Mejia v City of New York
2013 NY Slip Op 33057(U)
October 18, 2013
Sup Ct, Queens County
Docket Number: 700672/11
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

Emanuel Mejia, an infant by his mother and natural guardian, Germania Mejia and Germania Mejia, individually, Plaintiffs, - against -	Index Number: 700672/11
	Motion Date: 10/8/13
The City of New York, The New York City Department of Education, "John" Osorio as father and natural guardian of Karina Osorio, Defendants.	Motion Cal. Number: 83
	Motion Seq. No.: 3

The following papers numbered 1 to 9 read on this motion by defendants, The City of New York and The New York City Department of Education (DOE), 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 and DOE for summary judgment dismissing the complaint as against them is granted.

Infant plaintiff, a fifth-grade student at P.S. 89 in Queens County, allegedly sustained injuries as a result of being assaulted by another child in the school's front yard on March 15, 2011.

Plaintiff testified in his 50-h hearing that on the date of the incident, school ended early, at approximately 11:35 a.m., because parent-teacher conferences were scheduled for the afternoon. Infant plaintiff and his mother, plaintiff Germania Mejia, agreed to meet at the yard, which plaintiff referred to as a "park", at approximately 5 p.m., the time when his mother was scheduled to be at the conference. During the interval between

dismissal and the time he was to meet his mother in the yard, infant plaintiff walked home and back to the yard twice, first to drop off his "things", then to change out of his school uniform. There was one security guard standing in front of the yard by the gate. Plaintiff had been playing soccer in the yard for approximately four hours prior to the incident. At some point, while he was sitting on the bench resting, a girl by the name of Karina Osorio, who was known by him to be a former student of P.S. 89 and who was now a sixth-grade student at another school, came over to him and pushed him off the bench. She did not say anything to him prior to pushing him and he did not say anything to her. He did not know why she pushed him off the bench and "didn't realize she was going to push me". She had never gotten into a fight with him before and she did not get into any fights with other children that day.

Infant plaintiff observed Osorio talking to her friends and calling other children names and cursing at them. Plaintiff observed those children go to their mothers and complain and heard one grown-up tell one of the children not to pay attention to her but to stay on the bench and wait until she left. Plaintiff said there were approximately 15 adults in the yard.

Plaintiff testified that he did not inform the security guard of Osorio's behavior and did not see any of the adults or children do so. However, the security guard saw Osorio disrespecting people and told her to get out of the park because she was behaving badly and further told her that she could come back when she learned how to respect others. Osorio came back and was allowed into the yard some 20 minutes later, after which she pushed plaintiff off the bench.

Antonina Prestigiacomo, special education coordinator at P.S. 89 and dean of the school at the time of the incident, testified in her deposition that when there is a parent-teacher conference, the students have a half-day of school and are dismissed at 11:50 a.m. and are expected to go home. The conference is in two sessions: the first runs from 12:00 p.m. to 2:30 p.m. and the second session runs from 5-5:30 p.m. to 7:30-8:00 p.m. The entire school staff is present and the conference is for the parents of the entire student body of nearly 2000 students. Security guards are present during the conferences.

The front yard of the school becomes open to the public after school hours. When asked if students go there during parent-teacher conferences, Prestigiacomo replied, "If their parents allow them to", adding that it was a public park after school hours and anyone was allowed to go there. No school staff is present to supervise students in the park after school hours, and no school personnel

were in the yard during the incident, since they were all in the school building for the parent-teacher conference.

Once students are dismissed for the day, the school no longer has control over them and does not supervise them. No one monitors students coming in or going out of the park during parent-teacher conferences because the students should be with their parents. Prestigiacomo also explained, "We ask the parents, if they have their children with them, to supervise them. They're allowed to walk freely throughout the building. We have a school safety agent at the front door, and we have staff on each floor directing parents."

The complaint alleges, with respect to the City and the DOE, as a first cause of action, that they negligently failed to supervise and control the students enrolled at the subject school. Plaintiffs' second and third causes of action are against infant Osorio for negligent assault and intentional assault, respectively, resulting in damages to plaintiff "because of the above stated accident site", and the fourth cause of action is a derivative claim by infant plaintiff's mother.

It is undisputed that P.S. 89 is a public school under the New York City Department of Education. It is also undisputed that the Department of Education (formerly known as the Board of Education) is a separate and distinct entity from the City (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. Suits involving public schools may only be brought against the DOE (see New York City Charter §521[b]). 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]). The Court also notes that 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 committed by a student against another student (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Therefore, the City is entitled to summary judgment as a matter of law. Indeed, plaintiffs offer no opposition to the City's motion.

With respect to the DOE, a school is under a duty to provide adequate supervision to its students and is liable for injuries sustained by a student in its charge that are the foreseeable and

proximate result of its failure to provide such supervision (see Mirand v City of New York, 84 NY 2d 44 [1994]). The school merely stands in loco parentis to its students and is not an insurer of their safety (see id.). Therefore, a school owes a duty of care toward students only while it has custody and control over them (see Morning v Riverhead School Dist., 27 AD 3d 435 [2nd Dept 2006]).

Here, the unrebutted evidence on this record is that the incident occurred after school hours, after the students had been dismissed for the day, and when the school yard was open to the public and was not supervised. Therefore, infant plaintiff was, at the time of the incident, no longer under the control and custody of the school, but that control and custody had passed to his parent. To the extent that any child, including plaintiff, was playing in the yard after school hours, it was with the permission of his or her parents. That there was a parent-teacher conference being held at the school and there was security present does not raise an issue of fact as to whether the school assumed a duty to supervise plaintiff. No evidence has been presented that the school had custody of students during the conference. Indeed, parents who chose to allow their children to be at the school during the conference were instructed to supervise them. Moreover, that there was security for the conference of parents and teachers after school hours does not raise an issue of fact as to whether the school assumed a duty to supervise the students who were in the yard.

Therefore, since the DOE had no duty to supervise infant plaintiff and his attacker, as neither plaintiff nor Osorio were in the school's custody and control, plaintiffs' cause of action against the DOE alleging negligent supervision must be dismissed.

Thus, the Court does not reach, and will not decide, movants' alternative bases for summary judgment relating to plaintiffs' cause of action for negligent supervision. In this regard, plaintiffs' counsel's argument that the motion is premature because discovery is incomplete, in that an in-camera inspection of Osorio's school records has not yet been conducted is moot. Counsel argues that he is entitled to discover whether Osorio had a prior history of similar violent acts against other students and, thus, whether the DOE had actual or constructive knowledge of Osorio's propensity to violence whereby they could reasonably have anticipated the subject pushing incident so as to support a cause of action for negligent supervision. However, such information is irrelevant in light of the fact that the incident did not occur when the school had custody and control of its students and, therefore, did not have a duty to supervise them.

Finally, the DOE's remaining branch of its motion seeking dismissal of plaintiffs' negligent security cause of action is moot. No such cause of action is alleged in the complaint. Although plaintiffs apprised the DOE in their notice of claim that they would potentially make a claim for negligent security, they, in fact, did not do so.

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

The caption of this action is hereby amended to read as follows:

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Emanuel Mejia, an infant by his mother and natural guardian, Germania Mejia and Germania Mejia, individually,

Index Number: 700672/11

Plaintiffs,

- against -

"John" Osorio, as father and natural guardian of Karina Osorio,

Defendant.

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Dated: October 18, 2013

KEVIN J. KERRIGAN, J.S.C.