

Matter of Rosario v City of New York

2010 NY Slip Op 32186(U)

August 12, 2010

Supreme Court, New York County

Docket Number: 110497/07

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
Justice J.S.C.

PART 5

Index Number : 103673/2007
CASILLA, ROBERT ARIEL
VS.
DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

CAL 425

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

n this motion ~~to~~ for summary judgment

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
AUG 18 2010
NEW YORK
COUNTY CLERKS OFFICE

Dated: 8/12/10

AUG 12 2010

BJ
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
IN THE MATTER OF THE CLAIM OF MARIA
ROSARIO AS MOTHER AND LEGAL GUARDIAN OF
ROBERT ARIEL CASILLA An infant under the age of
fourteen And MARIA ROSARIO INDIVIDUALLY,

Index No. 110497/07
Motion Date: 7/20/10
Motion Seq. No.: 002
Calendar No.: 25

Plaintiffs,

DECISION & ORDER

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF EDUCATION AND NEW YORK
CITY POLICE DEPARTMENT, OF THE CITY OF
NEW YORK, ET AL.,

Defendants.
-----X

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK

BARBARA JAFFE, JSC:

For plaintiff:

A. Camilla Popin, Esq.
108-18 Queens Blvd. Suite 806
Forest Hills, NY 11375
718-261-1208
718-461-6633

For defendant City:

Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-242-6851

By notice of motion dated March 24, 2010, defendant City, on behalf of all named defendants, moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint. Having failed, however, to include any factual or legal basis for a dismissal pursuant to CPLR 3211(a)(7), only the motion pursuant to CPLR 3212 is addressed. (*See Kane v City of New York*, Sup Ct, New York County, May 14, 2010, Jaffe, J., Index No. 103963/07).

I. UNDISPUTED FACTUAL BACKGROUND

At approximately 11:45 a.m. on December 19, 2005, plaintiff, a 7th grade student at IS 143, was assaulted by a 6th grade student at the school in Manhattan. (Affirmation of Peter C.

Lucas, ACC, dated Mar. 24, 2010 [Lucas Aff.], Exh. E at 5, 16, 23-25). At the time of the assault, the New York City Police Department (NYPD) employed school safety agents to patrol the school and Darius Futrell was one of three school safety agents there that day. (*Id.*, Exh. G at 6-9).

At plaintiff's 50-H hearing, he testified that immediately before the assault, his assailant had thrown a piece of candy at his feet and that as soon as he asked him why, "[i]n one second he was in my face" and said "you want a problem." Just before he was punched, plaintiff heard Futrell warn them not to fight, and once he was punched, Futrell grabbed plaintiff's assailant. (*Id.*, Exh. E, at 22-27).

At a deposition held on March 9, 2009, Futrell testified that he saw a group of students circle around the two students and as he approached them, he saw the assailant verbally confront plaintiff. Plaintiff had already been hit and was holding his injured eye. Futrell quickly escorted plaintiff's assailant from the scene. (*Id.* Exh. G at 24-25).

II. CONTENTIONS

City denies liability for plaintiff's injuries as it is a legal entity separate and distinct from the New York City Department of Education (DOE) and is not responsible for torts arising from the conduct of DOE's agents, servants, and employees. (Lucas Aff.). DOE argues that any failure to supervise could not have proximately caused plaintiff's injury which was incurred as a result of a spontaneous and unforeseeable act. (Lucas Aff.).

Although plaintiffs concede that DOE is an entity separate and distinct from City, they oppose City's dismissal from the action, positing its liability with that of the NYPD, and argue that City has not demonstrated the school safety officers are solely under the control of DOE.

They also maintain that DOE and NYPD failed to provide adequate supervision, that the accident was thus foreseeable, and that the issue of proximate cause is peculiarly within the jury’s province. They assert that DOE and NYPD failed to provide a sufficient number of school safety officers to patrol the school’s hallways, thereby breaching the duty to maintain order and preserve the students’ safety. (Affirmation in Opposition of A. Camilla Popin, Esq., dated June 10, 2010).

In reply, City argues that NYPD may not be held liable absent proof of a special relationship between plaintiff and City, and alternatively, that school security services constitute a governmental function involving policy-making determinations which are not actionable as a matter of law. (Reply Affirmation of Peter C. Lucas, Esq., dated June 22, 2010).

III. ANALYSIS

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff’s cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

The Court of Appeals has recently reaffirmed that it is “well-settled that [s]chools 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 adequate supervision.” (*Brandy B. v Eden Cent. School Dist.*, NY3d , 2010 NY Slip Op 04873 [2010]; *Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Lawes v Bd. of Educ. of City of New York*, 16 NY2d 302, 306 [1965]). However, a school is not an insurer of students’ safety (*Mirand*, 84 NY2d at 49), and “unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school’s liability in negligence absent actual or constructive notice of prior similar conduct” (*Brandy B.*, 2010 NY Slip Op 04873). Rather, “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.” (*Id.*; *Doe v Bd. of Educ. Of Morris Cent. School*, 9 AD3d 588, 590 [3d Dept 2004]).

Here, DOE offers sufficient admissible evidence demonstrating that there was no prior notice of any conduct by plaintiff’s assailant which would have alerted any of the defendants of the assault. Rather, the assault was a spontaneous act which cannot be attributed to a lack of supervision. Consequently, DOE has met its burden of establishing, *prima facie*, that any alleged failure to supervise did not proximately cause plaintiff’s injuries.

As plaintiffs do not even allege that defendants had notice of any conduct by plaintiff’s assailant, they have failed to show the existence of any triable factual issues as to defendants’ negligence. Consequently, the other issues raised by defendants need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion by defendants City of New York, the New York City

Department of Education, and the New York City Police Department are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:


Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

DATED: August 12, 2010
New York, New York

AUG 12 2010

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE