

Perez v NYC Dept. of Educ.

2024 NY Slip Op 31457(U)

April 24, 2024

Supreme Court, New York County

Docket Number: Index No. 155541/2017

Judge: Nicholas W. Moyne

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NICHOLAS W. MOYNE PART 52

Justice

<p style="text-align: center;">-----X</p> <p>BRIGITA PEREZ</p> <p style="text-align: center;">Plaintiff,</p>	<p>INDEX NO. <u>155541/2017</u></p> <p>MOTION DATE <u>05/22/2023</u></p> <p>MOTION SEQ. NO. <u>001</u></p>
--------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------

- v -

NYC DEPARTMENT OF EDUCATION,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

Plaintiff, Brigita Perez, a public-school teacher, claims that she was injured when she was assaulted by a student after intervening to break up a fight between the assailant and another student. Plaintiff commenced this suit against the New York City Department of Education (DOE), claiming that the DOE failed to protect her from harm, failed to provide her with a safe place of employment, and was negligent in failing to adequately supervise the students at her school.

The DOE now moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint. The DOE argues that dismissal is warranted for two reasons. First, under the special duty rule a municipal corporation's performance of a governmental function, such as a school system's providing security services to protect teachers, cannot give rise to liability in a negligence claim unless the plaintiff both pleads and establishes that the school system owed the plaintiff a special duty beyond any general duty owed to the public at large. The DOE maintains that the plaintiff failed to plead a special duty and that it has established as a matter of law that it assumed no such special duty because it never made any promises or assurances of protection to the plaintiff nor took any actions which would have caused the plaintiff to reasonably rely on a guarantee of safety. Second, even if the plaintiff had pled and could establish a special duty, the DOE argues it is still entitled to summary judgment on its defense of governmental function immunity. The DOE asserts that the conduct complained of, namely, the steps the school took to implement security measures, involved the performance of a discretionary governmental function, and the record shows the school exercised discretion in its performance.

The facts taken in the light most favorable to plaintiff are as follows (*see Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [On a motion for summary

judgment, the facts must be viewed in the light most favorable to the non-moving party]). Plaintiff was employed as a teacher at I.S. 219 New Venture School, M.S. 219, a public high school located in the Bronx. On March 21, 2016, plaintiff alleges that while she was teaching her eighth period class, J.B., a student that was not in her class, was in the hallway and kept looking through her classroom window supposedly at another student (see NYSCEF Doc. 37 at 17). Plaintiff asserts that there were more than twenty, probably about thirty, students in the classroom at this time as well as a paraprofessional, Ms. Marshall. J.B. then knocked on the door and asked the plaintiff for a pencil, which the plaintiff gave to J.B. (NYSCEF Doc. 37 at 17). After which, the plaintiff allegedly learned from the students in her classroom that J.B. was going to start a fight after the period or there was going to be a big fight (NYSCEF Doc. No. 37 at 18). Once she learned of this possible fight, plaintiff called the Assistant Principal and the downstairs office for help but did not receive a response and plaintiff claims she could not call the school safety office because they patrol, she didn't have a walkie-talkie, and were probably were getting ready for dismissal (NYSCEF Doc. 37 at 18, 29). Plaintiff contends that another student from her class had gotten up and opened a door to the classroom so J.B. could enter (NYSCEF Doc. No. 37 at 18, 23). When J.B. entered the classroom, she went straight for the other student and started hitting her (NYSCEF Doc. No. 37 at 24). Plaintiff asserts that she then got in between the two students and tried to pull them apart when she was hit by J.B. (NYSCEF Doc. No. 37 at 25, 26).

At both her 50-H hearing and at her deposition, the plaintiff acknowledged that while J.B. had been involved in prior disciplinary issues at the school, J.B. had never made any physical threats against plaintiff prior to this incident (NYSCEF Doc. No. 37 at 19, 20; NYSCEF Doc. No. 36 at 27-29). At her deposition, plaintiff also conceded that she was not promised by either the dean or any member of the school to protect her from J.B. (NYSCEF Doc. No. 37 at 34). DOE argues these concessions are fatal to her claims of negligence and therefore require that the court grant summary judgment and dismiss the complaint.

The DOE is correct that the general rule is that municipalities may not be held liable for injuries resulting from a simple failure to provide protection or security to their employees. However, there is an exception for a narrow class of cases in which a special relationship exists between the municipal entity and the injured party (*see Pascucci v City of New York*, 305 AD2d 103, 104 [1st Dept 2003]). The four elements of this special duty are: (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 (*see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Pascucci*, 305 AD2d at 104). Whether a special relationship exists sufficient to confer a corresponding duty upon the public entity is a question of law for the court (*see Bardavid v N.Y.C. Transit Auth.*, 97 AD2d 353, 354 [1st Dept 1983]).

Here, the DOE argues that plaintiff has failed to prove or demonstrate the existence of a special relationship that would be sufficient to establish an affirmative duty on their part towards the plaintiff. The Court agrees. There is no evidence that the DOE undertook any specific security measures for plaintiff's exclusive benefit beyond the general security for which it was responsible (*see Vitale v City of New York*, 60 NY2d 861[1983]). Further, there is no evidence

that the plaintiff justifiably relied on any security measures or other assurances so as to lull her into a false sense of security or a belief that such measures were specifically intended for her exclusive benefit (*see Buder v City of New York*, 43 AD3d 720 [1st Dept 2007]; see also *Dinardo v City of New York*, 13 NY3d 872 [2009]). Absent such evidence, the plaintiff cannot establish that the DOE owed her a special duty to provide protection from assault.

In support of her argument that the DOE affirmatively assumed a duty to act on her behalf, the plaintiff relies on *Pascucci*, one of a very few cases in which a court found a public entity owed a special duty to a teacher to prevent an assault by a student. In *Pascucci*, a teacher was injured when she attempted to break up a fight between two students. During the altercation, the teacher called the school secretary three separate times over the intercom to request a security guard and all three times, the secretary answered the phone and acknowledged the teacher's request for help (*see Pascucci*, 305 AD2d at 103). However, no security guard was sent and after the third phone call to the secretary, the teacher was injured by one of the fighting students (*Id.*) The appellate court reversed the trial court's granting of summary judgment, finding that "a jury could reasonably find that the school secretary's acknowledgment of plaintiff's request for assistance was an implicit promise to act on plaintiff's behalf." (*Id.* at 105).

Here, while the plaintiff called the Assistant Principal and the office, her calls were never answered and as such there was no acknowledgment by an agent of DOE that would constitute a promise that protection would be forthcoming. Plaintiff admits that she did not receive any representations that help was forthcoming. Accordingly, *Pascucci* is distinguishable and does not help her case. Furthermore, it would be incorrect to interpret the First Department's decision in *Pascucci* as establishing an exception for schoolteachers to the special duty requirement, as evidenced by the Court's subsequent decision in *Rivera v Board of Educ. of the City of New York*, 82 AD3d 614 (1st Dept 2011). In *Rivera*, the plaintiff was allegedly injured while attempting to restrain a disruptive student whom she had previously asked the school defendant to remove from her classroom (*Id.*) The school was on notice of the violent propensity of the student. However, in dismissing the case, the Court found that the requirement of pleading a special duty was not satisfied "as plaintiff neither alleged nor testified that defendant assured her that the student would be removed from her classroom or that she would be provided with any particular security" (*Id.* at 615). The plaintiff's assertions that the school had a protocol in place for teachers to call for help and therefore, had undertaken a special duty was unavailing as no acknowledgement of the calls was made. This case is on all fours with *Rivera*. Accordingly, there is no evidence that any special duty was assumed by DOE in regard to plaintiff and DOE is entitled to summary judgment and a dismissal of the complaint.

Accordingly, it is hereby

ORDERED that the motion by defendant, the New York City Department of Education, for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Nicholas W. Moyne

4/24/2024

DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE