Minneci v West Hempstead Union Free School Dist.
2009 NY Slip Op 30053(U)
January 6, 2009
Supreme Court, Nassau County
Docket Number: 5727/07
Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

LUCREZIA MINNECI,

Plaintiff,

-against-

WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT and COPSTAT SECURITY, LLC,

Defendants.

Motion Sequence #1, #002
Submitted September 5, 2008
XXX

INDEX NO: 5727/07

The following papers were read on these motions:

DISTRICT Notice of Motion.....1
COPSTAT Notice of Cross-Motion.....2
Plaintiff Affirmation In Opposition.....3
DISTRICT Partial Opposition to Cross-Motion.....4
DISTRICT Reply Affirmation.....5
COPSTAT Reply Affirmation.....6

Requested Relief

Defendant, WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims against it or, in the alternative, granting summary judgment on its cross-claim against co-defendant, COPSTAT SECURITY, LLC. (hereinafter referred to as "COPSTAT"). COPSTAT cross-moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing

the complaint and all cross-claims against it or, in the alternative, granting summary judgment on its cross-claim against the DISTRICT. The plaintiff, LUCREZIA MINNECI, opposes the motion and cross-motion, which are determined as follows:

Background

This personal injury action arises out of an incident that occurred on January 30, 2006, at the West Hempstead High School, located at 400 Nassau Boulevard, West Hempstead, New York. At the time of the accident, plaintiff was employed by Chartwells, a company that provided food services for various schools including West Hempstead, where plaintiff ran the computers for the cafeteria and was a cashier. Plaintiff's deposition testimony reflects that, on the day of the accident, she arrived at work at approximately 9:50 A.M., set up her register and then went to the ladies room. She claimed that, when she exited the ladies room, at about 10:10 A.M., she greeted the security guard, Robert Rosario, who she heard yell to a student, "Ed, slow down". She alleged that the student, later identified as Eddie Nicholas, continued to run, turned the corner and ran into her, knocking her to the floor. The complaint alleged that plaintiff's injuries and damages were caused by the joint, several and concurrent negligence of the DISTRICT and COPSTAT, who provided security services to the school, in, *inter alia*, failing to protect the plaintiff from reasonably foreseeable injury, in failing to take suitable and proper precautions for the safety of persons on the premises, in failing to adequately supervise students during school hours and in failing to foresee and prevent the occurrence. The DISTRICT denied the allegations of the complaint, submitted affirmative defenses and cross-claimed against co-defendant, COPSTAT, for contribution and indemnification. COPSTAT denied the

allegations of the complaint, submitted affirmative defenses, and cross-claimed against the DISTRICT for contribution and indemnification.

In support of the motion in chief, the DISTRICT asserts that it is entitled to summary judgment because the DISTRICT owed no duty of supervision to plaintiff who was not one of its students, citing *Goga v Binghampton City School District*, 302 AD2d 650, 754 NYS2d 239 (2nd Dept. 2003). In *Goga*, Second Department held that the special duty owed by a school to its students by assuming physical custody of the child in the absence of the parent, does not apply to members of the public injured at the school. In order to maintain an action against a school district for negligent supervision, the plaintiff must demonstrate a special relationship with defendant which created a special duty to protect plaintiff, upon which plaintiff justifiably relied. *Goga v Binghampton City School District, supra.* Moreover, counsel for the DISTRICT states that, even if a special duty is shown, there is no evidence presented that the DISTRICT was negligent or that said negligence caused plaintiff's injuries. It is the DISTRICT's position that there was nothing more that it could reasonably have done to prevent the accident in that a security guard was present and told the student to stop running. As to the cross-claim, the DISTRICT states that it owed no duty of supervision to COPSTAT and, if there was a breach, it was on the part of COPSTAT whose employee failed to prevent the accident.

In support of the cross-motion to dismiss, COPSTAT points to the verified bill of particulars with respect to COPSTAT which, *inter alia*, alleges that it disregarded its duties as to the safety of plaintiff, that it failed to take suitable precautions for the safety of persons using the premises, that it caused or permitted the plaintiff to be injured by a

student running in the hallway while that student was under the exclusive supervision of COPSTAT, and that it failed to provide adequate supervision of the students during school hours. Counsel for COPSTAT asserts that there is no evidence, whatsoever, that the security company hired by the DISTRICT had any duty towards the plaintiff or that the students were under the exclusive supervision of COPSTAT. It is COPSTAT's position that the rules and regulations of the school are the responsibility of the DISTRICT and the record herein reflects that there was a firm rule that security guards hired by the school were not to place their hands on students. Counsel for COPSTAT states that, the guard warned the student to stop running and, beyond that, his only recourse would be to notify the school, who had the ultimate duty for disciplining the students. Citing *Blanc v City of New York*, 223 AD2d 522, 636 NYS2d 112 (2nd Dept. 1996), counsel for COPSTAT contends that the mere employment of security guards does not create a special duty, absent any evidence that the security guards were hired specifically to protect the claimant or a class of persons of whom claimant was a member, a factual scenario that cannot be established herein. Counsel for COPSTAT urges that it is entitled to summary judgment as the disciplining and control of ths students is the responsibility of the school and COPSTAT performed its duties just as they were asked and there can be no determination of negligence.

In opposition to the motion and cross-motion, counsel for plaintiff argues that, even if plaintiff cannot establish a special duty was owed to her, the DISTRICT owed the general public a duty to provide a safe place and to eliminate any known hazards. It is the plaintiff's position that the DISTRICT had ample evidence of students running in the hall and that this specific student "frequently engaged in this dangerous activity". Counsel for

plaintiff claims that the school had actual notice of the student's conduct and chose not to act and eliminate the risk to others. Counsel argues that it is reasonably foreseeable that students run in hallways and pose a risk to other students and non-students alike and that a jury could find that the school was negligent.

The Law

It is a fundamental principle of law that before a party may be held liable in negligence, it must be shown that the party owed a duty of care to the plaintiff. *Strauss v Belle Realty Company*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 24 (C.A. 1985). In the absence of a duty, there is no breach and without a breach there is no liability. *Pulka v Edelman,* 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (C.A. 1976). To establish a claim sounding in negligence, it is incumbent upon the plaintiff to demonstrate that the defendants breached a legal duty owed to her and that this breach was a substantial factor in occasioning the plaintiffs injuries (*Pulka v Edelman, supra; Derdiarian v Felix Contracting Corp.,* 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 [C.A. 1980]).

It is well settled that schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of proper supervision. However, as stated above, Second Department has held in *Goga v Binghampton City School District, supra, that* the special duty owed by a school to its students is based upon its assuming physical custody of the child in the absence of the parent and said special duty does not apply to members of the public injured at the school. Indeed, even when a special duty to the students exists, a long line of cases have held that the schools are not insurers of their student's safety for they cannot reasonably

be expected to continuously supervise and control all movements and activities of students (*Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 [C.A. 1994]). Where injuries are caused by the intentional acts of a fellow student, the imposition of liability upon the school under a theory of negligent supervision is justified only when a plaintiff can show, usually by virtue of the school's prior knowledge or notice of the dangerous conduct which caused the injury, that the acts of the student could reasonably have been anticipated. However, school personnel cannot reasonably be expected to guard against an injury caused by the impulsive, unanticipated act of a fellow student (*Mirand v City of New York, supra*).

There is a dearth of reported cases which defines the responsibility of a school for injuries caused by its students to non-students while on school grounds. Most of the cases cited by the parties herein involve injuries to students by other students who were in the physical custody of the school at the time. "Indeed, schools have been held to have a duty to supervise their students and protect them from risks of harm from each other (see, e.g., *Ohman v Board of Educ.*, 300 NY306; *Hoose v Drumm*, 281 NY 54; *Lauricell v Board of Educ.*, 52 AD2d 710), and from others, if the school has physical custody of and control over them (*Pratt v Robinson* 39 NY2d 554, 560)". *Thompson v Ange*, et al, 83 AD2d 193, 443 NYS2d 918 (4th Dept. 1981). In *Thompson*, the Court considered the duty of the school to drivers injured in an accident caused by a student's operation of his car on a public highway while in transit from school to a vocational center, which was in violation of school rules. The drivers claimed that the school authorities were liable through negligent supervision and failure to enforce its own rules. The Court in *Thompson* held that the

school authorities could not be liable because they did not owe the drivers a duty of care in the way in which they supervised and enforced their rules governing driving by commuting students. It found that the standard of care applicable to a school's supervision of its students is the same standard of supervision which a parent of ordinary prudence would undertake in comparable circumstances.

In *Rubino v City of New York*, 114 AD2d 243, 498 NYS2d 831 (1st Dept. 1986), cited by plaintiff in support of their general claims of negligence against the defendants predicated upon their duty to the general public, the Court found that when the State acts in a proprietary capacity as a landlord, it is subject to the same principles of tort law as a private landlord. In *Rubino*, a teacher, who was supervising a class in the school yard, was injured when a metal object was thrown through the air from a neighboring apartment building and lot striking the teacher. The *Rubino* Court found that the Board was not immune from liability because the incident was not isolated and because the Board failed in its proprietary capacity as landlord to issue warnings or otherwise take appropriate action

In the case at bar, the DISTRICT, as the landowner, ". . . has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk" (*Branham v Loews Orpheum Cinemas, Inc.*, 31AD3d 319, 819 NYS2d 250 [1st Dept. 2006]; *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 [C.A. 1995]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 [C.A. 1976]; *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 785 NYS2d 424 [1st Dept. 2004]). In order to recover damages for an alleged breach of this duty, a plaintiff must first

demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493, 646 NE2d 795 [C.A. 1994]; *Beck v J.J.A. Holding Corp., supra*). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or its agents to discover and remedy it (*Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 [C.A. 2005]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [C.A. 1986]; *Green v City of New York*, 34 AD3d 528, 825 NYS2d 227 [2nd Dept. 2006]). Notably, a "general awareness of a dangerous condition" will not suffice (*Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 740 [C.A. 2005]; *Piacquadio v Recine Realty Corp., supra,* at 967; *Panetta v Phoenix Beverages, Inc.*,29 AD3d 659, 816 NYS2d 122 [2nd Dept. 2006]; *Melendez v New York City Housing Authority*, 23 AD3d 211, 803 NYS2d 547 [1st Dept. 2005]).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept.

2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). 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 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A. 1985]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

Conclusion

After a careful reading of the submissions herein, and reviewing the record in a light most favorable to plaintiff, the Court finds that the record does not reveal any triable issues of fact as to whether any additional supervision was necessary or that it would have

prevented the plaintiff's accident. The accident in which the plaintiff was injured occurred suddenly and without warning. Thus, given the nature of the plaintiff's accident, the Court finds that the DISTRICT and COPSTAT took appropriate action to supervise the students and prevent running in the halls and the presence of additional supervisory personnel would not have prevented the accident.

It is the judgment of the Court that the DISTRICT and COPSTAT, both, have made a *prima facie* showing that they are entitled to judgment as a matter of law. The Court finds that plaintiff's submission is insufficient to defeat the instant motions. Based upon the affirmations submitted on the motion, the authorities cited therein, and the transcripts of the depositions of the parties, the school principal and the COPSTAT witnesses, it appears to the Court that no interpretation of the facts presented can result in a finding of negligence on the part of the DISTRICT or the security company, COPSTAT. Despite plaintiff's attempt to raise factual questions, the record before us establishes that the school contracted with the security company to manage the safety and security of the school and the students, the security guard on duty told the student to stop running, the student stopped running but, when he turned the corner, in an instant he collided with the plaintiff, an unfortunate accident. The evidence presented does not establish that the student had a history of behavioral problems or running in the halls, bur rather shows that he was an obedient student, a senior, who had no history of disciplinary problems. The Court finds that the DISTRICT had no prior notice of dangerous conduct that made the accident foreseeable or that could have prevented same. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. *Zuckerman v City of New York, supra; S.J. Capelin Associates Inc. v Globe Mfg. Corp., supra.* Plaintiff has not

distinguished any of the cases cited by movants nor demonstrated a material issue of fact that requires a trial. Based upon the foregoing, it is hereby

ORDERED, that the motion by WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED, that the cross-motion by COPSTAT for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED, that the defendants' alternate requests for contribution and indemnification are denied as moot.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 6, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

JAN 08 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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