Melissa G. v North Babylon Union Free Sch. Dist.
2017 NY Slip Op 31085(U)
May 8, 2017
Supreme Court, Suffolk County
Docket Number: 36209/2006
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Melissa "G" and Garry "G",

Plaintiffs,

-against-

North Babylon Union Free School District, Sean C. Feeney, Danny Cuesta a/k/a Danny Cuesta Rivera, John Hartz, Donald Shevlin and John Micciche,

Defendants.

Motion Sequence No.: 010; MG
Motion Date: 6/15/16
Submitted: 3/29/17

Index No.: 36209/2006

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Clerk of the Court

Upon the following papers numbered 1 to 47 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 21; Answering Affidavits and supporting papers, 22 - 39; Replying Affidavits and supporting papers, 40 - 41; 42 - 44; Other, 45, 46 - 47; it is

ORDERED that this motion by defendants, North Babylon Union Free School District, Sean C. Feeney and John Micciche (School District), for an order pursuant to CPLR 3212 awarding summary judgment in their favor dismissing the complaint of plaintiffs, Melissa "G" and Garry "G", against them is granted, the action is severed and shall otherwise continue as to the remaining defendant(s).

By order to show cause dated October 19, 2005, plaintiffs Melissa "G" (Melissa) and Garry "G" sought leave to serve a late notice of claim upon the North Babylon Union Free School District. Following denial of such motion by order of the Court dated April 26, 2006 (Loughlin, J.), an appeal was taken to the Appellate Division, Second Department. On appeal, it was determined that the lower court had properly denied leave to Garry "G" to serve a late notice of claim, but the decision of the lower court was modified to grant the petition for leave to serve a late notice of claim on behalf of Melissa (***Matter of Melissa G v North Babylon Union Free School Dist.,*** 50 AD3d 901, 855 NYS2d 276 [2d Dept 2008]). In 2007 plaintiffs filed a summons with notice, and thereafter a complaint dated October 10, 2008 was filed in which plaintiff seeks to recover damages for personal injuries allegedly sustained by Melissa as the result of sexual contact that she had with a teacher employed by the school district, identified as defendant Danny Cuesta, from September or October 2003 through March 2004. It is alleged under the first cause of action that the School District negligently supervised its employee Cuesta and that the School District is vicariously liable for his actions, under the second cause of action that the School District negligently hired and supervised Cuesta, under the third cause of action that the defendants negligently inflicted harm on Melissa, under the fourth cause of action that plaintiff's constitutional rights to equal protection and due process were violated, under the fifth cause of action that the defendants were negligent in allowing plaintiff to be assaulted, under the sixth cause of action that the defendants were negligent in allowing Cuesta to assault plaintiff, under the seventh cause of action that plaintiff was falsely imprisoned, under the eighth cause of action that defendants intentionally inflicted emotional distress upon plaintiff, under the ninth cause of action that defendant Cuesta invaded plaintiff's privacy and under the tenth cause of action that defendant Cuesta engaged in negligent infliction of emotional distress upon plaintiff. The remaining causes of action are asserted on behalf of plaintiff Garry "G", notwithstanding the denial of his application for leave to file a late notice of claim.

It is set forth in plaintiffs' bill of particulars that on November 1, 2006, Cuesta pled guilty to having engaged in a course of conduct which was likely to be injurious to the physical, mental and moral welfare of Melissa by engaging in sexual acts with her, including sexual intercourse and oral sex, when she was fifteen or sixteen years of age. Plaintiff Melissa testified at a municipal hearing and later at a deposition that when she was in 10th grade, she sat in on a friend's class that was taught by Cuesta, and that she accompanied Cuesta to the copy room, whereupon he shut the door, pulled her to him, kissed her and put her hand on his penis. Melissa also testified, however, that she did not tell any teachers or administrators at the school about the incident. She also testified that Cuesta wrote notes of a sexual nature to her at school, but that she did not tell anyone at the high school about the notes. It was also Melissa's testimony that she did not have any other contact of a sexual nature with Cuesta in school. In October 2003 she met Cuesta after school at a shopping mall and that they went to a motel and engaged in sexual relations. She also testified that on other occasions

they went to motels for sexual relations, but she did not tell anyone at the School District about it. Melissa testified that Cuesta would also visit Melissa at her family home, that they engaged in sexual relations in her home, and that her mother was aware of the sexual relationship between them.

In March 2004, Melissa's father was summoned to the high school, where he was told by Assistant Principal Sean Feeney that another student had reported to a guidance counselor that she had been involved sexually with Cuesta, and she had also reported that Melissa was sexually involved with Cuesta. Superintendent John Micciche testified that a confidential report was prepared and submitted to the State Education Department as well as to law enforcement on March 19, 2004 about the student's report. However, Melissa denied any sexual involvement with Cuesta to both her father as well as to the police. It was not until July 2005 that Melissa admitted to her father that she had been having sexual relations with Cuesta.

Assistant Principal Feeney testified that prior to March 2004 he had received complaints from students that Cuesta would have students do jumping jacks or push-ups in the classroom when they gave a wrong answer in class. He testified that he counseled Cuesta not to punish students or have them do push-ups or other inappropriate activities in class. On March 18, 2004, a guidance counselor told Feeney that a student, identified as "Ms. A", had reported that she had sexual contact with Cuesta, and the same student reported that Melissa was also sexually involved with Cuesta. On March 19, 2004, Feeney met with Ms. A's parents. He then met with Cuesta and a union representative to confront Cuesta with the allegations. At the conclusion of the meeting with Cuesta, Cuesta was put on administrative leave and "was removed from the school pending the investigation." It was noted in a probationary evaluation report dated March 26, 2004 that Cuesta inappropriately used sarcasm or humor in the classroom, that he imposed classroom punishments "that bring into question his judgment as an educational professional" and that "he has repeated mistakes often." It was concluded that Cuesta would not be recommended for a tenured teaching position and that he would not be invited back to the district to teach.

Defendant School District now moves for an order awarding summary judgment in its favor dismissing the complaint against it. Plaintiff has opposed the application.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Friends of Animals v. Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material

questions of fact on which the opposing claim rests (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** *supra*).

A school district owes a duty to adequately supervise students in its care, and will be held liable for foreseeable injuries that are proximately related to the school's failure to provide adequate supervision (***Ghaffari v North Rockland Cent. Schl. Dist.,*** 23 AD3d 342, 343, 804 NYS2d 752 [2d Dept 2005]). 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 (***Timothy Mc. v Beacon City Schl. Dist.,*** 127 AD3d 826, 828, 7 NYS3d 348 [2d Dept 2015]). Here, the defendant School District demonstrated its *prima facie* entitlement to summary judgment dismissing the claims alleging negligent supervision by presenting evidence that it had no specific knowledge or notice of the subject teacher's propensity for sexual misconduct (*see* ***Ghaffari v North Rockland Cent. Schl. Dist.,*** *supra*, 23 AD3d 342). Notwithstanding the diligent efforts by counsel to obtain relevant disclosure from defendants, there is no evidence in the record before this Court to suggest that, prior to the report it received in March 2004, the School District had knowledge of any propensity or inclination toward sexual contact on the part of Cuesta which showed that his actions could have been anticipated or were foreseeable (*see, e.g.,* ***I.R. v Leake and Watts Services, Inc.,*** 139 AD3d 641, 30 NYS3d 866 [1st Dept 2016]). Furthermore, there is no evidence before this Court tending to show that the School District was negligent in its hiring of Cuesta, or that it was negligent in its retention or supervision of him. Likewise, moving defendants have demonstrated that there is no evidence of their negligent or intentional infliction of harm on plaintiff, nor is there any evidence that plaintiff's constitutional rights were violated by the School District.

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (***Dia CC v Ithaca City Schl. Dist.,*** 304 AD2d 955, 956, 758 NYS2d 197 [3d Dept 2003], quoting ***N.X. v Cabrini Med. Ctr.,*** 97 NY2d 247, 251, 739 NYS2d 348, 765 NE2d 844 [2002]). An act of sexual assault by an employee is a clear departure from the scope of employment, committed solely for personal reasons, and unrelated to the furtherance of the employer's business (***Dia CC v Ithaca City Schl. Dist.,*** *supra* at 304 AD2d 956). Accordingly, the School District can not be vicariously liable for Cuesta's sexual conduct with plaintiff.

Where, as in this case, the moving defendants have sustained their burden, the plaintiff must raise a triable issue of fact 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 (*see* ***Ghaffari v North Rockland Cent. Schl. Dist.,*** *supra*, 23 AD3d 342; *see also* ***John B. v Allegro Vivace Music School, Inc.,*** 113 AD3d 800, 979 NYS2d 531 [2d Dept 2014]). The hearsay affidavits of Lisa and Michael Pomilla offered by plaintiff in an attempt to show that another teacher, Mr. Langer, and other faculty members "were aware at all times as to what was going on between Cuesta and Melissa and other students" lack probative value are not admissible proof in evidentiary form (*see* ***Rue v Stokes,*** 191 AD2d 245, 594 NYS2d 749 [1st Dept 1993]). Likewise, testimony by Garry

"G" regarding statements allegedly made by members of the school board is hearsay and does not constitute evidence sufficient to raise a triable issue of fact. This Court has considered plaintiff's remaining contentions and finds them to be without merit. Plaintiff failed to raise a triable issue of fact and, accordingly, summary judgment in favor of the moving defendants must be granted.

To the extent that plaintiff Garry "G" seeks recovery of damages against these moving defendants, his claims are dismissed for his failure to comply with the notice of claim requirements under the General Municipal Law (*see* (***Matter of Melissa G v North Babylon Union Free School Dist.***, *supra* at 50 AD3d 901).

Dated: 5/8/2017

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**