Mizrack v Schwartz
2006 NY Slip Op 30667(U)
April 26, 2006
Supreme Court, New York County
Docket Number: 110215/2001
Judge: Marilyn Shafer
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SCANNED ON 5/11/2006

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PART _____

Index Number : 110215/2001

MIZRACK, JONATHAN

VS

SCHWARTZ, JERROLD

Sequence Number : 010

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion is decided per annexed decision.

FILED
MAY 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/27/06

HON. MARILYN SHAFER, JSC J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----------X

JONATHAN MIZRACK,

Plaintiff,

-against- Index No. 110215/2001

JERROLD SCHWARTZ, indiv. and as SCOUTMASTER OF TROOP TRIPLE SIX, BOY SCOUTS OF AMERICA and as PRESIDENT OF ADVENTURE TRAILS INC., et al.,

Defendants.

----------X

FILED
MAY 11 2006
NEW YORK
COUNTY CLERK'S OFFICE

Marilyn Shafer, J.:

Motion sequence numbers 010, 011, 012, and 013 are consolidated herein for disposition.

In sequence number 010, defendant Boy Scouts of America (the BSA) moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all claims asserted against it. In sequence number 011, defendant pro se Jerrold Schwartz moves for permission to proceed as a poor person pursuant to CPLR 1101 and to compel further and more complete responses to his demands for document production and to his first and second sets of interrogatories. In sequence numbers 012 and 013, Schwartz moves to dismiss the complaint and to strike and vacate plaintiff's note of issue for failure to comply with these demands and interrogatories.

This negligence action arises out of allegations that Schwartz, while a BSA

scoutmaster, repeatedly sexually abused plaintiff, then a minor and a BSA scout. Schwartz admits that he had improper sexual contact on more than one occasion with plaintiff. On May 7, 2002, Schwartz pleaded guilty before the Supreme Court for New York County, Criminal Term, Part 82, of four counts of sodomy in the third degree involving plaintiff, covering the period September 1, 1996, through December 31, 1996. Schwartz is presently incarcerated in Oneida Correctional Facility, a New York State correctional facility located in Rome, New York.

Plaintiff first met Schwartz in September 1992, when plaintiff, then 11 years old, joined the BSA's Troop Triple Six (Troop 666), then sponsored by nonparty Central Synagogue of Manhattan. In late 1994, sponsorship of Troop 666 was taken over by defendant St. Bartholomew's Church.

Schwartz had been active in scouting as a boy since 1967 and became an assistant scoutmaster in 1978, and then a scoutmaster in 1981, of Troop 666. Schwartz was a scoutmaster throughout the alleged period of the abuse. Plaintiff alleges that, soon after meeting plaintiff, Schwartz allegedly began favoring him above the other scouts with extra attention and gifts, allegedly to gain plaintiff's trust and the trust of plaintiff's mother, in order to create the opportunity for sex abuse.

Plaintiff testified at deposition that Schwartz initiated physical sexual contact with him in 1994, at about the time that Schwartz hired plaintiff to work for Schwartz' company, defendant Adventure Trails Inc., first as a volunteer and, later, as a paid

employee. Adventure Trails was a bus/transportation company providing service throughout the United States, including New York, Colorado, and New Mexico, to the BSA, including Troop 666 members, as well as to school districts and private groups. Schwartz was president of and an employee of Adventure Trails.

Plaintiff alleges that he voluntarily ended the abuse in September 1997, when he was 16 years old, by ceasing to meet Schwartz at his home-offices in New York and Colorado and by leaving Troop 666. Schwartz testified at deposition that he ended their relationship in the late summer of 1996, when he confronted his problem and told plaintiff that their relationship was wrong, unlawful, and immoral, and had to end (see Jerrold Schwartz, Jan. 28, 2005, dep tr, at 332-333). Plaintiff kept silent about Schwartz' misconduct until 2000. Schwartz was arrested on charges of sex abuse in the summer of 2001.

In 2001, plaintiff commenced this action against Schwartz on allegations of repeated sex abuse of a minor, emotional abuse, sexual assault and harassment, psychological and physical intimidation, and endangering the welfare of a child. Plaintiff has also joined the BSA on allegations of negligent hiring, retention, and supervision of Schwartz, negligent training of volunteers to recognize predatory behavior, and vicarious liability for Schwartz' misconduct. Plaintiff alleges that, as a result of defendants' misconduct, he has suffered permanent physical, psychological, and emotional injuries, including drug addiction, stress, anxiety, and depression, requiring psychiatric

hospitalization. Plaintiff seeks to recover $50 million in compensatory, special, and punitive damages.

BSA's Summary Judgment Motion

In motion sequence 010, the BSA seeks summary judgment and dismissal of all claims and cross claims asserted against it, on general grounds that the factual allegations and plaintiff's own deposition testimony demonstrate that plaintiff consented to a sexual relationship, that Schwartz did not physically force him to have such contact or to conceal their sexual relationship, and that plaintiff concealed the relationship and permitted it to continue by voluntarily meeting Schwartz at his New York City and Colorado Springs, Colorado home-offices.

In opposition, plaintiff contends that the BSA has mischaracterized and misrepresented his allegations asserted in the complaint, his deposition testimony, and the relevant statutory and case law.

Contrary to the BSA's contention, in the complaint, plaintiff unambiguously alleges that, at no time, did he consent, nor was he capable of consenting, to a physical relationship with Schwartz (see Complaint, ¶ 11).

Moreover, plaintiff testified at deposition that he did not consent to, and did not willingly participate in, the sexual acts required by Schwartz. Plaintiff testified that, in the fall of 1996, when he was not working for Schwartz, Schwartz told him to go to Schwartz' Manhattan home-office and that he went because he felt that he had no other

option (see plaintiff, Jan. 4, 2005, dep tr, at 101-102). Plaintiff also testified that "when I wanted to not lie down on him anymore, he forced me to stay on top of him and continued to fondle me" and that the contact was offensive to him (id. at 68 [li 19-21], 69). He also testified that the sexual contact demanded by Schwartz progressed over time (see id. at 317) and that Schwartz "anally raped me and forced me to perform oral sex on him" (id. at 112 [li 19-20]). Plaintiff further testified that, at the time, he did not want the type of affection that Schwartz wanted to give him (id. at 306 [li 11-23]) and that he felt shame and guilt and "disgusting" at what Schwartz did to him (id. at 312 [li 2-4]). Plaintiff testified that he was "confused," "scared," and "manipulated to think that [the sexual abuse] was an expression of love" and that Schwartz had "tried to move in as a father figure and make this . . . an expression of love" (id. at 305 [li 16-25], 306). Plaintiff testified that he did not tell anyone about Schwartz' behavior because he was afraid to tell his parents or anyone else and that he thought no one would believe him (see id. at 311-312).

In addition, in audio tapes made by plaintiff of his conversations with Schwartz prior to his arrest and commencement of this action, Schwartz admits that he "did something very, very wrong" and apologizes for taking advantage of plaintiff in "a sexual way" and for harming plaintiff by acting as a father figure and a friend, yet requiring plaintiff to have oral and anal sexual contact with him (plaintiff/Schwartz, Apr. 18, 2001, recorded conversation tr, at 4-7, 9, 11, 17). Schwartz admitted to plaintiff that he "took

advantage of [him] sexually" (id. at 9 [li 13-14]).

The Legislature and courts of this state have long recognized children as a protected class and have accorded children increasingly greater protections from sexual abuse (see e.g. Social Services Law, Title 6, Child Protective Services, §§ 411-428; Penal Law §§ 130.25 [2] [rape in the third degree] [person over age of 21 engages in sexual intercourse with person under age of 17, consent irrelevant], 130.40 [2] [criminal sexual act in the third degree] [person over age of 21 engages in oral or anal sexual conduct with person under age of 17, consent irrelevant], 130.45 [1] [criminal sexual act in the second degree] [person over age of 18 engages in oral or anal sexual conduct with person under age of 15], and 130.75 [course of sexual conduct against child in first degree, consent irrelevant]). "If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action" (Restatement [Second] Torts, § 892C [2]).

At most, by questioning the voluntary or involuntary nature of plaintiff's consent or assent to Schwartz' misconduct, the BSA has raised triable issues for the jury to decide.

> [P]roof of force, fear, fraud or undue influence which, although short of forcible compulsion, reflects on voluntariness . . . . Evidence of consent gained by threats, intimidation, fraud or undue influence presents a question of fact for the jury as to whether the [victim] acted voluntarily. Although in such cases the defendant may not be guilty of an actual rape or other sexual assault, it cannot be said as a matter of law that the [victim] is an accomplice to [a sexual act] because he or she submitted to the advances of [the defendant]. Where such proof is present, the jury could find

> that although the [victim] had 'assented' to intercourse with the defendant, she had actually not 'consented' to it . . . . '[I]f different inferences may reasonably be drawn from the proof regarding complicity . . . the question should be left to the jury for its determination.'

(People v Facey, 115 AD2d 11, 16-17 [4th Dept 1986], affd 69 NY2d 836 [1987] [issue of assent versus consent in case involving whether 18-year-old daughter was victim or accomplice to incest with her father] [internal citations omitted].)

With regard to the specific negligence claims asserted against it, the BSA contends that summary judgment must be granted in its favor because it did not hire or retain Schwartz in any capacity and bore no duty to investigate or supervise him. The BSA further contends that it does not participate in the selection of volunteers at the local level or exercise any control over their activities.

In opposition, plaintiff contends that there exist numerous triable issues regarding whether the BSA had the authority to control the selection and retention of a scoutmaster, whether the BSA had notice of Schwartz' misconduct, and whether the BSA owed a duty to plaintiff in connection with the repeated annual hiring and retention of Schwartz and the education of other adult volunteers.

In the first cause of action, plaintiff alleges that the BSA failed to properly investigate Schwartz prior to hiring or appointment; in the second, that the BSA failed to properly supervise Schwartz; in the third, that the BSA failed to provide a safe and secure environment for plaintiff; in the fourth, that the BSA improperly retained Schwartz; in the

sixth, that the BSA failed to investigate allegations of child abuse leveled against Schwartz prior to plaintiff's joining Troop 666; and in the seventh, that the BSA failed to train employees other than Schwartz to discover child abuse.

An entity or an adult may be held responsible for negligent supervision of a child when the entity or adult undertakes the care and supervision of a child, the child is injured, and such injuries are foreseeably related to the absence of adequate supervision (Willis v Young Men's Christian Assn. of Amsterdam, 28 NY2d 375, 379 [1971], ["(A)lthough persons having children entrusted to their care are 'not the absolute insurers' of their safety, they are 'charged with the highest degree of care' (Oldham v Hoover, 140 So 2d 417, 421 (La App 1962)"]). A defendant employer may be held liable for negligent hiring, retention, and supervision of an employee who negligently or intentionally hurts the child entrusted to the employee's care (Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [2d Dept], cert denied 522 US 967 [1997] [diocese held liable for negligent hiring, retention, and supervision where priest sexually abused infant plaintiff]; see Restatement [Second] of Torts, §§ 317, 320).

The BSA's threshold contention that, as a matter of law, the BSA does not control the day-to-day operations of the local scout troop and actions of the scout leader is based on a misinterpretation and misapplication of the relevant case law. Significantly, unlike the action at bar, none of the actions cited by the BSA are based on allegations of scout sexual abuse by a scout leader and none include evidence that the BSA retained authority

to approve or reject a scout leader applicant for sexual misconduct (see Alessi v Boy Scouts of America Greater Niagara Frontier Council, Inc., 247 AD2d 824 [4th Dept 1998] [scout injured while sledding on scout trip]; Matson v Town of Milton, 252 AD2d 919 [3d Dept 1998] [scout injured by slip and fall during nighttime scout hike]; Davis v Shelton, 33 AD2d 707 [3d Dept 1969], appeal dismissed 26 NY2d 829 [1970] [scout injured while climbing tree during scout trip]; Pitkewicz v Boy Scouts of America, Inc. – Suffolk County Council, 261 AD2d 462 [2d Dept 1999] [scout injured while skiing on scout trip]).

Summary judgment in favor of either party on the claims asserted against the BSA is denied. Summary judgment is not appropriate where, as here, there exist genuine triable issues of material fact (see Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223 [1978]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957] [internal citations and quotation marks omitted]; Creighton v Milbauer, 191 AD2d 162 [1st Dept 1993]). Summary judgment is rarely granted in negligence cases (Ugarriza v Schmieder, 46 NY2d 471 [1979]), for "even when the facts are conceded, there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances[,] [a question which] can rarely

be decided as a matter of law" (Andre v Pomeroy, 35 NY2d 361, 364 [1974]). Moreover, summary judgment is not appropriate where, as here, resolution of the issues requires credibility determinations (see S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 [1974]). Where, as here, a question of fact regarding consent exists, summary judgment is properly denied (Furnari v Rutigliano, 245 AD2d 541 [2d Dept 1997]; Guerrieri v Gray, 203 AD2d 324 [2d Dept 1994]).

With regard to the issue of the BSA's authority to approve or reject adult volunteers, the BSA has submitted an affidavit by nonparty Terry Lawson, the BSA director of Advancement/Eagle Service/NESA, Boy Scouts division, originally submitted in an unrelated action (see Steinborn v Himmel, Sup Ct, Saratoga County, index no. 1285/97). In the affidavit, Mr. Lawson attests that the local scout councils are autonomous and, after receiving its charter from the BSA, conducts its day-to-day operations and activities independently of the BSA (Terry Lawson, Aug. 20, 2002, aff. in Steinborn, ¶ 6-7). Mr. Lawson further attests that neither the BSA nor the local council employs or controls the adult volunteers who operate the chartered organization and that the chartered organization has the discretion to select the volunteers who deliver the scouting program to the scout packs and troops that they sponsor (id., ¶ 10-13).

However, the record also includes evidence that may be held to demonstrate that the BSA had reserved to itself the authority to control defendant the Greater New York Council of the BSA (the GNYC) and to control, directly or through the GNYC, the local

chartered troops, and had the power to select, appoint, reappoint, or exclude scoutmasters. (See Boy Scouts of America v Dale, 530 US 640 [2000] [US Supreme Court affirmed BSA's right to expel an avowed homosexual adult from the position of assistant scoutmaster as an expression protected by the First Amendment].)

The BSA charter and bylaws indicate that the BSA directly and vertically through the local councils controls the individual troops and is ultimately responsible for the hiring, retention, and supervision of troop leaders. The BSA charter and bylaws provide that each local council's charter "shall be contingent on such local council's fulfilling the basic purpose of the Scouting movement within their specified territory in accordance with these Bylaws and the Rules and Regulations of the [BSA]" (BSA Charter and Bylaws, Art. VI, § 1). The BSA charter and bylaws further provide that "[n]o person shall be approved as a leader unless, in the judgment of the [BSA], that person possesses the moral, educational and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as [the BSA] may from time to time require" (id., Art. VIII, § 1; see BSA-GNYC membership standards ["All BSA members register for a limited period and must reregister at the end of that term. The chartered organization and the local council must approve all registration and reregistration applications. Individuals deemed unsuitable for BSA membership will be removed from membership if already registered or denied registration if not registered"]).

Furthermore, the BSA rules and regulations accord the BSA the authority to grant

charters to organizations meeting the BSA requirements and the power "to revoke such charters when in its sole judgment such revocation is warranted" (BSA Rules and Regulations, Art. VI, § 3, clause 1). In the rules and regulations, the BSA has set forth mandatory qualifications of a scout leader, including that the leader be male and at least 21 years of age (id., Art. VI, § 3, clause 9). Contrary to the BSA's assertion that neither it nor the GNYC employs or controls the adult volunteers, the BSA rules and regulations provide that "[l]ocal councils shall provide the means for assisting chartered organizations in securing and training individuals to serve as unit leaders and assistants" (id., Art. VI, § 4, clause 4). The BSA rules and regulations also require adult volunteers to register annually and to pay an annual registration fee to the BSA (id., Art. XI, § 3, clause 8).

Contrary to the BSA's contention that the BSA has no control over scouting trips organized at the local level, the BSA requires any troop wishing to travel over 500 miles from its home to complete a national tour permit application and submit it to the BSA local counsel for forwarding to the regional office for approval at least one month prior to the trip (see BSA Natl. Tour Permit Application). Here, plaintiff alleges that some instances of sexual abuse occurred on scouting trips in Colorado and Florida.

The record also includes deposition testimony that may be found to demonstrate that, in practice, the BSA national council retained the ultimate right to approve or remove any adult volunteer, including scoutmaster, and has the right to prevent a scoutmaster who is otherwise approved by a troop committee and local council from

becoming a scoutmaster and to revoke the scoutmaster's membership, although that authority is rarely exercised (see Lawrence Potts, Admin. Group Director of the Natl. Office of the BSA, Dec. 15, 2004, dep tr, at 203-204). Lex Jervis, the GNYC director of Support Services and a 36-year scouting veteran, testified at deposition that all local council bylaws changes must be approved by the BSA (see Lex Jervis, Jan. 25, 2005, dep tr, at 66-67), and that the BSA approves adult volunteer applications (id. at 68-69) and can intervene to prohibit a troop committee from recruiting a gay volunteer, but that the GNYC does not have such power (id. at 71-73). Mr. Jervis also testified that membership standards are determined by the BSA, rather than the GNYC (id. at 73). The BSA provides liability insurance to troops and adult volunteer leaders (id. at 65).

On this evidence, the trier of fact may find that the BSA, directly and through the GNYC, bears a duty to review all adult registration applications, including Schwartz', on a yearly basis and determine whether the adult possessed the appropriate qualifications or posed any danger to the scouts.

Next, plaintiff has raised triable issues regarding his claim that the BSA, directly or through the GNYC, knew, or had reason to suspect, that Schwartz was a pedofile, prior to plaintiff's disclosure of the alleged of sex abuse made in June 2001. "An employer may be liable for the negligent hiring and retention of an employee when it knew or should have known of the employee's propensity to commit injury. Moreover, an employer has a duty to investigate a prospective employee when it knows of facts that

would lead a reasonably prudent person to investigate that prospective employee" (T.W. v City of New York, 286 AD2d 243, 245 [1st Dept 2001]). " '[T]here must be some foundation upon which the question of foreseeability of harm may be predicated, i.e., at least a minimal showing as to the existence of actual or constructive notice' " (Steinborn v Himmel, 9 AD3d 531, 534 [3d Dept 2004], quoting Schrader by Schrader v Board of Educ. of Taconic Hills Cent. School Dist., 249 AD2d 741, 743 [3d Dept], lv denied 92 NY2d 806 [1998]; Honohan v Martin's Food of S. Burlington Inc., 255 AD2d 627 [3d Dept 1998]).

The BSA next argues that, even if it had the authority or duty to review Schwartz' reregistrations, it had no notice, either directly or through the GNYC, that Schwartz might be a pedofile.

Triable issues of material fact exist regarding whether the BSA had such notice. The record includes evidence that, in 1979, a nine-year-old scout accused Schwartz, then a Troop 666 assistant scout leader, of having sexually molested him while the two were on an overnight scouting trip at a boy scout camp. The record also includes evidence that, the night the incident allegedly occurred, Schwartz had been permitted to share a tent with that scout and two other scouts and that no other adults were present, even though such a practice was not a common one. Although the scout's mother complained to Troop 666 and the GNYC, there is evidence in the record that a GNYC representative advised her to drop the complaint because nobody would ever believe her.

In June 1993, the former scout repeated his allegations of abuse occurring some 14 years earlier. By letter dated June 23, 1993, the GNYC suspended Schwartz' registration with the BSA. The GNYC investigated the 1993 allegation by interviewing the former scout and Schwartz and by reviewing testimonial letters in Schwartz' favor submitted by other adult volunteers, his friends, and Adventure Trails employees.

In July 1993, the BSA and the GNYC permitted Schwartz, as scoutmaster, to temporarily register in order to lead a group of Troop 666 scouts and adult volunteers on a trip to a BSA scout camping facility located at the Philmont Scout Ranch in New Mexico. The temporary reinstatement occurred prior to the GNYC's interview of the former scout making the accusation, which occurred in August 1993.

After its investigation, the GNYC concluded that the allegation of abuse could not be substantiated and that there existed no reasonable and justifiable basis upon which to conclude that Schwartz was a probable child molester. In July 1993, the GNYC then gave Schwartz permission to reregister with the BSA and, by letter dated October 7, 1993, the Central Synagogue informed the GNYC that it had decided to reinstate Schwartz as scoutmaster of Troop 666.

The BSA admittedly was informed of the 1993 complaint by the former scout and, by letter dated July 29, 1993, offered to provide financial assistance for counseling sessions, if any, required by the former scout.

The record also includes evidence that, in 1993, two scouts accused Schwartz of

"grooming" each of them for abuse and then sexually abusing them between 1991 and 1993.

In addition, it appears from the record that it was common for scouts to meet Schwartz at his New York City home-office, rather than at the usual meeting place, regarding scout business, including the planning of scouting trips (see e.g. Gregory Josephson, a former Troop 666 cub scout, boy scout and assistant scout leader, Jul. 13, 2005, dep tr, at 42).

The BSA contends that, because the GNYC found no basis to conclude that Schwartz was a pedofile prior to 2001, no such basis existed to be found.

However, plaintiff has raised triable issues regarding whether the BSA, directly and through the GNYC, failed to use reasonable care in training its representatives conducting the investigations into the allegations made against Schwartz in 1979 and 1993 and whether the investigations were negligently performed. Plaintiff further contends that, had the BSA and the GNYC properly investigated all claims made against Schwartz, Schwartz' abuse of the scouts would have been revealed years before, thus avoiding or lessening the harm done to plaintiff by Schwartz.

A review of the record indicates that there is no evidence that the BSA or the GNYC ever interviewed the scouts who accused Schwartz in 1993.

With regard to the allegations against Schwartz made in 1979 by the nine-year-old scout, the record includes evidence that the investigation consisted primarily of interviews

of the scout's mother and Schwartz. The Troop 666 committee member who interviewed the scout's mother testified that he had received no training from the BSA regarding the handling of child sex abuse complaints or in the conducting of interviews of either the minor's parent or the minor and had never before conducted such interviews (see Frederick Bondy, Mar. 10, 2005, dep tr, at 31-32, 34). Gary Laermer, a GNYC official since 1980, testified that he was not aware of any BSA or GNYC mandatory youth protection training for adult volunteers in 1979 or 1993 (Gary Laermer, Mar. 15, 2005, dep tr, at 34-35). There is also evidence that, in 1979, the GNYC discouraged the scout's mother from continuing to accuse Schwartz.

With regard to the 1993 investigation into the 1979 alleged incident of abuse, the record includes evidence that neither the BSA nor the GNYC interviewed any of the individuals who wrote the testimonial letters or any of the individuals involved in scouting at the time the alleged abuse occurred.

Plaintiff has also raised triable issues regarding whether the steps taken by the BSA beginning in the mid-1980's were reasonably calculated to protect plaintiff from child abuse by an adult scout volunteer and whether the 1979 and 1993 investigations were properly performed, given the BSA's admitted knowledge of the possibility of abuse.

The record includes evidence that indicates that, by 1993, when the BSA conducted its second investigation into the former scout's allegations of abuse by

Schwartz, the BSA was well aware that abuse was occurring within the BSA membership and had made education regarding child abuse recognition and avoidance a priority as early as 1986. In 1987, the BSA formed the Youth Protection Task Force and, at about the same time, issued documents entitled, Youth Protection Guidelines: Volunteer Training Overview and Sexual Child Abuse: How to Deal with it: BSA Staff Orientation. In the Youth Protection Guidelines, the BSA advises that "[t]here is no sure way to detect who will be a child molester. Because these individuals seek legitimate contact with children, the Scouting program constitutes an attractive target to obtain access" (BSA Youth Protection Guidelines, Obtaining Quality Leadership, at BSA 00902). In the Guidelines, the BSA sets forth reporting requirements that include requiring scout volunteers who suspect that child abuse in the scouting program has occurred to report such suspicions to the "Scout executive" immediately (id., Establishing External Obstacles to Abuse, at BSA 00903). The BSA emphatically states in the Guidelines that "The Boy Scouts of America will not tolerate any form of child abuse in our program and will take all necessary steps to remove any offenders from membership in the BSA" (id.).

The record also demonstrates that, in the early days of scouting, the BSA created a confidential file to record and bar from membership those people seeking to register who are known to be unfit for BSA membership (see BSA Sexual Child Abuse and How to Deal With It, at 12). The file, still in existence today, includes names and addresses of individuals who are alleged to have engaged in improper conduct, including child abuse,

and a summary of the underlying facts and supporting documentation (see id. at 12-13).

The BSA contends that it cannot be held liable because most of the instances of abuse occurred outside the context of scouting activities, and instead occurred within the context of plaintiff's personal relationship with Schwartz and plaintiff's employment by Schwartz's transportation company.

In opposition, plaintiff alleges that the abuse began during his first interactions with Schwartz in connection with scouting, well before plaintiff came to work for Schwartz at Adventure Trails, and that Schwartz spent months gaining the trust of plaintiff and his mother by giving plaintiff gifts, extra attention, and taking him to restaurants, as a precursor to the physical abuse.

Triable issues exist regarding the context in which the abuse occurred. In its Youth Protection Guidelines, the BSA describes the same type of preferential treatment alleged by plaintiff as a signal that the adult might be a pedofile (see BSA Youth Protection Guidelines, Avoiding Child Sexual Abuse in the Scouting Program, at BSA 00901). In addition, plaintiff alleges that at least 10 of the instances of sexual abuse were in some way connected to a scouting trip or function or on scout property. Plaintiff alleges that Schwartz had sexual contact with him on scouting trips to Camp Alexander at Lake George, Colorado; Philmont Boy Scout Ranch in New Mexico; and the Sea Base Boy Scout Camp in Orlando, Florida. In addition, there is evidence that Schwartz used his home-office in New York City for scout and scout leader meetings prior to departing

on a scout trip. Plaintiff alleges that one instance of abuse occurred at Schwartz' Manhattan home-office the evening before a scout trip to the Florida Sea Base Scout Camp and that he had gone to the apartment in connection with the trip.

For the foregoing reasons, the BSA's motion for summary judgment and to dismiss all claims asserted against it is denied in its entirety.

Schwartz' Poor Person Status and Discovery Motions

Schwartz seeks permission to proceed as a poor person.

In opposition, plaintiff contends that Schwartz has not submitted any proof of his allegations of poverty and that Schwartz has the financial ability to retain counsel to represent him in this action.

Article 11 of the CPLR permits a person to move for permission to proceed as a poor person (see CPLR 1101, et seq.). The court, in its sound discretion, may grant the motion (see Smith v Smith, 2 NY2d 120 [1956]) and excuse the poor person from paying any costs or fees, unless he recovers by judgment or settlement (see CPLR 1101 [d]), and may assign counsel to represent the poor person (see CPLR 1102 [a]).

The statute requires the person applying for poor person status to file an affidavit in which he or she sets forth his or her assets, amount of income, inability to pay fees and expenses, the nature of the action, sufficient facts to ascertain the merit of his or her contentions, and whether any other person is beneficially interested and that person's financial ability (Mina v Mina, 83 AD2d 776 [4th Dept 1981], affd 56 NY2d 617 [1982];

CPLR 1101 [a]). Failure to furnish an appropriate affidavit showing sufficient facts so that the merits of the party's contentions can be ascertained requires denial of the application (Teeter v Reed, 57 AD2d 735 [4th Dept 1977]).

Schwartz has failed to make the required showing. Schwartz attests that he is a pro se defendant in this action and has been incarcerated at Oneida Correctional Facility in Rome, New York, for 33 months as of May 19, 2005, the date of his affidavit. Schwartz was incarcerated after pleading guilty to sodomy in the third degree.

Schwartz attests that he owns no valuable property and has no assets or source of income, other than his earnings while incarcerated. However, defendant Eileen Schwartz, nee Yatvin, Schwartz' former spouse, testified at deposition that, after he was incarcerated, Schwartz sold his co-op apartment located at 340 East 80th Street in Manhattan for more than $500,000 and that she believed that he had secreted the sale proceeds (see Eileen Beth Yatvin, Dec. 21, 2004, dep tr, at 115-118). In addition, real property records of the State of Colorado indicate that Schwartz is the owner of property located at 1074 Fontmore Road, Colorado Springs, Colorado, and had transferred ownership of his property located at 4935 Champagne Drive, Colorado Springs, Colorado, to his mother, nonparty Shirley Schwartz.

Contrary to Schwartz' contention, Schwartz' retention of counsel on behalf of Adventure Trails to commence an action against a former employee (see Adventure Trails, Inc. v Leading the Way Tours, Inc., Sup Ct, NY County, index no. 602139/04) and

to proceed with the criminal appeal does not demonstrate Schwartz' inability to retain counsel to defend himself in this action. This conduct merely demonstrates that Schwartz' financial limitations are self-inflicted, rather than the results of events beyond his control, and does not form a basis for granting Schwartz' application. Where the person applying for poor person status has voluntarily reduced his financial resources, it would be improper to require the state or municipal government to pay his or her costs of defense (see Mina v Mina, 83 AD2d 776, supra).

Last, Schwartz has failed to demonstrate a valid defense to the claims asserted against him here. Schwartz contends that he would not have pleaded guilty to the criminal charges, had plaintiff's allegations regarding the date and time of the incidents of abuse been accurate and more specific. He specifically contends that one of the many alleged incidents occurred while he was out of the country on his honeymoon. He also contends that plaintiff's attorney has used unethical and improper methods in aggressively prosecuting both the criminal and civil actions against him. However, Schwartz has failed to set forth specific facts regarding the merits of his defense in this action to warrant the granting of poor person status (see Teeter v Reed, 57 AD2d 735, supra).

For these reasons, and in the sound discretion of the court, Schwartz' motion to proceed as a poor person is denied.

Next, Schwartz seeks to compel further and more complete responses to his demands for document production and to his first and second sets of interrogatories.

Schwartz also seeks to strike and vacate plaintiff's note of issue and to dismiss the complaint for failure to provide such responses.

In opposition, plaintiff contends that he has responded in full to all proper document demands and interrogatories and objects to the rest on grounds that the document demands and interrogatories are over broad, burdensome, unintelligible, vague, and consist of legal argument for trial and recitations of alleged fact that are irrelevant and outside the proper scope of discovery.

The branches of the motions to dismiss the complaint and strike and vacate the note of issue are denied. Plaintiff filed the note of issue and certificate of readiness upon this court's direction and with this court's authorization that discovery may be conducted after such filing.

A review of Schwartz' discovery demands and plaintiff's responses demonstrates that plaintiff has responded as fully and completely as is possible to Schwartz' discovery demands and interrogatories that refer to the instant civil action, with one exception.

Plaintiff is directed to respond to all questions regarding Troop 666 and Adventure Trails, to the extent that responsive information and documents are in his possession. Plaintiff has joined Schwartz in his individual capacity, as president of Adventure Trails, and as Troop 666 scoutmaster and alleges that Schwartz used both Adventure Trails and Troop 666 as lures to coerce plaintiff into acceding to sexual contact. Therefore, Schwartz is entitled to responses to demands relevant to these claims.

To the extent that Schwartz demands information and documents regarding plaintiff's counsel's conduct during the criminal proceeding, the demands are improper in this venue and are more properly raised during the criminal appeal, if so advised.

Accordingly, it is

ORDERED that motion sequence number 010 is denied in all respects; and it is further

ORDERED that motion sequence numbers 011, 012, and 013 are granted to the limited extent detailed above.

Dated: April 26, 2006

ENTER:

J.S.C.

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