

**Schwartzman v Bellmore-Merrick Cent. High  
School Dist.**

2008 NY Slip Op 30195(U)

January 4, 2008

Supreme Court, Nassau County

Docket Number: 8200-06/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 22 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_ x

**IAN SCHWARTZMAN,**

**Index No. 8200/06**

**Plaintiff(s),**

**-against-**

**Motion Submitted: 11/7/07  
Motion Sequence: 001**

**BELLMORE-MERRICK CENTRAL HIGH  
SCHOOL DISTRICT,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

The motion by defendant Bellmore-Merrick Central High School District ("School District") for summary judgment is granted for the reasons set forth herein.

Plaintiff commenced this action for personal injuries allegedly sustained on May 9, 2005 at Kennedy High School, a school owned and operated by School District. Plaintiff alleges his hand went through the glass in a stairway door in the school. Plaintiff testified that the door swung toward him quickly, and he put up his hand to stop the door. His palm made contact with the glass, the glass broke and plaintiff states he sustained an injury (see Exhibit C, pp. 24-25, 28, 30; Exhibit D, pg. 97, both annexed to School District's motion). Plaintiff never previously had experienced the offending door "shoot back" at him (see Exhibit D, pg. 85 annexed to School District's motion). Plaintiff never made a complaint about any of the doors in the school building before May, 2005 (Exhibit D, pg. 88 annexed to School

District's motion). Plaintiff was never advised that the offending door had a crack in the glass panel (Exhibit D, pg. 89). Plaintiff never had a problem opening the offending door (Exhibit D, pg. 81 annexed to School District's motion).

Plaintiff alleges School District was negligent in the ownership, operation and maintenance of the school, specifically the door in issue. Plaintiff alleges the School District failed to repair or replace the glass and failed to warn of the condition of the door.

Schools are not insurers of the safety of their students as they cannot reasonably be expected to continuously supervise and control all movements and activities of students (*see Doe v Orange-Ulster Board of Cooperative Educational Service*, 4 A.D.3d 387, 771 N.Y.S.2d 389 [2d Dept. 2004]). Schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances (*David v County of Suffolk*, 1 N.Y.3d 525, 807 N.E.2d 278, 775 N.Y.S.2d 229 [2003]).

A landowner owes a duty to a person coming upon the land to keep it in a reasonably safe condition (*Gustin v Association of Camps Farthest Out, Inc.*, 267 A.D.2d 1001, 700 N.Y.S.2d 327 [4<sup>th</sup> Dept., 1999]). A reasonably safe condition takes in all circumstances including: the purpose of the person's presence on the property and the likelihood of injury (*Macey v Truman*, 71 N.Y.2d 949, 524 N.E.2d 147, 528 N.Y.S.2d 827 [1988]). For a landowner to be liable in tort for an injury resulting from an allegedly defective condition upon his, her or its property, the existence of a defective condition must be established (*Sadowsky v 2175 Wantagh Avenue Corp.*, 281 A.D.2d 407, 721 N.Y.S.2d 665 (2d Dept., 2001); *Fischer v. Westchester County*, 24 A.D.3d 498, 808 N.Y.S.2d 241 [2d Dept., 2005]).

School District offers the testimony and affidavit of Timothy Walsh, the head custodian of School District. Mr. Walsh testified that the glass panel stayed, for the most part, intact (see Exhibit E, pg. 43 annexed to School District's motion). Mr. Walsh stated the doors are inspected weekly (Exhibit E, pg. 8). In his affidavit (see Exhibit H annexed to School District's motion), Mr. Walsh notes he did not receive prior complaints about the glass in the door where the incident occurred. There was no history of the glass in the doors—1/4 inch safety glass with wire mesh to prevent shattering—being broken accidentally; the school where the incident occurred received daily inspections; before the Plaintiff's incident Mr. Walsh stated there were no broken windows in any of the stairway doors where the incident occurred. Mr. Walsh also stated that the hydraulic door closer mechanism was adjusted for speed of closure and tightness of fit as needed. Mr. Walsh stated he had never experienced a problem with the stairway doors in issue closing too quickly nor did Mr. Walsh receive any complaints to that effect. Mr. Walsh noted his inspection of the doors in issue immediately after the incident showed the doors in issue were working properly.

As noted, in order for a landowner to be liable in tort to a Plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landlord affirmatively created the condition or had actual or constructive notice of its existence (*Bodden v Mayfair Supermarkets*, 6 A.D.3d 372, 773 N.Y.S.2d 905 [2d Dept., 2004]).

Here, the testimony of Plaintiff and Mr. Walsh demonstrate there was no prior notice of any “condition” as to its door in issue. School District used reasonable care in the maintenance of the doors in issue, there was no problem with the hydraulic door closer of the door involved in the incident, and School District has shown no problem existed with the door or its safety glass panels or anything else when the incident occurred. Clearly, there is no evidence School District created the alleged condition—basically there was no “condition,” alleged or otherwise.

Here, the door does not constitute a defective or dangerous condition. Mr. Walsh stated the door was inspected on a regular basis (see Exhibit E, pg. 8 annexed to School District’s motion). The door was checked after the incident and found to be operating properly (see *DeCarlo v Village of Dobbs Ferry*, 36 A.D.3d 749, 828 N.Y.S.2d 532, [2d Dept., 2007]). Mr. Walsh recalled no prior complaints about the speed of the closing of the door in issue (see *Lezama v 34-15 Parsons Blvd., LLC*, 16 A.D.3d 560, 792 N.Y.S.2d 123 (2d Dept., 2005); *Aquila v Nathan’s Famous, Inc.*, 284 A.D.2d 287, 725 N.Y.S.2d 371 [2d Dept., 2001]).

School District has also shown from the record herein that it had no knowledge of any alleged defect, whether actual or constructive, for a sufficient time prior to the accident to correct it (*Hunter v Riverview Towers, Inc.*, 5 A.D.3d 249, 773 N.Y.S.2d 290 [1<sup>st</sup> Dept., 2004]).

Also, Plaintiffs have failed to submit an affidavit of an engineering expert attesting to the alleged defect (*Maldonado v Su Jong Lee*, 278 A.D.2d 206, 717 N.Y.S.2d 258 [2d Dept., 2000]) although the record shows the Plaintiff has had ample opportunity to do so.

Where the Defendant has made a *prima facie* showing of entitlement to judgment as a matter of law relating to a case where the Plaintiff’s hand went through a pane of glass in a door, the Plaintiff must submit evidence sufficient to raise a triable issue of fact as to whether the Defendant contravened industry standards and custom by failing to use safety glass in the door or whether the Defendants had prior notice of the alleged dangerous condition of the glass in the door (*Mele v Golian Realty Co.*, 7 A.D.3d 683, 776 N.Y.S.2d 844 [2d Dept., 2004]).

Thus, at this point, the Plaintiff is required to make a *prima facie* showing that the defendant was negligent for failing to use safety glass in the door (*Thompson v St. Christopher-Ottile*, 31 A.D.3d 534, 817 N.Y.S.2d 519 [2d Dept., 2006]). Here, Plaintiff has failed to meet this burden.

The affidavit of John Scalisi, Director of Building and Grounds for the School District, indicated that the glass in the doors where the incident occurred was in compliance with the regulations of the Commissioner of Education, 8 NYCRR § 155.7 (b)(4)(ii) in that 1/4 inch wire safety glass was used in the stairwell doors (see Exhibit K annexed to School District's reply affirmation).

Also, a plaintiff cannot defeat a motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to a motion for summary judgment (*Marchetti v East Rochester Central School District*, 26 A.D.3d 881, 808 N.Y.S.2d 877 [4<sup>th</sup> Dept., 2006]). As noted by School District, Plaintiff sought to shift or expand his theory of negligence to include the hydraulic door closer, i.e., it closed the door in issue too quickly. Aside from the fact that this, in Plaintiff's reply papers, is the first time Plaintiff has offered this new theory, the record herein reflects School District took reasonable steps as to the maintenance of the door and its hydraulic closing mechanism.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 [2d Dept., 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. (*Ayotte v Gervasio*, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). Here, Defendant has met its burden. The complaint is therefore dismissed.

The foregoing constitutes the Order of this Court.

Dated: January 4, 2008  
Mineola, N.Y.

**ENTERED**

JAN 22 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

J. S. C.