

Nurse v New York City Dept. of Educ.

2018 NY Slip Op 32475(U)

September 28, 2018

Supreme Court, New York County

Docket Number: 153317/2012

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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ANITA NURSE,

Plaintiff,

DECISION & ORDER

- against -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Index No. 153317/2012

Defendant.

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ALEXANDER M. TISCH, J.:

Plaintiff Anita Nurse brings this action for personal injuries sustained during her employment as a school safety officer. Defendant New York City Department of Education (“DOE”) brings this motion to dismiss pursuant to CPLR 3211 (a) (7) and/or CPLR 3212. For the reasons set forth herein, defendants motion is granted.

Plaintiff, an employee of the division of school safety of the New York City Police Department (“NYPD”), was in charge of security at a junior high school. A student had been permanently removed from the school due to an incident involving “violent acts” against another school safety officer (complaint, ¶ 11). The student came back to the school for three days. The principal told plaintiff that the student’s return was owing to a “mix up” or “glitch” with her papers (complaint, ¶ 14).

On December 2, 2008, the second or third day of the student’s return, plaintiff came upon her yelling and cursing at the principal. The student ran off, and the principal told plaintiff “to get her” (plaintiff tr at 63). Plaintiff testified that “the procedure would have been to get [the student] back downstairs to the first floor where she belonged,” where her class was (plaintiff tr at 63). Plaintiff used her radio to inform other school security officers that the student “is running the building ... when you see her, call me” (*id.* at 48). Plaintiff told the other school safety officers not to approach the student and

to wait for plaintiff.

The student was found in a third-floor hallway. Plaintiff and two other officers approached the student and plaintiff tried to talk to the student. The student tried to shove one of the officers. Plaintiff and the other officers tried to restrain her. There was a struggle during which the student attempted to stab plaintiff in the face with a pencil. Plaintiff moved her head backwards to avoid the pencil and hit her head on a door. She fell down hurting her leg, and the student kicked her in the throat. Plaintiff fell unconscious and woke up in a hospital emergency room.

At another time, the student had spit at plaintiff and tried to take the fire extinguisher off the wall when plaintiff tried to make her go into her classroom. Another time, the student had tried to bite plaintiff. On that occasion, the student “got into an altercation with” another school safety officer and hit him with a ruler, and plaintiff was trying to hold the student but she was too strong (*id.* at 53). Additional school safety officers were called to the scene. Plaintiff testified that it was as a result of that incident that the student was permanently removed from the school.

Before and after the incident that resulted in the student’s permanent removal, plaintiff “preferred to restrain her ... I was the new person. She had a problem with everyone and I’m there to diffuse and figure out how to get everything in order” and “in the beginning . . . I was building up a rapport with her” (*id.* at 54). Plaintiff had been “informed earlier that [the student] does not belong here, but she’s here. And they are working on having her removed” (*id.* at 49). Plaintiff was told “to be careful with her, she is very difficult, she likes to fight you ... just be careful. So, I kind of developed a rapport with her so I at least get her to, you know, gradually listen when I say go somewhere” (*id.* at 49-50).

Plaintiff claims that the school negligently created the mix-up which allowed the student to return to school for three days. Plaintiff seeks damages under General Municipal Law (GML) § 205-e and common-law negligence. Defendant moves for a summary judgment dismissal or a dismissal based

on failure to state a cause of action.

The proponent of a motion for summary judgment must submit evidence demonstrating that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). If the moving party proves entitlement to summary judgment, the party seeking to defeat the motion must produce evidence showing the existence of material issues of fact that are in dispute (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). The court does not consider the credibility of the parties and accepts as true statements made in opposition to the motion (*Jiminez v Cummings*, 226 AD2d 112, 113 [1st Dept 1996]). A defendant's motion for summary judgment will be decided on the version of the facts most favorable to the plaintiff (*Mullin v 100 Church LLC*, 12 AD3d 263, 264 [1st Dept 2004]).

On a motion to dismiss pursuant to CPLR 3211(a) (7), the court considers "whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained" (*Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]). In determining such a motion, the court accepts the facts alleged in the complaint as true, accords them an interpretation favorable to plaintiff, and determines only whether they fit within an actionable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Under GML § 205-e, a police officer may recover for an accidental injury resulting from the "negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of" any branch of government. To prove liability under GML § 205-e, the plaintiff must identify the statute, ordinance, or rule which the defendant violated and set forth facts from which it may be inferred that the violation caused the accident which caused the injury (*Gammons v City of New York*, 24 NY3d 562, 570 [2014]; *Desmond v City of New York*, 88 NY2d 455, 464 [1996]). Failure to identify the specific statute or ordinance which was violated

renders the complaint legally insufficient (*Maisch v City of New York*, 181 AD2d 467, 469 [1st Dept 1992]). As defendant states, plaintiff fails to identify any statute or ordinance that was violated.

To the extent that plaintiff means to rely on Education Law § 3214 (6) as a predicate for liability under GML § 205, it is inadequate. The statute provides that a student being transferred, shall remain on the register of the original school for two school days following transmittal of his or her records to the school to which he or she is to be transferred, that the receiving school shall immediately review the records to insure proper placement of the student, and that staff members who are involved in the student's education must be provided with pertinent records relating to the student before he or she is placed in a classroom. Even if defendant violated the statute, the violation is not shown to be connected to the student's return to the school. In addition, there is no evidence that the statute was violated.

In regard to the claim that defendant was negligent, according to the doctrine of governmental immunity, discretionary government action is not a basis for liability, even if the action is negligent (*McLean v City of New York*, 12 NY3d 194, 203 [2009]) or the result of a misjudgment or mistake (*Public Adm'r of Bronx County v City of New York*, 271 AD2d 220, 220-221 [1st Dept 2000]). Liability for negligence attaches to a municipal department only if the offending action was both ministerial and a breach of a special duty of protection the municipality owes to the injured party, a duty apart from any duty owed to the public in general (*id.*; *Joline v City of New York*, 32 AD3d 492, 494 [2d Dept 2006]).

While defendant puts forth no evidence regarding whether the decision to return the student to the school was discretionary or ministerial, the decision to change a student's classroom placement has been held to be discretionary (*Rivera v Board of Educ. of City of N.Y.*, 82 AD3d 614, 615 [1st Dept 2011]; *Brady v Board of Educ. of City of N.Y.*, 197 AD2d 655, 656 [2d Dept 1993]). Likewise, providing security in public schools is discretionary rather than ministerial (*Shivers v City of New York*, 2012 NY Slip Op 31437[U] [Sup Ct, Queens County 2012]). Plaintiff attributes the student's return to

defendant's error. However, as stated above, the doctrine of governmental immunity precludes liability for a "mere error of judgment," provided that the mistaken action resulted from discretionary decision making (*Trimble v City of Albany*, 144 AD3d 1484, 1487 [3d Dept 2016]).

"[D]iscretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Haddock v City of New York*, 75 NY2d 478, 484 [1990] [internal citation and quotation marks omitted]).

Plaintiff contends that Education Law § 3214 (6) and Chancellor's Regulation A-450, Involuntary Transfer Procedures¹ show that defendant's action was ministerial. Plaintiff's papers do not include a copy of the Chancellor's Regulation. The copy found on the online site of the NYC Department of Education states that it became effective in January 2011 and that it supersedes the regulation previously in effect. Plaintiff's incident took place in 2008.

In any event, even if the regulation and the statute were ministerial and defendant's violation led to the student coming back to the school, defendant would still not be answerable to plaintiff in the absence of a special duty owed to her by defendant.

In general, a school district or board of education does not owe a special duty to teachers, administrators or other adults on or off school premises, unless a special relationship has resulted in the creation of a special duty (*Morgan-Word v New York City Dept. of Educ.*, 161 AD3d 1065 [2d Dept 2018]; *see also Vitale v City of New York*, 60 NY2d 861, 863 [1983]; *Wilson v New York City Bd. of Educ.*, 2016 NY Slip Op 30560[U], *3 [Sup Ct, Richmond County 2016]).

A special duty exists "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance

¹ <https://www.schools.nyc.gov/school-life/policies-for-all/chancellors-regulations/volume-a-regulations> (last accessed September 19, 2018).

by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation” (*Brumer v City of New York*, 132 AD3d 795, 796 [2d Dept 2015] [internal citation and quotation marks omitted]; *Blackstock v Board of Educ. of the City of New York*, 84 AD3d 524, 524 [1st Dept 2011]; *Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541 [1st Dept 2009]).

It also has been held that a special relationship giving rise to a special duty is created through “an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; knowledge on the part of the agents of the municipality that inaction could lead to harm; direct contact between those agents and the injured party; and the injured party's justifiable reliance on the municipality's affirmative undertaking” (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Rodriguez v County of Rockland*, 43 AD3d 1026, 1028 [2d Dept 2007]; *Pascucci v Board of Educ. of City of N.Y.*, 305 AD2d 103, 104 [1st Dept 2003]).

The question of whether plaintiff offers sufficient evidence to establish a special relationship is a question of law for the court to resolve (*Valdez v City of New York*, 18 NY3d 69, 81 [2011]). Defendant correctly argues that plaintiff's testimonies during her General Municipal Law § 50-h hearing and her deposition show that no special duty was established. Plaintiff does not allege that a special relationship was formed because the defendants violated any statutory duty, or assumed positive direction and control in the face of a known, blatant, and dangerous safety violation. Nor does she allege that defendant undertook any specific security measures for her, that she relied on any measures or assurances that lulled her into a false sense of security (*see Zimmerman v City of New York*, 74 AD3d 439, 439 [1st Dept 2010]), or that defendant reneged on a promise to provide assistance (*see Bloom v City of New York*, 123 AD2d 594, 595 [2d Dept 1986]). Reliance, a critical element of a special relationship with a municipal entity, is not present here (*see Feder v Board of Educ. of City of New York*, 147 AD2d 526, 527 [2d Dept

1989]). Plaintiff's conclusory allegation that she relied on the statement that the student would not return to school lacks the detail that would show justifiable reliance (*compare Santos v City of New York*, 2011 NY Slip Op 33912[U] [Sup Ct, Bronx County 2011] [whether plaintiff justifiably relied on defendant was an issue of fact, where plaintiff repeatedly expressed concern for her safety from a violent student, her calls for help to the security officer went unanswered, she was the only supervisor on cafeteria duty when the student assaulted her, the principal had promised to but did not reassign a security officer to the cafeteria, and the principal told plaintiff more than once that the student could not return until cleared in writing by a psychiatrist but he was allowed to return each time]; *see also Dinardo v City of New York*, 13 NY3d 872, 874 [2009]).

Plaintiff asserts that she has a statutory cause of action under General Obligations Law (GOL) § 11-106, which created a right of action for police officers and firefighters injured by the negligence or intentional conduct of any person, except an employer or co-employee. However, as this statute does not dispense with the requirement of proving a special duty on the part of a governmental defendant, it is of no aid to plaintiff.

The case law addressing whether a special duty is necessary to uphold liability under GOL § 11-106 is sparse. A school social worker's case against the DOE and the City of New York was dismissed on the ground that neither owed her a special duty (*Ferguson v City of New York*, 118 AD3d 849, 850 [2d Dept 2014]; *see also Brumer v City of New York*, 132 AD3d 795 [2d Dept 2015]; *Buder v City of New York*, 43 AD3d 720, 721 [1st Dept 2007]). These cases applied the special duty requirement to defendant. The Third Department noted that nothing in the legislative history of GOL § 11-106 indicates an intention to give police officers greater rights than the public at large. "It would appear, then, that the special duty would be applicable" to both GOL § 11-106 and GML § 205-e (*Brinkerhoff v County of St. Lawrence*, 24 Misc 3d 426, 442 [Sup Ct, Lawrence County 2009], *aff'd* 70 AD3d 1272 [3d

Dept 2010)). This Court concludes that without a special duty plaintiff cannot recover from defendant for negligence.

In light of the above, the Court need not determine whether, as defendant contends, plaintiff's relationship with the defendant constitutes an employment relationship so as to bar recovery under GOL § 11-106.

In conclusion, it is hereby

ORDERED that defendant's motion to dismiss the complaint is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action.

No costs.

Dated: September 28, 2018

ENTER:



A.J.S.C.

HON. ALEXANDER M. TISCH