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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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SEAN DONNELLY, an infant, by his mother and natural guardian, ANNEMARIE DONNELLY,

Plaintiff(s),

-against-

ST. AGNES CATHEDRAL SCHOOL,

Defendant(s).

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Index No. 5223/09

Motion Submitted: 1/26/12
Motion Sequence: 004, 005

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X

Defendant moves this Court for an Order granting its motion for summary judgment and dismissing the complaint. Plaintiffs cross-move for summary judgment on the issue of liability, and for sanctions for allegedly destroying evidence relevant to the prosecution of this matter, including charging the jury on spoliation of evidence. The parties oppose each other's motions.

Infant plaintiff Donnelly (hereinafter "Donnelly") commenced this action for injuries sustained to his right hand as the result of his hand becoming caught in a fire door located at defendant's school. Donnelly was eleven years old at the time of the accident.

The complaint alleges, in sum and substance, that defendant created a dangerous condition with respect to its self-closing fire door in which plaintiff's hand was caught. Plaintiff also alleges that defendant allowed the dangerous condition to exist for an unreasonable length of time, that defendant was negligent in placing the infant plaintiff in the care of incompetent teachers, agents, servants and/or employees of defendant, and that defendant's agents, servants and/or employees failed to exercise reasonable care and diligence in allowing the plaintiff to be exposed to the hazardous condition (the self-closing door).

Specifically with regard to its negligent supervision claims, plaintiff alleges that suitable supervisors, to whom the students' safety could be entrusted, were not furnished, and that the defendant did not properly control the operation of the school and "the supervision of the students, including the infant plaintiff."

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Although it is possible for a party to obtain summary judgment in a negligence case, "negligence cases by their very nature do not usually lend themselves to summary judgment . . . ." (***Ugarriza v. Schmieder***, 46 N.Y.2d 471, 386 N.E.2d 1324, 414 N.Y.S.2d 304 [1979]).

Also, issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR § 3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); ***Frame v. Markowitz***, 125 A.D.2d 442, 509 N.Y.S.2d 372 (2d Dept., 1986).

Based upon the submissions to this Court on the motion and cross-motion, it is evident that significant issues of fact have been raised, as well as significant issues of credibility.

Whether or not the door constituted a dangerous condition at the time of plaintiff's accident is a significant factual issue that can only be determined by the trier of fact, who will have to consider the credibility of the witnesses regarding whether or not that door, and/or other fire doors were serviced to adjust closing speeds prior to or after the accident. Inherent in that determination is consideration of expert testimony, plaintiffs' observations of the closing speed after the accident, and the testimony of defendant's witnesses denying that such adjustments were made to the door in question.

Also, the deposition testimony of defendant's co-principals and that of plaintiff are at odds with each other as to whether plaintiff ever received instruction regarding the proper manner in which to open the self-closing fire doors. The Court noted the existence of this factual issue long ago, in its Decision and Order dated April 8, 2011:

> The co-principals testified that the instructions to students regarding the proper manner to open the fire doors was administered *verbally*, with demonstration by teachers, at the beginning of the school year and throughout the year thereafter. Apparently, there is no documentation.
>
> Moreover, the fact that the infant plaintiff testified that he never received such instruction gives rise to an issue of credibility that will be determined by the trier of fact . . . .

Not surprisingly, the factual issue continues to exist based upon the submissions presently before the Court. The deposition testimony of the parties has not changed, nor has any new evidence been submitted to resolve this issue.

Moreover, another factual issue continues to exist as to whether or not the self-closing door involved in plaintiff's accident closed more slowly after his accident, indicating that an adjustment was made to the closing mechanism, or that the mechanism was replaced. Defendant's witnesses claim that no such adjustment/replacement was made, but plaintiff and his mother testified at their respective depositions that the door closed noticeably slower after the accident.

> As the Court previously determined in its April 8, 2011 Decision and Order:
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> The fact that infant plaintiff and his mother testified that they observed the door to close much more slowly after the accident, and that a different type of door handle was present on one of the doors does not constitute a sufficient basis for this Court to conclude that documentation exists regarding this issue when there has already been testimony that the documentation does not exist.
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> . . . this issue as to the closing mechanism is ripe for a determination of credibility by the trier of fact . . . .

The deposition testimony submitted by the parties upon the instant motion and cross-motion remains the same, and no further evidence has been submitted to resolve this issue of fact.

Furthermore, the diametrically opposed testimony of the parties on these points raises issues of credibility that can only be resolved by the trier of fact, upon thorough examination/cross-examination of the witnesses. This Court cannot resolve the myriad issues of credibility raised by the testimony in this matter.

Plaintiff's request for sanctions and for a spoliation of evidence jury charge, are denied at this juncture. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to defend [the] action.'" (***Utica Mutual Insurance Company v. Berkoski Oil Company, supra*** at 718, quoting ***Lawson v. Aspen Ford, Inc.***, 15 A.D.3d 628, 629, 791 N.Y.S.2d 119 (2d Dept., 2005), and citing ***Kirschen v. Marino***, 16 A.D.3d 555, 556, 792 N.Y.S.2d 171 [2d Dept., 2005]).

Plaintiff's claim that defendant "either intentionally or negligently, withheld and/or destroyed the records and/or information relating to the changing the closing mechanisms and closing speeds of the fire doors on the second floor (sic)" is purely speculative, and does not warrant a spoliation of evidence charge at this juncture, especially in view of defendant's testimony that no such documentation ever existed.

This particular issue as to documentation, and/or the absence thereof, will undoubtedly be fully explored upon cross-examination of defendant's witnesses at trial. Accordingly, plaintiffs may make a motion for a spoliation of evidence charge before the trial court.

The trial court shall make the determination as to whether Douglas Hilfam, a/k/a Hilfman may testify as an expert on plaintiffs' behalf, after an appropriate voir dire of the witness's qualifications.

Defendant claims that it was not served with expert witness disclosure regarding plaintiff's witness Stanley Fein. Plaintiffs state that the witness disclosure was served upon defendant on October 22, 2009, accompanied by an Affirmation of Service indicating same. In any event, plaintiff served its cross-motion containing Stanley Fein's expert witness disclosure and report upon defendant on December 19, 2011. Accordingly, Stanley Fein shall not be precluded from testifying at trial based on defendant's claim that it was never served with the expert witness disclosure. Any other objections to Mr. Fein's qualifications and/or testimony are properly brought before the trial court.

The parties' respective motions for summary judgment are denied, and any relief not specifically addressed herein is denied.

The foregoing constitutes the Order of this Court.

Dated: March 26, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.