

**Deinzer v Middle Country Pub. Lib.**

2013 NY Slip Op 33823(U)

September 17, 2013

Supreme Court, Suffolk County

Docket Number: 11-23609

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 47 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 10-16-12 (#001)  
MOTION DATE 10-24-12 (#002)  
ADJ. DATE 6-12-13  
Mot. Seq. # 001 - MD  
# 002 - MD

-----X  
MARIE DEINZER, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 MIDDLE COUNTRY PUBLIC LIBRARY, :  
 MIDDLE COUNTRY CENTRAL SCHOOL :  
 DISTRICT #11, BOARD OF EDUCATION OF :  
 THE MIDDLE COUNTRY CENTRAL SCHOOL :  
 DISTRICT and BOARD OF EDUCATION OF :  
 UNION FREE SCHOOL DISTRICT # 11, :  
 :  
 Defendants. :  
-----X

THE BONGIORNO LAW FIRM, LLC  
Attorney for Plaintiff  
250 Mineola Boulevard  
Mineola, New York 11501  
  
HAMMIL, O'BRIEN, CROUTIER, et al.  
Attorney for Defendants Middle Country Public  
Library & Middle Country CSD #11  
6851 Jericho Turnpike, Suite 250, P.O. Box 1306  
Syosset, New York 11791  
  
CONGDON, FLAHERTY, O'CALLAHAN, et al.  
Attorney for Defendants Board of Ed or Middle  
Country CSD & Board of Ed of UFSD #11  
333 Earle Ovington Boulevard, Suite 502  
Uniondale, New York 11553-3625

Upon the following papers numbered 1 to 41 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11, 12 - 21; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 22 - 27, 32 - 39; Replying Affidavits and supporting papers 28 - 29, 30 - 31, 40 - 41; Other memorandum of law 3; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the Court, sua sponte, hereby recalls and vacates its prior order dated August 19, 2013; and it is further

**ORDERED** that the Court now issues the following order in its place and stead:

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that this motion by the defendants Middle Country Public Library and Middle Country Central School District # 11 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is denied, and it is further

**ORDERED** that this motion by the defendant Board of Education of the Middle Country Central School District sued herein as Board of Education of the Middle Country Central School District and Board of Education of Union Free School District # 11 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it, and granting it judgment over against its codefendants, is denied as academic.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on July 20, 2010 at approximately 1:30 p.m. when she was assaulted by an unidentified teenager while attempting to enter her local library. The plaintiff alleges that the defendants Middle Country Public Library (Library) and Middle Country Central School District # 11 (School District) (collectively the Defendants) and the defendant Board of Education of the Middle Country Central School District (BOE) created a dangerous condition through their negligence in failing to provide adequate security on the library premises. It is undisputed that the Library operates two libraries within the subject school district, and that this incident occurred at the library located at 101 Eastwood Boulevard, Centereach, New York (the premises or library).

It is also undisputed that BOE is the owner of the premises, and that the Library is in possession of the library building pursuant to a written lease dated January 1, 2000. The record reveals that the aforementioned lease was executed by BOE as the governing body of the School District, the owner of the property. Education Law § 1804 provides that every central school district shall be managed by a board of education with the power to sell or otherwise dispose of the property of such district with the approval of a majority of the qualified voters of the district. "A board of education is the governing body charged with the general control, management and responsibility of the schools of a union free school district, central school district, central high school district or of a city school district" (*Matter of Widger v Board of Educ. of Cent. School Dist. No. 1, Town of Ellicottville*, 35 Misc 2d 529, 230 NYS2d 973 [Sup Ct, Cattaraugus County 1962]; *Matter of Locust Val. Lib. v Board of Educ. of Cent. School Dist. No. 3 of Town of Oyster Bay*, 54 Misc 2d 315, 282 NYS2d 376 [Sup Ct, Nassau County 1967]). In effect, the allegations against BOE are essentially made against the School District, and BOE is not a necessary party to this action.

In recognition of this fact, the parties executed a stipulation of discontinuance dated March 13, 2013 in favor of BOE only, which was filed on May 17, 2013. Thus, BOE's motion for summary judgment is academic, as is that branch of the Defendants' motion which seeks to dismiss all cross claims against it. The result is that the Defendants have chosen a united defense of the plaintiff's action.

The Defendants now move for summary judgment dismissing the complaint and all cross claims against them on the grounds that the plaintiff's injuries are the result of an unforeseeable criminal incident and that their alleged negligence was not a proximate cause of those injuries. In support of their motion, the Defendants submit, among other things, the pleadings, and the transcripts of the plaintiff's testimony at a municipal hearing and her deposition in this action.

The plaintiff testified at a 50-h municipal hearing on December 28, 2010, and she was deposed on August 10, 2012. Her testimony was essentially the same at both proceedings and can be summarized as follows: She drove to the library on July 20, 2010 intending to pick up a book that she

had reserved, and arrived at approximately 1:00 p.m. She stated that she visited the library at least once a week, and that she had been a patron of the library for more than 15 years. On the day of this incident she parked her car, and proceeded to walk towards the main entrance to the building. She noticed a young man in his late teens sitting on a bench located near the entrance. When she was approximately 10 feet from the entrance doors she felt a force yanking her purse from her arm, and the assailant then pushed her to the ground. The plaintiff further testified that she had never had any previous trouble at the library, that she had never seen any violent crime take place in the area where she was assaulted, and that she never had reason to believe that there was any violent crime in that area.

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

An owner or possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties (*see Bryan v Crobar*, 65 AD3d 997, 885 NYS2d 122 [2d Dept 2009]). However, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*see Katekis v Naut, Inc.*, 60 AD3d 817, 875 NYS2d 212 [2d Dept 2009]; *Guo Hua Wang v Lang*, 47 AD3d 766, 849 NYS2d 654 [2d Dept 2008]; *Millan v AMF Bowling Ctrs., Inc.*, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]; *Durham v Beaufort*, 300 AD2d 435, 752 NYS2d 88 [2d Dept 2002]). The owner or possessor of real property cannot be held to a duty to take protective measures unless it is shown that the owner or possessor knew or should have known from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of those lawfully on the premises (*see Guo Hua Wang v Lang, supra*; *Mohmand v Shorestein Realty Inv. Two, LP*, 307 AD2d 918, 762 NYS2d 900 [2d Dept 2003]; *see also Bryan v Crobar, supra*).

The Defendants failed to establish their *prima facie* entitlement to judgment as a matter of law by showing that the assault of the plaintiff, by an unknown assailant, was unexpected and unforeseeable. Whether a certain criminal activity in an area is reasonably foreseeable and that there is a risk of harm depends on a variety of factors, including the location, nature and extent of any previous criminal activities and their similarity, proximity or other relationship to the crime in question (*see Jacqueline S. v City of New York*, 81 NY2d 288, 598 NYS2d 160 [1993]; *Johnson v City of New York*, 7 AD3d 577, 578, 777 NYS2d 135 [2d Dept 2004], quoting *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153, 694 NYS2d 445 [2d Dept 1999]; *Ishmail v ATM Three, LLC*, 77 AD3d 790, 909 NYS2d 540 [2d Dept 2010]). The defendants have not submitted any evidence regarding the prior history of criminal activity in the area of this incident, if any. A defendant moving for summary judgment cannot satisfy its initial burden of establishing its entitlement thereto merely by pointing to gaps in the plaintiff's case

Deinzer v Middle Country Public Library

Index No. 11-23609

Page 4

(*Coastal Sheet Metal Corp. v Martin Assoc., Inc.*, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; see also *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]; *Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 931 NYS2d 116 [2d Dept 2011]; *Shafi v Motta*, 73 AD3d 729, 900 NYS2d 410 [2d Dept 2010]; *Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 838 NYS2d 639 [2d Dept 2007]). Accordingly, the Defendants' motion for summary judgment dismissing the complaint and all cross claims against them is denied.

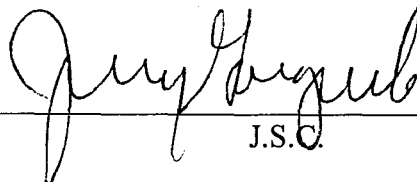
In any event, in her opposition to the Defendants' motion, the plaintiff submits two incident reports created by employees of the Library regarding incidents of purse snatching prior to the date of this incident. Thus, the plaintiff has established that there are issues of fact whether this criminal activity was foreseeable and whether the security measures taken by the Defendants were reasonable under the circumstances.

In addition to the aforementioned incident reports, the plaintiff submits, among other things, the affidavit and supplemental affidavit of the president of a security management consulting company, and the depositions of two employees of the Library. Based on her opposition to the motion, the plaintiff requests that the Court search the record pursuant to CPLR 3212 (b) and grant her summary judgment "on the issue of liability."

A review of the record reveals that there remain issues of fact whether this criminal activity was foreseeable, and whether the security measures taken by the Library or the School District were reasonable under the circumstances.

Dated:

Sept. 17, 2013

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION