Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Oglivia Gibson-Purdie,

Plaintiff,

- against -

The City of New York and the New York City Department of Education,

Defendants.

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Index Number: 3464/10

Motion Date: 12/6/11

Motion Cal. Number: 7

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendants, the City of New York and the New York City Department of Education (DOE) for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff, a teacher at P.S. 42 in Queens County, allegedly sustained injuries as a result of being assaulted by Kevin Duncan, and eighth-grade student, while she was attempting to break up a fight between Duncan and another student in the hallway outside her classroom on March 31, 2009.

It is well settled that a municipal agency cannot be held liable for acts of negligence committed in the performance of its governmental functions in the absence of a special relationship with the plaintiff (see Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]).

Plaintiff's testimony at her 50-h hearing does not raise a question of fact as to whether a special relationship was

established.

The incident in question involved two students getting into a fight in the hallway outside plaintiff's classroom and both boys falling onto plaintiff's arm. Plaintiff has failed to set forth any showing that the school had implemented any measures designed specifically to protect her personally against such incidents or a limited class of teachers of which plaintiff was a member (see Corcoran v. Community School Dist. 17, 114 AD 2d 835 [2nd Dept 1985]) and that plaintiff detrimentally relied upon such special duty (see Feinsilver v. City of New York, 277 AD 2d 199 [2nd Dept 2000]; Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]). Plaintiff's status as a teacher, without more, is insufficient to establish a special duty, since she was in no different a position than any other teacher in the school(see Feinsilver v. City of New York, supra).

Plaintiff testified in her 50-h hearing that during art class on the date of the incident, Duncan jumped out of his seat and ran into the hallway. Plaintiff went out after him and asked him to return to his seat. Instead, Duncan approached another boy and "dived on top of him and they began to wrestle." She stated, "When they moved to avoid the assistant principal, I think they just fell. Somehow they tripped or something. I'm not sure." She stated, "They fell on my arm." She also stated that they thereupon scattered when, she surmises, they saw the assistant principal approaching.

In her deposition, plaintiff testified that Duncan was defiant and argumentative and that he moved about and would hit other students. She stated that he was involved in a fight with other students in her class approximately twice. She did not know of his ever hitting teachers, but he verbally assaulted her, using profanities, five to ten times. Almost every time he attended class there would be some kind of disagreement between him and plaintiff which would last a few seconds. She would also write reports concerning the various incidents and give the reports to Dean Harris. After the third "write-up", she called Mr. Harris and told him that they needed to intervene on behalf of the child and everyone else's safety. She stated that she was told by Harris that if there was a problem he would come and remove Duncan. She testified that Harris, in fact, came and removed Duncan almost every class. Plaintiff also testified that she never witnessed the other boy in the subject altercation ever have a fight with Duncan, or anyone else, before that incident. She does not recall ever calling the school safety officers for assistance whenever there was a fight in her class involving Duncan. The safety officers did respond to incidents in the auditorium when classes were held at

that location. These incidents involved problems such as throwing crayons and art materials, and it was determined that because of these incidents, which did not only involve Duncan, who was not the only child who misbehaved, the classes were relocated to the fifth floor so that she would have more supervisory help.

Harris testified in his deposition that he received a call apprising him that Duncan and the other boy were fighting on the fifth floor. When he arrived and saw plaintiff and a group of students and several teachers, the students dispersed. Plaintiff thereupon informed him that she hurt her arm while trying to break up the fight. Both Duncan and the other boy were suspended as a result of this incident.

Harris also testified that he was aware of Duncan's behavioral problems before the date of the incident, involving talking in class and physical altercations in class. He stated that he had suspended Duncan once for verbal abuse of a staff member, not plaintiff. Harris stated that the only incidents she reported concerning Duncan involved disrupting the class, talking and walking out of the class, but not incidents such as throwing a table or chair. They were only incidents of mere misbehavior. Also, when asked if there were any arrangements made between him and plaintiff regarding Duncan, Harris stated, "No, but like I had decided, I would go by her class when she was with certain classes, I would go to those classes, let them know that Ms. Purdie had backup, it was not for Kevin in particular, but it was for the class in general."

The record herein fails to raise an issue of fact as to whether there was a special duty owed to plaintiff. There is no testimony or other evidence to show that the DOE assumed an affirmative duty to act on plaintiff's behalf and that plaintiff justifiably relied upon the school's affirmative undertaking to her detriment. There is nothing to indicate that plaintiff was placed in any different a position than the other teachers of the school who had to cope with a problem student. Therefore, the fact that she taught an art class with Duncan in it did not place her in a position of unique danger and did not establish a special duty owed to her. That she may have been told to call if there were an incident and that Harris would come to provide assistance does not constitute an assumption by the DOE of an affirmative duty to act on her behalf. Moreover, even had plaintiff testified that she had been assured that help would be sent if she called for assistance, she fails to establish any detrimental reliance. Plaintiff does not demonstrate or allege that she would not have been in the classroom with Duncan but for the principal's assurance that he would provide supervisory or interventionary assistance if she called. There is

no showing or allegation that plaintiff had the choice not to teach the class in which Duncan was a student and that she elected to do so only upon the assurance that assistance would be sent if she called for it. Plaintiff does not describe what she would have done differently that would not have placed her in contact with Duncan had the principal not told her that he would provide back-up if she called. Plaintiff has, thus, failed to show or allege that she changed her position to her detriment in reliance upon any promise by the principal. Although plaintiff avers in her affidavit that in reliance upon the principal's assurances that help would be sent if she called out for it, she "did not press my request that Wendell be removed", such does not raise an issue of fact as to detrimental reliance. Moreover, there was no testimony by plaintiff that she feared for her own safety. Plaintiff's affidavit in opposition, in which she avers that she expressed fear for her safety, contradicts her 50-h and deposition testimony which mentions nothing about her fear for her own safety and must, thus, be disregarded. In any event, even were the Court to consider her affidavit, her expression of fear for her safety still fails to establish or raise an issue as to special duty.

Therefore, that branch of the motion by the DOE for summary judgment dismissing the complaint against it must be granted.

That branch of the motion for summary judgment dismissing the complaint as against the City is also granted, there appearing no opposition to that branch of the motion. There is no dispute that P.S. 42 is a public school under the New York City Department of Education. The Department of Education of the City of New York (formerly known as the Board of Education) is a separate and distinct entity from the City of New York (see NY Education Law §2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Since the City does not operate, maintain or control the subject public school, it is entitled to summary judgment (see Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]). Suits involving public school property may only be brought against the Department of Education (Board of Education). New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Moreover, although the 2002 amendments to the Education Law granted the Mayor greater control over public schools and limited the power of the Department of Education (L 2002, ch 91), such amendments did not alter the fact that the City and the Department of Education are separate legal entities and did

not serve to abrogate the rule that tort actions involving public schools may not be brought against the City (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Moreover, the rule that tort actions relating to public schools may only be brought against the Department of Education and not the City is not limited merely to claims of premises liability but also applies to actions involving intentional torts committed by a student against another student (see id.). Therefore, the City is entitled to summary judgment as a matter of law.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: December 13, 2011

KEVIN J. KERRIGAN, J.S.C.