SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

TRIAL/IAS, PART **10**
NASSAU COUNTY

MORDECHAI DIAMOND, an infant under the age of 14, by his mother and natural guardian, FRANCINE DIAMOND, and FRANCINE DIAMOND, Individually,

Plaintiffs,

MOTION DATE:
October 3, 2001
INDEX No. 14030/99

-against-

SEQUENCE No. 3, 5

CAMPS MORGEN AVRAHAM, HELLER, STERNBERG, INC. and YAAKOV WEINER,

Defendants.

The following papers read on this motion:

Notice of Motion and Supporting Papers
Affirmation of Peter C. Contino
Affirmation of Donald S. DiBenedetto
Affidavit of Rabbi Moshe Wein
Affidavit of Rabbi Label Steinhardt
Memorandum of Law
Affirmation in Opposition

Order to Show Cause and Supporting Papers
Affirmation in Opposition
Reply Affirmation

Motion by the defendant Camp Mogan Avraham pursuant to CPLR 3212 for an order dismissing the complaint insofar as asserted against it, is granted.

Motion by the defendant Yaakov Weiner pursuant to CPLR 3106[b] for an order of the Court authorizing the issuance of certain subpoenas directed to non-parties Peninsula Counseling Center and Andrea Oppenheimer, is granted.

On August 8, 1998, the infant plaintiff Mordechai Diamond - then 10 years of age - was attending the defendant Camp Mogen Avraham [the Camp], when he was allegedly sexually molested in his bunk bed by the defendant Yaakov Weiner. At the time, Weiner, was employed by the Camp as a "learning Rebbe," and had been assigned to sleep in the bunkhouse with several other campers where the assault allegedly took place (Pltff's BOP ¶¶ 2-3, 16-19; Steinhardt Aff., ¶¶ 3, 6; see, Weiner OSC, Exh., "H," at 25-27).

Weiner had been employed by the Camp for many years prior to the subject incident (Weiner Dep., 120-121), and also taught at various Yeshivas in the New York metropolitan area (Weiner Dep., 120-121, 127; Steinhardt, Aff.,¶ 6).

A criminal proceeding was subsequently instituted against Weiner based upon the infant plaintiff's allegations, although he was ultimately acquitted of charges brought against him (see, DiBenedetto Aff., ¶ 12; see also, Pltffs' Opp., Exh., "A", Report dated April 2, 1999, p 3, ¶ 5). Prior to the subject incident, Weiner had never been convicted of a crime (Weiner Dep., 12). Nor

had any claims of inappropriate behavior been made against him (Weiner Dep., 142; Steinhardt Aff., ¶¶ 7-8).

In July of 1999, the plaintiff commenced the within action, alleging, inter alia, that the Camp failed to properly inquire into Weiner's background before hiring him; failed to properly train him; and did not properly supervise his activities (Cmplt.,¶ 16). The plaintiffs further allege that Weiner was acting within the scope of employment when he committed the alleged assault and assert claims against the Camp founded upon a respondent superior theory of vicarious liability (Cmplt., ¶¶ 11, 13).

The Camp now moves for summary judgment dismissing the complaint insofar as asserted against it. The motion should be granted.

With respect to liability predicated upon the claim that Weiner was acting within the scope of his employment when the alleged abuse occurred, it is well settled that if an employee " `for purposes of his own departs from the line of duty so that for the time being his acts constitute an abandonment of his own service, the master is not liable' " (Judith M. v Sisters of Charity Hosp., 93 NY2d 932, 933, quoting from, Jones v Weigand, 134 App Div 644, 645).

Here, however, "[a]ssuming plaintiff's allegations of sexual abuse are true, it is clear that [Weiner] * * * departed from his duties for solely personal motives unrelated to the furtherance of the [Camp's] business" (Judith M. v Sisters of Charity Hosp., supra, at 933; see also, N.X. v Cabrini Med. Ctr., 280 AD2d 34;

Curtis v County of Oneida, 248 AD2d 999; Olson v B & S Caring Assocs, Inc., 271 AD2d 588; Seegers v Shibley Summer Day Camp, Inc., 255 AD2d 499; K. I. v New York City Bd. of Educ., 256 AD2d 189, 191). Inasmuch as the parties' submissions fail to generate triable issues of fact with respect to the claim that the alleged abuse was perpetrated in the furtherance of the employer's business, that conduct cannot form the basis for vicariously imputing liability to the Camp.

Further, while the absence of vicarious liability will not foreclose the possible assertion of "negligent hiring, negligent retention and negligent supervision" causes of action (Sato v Correa, 272 AD2d 389; Avent v Headley, 252 AD2d 565), " `a necessary element of such causes of actions is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' " (Sato v Correa, supra, at 389, quoting from, Kenneth R. v Roman Catholic Diocese, 229 AD2d 159, 161 see also, Seegers v Shibley Summer Day Camp, Inc., supra, at 500; K. I. v New York City Bd. of Educ., supra; Avent v Headley, supra, at 566; Curtis v County of Oneida, supra).

Contrary to the plaintiff's contentions, there is nothing in the record demonstrating that Weiner was disposed to commit the sort of misbehavior which allegedly occurred at bar, or that additional background inquiries would have disclosed any pertinent information (Ceneus v Beechmont Bus Ser., 272 AD2d 499; Curtis v County of Oneida, supra; K. I. v New York City Bd. of Educ., supra). More particularly, Weiner's employment history contains no

evidence that he had ever been accused of inappropriate behavior with children or that he previously posed any threat to the campers he supervised (Sato v Correa, supra; Seegers v Shibley Summer Day Camp, Inc., supra). Accordingly, the risks posed by Weiner's alleged proclivities - assuming they existed - were not known or foreseeable by the Camp at the time the incident purportedly occurred (Seegers v Shibley Summer Day Camp, Inc., supra). The plaintiffs' speculative assertions to the contrary are insufficient to generate triable issues of fact with respect to these claims.

Similarly unavailing is the plaintiffs' reliance upon an post-incident report authored by a "senior sanitarian" employed by a local district office of the Department of Health, which periodically reviewed the Camp's written safety plan and issued permits for the Camp's operation (Pltffs' Opp., Exh., "A").

The record supports the Camp's assertion that it had previously submitted a safety plan to the Department of Health; that it had received an annual operating permit for 1998 based thereon; and that prior to the incident, no relevant modifications to the plan had been requested by the Department of Health (Aff. of Rabbi Moshe Wein, ¶¶ 5-8 see, Exh., "A" thereto). It bears noting that although the post-incident report recommends that the Camp consider, inter alia, mandating "two deep staff supervision" (Report at 4-5), the Department declined to impose any administrative sanction based thereon, since the Camp had implemented its safety plan as written and was never informed by

the Department that, inter alia, its supervisory practices were in any way lacking (Report at ¶ 3, at 4).

The Court has reviewed the plaintiffs' remaining submissions, including the expert affidavit of Stephen Haley (Opp. at Exh., "E") (see, Scheir v Lauenborg, 281 AD2d 530; Scola v Sun Intern. North America, 279 AD2d 466), and finds that they fail to generate triable issues of fact with respect to the claims interposed against the Camp.

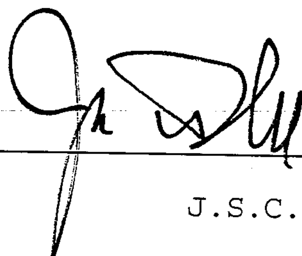
In light of the above, the Camp's motion for summary judgment dismissing the complaint insofar as asserted against it, is granted.

Lastly, the motion of co-defendant Yaakov Weiner for an order directing the issuance of subpoenas and notice of deposition for service upon Peninsula Counseling Center and Dr. Andrea Oppenheimer "to give testimony at [a] deposition as non-party witness and * * * to produce thereat their original office records regarding the infant plaintiff Mordechai Diamond * * *", is granted, there being no opposition or response from the aforementioned non-parties in connection with the application.

The Court has reviewed the opposing affirmation submitted by plaintiff's counsel - which is notable for its gratuitous commentary - and concludes that nothing contained therein warrants the denial of the movant's application.

Counsel for movant Yaakov Weiner shall serve a copy of this Court's order, together with notice of entry, upon service of the above-mentioned subpoenas.

The foregoing constitutes the decision and order of the Court.



J.S.C.

Dated: December 10, 2001

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