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Third Department Upholds Dismissal of Teacher for Sexually Grooming Former Students.

Mudge v. Huxley, 2010 N.Y. Slip Op. 09311.

A male physical education teacher's moral character was questioned and he was ultimately dismissed after having sexual intercourse with two former female students. In an Article 78 proceeding, petitioner sought to challenge these findings. The Third Department affirmed his dismissal and held that he had "groomed" these former students for sex while they were enrolled in school.

Petitioner had two separate encounters of sexual intercourse with former female students, both eighteen years old and graduated at the time. Both encounters were consensual and occurred in the petitioner's vehicle after he had taken these women to a Mets game. While they were enrolled as students, petitioner taught both of these women in his physical education class, coached them both while they were on the girls soccer team and coached the boy's sports teams for which both women served as statisticians. Petitioner also took both of these women to a Mets game in the spring before their graduation ceremonies.

The Court held that the preferential treatment petitioner gave to these woman amounted to sexual grooming. Specifically, the Court held that the petitioner groomed these women for a sexual relationship while they were students and then exploited the relationships that he had cultivated after both women had graduated. Based on his actions, the Court affirmed his dismissal and agreed that he lacked the requisite moral character to be a teacher in the State of New York.

While the petitioner argued that he did not invite the young woman to the Mets game while they were enrolled as students, the Court refused to resolve conflicts in the testimony presented at Petitioner's hearing.

School's Motion for Summary Judgment Denied Where it Arguably Could Have Prevented a Physical Altercation Between Students Which Took Place in the School's Main Office.

Goff v. Roosevelt Union Free Sch. Dist., 2010 Slip Op. 51990.

In this case, the Court held that fact issues existed as to a school's liability where an altercation occurred between students in the school's main office and in the presence of school employees.

The infant plaintiff was a student in the defendant's district, as were here two assailants. As per plaintiff's deposition, her assailants followed her as she walked to the school's main office. Once in the office, she was crying and told the office secretary that she was being chased by girls who were trying to "jump" her. After the secretary that she spoke with left the office, plaintiff remained behind the office counter for approximately seven to eight minutes while her two assailants verbally harassed her from the hallway outside the office. After these seven or eight minutes elapsed, plaintiff's assailants entered the office, with one of them remaining on the side area of the counter and the other proceeding behind the counter directly towards the plaintiff. As plaintiff backed up, another secretary walked over in order to stop the assailant who was already behind the counter. After this assailant pushed the secretary in order to reach the plaintiff and plaintiff ran to the principal's office to find it empty, plaintiff took cover behind the secretary as the other assailant attempted to jump over the counter. The assailant who had been chasing the plaintiff behind the counter then removed a belt from around her neck and struck plaintiff's face with it. Thereafter, a security guard removed the two assailants from the main office. The security guard's office was just across the hall from the main office where the altercation ensued.

The Secretary present during the altercation testified in her deposition that she asked the assailants what they wanted when they first entered the office and that each responded that they wanted the plaintiff, and specifically, that they wanted to fight her. The assailants then began calling out to plaintiff who was behind the counter. After the secretary told them to leave the office, the principal arrived and restrained the assailant attempting to jump over the counter while the secretary rushed in front of the plaintiff, who was proceeding toward the assailant that was already behind the counter. When asked how much time had elapsed from when the assailants first entered the office to when the plaintiff was struck, the secretary testified that she could not say if it was more or less than fifteen minutes. According to the secretary, there had been no prior incidents or complaints with either the plaintiff or either of her assailants.

While the Court acknowledged that a school cannot be expected to shield students from all sudden and spontaneous acts that occur in the school setting on a daily basis, the Court denied the School's motion to dismiss the plaintiff's negligent supervision cause of action.

The Court opined that to succeed on a claim of negligent supervision against a school district, a plaintiff must show (1) that the injury was foreseeable and (2) that the school's negligence proximately caused the plaintiff's injury. With respect to the first prong, the Court held that foreseeability often hinges upon the school's actual or constructive notice of prior or similar conduct amongst the students involved. With respect to prong (2), the Court opined that proximate cause is sufficiently established when the plaintiff's injury is a normal or foreseeable consequence of the school's negligence.

To show entitlement to summary judgment under prong (1), the School cited *Scheckler* and *Busby*, where summary judgment for schools faced with negligent supervision claims was proper because the physical altercation that injured the plaintiff was sudden and unanticipated[i]. In *Scheckler*, a fellow student stated that he wanted to fight the plaintiff and "sucker punched" the plaintiff immediately thereafter. In *Busby*, plaintiff was punched after exchanging a few words with his aggressor.

While the School argued that the act of striking plaintiff with a belt was sudden and unanticipated, the Court held that it is *not* the speed of the injury producing act which is dispositive under prong (1). Rather, the inquiry is whether the school had sufficient time to prevent the injury based on the conduct which occurred beforehand. The Court found this matter distinguishable from *Busby* and *Schekler* because seven to eight minutes (or even as much as fifteen as per the secretary's testimony) elapsed after school personnel were notified that the plaintiff's assailants wanted to fight her. Regardless of the absence of any prior incidents involving the plaintiff or her assailants, the Court opined that the school staff was notified several times of the assailants' desire to fight the plaintiff. Further, the Court emphasized that after the assailants repeatedly voiced their belligerent intent, neither the secretaries nor the principal summoned the security guards, who were just across the hall. Accordingly, the Court found factual issue precluding summary judgment as to whether the school had actual or constructive notice of the altercation that ensued.

With respect to prong (2), the Court held that the defendant failed to establish that its actions were not the proximate cause of plaintiff's injuries. While the School relied on cases granting summary judgment because the sudden and spontaneous injury-producing act could not have been prevented even with intense supervision, the Court found these cases distinguishable from the instant matter because unlike in those cases, the School in this matter was put on notice of an altercation when the plaintiff sought protection from her assailants and when her assailants made verbal threats about wanting to fight the plaintiff. By failing to promptly summon the security guards or place plaintiff in a safe area, the Court found a question of fact as to whether the school's failure to do so proximately caused the plaintiff's injuries.

Second Circuit Affirms Lower Court's Decision to Enjoin the City's Revocation of a Church's Accessory-Use Permit which it used to hold private, catered events on Church Grounds.

Third Church of Christ v. City of N.Y., 2010 WL 4869763 (2d Cir. 2010).

Seeking to finance renovations to its Church Building, the Scientist Third Church of Christ ("the Church") agreed to have Rose Group ("Rose"), a catering company, hold private functions in the Church building in exchange for Rose's funding of the renovations. Prior to executing this agreement, the Church sought and obtained an accessory-use permit from the Manhattan Borough Commissioner of the Department of Buildings ("DOB"). After the agreement between Rose and the Church was in effect and Rose hosted various private catered events on the Church grounds, neighbors in the surrounding area began to complain about these events.

Subsequently, the DOB issued the Church a Notice of Intent to revoke the Church's accessory-use permit, allegedly because the catering that was ongoing at the premises gave the appearance that the Church was a "principal commercial establishment." The DOB gave the Church ten days to prove to the contrary and opined that "in no event" would catering events be

allowed on the premises after a designated date. Ultimately, the DOB revoked the Church's permit.

The Church commenced suit against the City, alleging that it had violated the provision of the RLUIPA, 42 U.S.C. §§2000cc (b)(1), which prohibits land use regulations that treat religious assemblies or institutions unequally or on a less than equal footing with nonreligious assemblies or institutions. In order to establish that it had been treated unequally within the ambit of the RLUIPA, the Church submitted evidence that the Beekman Co-operative apartment complex ("Beekman") and the Regency Hotel ("Regency"), both in the same R-10 residential-zoned area as the Church, operated restaurants and other catered facilities and services in violation of their certificates of occupancy (which allowed both entities to operate catering facilities for *only* the "hotel residents and guests of the residents"). The City refuted the Church's allegations with evidence that it had issued Notices of Violations ("NOV") to Beekman and Regency for operating outside of their certificates of occupancy.

The District Court for the Southern District of New York permanently enjoined the City from revoking the Church's permit on the grounds that the Church had been treated differently from the hotels in violation of the RLUIPA. The Court held that the City violated the RLUIPA because the NOVs issued to Beekman and Regency merely initiated a DOB administrative process whose outcome is uncertain, whereas the DOB flatly revoked the Church's permit.

On Appeal, the Court of Appeals for the Second Circuit agreed. In affirming the lower Court's decision, the Second Circuit first had to gauge whether the hotels and the Church could be validly compared to one another for purposes of determining whether the latter had been treated differently from the former entities under RLUIPA.

The Second Circuit referred to the law of three sister states in its analysis.

The Court noted that the *Eleventh* Circuit had compared a Rabbi's home, used for weekly prayer meetings, with Cub Scout troop meetings (with the County prohibiting the former use and allowing the latter). The Eleventh Circuit held that in determining whether an entity is a valid secular comparator under RLUIPA, the Court should consider whether the secular entity has "comparable community impact" as the religious organization to which it is being compared.

The *Third* Circuit held that the focus should be on the "impact of the allowed and forbidden uses, in light of the purpose of the regulation" being imposed. Using this reasoning, the Third Circuit compared a Church to an assembly hall and upheld the City's restrictions on the Church use of its property for religious meetings because these meetings would frustrate the City's new zoning scheme, which sought to create a vibrant downtown district with retail and nightlife.

Finally, the Court noted that the *Seventh* Circuit shifted the focus from the government's subjective purpose (as the Third Circuit emphasized) to the law's stated,

regulatory criteria. Using this reasoning, the Seventh Circuit upheld a City zoning ordinance which flatly prohibited all non commercial uses of property, including Churches, in a given zoning area because it applied equally to Churches and non religious entities such as assembly halls and homeless shelters.

The Second Circuit noted that RLUIPA is "less concerned" with whether "formal differences" exist between religious and non-religious institutions, because such differences invariably do exist and no Court has held that a secular comparator's land use need be identical to that of a religious entity for them to be properly compared.

While the City relied on the Eleventh Circuit's decision in *Primera Iglesia* to argue that the Court could not compare two different entities at different stages of the same procedural process (the hotels' NOV citations versus revocation of the City's accessory-use permit), the Court held that the City's reliance on this case was misplaced.[ii] Rather, the Court clarified that the Court in *Primera Iglesia* declined to compare two organizations subject to different land-use *regimes*. Accordingly, the Court found that the Church and hotels could be validly compared under the RLUIPA because they were subject to and in violation of the same DOB zoning rules.

With this first part of the analysis complete, the Court now had to decide whether the Church had been treated differently than its comparators under the RLUIPA. In finding that it had been treated unequally, the Court emphasized that the City flatly prohibited the Church from holding *any* catering events on the premises, even those held in conjunction with religious ceremonies such as weddings and baptisms, while the City never even threatened to ban catering f facilities that remained *ongoing* at both hotels. The Court further noted that unlike the Church, the hotels never sought an injunction before continuing its catering activities.

While the City argued that the revocation of the Church's permit merely indicated that the DOB would issue a NOV to the Church if it continued its catering operations, the Court held that the DOB's absolute prohibition of the Church's catering activities could not be construed as an open invitation for the Church to violate the law. The Court similarly rejected the City's argument that it did not have proper authority to revoke the hotels' certificates of occupancy, noting that the City had various avenues of redress that it could have pursued to enforce the issued NOVs and that it chose not to do so.

Interestingly, the Court held that the City *could* successfully remove the permanent injunction, so long as it presented sufficient evidence that either the unequal treatment of the Church had ceased, or that the City had substantive and non discriminatory reasons for revoking the Church's accessory use permit. Further, the Court clarified that it would not decide whether the City's accessory use rule fosters unequal treatment between secular and religious institutions in violation of the RLUIPA.

<u>The Court of Appeals Finds that the Administrative Code Provision Mandating Minimum Finger Clearance on Handrails Did Not Apply to Interior Stairwells Leading From One Floor to Another for Purposes of a Firefighter's Cause of Action Against the City of New York.</u>

<u>Consumano v. City of N.Y.,</u> 15 N.Y.3d 319 (2010).

The Plaintiff Firefighter brought suit against the City of New York after he fell down a flight of stairs while attending a Fire Department training session. The City of New York owned the building where the accident occurred and the plaintiff claimed to have fallen down the stairs which ran from the first floor of the building to the basement.

Plaintiff sought recovery under General Municipal Law §205-a, which provides Firefighters with a cause of action when they are injured as a result of any "neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the . . . City governments." General Municipal Law §205, as a prerequisite to recovery, requires that plaintiff demonstrate "negligent non compliance with a requirement found in a well-developed body of law and regulation that imposes *clear* duties."

In order to satisfy 205-a, plaintiff alleged that the City had violated sections 27-127 and 27-128 of the Administrative Code, which require that all buildings and/or service equipment, devices, and safeguards required in a building be maintained in a "safe condition." Plaintiff further alleged that the City violated section 27-375 of the Administrative Code, which mandates that "interior" stairs have handrails with a finger clearance of one and one half inches. It was the alleged 27-375 violation which was the center of the Court of Appeals' analysis.

After the plaintiff's two experts testified during trial that the handrails on the staircase were in violation of the Code's requirements and the jury returned a verdict in plaintiff's favor, the Court of Appeals affirmed the decision of the Appellate Division for the Second Department, which reversed and remanded the case for a new trial.

Both the Court of Appeals' Majority opinion written by Justice Pigott and the concurring opinion by Justice Lippman agreed that the City's liability under § 27-375 of the Code could not stand because plaintiff had fallen on a staircase leading from one floor to another and not an "interior" staircase, which is defined in the statute as those which "serve as a required exit." The Court opined that because the stairs merely descended from the first floor into the basement, the stairs did not serve as an exit such that its handrails had to comply with § 27-375. Both the Majority and concurring opinion agreed that a new trial was necessary because the testimony of plaintiff's experts regarding unsafe handrails had "tainted" the entire proceeding and not just the portion of the case designed to prove the alleged 27-375 violation.

However, the concurring opinion diverged from the Majority in holding that plaintiff *did* have a valid basis for suing the City under General Municipal Law §205-a by alleging its violations of sections 27-127 and 27-128 of the Administrative Code. The Majority refused to address the issue of whether the alleged 27-127 and 27-128 violations could serve as a predicate for a 205-a suit against the City because the City had not specifically argued that they could not. To the contrary, the Concurring opinion found that the City had reserved this issue for appeal in a charge conference, and went a step further to find that violations of either of these provisions could serve as a predicate for a 205-a suit because of the legislative intent to apply 205-a "expansively, so as to favor recovery by Firefighters whenever possible." The Concurring opinion further opined that a 205-a suit can stand in cases where the plaintiff alleges violations of Fire Code specifications, architectural standards and other "industry wide standards or accepted practices in the field."

Contrarily, the Majority, regarded sections 27-127 and 27-128 of the Administrative Code as mere "general" provisions, thus not the kind that impose "clear duties." The Majority appeared to find that the City's alleged violations of sections 27-127 and 27-128 could not serve as a basis for its liability under 205-a.

The Court of Appeals Finds that the Police Department and City of New York Were Not Liable to a Bystander Who Was Injured in a Shoot-Out Between Police Officers and a Suspect.

Johnson v. City of N.Y., 2010 Slip Op. 08609 (2010).

After two NYPD Officers approached a man in the Harlem area who was suspected of armed robbery and asked him to drop his weapon, the suspect began firing gunshots at the Officers. Each Officer took cover behind separate, parked vehicles. One of the two Officers positioned himself directly across the street from the suspect and an exchange of fire ensued between them. Fearing for his fellow Officer's safety, the other Police Officer fired one or two shots at the suspect after seeing the suspect back onto the sidewalk from his hiding spot and while having a clear view of the suspect's profile.

As the suspect continued to shoot at the two Officers, three NYPD back-up Officers arrived at the scene. The first back-up Officer took cover in a brownstone well and fired one or two shots at the suspect while having a clear view of him and in fear for the safety of the first two Officers that had been on the scene. The second back-up Officer took cover behind his Police cruiser and also fired two shots at the suspect while having a clear view of him. The third backup Officer, who took cover behind a parked vehicle, also fired one shot at the suspect after the suspect backed onto the sidewalk and moved into the officer's clear view and while the suspect continued to fire. At some point during the shoot-out, plaintiff, who had been socializing with her neighbors down the street, ran and took cover on the floor behind a vehicle which was two vehicles away from the vehicle that the suspect was hiding behind. During what the Court

described as the "melee" between the suspect and the Officers, a stray bullet struck the plaintiff's elbow.

Plaintiff subsequently brought suit against the City of New York and NYPD, alleging that the Officers were negligent in having violated Police Procedure No. 203.12 (b), which provides that "Police Officers shall not discharged their weapons when doing so will unnecessarily endanger innocent persons." Each Officer testified that during the shoot-out they observed no other pedestrians in the surrounding area aside from the suspect. However, two out of the five Officers on the scene that day testified that they did not affirmatively look for pedestrians before firing their weapon.

The Court of Appeals affirmed the Appellate Division's decision which dismissed plaintiff's complaint, finding that the Officers did not violate Police Procedure and that the "Professional Judgment Rule" ("PJR") protected their actions.

The Majority opinion by Justice Pigott opined that the PJR insulates municipalities in the performance of their duties when such duties involve the exercise of professional judgment because of a broader interest in having government officers and employees feel free to exercise discretion in their official functions. The Court forewarned that this broader interest would be undermined if Government personnel were to second guess their every decision in fear of retaliatory lawsuits. However, the Court acknowledged that the PJR protection is inapplicable when the municipality violates its own internal rules and policies and/or exercises no judgment or discretion in carrying out its official duties.

In this case, the Court found that the Officers had discretion whether to discharge their weapons and that they exercised this discretion soundly being that they had probable cause and the suspect was firing gunshots on a public street, thus endangering the lives of the Officers and others. The Court also found it significant that none of the Officers observed any bystanders in the area during the shoot-out and only returned fired when having a clear view of the suspect. The Court found that plaintiff's expert, who claimed that plaintiff's positioning during the shoot-out had to have put her within the Officers' view, still did not refute that they exercised professional judgment when confronted with an armed and dangerous suspect. Accordingly, the Court found that neither the City nor NYPD were liable for plaintiff's injuries and affirmed the dismissal of her complaint.

Justice Jones' Dissenting opinion, while acknowledging the difficulties Officers face in the performance of their duties, found that there was a question of fact as to whether the Officers here unnecessarily endangered the plaintiff's life by opening fire because two Officers testified that they did not affirmatively look for bystanders before doing so. The Dissent also noted that a crime scene sketch and photos of the scene indicate that plaintiff was positioned in an area where she should have been in plain view of at least one of the Officers. Finally, the Dissent opined that in order for liability to attach against the City or NYPD, violations of Police guidelines do not

have to be as blatant as cases cited by the Majority, which involved Officers shooting into a crowd or at a suspect who was holding an innocent hostage.

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[i] Busby v. Ticonderoga CSD, 258 A.D.2d 762 (3d Dept. 1999); Schekler v. Connetquot CSD, 150 A.D.2d 548 (2d Dept. 1989).

[ii] Primera Iglesia Bautista Hispana of Boca Raton Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).