Neves v Katonah-Lewisboro Sch. Dist.
2012 NY Slip Op 33605(U)
September 19, 2012
Sup Ct, Westchester County
Docket Number: 18091/08
Judge: Orazio R. Bellantoni

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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.

PRESENT:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

FILED & ENTERED
9/25 2012
WESTCHESTER COUNTY CLERK

FILED
SEP 25 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

JOSEPH H. NEVES,

Plaintiff,

- against -

KATONAH-LEWISBORO SCHOOL DISTRICT and FRANK MOORE,

Defendants.

SHORT FORM ORDER
Index No. 18091/08
Motion Date: 8/29/12

Defendant Katonah-Lewisboro School District (KLSD) moves for an order, pursuant to CPLR 3212, granting it summary judgment and dismissing plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Affidavit-Exhibits A-M-Affidavit of Service	1-17
Memorandum of Law-Affidavit of Service	18-19
Affirmation in Opposition-Exhibits A-B-Affidavit of Service	20-23
Memorandum of Law	24
Reply Affirmation-Affidavit of Service	25-26

Upon the foregoing papers the motion is decided as follows:

By way of background, plaintiff commenced this action seeking damages for personal injuries allegedly sustained as a result of inhalation of smoke on September 22, 2007, while undergoing training to maintain his State of Connecticut Bus Driver's Certification. Plaintiff and approximately fourteen other drivers were seated in bus for the training. Defendant Frank Moore, instructed one of the driver's seated in the rear of the bus to light smoke bombs to simulate an emergency situation. The drivers were

instructed to remain in their seats until the driver of the bus unbuckled them. The plaintiff alleges that he was seated for approximately three minutes before the driver came to unbuckle and evacuate him from the bus.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974). The movant must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York.*, 49 NY2d 557 [1980]).

Initially, this Court notes that plaintiff concedes that defendant Moore's act of directing smoke bombs to be set off in the school bus was not an incident that arose out of the "use and operation" of a motor vehicle as defined in Vehicle and Traffic Law §388, so as to render KLSD strictly liable by virtue of being the owner of the vehicle. Additionally, plaintiff conceded that KLSD is not liable by Mr. Moore's act based upon the claim of respondeat superior. Accordingly, the branches of defendant's motion which seeks summary judgment as to these causes of action is granted on consent.

Plaintiff's remaining cause of action as to KLSD seek damages based upon the doctrine of respondeat superior and negligence. In support its motion KLSD offers the affidavit of James Minahan, Superintendent of Transportation for KLSD. Mr. Minahan states that defendant Frank Moore was employed by KLSD, but is now deceased. Mr. Moore did on occasion ask, and was granted permission, to could conduct training at the School District on the weekends, in the driver's room. Mr. Minahan states that KLSD did not sponsor the training done by Mr. Moore, nor did it receive any money or other remuneration for the training. Mr. Minahan states that he has no knowledge of whether or not the bus on which the training was being conducted was owned by KLSD. The affiant further states that KLSD had no knowledge of the curriculum or subject matter of the training sessions, specifically, it had no knowledge that Mr. Moore would be using smoke bombs during his training. Ultimately, Mr. Minahan states that no accident or incident report was prepared as the matter was not considered a district activity.

In instances where an employer cannot be held vicariously liable for an employee's acts, the employer can still be held liable under the theory of negligent supervision (*see Kenneth R. v. R. C. Diocese*, 229 AD2d 159 [2nd Dept 1997]). Here, plaintiff's third cause of action seeks damages based upon a theory of general negligence. However, it is clear upon a further reading of the complaint that the negligence

complained of is that of KLSDs alleged lack of supervision of Mr. Moore. A claim for negligent supervision arises when an employer places an employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising the employee (*id.*). An essential element of this cause of action is that the employer knew or should have known of the employee's propensity for the conduct that caused the injury (*see generally Bumpus v. New York City Tr. Auth.*, 47 AD3d 653 [2nd Dept 2008]; *Ghaffari v. North Rockland Cent. School Dist.*, 23 AD3d 342 [2nd Dept 2005]). Here, the affidavit of James Minahan clearly indicates that KLSD had no knowledge of Mr. Moore's curriculum or that he would use smoke bombs during his training. Accordingly, the movant has established that the harm to the injured party was not foreseeable, nor did KLSD know or should have known about the use of smoke bombs during the training.

Since defendant has made a prima facie showing of entitlement to judgment as a matter of law (*see Zuckerman v. City of New York*. 49 NY2d 557 [1980]), plaintiff must show that genuine triable issues of material fact exist in order to defeat the motion (*id.*).

In opposition, plaintiff alleges that KLSD was negligent in that it gave permission to Mr. Moore to use its property to conduct training without ascertaining what he intended to do and if the activity could present a risk of harm to others. The allegation by plaintiff that Mr. Minahan's failure to seek additional information which may have prevented KLSD from allowing Mr. Moore to use the premises, may have prevented the use of smoke bombs during the training and may have been unreasonable, amounts to nothing more than mere conjecture and speculation which is insufficient to raise an issue of act fact (*see generally Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Fotiatis v. Cambridge Hall Tenants Corp.*, 70 AD3d 631 [2nd Dept 2010]). Here, it is clear from the evidence submitted that KLSD had no knowledge that Mr. Moore was intending to use smoke bombs in his training, moreover, even if that knowledge was acquired, plaintiff fails to establish that an injury would be foreseeable if smoke bombs were used. Additionally, plaintiff proffers no evidence that there were any prior complaints of any improper conduct or training by Mr. Moore, which would have placed KLSD on notice of a potential for repetition of improper conduct.

Based upon the foregoing, defendant KLSD's motion for summary judgemnt is granted and plaintiff's complaint is dismissed as to defendant KLSD.

Dated: September 19, 2012
White Plains, New York

HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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