Romero v City of New York
2007 NY Slip Op 34544(U)
January 17, 2007
Supreme Court, New York County
Docket Number: 108894/05
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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YOSELIS ROMERO, an Infant by Her Mother and Natural Guardian ELIZABETH HENRIQUEZ, and ELIZABETH HENRIQUEZ Individually,

Plaintiffs,

Index No. 108894/05

- against -

Decision and Order

THE CITY OF NEW YORK and NEW YORK CITY BOARD OF EDUCATION

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries sustained when, their ten-year old plaintiff Yoselis Romero ("Infant Plaintiff"), was allegedly sexually assaulted by a fellow student over a four month period beginning around November of 2004 and continuing through February of 2005 at or near PS 72 located at 113 East 104th Street and Lexington Avenue. Defendant the City of New York ("City") moves to dismiss pursuant to CPLR 3211, or in the alternative, for summary judgment pursuant to CPLR 3212. Plaintiff opposes City's motion and cross moves for an order striking the City's answer and extending plaintiff's time to file her note of issue.

The City, in support of its motion, argues that plaintiffs filed a timely notice of claim but that it was defective in that it failed to inform the City of the relevant facts necessary to investigate plaintiffs' claim. Specifically, City alleges that the claim is too vague in its statement of the place and time that the incidents occurred. The claim states that the incidents occurred "during the course of four months while students were on school trips and during class time, and while in the care of the subject school." Further, the City argues that plaintiffs did not supply the name of the accused student in their notice of claim.

Plaintiffs, in opposition, argue that the infant plaintiff was only ten years old at the time of the incidents and that she could not remember specifics about what happened. However, plaintiffs claim that the City is in possession of information that would allow them to amend their notice of claim in order to list the exact dates and locations of the alleged assaults. Infant plaintiff's mother, Elizabeth Henriquez,

claims that she was made aware of the assaults when a school employee, Elizabeth Pabon, Program Coordinator of the after-school program, contacted her and told her that her daughter was being sexually assaulted by a "certain student." Ms. Pabon told Ms. Henriquez that she had informed the principal, Maria Diaz of the ongoing sexual assault. Ms. Henriquez met with Ms. Diaz regarding the assault and claims that following the meeting, Ms. Diaz did not take any immediate precautions to prevent the sexual assaults from reoccurring. Plaintiffs were unaware of the assaulting student's name at the time that they filed their notice of claim but were able to name him in their complaint which was served on the City on June 27, 2005.

The inquiry as to whether the notice of claim should be sufficient in and of itself to give the City all of the facts it needs to investigate an allegation is not limited to the four corners of the notice of claim.

> "In determining whether to grant the motion to dismiss the complaint, the courts below erroneously concluded that their inquiry was strictly limited to the "four corners" of the notice of claim." (Reversing a lower court decision based on the failure of plaintiff to identify in his notice of claim the bus or bus driver allegedly involved in his accident or the nature of the accident). *D'Alessandro v. New York City Transit Authority*, 83 N.Y.2d 891 (1994).

Pursuant to General Municipal Law §50-e(6):

> "Mistake, omission, irregularity or defect. At any time after the service of a notice of claim ...a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section...may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby."

The complaint, filed relatively soon after the notice of claim, reports that Ms. Henriquez first learned of the acts complained of by a school employee, and took steps to alert the principal of the school . Thereafter, she filed a timely notice of claim. It is not uncommon that a child who was ten years of age at the time of the alleged sexual assaults would not be able to recount with one hundred percent accuracy the events leading up to her claim. Still, the City chose not to hold a 50-h hearing, at which many outstanding questions could have been answered. Much of the information defendant claims has been omitted from the Notice of Claim is more

easily discerned from the school's own records and interviews with school employees already identified than from the infant plaintiff.

The court now turns to plaintiffs' cross motion to strike the City's answer for failure to comply with discovery demands. Plaintiffs sent a request for discovery and inspection dated September 7, 2005 demanding a copy of the Teachers Handbook at P.S. 72, the school file of plaintiff Yoselis Romero, the school file of Eddie Gilyard and copies of all incident reports pertaining to the alleged assaults. City objected to each request as over broad and unduly burdensome and claimed that the school files were privileged and thus, turning them over would be in violation of confidentiality rules. Included in City's reply affirmation to plaintiffs' cross motion is a letter written by Martha Emanuel, Guidance Counselor at P.S. 72 dated November 28, 2006. Ms. Emanuel states that the school is not in possession of any reports about the alleged sexual assaults.

According to CPLR §3126(3), a court may strike a pleading when a party willfully fails to disclose information which the court finds ought to have been disclosed. It is fully within the court's discretion to decide the nature and degree of the sanction imposed on a party for willfully failing to comply with disclosure orders. *Berman v. Szpilzinger*, 180 A.D.2d 612 (1st Dept. 1992)(sanction appropriate where party repeatedly fails to comply with prior court orders, stipulations, and letters, and forces movant to seek compliance with discovery).

The City is in possession of materials necessary to plaintiffs' case. Plaintiff is entitled to these materials. However, the City's conduct does not rise to the level of "willfully failing to comply with disclosure orders" and thus should not be subject to the severe sanction of having its answer stricken.

Wherefore it is hereby

ORDERED that defendant the City of New York's motion to dismiss is denied, and it is further

ORDERED that plaintiffs' cross motion to strike defendant City of New York's answer is denied, and it is further

ORDERED that defendants submit the complete school records for plaintiff Yoselis Romero to plaintiffs, and the complete school records of Eddie Gilyard, to the court for an *in camera* review by February 17, 2007, and it is further

ORDERED that defendant the City of New York comply with plaintiffs Request for Discovery and Inspection dated September 7, 2005 to the extent not already complied with, and it is further

ORDERED that plaintiffs' time to file their note of issue is extended to a date on or before May 16, 2007.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: January 17, 2007

EILEEN A. RAKOWER, J.S.C