Pinero v City of New York
2012 NY Slip Op 33452(U)
February 22, 2012
Supreme Court, Bronx County
Docket Number: 13600/06
Judge: Mary Ann Brigantti-Hughes
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

3-8-12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

ELVIS E. PINERO, AN INFANT BY HIS FATHER AND NATURAL GUARDIAN, PEDRO E. PINERO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and LEHMAN HIGH SCHOOL,

Defendants.

X

DECISION/ORDER

Index No.: 13600/06

The following papers numbered 1 to read on the below motions noticed on **May 27, 2011** and duly submitted on the Part IA15 Motion calendar of **July 29, 2011**:

Papers Submitted	Numbered
Defs' Affirmation in support of motion, Memo of Law, Exhibits	1,2
Pl.'s Affirmation in opposition, Exhibits	4,5

In an action seeking damages for personal injuries arising out of an alleged physical altercation, defendants City of New York, The New York City Department of Education, and Lehman High School (hereinafter collectively referred to as "Defendants") move for an order (1) renewing Defendants' motion for dismissal and/or summary judgment, pursuant to this court's July 14, 2008 order, and (2) upon renewal, granting Defendants' summary judgment pursuant to CPLR 3212 or dismissal pursuant to CPLR 3211, dismissing the complaint of plaintiff Elivs E. Pinero (hereinafter "Plaintiff"), with prejudice. Plaintiff opposes the motion.

I. Factual History

At relevant times, Plaintiff was a student at defendant Lehman High School. On January 13, 2005, Plaintiff alleges he was assaulted while on his way home from school approximately 15 minutes after school had ended, and while he was no longer on school property. The incident

occurred at Westchester Square, approximately one quarter mile from the school. Plaintiff was walking with friends, when a female friend got into a verbal altercation and subsequent physical altercation with an unknown boy. Plaintiff attempted to break up the fight. Plaintiff alleged that gang members nearby threw Plaintiff against a fence and assaulted him with their fists. Plaintiff and his friend managed to escape briefly, but the gang caught up to them and continued the assault with their fists. Plaintiff was rendered unconscious. He was later helped to his feet by a NYPD officer and returned to school. The assistant principal at the time refused to send Plaintiff home in a cab, as per Plaintiff's mother's request, and called an ambulance to take Plaintiff to Jacobi hospital. Plaintiff did not identify his assailants and no arrests were made.

Defendants argue they owed no duty to Plaintiff as the alleged incident occurred after school hours and off school property. *Pratt v. Robinson*, 39 N.Y.2d 554, 560 (1976). There can be no actionable breach of a school's duty where the injury occurs off of school premises, since the duty extends only to the boundaries of school property. *Tarnaras v. Farmingdale Sch. Dist.*, 264 A.D.2d 391 (2nd Dept. 1999). Plaintiff was on a public sidewalk here separated from school property by a chainlink fence. Defendants also allege that they owed no duty to Plaintiff since the incident occurred outside of normal school hours. The incident allegedly occurred at 3:00PM, when the school day ended at 2:46 PM.

Even if the incident did take place on school property, and during school hours, Defendants argue that they had no duty to protect Plaintiff as no liability may arise from attacks from third parties absent a special duty of protection. *Dickserson v. City of New York*, 258 A.D.2d 433, 433-34 (2nd Dept. 1999). Finally, Defendants assert that the alleged incident was spontaneous in nature and more supervision, therefore, could not have prevented it. They allege that schools are not insurers of a student's safety, for they cannot reasonably be expected to supervise continuously all students' movements and daily activities, much less "guard against all of the sudden, spontaneous acts that take place among students daily." *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994).

In opposition, Plaintiff argues that Defendants had notice of gang related violent propensities of fellow students. Plaintiff submits a newspaper article detailing gang activity

around the School from 1999, and a police incident report stemming from this incident which notes that "fights happen every day" where the incident occurred. The assailant was a student of the same school as Plaintiff, according to Plaintiff's testimony. Moreover, Plaintiff argues that the incident occurred within school boundaries. According to the testimony of Scott Arbuse and Giusseppi Di Maio, former and current assistant principles of security and administration for the school, respectively, a "safe corridor," or a designated route established by the school with the NYPD to provide a safe exit to the students, was purposefully established to afford protection to students exiting the high school. Mr. DiMaio testified that the corridor "encompasses one side of the school all the way to the other side of the school, Exit 6 is the one corner of the school and White Castle is where the football field would end. We provide a safe corridor in that whole area of the school." Mr. Arbuse concurred with "safe corridor" definition. Plaintiff testified that this incident occurred near the football fields.

Plaintiff also argues that Defendant owes a duty during class dismissal times. *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994). This incident occurred 13 minutes following the conclusion of Plaintiff's final class for the day. Finally, Plaintiff argues that a "special duty of protection" did indeed exist between Defendant and Plaintiff, obligating Defendant to protect Plaintiff from third-party attacks. *Dickerson v. City of New York*, 258 A.D.2d 433 (2nd Dept. 1999), citing *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987). Here, Plaintiff alleges (1) defendants affirmatively took action to prevent attacks against students after dismissal; (2) defendants knew inaction could lead to harm; (3) there was direct contact between Plaintiff and Defendant principal; and (4) Plaintiff justifiably relied on the school's affirmative undertaking.

On July 11, 2008, Defendants moved for summary judgment, dismissing the complaint. Justice Larry S. Schachner, J.S.C., denied the motion with leave to renew upon completion of discovery. Defendants assert that Note of Issue in this matter was filed on May 2, 2011 and accordingly discovery is now complete. This court will therefore grant that portion of Defendants' motion, pursuant to CPLR 2221, renewing their motion for dismissal and/or summary judgment.

II. Standard of Review

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

III. Analysis

It is well settled that an action for negligence does not lie unless there exists a duty on the part of the defendant and a corresponding right in the plaintiff (*see Palsgraf v. Long Is. R. R.*, 248 N.Y. 339, 341 [1928]). A school district's duty of care is "coextensive with, and concomitant to, its physical custody and control over a child" See *Chainani v. Board of Educ.*, 87 N.Y.2d 370 (1995); *Pratt v. Robinson, supra*. Thus, the duty of care owed to the students is

present while they are in the school's physical custody or orbit of authority, or when a specific statutory duty has been imposed. *Chainani, supra.*

In this case, there are factual issues surrounding whether, at the time of the incident, Plaintiff was still in Defendant's "orbit of control" thus giving rise to a custodial duty of care. Defendants and the NYPD had implemented a "safe corridor" that extended around the boundaries of the school and its football fields, where the incident allegedly occurred. (Dep testimony DiMaio). Mr. Arbuse, an assistant principal for security administration at the time, described the "safe corridor" as an area that students walk through once they exit the school that will provide safe passage up to a certain point. He testified that the "safe corridor" would "usually [go] just about to Westchester Square...". Giusseppe DiMaio was the "head dean" at the School during relevant times. Upon dismissal, school safety agents were stationed to provide "safe corridor" "from the Exit 6 bus stop, to and including White Castle." Mr. DiMaio explained that the "safe corridor" "encompasses one side of the school all the way to the other side of the school, Exit 6 is one corner of the school and White Castle is where the football field would end. We provide a safe corridor in that whole area of the school." Plaintiff testified that this incident occurred in front of the School's football fields. The above testimony presents factual issues as to whether the incident thus occurred within Defendant's area of authority and control.

Further, the mere fact that this incident occurred 13 minutes following the end of Plaintiff's last class of the day does not automatically release Defendant from a custodial duty. Indeed, it has been held that dismissal times are when fights amongst a congregation of students is most likely to occur. *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994). Moreover, the incident report prepared in this matter stated that the incident occurred during school hours. The report was confirmed by Mr. DiMaio at his deposition. He also testified that the report was unclear as to the location of the incident.

Defendants assert that, nevertheless, they are entitled to judgment as they owed no duty of care and cannot be liable for negligent supervision.

It is well established that "a municipality's duty to provide police protection is ordinarily one owed to the public at large and not to any particular individual or class of individuals" and

that, absent a "special relationship" which creates a "special duty", a claim grounded in the lack of such protection is legally insufficient and must be dismissed. *Logan v. City of New York*, 148 A.D.2d 167 (1st Dept. 1989). A special relationship is comprised of the following elements (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; and (4) the party's justifiable reliance on the municipality's affirmative undertaken. *Cuffy v. City of New York, supra*. If the aforementioned elements are not established, a plaintiff cannot sustain an action against a municipality for failure to provide police or school guard protection. *Logan*.

However, separate and distinct from a municipality's provision of police or school guard protection, is a duty of supervision owed by a school to its students, which "stems from the fact of its physical custody over them" thus depriving custody of the child's parent or guardian. *Logan, supra*. Therefore, the actor who takes custody of a child is properly required to give him the protection which the custody or manner in which it is taken has deprived him. Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. *Mirand, supra*. In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury, or that the conduct could reasonably have been anticipated. *Id.*, citing *Bertola v Board of Educ.*, 1 AD2d 973 (2nd Dept. 1956). Such actual or constructive notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily. *Id.*

An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act. *Id.*, citing Ohman v Board of Educ., 300 NY 306, 310, supra; Wilber v City of Binghamton, 271 App Div 402, 406, affd

296 NY 950). *Mirand, supra*. The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence. *Mirand, supra* (internal citations omitted). To this point, Defendants argue that this incident was spontaneous and unforeseeable.

In *Logan*, a student was raped by fellow students while on school premises. The Court noted that the subject school had established careful security measures which including the posting of two security guards and at least two school aides on each floor. Implementation of these security measures raised a factual issue as to whether the Board of Education had notice, actual or constructive, that a child was at risk of attack if left unescorted to travel the stairwells of this school at a time other than the scheduled change-of-class intervals. 148 A.D.2d 167, 172. The issue of notice, the court reasoned, could not be resolved absent reference to the history of violence at the school. "While a school is not an insurer of student safety, it will be held liable in damages for a foreseeable injury proximately related to the absence of supervision." *Cavello v. Sherburne-Earlville Central School Dist.*, 110 A.D.2d 253, 255 (3rd Dept. 1985), *lv dismissed*, 67 N.Y.2d 601.

In this matter, Plaintiff testified that gang members got involved when he tried to break up a fight between two Lehman High students. He testified at deposition that he had seen the gang members at the School before and testified that they attended the School. While the newspaper article and incident report submitted by Plaintiff constitute inadmissible hearsay evidence, there is sufficient evidence on the motion record to raise a triable issue of fact as to whether this incident was foreseeable. Plaintiff testified that fights would occur with the gangs surrounding the school prior to this incident, although he could not recall specifics. The School had worked with the NYPD to instill "safe corridor" around the school grounds in order to provide the students safe egress following dismissal from classes. One of these alleged safe corridors was the path from the School to a White Castle restaurant in nearby Westchester Square, abutting the School's football field, where the incident allegedly occurred. Accordingly, it appears that the School had established careful security measures to prevent incidents like this one from occurring. There is therefore a factual issue as to whether Defendants had actual or

constructive notice that their students were at risk of attack when traveling along the boundaries of the school grounds following dismissal for the day. Moreover, questions of notice, foreseeability of danger, necessity for an adequacy of supervision, and causation are, generally, for the jury. *Garcia v. New York*, 222 A.D.2d 192 (1st Dept. 1996).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion to renew their previously filed motion to dismiss pursuant to CPLR 3211 or for summary judgment pursuant to CPLR 3212 is granted, and upon renewal, it is hereby

ORDERED, that Defendants' motion for dismissal and/or summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: February 22, 2012

Mary Ann B Hughes

Hon. Mary Ann Brigantti-Hughes, J.S.C.