SHORT FORM ORDER

SCAN

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: **HON. ANTHONY L. PARGA, J.S.C.**

JESSICA BLAU, an Infant under the age of 18 years, by her father and natural guardian MITCHELL BLAU, and MITCHELL BLAU, Individually,

Plaintiffs,

- against -

HICKSVILLE UNION FREE SCHOOL DISTRICT and HOWARD SCHWARTZ,

Defendants.

Sequence #03, 04
Motion Date: 1/15/02
Index # 031469/93
Part 22

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Upon the foregoing papers, the motion by defendant Hicksville Union Free School District ("School District") for an order granting summary judgment dismissing the complaint and all cross-claims against it is granted. The cross-motion by defendant Schwartz for an order granting summary judgment dismissing the complaint against him is denied.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff ("plaintiff") when she was allegedly sexually assaulted and molested by defendant Schwartz on December 10, 1992, in the sixth period technology classroom in Hicksville Middle School. At the time of the incident, Schwartz had been a teacher in that school for 26 years. Criminal charges were subsequently filed by the District Attorney on behalf of the plaintiff and four other student complainants. Schwartz was accused of

violating Penal Law §130.60-2, sexual abuse in the second degree. A non-jury trial was eventually conducted by the Hon. M. Arthur Eiberson in the District Court (First District) of Nassau County between February 1 and February 24, 1994. During the course of the trial the Court heard testimony from 28 witnesses, and concluded that the People failed to prove the guilt of defendant Schwartz beyond a reasonable doubt. Disciplinary charges had also been brought against Schwartz by the School District on January 28, 1993. It appears, based upon a partial transcript, that a hearing was intermittently conducted for over one year during which time 11 witnesses appeared for the School District and 18 witnesses were called by Schwartz to testify, including himself. Schwartz was represented by counsel throughout the hearing; the plaintiff and her schoolmates who testified were not. A three person panel eventually dismissed the charges involving the plaintiff.

The action at bar was also commenced in 1993, and asserts four causes of action sounding in battery, negligent hiring and supervision, intentional infliction of emotional distress and loss of services.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (see, *Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324). Here, the School District has met its initial burden of making a *prima facie* showing, based upon defendant Schwartz' personnel file and the testimony of the plaintiff and Raymond McDonough, the principal of the School District's high school, that school personnel did not possess any knowledge or notice of Schwartz' alleged proclivity to engage in sexual misconduct (see, *Paul J.H. v Lum,* __ AD2d __, 736 NYS2d 561 [4th Dept. 2002]; *Sato v.*

Correa, 272 AD2d 389, 390; *K.I. v. New York City Bd. of Educ.,* 256 AD2d 189, 191-192; *Kenneth R. v. Roman Catholic Diocese,* 229 AD2d 159, 161). The plaintiffs failed to meet their burden of raising a triable issue of fact since they did not submit any evidence which would establish that the School District was aware or should have been aware of the propensity of Schwartz to engage in the type of behavior which allegedly caused the infant plaintiff's injuries (*Paul J.H. v. Lum, supra*; *Vega v. Northland Marketing Corp.,* __ AD2d __, 735 NYS2d 213, 214 [2nd Dept. 2001]; *Sato v. Correa, supra*; *K.I. v. New York City Bd. of Educ., supra*; *Kenneth R. v. Roman Catholic Diocese, supra* at 163). No proof was submitted that the School District had any knowledge of the related incidents involving other girls which allegedly occurred prior to the incident involving the plaintiff at bar. In addition, the School District cannot be held liable to the plaintiffs for the allegedly tortious act of Schwartz under the doctrine of respondent superior since the alleged sexual assault by Schwartz was not in furtherance of the School District's business and was a clear departure from the scope of Schwartz' employment (see, *N. X. v. Cabrini Med. Center,* ___ NY2d _ _, 2002 N.Y. LEXIS 184 [Court of Appeals, Feb. 14, 2002]; *Vega v. Northland Marketing Corp., supra*). Accordingly, the motion by defendant School District for an order dismissing the complaint against it is granted.

However, the cross-motion by defendant Schwartz for an order granting summary judgment dismissing the complaint, on the ground that the infant plaintiff is collaterally estopped from pursuing her tort claims against Schwartz since Schwartz was acquitted of the criminal and administrative charges asserted again, is denied (see, *Reed v. State of New York,* 78 NY2d 1, 8; *Ryan v. New York Tel. Co.,* 62 NY2d 494, 500). "A dismissal of a criminal

charge or an acquittal does not generally constitute collateral estoppel in relation to a civil action because of the difference in the burden of proof to establish the factual issues. At best, the dismissal in the criminal proceeding 'rests upon a failure of proof beyond a reasonable doubt and is not a conclusive finding of innocence or nonparticipation in the underlying acts charged' [citations omitted]. In effect, even if on the merits, the dismissal in the criminal proceeding means that the People failed to establish the criminal conduct of the defendant, including the alleged assaultive behavior, beyond a reasonable doubt. On the other hand, the plaintiff . . . in the civil action has the burden of establishing her case by a fair preponderance of the credible evidence. Therefore, the dismissal of the prior criminal charge against the defendant, even if proved on the merits, could not have preclusive effect against the plaintiff's civil action to recover damages based on the same conduct" (*Kalra v. Kalra,* 149 AD2d 409, 410-411).

A different analysis must be applied with respect to the dismissal of the disciplinary charges pertaining to the plaintiff which were brought by the School District against Schwartz.

The doctrine of "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . ., whether or not the tribunals or causes of action are the same' (*Ryan v. New York Tel. Co.,* 62 NY2d 494, 500)" (*Parker v. Blauvelt Volunteer Fire Co., Inc.,* 93 NY2d 343, 349). The doctrine "rests on the interest of reducing needless litigation and conserving the resources of courts and litigants. Part of the doctrine's justification is the unfairness and inefficiency of otherwise permitting a party to relitigate an issue which has been previously decided against that person, or a party in privity with that

person . . . " (*David v. Biondo,* 92 NY2d 318, 322; *Matter of Juan C. v. Corines,* 89 NY2d 659, 667). It gives "conclusive effect to the quasi-judicial determinations of administrative agencies [citations omitted] when rendered pursuant to the judicial authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law [citations omitted]" (*Ryan v. New York Tel. Co.,* 62 NY2d 494, 499; *Matter of Venes v. Community School Bd.,* 43 NY2d 520, 524). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v. New York Tel. Co., supra* at 500, 501). 'The burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (id. at 501)" (*Parker v. Blauvelt Volunteer Fire Co., Inc., supra*). Most importantly, however, "collateral estoppel is not a tool to benefit or punish particular litigants. The judicial responsibility, rather, is to see to it that substantive and procedural safeguards are applied evenhandedly for the protection of all persons who turn to the Court system, even, and perhaps especially, under the constraint of difficult fact patterns" (*David v. Biondo, supra* at 325).

An analagous scenario was addressed in 1998 by the Court of Appeals in the case of *David v. Biondo*, 92 NY2d 318. Plaintiff David had commenced a dental malpractice action against defendant Biondo in Supreme Court, Queens County, and while the case was pending, a disciplinary proceeding was brought against Biondo by the New York State Education Department's Office of Professional Discipline ("O.P.D.") based upon a grievance the plaintiff had filed with that office. When the disciplinary proceeding was dismissed in

Biondo's favor, by the State Board of Regents, Biondo then filed a motion with the trial court for an order granting summary judgment dismissing the malpractice action on the grounds of collateral estoppel. The trial court granted Biondo's motion, and the decision was affirmed by the Appellate Division, Second Department. In reversing both courts and holding that plaintiff David did not have a full and fair opportunity to litigate her personal injury claim within the confines of the disciplinary proceeding, the Court of Appeals relied on its decision one year earlier in *Matter of Juan C. v. Cortines*, 89 NY2d 659, and reasoned that the lower courts must examine (1) whether the tort victim was in legal privity with the disciplinary or regulatory body or agency, i.e., whether there was an identity of interests between the plaintiff and that body, and (2) whether the plaintiff "was able to sufficiently participate in, or meaningfully control, the . . . proceeding" (*David v. Biondo, supra* at 322-323). The Court found that the nature of plaintiff David's interests were "purely individual and pecuniary", and thus "distinct" and could not be equated with those of a professional regulatory body such as the State Education Department's Office of Professional Discipline ["O.P.D."] (Id. at 322-324). The Court then applied the "control/participation" standard and concluded that (1) "the public body did not serve as [plaintiff David's] personal counsel in the disciplinary proceeding," (2) plaintiff David's assistance of the O.P.D. was "mere facilitation" and was "not enough to demonstrate control," (3) the "O.P.D. is not an advocate for her pecuniary interest," and (4) plaintiff "David's individual objective for damages was never at issue considered or resolved by O.P.D.". Moreover, the Court declared that as a matter of public policy the greater public interest of having professions scrutinized as a result of civic reports of misconduct would not be served if plaintiffs such as David were detered

in filing complaints and grievances if doing so meant that they would forfeit a judicial resolution of their personal damage claim (Id. at 324).

This Court pursuant to the guidelines set forth by the Court of Appeals in *David v. Biondo*, will not invoke the doctrine of collateral estoppel. Here, the School District's disciplinary matter was not plaintiff's case in any legal or functional sense since the School District "did not serve as her personal counsel in the disciplinary proceeding" (*David v. Biondo, supra* at 324). The plaintiff could not meaningfully control or participate in the School District's disciplinary proceeding since she was not represented at the hearing by counsel, she could not cross-examine Schwartz and she was deprived of her right to a trial by a civil jury (see, *Stevenson v. Goodmar,* 148 AD2d 217, 219, 221). Here, the plaintiff's interest is purely individual and pecuniary; in the proceeding brought by the School District, the plaintiff's individual objective for damages was never at issue, considered or resolved by the School District. The common allegations against Schwartz of sexually assaulting the plaintiff merely served as the instrument for the District Attorney and the School District to fulfill their responsibility to the public. The plaintiff and the School District had distinct interests and were not in privity, and consequently the plaintiff did not have a full and fair opportunity in the School District's disciplinary proceeding to litigate her personal claim to recover monetary damages for Schwartz' alleged sexual battery.

The plaintiff also did not have a full and fair opportunity in any prior forum to litigate her cause of action to recover damages from Schwartz for his allegedly intentional infliction of emotional distress. This specific allegation was not addressed or raised by the School District in the disciplinary proceeding nor was the plaintiff permitted to submit proof on that claim. Thus, the question of whether Schwartz' conduct can be found to be so "extreme and

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outrageous" and "utterly reprehensible" (*Howell v. New York Post Co.*, 81 NY2d 115, 121, 122) that it exceeded "beyond all possible bounds of decency" (*Fischer v. Maloney*, 43 NY2d 553, 557) remains an issue of fact for the jury to consider and determine (see, *Malvestuto v. Malvestuto*, 259 AD2d 1021, 1022; *Roe v. Barad*, 230 AD2d 839, 840; *Laurie Marie M. v. Jeffrey T.M.*, 159 AD2d 52).

Dated: March 18, 2002

Anthony L. Parga, J.S.C.