

SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

MADDLINE DEJESUS,		Index Number..25309/96
	Plaintiff,	Motion Date...7/9/02
-against-		Motion Cal. Number.....7
NEW YORK CITY HEALTH & HOSPITALS CORPORATION, QUEENS HOSPITAL CENTER, a division of NEW YORK CITY HEALTH & HOSPITALS CORPORATION, and THE CITY OF NEW YORK,		Trial Cal. Number.....
	Defendant.	

The following papers numbered 1 to 4 read on this motion

Notice of Motion	1 - 2
Affirmation in Opposition	3
Reply Affirmation	4

The City defendants have moved, inter alia, for summary judgment dismissing the complaint.

This action, for personal injuries, including psychological injuries, arises out of an assault and rape which occurred on November 19, 1995 on the third floor of the "T" building located in the defendant Queens Hospital Center. The plaintiff, employed by the defendant New York City Health and Hospitals Corporation ("NYCHHC") as a Housekeeping Aide, alleges that she was forced off the elevator by an unknown male, and raped at knife point in a secluded bathroom.

The plaintiff filed for and is receiving Workers' Compensation benefits as a result of her injuries.

The plaintiff alleges that not only did the hospital fail to have adequate security cameras, but it also failed to have adequate security personnel. Further, that the few security officers on duty at the time neither monitored the available cameras nor patrolled the floors.

Summary judgement is a drastic remedy and should not be granted when there is any doubt of the existence of a triable issue or where the issue is even arguable (Andre v. Pomeroy, 35 NY2d 361 [1974]; Cohen v. Herbal Concepts, Inc., 100 AD2d 175 [1st Dept. 1984], aff'd 63 NY2d 379 [1984]).

A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (Zuckerman v. City of New York, 49 NY2d 557 [1980]), and has the heavy burden of demonstrating the absence of a genuine issue of material fact on every relevant issue raised (Simon v. Wohl, 93 AD2d 811 [2d Dept. 1983]). Anything less requires a denial of the motion for summary judgment, regardless of the sufficiency of the opposing papers (Yates v. Dow Chemical Co., 68 AD2d 907 [2d Dept. 1979]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065, 1067 [1979]).

In determining whether a triable issue of fact exists, the court must accept the version of the facts set forth by the opponent of the summary judgment motion (Menzel v. Plotnick, 202 AD2d 558 [2d Dept. 1994]). The non-moving party, is entitled to every favorable inference which may be drawn from the facts and documents of record (Blake v. Veeder Realty, Inc., 110 AD2d 1007 [3d Dept. 1985]).

§11 of the Workers Compensation Law provides in partial fact:

The liability of the employer... shall be exclusive and in place of any other liability whatsoever, to such employee... to recover damages, at common law or otherwise, on account of such injury or death...

Thus, workers' compensation is the exclusive remedy¹ available to the plaintiff as against her employer for accidents arising out of and in the course of her employment. At bar, the plaintiff has availed herself of her exclusive remedy.

1. There is presently pending before the New York State Assembly Bill A2930 known as "protection in the workplace act", extending workers' compensation to sex offense victims, and exempting them from exclusivity of remedy.

It is well settled that a determination of the Board that a claimant's injuries are accidental is binding on the claimant despite the pending civil action even if the claimant did not apply for or accept the benefits awarded (Pollack v. City of New York, 145 AD2d 550, 551 [2d Dept. 1988]). Further, such a determination precludes an action against the employer (Cunningham v. State of New York, 60 NY2d 248, 252-253 [1983]).

Thus, the motion by the defendant NYCHHC is granted. The application by the City to dismiss on the same ground is denied since the plaintiff is not employed by the City of New York (see, Vaughn v. City of New York, 108 Misc. 2d 994, 1000 [Sup. Ct. New York County 1980] aff'd 89 AD 2d 944 [1st Dept. 1982]).

Regarding the City's motion to dismiss the claim on the ground that the City is not a proper party to the lawsuit, the courts have held that the City is a proper party to a lawsuit when the City admits ownership of the hospital and the plaintiff is not an employee of the City (see, Vaughn v. City of New York, supra). Further, it is well settled that when a public entity is acting as a landowner or landlord, it is performing a proprietary function and has the same negligence liability as a private entity (Miller v. State of New York, 62 NY2d 513 [1984]). It must:

"act as a reasonable person in maintaining its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."

(Preston v., State of New York, 59 NY2d 997, 998 [1983]; Basso v. Miller, 40 NY2d 233, 241 [1976]).

However, an out-of-possession landlord who is not obligated, under the lease, to maintain security of the premises and places such obligations upon the tenant, does not owe a plaintiff a duty of care, and is entitled to summary judgment (see, Putnam v. Stout, 38 NY2d 607 [1976]; D'Orlandro v. Port Authority of NY & NJ, 250 AD2d 805 [2d Dept. 1998]).

At bar, the City cites a clause from the lease, dated July 16, 1990, and submits a self-serving affidavit from a NYCHHC official, in an attempt to establish the City had no security obligations under the lease. However, it has failed to submit the lease itself. Absent such proof the affirmation of the Corporation Counsel is insufficient to warrant summary judgment.

Therefore, the motion as to the City of New York is denied.

August 14, 2002

J.S.C.