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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 104434/2006
SCHWADERER, MELISSA
VS
COLUMBIA UNIVERSITY
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of defendant The Trustees of Columbia University in the City of New York for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff Melissa Schwaderer, is granted and the instant complaint as against defendant The Trustees of Columbia University in the City of New York is severed and dismissed; it is further

ORDERED that the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant The Trustees of Columbia University in the City of New York shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties and it is further

ORDERED that the balance of this action shall continue

Dated: 8/10/09

HON. CAROL EDMEAD J.S.C.

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

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 35

MELISSA SCHWADERER,

Index No. 104434/06

Plaintiff,

DECISION/ORDER

-against-

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JASON ROMANO,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant The Trustees of Columbia University in the City of New York ("Columbia") moves for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff Melissa Schwaderer ("plaintiff").

Background

Plaintiff alleges that on April 15, 2003, at approximately 3:00 to 3:30 p.m., she, a student at Columbia, was struck in the head by a boomerang thrown by co-defendant, Jason Romano ("Romano"), another student at Columbia. The boomerang struck plaintiff at the top of her head while she was sitting on "College Walk," a grassy area located on Columbia's campus.

Plaintiff alleges that on the date of plaintiff's accident, an advertised party had been arranged known as the "Low Beach Party," which referred to an outdoor party in front of the Low Library on the campus of Columbia. As part of this party, there were arrangements for alcoholic beverages to be brought by students to participate. Plaintiff had walked from the Butler Library towards the Low Library. Thereafter she sat down on the grass to do her studying and after about

five minutes, she was struck in the head by a boomerang thrown by Romano, who was participating in this party.

In her deposition, plaintiff states that she did not see anyone throwing a boomerang prior to her being hit; however, in her affidavit in opposition to the instant motion, she says she saw objects, including a boomerang, being thrown prior to her accident.

Columbia's Contentions

Prior to plaintiff's accident, no prior complaints were made as to students throwing and/or being injured by any boomerang thrown on campus. Prior to being hit with the boomerang, plaintiff admittedly did not see anyone throwing a boomerang on campus nor did Columbia receive any complaints regarding the same. Not only did Lieutenant Federico Morales, who at the time was a senior sergeant at the Morningside campus, testify that he never saw any students using a boomerang on campus prior to April 2003, but he also testified that he never heard from other Columbia security that they ever observed any students using a boomerang on campus prior to April 2003.

Further, the affidavit from Jose Rosado, the director of Public Safety for the Morningside Campus for Columbia, establishes a lack of notice regarding the alleged dangerous condition. Mr. Rosado conducted a search, two years prior to the incident, for any incident reports, records of complaints, and/or safety bulletins in the possession of Columbia relative to the use of a boomerang on the Morningside campus, and that search revealed that there were none.

Columbia has no legal duty to protect plaintiff from the sudden, unexpected, and unforeseeable act by another student, i.e., throwing a boomerang into an area where other students were sitting.

Plaintiff's Opposition

According to plaintiff's affidavit, she was in the area of the party for between 15-17 minutes before the incident. During that period, she noticed the following:

- there was a large number of students drinking alcohol in plain site, including many sitting on the steps of the Low Library;
- plaintiff recognized many of these students as underclassmen, and therefore they were not yet of legal drinking age;
- there were students dancing in a large elevated fountain where the students had climbed to the top and were dancing in the top bowl of the fountain, perhaps 5-6 feet off of the ground;
- there were students throwing baseballs, boomerangs, footballs and frisbees. These were being thrown in and around many students who were in the grass area where she was sitting;
- during the entire time there was only one security guard from Columbia in the entire area, standing on the side of the Low Library steps;
- during the entire time the conduct of the students, including the drinking and throwing of the various objects identified above, was within the clear site of this one security guards;
- during that time the Columbia security guard took no action relative to any of the student drinking or their conduct.

The incident report filled out by a Columbia employee subsequent to the accident, indicates the veracity of the occurrence, the present sense testimony and utterance of the plaintiff relative to the drinking of Romano at the time of the incident, as well as the single Columbia security guard response by Sgt. Morales to the incident.

Plaintiff's affidavit and deposition testimony establish both actual and constructive notice herein. Actual notice is established in that the plaintiff's affidavit cites the presence of a Columbia security guard actually present and within full view of the activities described during this on campus party, inclusive of the throwing of various objects (baseballs, footballs, frisbees and boomerangs) in the vicinity of other students. Moreover, this security guard did nothing to curtail, control or otherwise limit this or any other activity.

The issue of whether this conduct constituted a foreseeable risk of injury to another - such as the plaintiff - is an issue for the jury.

Not only does the above constitute actual notice, it also constitutes constructive notice. Coupled with the above, constructive notice is established by the presence of the security guard for a period of at least 15-17 minutes before the actual occurrence herein to observe and take action concerning these activities and student conduct, and he did not.

Columbia's Reply

Plaintiff has not correctly identified Columbia's duty with regard to the alleged incident. Plaintiff seems to claim that Columbia had a duty to prevent all recreational activities on its campus and/or that the plaintiff was injured by alcohol. However, the act of throwing a recreational object on a college campus on a beautiful spring day is not, by itself, a dangerous activity that requires intervention from supervising personnel.

Plaintiff herself couples the act of throwing a boomerang in the same class of objects commonly thrown on a college campus including a Frisbee, baseball, and football.

Undoubtedly, Columbia had no duty to prevent its student from engaging in common campus recreational activities. Further, the evidence is still undisputed that Columbia had no notice of the hazard claimed in this case. Plaintiff would have this court rule that Columbia had some duty to confiscate all recreational objects.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; Zuckerman, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st

Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Notice: Actual and/or Constructive

In order to prevail on its motion for summary judgment, Columbia is required to establish that it "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" (*Candelario v Watervliet Hous. Auth.*, 46 A.D.3d 1073, 1074, 847 N.Y.S.2d 298 [2007]; *see Cantwell v Rondout Sav. Bank,* 55 A.D.3d 1031, 1031-1032, 866 N.Y.S.2d 377 [2008]; *Amidon v. Yankee Trails, Inc.,* 17 A.D.3d 835, 836, 794 N.Y.S.2d 132 [2005]). A demonstration of " '[c]onstructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit [the] defendant[ ] to discover it and take corrective action' " (*Cantwell v Rondout Savings Bank,* 55 A.D.3d at 1032, 866 N.Y.S.2d 377, quoting *Boyko v Limowski,* 223 A.D.2d 962, 964, 636 N.Y.S.2d 901 [1996]; *see Martin v.RP Assoc.,* 37 A.D.3d 1017, 1017, 830 N.Y.S.2d 816 [2007]).

Particularly relevant here, "[w]hile plaintiffs ... bear the burden at trial of establishing that defendant created or had notice of the condition, in the current procedural context-i.e., a motion for summary judgment by Columbia -the 'initial burden of establishing a prima facie entitlement to judgment' falls upon [the] defendant" (*Rosati v Kohl's Dept. Stores,* 1 A.D.3d 674, 674, 766

N.Y.S.2d 620 [2003], quoting *Altieri v Golub Corp.*, 292 A.D.2d 734, 734, 741 N.Y.S.2d 126 [2002]).

Although it has been held that as a general rule, colleges and universities have no legal duty to shield their students from the dangerous activities of other students, *Eiseman v State,* 70 N.Y.2d 175, 518 NYS2d 608 (1987), under appropriate circumstances, a college or university may be held liable, under a theory of premises liability, for injuries sustained by a student while on campus (*see Tarnaras v Farmingdale School Dist.,* 264 A.D.2d 391, 694 N.Y.S.2d 413; *Ellis v Mildred Elley School,* 245 A.D.2d 994, 996, 667 N.Y.S.2d 86; *Adams v State of New York,* 210 A.D.2d 273, 274, 620 N.Y.S.2d 80). As property owners/occupiers, Columbia had a duty to exercise reasonable care to protect the plaintiff from reasonably foreseeable criminal or dangerous acts committed by third persons on campus (*see Ellis v Mildred Elley School, supra* at 996, 667 N.Y.S.2d 86; *Adams v State of New York, supra* at 274, 620 N.Y.S.2d 80).

However, Columbia has made a *prima facie* showing of their entitlement to judgment as a matter of law by tendering evidence that the boomerang incident was unforeseeable, and that, in any event, Columbia did not breach any duty owed to plaintiff (*see Alvarez v Prospect Hosp.,* 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572).

Further, plaintiff's claims that the ineffective security in some way resulted in Columbia's breach of its duty to her and caused her accident, is countered by case law. Courts have held that when a spontaneous and accidental act happens, supervision cannot prevent such an act.

In *Janukajtis v Fallon,* 284 AD2d 428, 726 NYS2d 451 (2d Dept 2001) the court held that:

> It is well established that although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, schools are not insurers of the safety of their students, for they cannot reasonably be expected to continuously supervise and control all of the students' movements and activities (see, *Mirand v City of New York,* 84 NY2d 44, 49; *Convey v City of Rye School Dist.,* 271 AD2d 154, 159). In order to find that a school has breached its duty to provide adequate supervision in the context of injuries caused by the acts of fellow students, it must be shown that the school "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, supra,* at 49). Actual or constructive notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place on a daily basis among students (*see, Mirand v City of New York, supra*). An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act (*see, Mirand v City of New York, supra,* at 49; *Convey v City of Rye School Dist., supra,* at 159; *Hauser v North Rockland Cent. School Dist. No. 1.,* 166 AD2d 553, 554).

Id. at 430; *see also, Convey v City of Rye School District,* 271 AD 2d 154, 710 NYS2d 641 (2d Dept 2000).

It is undisputed that the subject incident occurred on the premises of the Columbia University campus and that co-defendant Romano threw the boomerang that caused the alleged injuries to the plaintiff.

However,

1. the sworn deposition testimony of the plaintiff herself, who testified that prior to being hit with the boomerang that day, she did not see anyone throwing a boomerang;

2. the deposition testimony of Mr. Morales, a sergeant at the Morningside campus at the time of the subject incident, who testified that no prior complaints were made as to students throwing and/or being injured by any boomerang thrown on campus; and

3. the affidavit of Mr. Rosado, the director of Public Safety for the Morningside campus, who conducted a search, two years prior to the incident, for any incident reports, records of complaints, and/or safety bulletins in the possession of Columbia relative to the use of a boomerang on the Morningside campus and found none

substantiate a finding of no actual or constructive notice in the instant case.

And, plaintiff's claim now asserted for the first time in opposition to the instant motion that she did see boomerangs being thrown, is insufficient to overcome Columbia's entitlement to summary judgment.

This court finds that defendant Columbia University could not have reasonably anticipated that this dangerous act would occur, as there was no known prior similar acts or events that could amount to actual or constructive notice. Therefore, given the undisputed facts and the lack of notice, summary judgment is granted.

The underage drinking of students on campus alleged by plaintiff, if true, although clearly illegal, and the students dancing in the fountains, do not bear on this motion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant The Trustees of Columbia University in the City of New York for an order, pursuant to CPLR 3212, granting summary judgment, dismissing the complaint of plaintiff Melissa Schwaderer, is granted and the instant complaint as against

defendant The Trustees of Columbia University in the City of New York is severed and dismissed; it is further

ORDERED that the Clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendant The Trustees of Columbia University in the City of New York shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties and it is further

ORDERED that the balance of this action shall continue

Dated: August 10, 2008

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD