STATE OF NEW YORK
SUPREME COURT : COUNTY OF ORLEANS

AB 511 DOE,

Plaintiff,

v.

DECISION
Index No. 20-46602

LYNDONVILLE CENTRAL SCHOOL DISTRICT,
LYNDONVILLE ELEMENTARY SCHOOL,

Defendants.

Defendants, Lyndonville Central School District and Lyndonville Elementary School, (hereafter collectively Lyndonville), moved for summary judgement pursuant to CPLR 3212, requesting dismissal of the Amended Complaint, (NYSCEF motion 004). Plaintiff cross-moved for summary judgement (NYSCEF motion 005). Both motions were opposed.

Plaintiff filed this action pursuant to the Child Victims Act (CPLR 214-g). Plaintiff alleges that between 1986 and 1987, when he was a fifth-grade student attending Lyndonville Elementary School, he was abused by his fifth-grade teacher, Terry Houseman, (hereafter, Houseman). The abuse first occurred at Houseman's residence and all abuse thereafter at the school in Houseman's classroom. Plaintiff alleges the abuse at the school occurred before class, during class and after school. Plaintiff also alleges that Houseman pulled plaintiff out of other classes and recess to abuse him and that a custodian allowed only plaintiff into school in the morning before classes, while all other students waited outside. During these times plaintiff alleges he was abused by Houseman. Plaintiff further alleges that another fifth-grade teacher, Ruth Bane, walked into Houseman's classroom while Houseman was abusing plaintiff.

The following causes of action are asserted in the Amended Complaint: negligence – failure to protect plaintiff from harm; negligent hiring; negligent training and supervision of Houseman and other Lyndonville employees; negligent retention; and breach of statutory duty to report.

To succeed on a CPLR 3212 motion, "it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor, and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'" (*Zuckerman v New York*, 49 N.Y.2d 557, 562 [1980] citing to CPLR 3212(b)). "[F]acts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] citations omitted).

As to the first cause of action for failure to protect plaintiff, the plaintiff raised a question of fact. It is well established that a school owes a duty to adequately supervise its students. "[A] teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." (*Mirand v City of New York*, 84 N.Y. 2d 44, 49 [1994] internal citation omitted). Here, plaintiff submitted evidence that the fifth-grade teacher, Ruth Bane, walked into Houseman's classroom while Houseman was abusing plaintiff and claims the teacher saw the abuse as it was occurring. In addition, there is testimony that Houseman pulled plaintiff out of other classes and at recess, and that a custodian allowed plaintiff into school in the morning before classes while all other students waited outside. Taking the evidence in the light most favorable to the plaintiff, the plaintiff raised a triable issue of fact on the issue of notice and whether the defendant failed to adequately supervise the plaintiff.

(See, *Doe v Whitney*, 8 AD3d 610 [2nd Dept. 2002]). Lyndonville's motion to dismiss the first cause of action is therefore denied.

The second cause of action is for negligent hiring. "A necessary element of a cause of action alleging negligent hiring "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Doe v Whitney* at 612). Relying on *Doe v. New York City Dep't of Educ.*, 126 A.D.3d 612 [2d Dept. 2015], Lyndonville argues that it did not and could not have known of Houseman's dangerous propensities. In support of the motion, Lyndonville submitted Houseman's employment application and teaching certificate and pointed out that Houseman had no prior criminal history. As such, Lyndonville met their burden on the issue. In opposition, plaintiff failed to create a question of fact. Lyndonville's motion to dismiss the second cause of action for negligent hiring is granted.

With respect to the claims for negligent supervision and retention of Houseman, an essential element is that Lyndonville knew or should have known of Houseman's propensity to sexually abuse children. (*Dolgas v. Wales*, 215 A.D.3d 51, 55 [3rd Dept. 2023]). When the evidence as previously noted is taken in the light most favorable to the plaintiff a question of fact is raised as to whether Lyndonville knew or should have known of the alleged propensity of Houseman.

As to the allegations that Lyndonville employees were improperly trained Lyndonville submitted evidence in the form of deposition testimony of employees that worked during the period of time plaintiff was abused. Those employees testified that if they knew or suspected that a child was being abused, they would report it to their supervisor. As such, Lyndonville met

their burden on the issue of training. Plaintiff failed to establish the employees were negligently trained and/or supervised. Plaintiff's cross-motion for summary judgment on the issue is denied and Lyndonville's motion to dismiss the failing to train aspect of the third cause of action is granted.

The fifth is for breach of the statutory duty to report pursuant to Social Services Law § 413. In *Matter of Yolanda D.*, 88 N.Y.2d 790 [1996], it was held that though the determination of whether a particular person has acted as the functional equivalent of a parent is a fact intensive inquiry which will vary according to the particular circumstances of each case, "article 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, *such as teachers*" (emphasis added). More recently, the Second Department decided *Hanson v. Hicksville Union Free Sch. Dist.*, 209 A.D.3d 629 [2nd Dept. 2022]. In that case, plaintiff brought a claim pursuant to CPLR 214-g alleging she was sexually abused by her guidance counselor while in junior high school. The Second Department reversed the decision of the lower court and dismissed the cause of action asserted under Social Services Law on the grounds that the law required reporting when the abuse is committed by a person legally responsible for the child's care as defined by the Family Court Act and that a guidance counselor was not such person.

Here, there was no evidence submitted to support a finding that the teacher here was acting as a functional equivalent of a parent. Lyndonville's motion to dismiss the fifth cause of action is therefore granted.

Lyndonville also moved to dismiss the allegations related to off premises abuse. Plaintiff testified that the first time that Houseman abused him was off school premises when plaintiff slept over at Houseman's residence. At the time of that particular abuse, Lyndonville did not have custody of control over plaintiff and no duty monitor Houseman's conduct. *(See, Tanaysha T. v City of New York,* 130 A.D.3d 916, 917 [2nd Dept 2015]). Moreover, no off-premises abuse occurred after Houseman allegedly began to abuse plaintiff on school premises. Lyndonville's motion to dismiss allegations related to off premises abuse prior to the abuse alleged at the school is granted.

Lyndonville also argues that Lyndonville Elementary School is not an entity capable of being sued, citing to *Guerriero v. Sewanhaka Cent. High Sch. Dist.*, 150 A.D.3d 831, 832 [2nd Dept 2017] stating "The Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against the School, as the School is not a legal entity capable of being sued"). Plaintiff failed to create a legal question or a question of fact on the issue. Lyndonville's motion to dismiss the Amended Complaint against Lyndonville Elementary School is granted and plaintiff's cross-motion denied.

As for plaintiff's argument the defendant may be liable for the reasonably foreseeable consequence of its actions, plaintiff relies on the expert report of Sherryll Kraizer. This report however is not in admissible form and therefore not considered by the Court. Moreover, even if the Court were to accept the unsworn report, the opinions expressed are unsupported by data or resource. Additionally, defendant's submission of its expert report raises questions of fact. As such plaintiff's cross-motion on this theory of liability is denied.

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