

Santos v City of New York

2011 NY Slip Op 33912(U)

November 2, 2011

Sup Ct, Bronx County

Docket Number: 13305/07

Judge: Larry S. Schachner

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.

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: PART IA3

-----X
DIANA SANTOS,

Plaintiff(s)

-against -

Index No. 13305/07

THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION A/K/A,
THE BOARD OF EDUCATION OF THE CITY
OF NEW YORK,

Defendant(s).

-----X
HON. LARRY SCHACHNER:

Defendants motion to dismiss the complaint for failure to state a cause of action and or summary judgment is decided as follows:

Plaintiff is a guidance counselor for the New York City Department of Education (DOE). In this action she alleges that she was attacked by Brandon Marrero, a student at P.S. 14 in the Bronx on March 15, 2006 while she was supervising the breakfast program at the school.

In moving to dismiss the complaint the City and DOE argue that the City of New York is not the correct party to this action. Further, the municipal defendants contend that plaintiff has failed to demonstrate that a special duty was created because plaintiff cannot establish justifiable reliance. In addition, the City/DOE argue that even if plaintiff were to establish a special duty, the DOE is entitled to governmental immunity based upon the exercise of discretion and professional judgment under

McLean v City of New York, 12 NY3d 19 (2009).

Based upon the record currently before the court the motion is granted only to the extent of dismissing the case as to defendant City of New York pursuant to Perez v City of New York, 41 AD3d 378 (1st Dept 2007). The remainder of the motion is denied.

In opposing the motion plaintiff's factual allegations are not disputed. She alleges she was assigned to breakfast cafeteria duty by her principal in September 2005. In January 2006, the assailant student was assigned to the breakfast program. Plaintiff alleges she witnessed repeated incidents of aggressive behavior from the assailant during the breakfast program on numerous occasions during February and March 2006. The assailant would not listen and would act violently towards plaintiff and other students. The assailant would use profanity and threatened plaintiff on numerous occasions. As a guidance counselor, plaintiff would be called to the assailant's classroom by his teachers and would be asked to address the assailant's violent and disruptive behavior in class during February and March 2006.

On February 14, 2006, the assailant reportedly kicked Principal Guzzio several times in the leg, and began throwing furniture at him. This incident was reported to plaintiff by the principal. At that time, plaintiff expressed to Principal Guzzio her fear that the assailant would assault her and that she was scared to continue with cafeteria duty. Principal Guzzio

promised her that he would assign Safety Officer Johnson to the cafeteria during the breakfast program for her safety. Also, Principal Guzzio promised he would take disciplinary action against the assailant for his aggressive behavior towards her. Based on Principal Guzzio's promises, plaintiff continued with the cafeteria program.

On February 17, 2006, it was reported that the assailant engaged in violent behavior in fellow teacher Ms. Vidal's class by flipping a desk and striking Ms. Vidal's foot, resulting in an injury to her foot. Plaintiff was notified of this act by Ms. Vidal and Principal Guzzio. Plaintiff again told Principal Guzzio that she feared for her safety and that she did not want to engage the assailant if he continued with his violent behavior. Principal Guzzio again promised he would follow school disciplinary policy, and that plaintiff should not be concerned.

Principal Guzzio sent a letter home to the assailant's mother stating that he could not return to school until he was cleared by a psychiatrist that he is not a danger to himself, fellow students or any staff members. According to the assailant's school file, a note was submitted to the school, and although it did not meet the principal's requirements, he was permitted to return to class.

When the assailant returned to the breakfast program, he continued with his aggressive behavior, and threatened to kill plaintiff. Despite Principal Guzzio's promise, Safety Officer Johnson was never assigned to the cafeteria. Plaintiff

complained to Principal Guzzio about this and he promised that he would act on it and notify S.O. Johnson.

On February 27, 2006, it was reported to plaintiff by Ms. Clavin, another teacher, that the assailant was acting up again in her classroom. Later that day, Mr. Melcer, a fellow teacher, reported another violent outburst by the assailant. Principal Guzzio was called and during this encounter, the assailant repeatedly kicked Mr. Melcer and Principal Guzzio.

On February 28, 2006, during the breakfast program, the assailant acted aggressively towards plaintiff and would not listen to her instructions. Later that day, he again attacked Principal Guzzio. At this time plaintiff again expressed fear and concern for her safety and demanded that Principal Guzzio follow through with his promise to act on the assailant's behavior. The principal again assured plaintiff he would notify Safety Officer Johnson and require that she be present during any violent outburst by the assailant. Plaintiff states she relied on this promise and continued with the cafeteria duty.

Following March 1, 2006, the assailant continued exhibiting violent behavior every school day, and on March 3, 2006, he again exhibited violent behavior towards plaintiff and later attacked his teacher. After this incident plaintiff again expressed fear and concern for her safety to the principal. Plaintiff was assured that the assailant would not be allowed to return to school until the school received written clearance from a psychiatrist that the assailant did not pose a danger to himself,

students or staff members. Plaintiff claims she relied on this act from Principal Guzzio and continued with the cafeteria duty during the breakfast program. The next day, the assailant returned to school without any indication that he was cleared by a psychiatrist. Plaintiff alleges that the principal was aware of the assailant's return, but that he did not follow through with his request for written certification.

On March 7, 2006, it was reported to plaintiff by Ms. Primavera, a teacher, that the assailant attacked her with a broomstick. Plaintiff claims she again expressed concern for her safety to the principal and he again assured her that the assailant would not return to school unless he was cleared by a psychiatrist. Plaintiff contends that Principal Guzzio also acknowledged that the assailant was required to do this after the March 3, 2006 incident, but that he failed to receive such written certification. Plaintiff stated that Principal Guzzio promised that he would follow-through with this requirement before allowing the assailant to return.

The next day, the assailant returned to school even though he did not have the required certification. He continued to act violently and use profanity during the breakfast program. S.O. Johnson was called by plaintiff to intervene, and she failed to respond. On March 9, 2006, it was reported to plaintiff by Principal Guzzio that the assailant continued exhibiting violent behavior and that he would not allow him to return to school until he was cleared in writing, by a psychiatrist. The

principal told her that this was the policy to proceed with to address violent behavior. Plaintiff states that she again relied on Principal Guzzio's actions, and promises.

Apparently, the assailant was allowed to return to school without the required written certification the very next school day, and he engaged in aggressive behavior towards plaintiff in the breakfast program. S.O. Johnson was never re-assigned to the cafeteria as promised by the principal.

On March 15, 2006, while plaintiff was performing cafeteria duty, the assailant became violent, and tried escaping the school. Plaintiff called S.O. Johnson for assistance, who appeared at the cafeteria door, observed the assailant's behavior, and then proceeded to leave without providing any help. Plaintiff then called the main office for assistance. She was left alone in the cafeteria, to be assaulted by the assailant, until Assistant Principal Falzone came to assist her. From the time Assistant Principal Falzone attempted to restrain the assailant up until she and plaintiff reached the principal's office, the assailant repeatedly kicked, grabbed, and scratched plaintiff.

It is not disputed that the assailant's mother never produced a written certification from a psychiatrist as required by the principal in his letters dated March 3 and March 9, 2006 and that the assailant was permitted to return to school despite this. The principal also failed to assign Safety Officer Johnson to the cafeteria breakfast program as promised. There is no

sworn testimony from the principal before the court which contests any of plaintiff's allegations.

The municipal defendants cite Valdez v City of New York, 74 AD3d 76 (1st Dept 2010) *affd* NYLJ 10/19/11 p. 22 col. 3 and Dinardo v City of New York, 13 NY3d 872 (1st Dept 2009) for the proposition that a verbal assurance without more does not constitute a sufficient basis for plaintiffs' justifiable reliance. However, the facts and circumstances of this case are distinguishable from the above cited cases, as the case at bar involves more than just a verbal assurance from plaintiff's principal. In addition, the City has failed to provide the court with certain essential information from a person with knowledge regarding DOE disciplinary rules, pupil placement, procedures, and policy. As outlined above, the assailant was involved in a series of violent outbursts directed at teachers, students, administrators, and himself during the six weeks prior to the incident at issue. The principal sent notes home to the assailant's parents on multiple occasions stating that he would not be permitted back at school unless the school received certification in writing from a medical professional that the assailant was not a danger to himself or others. On more than one occasion the assailant was allowed to return to school without the required certification. The City fails to explain why the principal did not follow up on his letters or why the assailant was allowed back in school. In addition, the City did not contest plaintiff's sworn statement that the principal failed

to assign a school security officer to the morning breakfast program despite repeated promises to do so. The lack of evidence regarding disciplinary rules, policy, and procedure, and the failure to explain how the assailant was allowed back in school despite no certification from a psychiatrist distinguishes this case from Dinardo and Valdez, as plaintiff alleges more than just a verbal assurance. In addition, given that the promises made to plaintiff were made in the contest of an employee - employer relationship it creates an additional issue of fact as to whether plaintiff's reliance was justified. Accordingly, issues of fact exist on the question of justifiable reliance.

Furthermore, the City has not met its burden with regard to its Government Function Immunity defense under McLean v City of New York, 12 NY3d 194 (2009). From the record currently before the court it is not possible to determine if the governmental function at issue involved the exercise of reasoned judgment. Counsel's conclusory pronouncement that "pupil placement" is purely a discretionary governmental function that cannot give rise to governmental tort liability is not supported by sworn testimony from the principal or by anyone with personal knowledge of pupil placement rules, policies, or procedures, as well as disciplinary rules and procedures. In addition, it is unclear from this record whether any discretion was utilized or whether allowing the assailant back in the school without the certification from a psychiatrist or psychologist as required by multiple letters from the principal was a ministerial act.

Accordingly, the motion to dismiss as to the DOE is denied.

This constitutes the decision and order of the court.

Dated: November 2, 2011



LARRY S. SCHACHNER, JSC