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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART Part 5

Justice

Index Number : 118426/2000

RAMOS, RICARDO

vs

CITY OF NEW YORK

Sequence Number : 001

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3
	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/09

HON. EILEEN A. RAKOWER

Check one: ☒ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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RICARDO RAMOS, an Infant Over the Age of Fourteen (14) by his Mother and Natural Guardian, CYNTHIA RODRIGUEZ, Individually,

Plaintiffs,

-against-

CITY OF NEW YORK, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, "DEAN" MARGRATTA, "DEAN" VINCENT, "ASSISTANT PRINCIPAL" MR. BOSSIER, and "SECURITY GUARD" CAESAR,

Defendants.

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Index No. 118426/00

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

Plaintiffs Ricardo Ramos ("Ramos") and Cynthia Rodriguez (collectively "Plaintiffs") bring this action to recover for personal injuries sustained when Plaintiff Ricardo Ramos was assaulted by several males outside the exit of the Martha Valle Intermediate School ("Martha Valle" or "the school") in New York, New York, at approximately 2:45p.m. on May 4, 2000 ("the incident").

Presently before the court are motions by both the Plaintiffs and the Defendants ("City"). Plaintiffs move this court for an order striking the City's Answer, or alternatively, resolving issues in favor of Plaintiffs based upon the City's alleged failure to comply with court-ordered discovery. In addition, Plaintiffs seek modification of the July 18, 2007 order of this court, wherein the court ordered the production of relevant police records with redactions of, *inter alia*, the tax registry numbers of police officers named in the report. Plaintiffs also seek additional time to file their note of issue, and an order compelling the City to comply with all outstanding discovery. Plaintiffs have submitted an Affirmation of Good Faith and a Affirmation in Support of its motion. Annexed to Plaintiffs' moving papers as exhibits are: Plaintiffs' Notice of Claim; a notice of the City's intent to use Plaintiffs' 50-h transcript as evidence; Plaintiffs' Summons and Complaint; the City's Answer; Plaintiffs' Amended Summons and Complaint;

Plaintiffs' Verified Bill of Particulars; the Case Scheduling Order; copies of numerous compliance conference stipulations and orders; the deposition transcript of Mike Margiotta; the statement on the record pertaining to the "busted" April 3, 2005 depositions of two City defendants; the City's response to the 12/20/05 compliance conference order of the Hon. Michael D. Stallman; the City's response to the 4/24/07 compliance conference order of this court; a 5/30/07 letter from New York County Assistant District Attorney Charles E. King III, stating that his office is unable to locate its file on the incident; this court's 7/18/07 order; a police report containing redactions; the deposition transcript of Detective Frank Pangallo of the NYPD; and Plaintiffs' Demand for Discovery and Inspection.

The City cross moves for summary judgment, asserting that based upon the undisputed facts adduced from the record, it cannot be held liable for the assault on Ramos as a matter of law. The City also opposes Plaintiffs motion to strike the City's Answer, or for alternative relief in either the form of resolving issues in Plaintiffs' favor or compelling discovery. The City has submitted an Affidavit in Support of its cross-motion and in Opposition to Plaintiffs' motion. Annexed to the City's papers as exhibits are: Plaintiffs' Notice of Claim; Plaintiffs' 50-h transcript; the deposition transcript of Jeffrey Bozler; the deposition transcript of Caesar Valdez; the deposition transcript of Fritz Vincent; the City's response to the 12/20/05 compliance conference order of the Hon. Michael D. Stallman; numerous compliance conference stipulations and orders from February 2004 through February 2009; Ramos' transfer form; the City's supplemental response to this court's 7/18/07 order, dated 4/3/09; and the City's response to Plaintiff's 12/30/08 demand for discovery and inspection.

Plaintiffs have submitted an Affirmation in opposition to the City's motion for summary judgment and in further support of its motion. The City has submitted a Reply Affirmation in further support of its motion for summary judgment.

On May 4, 2000, at around 2:45 p.m., Ramos, a student at Martha Valle, was physically assaulted by several males "right at the exit of the school" upon leaving the building during dismissal. The assault ended when a paraprofessional who was present to monitor the school exit intervened. The record indicates that the school regularly maintained a security presence consisting of guards located throughout the school, and that security guards were stationed outside the school during dismissal.

Among Ramos' alleged assailants were fellow students Javier Rodriguez ("Rodriguez") and Carlos Rivera. Ramos testified that he had been having problems with Rodriguez since he started going to the school. According to Ramos, Rodriguez had threatened to jump him on three separate occasions - the last of which was approximately one month prior to the May 4, 2000 incident. Ramos reported each of these three incidents to the Deans. Ramos testified that the Deans spoke to Rodriguez on each occasion. However, after Rodriguez denied any wrongdoing, the Deans did not take any further action. This is consistent with the deposition testimony of Michael Margiotta, Dean of Martha Valle at the time of the incident. Dean Margiotta testified that, if a student came to him telling him that he or she was having a problem with another student, he would follow up on the complaint by speaking with friends of the person who was allegedly causing problems, and ultimately meet with the student to get his or her account of events. Dean Margiotta would generate incident reports in the event that there was an incident of substantial import which was substantiated by further investigation, but would not take further action in cases where the accusations did not rise above the level of "he-said, she-said."

Ramos alleges that, one day prior to the May 4, 2000 assault, he and Rodriguez inadvertently bumped into one another in the lunchroom and exchanged words. Ramos testified that the lunchroom was regularly supervised by Dean Margiotta and Assistant Principal of Special Education Jeffrey Bozler; and that he specifically recalled Bozler being present in the cafeteria that day. Still, Ramos reports that Bozler did not witness the verbal altercation between himself and Rodriguez. Ramos did not report the verbal altercation to any of the school's staff or security personnel. He testified that, based on his prior experience, "nothing's going to happen" as a result of his reporting the situation.

As was customary, a security officer was positioned outside of the school's Stanton Street exit for dismissal on May 4, 2000. According to police records, paraprofessional Perry Blackmore, the security official stationed outside, told the investigating police officer that he had heard from students that "some kids were outside the [school]... and that they were there to jump another kid from the school but he did not know who." The report further states that Blackmore noticed three males standing opposite the school and positioned himself in proximity to them in case there were any problems. However, Blackmore became distracted at one point. Blackmore did not observe how the altercation began but interceded when he observed Ramos on the ground with three males standing above him. One of the

assailants kicked Ramos. Blackmore was able to grab another one of the assailants while he was winding up to punch Ramos. Blackmore took Ramos back into the school for his safety.

Plaintiffs filed a Notice of Claim in connection with the incident on June 9, 2000, and commenced this action by service of a summons and complaint In August 28 and September 1, 2000, respectively. Plaintiffs allege that Ramos' injuries were caused by the City's negligent supervision of students at the school.

The parties have engaged in lengthy discovery. Plaintiffs chronicle a series of alleged violations of discovery orders on the part of the City during the course of discovery, including cancelled depositions and repeated failures to comply with so-ordered compliance conference stipulations, and state that outstanding discovery includes:

1. Dean Margiotta's daily logbook for the two year period leading up to and including the incident;
2. Student disciplinary folders for Carlos Rivera and Javier Rodriguez;
3. All records of prior incidents of violent behavior in school from the file cabinet referenced in the deposition of Dean Margiotta;
4. All security guards' daily logs for the two year period leading up to and including the incident.
5. Records of any and all suspensions and suspension hearings involving Javier Rodriguez, Carlos Rivera, and other students involved in the assault;
6. All investigations, reports, and statements pertaining to the incident;
7. All records pertaining to Ramos' transfer out of Martha Valle after the assault;
8. NYPD records previously produced by the City pursuant to this court's July 18, 2007 order without allegedly improper redactions; and
9. A complete response to Plaintiffs' December 30, 2008 post-EBT demand for discovery and inspection from the City.

The City has supplied NYPD records relating to the incident, containing fewer redactions than the documents previously disclosed by the City, and has provided a response to Plaintiffs' December 30, 2008 discovery demands in its opposition/cross-motion papers.

CPLR §3216 provides, in pertinent part:

> If any party... refuses to obey an order for disclosure... the court may make such orders with regard to the failure or refusal as are just, among them:
>
> (1) an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> (3) an order striking out pleadings or parts thereof...

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted only when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. *(Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct. (*Goldstein v. CIBC World Markets Corp.*,30 A.D.3d 217 [1st Dept. 2006]).

Here, to date, all depositions have been completed. While the City's failure to provide timely responses cannot be countenanced by the court, the lack of a response to Plaintiff's discovery demands for a three year period is not entirely the City's doing. Indeed, City has pointed out that plaintiff failed to raise these issues at some fourteen compliance conferences since 2005.

To the extent City has failed to respond to the above requests, it is hereby ordered to respond within 60 days of service of a copy of this order with notice of entry. City's failure to respond will be deemed willful and contumacious, and may serve as a basis for a future motion to strike City's answer.

The court now turns to the City's motion for summary judgment. "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019 [3rd Dept. 1952]), or where the appeal is "arguable" (*Barrett v. Jacobs*, 255 N.Y. 520, 522 [1931]); "issue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v. Abad*, 271 App.Div. 725, 727 [1st Dept. 1947]).' (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957])." (*Ramsammy v. City of New York*, 216 A.D.2d 234, 236-237 [1st Dept. 1995].)

In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The law regarding education officials' alleged negligent supervision in the context of an assault by a fellow student is well settled:

> In determining wither the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated.

(*Mirand v. City of New York*, 84 N.Y.2d 44, 49 [1994]). It is equally settled that school officials are not insurers of students' safety since it is impossible to control all movements and activities of students, and thus schools cannot be held liable for impulsive and spontaneous occurrences in which an individual is injured at the hands of a fellow student (*id.*). The First Department has noted that "whether the actions of a school, or its board members, are adequate and reasonable and, if they are not, whether the negligence is the proximate cause of plaintiff's injuries, are

almost always questions of fact" (*Garcia v. City of New York*, 222 A.D.2d 192, 194 [1st Dept. 1996]).

Here the record indicates that Ramos made prior complaints concerning Rodriguez. This did not include the last exchange between Ramos and Rodriguez one day prior to the May 4, 2000 assault, which was neither observed by school officials nor reported by Ramos. Mr. Blackmore, the paraprofessional who intervened to break up the instant assault, made a statement to the NYPD (referenced by Plaintiffs) indicating that, prior to the assault, Blackmore had heard "from the students" that "some kids were outside the school... to jump another kid from the school...." Moreover, Blackmore observed three suspicious individuals across from the school. However, Blackmore did not pursue the matter and got distracted, at which point, Ramos was assaulted by these individuals. Under these circumstances, a rational jury could conclude that the school was negligent in failing to take measures to lessen the threat of an assault on a student or students, by, for example, ordering the suspicious individuals to disperse, calling for additional security, or contacting the police. Questions of notice, foreseeability of danger, and the necessity for and adequacy of supervision, are generally for the jury.

Regarding Plaintiffs' motion to compel the above-listed discovery items, CPLR 3124 provides:

> If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article... the party seeking disclosure may move to compel compliance or a response.

As summarized by the First Department in *Anonymous v. High School for Environmental Studies*, the law governing disclosure in New York is well settled:

> It is beyond cavil that New York has long favored open and far-reaching pretrial discovery.... There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.... The words 'material and necessary' as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on

> the controversy which will assist in the preparation for trial.

32 A.D.3d 353, 358 [1st Dept. 2006]) (citations and internal quotations omitted).

As noted above, the City has provided responses to items 8 and 9 in their opposition to Plaintiffs' motion to strike, the sufficiency of which has not been challenged by Plaintiffs.

The City objects to the production of item 1, because Dean Margiotta testified that the logbook he maintained for incidents *might* not contain an entry of an incident which occurred after school in which the police were involved. Nevertheless, the City is to produce copies of all logbook entries pertaining to the specific assault at issue in the case, along with all logbook entries containing reports of bullying or assaultive conduct by Javier Rodriguez or Carlos Rivera for the two year period leading up to the incident involving Plaintiff Ramos.

With respect to item 2, the City refers the court to its response to the compliance conference order dated December 20, 2005, wherein the City replied that, after a search for "full and complete student and disciplinary records for Carlos Rivera and Javier Rodriguez," it was unable to locate any records pertaining to Carlos Rivera, and that it located Javier Rodriguez's records and found no disciplinary records therein.

The City opposes the production of item 3 (all records of prior violent incidents maintained in the file cabinet referenced by Dean Margiotta in his deposition) on the grounds that the request is overly broad, unduly vague, and overly burdensome, in that it is unlimited in time. The court denies Plaintiffs' request for this discovery. As the uncontroverted facts establish that the school regularly positioned security personnel at the school's exits at dismissal, including at the time of the incident herein, there is no issue as to whether the City was negligent in failing to maintain security personnel at the school exits during dismissal.

Plaintiffs' request for production of item 4 (log books of all security guards for the two year period up to and including the incident) is granted only to the extent that the City is to produce any such records pertaining to the subject incident, or records regarding bullying or assaultive conduct on the part of Javier

Rodriguez or Carlos Rivera. All other such records are denied for the reasons set forth in the preceding paragraph.

Plaintiffs' request for production of item 5 (suspension records of Javier Rodriguez and Carlos Rivera) is denied, since City has conducted a search of each students' records and was unable to find any disciplinary records for Rodriguez in his file, and was unable to find any records whatsoever for Rivera. Insofar as Plaintiffs seek suspension records for conduct during or post-dating the incident at issue in this case, such records are irrelevant on the issue of notice.

With respect to the sixth item (all investigations, reports, and statements pertaining to the incident from the school), The City refers the court to its response to the December 20, 2005 order, wherein the City states that no records could be found with respect to Rodriguez and/or Rivera. Since it is unclear whether there exists any responsive documentation *unrelated to Rodriguez and/or Rivera*, the City is directed to produce any and all non-privileged documents responsive to this request, to the extent not already produced.

Finally, with respect to item 7 (records regarding Plaintiff Ramos's transfer from the school), the City claims that Plaintiffs have already been supplied with documentation concerning Ramos's transfer.

To the extent that the City is directed to provide further discovery, said discovery shall be provided within 60 days of receipt of a copy of this order with notice of entry. To the extent that no such records exists, or cannot be located, the City shall provide an affidavit from a knowledgeable representative setting forth the parameters of the search.

The court notes that, insofar as Plaintiffs can establish that relevant items of discovery existed and are now missing, Plaintiffs' may move for sanctions at the time of trial, such as requesting that the trial court instruct the jury that it may draw an adverse inference against the City. (*See*, PJI2d 1:77.1).

Wherefore, it is hereby

ORDERED that Plaintiffs' motion is granted to the extent that City is ordered to respond, to the extent City has not already responded, to outstanding

discovery, within 60 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that the City's cross-motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 14, 2009

EILEEN A. RAKOWER, J.S.C.