R.A.B. v City of New York
2020 NY Slip Op 32027(U)
May 18, 2020
Supreme Court, Bronx County
Docket Number: 29008/17
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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R.A.B., an infant by her mother and natural guardian, SHARI CORNISH, and SHARI CORNISH,

Index No.: 29008/17

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, PUBLIC PREPARATORY NETWORK, INC., GIRLS PREP BRONX MIDDLE SCHOOL, and PUBLIC PREP CHARTER SCHOOL ACADEMIES,

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Recitation as Required by CPLR §2219(a): The following papers were read on this Notice of Motion to dismiss/summary judgment:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits by City	1
Affirmation in Opposition by plaintiff	2
Affirmation in Reply by City	3
Notice of Motion, Affirmation in Support with Exhibits by Co-defendants	4
Affirmation in Opposition by plaintiff	5
Affirmation in Reply by Co-defendants	6

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

The City of New York (hereinafter "City") and the New York City Department of Education, (hereinafter "DOE"), moves to dismiss plaintiff's claims pursuant to CPLR §3211(a)(7) and pursuant to CPLR §3212 for summary judgment in favor of the City. Plaintiff opposes the City's motion. Defendants, Public Preparatory Network, Inc., Girls Prep Bronx Middle School, and Public Prep Charter School Academies, (hereinafter "Girls Prep"), move to dismiss plaintiff's claims pursuant to CPLR §3212. Plaintiff opposes Girls Prep's motion.

According to plaintiff's notice of claim, this action arose on March 6, 2017, at approximately 1:50 p.m. in the schoolyard located at Girls Prep at 890 Cauldwell Avenue, Bronx, New York. Infant plaintiff was playing in the schoolyard when she was caused to trip

and fall due to a cracked, holey, raised, uneven, depressed, dangerous, hazardous, and unsafe condition sustaining permanent injuries. Plaintiff alleges she was negligently supervised in the schoolyard. (City Ex. A).

According to infant plaintiff's testimony, infant plaintiff was a 6th grade student and was running in the schoolyard during recess and tripped and fell on a crack in the middle of the schoolyard. She had seen the crack before. She never complained to anyone about the crack. The crack was two inches wide and one inch deep. Infant plaintiff specifically testified the crack was wide, long, and deep. She was not present for any pictures taken of the crack. At the time she fell, she was running from one end of the play area to the other. Infant plaintiff testified that only one office person was supervising the lunch and recess area when the incident occurred, and that person was in the cafeteria at the time she fell. There was no adult in the yard when she fell. Her entire grade had recess at the same time. There were no parents present or school aides. Infant plaintiff approximated that there were 50 people in her grade. Infant plaintiff was not asked to identify the crack in any photos or to be more specific as to where the crack was in the schoolyard in her 50-h. At her deposition, infant plaintiff was shown a photo marked as Defendant's Exhibit B. She was asked if the area where she was playing capture the flag was depicted. She did not know. She recognized the building in the photo as Girls Prep and the exit from the cafeteria to the outside area. She was shown Defendant's Exhibit D. She recognized the Girls Prep building and the yard. She did not know if the area where she was playing capture the flag was depicted. She did not know if that area was where her incident occurred. The City asked no further questions about the location of plaintiff's incident. Co-defendant's attorney then questioned plaintiff, she asked if she could describe where she was when she fell, and plaintiff did not know. The yard is a rectangle with a school wall on one side and a fence on the other. She fell somewhere near the middle but not exactly in the middle. She was approximately twenty feet from the brick wall opposite the cafeteria wall when she fell. At the time of her deposition, the crack was still present. Infant plaintiff could not identify where she fell, Defendant's Exs. A, B, D. She was not specifically asked with regard to Ex. C. She testified she did not know where she fell in the front yard. (City Ex. H, City Ex. J, City Ex. N).

The custodian engineer at 890 Cauldwell Avenue, James McDonnell testified that there are three schools in the building, Girls Prep and two DOE Schools. Girls Prep is a charter school which is not run by the DOE. The schools share the cafeteria, gym, auditorium, and yard. Mr.

McDonnell's duties included cleaning and minor repairs. Per Mr. McDonnell, if a crack were more than an inch deep, it would need repair. If less than one inch deep, he would trim it off, paint it yellow to alert, and/or fix it with concrete to level it. Prior to March 2017, he received no complaints about the condition of the yard from staff or students. Mr. McDonnell first noticed the cracks depicted in the photos marked as City Ex. N in December of 2018. He did not know if it was present in 2017. He opined that the crack in the photos was not a defect. Per his affidavit, Mr. McDonnell measured the cracks depicted in City Ex. N and the measurements are as follows: 62 in. long, ¼ in. wide, and less than 1/16 in. deep and 90 ft. long, ¼ in. wide, and less than 1/16 in. deep. City Ex. P.

Girls Prep Principal Michael Farkosh testified that there were nine to ten teachers supervising the students during lunch and recess. He received no complaints regarding the schoolyard. According to Mr. Farkosh, the cracks depicted in the photos marked as City Ex. N would be desirable, but not required. He testified he did not know if the cracks were present in 2017. Per Mr. Farkosh's affidavit, five supervisors were present for lunch/recess duty on the date of incident. (Girls Prep Ex. K).

The City moves to dismiss and for summary judgment arguing first, that plaintiff's complaint as against the City must be dismissed as the City is not a proper defendant to this action. As the DOE is a separate and legally distinct entity from the City, the Court agrees, and the City is dismissed from the action. (N.Y. Educ. Law §2551, *Perez v. City of New York*, 41 A.D.3d 378 [1st Dep't 2007]).

Next the City/DOE argues that all negligent supervision claims must be dismissed as against the DOE because the DOE did not have a duty to supervise plaintiff at the time the incident occurred. The Court agrees. Per plaintiff's testimony and the testimony of Mr. McDonnell and Principal Farkosh, the DOE was not supervising plaintiff at the time of her incident and therefore any negligent supervision claim as against the DOE is dismissed. (*Hernandez v. City of New York*, 147 A.D.3d 821 [2d Dep't 2017]).

The remainder of the City/DOE motion argues that: (1) plaintiff's complaint must be dismissed as plaintiff's notice of claim fails to state the place of the subject incident with adequate specificity; (2) the alleged defect is too trivial to be actionable; (3) the defendants did not have actual or constructive notice of the defective condition, nor did they cause and create

the subject condition; and (4) infant plaintiff's parent claims are derivative and cannot survive dismissal of the infant plaintiff's claims.

Girls Prep moves arguing that: (1) plaintiff's inability to identify the cause of her fall is fatal to her negligence claim; (2) summary judgment should be granted as to plaintiff's negligent hiring and retention claim; (3) there was adequate supervision; (4) inadequate supervision was not the proximate cause of plaintiff's accident; (5) Girls Prep had no duty to maintain or repair the play yard and no notice of the defective condition; and (6) no dangerous condition existed and any defect was trivial and superficial.

Plaintiff opposes both motions and argues: (1) plaintiff's notice of claim sufficiently states that location of the subject incident; (2) the defendants have failed to establish that the plaintiff failed to identify the cause of her fall; (3) defendants have failed to establish prima facie entitlement to summary judgment as to the trivial nature of the defect; (3) the defendants failed to establish that they did not have constructive notice of the defective condition; (4) infant plaintiff's parent claim survives because defendants are not entitled to summary judgment; (5) defendant, Girls Prep, fails to establish that there was adequate supervision and that inadequate supervision was not one of the causes of plaintiff's accident;

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 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 debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

In this matter, infant plaintiff cannot particularize where she fell. According to her notice of claim, she fell in the school yard due to a cracked, holey, raised, uneven, depressed, dangerous, hazardous, and unsafe condition sustaining permanent injuries. The school yard is depicted in the photographs annexed to the City's motion as Ex. N, although not in its entirety. At the time of her 50-h and deposition, she could not be more specific than crack in the middle of the schoolyard that was two inches wide, and one inch deep. She could not identify where she was playing in the photos exchanged in this matter by plaintiff. When confronted with the photos at her deposition, she was told that the area where she fell was not depicted in defendant's Ex. A, B, or D. She was not specifically asked if the area where she fell was depicted in Ex. C, however, she was questioned about Ex. C. Plaintiff testified she did not know if she fell closer to the fence depicted in Ex. C or closer to the fence on the opposite wall, she did not know how far she was from the fence depicted in Ex. C. After being asked specific questions about the distance from the wall, she testified she was more or less than fifteen feet away from the fence in Ex. C. She was asked if she knows whether where she fell is in any of the photos shown to her and her testimony was "no." She was asked, if she knew where she fell in the yard and her testimony was "no." (City Ex. H, City Ex. J, City Ex. N).

Now, plaintiff, in opposition to these motions, submits an affidavit (Pl. Ex. B) setting forth that plaintiff is now able to identify the crack that caused her to fall. The Court will not consider her affidavit for many reasons. First, plaintiff's affidavit was prepared in order to defeat the defendant's motions for summary judgment and contradicts her prior testimony. (*Beahn v. New York Yankees Partnership*, 89 A.D.3d 589 [1st Dep't 2011]). Plaintiff refers to the photos shown to her at her deposition which were marked as Def. Ex. C and D. She states that due to the black and white photos shown to her at her deposition, she was unable to see the location because the photo was very blurry, and she was unable to see the crack in the photo. Plaintiff now circles an area close to the wall that she was previously questioned about. The Court finds plaintiff's affidavit unpersuasive. A review of the photos in black and white and in color annexed to plaintiff's affidavit, clearly shows a crack. The photos are not blurry. The photos are not confusing, if this is in fact where plaintiff fell. Plaintiff was shown these photos in her deposition and could have easily marked where she fell at that time. Further, at the time of her deposition, no objections were made as to the quality, condition, and clarity of the photos. Based

on plaintiff's sworn testimony, it is likely the location of plaintiff's fall is not in photos exchanged during discovery.

A notice of claim must be specific as to the time, place, and manner in which the claim arose. (GML §50-e (2)). The location must be specific enough for the defendant to locate the defect. (*Walston v. City of New York*, 229 A.D.2d 485 [2d Dep't 1996]). The accident location cannot be so vague that the defendants cannot locate the alleged defect. (*Harper v. City of New York*, 129 A.D.2d 770 [2d Dep't 1987], *Caselli v. City of New York*, 105 A.D.2d 251 [2d Dep't 1984]). When the location in the notice of claim is insufficient to permit the municipality to locate the defective condition, the deficiently in the notice of claim can be ameliorated by testimony at a GML §50-h, or by other relevant evidence. (*Rivera v. City of New* York, 169 A.D.2d 387 [1st Dep't 1991]). In *Rivera*, the notice of claim was vague, however, photos exchanged allowed the Comptroller's office to locate the defect. Here, it seems that plaintiff's accident description was so vague that the defect could not be located because photos were exchanged that do depict the accident location. According to plaintiff, the defendants were able to locate the defect and investigate the defect, but this is not accurate. The defendants located the defects in the photos exchanged during the course of discovery. Per plaintiff's testimony, and prior to January 3, 2020, these photos did not depict where the accident occurred. Therefore, as the test is whether or not the City had information enough to investigate the claim, they did not. (*O'Brien v. City of Syracuse*, 54 N.Y.2d 353 [1981]). The Court finds that plaintiff did not satisfy GML §50-e (2) with adequate specificity as to the location of plaintiff's accident and therefore, all plaintiffs' claims against the municipal defendants are dismissed. As a result, the Court need not address the remainder of the City's motion.

Turning to Girls Prep's motion. Girls Prep first argues that a plaintiff's inability to identify the cause of his or her alleged accident is fatal to her cause of action. However, plaintiff has consistently said that a crack caused her to fall. She indicated that the crack is one inch deep and two inches wide. While she cannot locate the crack in any of the photos, nor is she aware of where the crack is in the school yard, she is aware of what she alleges caused her fall. Plaintiff's inability to sufficiently particularize where the crack is located is the issue. Without knowing which crack plaintiff fell on, actual and constructive notice cannot be established. Per plaintiff's testimony, the testimony of Mr. McDonnell, the testimony of Principal Farkosh, there were no complaints made regarding the condition of the school yard. Further, since plaintiff cannot

identify where she fell, constructive notice would just be speculative. Additionally, Girls Prep did not own the facility it occupied and was not responsible for repairs to the school yard. The DOE was responsible for repairs. As plaintiff does not oppose this portion of Girls Prep's motion, plaintiff's claims of negligent ownership, maintenance, and operation are dismissed.

Plaintiff alleges she was negligently supervised in the school yard when the incident occurred. Plaintiff testified there was one person who worked in the office that would supervise the school yard during recess, but that person was inside when plaintiff's incident occurred. Girls Prep submitted an affidavit from Principal Farkosh that four to five teachers and teacher's aides were supervising the lunch/recess area at the time plaintiff's incident occurred. As the parties offer conflicting testimony and evidence, a question of fact exists as to whether or not the supervision was adequate at the time of plaintiff's incident. However, inadequate supervision was not the proximate cause of plaintiff's incident. "Even if a breach of the school district's duty of supervision is established in a negligence action, the inquiry has not ended; the question arises whether such negligence was the proximate cause of the injuries sustained." (*Jorge C. v. City of New York*, 128 A.D.3d 410 (N.Y. App. Div. 2015]). Per plaintiff's testimony she generally runs and talks during recess. On the date of her incident, she was running while playing capture the flag. Per Principal Farkosh, running and games like capture the flag are not inherently dangerous. Plaintiff alleges she fell on a crack while running. Even with one or more adults present, plaintiff's incident would not have been prevented. It happened spontaneously. No amount of supervision could have prevented the accident, and the alleged inadequacy of the supervision was not a substantial factor in the cause of the injury here. (*Chynna A. ex rel. Nitoscha A. v. City of New York*, 143 A.D.3d 623 [1st Dep't 2016]). As a result, plaintiff's claims for negligent supervision are dismissed.

Accordingly, both the City/DOE motion and Girls Prep's motions are granted. Defendants are directed to serve a copy of this order with notice of its entry, upon the plaintiff within thirty (30) days of the entry date. The above constitutes the decision and judgment of the Court.

Dated: 5/18/21
Bronx, New York

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