Granillo v Kipp Wash. Hgts. Middle Sch.
2017 NY Slip Op 31740(U)
August 14, 2017
Supreme Court, New York County
Docket Number: 155371/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ADRIANA GRANILLO et al

INDEX NO. 155371/15

MOT. DATE

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MOT. SEQ. NO. 002

KIPP WASHINGTON HEIGHTS MIDDLE SCHOOL

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s). 36-46

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s). 70-75

Replying Affidavits ECFS Doc. No(s). 76-77

This case presents an interesting question that does not appear to have been reported on by any other court in this state: whether a New York City charter school co-located in a public school building, which does not own the premises in which it operates, can be held liable for personal injuries sustained thereon due to an allegedly defective condition. This court answers that question in the affirmative.

In this personal injury action, plaintiffs seek to recover for injuries sustained by the infant plaintiff when her ring finger became caught in a playground fence during recess at her school, defendant KIPP Washington Heights Charter School h/s/a KIPP Washington Heights Middle School ("KIPP") located at 21 Jumel Place, New York, New York (the "Premises"). Defendants KIPP, KIPP New York City, LLC and KIPP New York, Inc. (collectively "Movants") move for summary judgment, on the grounds that they are not responsible for the design, construction or maintenance of the fence since they operate a charter school and otherwise shares the Premises with three other public schools. Plaintiff opposes the motion. The motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The facts regarding the underlying incident are largely not disputed. On May 6, 2015, the infant plaintiff sustained injuries, including the complete amputation of her ring finger. At that time, the infant plaintiff was in the playground at the Premises. The infant plaintiff testified as follows at her deposition. On the date of the accident, she had come out of the school for recess at approximately 2:50pm and her accident occurred approximately five minutes later. During those five minutes, plaintiff was talking with her friends about what they were going to do on the weekend. A "boy that always bothers" the infant plaintiff named Victor interrupted the conversation and plaintiff "just walked away" towards a fence. The infant plaintiff put her hand on the fence, and Victor ran to her and tried touching her hand. When the infant plaintiff pulled her hand away, she didn't realize her ring was stuck, so the "skin was on the sharp part of the gate and [she] only had [her] bone." The infant plaintiff further explained that when she pulled her hand away, "[her] skin popped off [her] finger. Then [she] just saw [her] bone."

Dated: 8/14/17

HON. LYNN R. KOTLER, 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**

KIPP has submitted the sworn affidavit of Cindy Lee, who is employed by KIPP as the Director of Operations, wherein she states the following. KIPP is a charter school which opened in the 2012-2013 school year. KIPP entered into a "Building Utilization Plan" with the NYC Department of Education, pursuant to which the school shares the Premises, which includes the subject playground, a cafeteria and an auditorium, with three other public schools. KIPP does not own the Premises nor does any maintenance or repairs on the fences. The subject fence was already constructed before KIPP opened in 2012. Finally, KIPP never received any complaints about the fence.

Lee was present on the date of plaintiff's accident, as she and Lariely Sanchez were assigned recess duty and escorted the children to recess that day. Lee became aware of the infant plaintiff's accident when "children began calling [her] name." After the accident, an investigation by KIPP involving questioning other students about what they observed at the time of plaintiff's accident "revealed that [the infant] plaintiff was playing tag with other students."

Further, after the accident, Lee "requested that school safety officer Singleton and custodian (Alex), who are not employed by KIPP, examine the fence. They found no irregularities."

KIPP has also submitted the affidavit of Joseph Cannizzo, principal and chief engineer of the Forensic Division at Fortech, Ltd. Cannizzo has "extensive experience in civil and construction engineering, including but not limited to, playground accidents." Cannizzo inspected the subject fence on February 3, 2016 and opines that "the downward turning of the top of the fence fabric is intended to create a knuckled rounded top edge of the mesh rather than being barbed (pointed upward) and is required by the [NYC School Construction Authority ("NYCSCA")] standard specification." Therefore, Cannizzo concludes that the fence "was not in violation of the NYCSCA standars or dangerous in a manner to have caused the incident."

Cannizzo also contends that plaintiffs' expert, Margeret A. Payne, a Certified Playground Safety Inspection, is not qualified "as a civil engineer" based upon his review of her resume.

In opposition, plaintiffs argue that at the very least, "it should be a question of fact for a jury to determine if in the ordinary course of *reasonable inspections*, one should have and could have identified the sharp edges of the fence as a safety issue for the children playing in the school yard, such that serious injury or dismemberment could occur..." Plaintiffs point to a page 22 of the Building Utilization Plan and section entitled Building Safety and Security, which requires KIPP to have a school safety committee responsible for establishing safety procedures. This provision states, *inter alia*, that "the leader/designee of KIPP NYC Washington Heights Academy will be part of the M090 School Safety Committee. ... KIPP NYC Washington Heights Academy will enter information in the M090 schools' overall Safety Plan to ensure the safe operation of the school building."

Plaintiffs argue that Payne is a qualified expert in playground safety and contends that Cannizzo is not qualified. Payne, who inspected the subject fence approximately one month after plaintiff's accident, claims the fence was not reasonably safe because it was not free of roughness and sharp edges in violation of NYCSCA Specification Section 02831 and that while the fence was "knuckled", sharp edges were accessible and at 4 feet high "where it was foreseen that middle school children would lay their hands." Finally, plaintiffs argue that negligent supervision "is an issue."

In its reply, defendants maintain that plaintiff has failed to raise a triable issue of fact. They contend that the Building Utilization Plan does not impose a legal duty upon KIPP "to design, construct, inspect or maintain the fence" and that the provision plaintiffs cite to "is included in every Building Utilization Plan entered into which is a matter of public record." Finally, defense counsel states that plaintiff's accident "was the result of a spontaneous, unanticipated act which could not have been averted through the exercise of any greater supervision by defendants."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

There can be no negligence without a duty. Defendants argue that KIPP does not own the property, and therefore owes no duty to the infant plaintiff in connection with the underlying accident. However, ownership is not the sole basis for the imposition of the common law duty to keep the a premises reasonably safe. Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or a special use of the property (*Gibbs v. Port Authority of New York*, 17 AD3d 252 [1st Dept 2005]). Here, while defendants point to other users of the Premises, there is no dispute that KIPP utilized the playground where the infant plaintiff was injured. Education Law § 2853 [1][c] provides that "[a] charter school shall be deemed an independent and autonomous public school..."

KIPP therefore was in possession of the Premises. While the exact nature of KIPP's possession has not been explained, whether through statute, lease or some other category of occupancy agreement, the classification is of no moment. In any event, plaintiff was in the playground at the direction of KIPP's employees and under their supervision when the accident occurred. Therefore, KIPP had a legal duty to maintain the playground in a reasonably safe condition.

This case contrasts with the plethora of cases where leaseholder in one portion of a premises, such as store in a mall, cannot be held liable for an injury which occurred due to a defective condition in an area of the premises outside the leaseholder's control, such as a parking lot (see i.e. *Bridgham v. Fairview Plaza, Inc.*, 257 AD2d [3d Dept 1999]). Nor do defendants argue that KIPP is a mere licensee of the playground for a limited time (*cf. Gibbs, supra*). That KIPP points to non-parties as having a duty to maintain the subject fence is a red herring, since the only question with regards to KIPP's own duty is whether it possessed that portion of the Premises where plaintiff's injury occurred such that a common law duty to maintain that area in a reasonably safe condition.

Further, defendants attempt to explain away the School Safety Committee requirement contained in the Building Utilization Plan as boilerplate including in every such plan is not persuasive. The relevant provision cites Chancellor's Regulation A-414, which sets forth the requirements for such a committee. Indeed, while no one raises the argument, the court takes judicial notice of Education Law § 2850-2857, the Charter Schools Act, which authorizes a system of charter schools, including KIPP. Education Law § 2853 [3][a-1][i] provides in pertinent part:

> ... charter schools shall comply with all department health, sanitary, and safety requirements applicable to facilities and shall be treated the same as other public schools for purposes of local zoning, land use regulation and building code compliance.

Finally, finding that KIPP owed the infant plaintiff a legal duty here comports with public policy, otherwise, charter schools that share space would owe no duty of care for dangerous conditions on the premises which they occupy.

Based upon all the foregoing reasons, the court rejects defendants' argument that KIPP does not owe a legal duty to the infant plaintiff.

The court next considers whether defendants have established entitlement to judgment dismissing plaintiffs' premises liability claim. In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]). Here, the court finds that defendants have met their burden through the affidavit of Cannizzo, who opines that the subject fence met applicable standards and was not unreasonably safe. Further, defendants have established the absence of notice.

In turn, the court finds that the plaintiffs have raised a triable issue of fact. Payne's tested the fence and opined that the exposed "sharp edges of the fence fabric" constitute a hazard because "a child could easily come in contact with them by touching the fence." Indeed, the photographs of fence support Payne's claims. Payne has otherwise demonstrated that the fence did not comply with NYCSCA Specification Section 02831, pertaining to chain link fences and gates, which specifies that "finished materials must be free of roughness and sharp edges." The court rejects defendants' argument that Payne's opinion should be rejected because she is not a civil engineer, since she has otherwise demonstrated an expertise in playground safety.

The court does, however, agree that plaintiffs' argument regarding negligent supervision fails as a matter of law. Plaintiff claims that there was insufficient supervision because there were seventy children in the playground at the time of plaintiff's accident and only two teachers supervising at the time. Even if this claim could be otherwise properly asserted, plaintiff has failed to show how the allegedly negligent supervision proximately caused the infant plaintiff's injuries. The infant plaintiff admittedly was resting her hand on the fence and then pulled it away. No amount of supervision would have foreseen the tragic accident. That Victor tried to touch the infant plaintiff's hand and somehow caused the accident does not raise a triable issue of fact on this point because Victor's acts could not be construed by a reasonable fact-finder to have been a substantial factor in causing the infant plaintiff's injuries. Rather, it was the protruding piece of fence which the infant plaintiff's ring became caught on. Therefore, the only claim that remains to be tried in this case is for premises liability. To the extent that plaintiff asserts a negligent supervision claim in its complaint, that claim is severed and dismissed. Defendants' motion is otherwise denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion is granted only to the extent that plaintiffs' claims sounding in negligent supervision are hereby severed and dismissed; and it is further

ORDERED that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/14/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.