

I.E v Department of Educ. of the City of N.Y.
2019 NY Slip Op 31901(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 154896/2017
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS PART 5

Justice

-----X INDEX NO. 154896/2017

I.E, an infant under the age of
eighteen (18) years, by his Mother and
Natural Guardian, YVETTE NAVA and
YVETTE NAVA, Individually,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

DECISION AND ORDER

THE DEPARTMENT OF EDUCATION
OF THE CITY OF NEW YORK and THE CITY
OF NEW YORK,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for DISMISSAL/ SUMMARY JUDGMENT.

This is an action commenced by plaintiff on behalf of infant-plaintiff who sustained injuries from an assault that occurred on May 24, 2016 by fellow students of Alternative Learning Centers-Cloisters School located at 601 West 183rd Street, New York New York.

Defendants, The Department of Education of the City of New York and the City of New York, (collectively "City") move the court seeking an order pursuant to CPLR § 3211 dismissing the complaint and pursuant to CPLR § 3212 seeking summary judgment in its favor. In addition, the City seeks dismissal of the complaint as against The City of New York on the basis that The City of New York and The Department of Education (DOE) are distinct legal entities.

Plaintiff opposes the motion and cross-moves to strike the Note of Issue.¹

Pursuant to 22 NYCRR 202.21(e) the court may vacate a note of issue and certificate of readiness if it "appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section..."

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 (NY 1986) and *Winegrad v New York University Medical Center*, 64 NY2d 851 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

¹ While the Notice of Motion indicates that plaintiff seeks to strike defendant's answer and compel discovery, the affirmation in support seeks to strike the Note of Issue and compel discovery.

The facts as asserted by the papers and the 50-h hearing of the infant-plaintiff submitted herein are as follows:

On May 24, 2016 at approximately 1:30 P.M., two students in infant-plaintiff's science class, "J" and "C", engaged in a verbal altercation which escalated into a physical altercation. Infant-plaintiff was involved in the altercation to the extent that he tried to encourage J and C to stop fighting. During the altercation, the science teacher left the class to get help from a school staff member, Mr. Cross. Mr. Cross broke up the fight and escorted J out of the classroom. After class was dismissed, infant-plaintiff made his way to the school office where student cell phones and Metro Cards were held during the school day. Upon attempting to retrieve his MetroCard and cell phone, a staff member asked him about the altercation between J and C. After providing information about what transpired, infant-plaintiff met up with J and proceeded to exit the school building. Upon exiting, infant-plaintiff who was accompanied by J, see C who is directly in front of the school building. J and C engage in another verbal altercation. While it is unclear on this record exactly where the students were standing at this point, it appears that they were arguing from the time they exited the school until they reached the corner of the school building. At that time, infant-plaintiff became involved again to the extent that he tried to persuade J and C to stop arguing. At this time, the students were still on the sidewalk abutting the school. School Safety officers observing the altercation, instructed J, C, and the students standing by to leave the school property. The students then crossed the street. While across the street from the school, J and C continued arguing until the Principal and Dean of the school approached and instructed them to "keep walking." While walking, infant-plaintiff asked C about money she owed him. C then began to argue with infant-plaintiff. Infant-plaintiff ceased arguing with C and continued towards the subway station. At the subway station, infant-plaintiff entered the elevator. C, along with several other people, attacked infant-plaintiff inside the elevator. The attack continued until the elevator doors opened.

The City asserts that since the altercation causing the plaintiff's injuries occurred off school property-inside of an elevator at the 181st subway station-it cannot be held liable as there is no duty to supervise students after school hours, when students are not on school property. The City further asserts that the complaint attempts to describe the interaction which occurred earlier in the day as single on-going event in order to warrant the negligent supervision standard. The City argues schools can only be held liable for foreseeable injuries proximately related to the absence of adequate supervision of students in their physical custody and control. Defendant further argues that if it breached its duty to supervise plaintiff, that the attack of the students after school, off school property was an extraordinary, intervening, unforeseeable act which severs any nexus between the DOE and the infant-plaintiff. Finally, the City contends that the school staff did not release infant-plaintiff into a potentially dangerous situation as he was never involved in an altercation with the student who attacked him until he arrived at the subway station.

In opposition, plaintiff contends that no depositions of the City witnesses have been held despite numerous so-ordered stipulations directing same. Plaintiff's asserts that it filed its Note of Issue in compliance with a November 16, 2018 order but indicated that discovery is not complete as medical reports and depositions remain outstanding. Plaintiff avows that its attempts to withdraw its Note of Issue were unsuccessful and the City was unwilling to execute a stipulation allowing same. Plaintiff avers that the City is seeking dismissal without any evidence other than the infant's testimony and has failed to show that no issues of fact remain.

Based upon the facts asserted herein, the court finds that issues of fact remain. Here, the only facts asserted are those presented by the infant-plaintiff at his 50-h hearing. In failing to produce witnesses for deposition, the City has failed to challenge the facts asserted by plaintiff. While depositions are not required to support a motion for summary judgment, they, along with other forms of discovery may be crucial in supporting the contention that no triable issues of fact exist. Here, while the City asserts the infant-plaintiff was not actually involved in the verbal and physical altercation which occurred between J and C in class, that standpoint is highly contested. Specifically, the infant-plaintiff testified to being involved, both in the classroom and directly outside of the school, by way of trying to deescalate the altercations between J and C. Furthermore, the school staff's inquiry to infant-plaintiff about the facts and circumstances pertaining to the altercation in the classroom tends to support the notion that infant-plaintiff was involved in some manner.

Additionally, there is nothing in the record regarding school policies pertaining to student fights, i.e., whether parental notification is required; whether parents are expected to be present at dismissal when students have engaged in a physical altercation at school; and/or whether students involved in any altercation are to remain separated at school for any designated period. Furthermore, it is undisputed that the J and C continued to argue in the presence of school safety personnel, the Principal, and the Dean. In addition, the record remains undeveloped as to the exact location of the involved students in relation to the exit doors of the school; the role of the School Safety officers in the instant circumstances; and the respective responsibilities and obligations of the Principal and the Dean. Moreover, questions such as why did school safety officers and administrators direct the students to leave if they were not on school property? And, if the children were in fact still on school property, what constitutes appropriate action by school safety offices, the Principal and the Dean? As there may be more than one proximate cause of an incident, reasonable minds may differ as to whether the failure to take appropriate measures to handle the altercation that occurred in science class placed all students involved, including the infant-plaintiff, at risk. These inquiries represent a sampling of factual issues germane to the matter of negligent supervision. While the court may agree that the school cannot be held liable for unforeseeable acts of its students, in this instance whether or not another physical altercation involving the students who were involved in an earlier dispute is foreseeable is an issue that has not been resolved by this record. Based on the foregoing, it is hereby

ORDERED that The Department of Education of the City of New York and the City of New York's motion to dismiss the complaint as to the City of New York is granted and the complaint is dismissed in its entirety as against The City of New York, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant The Department of Education of the City of New York; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that The Department of Education of the City of New York and the City of New York's motion for summary judgment is denied with leave to renew upon completion of discovery; and it is further

ORDERED that plaintiff's cross-motion is granted solely to the extent that the Note of Issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that any and all outstanding discovery including, but not limited to, depositions of the defendant witnesses, the production of the medical records, and the exchange of other relevant and material documentary evidence shall be completed/exchanged within 90 days from service of a copy of this order with notice of entry; and it is further

ORDERED that, within fifteen (15) days from completion of discovery, the plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness (for which no fee shall be imposed), to which shall be attached to a copy of this order and it is further

ORDERED that within fifteen (15) days from entry of this order, the City shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office and the Trial Support Office who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED the parties shall appear for a compliance conference on September 10, 2019 at 2:00 P.M., Part DCM, Room 106, 80 Centre Street, New York, N.Y.

June 26, 2019


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE