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SHORT FORM ORDER

INDEX No. 10-40399
CAL. No. 13-00643OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

***PRESENT:***

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MD

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| JERMELL DIXON,<br><br>Plaintiff,<br><br>- against -<br><br>WILLIAM FLOYD UNION FREE SCHOOL DISTRICT,<br><br>Defendant. | KENNETH M. MOLLINS, P.C.<br>Attorney for Plaintiff<br>425 Broadhollow Road, Suite 215<br>Melville, New York 11747<br><br>CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, ESQS.<br>Attorney for Defendant<br>333 Earle Ovington Boulevard, Suite 502<br>Uniondale, New York 11553 |

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 -16 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendant William Floyd Union Free School District seeking summary judgment dismissing the complaint is denied.

Plaintiff Jermell Dixon commenced this action to recover damages for injuries he allegedly sustained during a physical altercation that occurred at William Floyd High School on March 2, 2010. It is alleged that plaintiff, a 19-year-old twelfth grade student at William Floyd High School, was chased and physically assaulted in the south lobby of the school by three family members of another student, Summer Wright. Just prior to the assault upon plaintiff, the Wright family members entered the school's premises to take Summer Wright home due to her suspension for her involvement in an incident with another student, plaintiff's cousin, Taquina Dixon. William Floyd High School is operated by defendant William Floyd Union Free School District.

Defendant now moves for summary judgment on the basis that the level of supervision provided at the time of the incident was not the proximate cause of plaintiff's alleged injuries, and that the attack

on plaintiff was spontaneous and unanticipated and could not have been prevented by the most intense supervision. In particular, defendant contends that, under the circumstances, the supervision that was provided was adequate, that the assault was stopped immediately, and that the sudden and unexpected acts of the Wright family members were the proximate cause of plaintiff's injuries. Defendant further contends that there are no viable claims against it for inadequate security and sexual orientation discrimination, because it did not have a special duty to plaintiff and there is no evidence of a callous disregard for plaintiff's safety and well-being due to his sexual orientation. In support of the motion, defendant submits the pleadings, excerpts of plaintiff's 50-h hearing and deposition transcripts, excerpts of the deposition transcripts of Brian O'Hagan and non-party witness James Kiernan, and the affidavit of Joseph Rogozinski. In addition, defendant submits a compact disc of the video surveillance from William Floyd High School from the day of the incident and a photocopy of the layout of the first floor of William Floyd High School.

Plaintiff opposes the motion on the ground that defendant failed to demonstrate the assault upon plaintiff was unforeseeable, because the school security and the principal were on notice of a prior altercation that occurred between plaintiff and Summer Wright on February 25, 2010. Plaintiff further asserts that defendant's knowledge of its deficiencies in security procedures regarding the control of visitors entering the school raises triable issues of fact and whether such deficiencies were a proximate cause of plaintiff's injuries. In opposition to the motion, plaintiff relies on the evidence submitted by defendant on its motion for summary judgment. In addition, plaintiff submits the security report of James Kiernan, Director of School Safety, dated November 13, 2009. Since plaintiff's failed to oppose defendant's arguments that there are no viable claims against it for inadequate security and sexual orientation discrimination, the two causes of action alleging such claims hereby are dismissed.

A court's task on a motion for summary judgment is issue finding rather than issue determination (see Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395), and it must view the evidence in the light most favorable to the party opposing the motion (see Boyce v Vazquez, 249 AD2d 724). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see Roth v Barreto, 289 AD2d 557]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see Zuckerman v City of New York, 49 NY2d 557; Perez v Grace Episcopal Church, 6 AD3d 596).

It is axiomatic that schools have a duty to adequately supervise their students, and "will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (Mirand v City of New York, 84 NY2d 44, 49, citing Lawes v Board of Educ. Of City of New York, 16 NY2d 302, 306; see Brandy B. v Eden Cent. School Dist., 15 NY3d 297; Decker v Dundee Cent. School Dist., 4 NY2d 462). Concomitantly, schools are required to exercise such care of their students as a parent of ordinary prudence under similar circumstances (Pratt v Robinson, 39 NY2d 554, 560). Nevertheless, schools are not insurers of safety, because they cannot reasonably be expected to continuously supervise and control all the movements and the activities of their students (see Mirand v City of New York, supra; Paragas v

Comsewogue Union Free School Dist., 65 AD3d 1111). Therefore, schools will not be held liable "for every thoughtless or careless act by which one pupil may injure another" (Lawes v Board of Educ. of City of NY, 16 NY2d 302, 306). Furthermore, the unanticipated acts of a fellow student against another student, generally will not give rise to a school's liability absent actual or constructive notice of prior similar conduct (see Mayer v Mahopac Cent. School Dist., 29 AD3d 653). It must be established that the school officials had sufficiently specific knowledge or notice of the dangerous conduct that caused the injury; that is, that the third-party acts could reasonably have been anticipated (see Brandy B. v Eden Cent. School Dist., 15 NY3d 297; Bertola v Board of Educ. of City of N.Y., 1 AD2d 973). Consequently, an injury caused by an impulsive and unanticipated act of a fellow student will not give rise to liability absent proof of prior conduct that would have put a reasonably prudent person on notice to protect against the injury-producing act (see Schleef v Riverhead Cent. School Dist., 80 AD3d 743; Tanenbaum v Minnesauke Elementary School, 73 AD3d 743; Mayer v Mahopac Cent. School Dist., supra).

Furthermore, a plaintiff must demonstrate that the school's negligence was the proximate cause of the injuries sustained (see Derdiarian v Felix Contr. Corp., 51 NY2d 308, 434 NYS2d 166 [1980]). It also must be shown that under all the circumstances, the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence (Parvi v City of Kingston, 41 NY2d 553, 560; see Dunn v State of New York, 29 NY2d 313; Lopez v Freeport Union Free School Dist., 288 AD2d 355; Schlecker v Connetquot Cent. School Dist. of Islip, 150 AD2d 548).

During his 50-h hearing, plaintiff testified that, approximately five days before he was chased through the halls of William Floyd High School and assaulted by Summer Wright's family members, he and Summer Wright had an argument wherein she followed him outside of the school on their way to the school buses calling him a "faggot," and that this particular incident was stopped by school security. Plaintiff explained that he did not report the incident to anyone at school because the disagreement had been halted by school security. Plaintiff testified that following their verbal altercation, he was informed by a fellow student that Summer Wright came up to the school "looking" for him, but he did not see her. Plaintiff testified that on the day of the subject incident he was called down to the principal's office during his fourth period class, around 10:00 a.m., to determine if he was involved in or had any knowledge about the physical altercation that occurred between his cousin, Taquina Dixon, and Summer Wright. Plaintiff testified that he did not have any knowledge about the altercation between the two girls, because he was in class, and that he also was questioned by the principal regarding the verbal altercation that he and Summer Wright had five days earlier. Plaintiff testified that as he was heading back to class, Summer Wright's family was entering the school's building, that her mother called out his name, stating "you want to fight my daughter, you fucking faggot, fight my sons," and that her two sons and daughter immediately began running toward him. Plaintiff testified that the two boys and one girl, who were not students at the school, ran past the security guard that was stationed by the front desk and chased him through the school's hallway, and that he was punched in the left eye at one point during the chase, but managed to escape. Plaintiff testified that after he escaped the two boys and girl continued to chase him down the school's corridors, catching up to him outside of the guidance counselor's office, where they "jumped" on him, punching him all over his body, kicking him in the face, and beating him in his head with a sneaker. Plaintiff further testified that the school's security guards came to his

assistance, restraining the three individuals, although he had been unaware that the school's security guards were a part of the chase until the three individuals were pulled off of him, and that prior to his argument with Summer Wright he did not know her or any members of her family.

Non-party witness Brian O'Hagan testified at an examination before trial that he is employed by defendant, that he is stationed as a security guard at William Floyd High School, and that he was stationed in the Reserve Officers' Training Corps ("ROTC") corridor on the day of the incident involving plaintiff and members of the Wright family. O'Hagan testified that the protocol to be followed when visitors enter the school's premises requires a security guard to greet the guest at the locked east entrance of the school, direct the guest to the security desk to sign in, and, after the guest shows identification and signs in, to direct the guest towards his or her destination. He testified that the incident between plaintiff and the Wright family occurred on the first floor of the high school, that he is unclear as to whether he was signaled over his two-way radio about the incident, and that he became aware of the incident when he observed plaintiff run pass him. He testified that plaintiff did not say anything to him as he ran past, that he told plaintiff to slow down, but when he noticed other security guards running behind plaintiff and the Wright family, he also joined in the chase through the school's corridors. He testified that when he entered the south lobby of the school he saw a man on top of plaintiff with his arms "flaying," hitting plaintiff in the head, but he did not see a girl kicking plaintiff. O'Hagan further testified that the assault lasted approximately three to four seconds, that he does not know whether any of the security guards from the desks or office initially did anything affirmatively to prevent the assault from occurring, and that he was unaware of the incident which occurred a few days earlier between plaintiff and Summer Wright.

Non-party witness James Kiernan testified at an examination before trial that at the time of the incident at issue he was a certified police instructor, that he trained the security guards at William Floyd High School, and that he does not have personal knowledge of the incident that occurred between plaintiff and members of the Wright family. Kiernan testified that there are approximately 23 guards assigned to the high school, and that the placement of the security guards throughout the school was determined by the principal and the assistant principal. He further testified that it was school protocol for a suspended student's family to enter the school through the east entrance of the school to pick up the student and that it appears that the protocol was followed in this instance.

Based upon the adduced evidence, defendant has failed to meet its prima facie burden that it did not breach its duty of supervision or that the level of supervision was not a proximate cause of plaintiff's injuries (see Oliverio v Lawrence Public Schools, 23 AD3d 633; Douglas v John Hus Moravian Church of Brooklyn, 8 AD3d 327; Johnson v City of New York, 309 AD2d 671; cf. Schlecker v Connetquot Cent. School Dist. of Islip, supra). Defendant, in support of its motion, submitted only excerpts of all the interested parties' deposition transcripts, making it difficult for the Court to piece together the timeline of the events that occurred prior to the incident between plaintiff and the Wright family members, and raising more issues of fact than are eliminated. In any event, the evidence submitted showed that the entire Wright family was able to get past security personnel stationed throughout the school and chase plaintiff through several corridors before assaulting him, thereby, raising a triable issue as to whether the school's security personnel was presented with a potentially dangerous situation and failed to take timely steps to address such danger (see Lawes v Board

of Educ. Of City of New York, supra; Luciano v Our Lady of Sorrows School, 79 AD3d 705; Hofmann v Coxsackie-Athens Cent. School Dist., 70 AD3d 1116). Contrary to defendant's contentions, it cannot be said as a matter of law that the attack on plaintiff was an unanticipated and unforeseeable act (see Siller v Mahopac Cent. School Dist., 18 AD3d 532). Under the circumstances presented, including the prior incident between plaintiff and Summer Wright and the physical altercation between plaintiff's cousin and Summer Wright, triable issues of fact exist as to whether defendant had sufficiently specific knowledge of the dangerous conduct that led to plaintiff's injury (see Smith v Poughkeepsie City School Dist., 41 AD3d 579, Hernandez v City of New York, 24 AD3d 723).

Having determined that defendant failed to make a prima facie showing entitling it to judgment as a matter of law, it is unnecessary to determine the sufficiency of plaintiff's papers in opposition to the motion (see McArthur v Muhammad, 27 AD3d 552). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: April 22, 2014

**HON. JOSEPH C. PASTORESSA, J.S.C.**

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**