Thompson v City of New York
2013 NY Slip Op 34019(U)
July 8, 2013
Supreme Court, Queens County
Docket Number: 7128/11
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Nevaeh Thompson, an infant under the age of eighteen, by mother and natural guardian, Salome Stewart, and Salome Stewart, Individually,

Plaintiffs,

- against -

The City of New York; New York City Department of Education, Simon A. Watts, and Antonio K'Tori,

Defendants.

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Index Number: 7128/11

Motion Date: 6/28/13

Motion Cal. Number: 137

Motion Seq. No.: 2

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QUEENS COUNTY

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The following papers numbered 1 to 9 read on this motion by the City of New York, the New York City Department of Education (DOE) and Antonio K'Tori 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 the City for summary judgment dismissing the complaint and all cross-claims against it is granted, there appearing no opposition to this branch of the motion. That branch of the motion by the DOE and K'Tori for summary judgment dismissing the complaint and all cross-claims against them is also granted.

Infant plaintiff, a student at P.S. 15 in Queens County, alleges that she was sexually assaulted by defendant Watts, her teacher, at the school during the 2007-2008 and 2008-2009 school years. It is also alleged that defendant K'Tori, the principal of the school, negligently hired, supervised and retained Watts and negligently supervised infant plaintiff.

It is undisputed that P.S. 15 is a public school under the New York City Department of Education (DOE) and that Watts and K'Tori

were employees of the DOE. The DOE (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 DOE (L 2002, ch 91), such amendments did not alter the fact that the City and the DOE 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]). The rule that tort actions relating to public schools may only be brought against the DOE and not the City is not limited merely to claims of premises liability but also applies to actions involving intentional torts (see id.). Therefore, the City is entitled to summary judgment as a matter of law.

Indeed, plaintiff's counsel admits in his affirmation in opposition, "At the outset, we agree that the City of New York is an unnecessary party to this action as the New York City Department of Education is the properly named entity to be sued."

Therefore, the action must be dismissed as against the City.

The DOE and K'Tori move for summary judgment upon the grounds that no liability attaches to them under the doctrine of respondeat superior because Watts was not acting within the scope of his employment, that no liability attaches to them for negligent hiring, retention and supervision of Watts because they had no actual or constructive notice of any propensity on Watts' part to molest children, and that the evidence establishes that they adequately supervised infant plaintiff.

An employer may only be found vicariously liable for the tortious acts of its employee under the doctrine of respondeat superior where the employee was acting within the scope of his employment when he committed the tort (see Riviello v. Waldron (47

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NY 2d 297 [1979]). An employee is not acting within the scope of his employment, and the employer may not be found vicariously liable under the doctrine of respondeat superior where the tort committed by the employee was unrelated to the furtherance of the employer's business but was committed solely for personal motives (see Sandra M. v. St. Luke's Roosevelt Hosp. Center, 33 AD 3d 875 [2nd Dept 2006]; Oliva v. City of New York, 297 AD 2d 789 [2nd Dept 2002]). Sexual assault by an employee is clearly not within the scope of his employment and not done in furtherance of his employer's interests, but is done solely for personal reasons and, thus, is not an action for which the employer may be held liable under the doctrine of respondeat superior (see Waxler v. State, 2005 NY Slip Op 50305 [U] [Court of Claims]). Therefore, plaintiff's cause of action against the DOE and K'Tori premised upon respondeat superior must be dismissed.

With respect to plaintiff's claims against the DOE and K'Tori of negligent hiring, retention and supervision of Watts, it is undisputed that in order to sustain causes of action on such grounds, plaintiff must demonstrate that defendants knew or should have known of Watts' propensity for the type of conduct that caused plaintiff's injury (see Shantelle S. v. State, 2006 NY Slip Op 50768 [U] [Court of Claims]). To establish its prima facie entitlement to summary judgment as a matter of law, the DOE bore the burden of demonstrating that it "acted with reasonable care in hiring, retaining and supervising" Watts (Judith M. v Sisters of Charity Hosp., 93 NY 2d 932 [1999]). It has met its burden.

The evidence presented, on this record, is that Watts was hired by the DOE after a thorough investigation by the DOE's Office of Personnel Investigation was conducted. Watts had no prior criminal record. His personnel file contained one prior allegation of sexually inappropriate contact with a student in November-December 2004. An investigation was conducted by the Special Commissioner of Investigation which found the student's allegations unsubstantiated, and the investigation was closed. Therefore, since the evidence presented is that the DOE conducted a thorough background investigation of Watts and that nothing was uncovered to alert it of Watts' alleged sexual propensities, except for a single complaint by a student while Watts was a teacher at another school, P.S. 115, which was investigated and found to be unsubstantiated, there is no basis for plaintiff's cause of action alleging negligent hiring.

In any event, with respect to K'Tori, the unrebutted deposition testimony of K'Tori and the affidavit of Katherine G. Rondi, the DOE's Director of the Office of Employee Relations, are that it is the DOE and not the school principal that hires

teachers. Therefore, there is no basis for plaintiff's cause of action against K'Tori for negligent hiring. Moreover, the undisputed deposition testimony of K'Tori is that he first met Watts in the Summer of 2007 when Watts was seeking a transfer from P.S. 115 to P.S. 15, that Watts indicated that he sought the transfer because P.S. 115 was not "a good fit" for him, that the Principal of P.S. 115 indicated the same to K'Tori and added that Watts was a great teacher, that K'Tori also contacted the DOE's Human Resources Department to verify whether Watts was cleared to transfer to P.S. 15 and if there were any complaints against him, and that he was not informed of any allegations against Watts before recommending that the transfer be granted.

With respect to plaintiff's claims of negligent supervision, both of Watts and infant plaintiff, and negligent retention of Watts, the unrebutted evidence, on this record, is that K'Tori came to plaintiff's classroom on a daily basis unannounced to observe, that Watts shared the classroom with another teacher and a paraprofessional and that there were often other adults present in the classroom. Infant plaintiff testified in her deposition that no one ever observed Watts' inappropriate behavior and she never told anyone about Watts' behavior. It is also undisputed that K'Tori first learned of Watts' inappropriate sexual behavior toward a student in March 2010, when another student made an allegation of inappropriate sexual contact which resulted in Watts' arrest. It was not until April 14, 2010, when plaintiff's fifth grade teacher, one Ms. Darslin, approached her and asked her if anything had ever happened with Watts that she first informed the teacher that Watts had inappropriately touched her. K'Tori testified that Darslin immediately reported plaintiff's allegation to him, and that was the first time that he heard about plaintiff's allegation.

A school is not an insurer of the safety of its students, but since it stands in loco parentis with its charges, it does have the duty to supervise them adequately and will be held liable if its failure to provide adequate supervision is a substantial factor in causing foreseeable injuries (see Mirand v City of New York, 84 NY 2d 44 [1994]). Therefore, in determining whether the school breached its duty to provide adequate supervision, "it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous condition which caused injury; that is, that the third-party acts could reasonably have been anticipated" (id. at 49). Thus, in order to establish a prima facie entitlement to summary judgment as a matter of law on the issue of negligent supervision, the DOE, as the proponent of summary judgment, had the initial burden of demonstrating that the alleged sexual assault was not foreseeable (see Nossoughi v Ramapo Cent. School Dist., 287 AD 2d 444 [2nd Dept 2001]; Taylor v Dunkirk City

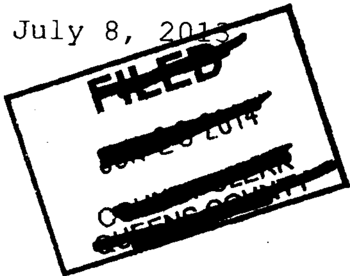
Chool Dist., 12 AD 3d 1114 [4th Dept 2004]; see also Zuckerman v City of New York, 49 NY 2d 557 [1980]). The DOE has met its burden by showing unrebutted evidence that it had no notice of Watts' sexual proclivities.

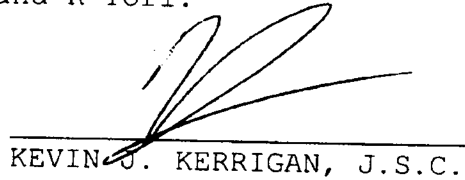
Plaintiff's opposition fails to raise any issue of fact as to the adequacy of supervision or as to any notice on the part of K'Tori or the DOE of Watts' sexual proclivities either before hiring him or during his tenure at P.S. 15.

With respect to plaintiff's boilerplate allegation of negligent training of Watts, this Court finds no rational basis for such a claim as it relates to sexual misconduct.

Accordingly, the motion is granted and the complaint is dismissed as against the City, the DOE and K'Tori.

Dated: July 8, 2013





KEVIN J. KERRIGAN, J.S.C.