Pietropaolo v Western Suffolk Bd. of Coop. Educ. Servs.

2012 NY Slip Op 32288(U)

August 3, 2012

Supreme Court, Suffolk County

Docket Number: 07-722

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

INDEX No. 07-722
CAL. No. 11-01039OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 7-5-11 (#005)
MOTION DATE 10-5-11 (#006)
ADJ. DATE 12-21-11
Mot. Seq. # 005 - MG
006 - MD

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TARA N. PIETROPAOLO,

Plaintiff,

-against-

WESTERN SUFFOLK BOARD OF COOPERATIVE EDUCATIONAL SERVICES a/k/a "WESTERN SUFFOLK B.O.C.E.S.", COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, SUFFOLK COUNTY DEPARTMENT OF LABOR, NORTH AMITYVILLE COMMUNITY ECONOMIC COUNCIL B.O.C.E.S., NORTH AMITYVILLE COMMUNITY ECONOMIC COUNCIL TRAINING INSTITUTE, NORTH AMITYVILLE COMMUNITY ECONOMIC, COUNCIL a/k/a "N.A.C.E.C.", N.A.C.E.C., COMMUNITY DEVELOPMENT CO., INC. and LARRY I. SMITH,

Defendants.

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Upon the following papers numbered 1 to 64 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19, 20 - 38 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 39 - 50, 51 - 58, 59 - 60 ; Replying Affidavits and supporting papers 61 - 62, 63 - 64 ; Other memoranda of law 38, 52 ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is

further

ORDERED that this motion by the defendant Western Suffolk Board of Cooperative Educational Services also known as Western Suffolk BOCES for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the defendants County of Suffolk, Suffolk County Department of Social Services, and Suffolk County Department of Labor for an order pursuant to CPLR 3211 (c) dismissing the complaint, and pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them, is denied.

This is an action sounding, *inter alia*, in negligence, premises liability, and negligent hiring to recover damages for personal injury allegedly suffered by the plaintiff while attending classes conducted by the defendant Western Suffolk Board of Cooperative Educational Services also known as Western Suffolk BOCES (BOCES) at a facility operated by the defendant North Amityville Community Economic Council also known as N.A.C.E.C. (NACEC) under a lease with the defendant County of Suffolk (Suffolk). The plaintiff alleges that she was sexually assaulted by the defendant Larry I. Smith (Smith), who was participating in a works program operated by the defendant Suffolk County Department of Labor (DOL), under the auspices of the defendant Department of Social Services (DSS).

It is undisputed that the plaintiff was registered as a student with BOCES, and that she was attending adult education classes in March 2006 in an effort to obtain a high school general equivalency degree (GED). The classes were conducted in a building located at One Commerce Avenue, Amityville, New York (the Building) owned by Suffolk and leased one-half to NACEC and one-half to another entity. On March 9, 2006, the plaintiff arrived early for her 9:00 a.m. class. When she arrived, the doors to the Building were unlocked and there was no security present. She went directly to her classroom, and while alone in the classroom she was sexually assaulted by the defendant Larry I. Smith (Smith). Smith was a participant in the Suffolk Works Employment Program (SWEP) operated by the DOL in which recipients were able to gain work experience and "work off" the social services benefits that they received from Suffolk through DSS. The DOL had referred Smith to NACEC for potential employment as a maintenance worker at the Building. Smith had twice been convicted of sexually assaulting a minor prior to the referral, and he was designated a Level III sex offender, a fact known to DOL. In her complaint the plaintiff alleges that the moving defendants were negligent in that they failed to properly operate, manage and control the Building in a reasonably safe condition, failed to provide adequate security at the Building, negligently hired and/or failed to properly train and supervise Smith, and failed to conduct a proper background check and investigation of Smith.

BOCES moves for an order granting it summary judgment dismissing the complaint on the grounds that it did not supervise or control Smith while he was working at NACEC, that it did not own or control the Building, that it had no duty to provide security at the Building, and that it had no duty to conduct a background check of Smith. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial

of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of the motion, BOCES submits, among other things, nine transcripts of testimony given by or on behalf of the parties to this action. The plaintiff testified at a 50-h municipal hearing on September 19, 2006, and she was deposed on December 11, 2007. Her testimony was essentially the same at both proceedings. The Court notes that, while in no way diminishing the importance and the impact of her testimony, it is entirely undisputed by the defendants and need not be summarized here. In fact, the details of her ordeal are not in dispute herein.

Nancy Kelsey, the Assistant Director of Career and Technical Education at BOCES, testified that BOCES provided GED classes at NACEC pursuant to a written agreement between the parties. BOCES provided teachers, a counselor, and one clerical staff person at the site, and NACEC was responsible for upkeep of the Building. Only adult education classes were given, and local residents could walk into the Building and apply to take classes. BOCES did not provide anything to Suffolk or NACEC for use of the classroom facilities. On the date of this incident, the BOCES counselor called her to report that a student had been assaulted. Ms. Kelsey further testified that she did not know who Smith was, or that he was even present at the Building until this incident, that BOCES had no idea that Smith had a criminal background, and that Rosemarie Dearing, the Executive Director of NACEC, told her that NACEC did not know that Smith had a criminal background. She indicated that under the agreement to use the classroom facilities BOCES did not provide security for the Building, nor did it specifically require NACEC to provide security.

At her deposition, Rosemarie Dearing (Dearing) testified that the Building is owned by Suffolk, leased by NACEC, and the lease required NACEC to maintain the interior space while Suffolk was obligated to maintain the exterior. In exchange for the right to lease the Building for one dollar a year, NACEC, a not-for-profit corporation, provides local community services pursuant to a services agreement with Suffolk. In addition, NACEC participates as a work site in the DOL's SWEP program. Under the program, DOL will refer individuals to fill positions at NACEC. Dearing stated that the usual need is for janitorial and maintenance workers. When NACEC agreed to participate in SWEP it informed DOL that it would not accept any referrals of individuals with a criminal background. She believes this restriction was done in written form. In July or August 2005, DOL called seeking to refer Smith to NACEC to do maintenance work. Dearing declared that she did not recall who called from DOL, but that the person only said that Smith needed work, and that he was an older person. The caller did not tell her that Smith had a criminal background. With the information at hand, she agreed to interview Smith for the position. She stated that NACEC had never accepted the referral of a SWEP participant with a criminal background, and that, when she conducted interviews of SWEP participants, she did not generally inquire about the person's criminal background because DOL knew about the restriction placed on referrals. She indicated that, at his interview, she did ask Smith if there was anything else that she needed to be aware of, and that Smith did not reveal his criminal convictions. If she had known of his criminal background, she would not have allowed him to work at the Building. One reason is that the entity which leases the other half of the Building conducts children's programs. Dearing further testified that SWEP participants, including Smith,

are not NACEC employees, but are compensated through some arrangement between Smith and Suffolk, and that they only work at NACEC until they "work off" their social services grant. She indicated that Smith performed well until the date of this incident, and that she immediately called the police and had Smith arrested when the plaintiff reported to her teacher that day what had occurred. The police informed her that Smith was a Level III sex offender, and when she learned that she called the DOL to ask why they did not follow the restriction on referrals, but got no response. Dearing stated that the Building was open to the public, and that NACEC had a receptionist stationed at a desk at the entrance to the building. She also stated that, from time to time, NACEC made it generally known to BOCES that it did not take DOL referrals of workers with a criminal background.

DOL produced five employees to give testimony in this action. At the time of this incident, Michael Dennington (Dennington) was the Director of Administrative Services for the SWEP program at DOL. At his deposition, Dennington testified that NACEC was a DOL work site pursuant to a memorandum of understanding (MOU) signed by both parties, which provided that hiring is up to the work site. Work sites had the obligation to provide work experience to SWEP participants, and they were required to fill out attendance forms showing the participant's work hours. Work sites had the right to place restrictions on who they would accept for referral, which was noted in the work site's "offering information." If a work site's offering information indicated that it would not accept participants with a criminal record, a sex offender should not be referred there by DOL. In order to join the SWEP program, participants must fill out a DOL form and be interviewed. DOL does not do background checks on participants, and it does not follow up if a participant admits to a criminal record. When DOL is aware of a participant's sex offender status, it is noted in the computer system which then indicates an "alert, work restrictions" for that individual. The computer system, known as the case management system (CMS), also includes screens for client notes, which reflect the information received by DOL regarding the participant. Smith's client notes show a number of entries showing "alert, work restrictions" (Alert) prior to and contemporaneously with his referral to NACEC. Dennington declared that, based on the Alert, Smith should not have been placed where he would have contact with the public, and that DOL counselors generally tell work sites about a participant's criminal background in their telephone conversations regarding referrals. He indicated that DOL counselors use discretion in placing participants with criminal backgrounds depending on what is known at the time. He acknowledged that he updated NACEC's offering information on CMS on May 27, 2005, with information from the older computer system, and that it read "Enrollment Requirements: do not refer applicant with criminal record." He indicated that based on the offering information in CMS, Smith should not have been referred to NACEC. Dennington further testified that the DOL counselor who referred Smith to NACEC, Elizabeth Trusas, should have looked at the offering information before the referral, and that she should have brought up Smith's criminal background in her conversation with the work site. He stated that DOL had no communication with BOCES regarding Smith, and that SWEP did not recommend Smith to BOCES at any time.

John Zanghi (Zanghi) was employed by DOL as a Labor Specialist Two at the time of this incident. At his deposition, Zanghi testified that Dennington was his supervisor, and that he only dealt with Smith when the old computer system was in operation. He indicated that the new CMS system includes a screen with work site offering information, and that it is DOL policy that, if a work site restricts employment, that request is always honored. If a work site requests that no one with a criminal background be referred, then it is DOL policy not to send participants there. The CMS system highlights Alerts with a red exclamation

point, and if an Alert shows, it is standard procedure that a counselor check the offering information screen. Zanghi further testified that work sites are never obligated to take a referral, that DOL rules and regulation require a counselor to alert a work site if the counselor is aware that the participant has a criminal background, and that, to his knowledge, no one at DOL informed BOCES that Smith had a criminal background.

At her deposition on October 26, 2009, Marianne Bailey (Bailey) testified that she is currently a Labor Technician with DOL, and that she was employed by DOL as a counselor until May 2005. She stated that DOL guidelines include questions to ask applicants to SWEP at their intake interview, and that these include questions about their criminal background. Offering information restrictions appear on a counselor's computer screen, and if she saw a request that no one with a criminal background be referred, she would not send a participant with convictions to that work site. Bailey further testified that Elizabeth Trusas (Trusas), the counselor who referred Smith to NACEC, had entered notes indicating that Smith had an Alert in his file, and that if a work site changed its offering information, or agreed to take a referral contradicting its prior request, that the counselor should enter those facts into the client notes on CMS. She indicated that Trusas did not enter any such client notes in this case, and that under DOL policy, procedures, and guidelines Smith should not have been referred to NACEC. Bailey further testified that Richard Krebs, a supervisor at DOL, entered a note in CMS on March 10, 2006, the day after this incident, which reads: "work site guidelines recently updated, work site guidelines did not appear previously." She stated that she would take that to mean that the work site's request for "no felons" was not previously in the CMS system. As a counselor, if she knew that a participant had a criminal record, she would always bring that to the work site's attention if there was an offering restriction. She acknowledged that it was the responsibility of counselors and the DOL's "work site unit" to check for any offering information restrictions, and that counselors' files went to a quality control unit to ensure compliance with those offering restrictions.

At her deposition, Trusas testified that she had been employed by DOL as a counselor since January 2003. She only worked with Smith in the Summer of 2005, when she interviewed him with the object of placing him or referring him to a work site. She was aware of his status as a sex offender due to the Alerts and notes in the computer and in Smith's paper file. Trusas further testified that in determining where to refer participants "we look at where the [participant] lives and we put in the zip code and we pull up the screen. And then we start making calls, and then we call the contacts and we ask them if they're willing to accept an interview with the [participant]. And sometimes they say no, sometimes they say yes. And if they do, then they go for an interview. And then it's up to the work site to accept that client as a work site participant." She indicated that Smith was difficult to place, and that, when she spoke with Dearing at NACEC, she told her that Smith was a sex offender. However, Dearing agreed to interview Smith saying that he would be doing work outside, and that NACEC was an adult education program where no children were present. She acknowledges that she did not make a record of her conversation with Dearing in the CMS client notes for Smith. Trusas declared that she did not know that NACEC had an offering information restriction regarding criminal background, and that she would not have called there if she had known of the request. She indicated both that she was not certain if the offering information screen on CMS was available to her during Smith's interview in August 2005, and that she believes she reviewed the offering information screen for NACEC that day, and that it did not include a request regarding a participant's criminal background. She had made one or two previous referrals to NACEC,

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and knew it to be an adult education program, but she did not know if there were any offering information restrictions at that time. Trusas further testified that DOL policy, procedure and guidelines require counselors to check a work site's offering information before making a referral. She states that, after this incident, she learned from Richard Krebs that NACEC's offering information restrictions were not on CMS prior to March 9, 2006, and that she had no contact with BOCES regarding Smith.

Richard Krebs (Krebs) was employed by DOL as its Director of Client Services at the time of this incident. At his deposition, Krebs testified that he oversaw the client services unit, which conducts all SWEP participant interviews. On June 13, 2005, DOL changed its computer system to the new CMS system, formally know as the welfare to work case management system. Just like the old computer system, CMS was intended to permit counselors access to a work site's offering information. On March 9, 2006, he was the supervisor of the person who directly supervised Trusas' work. When he learned of this incident, he had a conversation with Trusas who told him that she had called the work site and that Dearing had informed her that NACEC had need for outside work and that no children were present at the site. Trusas also told him that Dearing accepted the referral, and that, before she made the referral, she did not see a "work site restriction" on CMS. Krebs further testified that he investigated Trusas' claim by going to a random participant's computer file, not Smith's file, and that he learned that the offering information screen containing offering information/work site restrictions was not available to counselors. On March 10, 2006, he made notes in CMS that the work site "guidelines" did not appear on CMS previously. He acknowledged that DOL policy in August 2005 would not allow the referral of a sex offender to an indoor public facility where education courses were given, and that Trusas should have made a client note if Dearing had agreed to the referral of Smith. However, he stated that here Trusas made the referral because the position entailed outdoor work and no children were present at the work site. Krebs further testified that work sites which include educational programs are obligated to conduct background checks on prospective workers pursuant to the Education Law, that in March 2006 he thought that NACEC was a division of BOCES, and that DOL does not refer workers to BOCES. He also stated that, if NACEC and BOCES are not connected, then only NACEC should have competed a background check on Smith before he was put to work, and that there was no public information that would have enabled BOCES to learn that Smith was a SWEP participant.

As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also*, ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). To establish liability for a dangerous or defective condition, a plaintiff must establish that the defendant created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Goldin v Riker***, 273 AD2d 197, 709 NYS2d 119 [2d Dept 2000]; ***Aversano v City of New York***, 265 AD2d 437, 696 NYS2d 233 [2d Dept 1999]). Here, BOCES established that it merely used the Building as a site to conduct GED classes, the Building was owned by Suffolk and occupied and controlled by NACEC, and it had no notice of an allegedly defective or dangerous condition on the premises.

BOCES also established that it did not supervise, control or employ Smith while he was present at the Building. It is well settled that a party generally owes no duty to prevent a third party from causing harm to another unless that party has the authority and ability to control the third party's actions (***D'Amico***

v ***Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Fernandez v Rustic Inn, Inc.***, 60 AD3d 893, 876 NYS2d 99 [2d Dept 2009]; ***Fay v Assignment Am.***, 245 AD2d 783, 666 NYS2d 304 [3d Dept 1997]).

Additionally, BOCES has established that it did not owe a duty to the plaintiff to provide adequate security where this incident took place. An owner or possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties (*see* ***Bryan v Crobar***, 65 AD3d 997, 885 NYS2d 122 [2d Dept 2009]). The duty is imposed by virtue of the ownership and control over the property for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its dangers (***Blatt v New York City Housing Authority***, 123 AD2d 591, 506 NYS2d 877 [2d Dept 1986]; *see also* ***Bryan v Crobar***, *supra*). Here, BOCES has established that it is neither the owner, nor does it control the Building where this incident occurred. However, even if BOCES were found to have some measure of control over the premises, it owed no duty to the plaintiff herein. The owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*see* ***Katekis v Naut, Inc.***, 60 AD3d 817, 875 NYS2d 212 [2d Dept 2009]; ***Guo Hua Wang v Lang***, 47 AD3d 766, 849 NYS2d 654 [2d Dept 2008]; ***Millan v AMF Bowling Ctrs., Inc.***, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]; ***Durham v Beaufort***, 300 AD2d 435, 752 NYS2d 88 [2d Dept 2002]). The owner or possessor of real property cannot be held to a duty to take protective measures unless it is shown that the owner or possessor knew or should have known from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of those lawfully on the premises (*see*, ***Guo Hua Wang v Lang***, *supra*; ***Mohmand v Shorenstein Realty Inv. Two, LP***, 307 AD2d 918, 762 NYS2d 900 [2d Dept 2003]; *see also* ***Bryan v Crobar***, *supra*).
The adduced evidence reveals that BOCES was unaware that Smith was working at the Building, that he had a criminal background, that he was a sex offender, or that he was likely to have contact with any of its adult students.

Finally, BOCES has established that it did not have an obligation to conduct a background check on Smith prior to this incident. It is clear that, under the Education Law, BOCES has an obligation to conduct background checks on prospective employees (Educ. Law 87.1). However, BOCES has established that Smith was neither a prospective employee, an employee, nor an individual who is covered under said law. In fact, BOCES was not even unaware that Smith was working at the Building.

A review of the record reveals that BOCES has established its entitlement to summary judgment herein. In opposition to the motion, the plaintiff submits, among other things, the affirmation of her attorney wherein he contends that BOCES owed the plaintiff a duty to provide a safe place for learning based on the doctrine *in loco parentis*. However, it is well settled that the doctrine is not applicable with regard to young adults and those who are not under the age of majority (***McNeil v Wagner Coll.***, 246 AD2d 516, 667 NYS2d 397 [2d Dept 1998]; ***Rydzynski v North Shore Univ. Hosp.***, 262 AD2d 630, 692 NYS2d 694 [2d Dept 1999]; ***Talbot v. New York Inst. of Tech.***, 225 AD2d 611, 639 NYS2d 135 [2d Dept 1996]). The plaintiff's remaining contentions are without merit, and mere conclusions and unsubstantiated allegations are insufficient to raise triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** *supra*).

Accordingly, BOCES motion for an order granting summary judgment dismissing the complaint is granted.

The defendants County of Suffolk, Suffolk County Department of Social Services, and Suffolk County Department of Labor (collectively, movants) move for an order pursuant to CPLR 3211 (c) dismissing the complaint, and pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them. Initially, the Court notes that CPLR 3211 (c) permits a court to treat a motion made pursuant to CPLR 3211 (a) or (b) as a motion for summary judgment. The movants have not made a motion pursuant to CPLR 3211 (a) or (b). Rather, the motion is solely one for summary judgment.

The movants seek summary judgment on the grounds that they do not owe the plaintiff a duty, and that they are entitled to absolute government immunity for discretionary acts. In support of their motion, the movants submit, among other things, many of the deposition transcripts previously discussed herein, the memorandum of understanding signed by Suffolk, DOL and NACEC, and the signed lease for the Building. Initially, the Court notes that there are a number of issues regarding the movants' duty to the plaintiff that preclude the grant of summary judgment herein. Chief among these are whether the plaintiff was a third-party beneficiary of the contract between the movants and NACEC which prohibited the referral of persons with a criminal background to the latter's facility, whether any of the movants owe the plaintiff a duty as the landlord for the building, and whether any of them employed Smith, making them responsible for his actions. The Court will discuss these issues seriatim.

Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see*, ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731[2001]; ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra*). As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract (*see* ***Church v Callanan Industries***, 99 NY2d 104, 111, 752 NYS2d 254 [2002]; ***Espinal v Melville Snow Contractors***, *supra*).

Here, movants failed to establish their entitlement to summary judgment regarding their alleged lack of duty to the plaintiff. The Court finds an issue of fact exists as to whether the movants negligently created a dangerous condition – thereby "launch[ing] a force or instrument of harm" – when they referred a known Level III sex offender to a facility which they knew, at a minimum, housed educational programs (*see* ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]; ***Ragone v Spring Scaffolding, Inc.***, 46 AD3d 652, 848 NYS2d 230 [2d Dept 2007]; ***Bienaime v Reyer***, 41 AD3d 400, 837 NYS2d 737 [2d Dept 2007]).

In addition, the movants have failed to establish their prima facie entitlement to summary judgement regarding their obligations as owners of the Building. On a motion for summary judgment to dismiss a cause of action for premises liability, it is the defendant who bears the burden of proving the absence of notice as a matter of law (*see* ***Perlongo v Park City 3 & 4 Apts., Inc.***, 31 AD3d 409,

818NYS2d 158 [2d Dept 2006]; ***Campbell v Great Atl. & Pac. Tea Co.***, 257 AD2d 642, 684 NYS2d 572 [2d Dept 1999]). Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it. (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 894, 800 NYS2d 749 [2nd Dept 2005]; ***Curiale v Sharrotts Woods, Inc.*** 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 434, 739 NYS2d 186 [2d Dept 2002]). Where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk (***Cupo v Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]). The record reveals that there are triable issues of fact including, but not limited to, whether the movants created the unsafe condition at the Building or had actual or constructive notice of it and a reasonable time within which to remedy it, and whether Suffolk assumed responsibility to maintain a portion of the premises sufficiently to be held liable herein.

Moreover, the movants have failed to establish their prima facie entitlement to summary judgement regarding the plaintiff's cause of action for negligent hiring and negligent supervision. There are issues of fact whether Smith was an employee of Suffolk, DOL, DSS, or more than one of them. Participants in a Work Experience Program such as SWEP have been found to be employees of municipal corporations for the purposes of the Fair Labor Standards Act (***Carver v State***, 87 AD3d 25, 926 NYS2d 559 [2d Dept 2011]), in establishing their entitlement to a minimum wage (***Stone v McGowan***, 308 F. Supp. 2d 79 (N.D. N.Y. 2004], and regarding issues of employment discrimination (***United States v City of New York***, 359 F3d 83 [2d Cir 2004]; *but see* ***Brukhmam v Giuliani***, 94 NY2d 387, 705 NYS2d 558 [2000]). In addition, there is an issue of fact whether Smith was a special employee of one or more of the movants under the circumstances herein. A special employee is "one who is transferred for a limited time of whatever duration to the service of another" (*e.g.* ***Bounds v State***, 24 AD3d 1212, 809 NYS2d 314 [4th Dept 2005] quoting ***Thompson v Grumman Aerospace Corp.***, 78 NY2d 553, 557, 578 NYS2d 106 [1991]; *see also* ***Digirolomo v Goldstein***, 96 AD3d 992, 947 NYS2d 164 [2d Dept 2012]; ***Bautista v David Frankel Realty, Inc.***, 54 AD3d 549, 863 NYS2d 638 [1st Dept 2008]). "A person's categorization as a special employee is usually a question of fact that should not be resolved on a motion for summary judgment" ***Bounds v State***, *supra* quoting ***Ozzimo v H.E.S., Inc.***, 249 AD2d 912, 672 NYS2d 197 [4th Dept 1998]).

Accordingly, the movants' motion for summary judgment dismissing the complaint is denied.

The movants have likewise failed to establish their entitlement to summary judgment regarding that branch of their motion which seeks to dismiss the cross claims against them on the grounds of absolute governmental immunity. "[T]he common-law doctrine of governmental immunity continues to shield

public entities from liability for discretionary actions taken during the performance of governmental functions" (***Valdez v City of New York***, 18 NY3d 69, 936 NYS2d 587 [2011]; *accord* ***Matter of World Trade Ctr. Bombing Litig.***, 17 NY3d 428 , 933 NYS2d 164 [2011]). Thus, even where a litigant establishes that a state or municipal defendant was negligent, the state or municipal defendant will not be held liable so long as it proves that the alleged negligent act or omission involved the exercise of discretionary authority and that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated (***Valdez v City of New York***, *supra*; ***Mon v City of New York***, 78 NY2d 309, 574 NYS2d 529 [1991]). While "[g]overnment action, if discretionary, may not be a basis for liability . . . ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (***McClean v City of New York***, 12 NY3d 194, 203, 878 NYS2d 238, 244-245 [2009]). The difference between a discretionary act and a ministerial act is that a discretionary act involves the exercise of reasoned judgment which could typically produce a different acceptable result, whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result (*see* ***Tango v Tulevech***, 61 NY2d 34, 471 NYS2d 73 [1983]). It is this distinction which results in the movants arguing that Trusas' actions were discretionary entitling them to absolute government immunity.

However, when an action is exclusively ministerial, a municipality will be liable if its actions are otherwise tortious and not justifiable pursuant to statutory command (***McLean v City of New York***, *supra*; ***Lauer v City of New York***, 95 NY2d 95, 711 NYS2d 112 [2000]). Even where an act is ministerial, to sustain liability against a municipality the duty breached must be more than that owed the public generally (*see* ***McLean v City of New York***, *supra*; ***Lauer v City of New York***, *supra*). A duty to exercise reasonable care toward the claimant is born of a special relationship between the claimant and the governmental agency (*see* ***McLean v City of New York***, *supra*; ***Pelaez v Seide***, 2 NY3d 186, 778 NYS2d 111 [2004]). To form a special relationship by voluntarily assuming a duty to an injured person, plaintiff must demonstrate (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* ***McLean v City of New York***, *supra;* ***Pelaez v Seide***, *supra*). "Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach" (***Mon v City of New York***, *supra*).

Here, the adduced evidence reveals that Trusas' referral was a ministerial act which did not involve any discretionary action. Trusas' testimony that "[she] put in the zip code and we pull up the screen. And then we start making calls, and then we call the contacts and we ask them if they're willing to accept an interview with the [participant]," in no manner implicates an exercise of discretion. Where there is no exercise of judgment or discretion, the defense of absolute governmental immunity is not available (*see* ***Haddock v City of New York***, 75 NY2d 478, 554 NYS2d 439 [1990]).

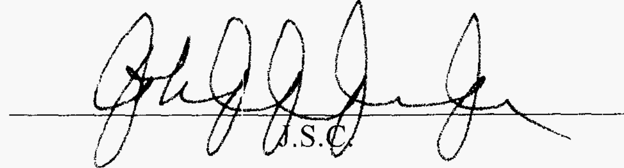
A review of the record establishes that the movants failed to establish as a matter of law that they did not form a special relationship with NACEC, and that, among other things, NACEC did not justifiably rely on DOL's promise not to refer individuals with a criminal background. A party's right to seek

contribution has been upheld even where the injured person herself has no right of recovery (*see* ***Garrett v Holiday Inns, Inc.***, 58 NY2d 253, 460 NYS2d 74 [1983]; ***Klinger v Dudley***, 41 NY2d 362, 393 NYS 2d 323 [1977]; ***Dole v Dow Chemical Co.***, 30 NY2d 143, 331 NYS2d 382 [1972]).

Accordingly, the motion by Suffolk, DOL and DSS for an order granting summary judgment dismissing all cross claims against them is denied.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 3 Aug. 2012



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION