Jones v Score! Educ. Ctrs.
2015 NY Slip Op 32104(U)
March 27, 2015
Supreme Court, New York County
Docket Number: 116832/2008
Judge: Eileen A. Rakower

[* 1]

FA 3/31/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER** PART 15

Justice

Jones

-v-

Score!

INDEX NO. 116832/2008

MOTION DATE

MOTION SEQ. NO. 2

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2

Answering Affidavits — Exhibits ____ | No(s). 3

Replying Affidavits ____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAR 31 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
MAR 31 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

MAR 27 2015

Dated: 3/27/15

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SIR-WESLYNN JONES, an infant, by his mother and National Guardian, LYNNE BUKSHA, and LYNNE BUKSHA, Individually,

Plaintiffs,

- v -

SCORE! EDUCATIONAL CENTERS,

Defendant.

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Index No. 116832/2008

DECISION and ORDER

Mot. Seq. 002

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs bring this action to recover for personal injuries allegedly sustained to Sir-Weslynn Jones' ("Jones") right hand on May 15, 2008 at the Score! Learning Center, located at 121 West 125 Street, New York, New York, when an allegedly defective bathroom-door damper failed to prevent the door from closing on his right hand. Jones was five years old on the date of the accident. Plaintiffs claim that defendant, Score! Educational Centers ("Score"), negligently maintained the restroom door and its damper, had "notice that said door slammed shut too quickly" and that the door's damper was not working properly, failed to provide adequate supervision to Jones, and negligently hired and trained its employees.

Jones and his mother, Lynne Buksha ("Buksha") were deposed on November 2, 2011. Laura Abrahams ("Abrahams") was deposed on Score's behalf on March 1, 2012. Abrahams was employed by Score on the date of the accident as Score's executive director of human resources.

Score moves for summary judgment. Score annexes: the Complaint, Amended Answer, Defendant's Verified Answer, the Verified Bill of Particulars, deposition transcript of Jones taken on November 2, 2011, deposition transcript of

Lynne Buksha taken on November 2, 2011, deposition transcript of Laura Abrahams dated March 1, 2012, Note of Issue, and photograph of the location where the accident occurred. Plaintiffs oppose. Plaintiffs submit the attorney affirmation of J. Joseph Cronen, which annexes an affidavit of Jones and Buksha.

Score argues that it is entitled to summary judgment because "the plaintiffs merely speculate that an allegedly defective bathroom door caused the infant plaintiff's accident; (2) the plaintiffs' negligent supervision claims lack merit; and (3) Score did not cause or have actual or constructive notice of the allegedly defective bathroom door."

Plaintiffs, in turn, argue that Score's motion should be denied for the following three reasons: "First, undisputed evidence establishes that the infant-plaintiff was injured by a door that was too heavy, slammed shut too quickly, and lacked a regulator for its speed. Second, the defendant had both actual and constructive notice of this condition. Third, the defendant negligently supervised the infant-plaintiff."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"It is well settled 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." *Brandy B. v. Eden Cent. School Dist.*, 15 N.Y. 3d 297, 302 [1st Dept 2010]. "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students." (see *Mirand v. City of New York and Board of Education*, 84 N.Y.2d 44, 49 [1994]). Rather, a school owes the same duty of care and supervision owed by a reasonably prudent parent under the circumstances.

(*Douglas v. John Hus Moravian Church of Brooklyn, Inc.*, 8 A.D.3d 327, 328 [2d Dep't 2004]).

An owner or tenant in possession has a duty to keep the property in a reasonably safe condition. A plaintiff's inability to identify the defective condition that caused plaintiff's injury is fatal to the action because a finding that defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation. "[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 A.D. 3d 452, 454 [1st Dept 2011]. To satisfy the requirement that he or she identify the defective condition, the plaintiff must identify the defect itself; mere identification of the approximate location of the accident is insufficient. *Id.* at 454-455. To establish a defect in design or construction, the plaintiff must adduce evidence that a relevant building code provision or specific, accepted industry standard was violated. *See McKee v. State*, 75 A.D. 3d 893, 894 [3d Dept 2010].

Plaintiffs "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 A.D. 3d 189, 190 [1st Dept 2004]. "Rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment." *Id.* at 190.

"[T]he theory of res ipsa loquitur is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 226 [NY 1986].

"Generally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded." *Lupinksy v. Windham Construction Corp.*, 293 A.D.2d 317, 318 [1st Dept 2002].

Score has the initial burden of showing that it neither created the allegedly

hazardous condition nor had actual or constructive notice of its existence. (*See Bernardo v. P. & J. Edwards*, 667 N.Y.S.2d 851 [3d Dept 1998]). "Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action." (*Boyko v. Limowski*, 636 N.Y.S.2d 901 [1996]).

According to Jones' and Buksha's deposition testimonies, in May 2008, Jones was enrolled at Score for tutoring in math/reading. Jones attended Score in the late afternoon about two times a week. Buksha remained at Score during his her son's tutoring sessions, as was required by Score's policies. Jones had attended Score for about three months or more as of the date of the accident and had used the bathroom before without issue. Jones testified that during a tutoring session on May 15, 2008, the date of the accident, Jones "told [his] tutor [he] was going to use the bathroom" and his tutor accompanied him to the corridor where the bathroom was located. Jones was able to open the bathroom door. As for what transpired after he used the bathroom and upon leaving the bathroom, Jones testified:

Q: Then after you used the bathroom, did you leave or try to leave the bathroom.
A: Yes.
Q: What happened when you tried to leave the bathroom?
A: I couldn't get outside. I was banging on the door and I was yelling for help.
Q: Why couldn't you get out?
A: Because the door was stuck in.
Q: Did you try to turn the handle or turn the doorknob inside?
A: Yes.
Q: On the inside was it a handle or a doorknob?
A: A handle.
Q: Was it a long piece of metal?
A: I don't remember,
Q: I'm going to show you what was marked as Defendant's Exhibit A on this date.
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Q: Does that door look like it did on the day of the accident?
A: Yes.

Q: Do you see the round silver thing on the door?
A: Yes.
Q: Is that the door handle?
A: Yes.
Q: Is that how it looked like on the outside?
A: Yes.
Q: Is that how it looked like on the inside or did it look like the handle in the middle of the picture on the inside of the bathroom?
A: I can't remember.
Q: When you tried to open the door inside of the bathroom, did you use your right hand again to try to open it?
A: Yes.
Q: What did you do with your left hand?
A: I tried to push it and I got a crack in the door and then I tried to get out and the door pushed back on my hand.
Q: Indicating your right hand?
A: Yes?
Q: When you opened the door to get out of the bathroom did you pull it towards you or push it in or something else?
A: Pulled it towards me.
Q: Did you have trouble pulling it open?
A: No.
Q: When you tried to open the bathroom door inside you finally were able to get it open a little bit?
A: Yes.
Q: How far open did it get it?
A: I can't explain. Like a crack.
Q: Did you put your finger in that crack?
A: Yes, I tried to, you know, when I tried the grabbing the thin end of the door.
Q: With your right hand you tried grabbing the door?
A: Yes.
Q: Pulling on it?
A: Pushed it open and then the door fell back on my hand.
***
Q: What happened when the door fell back on your hand?
A: I was screaming.
Q: Do you recall how long that happened for?

A: No.
Q: Did someone get the door open?
A: Yes.
Q: Who got the door open?
A: Mr. Steven Williams.

As Buksha testified at her deposition, Buksha saw her son's tutor take him to the bathroom. Buksha was outside in the hallway while her son was in the bathroom, along with the tutor, the director, and Mr. Williams who were also in the hallway. Buksha did not go into the bathroom with her son, but waited outside in the corridor. After about approximately five minutes, Buksha heard her son screaming from the bathroom. Buksha testified that Mr. Williams "had to pull [the door] towards him [Mr. Williams] by bracing that little door area. I guess he was trying to hold the knob or whatever it is." Buksha saw her son's "whole hand" in the door.

Jones' tutor at the time of the incident and Mr. Williams were not deposed.

Abrahams was employed by Score on the date of the accident as Score's executive director of human resources. Abrahams was never personally at the Score location where the accident occurred. Genny Gomez was the academic manager of the Score location where the accident occurred.

Abrahams testified that All Score centers closed in 2009, including the Score location where Plaintiff's accident allegedly occurred. Abrahams testified that students at Score "used the bathroom either by themselves or with one of their parents or guardians" and Score "employees could not be alone with a student" as per Score's internal policies. Abrahams further testified that on the date of the accident, Score implemented a "60 minute rule" that required Score employees to call Abrahams to notify her "if there was any sort of incident" and that on the date of accident, Abrahams was immediately notified that Jones' "hand was pinched by the door and that the ice pack was provided." Abrahams testified that prior to the incident, she was not aware of any accidents involving the bathroom door, or any kind of repair work done at the Score center.

Jones and Buksha submit affidavits in opposition to Score's motion. Jones avers, "After I used the bathroom I had trouble opening the bathroom door because it was so heavy. I started yelling and knocking on the door. I was finally able to

push the door open a bit, but it slammed on my right hand. The door crushed my hand. It hurt a lot so I screamed. My hand was bleeding and the door was stuck on my hand."

Buksha avers, "Both my son and I were very familiar with this door as we had been coming to this center once or twice a week for a few months before the incident. I always stayed in the center when my son was being tutored. We had both used the bathroom before. The bathroom door was very heavy and would close fast. It did not have a speed regulator which would prevent the door from moving fast and slamming into its frame. As such, this heavy door would always slam closed." Buksha further avers that while she assisted her son by running cold water on his hand, "defendant's supervisor stated that the bathroom door was broken and would slam shut. She used the word 'defective' and said they had been meaning to get the door fixed for a long time."

Here, Score has established entitlement to judgment by establishing that there is no evidence that the subject bathroom door was defective or that Score's negligence caused Jones' injuries. Additionally, it is uncontested that the child was escorted to the rest room. In essence, we have testimony that establishes that a five year old was accompanied by his tutor to the bathroom, that the child used the restroom himself and was the only one operating the door, and that the child's mother was also nearby. The child claims no problem with the door going in, but that in exiting, "the door was stuck in." He was able to open the door enough to slip his hand into the opening and the door shut on his hand.

Plaintiff must prove that the premises were not reasonably safe. A plaintiff's inability to identify the defective condition that caused plaintiff's injury is fatal to the action because a finding that defendant's negligence, if any, proximately caused plaintiff's injuries would be based on speculation. "[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*, 86 A.D. 3d at 454.

In this case, there is no showing by any evidence that a defect exists in the subject door or its parts or that the door was in a dangerous condition. There is no evidence of what the alleged defect was. There is no measure of how heavy or fast the door was and no allegation that it violated any building codes or statutes. There is no claim or evidence the subject door was unbalanced. The door closer

was not identified as defective. There is simply no testimony that identifies a defect of which the Defendant had notice of or a duty to warn about.

Asserted for the first time in opposition to this motion (the deposition was silent as to this point) is Plaintiffs' theory of liability that the door was so heavy it was defective, and the condition existed for a long enough period of time so as to show constructive notice.

However, there is no evidence in the record to quantify or qualify such conclusions. There is no evidence to establish the weight of the door and the speed at which the door closed or what it should be in order to be safe. No inspection was done of the subject bathroom door or the "door damper" and there was no preservation of the same. Additionally, while there is a mention of the photograph of the door, for whatever value it may have, it was not provided in opposition to the motion.

Wherefore, it is hereby,

ORDERED that Defendant's motion for summary judgment is granted, and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: MARCH 27, 2015

EILEEN A. RAKOWER, J.S.C.