

RCVAWCD-Doe v Collins
2024 NY Slip Op 35622(U)
May 29, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67590/2021
Judge: Alexandra D. Murphy
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To commence the statutory time period 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
RCVAWCD-DOE,

Plaintiff,

-against-

JAMES COLLINS, VILLAGE/TOWN OF MT. KISCO,
CAMP IROQUOIS and BOYS & GIRLS CLUB OF
NORTHERN WESTCHESTER,

Defendants.
-----X

MURPHY, J.S.C.

DECISION & ORDER

Index # 67590/2021
Motion Seq.: 1, 2, & 3

The following papers were read and considered in determining the motions by defendants BOYS & GIRLS CLUB OF NORTHERN WESTCHESTER ("BGC") (Motion Seq. No. 1); VILLAGE/TOWN OF MT. KISCO ("Mt. Kisco") (Motion Seq. No. 2); and JAMES COLLINS ("Collins") (Motion Seq. No. 3) for an order under CPLR 3212 granting summary judgment and dismissal of all claims against them:

Papers:

NYSCEF DOC. No.

Motion Sequence No. 1

32-46, 61-80, 109

1. Notice of Motion/Affirmation in Support/Exhibits A-K/Statement of Material Facts/Memorandum of Law in Support.
2. Memorandum of Law in Opposition/Statement of Material Facts/Affirmation/Exhibits 1-14/Affidavit of Charol Shakeshaft/Letter Correspondence.
3. Reply Affirmation/Memorandum of Law in Reply.

Motion Sequence No. 2

47-50, 90-106, 109

1. Notice of Motion/Statement of Material Facts/Memorandum of Law in Support.
2. Memorandum of Law in Opposition/Statement of Material Facts/Affidavit of Charol Shakeshaft/Affirmation/Exhibits 1-9/Letter Correspondence.
3. Reply Affirmation/Memorandum of Law in Reply/Exhibit A.

Motion Sequence No. 3

51-56, 81-89,

1. Notice of Motion/Affirmation in Support/Exhibits A-C/Statement of Material Facts.
2. Memorandum of Law in Opposition/Statement of Material Facts/Affirmation/Exhibits 1-6.
3. Affirmation in Reply.

Upon the foregoing papers and the proceedings heretofore had herein, the motions are consolidated and determined as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff RCVAWCD-DOE brought this action under the Child Victims Act (CPLR 214-g). This case arises from allegations that after meeting Collins when he was approximately eight years old, during the time when plaintiff was still a minor, he was repeatedly sexually abused by Collins, who plaintiff alleges was an employee or agent of defendants Mt. Kisco and BGC.

A summons and complaint were filed on September 10, 2020, in the action *Ardanowski v Collins*, Westchester County Index No. 59891/2020, which initially named four plaintiffs. Subsequently, a first amended complaint was filed on December 30, 2020, adding an additional eight plaintiffs. Thereafter, a second amended complaint was filed on July 30, 2021, bringing in five additional plaintiffs, for a total of seventeen plaintiffs. Plaintiff moved and was granted leave to proceed under a pseudonym.¹ Plaintiff LCVAWCP-DOE's claims against defendants Horace Greeley High School and the Chappaqua Central School District were subsequently dismissed.²

Thereafter, defendant Mt. Kisco moved for severance of the *Ardanowski* action into separate actions. That motion was granted, and plaintiff was directed to serve and file a separate summons and complaint.³ This complaint asserted seven causes of action against defendants: 1) negligence; 2) negligent hiring and retention; 3) negligent supervision; 4) negligent infliction of emotional distress; 5) negligent misrepresentation; 6) assault against defendant Collins only; and 7) battery against defendant Collins only.⁴

THE CONTENTIONS OF THE PARTIES

Defendants now move for summary judgment. Defendants rely on, among other things, the pleadings, deposition transcripts, affidavits, and the discovery responses of the parties [NYSCEF Doc. No. 34-44, 53-55]. In support of its motion, BGC argues that Collins ceased being an employee of BGC in January 1982, and BGC is therefore not liable for any behavior by Collins that occurred in or after 1982. As such, BGC seeks the following rulings through this motion: 1) that plaintiff cannot recover against BGC for any conduct Collins committed after his employment with BGC ceased in January 1982; 2) that plaintiff cannot recover against BGC for any conduct that did not occur on BGC property, regardless of Collins' employment status, under the theories

¹ See Decision and Order [Blackwood, J.] filed to NYSCEF as Doc. No. 4.

² See Decision and Order [Jaeger, J.] filed to NYSCEF as Doc. No. 44.

³ See Decision and Order [Jaeger, J.] filed to NYSCEF as Doc. No. 3.

⁴ See summons and complaint filed to NYSCEF as Doc. No. 1.

of negligent hiring and retention and negligent supervision; and 3) that plaintiff cannot recover for any alleged conduct committed by Collins that is not covered under the CVA. BGC also seeks dismissal of any claims for negligence, negligent supervision, negligent misrepresentation, and negligent infliction of emotional distress. BGC argues that plaintiff's claims for negligence, negligent misrepresentation, and negligent infliction of emotional distress must be dismissed, as they are duplicative of the claims for negligent hiring and retention and negligent supervision.

Similarly, defendant Mt. Kisco moves for summary judgment on the grounds that: 1) plaintiff's claims are barred by the Workers' Compensation Exclusivity Rule under New York Workers' Compensation Law §11; 2) certain alleged conduct committed by Collins is not covered under the CVA or did not occur on Mt. Kisco property; 3) plaintiff is unable to establish constructive notice of Collins' propensity to commit sexual abuse; 4) plaintiff's claims for negligent misrepresentation and negligent infliction of emotional distress are duplicative of plaintiff's negligence claims; and 5) plaintiff's claim for punitive damages must be dismissed, as punitive damages cannot be recovered from Mt. Kisco because it is a municipal corporation.

In support of his motion, defendant Collins submits that plaintiff's claims against him for assault and battery are time-barred and do not fall within any crimes enumerated under the CVA. Defendant Collins relies upon a decision of Justice Steven M. Jaeger with respect to another plaintiff that Collins' behavior, which included such things as grooming, inquiring about masturbation, giving bear hugs, wrestling, and requiring plaintiff to participate in a masturbation contest, "do[es] not rise to the level of claims that are intended to be revived under the CVA" [NYSCEF Doc. No. 44].⁵ Defendant Collins maintains that the facts in the record demonstrate that he did not commit any crimes enumerated in the CVA and that the CVA therefore does not apply to this action.

In response and in opposition to BGC and Mt. Kisco's motion, plaintiff argues that he repeatedly suffered forcible sexual contact from Collins. Plaintiff testified that at the BGC, Collins encouraged plaintiff to masturbate and that while plaintiff was sitting on a bench, Collins touched plaintiff's penis with Collins' right arm and asked plaintiff if he needed help [Pl. Tr. pp. 107-109]. Plaintiff testified that Collins provided plaintiff with alcohol, namely beer, to drink and that Collins engaged in mutual masturbation sessions with plaintiff and others [Pl. Tr. pp. 120-157]. Plaintiff also testified that Collins touched plaintiff's penis while measuring it with a ruler. Other boys were present at the time as Collins, plaintiff, and children were masturbating together [Pl. Tr. pp. 134-140]. In total, approximately six mutual masturbation sessions occurred at the BGC and at Leonard Park [Pl. Tr. pp. 120-157]. Plaintiff also testified that Collins would show plaintiff videographic pornography [Pl. Tr. pp. 157-159] and that Collins massaged plaintiff's body and gave plaintiff "cup checks" wherein Collins touched plaintiff's genitals [Pl. Tr. pp. 160, 166]. On a trip to New Hampshire, plaintiff testified about an incident in which Collins grabbed plaintiff's penis and began to stroke it until plaintiff screamed and turned to get away from Collins [Pl. Tr. pp. 190-195].

In response and in opposition to BGC's summary judgment motion, plaintiff consents to the dismissal of his claims for Negligent Infliction of Emotional Distress (Count IV) and Negligent Misrepresentation (Count V) [Pl. Memorandum of Law p. 22, NYSCEF Doc. No. 61]. As to the

⁵ See Decision and Order [Jaeger, J.] as it related to plaintiff LCVAWCP-DOE.

remaining claims, plaintiff asserts that BGC's arguments that: 1) Collins was not its employee; 2) even if he were an employee, his acts do not fall under the CVA; and 3) his negligence claims are duplicative, must all fail. Plaintiff asserts that his claim for negligence is not duplicative of any other causes of action. Plaintiff also submits that the record shows that Collins acted on behalf of BGC until at least 1993 and that whether there was an employer-employee relationship between BGC and Collins is an issue of fact to be resolved by a jury.

Furthermore, plaintiff asserts that he was subjected to forcible sexual contact from Collins, including, but not limited to, Collins having repeatedly touched plaintiff's penis. Plaintiff avers that these acts by Collins are ones that are revived under the CVA and fall squarely within the legislative intent of the CVA. Furthermore, plaintiff asserts that his claims for negligence involve BGC's failure to ensure plaintiff's safety, BGC's failure to supervise both plaintiff and Collins, and BGC's failure to protect plaintiff while he was under BGC's custody and control. Plaintiff submits that these failures by BGC were the proximate cause of his damages. Plaintiff further submits that these claims and duties are separate and apart from his claims for negligent hiring and retention and negligent supervision. Plaintiff maintains that BGC used Collins' services until his employment ended in 1993 and that BGC may have compensated Collins until 1982 but retained Collins as an agent afterwards. Based upon these arguments, plaintiff contends there are material issues of fact regarding Collins' employment arrangement with BGC. Plaintiff also contends that BGC had control of Collins' conduct and had the authority to dismiss him. Plaintiff also avers that he has sustained damages pursuant to conduct committed by Collins, which falls within Article 130 of the New York Penal Law.

In opposition to Collins' summary judgment motion, plaintiff avers that all the alleged touching by Collins is the type of conduct which the legislature intended to revive under the CVA, including the following abuse perpetrated by Collins: Collins' repeated touching of plaintiff's genitals and the twisting of his nipples, Collins hitting plaintiff's genitals with his hands, and massaging plaintiff's body. Plaintiff contends that all this conduct is actionable under the CVA, as it falls within conduct described under Article 130 of the New York Penal Law. Plaintiff also submits that any decision by Justice Jaeger [NYSCEF Doc. No. 44] that was issued with respect to a different plaintiff is not dispositive in this case.

In response and in opposition to Mt. Kisco's motion for summary judgment, plaintiff asserts he has established an issue of fact as to both actual and constructive notice. Plaintiff relies on the testimony of Leslie Carey (Carey), who at the time of these occurrences was either a camp counselor or a lifeguard at Leonard Park. Plaintiff proffers that portion of Carey's testimony in which she testified that she observed Collins' abusive conduct for years and directly reported the behavior to Collins' supervisor, Charles Pieragostini (Pieragostini), in 1980, which pre-dates the abuse that occurred here [Carey Tr. pp. 75-83, 86-87]. As to defendant Mt. Kisco, plaintiff also voluntarily withdraws his claims for Negligent Infliction of Emotional Distress (Count IV) and Negligent Misrepresentation (Count V). Plaintiff also voluntarily withdraws his request for punitive damages as asserted against Mt. Kisco, but he maintains his claim for punitive damages against defendants BGC and Collins [Pl. Memorandum of Law p. 19, NYSCEF Doc. No. 90].

With respect to Mt. Kisco's argument that it should be granted summary judgment because Workers' Compensation is the exclusive remedy here, plaintiff submits that this affirmative

defense was not pled in Mt. Kisco's answer. Furthermore, plaintiff avers that Mt. Kisco has not demonstrated that Workers' Compensation coverage was available at the time and that it would have covered plaintiff for the acts committed by Collins. Plaintiff also argues that Mt. Kisco "instigated, authorized or ratified" Collins' abuse based upon Carey's report to Pieragostini in 1980. Additionally, plaintiff submits that Mt. Kisco did not provide a copy of any Workers' Compensation insurance policy during discovery or on this motion. Therefore, plaintiff maintains that any filings Mt. Kisco submits now, including an affidavit that a Workers' Compensation policy was in effect during 1988 and 1989, should be disregarded by the court.

In reply, defendant BGC attacks the credibility of the affidavit of plaintiff's expert, Charol Shakeshaft (Shakeshaft) [NYSCEF Doc. No. 78, 94]. BGC also argues that while Collins engaged in various activities on BGC property, he was not an employee of BGC after 1982. Although Collins may have spent time at BGC property while he was employed by Mt. Kisco, BGC argues that this does not translate into Collins being an employee or agent of BGC. Additionally, BGC argues that any premises liability claims have long expired under the statute of limitations. As to off-premises conduct, BGC renews its arguments that it cannot be held liable under the theories of negligent hiring and retention and negligent supervision and also negligence, as they are duplicative.

In reply, defendant Collins reiterates his position that no forcible touching occurred and that any other conduct alleged by plaintiff that does not constitute forcible touching is therefore time-barred. Collins also submits that any other conduct alleged by plaintiff cannot be remotely construed as a sexual performance under §263.05 of the New York Penal Law and that none of the conduct in which he is alleged to have engaged is behavior enumerated under the CVA.

In reply, defendant Mt. Kisco renews and refers to its original arguments. Additionally, Mt. Kisco disputes that Article 130 of the New York Penal Law applies to Collins' conduct. Mt. Kisco also describes Collins' behavior as "rough housing" and not forcible touching, as defined under New York Penal Law §130.52.

ANALYSIS

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A defendant's burden is not satisfied by merely pointing to gaps in plaintiff's proof (*see Vittorio v UHaul Co*, 52 AD3d 823 [2d Dept 2008]).

Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d at 562). "[M]ere conjecture, suspicion, or speculation, is insufficient to defeat a motion for summary judgment" (*Sanchez v City of New York*, 190 AD3d 999, 1001 [2d Dept 2021], citing *Martinez v City of New York*, 153 AD3d 803, 806 [2d Dept 2017]; *Latuso v Maresca*, 150 AD3d 712, 713 [2d Dept 2017]).

Furthermore, on a motion for summary judgment, the court must consider all the facts in a light most favorable to the non-moving party (*see Thomas v Drake*, 145 AD2d 687 [3d Dept 1988]). As the court's function is issue finding, not issue determination, the court may not attempt to determine questions of credibility (*see SJ Capelin Assoc v Globe*, 34 NY2d 338 [1974]). Questions of credibility are solely for the trier of fact to determine (*see Republic Long Island, Inc v Andrew J Vanacore, Inc*, 29 AD3d 66 [2d Dept 2006]; *see also Harty v Kornish Distributors, Inc.*, 119 AD2d 729 [2d Dept 1986]).

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages" (*Davila v Orange Cnty*, 215 AD3d 632, 633-34 [2d Dept 2023], citing *Korsinsky v Rose*, 120 AD3d 1307, 1309 [2d Dept 2014], quoting *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]). For claims sounding in negligent training and supervision and negligent retention of an employee, "[t]he 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" (*see Roe v Domestic & Foreign Missionary Soc'y of the Protestant Episcopal Church*, 198 AD3d 698, 700-01 [2d Dept 2021], citing *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 635-636 [2d Dept 2018]). "As such, a necessary element of a cause of action to recover damages for negligent hiring and retention is a nexus or connection between the defendant's negligence in hiring and retaining the offending employee and the plaintiff's injuries" (*Roe v Domestic & Foreign Missionary Soc'y of the Protestant Episcopal Church*, 198 AD3d at 701, citing *Miller v. Miller*, 189 AD3d 2089, 2091 [4th Dept 2020]; *Gonzalez v City of New York*, 133 AD3d 65, 70 [1st Dept 2015]).

When a complaint asserts a cause of action for negligent supervision and claims damages arising from a person's intentional acts, plaintiff must also show that "the employer knew or should have known of the employee's propensity for conduct which caused the injury" such that the perpetrator's acts were to be anticipated or foreseeable (*see Guarino v ProHEALTH Care Assoc, LLP*, 219 AD3d 467, 468 [2d Dept 2023], citing *Barton v City of New York*, 187 AD3d 976, 978 [2d Dept 2020]; *Kenneth R v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]; *Johansmeyer v New York City Dept. of Educ*, 165 AD3d 634, 635 [2d Dept 2018]). Both "schools 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" (*see Osmanzai v Sports and Arts in Schools Foundation, Inc*, 116 AD3d 937, [2d Dept 2014]; *see also Doe v Whitney*, 8 AD3d 610 [2d Dept 2004]).

Charles Pieragostini, one of Collins' supervisors, testified that before hiring Collins, he did not call any of Collins' references, including a school that previously employed Collins [Pieragostini Tr. pp. 68, 89]. Furthermore, Pieragostini did not interview Collins before Collins was offered a position with the Mt. Kisco Recreation Department [Pieragostini Tr. pp. 68-69]. In fact, Pieragostini did not know if Collins was ever interviewed by anyone before Collins was hired [Pieragostini Tr. p. 69]. Dating back to 1974-1975, Pieragostini learned that the police caught Collins drinking alcohol with underage minors on the pool deck on Mt. Kisco property and that Collins was ultimately released by the police [Collins Tr. pp. 155-163, 325]. Nevertheless, Collins continued to work for Mt. Kisco [Collins Tr. p. 163]. This incident – in which the police caught Collins drinking alcohol with children – was never discussed again [Collins Tr. p. 165].

Thereafter, Collins was arrested on two separate occasions for driving while intoxicated – once in 1977 or 1978, then again in 1981. After Collins' second criminal case in 1981, his driver's license was revoked. Collins informed Pieragostini about the arrests [Collins Tr. pp. 22-37, 39]. Nevertheless, Collins was not removed from his position as a camp counselor and lifeguard, and Collins's employment for Mt. Kisco continued [Collins Tr. pp. 34-35, 37-39, 163]. In addition to multiple police interactions, all of which involved alcohol and one of which involved consuming alcohol with children, Collins admitted to openly massaging minor boys' shoulders at Leonard Park, in the pool area, and other locations, all while in view of Village employees and other adults [Collins Tr. pp. 389-393].

Leslie Carey testified that she first observed Collins and witnessed his behavior when she was 15 or 16 years old and was working as a camp counselor. She witnessed Collins routinely and openly spending time with children, both during camp hours and after camp hours [Carey Tr. pp. 63, 65, 67-68]. She testified that Collins routinely allowed campers in his personal car in public view on multiple occasions over the years, which is behavior that both stood out to and confused her [Carey Tr. pp. 68-70]. Carey also testified that Collins' behavior was brazen and that Collins was never reprimanded by his supervisors [Carey Tr. p. 71]. Carey testified she personally observed Collins place his hands on multiple children when she was both a camp counselor and a lifeguard [Carey Tr. pp. 72-74] and that she witnessed Collins holding the bodies of many children close to his body [Carey Tr. p. 75]. On one specific occasion in 1980, she observed Collins putting his hands inside and down the bathing suit of a boy in the pool [Carey Tr. pp. 75-77]. She further testified that, about two days later, she told Pieragostini what she witnessed in detail, and Pieragostini admonished her that she should "mind (her) own business" [Carey Tr. pp. 79-83, 86-87]. Carey specifically recounted that she became angry and told Pieragostini that Collins "...molested that kid" [Carey Tr. pp. 82, 87-88].

Furthermore, Linda Cindrich (Cindrich), who appeared as a deposition witness on behalf of Mt. Kisco, testified that Mt. Kisco's Recreation Department and BGC were "partners" [Cindrich Tr. pp. 84-85] in that they shared staff, expenses, and services and that the Recreation Department was operated out of BGC [Cindrich Tr. pp. 85-89; Pieragostini Tr. pp. 106, 109]. Furthermore, employees' salaries were paid jointly by Mt. Kisco and BGC [Scala Tr. p. 75]. Pieragostini, who was Assistant Superintendent and later Superintendent of the Mt. Kisco Recreation Department, was also the Assistant Director of BGC [Pieragostini Tr. p. 40; Collins Tr. p. 34; Cindrich Tr. p. 158]. Both Pieragostini and Michael Volpe, Senior ("Volpe, Sr."), who was both a Director of BGC and Superintendent of the Mt. Kisco Recreation Department, shared an office at BGC [Cindrich Tr. pp. 89, 145-146, 251; Pieragostini Tr. p. 377]. Volpe, Sr. and Pieragostini were paid half their salaries from BGC and half from Mt. Kisco [Cindrich Tr. p. 146; Pieragostini Tr. pp. 367-368] until BGC and Mt. Kisco stopped sharing services in the early 1990's [Cindrich Tr. p. 146], which post-dates plaintiff's allegations herein. The partnership between the two entities went on for decades [Cindrich Tr. pp. 244-248, 360]. Village programs were conducted in BGC facilities [Pieragostini Tr. pp. 370, 372-374]. Volpe, Sr. served in the dual role of Superintendent for the Village Recreation Department and Director for BGC until the two entities split apart in the early 1990's [Pieragostini Tr. p. 234]. Cindrich remembered Collins being at BGC and that he was a Little League coach and a floor hockey coach or referee [Cindrich Tr. p. 111]. She also testified that Collins' BGC employment included running programs [Cindrich Tr. p. 114]. Cindrich further testified that Collins worked for both Mt. Kisco and BGC [Cindrich Tr. p. 171].

Cheryl Scala (Scala), a bookkeeper and director of finance for BGC from 1971 to 2010, testified that BGC and the Mt. Kisco Recreation Department did not split apart until 1994 [Scala Tr. pp. 30-33]. Scala further testified that Collins had a cubicle at BGC [Scala Tr. pp. 44, 59; Pieragostini Tr. p. 377] and that Pieragostini and Volpe, Sr. were in charge of supervising Collins [Scala Tr. pp. 85-86]. Scala testified that she never wrote checks to Collins and that he was not on BGC payroll [Scala Tr. p. 48], but Collins testified that he was a part-time employee of BGC. Pieragostini confirmed that he and Volpe, Sr. were Collins' bosses [Pieragostini Tr. pp. 125-126] and that Collins was left in charge and was completely unsupervised during the summer overnight camp-outs and during floor hockey nights, with no security guards at the facilities [Pieragostini Tr. pp. 181-182, 248-249]. Neither Pieragostini nor Volpe, Sr. ever checked to ensure Collins left the facilities after programs ended [Pieragostini Tr. pp. 248-251, 288-290]. Moreover, neither Mt. Kisco or BGC had a rule or policy preventing or prohibiting an adult employee from confining or secluding a child in a room in either Village or BGC facilities [Pieragostini Tr. p. 334; Collins Tr. pp. 126-127]. Pieragostini denied being notified by Leslie Carey in 1980 that Collins improperly touched a child [Pieragostini Tr. p. 352].

Dennis Munson (Munson), who appeared as a deposition witness on behalf of BGC, testified that Collins maintained an office at the BGC until it split with Mt. Kisco in the mid-nineties [Munson Tr. p. 80]. In addition, Munson testified that Pieragostini and Volpe Sr. maintained offices at the BGC while they were serving in dual capacity roles for both Mt. Kisco and the BGC [Munson Tr. pp. 89-90]. Munson further testified that there were multiple occasions when Collins was the only adult left behind to supervise children at the end of the day in the BGC building [Munson Tr. pp. 98-99]. Munson additionally testified that Collins had keys to all the facilities at the BGC [Munson Tr. p. 99]. Collins himself confirmed that he had access to keys and that he locked up BGC facilities after programs ended [Collins Tr. pp. 127-128, 130-131, 133]. In addition, Munson testified that he observed Collins driving with boys in his car from the premises of the BGC [Munson Tr. pp. 142-143]. Munson also testified the witnessed Collins giving boys bear hugs and massages [Munson Tr. pp. 146-148].

On these motions for summary judgment, the court finds defendants Mt. Kisco and BGC have not satisfied their *prima facie* burden, as movants, that they did not know or could not have known of Collins' propensity to commit sexual abuse (*see Kwitko v Camp Shane, Inc.*, 2024 NY Slip Op 01005 [2d Dept. 2024]). While the *Kwitko* case involved sleepaway summer camp for children, the court finds the facts herein are similar to those in *Kwitko*. "An entity to whom the custody of a child is entrusted has a duty to adequately supervise children in its charge and may be held liable for foreseeable injuries related to the absence of adequate supervision" (*see Kwitko* citing *Carpaneto v Middle Bay Golf Club*, 184 AD3d 799 [2d Dept 2020], quoting *Mirand v City of New York*, 84 NY2d 44 [1994]). "The standard for determining whether the [entity] has breached its duty is to compare the [entity's] supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information" (*see Sullivan v St Ephrem RC Parish Church*, 214 AD3d 751 [2d Dept 2023]; *see also Timothy Mc. v Beacon City School District*, 127 AD3d 826 [2d Dept 2015]).

As to defendants BGC and Mt. Kisco, an entity "...may be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*see Burdo v Cold Spring Harbor Central School District*, 19 AD3d 1481 [2d Dept 2003], citing *Sullivan v St. Ephrem RC*

Parish Church, supra quoting *Timothy Mc. v Beacon City School District, supra*). Whether defendants were negligent in their hiring and supervision of both plaintiff and Collins and negligent in their retention of Collins as an employee and/or agent of its organization are questions to be considered and resolved by a jury (*see Belcastro v Roman Catholic Diocese of Brooklyn, NY*, 213 AD3d 800 [2d Dept 2023]). When determining a motion for summary judgment, it is well-settled that questions concerning credibility, accuracy of witnesses, and reconciling the testimony of witnesses are solely for the trier of fact to determine (*see Republic Long Island, Inc. v Andrew J Vanacore, Inc*, 29 AD3d 66 [2d Dept 2006]; *see also Harty v Kornish Distributors, Inc.*, 119 AD2d 729 [2d Dept. 1986]).

The factual issues of whether defendants squarely placed Collins in an ideal position to cause foreseeable harm to plaintiff and others for years and whether their actions were reasonable or constituted negligent hiring and/or retention and/or negligent supervision or negligence are all material matters to be determined by the trier of fact (*see Medeiros v Scarsdale Union Free School District Board of Education*, 220 AD3d 944 [2d Dept 2023]; *see also Roe v Domestic & Foreign Missionary Soc'y of the Protestant Episcopal Church*, 198 AD3d 698, 700-01 [2d Dept 2021], citing *Johansmeyer v New York City Dept of Educ.*, 165 AD3d 634, 635-636 [2d Dept 2018]). As to BGC's argument that Collins was not an employee after 1982, this is contradicted by testimony in the record, including the testimony of Collins himself. The issue of whether BGC employed Collins or held him out to the public as an employee or agent is also a question of fact, as BGC and Mt. Kisco were "partner" entities until the mid-1990's and Collins had keys and after-hours access to BGC and Village facilities. Moreover, even were Collins to have been a volunteer of BGC, BGC would not be shielded from liability had it known of Collins's propensity to sexually abuse children or should have known had Collins been provided with the necessary "oversight and monitoring" (*see Brophy v Big Bros. Big Sisters of Am., Inc.*, 224 AD3d 866 [2d Dept 2024] and cases cited therein). The testimony of multiple witnesses, including that of Pieragostini, also raises issues of fact as to the negligent hiring and supervision and negligent retention of Collins. Furthermore, the court does not find any of the remaining causes of action to be duplicative.

Additionally, the court finds defendants' arguments unavailing with respect to whether Collins' behavior constituted conduct covered by the CVA. The relevant definition of Forcible Touching under New York Penal Law §130.52 is as follows:

A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose:

1. forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire;...

For the purpose of this section, forcible touching includes squeezing, grabbing or pinching.

Whether Collins' behavior was simply "rough-housing" as defendants describe it, as opposed to criminal conduct defined under the Penal Law, and thereby conduct covered under the CVA, is another issue of fact for a jury. Furthermore, as to the CVA, "the actual reading of the statute evinces that is not a violation of one of the enumerated penal statutes that is required to

trigger the revival of certain civil causes of action, but rather it is ‘conduct which would constitute’ either a sexual offense as defined in article 130 of the Penal Law....or use of a child in a sexual performance, as defined in certain sections of the Penal Law” (CPLR 214-g; *see Doe v Wilhelmina Models, Inc.*, 2024 NY Slip Op 00969 [1st Dept 2024], quoting *SH v Diocese of Brooklyn*, 205 AD3d 180 [2d Dept 2022]). Additionally, “the plain meaning of the phrase ‘conduct which would constitute a sexual offense as defined in [Penal Law Article 130]’ as used in CPLR 214-g refers to the conduct described in the enumerated provisions of the Penal Law, and is not limited to those situations in which the conduct would subject the actor to criminal liability” (*see Doe v Wilhelmina Models, Inc.*, 2024 NY Slip Op 00969 [1st Dept 2024], quoting *SH v Diocese of Brooklyn*, 205 AD3d 180 [2d Dept 2022]).

Lastly, the court finds Justice Jaeger’s decision [NYSCEF Doc. No. 44] regarding the dismissal of a different plaintiff’s claims and the underlying facts therein not relevant or dispositive to DCVAWCS-DOE’s claims. Therefore, the court finds that all defendants, including Collins, have not met their *prima facie* burden on summary judgment to eliminate all material issues of fact in their favor and the court need not reach the sufficiency of plaintiff’s papers.

However, assuming *arguendo* that defendants did meet their burden, the court finds that in opposition, plaintiff has presented numerous material issues of fact requiring resolution by the trier of fact, including material issues of fact with respect to actual and constructive notice. Carey’s testimony that while serving as a lifeguard, she observed Collins reach inside a boy’s bathing suit in the pool and contemporaneously reported the incident to Pieragostini would constitute actual notice. Additionally, her testimony that Collins routinely spent time with young boys even after camp or sports activity hours and allowed them inside his personal vehicle for years raises issues of fact as to constructive notice. Viewing the evidence in a light most favorable to the nonmoving party, Carey’s testimony raises an issue of material fact as to whether both Mt. Kisco and BGC, given Pieragostini’s dual role with both Mt. Kisco and BGC and the intertwined “partnership” between the two entities, knew or should have known of Collins’ propensities to commit sexual abuse and the potential harm and danger Collins posed to numerous children, including plaintiff.

In addition, the affidavit of plaintiff’s expert, Charol Shakeshaft [NYSCEF Doc. No. 78, 92], and the exhibits put forward by plaintiff in opposition, including the affidavits of Shawn Pittrulle and Sean Wray [NYSCEF Doc. No. 64-78, 84-89, 94-102], also raise issues of fact and credibility which preclude the granting of summary judgment (*see Grassi v Nassau County*, 180 AD3d 1008 [2d Dept 2020]).

All other arguments raised in the motions and evidence submitted by the parties in connection therewith have been considered by this Court, notwithstanding the specific absence of reference thereto.

Accordingly, in light of the foregoing, it is hereby

ORDERED that those branches of defendants' motions which sought dismissal of plaintiff's causes of action for Negligent Infliction of Emotional Distress (Count IV) and Negligent Misrepresentation (Count V) are GRANTED without opposition; and it is further

ORDERED that the branch of defendant Mt. Kisco's motion to dismiss plaintiff's claims for punitive damages against defendant Mt. Kisco only is GRANTED without opposition; and it is further

ORDERED that the remaining branches of defendants' motions for summary judgment (Seq. 1, 2, and 3) are DENIED in their entirety for the reasons more fully set forth herein.

The parties are directed to appear for a further settlement conference on June 18, 2024, at 9:30 a.m. in the CPT-ADR Part, Courtroom 1600.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
May 29, 2024

ENTER:


HON. ALEXANDRA D. MURPHY J.S.C.

TO: All Counsel VIA NYSCEF