Morales v City of New York
2014 NY Slip Op 31089(U)
March 20, 2014
Sup Ct, Bronx County
Docket Number: 350785/08
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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Alexus Morales , *minor by her m/n/g*
Mildred Rivera and Mildred Rivera, *individually*

Index No.: 350785/08

Plaintiffs

DECISION/ORDER

-against-

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

Defendant

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The following papers numbered 1 to 3 read on this motion by defendants for an order dismissing the complaint against the City of New York and for summary judgment dismissing the complaint against the co-defendant

PAPERS	NUMBERED	
Notice of Motion /Affirmation and Affidavits in Support - Exhs. A-K	1	
Affirmation in Opposition - Exhs, A,B	2	
Affirmation in Reply	3	

Upon the foregoing papers, the motion is decided as set forth below.

Facts and Procedural Background

The infant plaintiff[1] seeks damages for injuries alleged to have been sustained on January 4, 2008, when she fell at the entrance to the gymnasium of her public school. At the time of the incident , plaintiff was fourteen years old.

Notice of Claim

By notice dated January 11, 2008, the City was advised that plaintiff would be seeking to recover damages for personal injury by reason of the negligence and/or intentional

[1] The infant's mother and natural guardian has interposed a derivative action . All references , unless otherwise indicated, are to Alexus Morales.

conduct of the defendants in permitting other students to "strike, hit, grab, and /or assault" plaintiff , and to push her near the location of the girl's entrance to the school's second-floor gymnasium , and during the course of the "assault", causing her to slip and fall on spilled milk on the floor.

On May 5, 2008, Alexus Morales and Mildred Rivera testified at a hearing .

This action was commenced in December 2008, and issue was joined in the following month.

The Note of Issue was filed on December 27, 2012.

Motion and Contentions of the Parties

Defendants moves for an order pursuant to CPLR 3211 (a)(7) dismissing the complaint as against the City of New York , and/or an award of summary judgment in favor of The New York City Department of Education·("Department of Education").

The first branch of the motion seeks dismissal because the City is a legal entity separate from the Board of Education, and cannot be held liable for torts committed by the Board (see, Perez v City of New York, 41 AD3d 378, 379, 837 N.Y.S.2d 571 [1st Dept 2007], *lv denied* 10 NY3d 708, 889 N.E.2d 80, 859 N.Y.S.2d 393 [2008]).

In the second branch of the motion seeking dispositive relief, defendants argue that as a matter of law, the Department of Education is not liable to plaintiffs as it did not breach its duty to adequately supervise students in its charge. Alternatively, defendant argues that

its actions were not the proximate cause of this sudden and spontaneous accident, and with respect to the transitory causative defect, contend that as a matter of law, the Department had no actual or constructive notice of the existence of the dangerous condition prior to the incident.

The motion is supported by the pleadings, as well as Mildred Rivera's hearing testimony, and the deposition testimony of Jose Mercado, an employee of the Department of Education charged with supervision of the school's maintenance personnel, as well as that of Teresita Cumayao, the school's nurse.

In **opposition,** plaintiffs contend that there are unresolved issue of material fact precluding dispositive relief, including whether plaintiff and her classmates were permitted to congregate for an extended period of time outside the closed gymnasium doors without the supervision of any school employees . Plaintiff's hearing testimony is submitted in support of this contention, as is the report of John H. Holloway, ED.D., an educational consultant , who was licensed in New Jersey as a teacher, principal and school administrator.

Discussion and Conclusions

The first branch of defendants' motion, to which plaintiffs submit no opposition, is granted and the complaint as asserted against the City of New York is dismissed (see, Antonetti v. City of New York, 111 A.D.3d 558, 976 N.Y.S.2d 42 [1st Dept. 2013]).

The causative negligence asserted here is two-fold, the school's lack of adequate supervision, and that grounded in the breach of the duty to maintain the school premises in a reasonably safe condition by permitting to remain on the floor of the hallway, a transitory dangerous condition of which defendant had prior knowledge.

Negligent Supervision

It is the finding of this court that defendant has failed to demonstrate as a matter of law that at the time of the incident, defendant was providing adequate supervision to the eighth graders gathered in the hallway waiting for the gym doors to open.

Jose Mercado, who as the school fireman made daily inspections at the start of the school day and after each period, testified that about twice a week, more than thirty students would get on line in front of the gym until it was opened, and there was always a teacher present [MERCADO EBT: 25-26;31-32], and as there were two entrances to the gym,

"the boy's side and one to the girl's side, and it would be more than - - that's why I'm saying it would be more than one ." [Id. 32:16-19].

Even were this testimony sufficient to demonstrate as a matter of law an adequate degree of supervision of the students, it is submitted that plaintiff's testimony raises material issues of fact as to whether the supervision "always" observed by Mercado, was present on the afternoon of the incident.

In pertinent part, **plaintiff** testified that at the time of the incident, no teachers, or security guards , or "any grownups" were anywhere nearby [MORALES HRG. 6-7]. Two male students, who had been in a group of five boys and approximately five to six girls , who she had observed dancing , pushed into her , and she began to fall, and then she slipped on milk that was on the floor of the hallway, about ten feet from the gym [Id. 8-9]. She described the "puddle" of milk as measuring around three to four feet [Id. 12-13]. She remained on the floor of the hallway for a period of around five minutes while students were "banging on the door so the [gym teacher] would open the gym door ." [Id. 18: 6-12]. Two other students "pulled" plaintiff into the gym after it was opened, and the gym teacher called the school nurse [Id. 20-21].

Plaintiff's description , as afforded all favorable inferences, raises material issues of fact as to whether there was any, much less, sufficient student supervision at the time and location of the accident.

In light of the unresolved issues of the extent of supervision, the court cannot make a dispostive finding that this incident was a "spontaneous and unforeseeable" collision no amount of supervision could have averted (see, Mirand v. City of New York , 84 NY2d 44,49, 637 NE2d 263 [1994]). It is to noted that the accident occurred in a non-recreational context (compare, Lizardo v. Board of Education of the City of New York, 77 A.D.3d 437 , 908 N.Y.S. 2d 395 [1st Dept. 2010]), and it is for the trier of fact to determine whether under

circumstances, to the extent plaintiff's testimony is deemed credible , contact between students would be unforeseeable if one- third of the estimated group was engaged in dancing.

Alleged Dangerous Condition

In support of its defense that defendant had no constructive notice of the milk puddle , the Department of Education relies on the deposition testimony of Mr. Mercado concerning the building's regular inspection schedule, and remedial response. However, defendant offered no evidence that the schedule was followed on the day of the accident (see Williams v New York City Hous. Auth., 99 AD3d 613, 952 N.Y.S.2d 554 [1st Dept 2012]), nor does defendant conclusively demonstrate when the hallway floor was last inspected before plaintiff's accident (see, Aviles v 2333 1st Corp., 66 AD3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]). It is settled that defendant's proof that a schedule existed does not suffice for purposes of showing that it was followed immediately before the incident.

For the reasons above-stated, the motion is granted to the extent of dismissing the complaint as asserted against the City of New York , and is otherwise, denied.

This constitutes the decision and order of this court.

Dated: March 20, 2014

Howard H. Sherman