Lotter v City of New York
2016 NY Slip Op 30437(U)
February 14, 2016
Supreme Court, Bronx County
Docket Number: 21559/2012
Judge: Mitchell J. Danziger
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 OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------x

GWENDOLYN LOTTER,

Index No.: 21559/2012

Plaintiff(s),

DECISION/ORDER

-against-

Present:
HON. MITCHELL J. DANZIGER

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant(s).

----------x

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment	Papers Numbered
Notice of Motion, Affirmation & Affidavit in Support with Exhibits	1
Affirmation in Opposition.....	2
Reply Affirmation in Support	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for summary judgment dismissing plaintiff's complaint pursuant to CPLR §3212. Plaintiff seeks to recover damages for injuries arising from an incident that occurred on March 5, 2012 at the Assembly Bronx School for Writers and Artists where plaintiff was employed as a teacher. On that date, plaintiff was injured when a student collided into her while the student was running through the hallway during the time of transition between classes. Defendants argue that the complaint must be dismissed entirely because they owed no special duty to plaintiff. Plaintiff opposes the motion and argues that the special duty element should not apply to this case because defendants were made aware of the unsupervised students running in the halls between classes and implemented a plan to curtail it.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to

all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]) . Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Under the public duty rule, a municipality's performance of an governmental function such as prevention of a crime or a provision of security against physical attack cannot give rise to liability unless the plaintiff both pleads and establishes a special duty, beyond a general duty owed to the public at large (*Valdez v. City of New York*, 18 N.Y. 3d 69, 75 [2011]); *Puello v. City of New York*, 118 A.D.3d 492 [1st Dep't., 2014]). Absent a special duty owed to him liability for his injuries may not be imposed on the city for its breach of a duty owed generally to persons in the school system and members of the public. *Vitale v City of New York*, 60 NY2d 861, 863 [1983]

Plaintiff contends that the instant matter is distinguishable from *Valdez, Puello*, and *Vitale* because here, defendants were made aware of the condition numerous times and further made an explicit promise to plaintiff that hallway sweeps would be increased to prevent students from running in the hallways. However the court finds this argument unpersuasive.

Plaintiff appeared at a 50-H hearing, the transcript of which is submitted as exhibit D to defendants' motion (hereinafter referred to as the "transcript"). Plaintiff testified that prior to the accident, she spoke to the principal, David Vasquez, and assistant principals Kelly Von Hoene and Emmanuel Polanco about the behavior of the students on the third floor during the time between classes, or "passing period" (transcript at p. 75). Plaintiff spoke to Vasquez "in passing conversation" two or three times over the course of 2011 and 2012 before and after the holiday break (id. at pp. 76-77). Plaintiff spoke to Van Hoene and Polanco once or twice each in passing within a few weeks of each other (id. at p. 77) and with the dean, Cesar Nunez, three to four times in 2011 and 2012 (id at

p.78). Plaintiff testified that during these conversations none of the administrators indicated any specific action would be taken to remedy the situation (id at p. 86). However, a meeting, attended by the principals and the third floor staff was held as a result of an email sent by plaintiff's colleague regarding students' behavior during the passing periods (id at 90). At the meeting, the staff expressed concerns about the chaotic state of passing periods and a need for help from administration to support proper behavior from the student (id.). Plaintiff testified that in response, the administrators, specifically principal Vasquez and dean Nunez, indicated that they would institute more "hallway sweeps" (id.) Plaintiff understood that to mean that there would be more administrators and teachers present in the hallways to encourage appropriate behavior (id at 82 & p. 90). Upon returning from break, plaintiff admits the hallways sweeps were increased (id. at p. 92) and that more teachers were present in the hallways (id. at 93). However, plaintiff informed Mr. Vasquez, Ms. Van Hoene, Mr. Polanco and Mr. Nunez (each at least one time) that there were still behavioral problems after the December meeting and prior to the incident in March (id. at 93).

Ms. Von Hoene testified that prior to March 2012, the school utilized hallway sweeps to regulate student conduct in the hallways and that there was a standing rule that students were not permitted to run in the hallway (Defendants' Ex. E at pp. 70-71 & p. 77). Ms. Von Hoene also testified that she remembers speaking with plaintiff about student conduct in the hallway but does not specifically recall conversations about students running in the hallway (id at p. 92-93).

Initially, the court notes that plaintiff cites no controlling authority in support of its argument that this is a case where a special duty need not be proven because the school was on notice of the of the situation. Plaintiff relies upon *Morgan-Word v. New York City Dept. of Educ.*, 96 A.D.3d 1025 (2d Dep't., 2012) to support this argument. However, in that case, defendants were denied summary judgment because an issue of fact remained as to whether they assumed a special duty to the plaintiff. In other words, the special duty requirement was applied there, as it will be applied here.

In order to prove that a special relationship exists through the voluntary assumption of a duty plaintiff must show: (1) an assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent that inaction would lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the

municipalities affirmative undertaking (*Cuffy v. City of New York*, 69 N.Y. 2d 255, 260 [1987]).

Based on the record, the court finds that plaintiff has failed to establish the first element in that plaintiff has failed to show defendants assumed a duty to act on her behalf. While hallway sweeps were increased after the staff meeting (a fact plaintiff admits) the purpose was not to protect the plaintiff from running students. Instead, the record shows the increase was to ensure students were in class on time and not socializing in the hallways (transcript at p. 90). The increased hallway sweeps were not an affirmative duty assumed by the defendants to act on behalf the of the plaintiff. Further, even if there was some affirmative undertaking by the defendant, plaintiff has failed to establish that her action of walking in the hallway was taken in reliance thereon. Plaintiff testified that she was struck by a running student as she was exiting a restroom during a passing period (transcript at pp. 32-33). Plaintiff does not even allege that her venture into the hallway was based upon any duty defendants purportedly assumed on her behalf.

Based upon the foregoing, plaintiff has failed to establish defendant owed her a special duty and defendants' motion for summary judgment is granted and it is hereby:

ORDERED, that plaintiff's complaint is dismissed in its entirety, and it is further

ORDERED, that Defendants serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days of the entry date.

Dated: 2/4/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.