

Zi Lin v City of New York
2021 NY Slip Op 32102(U)
November 1, 2021
Supreme Court, New York County
Docket Number: Index No. 150560/2017
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 52M

Justice

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ZI LIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, THE NEW
YORK CITY DEPARTMENT OF EDUCATION

Defendant.

-----X

INDEX NO. 150560/2017
MOTION DATE N/A
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 80

were read on this motion to/for DISMISSAL.

This action arises out of injuries allegedly sustained on April 14, 2016. Plaintiff alleges she sustained injuries when a student ran into her in the park. Defendants, the City of New York, the New York City Department of Parks and Recreation and the New York City Department of Education, (City) now move for summary judgment on the grounds that plaintiff has failed to plead a special duty. Plaintiff opposes the instant motion.

Factual Allegations

Plaintiff testified that while she was at the park, an unknown person ran into her causing her to fall and hit her side. Plaintiff did not see who ran into her, however, she relies on affidavits of witnesses who allege it was a student that ran into the plaintiff. Accordingly, the pleadings allege that the DOE was negligent in supervising its students. Further, plaintiff alleges that the students were running around the park and were out of control.

Applicable Law

When determining a motion for summary judgment, the issue is not whether the plaintiff can ultimately establish liability, but “whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial” (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). The court’s role “is limited to issue finding, not issue resolving” (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 531-532 [1991]; see *National Fin. Partners Corp. v USA Tax & Ins. Servs., Inc.*, 145 AD3d 440, 441 [1st Dept 2016]). The moving party has the burden to make a prima-facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing summary judgment must produce by admissible evidence the existence of a factual issue requiring a trial (*id.*).

If a municipality engaged in a governmental function, under the public duty rule, the municipality owes a general duty to the public at large but is not subject to claims of negligence by an injured person unless the facts demonstrate that a special duty was created between the injured plaintiff and the governmental entity. See *Valdez v City of NY*, 18 NY3d 69, 75 [2011]. “Without a [special] duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.” *Lauer v City of New York*, 95 NY2d 95, 100 [2000].

A special duty may arise in three scenarios: (1) a statute exists for the benefit of plaintiff; (2) the municipality voluntarily assumed a duty greater than that which is owed to the public at large; or (3) where the municipality takes positive control over a known dangerous condition (see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013], *Albino v New York City Hous. Auth.*, 78 A.D.3d 485, 488 [1st Dept 2011]).

To establish a voluntary assumption of a special duty the plaintiff must demonstrate: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. *Cuffy v City of New York*, 69 NY2d 255, 260 [1987].

Discussion

The City argues that plaintiff has failed to plead a special duty requiring dismissal of the instant action. In opposition plaintiff argues that special duty is not applicable. The Court disagrees.

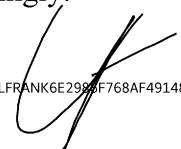
The Court finds that in fact the special duty doctrine applies as the City was performing a governmental function of supervising children during the school day. Plaintiff failed to include the theory of special duty in her notice of claim and in her complaint. The notice of claim and the complaint are devoid of any language that would allude to a special duty, rather plaintiff's notice of claim and complaint sound in ordinary negligence, which cannot be the basis of liability in the instant action.

Even if plaintiff properly pled the theory of a special duty, the facts of this case would nevertheless fail to impose liability on the defendants. Plaintiff was injured by the actions of a third-party and the record is devoid of any evidence to establish any elements of a voluntary assumption of a duty. The Court has reviewed the plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that the motion by the defendants is granted in its entirety and the complaint is dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

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11/1/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: