SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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HENRY CONCEPCION-RAMOS,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY DEPARTMENT OF CORRECTIONS,

Defendants.

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DECISION & ORDER

Index No: 68492/2018

Motion Sequence No. 1

The following papers (NYSCEF document nos. 30-55) were read on the motion by the defendant, County of Westchester, for an order granting it summary judgment dismissing the complaint.

Notice of Motion-Affirmation-Exhibits (A-N)
Affirmation in Opposition-Exhibits (A-D)
Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion is denied; and it is further

ORDERED the matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff, an inmate, sues alleging negligence for injuries purportedly sustained on September 15, 2017, when he became embroiled in an altercation with another inmate at the Westchester County Jail.

On September 14, 2017, the day prior to the subject assault, at approximately 10:00 p.m., plaintiff was pushed and thrown to the floor by an inmate named Mercedes. At deposition, plaintiff testified that all the inmates within the dormitory area witnessed this altercation.

On the following day, September 15, 2017, plaintiff testified that he reported the incident involving Mercedes to a corrections officer and requested to be moved to a different dormitory area. The corrections officer subsequently relayed the information provided by plaintiff to the sergeant. At deposition, Sergeant Haspil testified that plaintiff informed him of the incident that occurred the night before with Mercedes. Sergeant Haspil further testified that this conversation occurred by the officer's control panel which is located in the vicinity of the day room where they were both visible and where they could be heard by other inmates.

Shortly thereafter, Sergeant Haspil went to find Mercedes to tell him to pack up because he was being moved to another dormitory area. At deposition, plaintiff testified that the sergeant told Mercedes that he was being moved in front of all the other inmates. Plaintiff further testified that the group of inmates collectively asked Sergeant Haspil why Mercedes was being moved and according to plaintiff, Sergeant Haspil told the inmates that plaintiff had filed a report on Mercedes. Plaintiff alleges that after this, he was known as a "jailhouse rat" which prompted the subsequent assault at issue.

Shortly after Mercedes was removed, plaintiff was punched multiple times in the face by John Hicks, another inmate. Plaintiff testified that the assault by Hicks occurred when plaintiff was walking either to talk to another inmate or to the restroom. Plaintiff testified that as soon as he passed Hicks, Hicks began punching him. Plaintiff testified that he later learned from someone that Hicks yelled "rat" right before the assault on him.

Following the completion of discovery, the County moves for an order granting summary judgment dismissing the complaint. Plaintiff opposes the motion.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

It is well-settled that a municipality owes a duty of care to inmates in correctional facilities to safeguard them from attacks by fellow inmates (*see Sanchez v State of New York*, 99 NY2d 247, 252 [2002]; *McAllister v City of New York*, 159 AD3d 887, 887 [2d Dept 2018]). Although a municipality "is not an insurer of prisoner safety and negligence cannot be inferred merely because an incident occurred" (*Iannelli v County of Nassau*, 156 AD3d 767, 768 [2d Dept 2017]), it is, nevertheless, charged with a duty to provide reasonable care to protect inmates from risks of harm that are reasonably foreseeable (*see Adeleke v County of Suffolk*, 156 AD3d 748, 749 [2d Dept 2017]). "Foreseeability includes what the defendant municipality knew or should have known" (*McAllister*, 159 AD3d at 888). "Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (*Scurry v New York City Hous. Auth.*, 193 AD3d 1, 3 [2d Dept 2021]) [internal quotation marks omitted]).

"In determining whether the municipality had reason to know about a danger, its knowledge of the particular inmates is relevant, but so are its knowledge of risks to a class of inmates, its expertise or prior experience, and its own policies and practices designed to address the risks" (*Brown v City of New York*, 95 AD3d 1051, 1052 [2d Dept 2012] [internal quotation marks omitted]). Accordingly, a defendant municipality moving for summary judgment dismissing an inmate's negligent supervision claim "must meet a high threshold" (*Sanchez*, 99 NY2d at 254)—it bears the burden of establishing that the assault of the plaintiff was not foreseeable as a matter of law (*see Adeleke v County of Suffolk*, 156 AD3d 748, 749 [2d Dept 2017]; *Brown*, 95 AD3d at 1052).

Here, viewing the evidence in a light most favorable to plaintiff, and drawing all reasonable inferences in plaintiff's favor, the papers submitted raise a material issue of fact as to whether the assault on plaintiff by Hicks was reasonably foreseeable. Defendant's sole focus on the facts that plaintiff had never complained about Hicks prior to the assault, that it was unaware of the specific danger posed by Hicks to plaintiff, and that the assault occurred suddenly and unexpectedly are not entirely dispositive on the issue of whether the assault was reasonably foreseeable *to the defendant* (*see Sanchez*, 99 NY2d at 254; *Brown*, 95 AD3d at 1052; *Singleton v The City of New York*, Sup Ct, Bronx County, April 21, 2014, Brigantti-Hughes, J., index No. 14055/2007).

At deposition, Sergeant Haspil testified that he was aware that inmates characterized as "jail house rats" have been the subject of attacks (Haspil deposition tr at 65), and that he was concerned with plaintiff's well-being when Mercedes was in the process of moving out of the dorm because Mercedes, who Sergeant Haspil described as "liked" among the inmates, was telling the other inmates the reason he was being moved out of the dorm (Haspil deposition tr at 74-75). "A defendant's duty[] . . . is not measured by whether the assault was foreseeable to the plaintiff, but by whether it was foreseeable *to the defendant*" (*Brown*, 95 AD3d at 1052) (emphasis added). Moreover, the fact that the assault comes unexpectedly to plaintiff "cannot be the measure of the duty of the [municipality], as

[plaintiff's] custodian, to safeguard and protect [the plaintiff-inmate]" from harm (*see Sanchez*, 99 NY2d at 254). Accordingly, defendant's motion is denied.

ENTER,

Dated: White Plains, New York
April 5, 2021

HON. JOAN B. LEFKOWITZ, J.S.C.