

Whitaker v St. Paul Parish Elementary Sch.
2013 NY Slip Op 30044(U)
January 8, 2013
Sup Ct, NY County
Docket Number: 100899/08
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

CLARENCE BRANDON WHITAKER, an infant
by his mother and natural guardian,
SHEVONNE CARREGA, and SHEVONNE CARREGA,
individually,
Plaintiffs,

- v -

ST. PAUL PARISH ELEMENTARY SCHOOL
and THE ARCHDIOCESE OF NEW YORK,
Defendants.

Index No.: 100899/08

Motion Date: 10/02/12

Motion Seq. No.: 003

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

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

PAPERS NUMBERED	
_____	1
_____	2
_____	3

FILED

JAN 14 2013

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

In this action for personal injury, the Plaintiffs St. Paul Parish Elementary School (the School) and the Archdiocese of New York (the Archdiocese) move for summary judgment in their favor, pursuant to CPLR 3212, dismissing the complaint in its entirety. Clarence Brandon Whitaker (the Child), an infant by his mother and natural Guardian, Shevonne Carrega (the Mother), and Shevonne Carrega, individually, oppose.

The Child, born on October 23, 1991, was an eighth-grade student at the School, located at 114 East 118th Street, New York County, allegedly owned and/or operated by the Archdiocese. On January 21, 2005, at about 2:00 pm, he fell down an interior

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

staircase in the School, fracturing his right fibula and injuring his right ankle. Plaintiffs commenced the instant action on January 22, 2008, asserting causes of action for negligence on behalf of the Child, and loss of services and for medical expenses incurred by the Mother for her son's injuries.

The Child was a student at the School for seven years at the time of the accident of January 21, 2005. The School conducted an "accelerated reading program," which allowed fifth through eighth grade students to go to the library on the first floor, in unescorted groups of two or three, to choose a book to read, on which they were later tested.

In his deposition held on July 14, 2010, the Child stated that, on the day of the accident, he and two friends left their classroom on the School's top floor (either the fourth or fifth), to go to the library. He was carrying a book to return to the library. These trips to the library might be made at any time through the school day, with permission of the classroom teacher. The Child said that he had gone back and forth to the library before, but could not recall how often.

The Child testified that he could not recall where on the staircase the accident occurred, that is, between what floors, but he stated that it happened at the top of a flight of stairs, on the way down, and that he was on the first step, moving to the second, when he fell. He could not recall whether the staircase

had a handrail, even after observing handrails in the photographs taken sometime after the event. He said that one friend was next to him and the other immediately behind, as they went down the steps.

The Child was unable to explain how or why he fell. He testified that he did not slip, or trip over anything. He said that his feet did not get caught in anything, and he was not pushed. He speculated that there might have been a crack in the stairs, but had no information to that effect, and was unable to identify the hazard in the photographs.

The verified bill of particulars charged that "the cement stairs were defective in that there (*sic*) were chipped, not level, and worn out." It asserted that "plaintiff fell down the top steps from the third floor in the back staircase of the school." A contributing factor to the accident was that "Defendants neglected to provide adequate and proper supervision to infant plaintiff." A supplemental verified bill of particulars added that defendants

"violated any and all sections of the Building Code of the City and State of New York concerning the safe and proper maintenance of a buildings (*sic*), and any and all other applicable rules, laws, regulations, and statutes in such cases made and provided, concerning the safe and proper maintenance of a schools (*sic*), adequate supervising [of] the students in their charge, . . . [and] hiring of the defendants agents, servants, employees and/or licensees at the defendants school"

In a second supplemental verified bill of particulars,

plaintiffs specified alleged violations of New York City Administrative Code §§ 27-127, 27-128 and 28-301.1.

Agnes Sayaman (Sayaman), who was the School's principal at the time of the accident, was deposed on May 9, 2011. She said that she had no memory of the accident. Shown photographs of two staircases, the same photographs shown the Child at his deposition, Sayaman was generally able to identify them as within the School. She recognized one or more, but not all, of the photographs as showing the staircase on the Park Avenue side of the School, between the first and second floors. Sayaman could not recall receiving or hearing of "any complaints about the condition of the steps within the school." She said that the pastor of the adjoining church was responsible for the condition of the stairs; he would ask the custodian or a contractor to make necessary repairs. Sayaman knew of no contractors doing work on the stairs during the year prior to the accident. She was not aware of any cracks in any of the steps.

Father Claudio Stewart (Father Stewart), pastor of the Roman Catholic Church of St. Paul, at 113 East 117th Street, New York County, which is back-to-back with the School, submits an affidavit in support of the motion. He states that he is "responsible for the general administration of St. Paul Parish Elementary School," and was so at the time of the accident. Father Stewart says that he walks the corridors and staircases of

the School daily, and "never saw any cracks or defects on the subject steps." Additionally, he claims that the Archdiocese "did not own, manage, control, or operate St. Paul Parish Elementary School on January 21, 2005 . . . [nor] manage, control, supervise, train, retain or employ any staff or faculty" of the School at that time. This disclaimer is repeated in an affidavit from Sister Eileen Clifford, vice chancellor of the Archdiocese, submitted in support of the motion.

Denise Bekaert (Bekaert), a licensed architect, states that, in view of the testimony of the Child and Sayaman, the School's principal, "the subject stairs being free from debris and tripping hazards, and being safe . . . [they] complied with § 27-127 and § 27-128" of the New York City building code. Bekaert pointed out and is correct that the New York City Administrative Code § 28-301.1, pertaining to an owner's responsibilities for maintaining a building in a safe and code-compliant manner, became effective on July 1, 2008, more than 29 months after the accident. She avers that her examination of the photographs "do not reveal a defective condition in the area where Whitaker claims to have been before his claimed fall began."

Donald Weber (Weber), a former district superintendent in the New York City Department of Education, submits an affidavit in support of the motion. Weber bases his opinions on his experience personally supervising students and "ensuring that our

schools and staff had in place proper plans for supervising children at all times during the school day." He states that the School "acted reasonably in its procedure for traveling to and from the school library in connection with its accelerated reading program." Weber believes that the accident was "a spontaneous incident . . . impossible to predict or prevent," even if additional school personnel were present.

In opposition, plaintiffs argue that, at the very least, the instant motion is premature because they "should be afforded the opportunity to depose movant and the other defendants, who may have additional information concerning the identity of the entity which created the hole that caused the infant plaintiff's injuries." However, the court notes that plaintiffs' counsel filed a note of issue and certificate of readiness affirming that discovery was complete on or about August 29, 2011. Plaintiffs' counsel also argue that Weber's affidavit constitutes impermissible hearsay, and that there is no foundation for Bekaert's opinion as she did not visit the premises. He contends that Sayaman's inability to recall any prior complaints about the condition of the stairs does not prove that there were no such complaints.

However, the court observes that four-and-a-half years after this action commenced and seven-and-a-half years after the accident, plaintiffs have come forward with not one scintilla of

evidence that raises an issue of fact as to the assertions in the affidavits of Bakaert, Weber or Sayaman, i.e. that support their position. Plaintiffs certified that discovery was complete without seeking to identify and obtain the testimony of the other youths who were with the Child as he ascended the staircase and who would have been eyewitnesses to the accident. The Child, who is the only witness produced, was unable to provide details about the events. Apart from the Child's testimony, there is no evidence of "chipped, not level, and worn out" cement stairs. Moreover, there is absolutely no evidence of the duration of such a condition, viva voce, photographic or otherwise. Though the Child stated that "there was like a crack in the steps that caught my foot and I lost - like I lost balance when I was going doing the steps", he was unable to point to the crack in a photograph of the presumptive location, and answered, "I can't see." The case at bar is distinguishable from the facts of Durante v Kenmore-Tonawanda Free School District, 2 AD3d 1441 (3d Dept 2003), where in opposition to the school's motion for summary judgment, the plaintiffs came forward with photographs that showed a height differential between the risers in the staircase, thus raising an issue of fact of whether such differential constituted a defective condition created by the school, or for which the school had enough time to remedy such defect.

"[A] defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury." Siegel v City of New York, 86 AD3d 452, 454 (1st Dept 2011). Furthermore, plaintiffs "still must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment." Kane v Estia Greek Rest., 4 AD3d 189, 190 (1st Dept 2004). Therefore, summary judgment shall be granted in favor of defendants here.

Accordingly, it is

ORDERED that defendants St. Paul Parish Elementary School and the Archdiocese of New York's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety is granted, without costs and disbursements being levied against plaintiffs, and it is further;

ORDERED that the Clerk is directed to enter judgment.

This is the decision and order of the court.

Dated: January 8, 2013

FILED ENTER:
 JAN 14 2013
 NEW YORK COUNTY CLERK'S OFFICE
 DEBRA A. JAMES J.S.C.