

A.P. v John W. Lavelle Preparatory Charter Sch.

2021 NY Slip Op 34102(U)

October 7, 2021

Supreme Court, Richmond County

Docket Number: Index No. 151118/17

Judge: Judith N. McMahon

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

IAS PART 6

ORDER

A.P., an infant by her mother and natural guardian,
STEPHANIE PAULICELLI and STEPHANIE
PAULICELLI, Individually,

Plaintiffs,

- against -

Index Number: 151118/17

JOHN W. LAVELLE PREPARATORY CHARTER
SCHOOL,

Hon. Justice
Judith N. McMahon

Defendants.

x

Defendant’s motion (sequence 003) for summary judgment is denied as detailed herein.

This action arises out of an incident in which the Infant Plaintiff, A.P., alleges she fell as a result of being pushed by another student while A.P. was transitioning between classes at the John W. Lavelle Preparatory Charter School in Staten Island, New York on December 15, 2016.

Defendant is now moving for summary judgment to dismiss the case.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

“In reviewing a summary judgment motion, the court must consider the facts in a light most favorable to the nonmoving party, and examine whether the proponent has made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Once the moving party has done so, the

nonmoving party must show facts sufficient to require a trial on any issue of fact. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.”

Lau v. Margaret E. Pescatore Parking, Inc., 30 N.Y.3d 1025, 90 N.E.3d 1276 (2017).

Defendant first argues that Lavelle did not have any actual or constructive notice regarding any prior similar conduct.

On November 27, 2018, Plaintiff Stephanie Paulicelli, the Infant Plaintiff’s Mother, appeared for an examination before trial and testified as follows:

Q: And prior to December 15th of 2016, had you ever made any complaints to Lavelle with regards to your daughter concerning any incident involving pushing, shoving --

A: Yes.

Q: -- anything like that? How many times had you done so?

A: There were numerous. It started as conversations, and then I started to document it.

Q: How did you document it?

A: E-mails, started with e-mails.

Q: To whom?

A: Miss Peterford, who was the special education, special education coordinator I want to say, she was the go-to person that would oversee [A.P.], her seventh grade advisor, eighth grade advisor Miss Carnavas, and the principal, I would cc everybody, and her social worker too, I would cc everybody on the e-mails.

...

Q: And what did you e-mail them about?

A: Just if there was an incident that happened that day, or [A.P.] told me something that went on or, you know, anything, anything that I would have to inform them of.

Q: When you say incidents, what I'm asking, my question was any incident where somebody pushed or shoved her.

A: I did e-mail them about shoving and pushing, yeah.

Defendant next argues that there is no causal connection between the alleged breach and the Plaintiff's injuries. Defendant asserts that because Plaintiff can not identify the student who pushed A.P., and there are no known witnesses to the push, that it is speculative to say what happened to A.P. was deliberate and therefore Plaintiff can not establish proximate cause.

On February 14, 2020, Tytianna Fonville appeared for an examination before trial. At the time of the alleged incident, Ms. Fonville was a Teacher Assistant at Lavelle. Ms. Fonville testified that she remembered A.P., "coming back to school with a casted arm after an incident in the school." Ms. Fonville testified that on the date of the incident in question, she heard a commotion outside of the classroom she was in. When Ms. Fonville investigated the source of the commotion, she found A.P. surrounded by a group of students and Ms. Fonville could tell A.P. was "in the middle of the situation." Ms. Fonville testified that when she spoke to A.P., A.P. was upset and A.P. told her she had been tripped and wanted to find out who had done it to her. Ms. Fonville stated that she convinced A.P. to go to the nurse instead of seeking retaliation for what had happened to her.

At her examination before trial, conducted on November 27, 2018, A.P. testified that, “Somebody came from behind me, like they pushed me, though, like on purpose.”

“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. The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. Thus, summary judgment should only be granted where there are no material and triable issues of fact, and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion.” *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 114 N.Y.S.3d 100 (N.Y.A.D. 2nd Dept. 2019).

Considering the facts in the light most favorable to the (nonmoving) Plaintiff, there is testimony from A.P.’s mother that she put Defendant School on notice of bullying occurring. There is also testimony from A.P. that what happened to her was a deliberate action by another student. Furthermore, there is testimony from Teacher Assistant Fonville that “there absolutely should have been” a teacher stationed in the hallway where the incident took place, but Ms. Fonville never saw any teacher in the hallway on the date in question. The Teacher Assistant testified that she did see A.P. surrounded by students immediately after the incident.

There are issues of fact concerning the credibility of the individuals who testified in this case. *See Abdenbi v. Walgreen Co.*, 151 N.Y.S.3d 368 (N.Y.A.D. 2nd Dept. 2021); *See also Williams v. Light*, 196 A.D.3d 668 (N.Y.A.D. 2nd Dept. 2021).

Additionally, this Court notes that Defendant Lavelle admitted that it had reviewed videotape from cameras stationed in the hallways as part of an internal investigation of the incident. Defendant Lavelle determined that the tape did not capture the incident and the tape

was erased without it being shared/viewed by others. There are questions of fact as to what probative value such security footage may have had either on the occurrence of the incident itself or Lavelle's efforts at supervision to address complaints regarding bullying in the hallways.

Lastly, Defendant requests that Plaintiff's Complaint be dismissed because they failed to file a notice of claim.

NY Education Law of the State of New York states that:

No action or special proceeding, for any cause whatever...relating to district property or property of schools ...or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education, board of cooperative educational services, school... unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. *NY Educ Law § 3813.*

NY General Municipal provides that:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in

the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises. *NY Gen Mun Law § 50-e.*

Plaintiff opposes dismissal asserting that they have no obligation to serve such notice because the statutes do not explicitly state they are applicable to charter schools. Defendant cites to two federal cases suggesting that charter schools are subject to the notice requirement. The federal cases cited by Defendant are persuasive, but not controlling. Additionally, it is unclear on what basis the federal cases determined that charter schools are subject to the notice requirement, but it is clear that the statements regarding charter schools in the federal caselaw were dicta than the holding of the cited cases. As a result of the totality of the circumstances including email and oral complaints, this Court finds sufficient notice was provided for this case to proceed before a jury.

Therefore, Defendant's motion for summary judgment must be denied.

ORDERED that Defendant's motion (sequence 003) for summary judgment is denied; and it is further

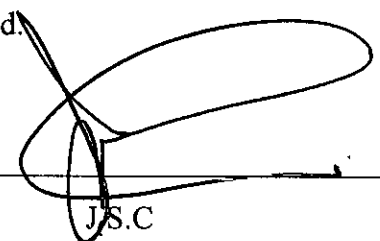
ORDERED that the Clerk is directed to enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: 10/7/2021

So Ordered

ENTER:



**Hon. Judith N. McMahon
J.S.C.**