SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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S. F.,

Plaintiff,

Part CVA-R
Index No. 900043/2021
Mot. Seq. No. 007

-against-

DECISION & ORDER

LAWRENCE WOODMERE ACADEMY and ROBERT DALY,

Defendants.

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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:

Defendant LWA's Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendant LWA's Reply.....3

In this action, plaintiff alleges that she was sexually abused from 2009 to 2012 by defendant Robert Daly, a teacher at Lawrence Woodmere Academy ("LWA"), and seeks to hold defendants responsible for her alleged injuries. LAW now moves for summary judgment pursuant to CPLR 3212 dismissing the action as against it. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND[1]

Daly was hired by LWA in 2008, the year plaintiff first attended LWA. Plaintiff first met Daly in her freshman year when she attended a history course Daly taught. Plaintiff asserts that Daly inappropriately touched her thigh and otherwise inappropriately

[1] The facts as set forth by the court are consistent with the evidence submitted by plaintiff, including her 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. *Adams v. Bruno*, 124 A.D.3d 566 (2d Dept. 2015). This court makes no findings of fact.

communicated and touched her on school grounds throughout her first three years at LWA. For purposes of this motion, LWA does not contest this. Instead, LWA argues that it lacked any notice of Daly's actions of which plaintiff complains.

Four claims remain against LWA following this court's November 15, 2021 Decision and Order determining LWA's motion to dismiss: negligence (Seventh Cause of Action) and negligent hiring, supervision and retention (the Tenth, Eighth and Twelfth Causes of Action, respectively).

Plaintiff testified that she would visit Daly in his classroom during free periods, during lunch and after school. In her sophomore year she and Daly began communicating via email and text. Daly would occasionally sit next to her at the computers in his classroom and would also touch the top of her hand, massage her shoulders, move her blouse and hug her. In plaintiff's junior year, the touching escalated, eventually leading to plaintiff reporting to the Dean of Students and the head of her school that Daly had been inappropriate with her. Plaintiff testified that everyone in the school "knew there was something going on. People would say it. The teachers would reference it. They would say we know where to find you. You are always with him. He is always with you." Plaintiff's Deposition Transcript, September 18, 2023, pp. 206, 207. Before plaintiff reported the alleged abuse, no teacher or administrative official ever asked plaintiff about her relationship with Daly.

LEGAL ANALYSIS

It is the movant who has the burden to establish an entitlement to summary judgment. *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 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 her 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. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985); *see also, Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986); *Mitchell v. Icolari*, 108 A.D.3d 600 (2d Dept. 2013).

> 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).

"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).

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 44, 49 (1994). "[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).

A defendant is on notice of an employee's propensity to engage in tortious conduct when it knows or should know of the employee's tendency to engage in such conduct. *Moore Charitable Foundation v. PJT Partners, Inc.*, 40 N.Y.3d 150, 159 (2023) "[T]he notice element is satisfied if a reasonably prudent employer, exercising ordinary care under the circumstances, would have been aware of the employee's propensity to engage in the injury-causing conduct." *Id*. at 159.

Here LWA has failed to sustain its burden of establishing that it lacked constructive notice of Daly's alleged abusive propensities and that its supervision of both Daly and plaintiff was not negligent. *See Fain v. Berry*, __A.D.3d __, WL 2837587, (2d Dept. 2024); *Sayegh v. City of Yonkers*, __ A.D.3d __, WL 2837443 (2d Dept. 2024). The submissions in support of the motion fail to eliminate an issue of fact since Daly was a brand new teacher in the school and for three years showered plaintiff with attention, allegedly spent excessive time with her at the school during and after class hours—which was known by all—and repeatedly touched her in the school. As a result, LWA's motion for summary judgment with respect to the Seventh, Eighth and Twelfth Causes of Action is denied.

The court agrees with LWA that there is no basis for plaintiff to rely on a negligent hiring theory. LWA has proffered evidence relating to Daly's application, credentials and references. Plaintiff has failed to raise an issue of fact as to whether the LWA had knowledge of a propensity by Daly to engage in sexual misconduct before his hire. *See Ghaffari v. North Rockland Cent. School Dist*., 23 A.D.3d 342, 343-44 (2d Dept. 2005).

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: June 10, 2024
Mineola, New York

ENTER:

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LEONARD D. STEINMAN, J.S.C.