Posada v City of New York
2016 NY Slip Op 30892(U)
April 1, 2016
Supreme Court, Bronx County
Docket Number: 309081/2012
Judge: Fernando Tapia
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FILED Apr 08 2016 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

PAULO POSADA, an infant by his mother and natural guardian, PAULA A. ESCOBAR, and PAULA A. ESCOBAR, individually,

Plaintiffs,

against

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Defendants.

Index No.: 309081/2012

Hon. Fernando Tapia

ORDER

In this negligence action, plaintiffs seek to recover for injuries sustained during an assault committed on October 22, 2011 while plaintiff was an inmate at Riker's Island Correctional Facility. Defendants, the City of New York and the New York City Department of Corrections ("the City"), move for partial summary judgment. The City made its motion within the deadline provided by the CPLR.

It is well settled law that a municipality has a duty of care to safeguard inmates, even from attacks of other inmates. However, as part of its prima facie case, the plaintiff must produce credible evidence that the assault was reasonably foreseeable (*See Sanchez v. State of New York*, 99 NY2d 247, 252 [2002]). According to the City, the plaintiffs have failed to present evidence that establishes notice or foreseeability of the injury.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient evidence to demonstrate the absence of a material issue of fact as a matter of law

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(*Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 324 [1986]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

In support of its argument that this assault was not foreseeable, the City alleges, inter alia; that the plaintiff had been in his assigned housing area for less than one day, he admitted that he had not made any prior complaints about the individuals that assaulted him, and he testified no one threatened him prior to the incident. Additionally, the very nature of the attack, seemingly spontaneous and unprovoked, relieves the City of liability because it was not foreseeable. This evidence as well as additional assertions made by the City that are addressed below are offered in support of the City's argument that there was no reason for prison officials to have known there might have been a risk of inmate-on-inmate attack.

Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Plaintiff disputes the evidence relied upon by the City by characterizing the event as a series of occurrences that gradually led to the attack beginning from the moment he arrived at the facility. Plaintiff testified about being harassed by several inmates, harassment which included taking his shoes, pants and pin number used to make outside phone calls. According to him, plaintiff was without shoes and pants for at least two days (page 31, Exhibit C, Plaintiff's 50-h transcript). While not disputed, the City points out that plaintiff did not specifically identify the individuals that were harassing him as he thought it would be "dangerous to snitch" (City Exhibit J., page 32, lines 20-24, Plaintiff's EBT). Although plaintiff did not "name names", he made multiple attempts to inform the officers he encountered of his predicament (Plaintiff's Exhibit C, page 25, Plaintiff's 50-h transcript). While it may be argued that knowledge of these

transgressions alone, given the dangers inherent in jail, may not amount to notice or foreseeability of an impending attack, this Court finds that with regards to the remaining arguments, plaintiffs have established that reasonable minds can differ as to whether the injury was foreseeable and summary judgment must be denied.

In response to the allegation that plaintiff had not made any prior complaints that would provide notice to the officers, plaintiff cites the following deposition testimony (Plaintiff's Exhibit D, Plaintiff's EBT, page 32, lines 7-19):

Q: Do you recall the first officer you spoke with regarding persons bothering you while you slept?

A: I'm not sure, but I know it's one of the three that was there during the entire process.

Q: Do you recall if you spoke with the female Hispanic officer regarding people bothering you while you slept?

A: I think so.

Q: Do you recall what you said to her?

A: Yes.

Q: What did you tell her?

A: That they wanted to like hit me, that they didn't let me sleep.

Here, plaintiff specifically addresses the possibility of being physically harmed. This is separate and apart from his earlier complaints. This testimony demonstrates that a question of

fact exists as to whether the plaintiff had placed this officer on notice which goes towards foreseeability.

The City points out that inconsistencies undermine the validity of this claim. Namely, the plaintiff testified at his 50-h hearing that one of the individuals that jumped him had asked him for his pants and tried to scare him by saying that he was going to kill him. However, at his deposition, he testified that none of the individuals who attacked him were the ones that bothered him regarding his clothes (City Exhibit J, page 50, lines 12-18; 52:8-18). This Court finds this argument unpersuasive and is not entirely convinced this is actually a contradiction as opposed to a poor articulation of the facts by the plaintiff. The motion court should view the evidence in the light most favorable to the nonmovant (*Gurfein Bros., Inc. v. Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998].

Even assuming this portion of the testimony does not establish notice, the plaintiff has presented additional credible evidence that supports that the assault was foreseeable. In his EBT, Captain Deshan Rainey was questioned about an incident report submitted by Officer K. Reyes, one of the assigned officers on guard in the dormitory located in lower modular three of the R.N.D.C. building. In the report Officer Reyes states that, "I did not witness any incident that involved the plaintiff." He went on to say, "At that time, I received a new body and stepped out to speak to him about the program house" (Plaintiff's Exhibit F., Rainey EBT, page 43). Capitan Rainey testified that a second officer should be monitoring the inmates at all times. However, as plaintiff points out, despite the City's witnesses' claims that Department of Corrections' policy was followed, the record reflects that the first time any corrections officers observed the assault is when Captain P. Harris viewed the assault on the video recording on October 26, 2011. The City disputes that the officers failed to follow protocol however questions of fact remain that

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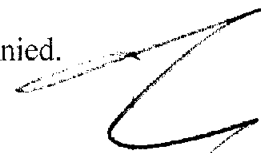
have not been resolved by this motion for summary judgment. These issues regarding what transpired on the night of the incident go towards foreseeability. Foreseeability includes not only what is known but also what should reasonably be known. In *Sanchez*, 99 NY2d at 245, the Court of Appeals stated, "What the State reasonably should have known, for example, should be determined, from its knowledge of risks to a class of inmates based on the institution's expertise or prior experience, or from its own policies designed to address such risks."

The City's argument that summary judgment must be granted because the proximate cause was an intervening criminal act must fail. The City argues that the plaintiff has not established the requisite causal connection between the acts or omissions complained of and the injury. While this may be the case, the plaintiff has introduced sufficient credible evidence to present the question of foreseeability to a jury.

The City's motion for partial summary judgment is denied.



Dated: April 1, 2016
Bronx, NY

Hon. Fernando Tapia, JSC