

Espinal v City of New York

2019 NY Slip Op 31355(U)

May 9, 2019

Supreme Court, New York County

Docket Number: 159606/2015

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X

VERONICA ESPINAL, TAMARA ESPINAL

Plaintiff,

- v -

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

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for

JUDGMENT - SUMMARY

DECISION AND ORDER

This action arises from injuries allegedly sustained on September 17, 2014, when infant plaintiff, Veronica Espinal, was accidentally pushed and fell over an object on the floor.

Defendants, The City of New York and The New York City Department of Education (“DOE”), move the court seeking summary judgment and dismissal of the complaint pursuant to CPLR 3212 asserting that there are no triable issues of fact as plaintiff was injured as a result of a spontaneous act which could not be prevented by additional supervision.

Plaintiff opposes the motion.¹

Summary Judgment Standard

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 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Summary judgment is a drastic remedy that

¹ Plaintiff did not oppose the motion as it pertains to defendant, City of New York. As such, that portion of the motion is granted without opposition.

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 AD2d 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 NY2d 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 NY2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 AD 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 NY2d 8, 12 [1960]).

Discussion

The DOE's motion is primarily based on the premise that no amount of supervision could have prevented infant plaintiff's accident and that it was not on notice, either actual or constructive, of any condition that allegedly cause infant plaintiff's accident.

Infant plaintiff testified that while she was in her classroom preparing for her Health class to begin, and after having come from Spanish class across the hall, she was bumped from behind and fell. She said at the time of her accident, she was in her homeroom class where she had been for twenty minutes prior to the accident, with several of her classmates. She testified that there was no teacher in the classroom during the twenty minutes prior to the accident.

Based on the plaintiff's testimony, there are 2 things that caused her to fall: one was being accidentally pushed from behind, and the second is from tripping over an object on the floor, that she believed to be a backpack, though the plaintiff was not able to identify it as such.

The cases cited by the plaintiff, *Oliverio* (23 AD3d 633 [2d Dept 2005]), and *Armellino*, (72 AD3d 849 [2d Dept 2010]), are both distinguishable from the instant case. In those cases, the conduct that occurred that caused the plaintiff's injuries were clear and was conduct that was specifically prohibited. In *Oliverio*, it was the infant plaintiff running during a game of tag. (23 AD3d 633 [2d Dept 2005]). In *Armellino*, it was another child who chased after the infant plaintiff after the students were throwing asphalt at each other. (72 AD3d 849, 850 [2d Dept 2010]).

This Court also rejects plaintiff's contention that "the students unsupervised in a classroom for a period of approximately twenty (20) minutes while students ran around" was the proximate cause of infant plaintiff's injuries. See Plaintiffs' affirmation in opposition paragraph 15. Infant plaintiff specifically testified that she did not see anyone running. See Infant Plaintiff's 50-h testimony, 22:1-2, annexed as Exhibit E in movants underlying motion papers.

As the affidavit she submitted in opposition to the summary judgment motion is inconsistent with her prior testimony, this Court finds that the affidavit is self-serving and inadequate to defeat the motion for summary judgment. See *Lupinsky v Windham Constr. Corp.* 293 AD2d 317 [1st Dept 2002].


In the instant action, it is unclear who pushed the infant plaintiff, or what that person was doing at the time of the incident. Moreover, this incident occurred during a class changeover when children would have been moving around, regardless of the supervision level. Finally, it is

also unclear just what the plaintiff tripped over and when the object was placed there, even assuming it was a backpack.

The DOE has made out its *prima facie* case of entitlement to judgment as a matter of law. The DOE has established that the record is devoid of how any level of supervision could have prevented the plaintiff's accident and that it was not on notice of any allegedly dangerous or defective conditions that may have caused infant plaintiff's injuries. The plaintiff has failed to adequately rebut that *prima facie* case. Accordingly, it is hereby

ORDERED that The City of New York and The New York City Department of Education's motions for summary judgment are granted and the complaint is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

<u>5/9/2019</u> DATE		 LYLE E. FRANK, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> DENIED	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

HON. LYLE E. FRANK
J.S.C.