STATE OF NEW YORK
SUPREME COURT : COUNTY OF ORLEANS

AB 511 DOE

Plaintiff,

Index No.: 20-46602

vs.

LYNDONVILLE CENTRAL SCHOOL DISTRICT; LYNDONVILLE ELEMENTARY SCHOOL

Defendants.

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff has brought a claim under the Child Victims Act for injuries he suffered as a result of being sexually abused by Terry Houseman, an employee of defendants Lyndonville Central School District and Lyndonville Elementary School, while a minor student.

Defendants have moved for summary judgment seeking dismissal of all claims against them based on arguments that they lacked notice of Houseman's dangerous propensities, along with other arguments raised only in their Memorandum of Law. Plaintiff has cross-moved for summary judgment on the issue of defendants' liability arising from their negligence, negligent training and supervision, and negligent retention.

Plaintiff submits the following in opposition to defendants' motion and in support of plaintiff's cross-motion.

Throughout their Memorandum of Law, defendants' reference various paragraphs in their Statement of Facts when summarizing the purported factual basis for their motion. In an effort to maintain at least some brevity, plaintiff refers the Court to plaintiff's response to defendants' Statement of Facts for information regarding these factual claims instead of repeating facts and arguments already set forth in that document. Plaintiff will primarily address the legal basis for defendants' arguments here.

ARGUMENT

SUMMARY JUDGMENT STANDARD

The moving party on a motion for summary judgment bears the "initial burden of tendering evidentiary proof in admissible form sufficient to demonstrate that judgment should be granted to him as a matter of law" Brust v. Town Of Caroga, 287 A.D.2d 923 (3rd Dept. 2001); see Zuckerman v. City of New York, 49 N.Y.2d. 557, 562 (1980). This initial burden must be

met before it shifts to the non-moving party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact." Zuckerman v. City of New York, 49 N.Y.2d at 562.

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

A party is liable for negligence when that party owes a duty to another, breaches that duty, and said breach results in an injury. See Evarts v. Pyro Eng'g, Inc., 117 A.D.3d 1148, 1150 (3d Dept. 2014). If only one conclusion may be drawn from the established facts, then the question of legal cause may be decided as a matter of law. See Grant v. Nembhard, 94 A.D.3d 1397, 1398 (3d Dept. 2012) (internal citations omitted).

"It has long been recognized that a Board of Education has a duty, arising from the fact of its physical custody over students, to exercise the same degree of care and supervision which a reasonably prudent parent would employ in the given circumstances." Logan v. City of New York, 148 A.D.2d 167, 168 (1st Dept. 1989) (citing to Ohman v. Board of Educ., 300 N.Y. 306 (1949)).

An employer may be held liable for the torts committed by an employee under theories of negligence, negligent training and supervision, and negligent retention, even when said acts occur outside the scope of employment. See Chichester v. Wallace, 150 A.D.3d 1073 (2d Dept. 2017). "The negligence of the employer in such a case is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." Med. Care of W.N.Y. v. Allstate Ins. Co., 175 A.D.3d 878 (4th Dept. 2019); White v Hampton Management Co. L.L.C., 35 A.D.3d 243 (1st Dept. 2006), *citing* Gomez v City of New York, 304 A.D.2d 374 (1st Dept

2003); Johnasmeyer v. New York City Dep't of Educ., 165 A.D.3d 634, 635–36 (2d Dept. 2018) (citations omitted).

To demonstrate that an employer, such as a school district, bears liability under a theory of negligent supervision, "'the plaintiff generally must demonstrate the [school district's] prior knowledge or notice of the individual's propensity or likelihood to engage in such conduct, so that the individual's acts could be anticipated or were foreseeable.'" Lisa P. v. Attica Cent. School Dist., 27 A.D.3d 1080 (4th Dept. 2006) (quoting Dia CC. v. Ithaca City School Dist., 304 A.D.2d 955, 956 (3d Dept. 2003)); see also Doe v. Chenango Valley Cent. School Dist., 92 A.D.3d 1016, 1016 (3d Dept. 2012).

In this matter, there is no factual dispute that plaintiff was a student at the school at all relevant times. Defendants therefore had a duty to him and were required to exercise the same degree of care and supervision as a reasonably prudent parent under the same circumstances.

The admissible evidence further established that defendant placed its employee, Terry Houseman, in a position to cause foreseeable harm to plaintiff, harm which plaintiff most probably would have avoided had defendant used reasonable care in its training and supervision of Houseman and other employees and was negligent in its retention of Houseman.

I. Defendant had actual notice of Terry Houseman's propensity to cause harm to minor students and specifically, to plaintiff.

The evidence establishes that defendants received actual notice of Houseman's dangerous propensities during the 1986-1987 school year while the abuse of plaintiff was ongoing, yet no action was taken and the abuse continued until the end of the school year.

As more fully set forth in plaintiff's attorney affirmation, a teacher, Ruth Bane, walked into Houseman's classroom while Houseman was abusing plaintiff. This incident occurred at the beginning of the fifth-grade school year shortly after the Houseman's abuse of plaintiff began,

was never reported by Ms. Bane, and Houseman continued to abuse plaintiff thereafter.

While defendants attempt to argue in their Memorandum of Law in support of their own motion that Ms. Bane must not have seen anything to cause her to suspect sexual abuse of plaintiff when she entered the room (Hayes MOL, pp. 14-16), defendants' argument is ultimately unsupported by the testimony.

Initially, while Ms. Bane denied ever having observed any inappropriate conduct by Houseman, despite teaching in the same building as Houseman since the early 1970s (Ex. D, p. 10) and getting their classes together to show movies (Ex. D, p. 33), she also denied any recall at all of any of Houseman's interactions with students (Ex. D, p. 34), claimed to have no recall of ever seeing Houseman interacting with any student (Ex. D, p. 62), and claimed she could not remember going to Houseman's room ever for any reason at all (Ex. D, p. 32). This lack of recall is not a denial and is insufficient to overcome plaintiff's *prima facie* showing regarding her having observed the abuse.

While defendants argue that she must not have seen anything based on defense counsel's interpretation of plaintiff's testimony, defendants omit that Ms. Bane entered the room while plaintiff's hand was actually inside Houseman's unzipped pants and she was clearly startled. (Ex. A, pp. 68-71). To clarify Ms. Bane's reaction, the positioning of Houseman and plaintiff in the room, and what she was able to see, plaintiff has submitted an affidavit providing additional details. This affidavit confirms that plaintiff was standing near Houseman with Houseman's body perpendicular to his. His entire body was not blocking Houseman's body and was visible from the doorway Ms. Bane entered that day. Plaintiff's pants were unzipped and Houseman had placed plaintiff's hands in his pants. At the time Ms. Bane walked in, she looked at them, let out a loud gasp. Plaintiff heard her gasp, then turned around and stepped back from Houseman, with

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