Lopez v City of New York
2011 NY Slip Op 30309(U)
January 14, 2011
Sup Ct, Queens County
Docket Number: 23583/08
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Gloria Lopez, an infant under the age of 15 years by her mother and natural guardian, Estella Lopez, and Estella Lopez, individually,

Plaintiffs,

- against -

The City of New York and the New York City Department of Education,

Defendants.

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Index Number: 23583/08

Motion Date: 12/7/10

Motion Cal. Number: 11

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City of New York (the City) and the Department of Education (DOE) for summary judgment dismissing the complaint is granted solely to the extent that the complaint is dismissed in its entirety against the City and plaintiff's cause of action for negligent security is dismissed as against the DOE. In all other respects, the motion is denied.

Infant plaintiff (hereinafter referred to as plaintiff), a student at I.S. 141 in Queens County, allegedly sustained injuries as a result of being sexually assaulted in a stairwell of the school by an unknown intruder on September 27, 2007. Plaintiff testified in her 50-h hearing and her deposition that on the previous day, September 26th, she had met a girl at a delicatessen near the school who introduced her to a male, who appeared to be approximately 17-18 years old. Thereafter, on the date of the incident, plaintiff testified that she had just finished third

period math class, which was on the second floor, and ran out to go to the cafeteria on the first floor, since it was lunch period. She had run down the hallway to the stairwell, when she realized that she had forgotten her binder. She ran back to the math classroom and returned to the stairwell. When she opened the door to the stairwell, she noticed that the unknown male she had met the previous day was there. He thereupon attacked her and forcibly raped her. Plaintiff commenced the present action against the City and the DOE alleging causes of action for negligent security and negligent supervision.

Defendants move for summary judgment upon the grounds that plaintiff was not in school on the date of the incident, the notice of claim is defective in that it erroneously states that the date of the incident was September 20, 2007 instead of September 27, 2007, that she has failed to allege in her notice of claim and her pleadings and has failed to demonstrate that there was a special relationship between her and defendants so as to support a cause of action for negligent security and that her cause of action for negligent supervision must be dismissed because the incident was not foreseeable.

In the first instance, there is no basis for liability against the City under either plaintiff's cause of action for negligent security or her cause of action for negligent supervision. It is undisputed that I.S. 141 is a public school under the New York City Department of Education. The DOE (formerly known as the Board of Education) is a separate and distinct entity from the City (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the DOE for purposes of education. Suits involving public schools may only be brought against the DOE (see New York City Charter §521[b]). Since the City does not operate, maintain or control the subject public school, it is entitled to summary judgment (see Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]).

The Court notes that although the Legislature amended the Education Law in 2002 to grant the Mayor greater control over public schools and limit the power of the DOE (L 2002, ch 91), such amendments did not alter the fact that the City and the DOE are separate legal entities and did not serve to abrogate the rule that tort actions involving public schools may not be brought against the City (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). The Court also notes that the rule that tort actions relating to public schools may only be brought against the DOE and

not the City is not limited merely to claims of premises liability but also applies to actions involving intentional torts (see id.).

Although the City has not moved for summary judgment upon this ground, the Court, in searching the record, sua sponte grants summary judgment to the City upon the ground that no cause of action lies against the City, as a matter of law.

As to the DOE, counsel for defendants contends that the complaint must be dismissed because plaintiff was not in school on the date of the alleged incident. Counsel's contention is based upon the school records, annexed to the moving papers, which indicate that plaintiff was marked absent on the date of the accident. However, plaintiff testified in her 50-h hearing and deposition that she was present at school on the date of the alleged incident and that the incident occurred on the second floor stairwell. In addition, one Andrewsca Valdiviezo, a schoolmate of plaintiff's, averred in her affidavit in opposition to the motion that she observed plaintiff in school on September 27, 2007. Therefore, the conflicting evidence raises a question of fact as to whether the alleged incident occurred in school, which cannot be resolved on summary judgment. Furthermore, without merit is counsel's argument that plaintiff's absence from school on the date of the alleged incident is established by the fact that her mother did not challenge the accuracy of plaintiff's report card which noted the number of days she was marked absent.

With respect to the erroneous statement of the date of the alleged incident in the notice of claim, pursuant to General Municipal Law §50-e(2), in order for a notice of claim to be sufficient, it must, inter alia, state "the time when...the claim arose" (Rosenbaum v City of New York, 8 NY 3d 1, 10 [2006]). However, in the discretion of the Court, a mistake, omission, irregularity or defect in the original notice, if it was made in good faith and the municipality has not been prejudiced, may be corrected or disregarded (Barrios v. City of New York, 300 AD2d 480 [2nd Dept. 2002]). The mistake in stating that the incident occurred on September 20, 2007 instead of September 27, 2007 was an inconsequential typographical error, will not result in surprise or prejudice to the DOE and may be disregarded. The DOE was apprised of the correct date of the incident in plaintiff's 50-h hearing and her complaint. Moreover, the notice of claim was served within 90 days of the alleged incident and the action was commenced within the one year and 90-day statute of limitations governing actions against a municipality or municipal entity (see General Municipal Law §50-i). Indeed, the DOE does not contend that it has suffered any prejudice. Accordingly, the notice of claim heretofore served is deemed amended to reflect the correct date of the incident as September 27, 2007. Alternatively, the typographical error of the date may be ignored.

Counsel for the DOE also contends that plaintiff's cause of action for negligent security must be dismissed because the school's security policy and procedures constitutes a governmental function involving policymaking, for which defendants cannot be held liable absent a special relationship with plaintiff. Since there is no evidence of a special relationship between plaintiff and defendants, argues counsel, no liability attaches to defendants.

Providing security to public school students is not a proprietary function but a governmental function involving policymaking, and is therefore a discretionary act rather than a ministerial one (see Bonner v City of New York, 73 NY 2d 930 [1989]; Pope v State, 19 AD 3d 573 [2nd Dept 2005]). A discretionary act of a governmental entity may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). Therefore, plaintiff's cause of action for negligent security, based upon an allegedly inadequate school safety plan, must be dismissed.

Since the provision of school security is a discretionary act for which the DOE cannot be held liable, the concept of special duty does not apply (see McLean v City of New York, supra; see also Dinardo v City of New York, 13 NY 3d 872 [2009], concurring ops of Lippman, J. and Ciparick, J.).

The Court notes that prior to McLean, courts were guided by such cases as Pelaez v Seide (2 NY 23 186 [2004]) and Kovit v Estate of Hallums (4 NY 3d 499 [2005]) which, it was generally thought, articulated the rule that a special relationship between the plaintiff and the municipality or municipal entity was an exception to governmental immunity from liability for the negligent performance of a discretionary act. However, the Court of Appeals, in McLean, for the first time held explicitly that the special duty exception to a municipal entity's immunity for negligence in the performance of a governmental function applies only to ministerial acts, as opposed to discretionary acts. "[D]iscretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is involved" (12 NY 3d at 202). The Court of Appeals further stated that "any contrary inference that may be drawn from the quoted language in Pelaez and Kovit is wrong" (id. at 203).

Therefore, since the adequacy or efficacy of the school's safety plan for protection against intruders involved the discretion and judgment of the DOE, and plaintiff's counsel does not dispute that the school's security measures were discretionary acts for which no liability attaches, plaintiff's cause of action premised upon a theory of negligent security must fail, as a matter of law. Thus, the Court need not, and does not reach or address the issue raised by defendants' counsel as to whether plaintiff

demonstrated the existence of a special relationship between plaintiff and the DOE. Indeed, plaintiff's counsel concedes in his affirmation in opposition that plaintiff does not allege that there was a special relationship and that there is no issue of special relationship in the present matter.

With respect to plaintiff's cause of action for negligent supervision, however, although the DOE's alleged lapses in security do not support a cause of action for negligent security, they are relevant in assessing plaintiff's cause of action for negligent supervision (see Logan v City of New York, 148 AD 2d 167 [1st Dept 1989]).

A school is not an insurer of the safety of its students, but since it stands in loco parentis with its charges, it does have the duty to supervise them adequately and will be held liable if its failure to provide adequate supervision is a substantial factor in causing foreseeable injuries (see Mirand v City of New York, 84 NY 2d 44 [1994]). Since the school's duty is based upon the fact that it stands in place of the students' parents, the standard of care imposed upon a school in this regard is the degree of supervision that a parent of ordinary prudence would give under similar circumstances (see id.).

Moreover, in determining whether the school breached its duty to provide adequate supervision, "it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous condition which caused injury; that is, that the third-party acts could reasonably have been anticipated" (id. at 49). Therefore, in order to establish a prima facie entitlement to summary judgment as a matter of law on the issue of negligent supervision, the DOE, as the proponent of summary judgment, had the initial burden of demonstrating that the alleged sexual assault was not foreseeable (see Nossoughi v Ramapo Cent. School Dist., 287 AD 2d 444 [2nd Dept 2001]; Taylor v Dunkirk City Chool Dist., 12 AD 3d 1114 [4th Dept 2004]; see also Zuckerman v City of New York, 49 NY 2d 557 [1980]). The DOE has failed to meet its burden.

Although the principal of the school, Miranda Pavlou, averred in her affidavit annexed to the moving papers that there have been no reports of sexual assaults at the school for the seven year period prior to September 27, 2007 and the assistant principal, Elaine Maroulis, who had been employed as assistant principal of the subject school since January 1994, testified in her deposition that no incidents "to my knowledge" were reported of any sexual assaults inside the school prior to September 2007, no evidence has been presented that there have been no other violent incidents involving intruders prior to September 27, 2007. A history of assaults upon students in the school by intruders would be sufficient to place the school on notice that lapses in security would pose a foreseeable risk of injury to students by violent

intruders. The exact nature of the injury inflicted upon a student by an intruder is immaterial. Therefore, the DOE, by limiting its evidence solely to whether there were prior sexual assaults as opposed to any other injury-producing assaults by outside individuals, has failed to establish its prima facie burden of showing that the assault upon plaintiff was not foreseeable.

Moreover, although evidence was offered by the DOE concerning its security plan, including access to the school via the back doors, plaintiff proffered evidence that those procedures and protocols were not followed. Plaintiff and two fellow-students, Andrewsca Valdivienzo and Sammuel Godoy, averred in their respective affidavits that students would prop open the rear door of the school to allow ingress and egress by students and non-students alike and that security guards at the front entrance would not check students' identifications, and plaintiff's mother averred in her affidavit that she voiced concern at a parent-teacher meeting that the rear door was kept ajar. Thus, plaintiff's testimony as to the school's security lapses raises a question of fact as to whether the DOE breached its duty to provide adequate supervision (see Doe v Department of Education of City of New York, 54 AD 3d 352 [2nd Dept 2008]).

Accordingly, the motion is granted solely to the extent that the complaint is dismissed in its entirety against the City and plaintiff's cause of action for negligent security is dismissed as against the DOE. In all other respects, the motion is denied.

Dated: January 14, 2011

KEVIN J. KERRIGAN, J.S.C.