SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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R.D.,

Plaintiff,

-against-

FREEPORT UNION FREE SCHOOL DISTRICT, FREEPORT UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, INCORPORATED VILLAGE OF FREEPORT AND ITS AGENCY, FREEPORT VILLAGE RECREATIONAL DEPARTMENT,

Defendants.

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Part CVA-R
Index No. 900038/2021
Mot. Seqs. 002 & 003

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:

Village Defendant's Notice of Motion, Affirmation & Exhibits.….....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
District Defendants' Notice of Motion, Affirmation & Exhibits.....3
Village Defendant's Affirmation in Opposition.....4
Plaintiff's Affirmation in Opposition & Exhibits.....5
Village Defendant's Reply 6

In this action brought pursuant to the Child Victims Act ("CVA"), plaintiff alleges that in 1956, when he was a fifth-grade student, he was sexually abused by his basketball coach, Vernon Alleyne. Plaintiff asserts causes of action against all defendants for: 1) statutory liability for violations of Penal Law; 2) negligence; 3) negligent failure to warn and implement child sexual abuse policies; 4) negligent hiring; 5) negligent supervision and training; 6) negligent retention; 7) breach of fiduciary duty; and 8) statutory liability for failure to report abuse.

Defendants Incorporated Village of Freeport and its agency Freeport Village Recreational Department (collectively, "the Village") and Freeport Union Free School District and Freeport Union Free School District Board of Education (collectively, "the District") move for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint and any cross-claims as asserted respectively against them. For the reasons set forth below, the District's motion is granted and the Village's motion is denied.

BACKGROUND[1]

In 1956, when plaintiff was a fifth-grade student in the District, he participated in a winter basketball program. The basketball program was hosted in the gymnasium of the Carolyn G. Atkinson school, plaintiff's elementary school, on a weeknight beginning at approximately 7 p.m. and ending approximately 9 p.m. Plaintiff would go home after school, do homework, and the return to the school for basketball practice. He did not recognize either of the two basketball coaches or any of the participants as being from his school.

At his deposition, plaintiff testified that he did not recall having seen any advertisements for the program, nor did he remember wearing a uniform. Plaintiff also did not recall the coaches wearing any identifying tags or markings during basketball practice. Plaintiff testified that it is his belief that the basketball program was run by the Village's recreation department. He also testified that it is his understanding that the District's only involvement in the program was to provide space for the Village's program to meet.

According to plaintiff, after the first basketball practice, one of his coaches, Vernon Alleyne, pulled his car up to the gymnasium doors as plaintiff was leaving and motioned for plaintiff to get in the car. Plaintiff alleges that before driving plaintiff home, Alleyne stopped in a secluded area (several blocks away from the school) and sexually abused him.

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

This same series of events transpired on at least 3 subsequent occasions. Plaintiff did not report the alleged abuse nor is he aware of anyone who witnessed plaintiff being in Alleyne's car.

The Village disputes that it operated the basketball program in which plaintiff participated. The Village conducted a search of its board meeting minutes from 1955-1957 and found no evidence of any after-school program run by the Village during the relevant time period nor did it find reference made to Alleyne as a coach or any related capacity.[2] The Village conceded at oral argument, however, that its records may not be complete. The District also conducted a search of its records and found no evidence of having ever employed Alleyne or receipt of complaints about him. There is no reference in the District's board meeting minutes from 1956 that the Village sponsored or supervised a basketball program at a District school in 1956.

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).

[2] The Village did find reference to an after-school program in minutes from a 1954 board meeting, but not a basketball program.

At the outset, plaintiff consents to dismissal of his causes of action for statutory liability for violations of Penal Law; breach of fiduciary duty; and statutory liability for failure to report abuse as asserted against all defendants.

To sustain his negligence claims, plaintiff must allege and prove (1) a duty owed by the defendants 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).

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's Motion

As a threshold issue, this court will first address the District's argument regarding the constitutionality of the CVA. The District argues that summary judgment dismissing the complaint must be granted because the claim revival provisions of New York's Child Victims Act violates its due process rights under the State's Constitution. This argument, however, has been rejected by the Appellate Division. *See Schearer v. Fitzgerald*, 217 A.D.3d 980 (2d Dept. 2023); *see also Matarazzo v. Charlee Family Care, Inc*., 218 A.D.3d 941 (3d Dept. 2023); *PB-36 Doe v. Niagara Falls City School District*, 213 A.D.3d 82 (4th Dept. 2023).

The District, however, has established its *prima facie* entitlement to summary judgment by demonstrating that it did not have custody and control over plaintiff during the alleged abuse and therefore owed no duty to plaintiff. None of the parties contend that the District sponsored the basketball program—which took place after school hours—only that it permitted the Village to utilize its property. Benjamin Roberts ("Roberts"), the assistant superintendent of personnel and special projects for the District, attests that he conducted a diligent search of the District's records and the District has no employment records for Alleyne. Under these circumstances, the District had no duty to plaintiff that was breached.

See Jonathan A. v. Board of Educ. of City of New York, 8 A.D.3d 80 (1st Dep. 2004)(Board not liable for sexual abuse of infant by non-employee during after-school program on school premises run by Police Athletic League).

As stated in *Jonathan A.*: "If the licensing of school property to a community-based organization exposed a district to liability for any negligence of the licensee group in hiring its staff or conducting its program, the effect would be to discourage districts from making their property available even to the most experienced and reputable of such organizations, to the general detriment of the youth of the community." *Id*. at 83.

Further, not only did the basketball program take place after school hours and was not sponsored by the District, but the alleged abuse did not even occur on school grounds. A school is not liable for injuries that occur off school property and beyond the orbit of its authority. *See Doe 1 v. Board of Educ. of Greenport Union Free School Dist.*, 100 A.D.3d 703, 705 (2d Dept. 2012); *Vernali v. Harrison Cent. School Dist.*, 51 A.D.3d 782, 783 (2d Dept. 2008); *see also Doe v. New York City of Dept. Of Educ.*, 126 A.D.3d 612 (1st Dept. 2015)(evidence that substitute teacher drove plaintiff home from school in violation of regulation was insufficient to raise an issue of fact as to whether defendant had actual or constructive notice of sexual misconduct).

Assuming arguendo that the District did owe plaintiff a duty under these facts, there is nothing in the record to suggest that the District had notice that Alleyne was on school grounds and/or had a propensity to commit child sex abuse. And plaintiff fails to raise a triable issue of fact in this regard. It is uncontested that plaintiff did not report Alleyne's sexual abuse. Further, the District's assistant superintendent of personnel and special projects testified that his search did not yield any complaints made against Alleyne prior to 1956.

The Village's Motion

This case is another example of the quandary that faces institutional defendants in defending CVA actions where the alleged abuse took place decades prior—here, nearly 70

years ago. It appears clear that plaintiff ultimately will be unable to establish his *prima facie* case at trial. He has no evidence to support his assumption that the basketball program was a Village program; he does not know if his abuser was a Village employee; he never reported his abuse to anyone; and does not know if anyone ever saw him with Alleyne. In short, he appears to have no evidence that the Village had actual or constructive notice that Alleyne (assuming he was a Village employee, agent or representative) had a propensity to abuse children.

Nonetheless, while it cannot reasonably be expected that the Village would maintain records for more than half a century, the Village now cannot meet its initial burden on summary judgment because it cannot produce records to affirmatively and conclusively establish that it did not employ Alleyne in 1956 or that it never received notice of Alleyne's propensity to commit child sex abuse. Under binding Second Department precedent, this court is constrained to deny the Village's motion and allow this action to be added to the impending trial backlog of revived claims that cannot be proved. *See Kwitko v. Camp Shane, Inc.*, 224 A.D.3d 895 (2024).[3]

Therefore, the District's motion for summary judgment dismissing the complaint in its entirety is granted, but the court is constrained to deny the Village's motion.

[3] In its underlying decision in *Kwitko*, reversed by the Second Department, this court highlighted this waste of judicial resources and the manner in which existing law disserves both plaintiffs and defendants under these circumstances. *S.K. v. Camp Shane*, WL 5500503 (Sup Ct., Westchester Co. 2023), *rev'd*, *Kwitko v. Camp Shane, Inc.*, 224 A.D.3d 895 (2024). "It would not be just to require a defendant to incur the cost, time and effort to defend an action at trial because, through no fault of its own, time has swept away the proof needed to prevail on summary judgment. Nor are victims benefitted by prolonging the inevitable dismissal of their suit and requiring their participation in emotionally gut-wrenching trials they cannot win." *Id*.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: April 11, 2024
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.