindergarten to 5th grade, where he played basketball for its Catholic Youth Organization (hereinafter, "CYO") team. Gaynor was Plaintiff's gym teacher and basketball coach during his 3rd and 4th grade years. Gaynor, who is the subject of numerous CVA actions, passed away just before appearing for a deposition.

In the fall of 1958, was the first time the Plaintiff was sexually abused by Gaynor, in the 3rd grade when he was 9 years old. Gaynor asked Plaintiff to come into his office after school because he had received new basketball uniforms to try on. Gaynor's office was attached to the rectory of St. Bernard, a house that was across the street from the school. When Plaintiff arrived at his office, Gaynor had laid out the uniform on his desk. Gaynor told Plaintiff to take off his clothes to try it on. Plaintiff took off his clothes but left his underwear on. Gaynor then told him to sit on his lap and he'd put the uniform on him. As the Plaintiff sat on Gaynor's lap, he put the uniform top on him. Gaynor used a vibrator and rubbed Plaintiff's bare legs, thighs, arms and chest with it. Plaintiff was on Gaynor's lap for a while. Plaintiff asked to put on his uniform shorts and Gaynor allowed him to. When Gaynor was done, the Plaintiff got undressed again in front of Gaynor to put his clothes back on.

The second incident occurred the following year, when Plaintiff was in the 4th grade. While Plaintiff was playing basketball, Gaynor called him into his office to try on a new uniform. Plaintiff did not want to go alone and asked another player, Bill Henry, to go with him. Plaintiff told Bill Henry earlier in the day what Gaynor had done to him in the 3rd grade. Plaintiff thought, since Bill Henry was a taller student, Gaynor would not abuse him in front of Bill Henry.

When they arrived, Gaynor told Plaintiff he had to come into his office alone and Bill Henry had to wait outside until they were done. The abuse that occurred on the first incident also happened on the second incident. Gaynor laid out a new uniform on his desk and told Plaintiff to remove his clothes to try it on. Plaintiff did as instructed and removed all his clothes except his underwear. Gaynor, again, put Plaintiff on his lap and placed the new uniform shirt on him. Gaynor proceeded to use the same vibrator to rub Plaintiff's bare legs, thighs, arms and chest. Bill Henry remained outside the office and was not a witness to the abuse.

Plaintiff had told his older brother about Gaynor's abuses when he was a teenager. Plaintiff never reported Gaynor's abuses to any other family members, nor to anyone at St. Bernard. Plaintiff stated that he maintained friendships with other St. Bernard students after he left after his 5th grade year. He testified he and these former St. Bernard students had spoken about Gaynor's abuse at a 2014 school reunion. He knows of at least three former St. Bernard students abused by Gaynor in the 1950's and 60's.

The St. Bernard parish was organized under a corporate organization with the Pastor of the parish, designated by the Archdiocese, as the head of that corporation. The Pastor was canonically appointed by the Archbishop; and the Archbishop works for the Archdiocese. The parish had a board, of which the Archbishop was the head. A letter of ecumenical appointment from the Archbishop of the Archdiocese of New York was required to appoint a Pastor as the head of a

parish school. The Pastor, hired by the Archbishop, had the ultimate authority over the way in which a parish school was run.

The Archdiocese controlled the schedule and activities of the CYO league, where Gaynor was a coach, at St. Bernard. The CYO program at St. Bernard was part of a larger league, which the Archdiocese of New York coordinated and organized. In order to create the CYO game schedules, the coordinator of CYO at one school would work together with the various coordinators at the other schools, under the direction of the Archdiocese. The Archdiocese of New York CYO would coordinate and regulate the code of conduct and the rules and policies.

Sister Patricia Anastasio (hereinafter, "Sr. Patricia") testified regarding the alleged time of the abuse, each parish religious corporation employed and supervised the staff and faculty of its own school. As per Sr. Patricia, the exclusive authority and control over the day-to-day operation of parish elementary schools – ie., hiring, supervising, paying, and terminating faculty and staff belonged to the Pastor of the parish. Parish schools, such as St. Bernard, were independently owned, operated, maintained, and managed. The Archdiocese maintained separate financial accounts from St. Bernard. According to her testimony, the Archdiocese, did not employ or supervise teachers, athletic coaches, or other staff at St. Bernard, nor had the authority to do so.

A 1962 IHM diploma issued to one of the plaintiffs in a related CVA action is signed by the Archdiocese Superintendent of Schools. The Superintendent of Schools' Office is a department in the Archdiocese. In addition, the Archdiocese Superintendent of Schools oversaw all Catholic schools within its jurisdiction.

Argument

Motion Sequence No. 3

St. Bernard argues that it did not employ Gaynor. Assuming *arguendo* that St. Bernard did employ Gaynor, it argues that liability will not attach for torts committed by an employee acting solely for personal motives unrelated to the furtherance of the employer's business, citing *Joshua S. by Paula S. v. Casey*, 206 A.D.2d 839 (4th Dept. 1994) and *Dia CC v. Ithaca Central School District*, 304 A.D.2d 955 (3rd Dept. 2003).

St. Bernard argues it had no prior notice of Gaynor's acts of sexual abuse against Plaintiff or that it could have reasonably anticipated that Gaynor would abuse Plaintiff. Additionally, St. Bernard argues that it owed no duty of care to Plaintiff after school hours, when the abuse occurred, and it should bear no responsibility for the alleged incidents that led to the abuse.

In opposition, Plaintiff argues that St. Bernard has not met its prima facie burden for summary judgment since no evidence was produced demonstrating lack of notice of Gaynor's abuse or propensity toward abuse. Further, Plaintiff argues that St. Bernard did receive both actual and constructive notice of Gaynor's history of abuse while Gaynor was employed at St. Bernard.

Motion Sequence No. 4

The Archdiocese argues that summary judgment should be granted dismissing Plaintiff's complaint against it on the ground that despite the Plaintiff's contrary allegations, the evidence establishes that the Archdiocese had no connection to Gaynor; no responsibility for Gaynor's employment at St. Bernard; and no duty to supervise Gaynor; or to protect the Plaintiff. The Archdiocese did not own, create, oversee, supervise, manage, control, direct, or operate St. Bernard parish or school, and by extension, the Archdiocese did not hire, train, retain, supervise, employ, pay, transfer, or control Gaynor.

The Archdiocese argues that it played no part in Plaintiff's attendance at St. Bernard, or his interactions with Gaynor, and that there is absolutely no nexus between the Archdiocese and Gaynor. The Archdiocese maintains that the testimonial and documentary evidence detailed in its Statement of Material Facts, together with the affidavit of Sr. Patricia, establishes that Gaynor was not an employee or agent of the Archdiocese, and that the Archdiocese did not hire, train, retain, supervise, employ, pay, transfer, control or have any authority over Gaynor. The Archdiocese did not have authority to discipline Gaynor or any lay person purportedly acting as a physical education teacher or coach at St. Bernard.

Further, the Archdiocese maintains that the Certified Certificate of Incorporation of St. Bernard, and the affidavit of Sr. Patricia, establish that St. Bernard is an independent religious corporation, incorporated separately from the Archdiocese. Because the Archdiocese was never entrusted with Plaintiff's care or custody and was never in a special or fiduciary relationship with him, Plaintiff's theory that Archdiocese had a duty to protect Plaintiff from injury, it argues, is invalid as a matter of law. Therefore, the admissible evidence before this Court demonstrates unequivocally that Gaynor did not have any relationship, including an employment or agency relationship, with the Archdiocese.

The Archdiocese further contends that even if the Court accepts that a duty existed, the Archdiocese had neither notice of any alleged propensity on the part of Gaynor to commit abuse nor of the specific acts of alleged child sexual abuse by Gaynor. They maintain that Gaynor's conduct was unknown to the Archdiocese, and that once the allegations came to light, appropriate action was taken.

Plaintiff contends that there is evidence that the Archdiocese did in fact exercise control over St. Bernard and Gaynor. Monsignor Krug was an Archdiocesan clergy, appointed by the

Archbishop, at St. Bernard when Gaynor abused other victims. The Archdiocese controlled student life and the curriculum at St. Bernard. St. Bernard followed the guidelines or policies that the Archdiocese superintendent of schools imposed. The Archdiocese superintendent of schools gave the authority to use the coat of arms. The superintendent of schools was "the official in the Archdiocese in charge of that office that would oversee Catholic schools," and would ask parish schools to "remit the funds." The Archbishop heads the Archdiocese, and its ecclesiastical territory, including St. Bernard. The Archbishop assigned Monsignor Krug and the other clergy and nuns at St. Bernard. The Archbishop was the head of the St. Bernard board.

Plaintiff argues that documentary evidence, purported to be written letters from Gaynor to members of the Archdiocese, establishes the Archdiocese and St. Bernard breached their *in loco parentis* duty to protect Plaintiff. Plaintiff concedes that where a complaint alleges negligent supervision due to 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. Plaintiff also alleges the Archdiocese had constructive notice of Gaynor's sexual abuse of students.

Discussion

The Child Victims Act, effective February 14, 2019, revived the statute of limitations to commence civil actions against any party for physical, psychological, or other injury suffered as a result of conduct that would constitute a sexual offense under the penal law committed against a minor (CPLR § 214-g). The primary intent of the legislation was to revive civil claims by survivors of childhood sexual abuse and provide a more generous statute of limitations for such claims in the future (*see* Vincent Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR § 214-g).

To obtain summary judgment, the movant is required to sufficiently establish its cause of action or defense to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212[b]). The movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985] [internal citations omitted]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v. Griffin*, 71 A.D.3d 1112, 1115 [2d Dept. 2010] [internal quotations omitted]). The evidence must be viewed in a light most favorable to the nonmoving party and it should be given the benefit of all favorable inferences (*Gonzalez v. Metropolitan Life Ins. Co.*, 269 A.D.2d 495, 496 [2d Dept. 2000]). However, speculative and conclusory assertions are insufficient to defeat summary judgment (*Hartman v. Mt. Valley Brew Pub, Inc.*, 301 A.D.2d 570, 571 [2d Dept. 2003]).

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, 631 [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 of demonstrating its prima facie entitlement to judgment as a matter of law, the motion for summary judgment should be denied (*US Bank N.A. v. Weinman*, 123

A.D.3d 1108, 1109 [2d Dept. 2014]). A defendant's burden on summary judgment cannot be satisfied merely by pointing to gaps in the plaintiff's proof, rather than submitting evidence showing why his claims fail (*Matter of New York City Asbestos Litig.*, 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, 562 [1980]; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067-68 [1979]).

Negligence

To prevail on a negligence claim, plaintiff must demonstrate a duty owed by the defendant to plaintiff, a breach of that duty, and injury proximately resulting therefrom (*Mitchell v. Icolari*, 108 A.D.3d 600 [2d Dept. 2013]). To sustain a cause of action for negligent supervision due to injuries related to an individual's intentional acts, plaintiff must demonstrate that the defendant knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could reasonably have been anticipated or were foreseeable (*Fuller v. Family Servs. of Westchester, Inc.*, 209 A.D.3d 983 [2d Dept. 2022]; *Navaeh T. v. City of New York*, 132 A.D.3d 840 [2d Dept. 2015]). Actual or constructive notice to defendant of prior similar conduct is generally required (*see Navaeh T.*, 132 A.D.3d at 842). Similarly, to establish a cause of action for negligent retention or negligent supervision of an employee, plaintiff must demonstrate that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Fuller*, 209 A.D.3d at 984).

Based on the record, ie; testimony and documentary evidence, Gaynor was employed at St. Bernard during the alleged time of abuse. The record, however, is silent regarding which Defendant(s) trained, supervised or retained Gaynor during this alleged period.

Plaintiff has established the Archdiocese was a constant and pervasive presence at St. Bernard. The Pastor who ran St. Bernard was appointed by the Archdiocese. The Archdiocese controlled matters of policy, procedures and curriculum at all three parish schools. The Archdiocese controlled the schedule of the CYO, for which Gaynor was a coach, and the activities of the CYO league at the parishes. The basketball league itself was an organization that extended beyond individual parishes.

Based on the record, all Defendants fail to submit evidence in admissible form to establish each had no employee-employer relationship with Gaynor. While the Defendants each allege gaps in Plaintiff's proof in failing to establish Gaynor's employment with any direct Defendant, the gaps in proof in of itself are not sufficient to sustain Defendants' burden on summary judgment (*Matter of New York City Asbestos Litig.*, 174 A.D.3d at 461).

Defendants argue that they did not owe a duty to Plaintiff and, assuming *arguendo* they did owe a duty, lack of prior notice of Gaynor's sexual proclivities and abuse precludes liability toward the Plaintiff. Under the *in loco parentis* doctrine,

> "The standard for determining whether the school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information" (*Wienclaw v. East Islip Union Free Sch. Dist.*, 192 A.D.3d 945, 946, 144 N.Y.S.3d 106 [2021] [internal quotation marks omitted]). Where alleged negligent supervision results in "injuries related to an individual's intentional acts, the plaintiff generally must [establish as an element of the claim] 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" (*Burdo v. Cold Spring Harbor Cent. Sch. Dist.*, 219 A.D.3d 1481, 1482, 196 N.Y.S.3d 517 [2023] [internal quotation marks omitted]; *see Fuller v. Family Servs. of Westchester, Inc.*, 209 A.D.3d at 984). Thus, "[a]ctual or constructive notice to the school of prior similar conduct generally is required" (*Burdo v. Cold Spring Harbor Cent. Sch. Dist.*, 219 A.D.3d at 1482

> [internal quotation marks omitted]; *see Nizen-Jacobellis v. Lindenhurst Union Free Sch. Dist.*, 191 AD3d 1007, 1007-1008, 143 N.Y.S.3d 368 [2021])." (*MCVAWCD-Doe v. Columbus Ave. Elementary Sch.*, 225 A.D.3d 845, 847 [2d Dept. 2024]).

MCVAWCD-Doe is a CVA case where the lower court granted summary judgment to the defendant school district dismissing plaintiff's claims of negligence and negligent hiring, supervision and retention of an abusive teacher. In reversing the lower court's decision, the Second Department held the defendants failed to establish, *prima facie*, that they lacked constructive notice of the teacher's alleged abusive propensities and conduct, regardless of the sufficiency of the plaintiff's opposition papers. Notably, the Court held, "[t]he adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff's injury' (*Braunstein v. Half Hollow Hills Cent. Sch. Dist.*, 104 A.D.3d 893, 894, 962 N.Y.S.2d 340 [2013] [internal quotation marks omitted]); *see Nizen-Jacobellis v. Lindenhurst Union Free Sch. Dist.*, 191 A.D.3d at 1008)." (*Id*).

Another recent CVA case found that lack of prior notice does not matter where there is an intentional criminal act by a third party.

> "Even if the District had no prior notice of [the alleged abusers'] specific propensities for abuse, where there is an intentional or even criminal act by a third party, a school district may nevertheless be liable for the reasonably foreseeable consequence of circumstances it created. (*Murray*, 283 AD2d at 997). Negligence lies in having placed the employee in a position to cause foreseeable harm, from which, most probably, the injured party would have been spared, had the employer taken reasonable care in making decisions respecting retention or supervision of the employee." (*Doe v. Newburgh Enlarged Sch. Dist.*, 2024 N.Y. Misc. LEXIS 5406, *15-16 [Sup Ct, Orange County, May 2, 2024]).

More recently, the Second Department considered a CVA case where defendants failed to eliminate triable issues of fact as to whether it was negligent to permit the plaintiff to be alone behind closed doors with a physician during medical examinations, in contravention of the School District's own policy. (*J. B. v. Monroe-Woodbury Cent. Sch. Dist.*, 224 A.D.3d 722, 2024 N.Y.

App. Div. LEXIS 855 [2d Dept. 2024]); (*see also*, *Murray v. Research Foundation of State University of New York,* 283 A.D.2d 995, 723 N.Y.S.2d 805 [4th Dept. 2001] [mother raised issues of fact regarding whether school district breached a duty, including whether a reasonably prudent parent would have permitted the child to meet with employee behind closed doors]).

In the matter at hand, the Defendants have failed to establish prima facie that they lacked constructive notice of Gaynor's abuse (*Braunstein*, *supra*, 104 A.D.3d at 894). Furthermore, as the sexual abuse by Gaynor was an intentional criminal act, triable issues of fact exist as to whether St. Bernard or the Archdiocese may be liable for placing him in a position to cause foreseeable harm to Plaintiff had they taken reasonable steps in supervising his interactions with the students (*Doe v. Newburgh Enlarged Sch. Dist.*, *supra*, 2024 N.Y. Misc. LEXIS 5406 at *15-16), such as ensuring an open-door policy or having witnesses present when he met with students.

Plaintiff testified that Gaynor told him to come to his office twice between 3rd and 4th grade to try on new uniforms, where he abused him on each occasion. Within a short period of time, Gaynor's actions should have raised red flags with his supervisors, once Gaynor began to isolate Plaintiff to abuse him. "A trier of fact could clearly find, if plaintiff's testimony is credited, that a sufficient nexus exists between defendants' lack of supervision or oversight of the [abuser], and the ensuing sexual abuse." (*D.S.P. v. Westchester Cnty.*, 2024 NYLJ LEXIS 1239, *31 [Sup Ct, Westchester County, April 19, 2024].)

Defendants further argue no liability may be predicated on conduct occurring after school hours. However, a school's *in loco parentis* duty to protect students after hours on school grounds has been recognized by the courts within the context of a CVA case:

> "The Court finds that plaintiffs have raised material issues of fact with respect to the issues of negligent retention and supervision and negligent failure to act as a reasonably prudent parent would with respect to [defendant]. These issues include, but are not limited to: whether the District, or its employees, should have been on notice of the repeated instances

> of plaintiff going to the art room *after school* [emphasis supplied], and of occasions when plaintiff was taken from the school premises by [defendant] in his private vehicle. There are questions of fact regarding whether the lack of any training regarding sexual abuse was a departure from the standards existing at the time. While both parties have raised compelling arguments, the existence of such issues precludes summary judgment on the remaining claims." (*Doe v. Newburgh Enlarged Sch. Dist.*, *supra*, 2024 N.Y. Misc. LEXIS 5406, at *17).

Any contentions or allegations of the parties not specifically addressed herein have been considered and are without merit.

Accordingly, it is hereby,

ORDERED that all of the Defendants' motions for summary judgment are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: 11/13 2024
White Plains, New York

ENTER:

HON. DORIS M. GONZALEZ, J.S.C.