SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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G.S.,

Plaintiff,

-against-

THE CITY OF YONKERS, YONKERS CITY SCHOOL DISTRICT and MARTIN O'KEEFE,

Defendants.

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Part CVA-R
Index No. 63811/2019
Mot. Seq. 005

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:

School Defendants' Notice of Motion, Affirmation & Exhibits……..…….....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
School Defendants' Reply.....3

In this action, plaintiff G.S. seeks damages resulting from alleged sexual abuse in 1970 through 1971 when he was 11 years old by defendant Martin O'Keefe, a teacher in the Yonkers City School District that plaintiff attended. Plaintiff asserts claims for negligence and negligent hiring, training, supervision, evaluation and retention against defendants the City of Yonkers ("City") and the District.[1] The City and District now move for summary judgment pursuant to CPLR 3212. For the reasons set forth below, their motion is granted.

BACKGROUND

[1] In opposition to the motion, plaintiff concedes that the other claims in his complaint are either duplicative or not applicable. Therefore, the second and third causes of action are dismissed against the City and District.

Plaintiff alleges that during his 5th grade school year (1970-1971), when he was ten to eleven years old, he was sexually abused on multiple occasions by O'Keefe. [2] The abuse took place in the classroom, both during and after school hours. Plaintiff told no one about the abuse.[3]

O'Keefe was interviewed by the school in 1969 and hired as a permanent teacher in January 1970 – the same year plaintiff alleges the abuse here took place. Among other materials, O'Keefe's personnel file contains multiple references, including letters from parents of then-students, that were submitted in support of his employment application. No complaints of sexual abuse or otherwise are contained in the file. [4]

LEGAL ANALYSIS

It is the movant who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (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

[2] 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. *Sheryll v. L & J Hairstylists of Plainview, Ltd.*, 272 A.D.2d 603 (2d Dept. 2000). This court is making no findings of fact. With respect to the plaintiff's motion, the court has viewed the facts in a light most favorable to the District.

[3] Plaintiff testified that he first spoke about the abuse over 20 years later.

[4] O'Keefe was arrested and ultimately convicted of sexual misconduct, but almost 30 years after plaintiff's abuse.

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).

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. *Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985); *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *see also, Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 AD3d 600 (2d Dept 2013). "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).

> 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).

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 at 49. "[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).

The City and District have satisfied their *prima facie* burden entitling them to summary judgment by providing the evidence available that they had no notice that O'Keefe had a propensity to abuse students prior to plaintiff's alleged abuse in 1970. There are no allegations of abuse in his personnel file. Although in a typical circumstance the absence of a complaint in a personnel file may not satisfy a defendant's *prima facie* burden, institutional defendants in Child Victim Act (CVA) cases may find themselves unable to locate material documents related to the hiring, supervision and retention of employees. This action, like many CVA actions, relate to events that occurred decades ago—here, over half a century ago. Witnesses who could otherwise testify to events from long ago may be no longer employed, impossible to locate or deceased.

The summary judgment analysis employed by New York courts is a judicial procedural construct. *See Yun Tung Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 35-36 (2011)(Smith, J. concurrence). Its purpose, as with all interpretations of the requirements of New York's Civil Practice Law and Rules, is meant "to secure the just, speedy and inexpensive determination" of civil proceedings. CPLR §104. But 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. Granting summary judgment is also consistent with the Legislature's intent that CVA actions be timely adjudicated (as evidenced by its directive that the Chief Administrator of the Courts promulgate rules for the timely adjudication of revived claims). *See* Judiciary Law §219-d.

By weeding out factually insufficient claims and defenses, summary judgment serves as an important tool for accomplishing the primary goal of the CPLR as spelled out in CPLR §104. *See* One Step Forward, Two Steps Back: Summary Judgment After Celotex, 40 Hastings L.J 53 (1988)(referring to Fed. R. Civ. P. 1, substantively identical to CPLR §104).

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that Rule 56 of the Federal Rules of Civil Procedure—the Federal Rules' equivalent to CPLR 3212—"mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 322-23. The Court further explained that the summary judgment rule "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Our courts are faced with a daunting backlog of actions waiting to be tried. No salutary purpose is served by piling on to this backlog revived cases that cannot be proved. It most certainly does not advance the principles upon which the CVA was based and the rationale of *Celotex* is particularly applicable under the unique circumstances of this case. A just determination can be reached now without putting the litigants through more heartache, delay and expense.

Here, plaintiff cannot prove his case. Plaintiff has failed to raise an issue of fact with respect to whether the moving defendants had actual or constructive notice that O'Keefe had a propensity to commit sexual abuse. He has no evidence in this regard. Plaintiff attempts to create an issue of fact by pointing out that the District's witness could not testify as to certain policies and procedures of the school in 1970. But plaintiff does not argue that the District violated a policy or procedure or that the lack of policies and/or procedures resulted in plaintiff's abuse.

As a result, the City and District are entitled to summary judgment and the action is dismissed against them.[5]

Any other relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: September 26, 2023
Mineola, New York

ENTER:

_____
LEONARD D. STEINMAN, J.S.C.
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[5] Plaintiff's complaint against defendant O'Keefe is dismissed as abandoned pursuant to CPLR 3215(c). Plaintiff is granted leave to move to restore the action against the defaulting defendant but must show: a reasonable excuse for the delay in moving for leave to enter a default judgment and demonstrating that the complaint is meritorious. *Wells Fargo Bank, N.A. v. Jackson*, 208 A.D.3d 613 (2d Dept. 2022).