22-1442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITTANY N. JONES, a/k/a BRITTANY N. FINCH,

Plaintiff-Appellant,

v.

CATTARAUGUS COUNTY SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the Final Order of the United States District Court for the Western District of New York in
Brittany N. Jones a/k/a Brittany N. Finch v. Cattaraugus County School District,
Civil Action #1:19-cv-00707-WMS-LGF

BRIEF AND SPECIAL APPENDIX OF THE APPELLANT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. §§ 1332, 1441, 1446.

Plaintiff-Appellant is a citizen of the Commonwealth of Pennsylvania. Defendant-Appellee The Cattaraugus County School District is a citizen of the State of New York. Therefore, the district court had jurisdiction under 28 U.S.C. § 1332(a)(2) because the amount in controversy exceeds the sum or value of $75,000 and the parties are citizens of different states.

The action was commenced on April 26, 2019 by the filing of a complaint in the Supreme Court of the State of New York, County of Cattaraugus. (A. 14.)

On May 31, 2019, the School District removed the action to the United States District Court of the Western District of Pennsylvania under 28 U.S.C. § 1441(b) and 28 U.S.C. § 1446. (A. 2, 40.) Defendant filed an answer on June 3, 2019. (A. 30.)

The district court granted the School District's motion for summary judgment on June 13, 2022. (A. 358.) The order granting summary judgment disposed of all the plaintiff's claims. (A. 358.) The trial court entered a final judgment on June 14, 2022. (A. 377.)

Plaintiff-Appellant filed a timely notice of appeal on July 6, 2022. (A. 378.) *See* F.R.A.P. 4(a)(1)(A). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the district court err as a matter of law or abuse its discretion when it dismissed Plaintiff-Appellant's claims under the New York Crime Victim's Act, N.Y. C.P.L.R. § 214-g ("CVA"), on the grounds that her complaint was prematurely filed, where the statutory language was ambiguous, the legislative intent underlying the CVA was to permit the filing of otherwise time-barred claims, and the statutory commencement date was intended to benefit plaintiffs, not defendants?

2. Did the School District engage in gamesmanship and forfeit its right to assert a statute of limitations defense when it engaged in extensive discovery and mediation for two years after the commencement of the action and counsel represented that the School District would not seek summary judgment, thereby lulling Plaintiff-Appellant into believing that her claims were timely?

STATEMENT OF FACTS

Plaintiff-Appellant Brittany N. Finch (a/k/a Brittany N. Jones) ("Brittany") was only fifteen years old and in the eighth grade when her teacher, Timothy Retchless, began grooming and sexually abusing her. The abuse began in 2009 and continued for approximately two years. As a direct consequence of that abuse, Brittany has suffered from post-traumatic stress syndrome for over a decade, manifested as suicidal ideation, self-harm, anorexia, and bulimia.

At the time of the abuse, Retchless was a full-time employee of Defendant-Appellee Cattaraugus-Little Valley Central School District, where he worked from 2000 to 2011.

A. Brittany's mother, Stacy Hubbard, notices her daughter's unusual behavior and contacts the school principal.

While Brittany was in the eighth grade, her mother, Stacy Hubbard, observed "weird behavior" from her daughter when she would take her and pick her up from school. (A. 124, 12.) When she picked her up from school, Brittany would look at a vehicle with a man in it. (A. 124.) Brittany also started staying late after school three to four times a week. (A. 128.)

Hubbard noticed that Brittany spent an unusual amount of cell phone time on calls to an unknown number. (A. 124.) Brittany told her mother she was talking to Mr. Retchless, a teacher at her school. (A. 126.) Brittany also once asked her mother

if she could have lunch with Retchless, to which her mother responded, “absolutely not.” (A. 129.)

At the beginning of Brittany’s freshman year in high school, after reviewing Brittany’s cell phone bills, Hubbard called Stacey Chapman, the administrative assistant to Aaron Wolfe, the school principal, and told her that she was concerned about Brittany’s “weird behavior” and her excessive time after school. (A. 130). Chapman responded, “yes, we already know this.” (A. 130.) She added, "the teachers have complained about girls sitting on Mr. Retchless’s desk. There was a complaint made about Mr. Retchless blowing kisses to Brittany.” (A. 131.)

The two teachers who complained to the principal were teachers in the middle school. (A. 131.) No one from the middle school or high school ever contacted Brittany’s mother about what was happening. (A. 134.)

B. The School District knew of the inappropriate sexual relationship but failed to act.

Stacey Chapman, the administrative assistant to the high school principal, testified at her deposition that a student on the cheerleading squad told her and a cheerleading coach that Brittany was spending time with an “older gentleman,” babysitting his children, and that he would drive her home afterward. (A. 116.)

In addition to Ms. Chapman’s admissions, other witnesses testified that the School District knew Retchless had the propensity to disregard authority and that he had been in an inappropriate relationship with Brittany for years. (A. 116-119.)

Anthony Giannicchi, the middle school principal, admitted that he had been alerted that Retchless was spending too much time with Brittany for no apparent educational reason. (A. 116.)

Timothy Miller, a middle school math teacher who knew about Retchless' relationship with Brittany, testified that he told Retchless: "you're messing with your career here, you've got to, you've got to cut it off right now." (A. 117.)

Laverne P. Hahn, Jr., a maintenance worker/janitor employed by the School District, witnessed inappropriate behavior between Retchless and Brittany in a locked classroom, after hours, with the lights off. (A. 117.) Although Hahn reported the incident to the middle school principal, no action was taken. (A. 117.)

Katherine Scott Merrill, a middle school social studies teacher, also noticed Retchless was spending an inordinate amount of time with Brittany. (A. 117-118.) She once overheard Retchless tell Brittany: "goodnight, sexy." (A. 118.) Again, the incident was reported to the School District, but no action was taken. (A. 118.)

Finally, Retchless testified at his deposition that he and Brittany had sex as many as five times during the 2010 school year, contradicting his criminal court testimony that they had sex just once. (A. 118.)

For over two years, notwithstanding ample reason to investigate, neither the school nor the School District acted to prevent the abuse. Nor did they alert

Brittany's mother of what was going on. Indeed, the School District took no action until February 7, 2011, when it put Retchless on administrative leave.

Retchless resigned from his teaching position on February 28, 2011.

C. Timothy Retchless is convicted of rape.

In 2011, the Cattaraugus County District Attorney's Office began a criminal investigation into Retchless' sexual abuse of Brittany Finch. On August 3, 2012, Retchless was arrested and charged with Rape and related charges. On June 3, 2013, Retchless pleaded guilty to rape in the Third Degree, a class E Felony under New York Penal Law § 130.25(2), and to Disseminating Indecent Material to Minors, a class E Felony under New York Penal Law § 235.21(3). (A. 105.)

Retchless was sentenced to ninety (90) days of incarceration followed by ten (10) years' probation, ordered to pay restitution to Brittany, and required to register as a sex offender.

D. Procedural History

1. Plaintiff files her complaint against the School District on April 26, 2019.

On February 20, 2019, in accordance with Section 1126 of the New York Education Law, plaintiff sent a demand letter to the Superintendent of the School District. *See* N.Y. C.L.S. Educ. § 1126, (A. 106.) The demand letter detailed the facts surrounding Retchless' criminal conviction for sexually abusing Brittany, offered to

settle the matter out of court and notified the School District that a lawsuit would be filed if the parties could not reach an amicable resolution.

Plaintiff filed this lawsuit on April 26, 2019, in the Supreme Court of the State of New York, Cattaraugus County. (A. 14, 106.) The six-count complaint asserts claims for endangering the welfare of a child, violation of New York State education law, negligent infliction of emotional distress, negligence, negligent supervision, and negligent hiring and retention. (A. 14.)

Counsel for the School District acknowledged receipt of the Summons and Complaint on April 29, 2019. (A. 106.) On May 31, 2019, the School District removed the action to the U.S. District Court for the Western District of New York under the court's diversity jurisdiction. (A. 2, 40.) The School District filed an answer the same day and asserted the statute of limitations among its affirmative defenses. (A. 2, 30.)

The lower court issued a case management order on July 28, 2019. The discovery deadline was extended several times on the application of both parties.

2. The parties engage in discovery for two years.

Both parties engaged in extensive discovery for over two years, including multiple depositions and document production. Notably, the School District did not produce Retchless' personnel file until November 24, 2020, in response to a subpoena issued to the New York State Department of Education.

Retchless' file included three disciplinary letters that revealed the School District knew there were issues with Retchless's temperament, his willingness to disregard authority, and his pursuit of Brittany on school grounds. (A. 109.)

On June 30, 2021, the lower court issued a third amended scheduling order extending the discovery deadline to October 5, 2021, with dispositive motions to be filed by May 27, 2022. (A. 7.)

3. The school district represents that it will not seek summary judgment.

On July 22, 2021, the School District's counsel told Brittany's counsel that he did not plan to file a motion for summary judgment. (A. 110.)

4. The district court grants summary judgment in favor of the School District.

On September 3, 2021, only a few weeks after the closing of the Child Victim's Act revival window, the School District moved for summary judgment, arguing that the lawsuit was premature because it was filed before August 14, 2019, the effective date of the Child Victim's Act. (A. 7, 53.) The motion also challenged plaintiff's causes of action for endangering the welfare of a child, violation of New York State education law, negligent infliction of emotional distress, and negligent hiring. (A. 53.) The summary judgment motion did not challenge plaintiff's claims based on negligence, negligent supervision, and negligent retention. (A. 53.)

Plaintiff responded to the School District's motion for summary judgment and moved for sanctions based on its failure to provide Retchless' disciplinary letters as part of its initial discovery disclosures. (A. 100.)

On June 13, 2022, the district court granted the School District's motion for summary judgment. (A. 358.) The court looked to the statutory language of Section 214-g and held that Appellant's complaint, which was filed on April 29, 2019 (three and a half months **before** the August 14, 2019 effective date of the statute), was premature under the Section 214-g requirement that an action "may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section."

Plaintiff filed a timely notice of appeal on July 29, 2022. (A. 378.)

SUMMARY OF ARGUMENT

The district court erred as a matter of law and abused its discretion when it granted summary judgment and dismissed Plaintiff-Appellant's Child Victim's Act ("CVA") claims on the grounds that they were prematurely filed.

The court erred when it failed to recognize the inherent ambiguity in the statutory language and consider the statute's legislative intent. The New York legislature enacted the Child Victim's Act to permit child sexual abuse survivors to pursue claims that would otherwise be time-barred. The CVA extended New York's restrictive statutes of limitations that required adult survivors to file suit long before they reported or came to terms with their abuse.

The CVA's six-month waiting period for filing claims was intended to give plaintiffs time to prepare their cases and the courts time to handle such actions. Unlike a statute of limitations, the CVA's six-month waiting period was intended to benefit plaintiffs—not defendants.

In this case, plaintiff filed prematurely because she did not need the extra window of time granted by the Child Victim's Act to prepare her case. Her premature filing did not unfairly prejudice the School District because it had roughly the same time to prepare a defense as if the claim had been filed a month later. Thus, neither the purpose of the effective date—to give plaintiffs time to do pre-filing discovery—

nor the intent of the Act—to allow plaintiffs to bring otherwise time-barred claims—would be furthered by upholding the district court's dismissal.

Equity also supports reversal and remand. The School District should be estopped from asserting a statute of limitations defense because it acted in bad faith by engaging in discovery and mediation for two years, thereby running out the clock and preventing Appellant from refiling to preserve her claim. Moreover, after representing to plaintiff's counsel that it did not plan to move for summary judgment, the School District did just that, filing for summary judgment on September 3, 2021–just weeks after the Child Victim's Act revival window closed. Appellant reasonably relied upon the School District's statements and actions as assurances that she did not need to withdraw her complaint and refile while the revival window was still open.

The School District should not be allowed to benefit from gamesmanship, delay, and using the Child Victim's Act as both a sword and a shield. In the face of such deception, the Court should step in as a matter of equity.

Appellant respectfully requests that this Court reverse the district court's dismissal of her lawsuit, reinstate her claims, and remand the case for trial.

STANDARD OF REVIEW

This Court reviews a dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013).

The interpretation and application of a statute present questions of law that this Court reviews de novo. *See Weingarten v. Board of Trustees of N.Y. City Teachers' Retirement Sys.,* 780 N.E.2d 174 (N.Y. 2002).

ARGUMENT

A. The district court erred as a matter of law and abused its discretion when it held that plaintiff's claims were prematurely filed and therefore time-barred.

1. The district court erred in concluding that the statutory language was unambiguous.

The New York Child Victim's Act ("the CVA"), which was signed into law on February 14, 2019, includes provisions that revive time-barred civil causes of action for injuries resulting from a sex crime. N.Y. C.P.L.R. § 214-g.

"The CVA provides, inter alia, that civil actions brought by any person for physical, psychological, or other injury suffered as a result of conduct that would constitute a sex crime, that was committed against such person when they were less than 18 years of age, may now be commenced against any party 'whose intentional or negligent acts or omissions are alleged to have resulted in the commission of [such] conduct' up until the date the plaintiff reaches the age of 55.'" *S.H. v. Diocese of Brooklyn*, 167 N.Y.S. 3d 171, 175 (N.Y. App. Div. 2022) (citing C.P.L.R. § 208(b)). Before the enactment of the CVA, the statute of limitations for such actions would begin to run when the victim turned eighteen. *Id*.

The original statutory language opened a one-year window reviving civil claims or causes of action for injuries resulting from sex crimes. *S.H.*, 167 N.Y.S. 3d at 184-85. The CVA was amended in 2020 to extend until August 14, 2021 the

deadline for commencing an action. *Pisula v. Roman Catholic Archdiocese of N.Y.,*159 N.Y.S.3d 458, 468 (N.Y. App. Div. 2021) (citing 2019 N.Y. Sess. Laws c. 11, §3).

As amended, the revival language of Section 214-g provides that an action "may be commenced not earlier than six months after, and not later than two years and six months after the effective date of the statute":

> Notwithstanding any provision of law which imposes a period of limitation to the contrary…, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense…which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim, is hereby revived, and action thereon **may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section.**

N.Y.C.P.L.R. §214-g (emphasis added) (Exhibit 1, attached).

The district court judge concluded that the statutory language creating the revival window was unambiguous and created a clearly defined timeframe for commencing an action. But the legislature chose to use the term "may" instead of "shall" – a word choice that is not insignificant. Black's Law Dictionary states, "as a general rule, the word 'may' will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense." *May, Black's Law Dictionary* (5th Ed., 1979). "In construction of statutes,

and presumably also in construction of federal rules, the word "may" as opposed to "shall" is indicative of discretion or choice between two or more alternatives, but the context in which the word appears must be controlling."

The use of the word "shall" in statutory text "makes the act of filing" within a "specified time period mandatory." *Amtrak v. Morgan*, 536 U.S. 101, 109 (2002); *N.Y.S. Citizens' Coalition for Children v. Poole*, 922 F.3d 69, 79 (2d Cir. 2019) (finding "shall" is mandatory statutory language). By comparison, the word "may" is permissive and reflects discretionary language. *XY Planning Network, LLC v. U.S. SEC*, 963 F.3d 244, 253 (2d Cir. 2020).

The legislature's use of "may" rather than "shall" supports the conclusion that the legislature intended to confer discretion on courts charged with applying the statutory window. At a minimum, the legislature's choice of "may" instead of "shall" creates an ambiguity that warrants consideration of the legislative intent.

2. The district court failed to consider the legislative intent underlying the statutory language reviving time-barred claims.

It is fundamental that when interpreting a statute, courts must effectuate the intent of the legislature. *Majewski v. Broadalbin-Perth Cent. Sch. Dist.,* 696 N.E.2d 978 (N.Y. 1998). Because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. *LG 67 Doe v. Resurrection*

Lutheran Church, 164 N.Y.S.3d 803 (N.Y. Sup. Ct. 2022). A statute "must be construed as a whole," and "its various sections must be considered together and with reference to each other." *LG 67 Doe,* 164 N.Y.S.3d at 804 (citing *Town of Aurora v. Village of E. Aurora,* 116 N.E.3d 64 (N.Y. App. Div. 2018)).

The CVA's purpose was to right the injustices of child sexual abuse survivors by extending New York's restrictive statutes of limitations that required most survivors to file civil actions or criminal charges long before they reported or came to terms with their abuse. *S.H.*, 167 N.Y.S.3d at 176. The CVA recognized that "thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and pose a persistent threat to the public." *Id.*

The CVA is a "legislative acknowledgment of the unique character" of child sex abuse, which so often causes victims to be "justifiably delayed" in acting against their abusers and/or those who facilitated their abuse. *Id.* By enacting the CVA, the legislature also recognized that perpetrators who are "aided by institutional enablers and facilitators" are successful "in covering up their heinous acts against children." *Id.*

In dismissing plaintiff's claims as time-barred, the lower court failed to effectuate the legislative intent and purpose underlying the Child Victims Act—to remedy the injustices of child sexual abuse survivors' time-barred claims.

a. The CVA's six-month waiting period was created to benefit plaintiffs, not defendants.

Nothing in the legislative history suggests that the CVA six-month waiting period was created for defendants' benefit. Indeed, as the district court recognized, the purpose of the CVA's six-month waiting period was to give plaintiffs time to prepare their cases and give the court time to prepare to handle such actions. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y. Annotated, C.P.L.R. 214-g, 2019. When plaintiff filed suit prematurely, she demonstrated that she was ready to begin discovery and did not need the extra window of time granted by the CVA to prepare her case.

The district court acknowledged in its Opinion that the rationale underlying the six-month waiting period was "not implicated by Plaintiff's early filing." Nevertheless, the court concluded it was under an "obligation to construe the CVA narrowly." In support, the court cited cases construing various other statutory revival clauses. *See Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal,* 154 N.E.3d 972 (N.Y. App. Div. 2020) (rental calculations); *In re Agent Orange Prod. Liab. Litig.,* 597 F.Supp. 740, 815 (E.D.N.Y. 1984), *aff'd* 818 F.2d 145 (2d Cir. 1987) (products liability); *Hopkins v. Lincoln Tr. Co.*, 135 N.E. 267 (N.Y. App. Div. 1922) (fraud).)

But courts construing child sexual abuse statutes have recognized that the unique nature of the crime and the legislative goals in enacting revival statutes for

child abuse claims require that these types of statutes be construed broadly, not narrowly. *See Doe v. City of Los Angeles*, 169 P.3d 559, 561 (Ca. 2007) (legislature intended to construe California revival statute broadly to effectuate the goal to expand child sex abuse victims' abilities to hold perpetrators and entities responsible for their injuries). Therefore, the trial court erred as a matter of law and abused its discretion when it narrowly construed the statutory language.

Finally, the overarching purpose of the CVA—to allow child abuse victims to finally seek justice—is furthered by allowing this case to proceed. Denying Appellant the ability to bring her claims under the CVA completely frustrates the goal of this important law and is contrary to the legislative intent.

B. Equity supports allowing plaintiff's CVA claims to proceed.

A party may waive an affirmative defense by engaging in a course of conduct inconsistent with an intent to preserve the defense. A personal jurisdiction defense, for example, may be waived or forfeited by a party's course of conduct during litigation. *Neirbo Co. v. Bethlehem Shipbldg. Co.,* 308 U.S. 165, 168, 60 S. Ct. 153, 84 L. Ed. 167 (1939).

Similarly, the statute of limitations is an affirmative defense that may be forfeited or waived by a defendant's actions. *See S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752, 754 (2d Cir. 2016) (statute of limitations defense abandoned by defendants when they failed to appear and assert the defense); *Doe v. Constant,* 354

F. App'x 543, 545 (2d Cir. 2009) (timeliness of a claim is an affirmative defense that may be forfeited or waived).

The issue of whether a defense has been waived or forfeited is a matter of federal procedural law and is based on the party's conduct during litigation. *Hamilton v. Atlas Turner*, 197 F.3d 58, 60-61 (2d Cir. 1999) (Newman, J.); *City of New York v. Mickalis Pawn Shop,* 645 F.3d 114, 133-34 (2d Cir. 2011).

In analyzing whether a defendant's conduct resulted in the waiver or forfeiture of a defense, this Court considers the length of time between the defense's assertion in the answer and the litigation of the defense in the motion. *See Hamilton*, 197 F.3d at 61. For example, in *Mickalis Pawn Shop*, the Court held that the defendant forfeited its jurisdictional defense where it raised the defense in its answer but failed to litigate that defense until four years later. *Mickalis Pawn Shop,* 645 F.3d at 134 (citing *Hamilton,* 197 F.3d at 60-62).

The Court will also conclude that a defendant forfeits a defense when it actively engages in litigation, including pretrial proceedings, but fails to assert the defense. *See Hamilton*, 197 F.3d at 60. The reason is to prevent defendants from engaging in "gamesmanship" or "sandbagging." *Id*.

1. The School District should be estopped from asserting a statute of limitations defense because it deceptively engaged in two years of discovery intended to lull plaintiff into believing her claims were timely filed.

Equitable estoppel is a well-established doctrine that applies in cases where it would be unjust to allow a defendant to assert a statute of limitations defense. *Zumpano v. Quinn*, 849 N.E.2d 926, 929, 816 N.Y.S.2d 703 (N.Y. 2006). The doctrine applies where a plaintiff "was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Id.; Twersky v. Yeshiva Univ.,* 993 F. Supp. 2d 429, 442 (S.D.N.Y.), aff'd, 579 F. App'x 7 (2d Cir. 2014), cert. denied, 135 S. Ct. 1702, 191 L. Ed. 2d 676 (2025), and reconsideration denied, No. 13 Civ. 4679 (JGK), 2015 U.S. Dist. LEXIS 89152, 2015 WL 4222837 (S.D.N.Y July 8, 2015).

For equitable estoppel to apply, a plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations. *Id.* The doctrine of equitable estoppel is an "extraordinary remedy" that only applies in "circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse." *East Midtown Plaza Housing Co., Inc. v. City of N.Y.*, 631 N.Y.S.2d 38 (N.Y. App. Div. 1995).

The New York district courts have denied defense motions to dismiss where there is evidence that the defendant engaged in an intentional pattern of defense gamesmanship and delay. *See e.g., Schreiber v. Friedman*, No. 15-CV-6861, 2017 U.S. Dist. LEXIS 221610, *29 (E.D.N.Y. 2017); *Apple & Eve, LLC v. Yantai N. Andre Juice Co*., 610 F.Supp.2d 226, 232 (E.D.N.Y. 2009). "Gamesmanship occurs

when a party delays in asserting defenses or claims with the intent or hope that the delay will prejudice the other side." *Carlson v. Northwell Health, Inc.,* No. 20-CV-9852, 2022 U.S. Dist. LEXIS 79448, *4 (S.D.N.Y. 2022) (citing *Mirror Worlds, LLC v. Apple, Inc.*, No. 08-CV-88, 2009 U.S. Dist. LEXIS 147407 *3 (E.D. Tex. 2009)).

This Court and the New York district courts have held that a defendant's course of conduct can estop that party's reliance on a statute of limitations defense. *See Reddy v. CTFC*, 191 F.3d 109, 120 (2d Cir. 1999) (in the context of APA claim). *See also Endemann v. Liberty Ins. Corp.,* No. 5:18-cv-00701, 2020 U.S. Dist. LEXIS 153976, *6 (N.D.N.Y. 2020) (defendant who lulled plaintiff into inaction during limitations period estopped from asserting a statute of limitations defense), citing *Plon Realty Corp. v. Travelers Ins. Co.*, 533 F.Supp.2d 391, 395 (S.D.N.Y. 2008) (when defendant engages in a course of conduct that lulls plaintiff into inactivity to a timely-filed action, defendant will be estopped from asserting a statute of limitations defense); *see also Zumpano, supra*.

Here, for over two years, the School District acted in a manner consistent with an intent to investigate, mediate, and litigate this case on the merits. There were countless discovery requests, multiple interrogatories, multiple depositions, and lengthy mediation attempts between both parties. The School District's participation in discovery was part of a scheme to lull plaintiff into believing that her claims were

timely filed and to run out the clock so she would be prevented from refiling before the window closed.

2. The School District waived its statute of limitations defense when it affirmatively misrepresented to plaintiff's counsel that it did not intend to file a motion for summary judgment.

This Court has held that a party may not make affirmative misrepresentations to obtain a material advantage at trial. *See Stiftung v. Jena*, 433 F.2d 686, 704 (2d Cir. 1970) (acquiescence is grounds for denial of relief upon finding of one party's assurance to the other party, express or implied, that it would not assert certain rights or claims against the other).

A party cannot lull the other into a "false sense of security" that they will not contest a particular issue and then reverse action. *Stone v. Williams*, 873 F.2d 620, 626 (2d Cir. 1989) ("Societal interest in a correct decision can be outweighed by disruption of a tardy filing") citing *See Loma Linda Univ. v. Smarter Alloys, Inc*., No. 19-CV-607-LJV-MJR, 2002 U.S. Dist. LEXIS 56221, *41 (W.D.N.Y. 2020) (equitable doctrine of waiver says one party cannot lull the other party into believing strict compliance is not required and then demand compliance).

In this case, on July 22, 2021, counsel for the School District made verbal assurances to plaintiff's counsel that the District did not intend to file a summary judgment motion. (A. 110.) Again, the School District sought to lull plaintiff into

believing that she had timely and legally viable claims. Plaintiff justifiably relied upon the School District's statements to believe that her claims were timely and that she did not need to withdraw her complaint and refile while the CVA revival window remained open.

Significantly, the School District filed its summary judgment motion on September 3, 2021, only three weeks after the CVA revival window closed on August 14, 2021. (A. 7, 53.) The School District's summary judgment motion was not filed earlier because plaintiff could have simply refiled her claims within the CVA revival window. The School District's disingenuous and deceptive actions warrant this Court allowing this action to proceed.

Upholding the district court and disallowing plaintiff's claims to proceed will permit the School District to successfully use the CVA revival window as both a sword and a shield. *See, e.g., In re Application of Michel*, 134 N.Y.S.2d 124 (N.Y. 1954); *Application of Addeso*, 69 N.Y.S.2d 702 (N.Y. 1947) (defense cannot use a statute of limitations defense as both a shield and a sword). That outcome would be both unfair and against public policy.

3. The School District would not be materially adversely prejudiced if plaintiff's claims were allowed to proceed.

Statutes of limitations are designed to protect a defendant's ability to defend a case while witnesses are available and evidence is preserved. *See Kassner & Co., Inc. v. City of N.Y.,* 46 N.Y.2d 544 (N.Y. App. Div. 2008) (statute of limitations

affords protection against defending stale claims). But, as the district court recognized, those concerns are not implicated by a premature filing.

In *Newsweek, Inc. v. U.S. Postal Service*, 652 F.2d 239, 242 (2d Cir 1981), this Court declined to dismiss an appeal that was prematurely filed. Similarly, when faced with this issue, other federal circuit courts have granted equitable relief and refused to dismiss prematurely filed complaints. *See, e.g.*, *Forester v. Chertoff*, 500 F.3d 920, 928 (9th Cir. 2007) (granting equitable relief to plaintiff for prematurely filed ADEA complaint because defendant was not prejudiced); *North American Telecommunications Ass'n., v. F.C.C.,* 751 F.2d 207, 208 (7th Cir. 1984) (upholding denial of a motion to dismiss action as premature). *See also Landmark American Ins. Co. v. Moulton Properties, Inc.,* No. 3:05cv401 2006 WL 2038554 *2 (N.D. Fla. 2006) (generally disapproving dismissal of prematurely filed claims if the passage of time cures premature nature of action).

Plaintiff's premature filing of her CVA claim does not, as a matter of policy, implicate the same concerns as a late-filed claim. Indeed, in filing early, plaintiff gave the School District more time—not less—to prepare its case for trial. This case is not one where the plaintiff waited too long to file suit, and the School District was prejudiced because of the spoliation of evidence and faded memories. The exact opposite is true. During the over two years that the lawsuit was pending, ample

discovery was obtained and exchanged, witnesses were located and deposed, and witness memories were fresh.

Because the School District would not be prejudiced in proceeding, plaintiff's prematurely filed claims should be allowed to proceed.

CONCLUSION

Appellant respectfully requests that this Court reverse the district court's dismissal of her suit and remand with instructions that her claims be reinstated.

Respectfully submitted,

/s/ Virginia Hinrichs McMichael
Virginia Hinrichs McMichael, Esq.
Counsel for Appellant

Dated: January 24, 2023

CERTIFICATION OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6595 words, as counted by Microsoft Office Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Office Word.

/s/ Virginia Hinrichs McMichael
Virginia Hinrichs McMichael, Esq.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 24, 2023, I caused the foregoing Brief of Appellant Brittany N. Jones to be (i) transmitted to the Clerk of the United States Court of Appeals for the Second Circuit through the Court's CM/ECF filing system, and (ii) served on the counsel listed below, who is a Filing User, through the CM/ECF system:

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140 Pearl Street, Suite 100
Buffalo, NY 14202

/s/ Virginia Hinrichs McMichael
Virginia Hinrichs McMichael, Esq.

Exhibit 1 -
Special Appendix

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BRITTANY N. JONES a/k/a BRITTANY N. FINCH,

Plaintiff,

v.

CATTARAUGUS-LITTLE VALLEY CENTRAL SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

19-CV-707S

I. INTRODUCTION

In this action, Plaintiff Brittany Jones seeks damages from her former school district for the harms she suffered when a teacher had a sexual relationship with her when she was fifteen and sixteen years old. Before this Court is Defendant Cattaraugus-Little Valley Central School District's motion for summary judgment, which Plaintiff opposes. (Docket No. 39.) Also before this Court are Plaintiff's motions for discovery sanctions and for a hearing on her motion for sanctions. (Docket Nos. 68, 76.) The District opposes these motions. For the reasons set forth below, Defendant's motion is granted, and Plaintiff's motions are denied.

II. BACKGROUND

Unless otherwise noted, the following facts are undisputed for purposes of the motion for summary judgment. This Court takes the facts in the light most favorable to Plaintiff, the non-moving party. See Mitchell v. City of New York, 841 F.3d 72, 75 (2d Cir. 2016) (at summary judgment, a court "views the evidentiary record in the light most favorable to ... the non-moving party").

Plaintiff Brittany Jones was a student in the District between 2009 and 2011. (Docket No. 39-15, ¶ 12.) Timothy Retchless was a teacher in the District from 2000 until his resignation in 2011. (Id., ¶¶ 13, 20.)

The District asserts that it learned that Retchless was engaged in an inappropriate relationship with Plaintiff in 2011. (Id., ¶ 17.) Plaintiff contends that the District was aware by 2009 that Retchless was engaged in an inappropriate relationship with her. (Docket No. 65, ¶ 17.) On February 7, 2011, the District put Retchless on administrative leave pending an investigation. (Docket No. 39-15, ¶ 19.) Retchless resigned no later than February 28, 2011. (Id., ¶ 20.)

Plaintiff, now a resident of Pennsylvania, commenced this action in New York State Supreme Court, Cattaraugus County, on April 9, 2019. Plaintiff alleged that the District was liable for endangering the welfare of a child, violations of New York State education law, negligent infliction of emotional distress, negligence, negligent supervision, and negligent hiring and retention. (Docket No. 1-1 at pp. 8-18.) The District removed the action to this Court on May 31, 2019, pursuant to this Court's diversity jurisdiction. (Docket No. 1.) The District filed its answer on the same day, including among its affirmative defenses that Plaintiff's action was barred by the applicable statute of limitations. (Docket No. 2 at p. 7.)

The late Honorable Hugh B. Scott, United States Magistrate Judge, to whom this case was referred, issued a case management order on July 28, 2019. (Docket No. 6.) The parties moved jointly on April 20, 2020, to extend time for discovery due to delays caused by the COVID-19 pandemic. (Docket No. 11.) On October 9, 2020, the District moved to extend the discovery deadlines due to Plaintiff's failure to timely provide medical

provider authorizations. (Docket No. 21.) Plaintiff opposed this motion. (Docket No. 24.) The District then moved to compel Plaintiff to provide the medical authorizations. (Docket No. 29.) Plaintiff opposed this demand, arguing that she had already substantially complied with the District's demands. (Docket No. 31.) On December 23, 2020, the District indicated that Plaintiff had complied with its requests, and asked for a further extension of the scheduling order. (Docket No. 33.) Judge Scott issued a second amended scheduling order on December 30, 2021. (Docket No. 34.)

On June 29, 2021, the District moved, with the consent of Plaintiff, for a further extension of discovery deadlines to allow the parties to complete their depositions and to find out the result of a related insurance action. (Docket No. 36.) According to the District, Plaintiff's refusal to sign authorizations for her medical and tax records had contributed to the delay. (Docket No. 36-1 at p. 3.)

On June 30, 2021, the Honorable Leslie G. Foschio, United States Magistrate Judge, to whom this matter was reassigned, granted the District's motion and issued a third amended Scheduling Order. (Docket Nos. 37, 38.) Pursuant to that order, the fact discovery deadline was October 5, 2021, and dispositive motions were due on May 27, 2022. (Docket No. 38.) On September 3, 2021, the District moved for summary judgment. (Docket No. 39.) Plaintiff sought and received two extensions of time to file her response.

The parties continued to engage in discovery motion practice after the District filed its motion for summary judgment. On October 5, 2021, the District moved to compel the production of Plaintiff's income and employment records and the enforcement of a subpoena compelling Retchless to testify. (Docket No. 43.) Plaintiff responded that the delays were due to paperwork issues such as the Social Security Administration's refusal

to accept a handwritten correction on a form and the District's providing her with the incorrect version of an IRS form. (Docket No. 47.) Plaintiff did not object to the enforcement of a subpoena compelling Retchless to testify. (Id.)

On January 12, 2022, Judge Foschio granted the District's motion to compel and issued a Fourth Amended Scheduling Order. (Docket No. 60.) Judge Foschio ordered Plaintiff's counsel to advise Plaintiff that her failure to comply with the court's order might jeopardize Plaintiff's ability to support her damage claims. Judge Foschio also ordered Plaintiff to show cause why he should not award the District its expenses, including reasonable attorney's fees. (Id.) In response, Plaintiff detailed her production of the discovery the District had requested. She also argued that, by engaging in substantial discovery practice and not filing a motion for summary judgment until just after the close of the filing period opened by New York's Child Victims Act, the District had acted in bad faith. (Docket No. 61 at p. 4.)

The District responded by leave of Court and addressed Plaintiff's accusations of bad faith. (Docket No. 64.) The District argued that it timely raised its statute of limitations defense in its answer filed on May 31, 2019, and that it was under no obligation to act against its own interests and alert Plaintiff to her error. (Id. at p. 3.)

On February 25, 2022, Plaintiff responded to the District's motion for summary judgment (Docket No. 66) and moved for sanctions against the District for its failure to provide certain disciplinary letters as part of its Rule 26 initial disclosures. (Docket No. 68.) On March 22, 2022, Plaintiff filed a motion for a hearing on her motion for sanctions. (Docket No. 76.)

III. DISCUSSION

The District argues that Plaintiff's claims are untimely because her complaint was not filed within the window of time set by the New York legislature for claims revived by the Child Victims Act. It also argues that Plaintiff fails to state a cause of action under New York Penal Law § 260.10 or under article 23-B of New York Education Law, that her claim for negligent infliction of emotional distress is duplicative of her negligence claim, and that Plaintiff cannot prove her negligent hiring claim.

A. Timeliness of Filing under New York's Child Victims Act

The District first argues that Plaintiff's action, commenced in New York State Court on April 29, 2019, should be dismissed because Plaintiff filed it before the opening of the window created by New York's Child Victims Act ("CVA"). The District argues that dismissal should be with prejudice, because that window is now closed. Plaintiff concedes that she commenced her action prematurely, but argues that this Court should find that the District is equitably estopped from asserting this defense, excuse her mistake, and find that the District would suffer no prejudice if her claim were permitted to proceed despite its premature filing.

1. Applicable Law

Under the New York law applicable to Plaintiff's claims, a plaintiff has one year and ninety days to commence a negligence action against a school district. Gen. Mun. Law § 50-i (1)(c). Pursuant to New York's infancy toll, this requirement is tolled for plaintiffs whose claims accrue when they are under the age of 18. N.Y. C.P.L.R. § 208 (a) (McKinney). Thus, a negligence action that accrued when a plaintiff was under eighteen must be brought within one year and 90 days after the plaintiff's eighteenth birthday.

In 2019, the New York legislature passed the CVA. This act aimed to correct a "perceived injustice, *i.e.*, that the statute of limitations for certain claims expired before child victims of sexual abuse recovered from past traumas to a degree sufficient to assert their rights." PC-41 Doe v. Poly Prep Country Day Sch., No. 20-CV-3628-DG-SJB, 2021 WL 791834, at *1 (E.D.N.Y. Mar. 1, 2021) (quoting Giuffre v. Dershowitz, No. 19-CV-3377, 2020 WL 2123214, at *2 (S.D.N.Y. Apr. 8, 2020)). The CVA changed the statutes of limitations and notice-of-claim requirements for child sex abuse claims in several ways. First, the CVA created C.P.L.R. 214-g, which "reopened the state's statute of limitations to allow abuse victims additional time to assert claims that were otherwise barred by the passage of time." Diocese of Buffalo v. Doe (In re Diocese of Buffalo), 618 B.R. 400, 403 (Bankr. W.D.N.Y. 2020). C.P.L.R. 214-g afforded child sexual abuse victims whose claims were time-barred a one-year window in which to bring those claims.

Separately from the claim-revival provision, the CVA also removed the requirement that child sexual abuse claims against municipalities be brought within one year and 90 days. N.Y. Gen. Mun. L. 50-i (5). Another part of the CVA, newly-created C.P.L.R. 208 (b), extended the infancy tolling of the statute of limitations for certain child sex abuse crimes from age 18 to age 55. N.Y. C.P.L.R. 208 (b).

Although the CVA was passed on February 14, 2019, it did not provide for newly-revived claims to be filed as of that date. Rather, the statute provided that claims revived pursuant to 214-g could be commenced *not earlier than six months after*, and not later than one year and six months after, the effective date of that section. N.Y. C.P.L.R. 214-g; 2019 N.Y. Sess. Laws c. 11, § 3. In other words, potential plaintiffs were required to commence their actions between August 14, 2019 (six months from the effective date)

and August 14, 2020 (one year and six months from effective date.) Because of the disruptions caused by the COVID-19 pandemic, the legislature later extended the revival period of 214-g by one year, to August 14, 2021. 2020 N.Y. Sess. Laws c. 130, § 1.

The practice commentary to this statute states that the purpose of the six-month waiting period between the effective date of the statute and the date plaintiffs could commence actions "was to give victims and their attorneys an opportunity to begin preparing their cases before the clock started ticking on the one-year revival period, and … to enable the court system to meet the special issues that the ensuing litigation was likely to generate." Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of New York Annotated, C.P.L.R. 214-g, 2019.

2. Plaintiffs' claims.

Plaintiff asserts that she had a sexual relationship with Retchless up to 2011. The District agrees that Retchless retired in February 2011. Pursuant to New York's infancy toll, Plaintiff had until one year and 90 days after her eighteenth birthday to file a notice of claim. Although Plaintiff's birthdate is not in the record, the parties agree that she turned 18 sometime in 2012. Plaintiff's claim thus became time-barred sometime in 2014. The parties agree that Plaintiff's claim was then revived by the CVA. Plaintiff commenced her action on April 29, 2019, almost four months before the date newly-revived cases could be commenced. Plaintiff does not dispute that she filed prematurely. Rather, she argues that a combination of factors—the principle of equitable estoppel, her counsel's errors, a lack of prejudice to the District, and the interests of justice—should convince this Court to set aside the timeframe established by the New York legislature and permit her claim to proceed, despite its filing outside the statutory window. (Docket No. 66.)

As an initial matter, this Court observes that the claim-revival provision of the Child Victims Act is an extraordinary use of the legislature's power. "Special laws," such as § 214–g, "that revive causes of action are 'extreme example[s] of legislative power' and are narrowly construed." S. H. v. Diocese of Brooklyn, No. 2020-07387, 2022 WL 1414607, at *4 (N.Y. App. Div. May 4, 2022) (quoting In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 815 (E.D.N.Y. 1984), aff'd 818 F.2d 145 (2d Cir. 1987) (quoting Hopkins v. Lincoln Tr. Co., 233 N.Y. 213, 215, 135 N.E. 267, 267 (1922)). C.P.L.R. 214–g, which opened the one-year filing window, is clearly a revival statute. Id. (citing Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 35 N.Y.3d 332, 371–372, 130 N.Y.S.3d 759, 154 N.E.3d 972)). This Court must, therefore, construe it narrowly.

Although the presumptive purposes of the six-month waiting period—giving plaintiffs time to prepare their cases and giving courts time to prepare to handle such actions—are not implicated by Plaintiff's early filing, regardless, this Court bears in mind the statute's clear statement of the terms of revival and its own obligation to construe the CVA narrowly.

a. Equitable Estoppel.

Plaintiff first argues that equitable estoppel applies to her premature claims because of the District's misconduct. According to Plaintiff, the District improperly failed to include, with its initial disclosures, three disciplinary letters to Retchless from 2009 that would have helped Plaintiff's claim. Plaintiff also argues that the District's counsel was "deceptive" when, in 2021, he informed Plaintiff's counsel that "he did not believe that he was going to file a motion for summary judgment." (Docket No. 66 at p. 11.) Plaintiff argues that these factors warrant estopping the District from asserting its statute of

limitations defense.

Equitable estoppel is an "extraordinary remedy." Twersky v. Yeshiva Univ., 993 F. Supp. 2d 429, 442 (S.D.N.Y.), aff'd, 579 F. App'x 7 (2d Cir. 2014) (quoting Pulver v. Dougherty, 58 A.D.3d 978, 871 N.Y.S.2d 495, 496 (2009) (Slip Op.)). Under New York law, the doctrine should be "invoked sparingly and only under exceptional circumstances." Abercrombie v. Andrew Coll., 438 F. Supp. 2d 243, 265 (S.D.N.Y. 2006) (quoting Matter of Gross v. New York City Health & Hosps. Corp., 122 A.D.2d 793, 505 N.Y.S.2d 678, 679 (1986)).

The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense. Zumpano v. Quinn, 849 N.E.2d 926, 929 (2006). The doctrine is applied when a plaintiff is "induced by fraud, misrepresentations or deception to refrain from filing a timely action." Id. (quoting Simcuski v. Saeli, 377 N.E.2d 713, 716 (1978) (internal quotation marks omitted)). "Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations." Id. Absent affirmative misconduct on the part of the defendant, "the plaintiff must demonstrate a fiduciary relationship ... which gave the defendant an obligation to inform him or her of facts underlying the claim." Id. at 930.

As an initial matter, the facts here do not reflect a traditional estoppel pattern in which a defendant's misconduct prevents a plaintiff from timely commencing its action. Here, Plaintiff did not file too late, but rather too early, and she does not allege that the District induced her to do so. Plaintiff's theory, rather, is that the District's discovery conduct and its failure to alert her to the untimeliness issue in time for her to recommence her action unfairly prolonged the action past the closing of the statutory period.

Plaintiff's estoppel arguments are unpersuasive. First, this Court does not discern any affirmative wrongdoing on the District's part. Contrary to Plaintiff's arguments, the District did not "hide" the existence of a statute-of-limitations defense. Rather, the District raised its statute-of-limitations defense in its answer. (See Docket No. 2, ¶ 71.)

Further, as is discussed at greater length below, this Court does not find wrongdoing in the District's not disclosing the letters in its Rule 26 (a) initial disclosures. Plaintiff's counsel affirms that it served the District with Plaintiff's interrogatories and requests for production around October 22, 2020, and the District provided the three letters around November 24, 2020. (Docket No. 67 at p. 9.) It appears the District timely provided these letters in response to Plaintiff's request for production.[1] In any event, Plaintiff provides no explanation for how the allegedly untimely disclosure of these letters impacted the timing of her suit. Simcuski, 377 N.E.2d at 713.

Plaintiff also appears to argue that she relied on the District's bad-faith participation in discovery as if the claims were not time barred. She implies that the District was under a duty to inform her of her premature filing to allow her to preserve her claim. But "[a] wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." Zumpano, 849 N.E.2d at 930. Similarly, this Court finds that an alleged wrongdoer is not legally obliged to alert its opponent of filing errors to benefit from filing deadlines.

Finally, Plaintiff argues that the District's statement that it did not think it would be

[1] Both parties refer to an insurance coverage action that the District was prosecuting against its insurer at the same time as the instant matter was ongoing. The District asserts that it informed Plaintiff of this action, in which the three letters were at issue, on August 8, 2019, and that Plaintiff had access to New York's electronic filing system and could have found them earlier. (Declaration of Patrick Hines, Docket No. 72, at p. 2.)

filing a motion for summary judgment, made on July 22, 2021—when Plaintiff still had one month to recommence her action—was deceptive. The District denies ever making this statement. (See Docket No. 72 at p. 8.) But even assuming that counsel's unsworn statements about how he might proceed were binding, this argument fails because Plaintiff does not explain how she relied on this statement, or how she would have acted differently absent such a statement.

Not finding any fraud, deception, misrepresentation, or duty to disclose, this Court declines to apply the drastic remedy of equitable estoppel to bar the District's statute of limitations defense.

b. Counsel's Errors

Plaintiff's counsel asserts that when he commenced this action he had extensive personal and professional obligations, including helping his mother during a lengthy illness that resulted in her death. (Docket No. 66 at pp. 4-6.) Plaintiff's counsel also asserts that he mistakenly believed that Plaintiff's claim was governed not by C.P.L.R. 214-g but by C.P.L.R. 208 (b), which extends the infancy toll for an under-eighteen victim of sexual abuse from 18 to 55.

Plaintiff's counsel asks this Court to consider his family obligations and excuse his error regarding the applicable section of the CVA. Plaintiff cites no law supporting this request, and the caselaw regarding early-filed claims is sparse.

At the outset, this Court notes that "it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable." Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 111, 65 S. Ct. 1464, 1471, 89 L. Ed. 2079 (1945) (internal citation omitted). As the Supreme Court has stated,

"[s]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." Id.

Even if this Court could provide the equitable relief Plaintiff requests, it does not find a basis to do so. The doctrine of equitable tolling is instructive in this regard, although it is not directly applicable for two reasons. First, the doctrine permits *late* actions for equitable reasons, taking into account important "social interests in certainty, accuracy, and repose." Rein v. McCarthy, 803 F. App'x 477, 480 (2d Cir. 2020). These interests are less at stake in the matter of an early filing. Second, equitable tolling is a doctrine applied by federal courts excusing parties' failure to comply with *federal* procedural rules and does not implicate state procedural rules, such as the CVA provision at issue here. See Holland v. Fla., 560 U.S. 631, 650, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130 (2010) (Ginsburg, J., dissenting) (contrasting "a case about federalism," that asked whether *federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, with equitable tolling, that asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, "an inquiry that does not implicate a state court's interpretation of state law.") (citing Lawrence v. Fla., 549 U.S. 327, 341, 127 S. Ct. 1079, 1084, 166 L. Ed. 2d 924 (2007)). Nevertheless, the principles of equitable tolling provide some guidance in determining whether Plaintiff merits relief.

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Rein, 803 F. App'x at 480. The Second

Circuit has held that "normal errors by attorneys" typically do not constitute the extraordinary circumstances warranting equitable tolling. Rein, 803 F. App'x at 480 (citing Baldayaque v. United States, 338 F.3d 145, 152 (2d Cir. 2003)). And "miscalculating a deadline is the sort of garden variety attorney error that cannot on its own rise to the level of extraordinary circumstances...." Dillon v. Conway, 642 F.3d 358, 364 (2d Cir. 2011).

Here, Plaintiff's counsel asserts that he believed that C.P.L.R. 208 (b), which extended the infancy toll, not 214-g, which revived previously time-barred claims, applied to Plaintiff's claim. His claim is, essentially, that he misread the statute. This Court finds that Plaintiff's counsel's error in determining when revived actions under the CVA could be commenced is "the sort of garden variety attorney error that cannot on its own rise to the level of extraordinary circumstances." Id. Equitable relief based on the assertion of this "garden variety" attorney error is simply not warranted.

c. Prejudice to the District

Plaintiff argues that the District would not be prejudiced in any way by this Court denying it its statute of limitations defense. She argues that the District's conduct during discovery shows that it was committed to defending this action and suggests that this conduct shows that the District intended to waive its statute of limitations defense. Because of the District's vigorous discovery practice, Plaintiff argues that the District would not be prejudiced by this Court denying its motion and being made to continue defending this action.

In an ordinary situation, the danger posed by disregarding statutes of limitations is to defendants' interest in finality and repose. "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation

and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 426–30, 85 S. Ct. 1050, 1053–56, 13 L. Ed. 2d 941 (1965) (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944)).

These are not the potential harms the District faces here, where Plaintiff's action was commenced not too late, but too early. But this does not mean that the District would not be prejudiced were this Court to reject its defense and compel it to continue to defend a case that was not commenced in accordance with the statutory provisions. The District timely raised a statute of limitations defense in its answer. It participated in discovery without any discernable bad faith. Plaintiff, for her part, demands $25 million in damages. To deny the District a valid defense under these circumstances would surely be prejudicial.

d. Interests of justice

Plaintiff argues that she will suffer grave injustice if this Court grants the District's motion based on the "technical issue" of the statute of limitations. (Docket No. 66 at p. 16.) She argues that the legislature intended to allow formerly time-barred victims of sex offenses to hold their abusers accountable for their injuries and that permitting her to proceed would therefore comport with the legislature's intent.

It is true that the CVA was intended to provide extraordinary relief, based on the legislature's assessment that survivors of sexual abuse had previously been required to bring their suits "long before they reported or came to terms with their abuse." S. H., 2022 WL 1414607, at *3. And this Court recognizes that enforcing the dates set forth by the legislature will, in effect, terminate Plaintiff's claims, because the revival window is now

closed.

At the same time, this Court must consider that the New York legislature clearly spelled out the period in which claims could be brought. The legislature established that claims could not be commenced until six months after the enactment of the CVA. As discussed above, "[s]pecial laws," such as C.P.L.R. 214–g, "that revive causes of action are 'extreme example[s] of legislative power' and are narrowly construed" S. H., 2022 WL 1414607, at *4.

Absent any indication of legislative intent for the extraordinary relief provided by C.P.L.R. 214-g to extend earlier or later than the dates set in the statute, this Court cannot permit Plaintiff's prematurely-commenced claim to proceed.

3. The District's other arguments

The District also moves for summary judgment on some of Plaintiff's state-law claims. The District argues that Plaintiff's claim for endangering the welfare of a child and for violating New York education law are not cognizable; that her negligent infliction of emotional distress claim is duplicative of her negligence claim, and that no facts in the record support her negligent hiring claim. Because this Court finds that summary judgment is warranted based on the District's statute-of-limitations defense, it declines to address the parties' arguments regarding those particular causes of action.

B. Plaintiff's motion for discovery sanctions and for a hearing

Plaintiff moves to sanction the District under Rule 37 (b)(2)(A) for failing to obey Judge Scott's initial scheduling order dated July 28, 2019. (Docket No. 68-1 at p. 1.) Plaintiff argues that the District's failure to disclose the three disciplinary letters regarding Timothy Retchless as part of its Rule 26 (a) initial disclosures warrants sanctions. As a

sanction, Plaintiff asks this Court to dismiss the District's motion for summary judgment. The District argues that it was under no obligation to produce the letters under Rule 26 (a), and that it timely produced them in response to Plaintiff's request for production of documents. (Docket 72-11 at pp. 8-10.) The parties conducted depositions beginning in May 2021, several months after Plaintiff received the letters from the District. (Id.)

Plaintiff's motion for sanctions, although it refers to Rule 37 (b), actually falls under Rule 37 (c), in that she asserts that the District failed to provide information required by Rule 26 (a). Pursuant to Rule 37 (c), "if a party fails to provide information … as required by Rule 26(a) …, the party is not allowed to use that information … to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P 37 (c)(1). "In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard, may order payment of the reasonable expenses, including attorney's fees, caused by the failure; may inform the jury of the party's failure; and may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Id. Such other sanctions include dismissing pleadings and rendering a default judgment against the noncompliant party. Fed. R. Civ. P. 37 (b)(2)(A)(vi).

Federal Rule of Civil Procedure 26 (a) states, in pertinent part, "a party must, without awaiting a discovery request, provide to the other parties … a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26 (a)(1)(A)(ii). Amendments to this rule in 2000 narrowed

"[t]he scope of the disclosure obligation … to cover *only information that the disclosing party may use to support its position*." Fed. R. Civ. P. 26, Advisory Committee's Note (2000) (emphasis added). In other words, "[a] party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use." Id.

Here, the District argues that it was not required to provide the disciplinary letters as part of its Rule 26 (a) initial disclosures because it had no intention of using them in support of its position. Plaintiff argues, somewhat confusingly, that the District could not *know* that it would not use the letters, and posits a hypothetical in which the District might later seek to use the letters. (Docket No. 76-1 at p. 3.) Regardless of this speculation, the rule refers to a party's intention to use documents as the test for whether documents must be disclosed under Rule 26 (a). The District asserts that it did not intend to use the letters.

Plaintiff also argues that the District inappropriately delayed turning over the letters. Plaintiff states, "it was only after Plaintiff's counsel served the District with their Request for production of documents and first set of interrogatories that the Districts (sic) counsel provided the three disciplinary letters." (Docket No. 68-1, ¶ 13.) But this does not appear to be improper discovery behavior.

This Court finds that sanctions are not warranted because the District was not required to turn over the letters with its initial disclosures nor did it fail to turn them over after receiving Plaintiff's request for production. Having carefully considered the parties' submissions on this issue, this Court does not find any misconduct during discovery that would warrant sanctioning the District, particularly with so harsh a sanction as dismissing its motion for summary judgment.

Because this Court has resolved Plaintiff's motion for sanctions based on the parties' submissions, it will deny Plaintiff's motion for a hearing on this issue as moot. (Docket No. 76.)

III. CONCLUSION

Because Plaintiff commenced this action before the date the New York legislature authorized for the commencement of suits under the CVA, and because this Court finds no equitable reasons to relieve Plaintiff from the dates set by the New York legislature, the District's motion for summary judgment will be granted. Because summary judgment is warranted on this basis, this Court will not consider the District's other arguments directed at Plaintiff's claims. Because the District did not engage in discovery misconduct warranting sanctions, Plaintiff's motion for sanctions will be denied, and her motion for a hearing on that motion will be denied as moot.

IV. ORDERS

IT HEREBY IS ORDERED, that the District's Motion for Summary Judgment (Docket No. 39) is GRANTED.

FURTHER, that Plaintiff's Motion for Sanctions (Docket No. 68) is DENIED.

FURTHER, that Plaintiff's Motion for a Hearing (Docket No. 76) is DENIED AS MOOT.

FURTHER, that the Clerk of Court is directed to close this case.

SO ORDERED.

Dated: June 13, 2022
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

Exhibit 2
NY CLS CPLR Sec. 214-g

NY CLS CPLR § 214-g

Current through 2022 released Chapters 1-841

New York Consolidated Laws Service > Civil Practice Law And Rules (Arts. 1 — 100) > Article 2 Limitations of Time (§§ 201 — 218)

§ 214-g. Certain child sexual abuse cases.

Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in *section 263.05 of the penal law*, or a predecessor statute that prohibited such conduct at the time of the act, which conduct was committed against a child less than eighteen years of age, which is barred as of the effective date of this section because the applicable period of limitation has expired, and/or the plaintiff previously failed to file a notice of claim or a notice of intention to file a claim, is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section. In any such claim or action: (a) in addition to any other defense and affirmative defense that may be available in accordance with law, rule or the common law, to the extent that the acts alleged in such action are of the type described in subdivision one of *section 130.30 of the penal law* or subdivision one of *section 130.45 of the penal law*, the affirmative defenses set forth, respectively, in the closing paragraph of such sections of the penal law shall apply; and (b) dismissal of a previous action, ordered before the effective date of this section, on grounds that such previous action was time barred, and/or for failure of a party to file a notice of claim or a notice of intention to file a claim, shall not be grounds for dismissal of a revival action pursuant to this section.

History

L 2019, ch 11, § 3, effective February 14, 2019; *L 2020, ch 130, § 1*, effective August 3, 2020.

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