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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 102967/2010
BURGESS, EMMANUEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS CAL: #21

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
DEC 21 2012
NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/11/12
DEC DEC 11 2012

BARBARA JAFFE J.S.C., J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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EMMANUEL BURGESS, an Infant by his Mother and Natural Guardian, CHININQUA WHITE,

Plaintiff,

-against-

THE CITY OF NEW YORK (THE NEW YORK CITY DEPARTMENT OF EDUCATION),

Defendants.

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103967/10

Index No. ~~122049/05~~

Argued: 5/16/12
Motion Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Deborah Pearl Henkin, Esq.
538 Riverdale Avenue
Yonkers, New York 10705
914-378-1010

For defendants:
Anshel David, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0960

By notice of motion dated February 2, 2012, defendants City and New York City Department of Education (DOE) move for an order granting them summary judgment and dismissing the complaint against them. Infant plaintiff, by his mother Chininqua White, opposes. Defendants also request an *in camera* examination of Waly Evans Muhammad's student records.

By notice of cross motion dated April 19, 2012, plaintiff cross-moves pursuant to CPLR 2001 and 3025 for an order granting her leave to amend and correct the caption of the complaint to reflect the proper defendant.

I. BACKGROUND

On October 6, 2005, the then seven-year-old infant plaintiff claims he was injured at P.S. 149 when he was pushed into a bookcase by a classmate, Waly Evans Muhammad. As a result,

he struck his head on the bookcase and suffered epileptic seizures. (Affirmation of Deborah Pearl Henkin, Esq., dated Apr. 19, 2012 [Henkin Aff.]; Affirmation of Anshel David, ACC, dated Feb. 2, 2012 [David Aff.], Exh. F).

Infant plaintiff and Waly were students in the same second grade class at P.S. 149 taught by Ms. Cleveland. The principal of the school was Shaniquia Dixon. (David Aff., Exh. E). At some point during the school year, some boys in the school began teasing him. Allegedly, Waly was one of the boys who picked on him. (*Id.*). Dixon had never before received any complaints that Waly had acted violently or had been involved in any physical altercations. While he occasionally presented disciplinary problems, Dixon recalled no incidents of improper touching of or hitting another student. DOE's search of its incident database reflects no prior incidents.

A few weeks before the incident, White called the principal's office and notified the secretary that several boys had been bullying her son. She did not identify Waly by name as she did not know the names of the boys who were allegedly picking on her son (*Id.*, Exh. F). Infant plaintiff had never complained to his mother about Waly and admitted that he had never before having been involved in a fight or physical altercation with him. (*Id.*, Exhs. E, K).

On the morning of the incident, infant plaintiff informed Cleveland that Waly was picking on him and calling him names. (*Id.*, Exh. F). Later, at the end of the school day when the students were lining up to go home, infant plaintiff and Waly again exchanged words and Waly pushed him into a desk. Infant plaintiff pushed back and Waly then punched him, causing him to fall back into the bookcase. (*Id.*, Exh. E). Having observed the exchange of words, Cleveland told the two to stop quarreling. (*Id.*).

Plaintiff advances a cause of action for negligent supervision of the students. (*Id.*, Exh. A). They also assert claims against City for negligent hiring and failing to recognize the need for greater supervision over staff and school. There are no allegations of negligence against DOE. (*Id.*).

On January 9, 2012, counsel for City wrote to Waly's mother and informed her that City sought to disclose some of Waly's school records and offered her the opportunity to object to it. By letter dated January 13, 2012, Muhammad objected to the release of the records. (*Id.*, Exhs. H, I).

II. CONTENTIONS

Defendants argue that the complaint should be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7), alleging that the complaint is fatally defective because all of the allegations of negligence are directed against City and not DOE, which is a separate legal entity. They maintain that under New York law, the City cannot be held liable for torts committed by DOE or its employees. Consequently, they assert that City is not a proper party to the action and that the complaint must be dismissed against DOE because it fails to state a cause of action for negligence against that agency. (*Id.*).

Alternatively, assuming plaintiff had asserted negligence claims against DOE, defendants argue that the altercation constituted a sudden, unforeseeable and/or spontaneous act which could not have been prevented with any degree of reasonable supervision. They maintain that the school had no notice that Waly had a propensity to engage in violent behavior toward other students and thus Cleveland and Dixon had no reason to place him under greater scrutiny or

supervision, and seek an *in camera* inspection of Waly's school records to help them establish an absence of such notice. (*Id.*). They additionally claim that plaintiff cannot recover damages because infant plaintiff was a voluntary participant in the altercation which led to his injuries. (*Id.*).

Plaintiff asserts that DOE has always been understood by the parties to have been properly designated as a defendant in this action and urges that, if her complaint is dismissed as against City because it is not a proper party, that the caption be amended to reflect that the case should continue against DOE. (Henkin Aff.). She also argues that defendants have not established their entitlement to summary judgment because they have failed to meet their burden of establishing that they lacked notice that Waly possessed any violent propensities toward other students. (*Id.*). Plaintiff joins defendants' application for an *in camera* review of the records with regard to whether Wally had a record of violent behavior of which DOE or its employees should have been aware.

Even if DOE or school personnel had no notice of Waly's violent propensities, plaintiff maintains that there remains an issue of a fact as to whether Cleveland acted reasonably under the circumstances, arguing that Cleveland's knowledge of the dispute between the two boys earlier that day gave rise to a duty to keep the boys separate as they stood in line and that had she done so, the physical altercation likely would not have occurred. Plaintiff also disputes defendants' contention that infant plaintiff voluntarily participated in the altercation which led to his injuries. (*Id.*).

In reply, defendants observe that plaintiff persists in failing to plead allegations of

negligence against DOE, and that even if the caption were amended per plaintiff's request, there is still be a failure to allege a cause of action against DOE. (Reply Affirmation of Anshel David, ACC, dated May 30, 2012).

III. ANALYSIS

Notwithstanding changes in the statutory scheme providing for greater mayoral control over DOE, City and DOE remain separate legal entities under the New York City Charter. Consequently, lawsuits arising out of torts allegedly committed by DOE or its employees must be brought against DOE, and not City. (*See Perez v City of New York*, 41 AD3d 378, 379 [1st Dept 2007]). Thus, City is not a proper party to this action.

And, as the complaint reflects a cause of action for negligence against City only, plaintiff fails to state a cause of action against either defendant. A correction of the alleged error in the caption is thus baseless (*cf Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 79 [4th Dept 1973] [where proper party is in court but under defective name or title, corrections concerning title are clearly permissible]), absent any request for leave to serve an amended complaint containing allegations of negligence against DOE and/or its employees. However, in the interests of judicial economy and to prevent needless motion practice, I address the legal merits of plaintiff's claims.

In determining whether a school's duty to provide adequate supervision was breached, a plaintiff must establish that the school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; i.e., that the actions of a third party in injuring the plaintiff could have reasonably been anticipated and prevented with adequate supervision.

(*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Actual or constructive notice to the school of prior similar conduct is required as school personnel cannot reasonably be expected to guard against all of the "sudden, spontaneous acts" that typically occur among students. (*Id.*). In the case of an incident such as the one alleged here, plaintiff must demonstrate that the school district had some actual or constructive knowledge that the student had a propensity to engage in acts of physical violence towards others students.

Here, Dixon had no notice that Waly had ever engaged in fights with other students, nor was she aware of any complaints that he had ever engaged in violent or physically aggressive behavior towards others. And while Waly may have teased infant plaintiff or called him names, he had never before hit or pushed him. Accordingly, DOE sustained its burden of establishing that it had no actual or constructive notice of any prior aggressive conduct by Waly toward other students nor did it have notice that infant plaintiff and Waly had ever engaged in fights or physical altercations. (*See Espino v New York City Bd. of Educ.*, 80 AD3d 496 [1st Dept 2011]; *Janukajtis v Fallon*, 284 AD2d 428, 430 [2d Dept 2001] ["The school defendants sustained their burden of establishing that they had no actual or constructive notice of prior similar conduct"]; *Convey v City of Rye School District*, 271 AD2d 154, 159-60 [2d Dept 2000] ["(T)he School defendants sustained their burden of establishing that they had no actual or constructive notice of similar conduct by other students. . . . . Neither (the plaintiff nor the assailant) had a history of prior disciplinary problems, and there had been no previous altercations between them."]; *Danna v Sewanhaka Cent. High School Dist.*, 242 AD2d 361, 362 [2d Dept 1997]).

For the same reasons, plaintiff's contention that Cleveland should have exercised greater

supervision over the students during lineup due to her knowledge of the earlier argument between the boys is unavailing absent any evidence suggesting that her supervision was inadequate. There is no evidence that the earlier argument made the physical altercation foreseeable, and that infant plaintiff had told Cleveland that Waly had been picking on him earlier that day puts neither her nor DOE on notice that Waly would later strike or push infant plaintiff. (*See Sanzo v Solvay Union Free School Dist.*, 299 AD2d 878, 878-79 [4th Dept 2002] [fact that principal of high school was aware of previous taunting between plaintiff and assailant insufficient to forewarn the school of the assault]).

At the parties' request, I have examined Waly's school records which were provided by City, and while they reflect that Waly had some anger control issues, there is no indication that he had ever engaged in any violent or aggressive behavior towards other students. In fact, he was described as generally cooperative and as having worked well with others. Consequently, plaintiff has not established that the school had actual or constructive notice of any prior behavior on Waly's part that would have made the altercation between them foreseeable, as opposed to sudden and spontaneous.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted and the complaint is hereby dismissed with prejudice against the City and DOE and with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the cross motion for leave to amend the caption of the complaint is denied .

ENTER:

Barbara Jaffe, JSC

DATED: December 11, 2012
New York, New York

BARBARA JAFFE