

**Maloney v Longwood Cent. Sch. Dist.**

2017 NY Slip Op 32470(U)

October 16, 2017

Supreme Court, Suffolk County

Docket Number: 13-9993

Judge: Peter H. Mayer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.



Maloney, dated September 6, 2016, and supporting papers; and by third-party defendant American Cancer Society, dated September 15, 2016, and supporting papers; and (4) Reply Affirmation by the third-party defendant American Cancer Society, dated September 19, 2016, and supporting papers; and by defendant and third-party plaintiff Longwood Central School District, dated September 22, 2016; (5) Other \_\_\_ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motions herein by third-party defendant American Cancer Society and defendant/third-party plaintiff Longwood Central School District are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by third-party defendant American Cancer Society for summary judgment dismissing the third-party complaint is denied; and it is further

**ORDERED** that the motion by defendant/third-party plaintiff Longwood Central School District for summary judgment dismissing the complaint as asserted against it and for summary judgment in its favor on the third-party complaint for indemnification is granted.

Plaintiff Michael Maloney commenced this action to recover damages for personal injuries he allegedly sustained on May 20, 2012 in the parking lot of Longwood Central High School located at 35 Yapank Middle Island Road, in Middle Island, New York. An American Cancer Society Relay for Life fundraiser was concluding when plaintiff alleges he was assaulted by defendant Michael Combs. Plaintiff alleges, in relevant part, that defendant Longwood Central School District was negligent in its supervision and security of the high school, and that it created a public and private nuisance. The School District, by third-party summons and complaint, alleges that it is entitled to common law and contractual indemnification from third-party defendant American Cancer Society, which sponsored the event. Issue has been joined, discovery is complete, and a note of issue has been filed.

American Cancer Society now moves for summary judgment in its favor dismissing the third-party complaint as asserted against it. In support of the motion American Cancer Society submits, among other things, the pleadings; the deposition transcripts of Rocco Perez, Elena Macaluso, and Katherine Hawkins; the Longwood Central School District's application for in-house use of school buildings or grounds; and regulations for use of school facilities. In opposition, Longwood Central School District submits an affirmation of counsel.

Longwood Central School District cross-moves for summary judgment in its favor on the third-party complaint and for summary judgment dismissing the complaint and the cross claim asserted against it. In support of the motion the Longwood Central School District submits the pleadings; the transcript of plaintiff's 50-h hearing and his deposition transcript; the deposition transcripts of defendant Michael Combs, Rocco Perez, Elena Macaluso, and Katherine Hawkins; the Longwood Central School District's application for in-house use of school buildings or grounds; and regulations for use of school facilities; a security report; a certificate of liability insurance; and an affidavit of Debra Winter. In

opposition, plaintiff submits an affirmation of counsel and the Longwood Central School District submits an affirmation of counsel, regulations for the use of school facilities and application for in-house use of school buildings or grounds.

Elena Macaluso testified at her deposition that she was employed by Longwood School District for ten years, and in 2011 was a secretary to Assistant Principal Reagan Hololob. She testified that she was asked by staff partner Jamie Pacheco of American Cancer Society to be the chairperson of the Relay for Life event. She testified she secured, filled out, and executed the application for in-house use of school buildings or grounds form in triplicate on behalf of the American Cancer Society. After the form was signed she received a copy of American Cancer Society's insurance policy. She testified that she also organized monthly meetings on behalf of the event.

Katherine Hawkins testified that she is a senior manager of American Cancer Society and supervised Jamie Pacheco, who was a director of special events. She testified that she did not know if the application for in-house use of school buildings or grounds form was ever received by American Cancer Society, but admitted that in 2012 and prior years volunteers filled out the document. Generally, the building usage forms are submitted to American Cancer Society's legal department in order to obtain certificates of insurance.

Debra Winter avers she is Assistant Superintendent for Student and Community Services for Longwood Central School District. She avers that the district did not sponsor, direct, control, or supervise any American Cancer Society events, activities, or fundraisers, including Relay For Life. She avers that students who participated in the Relay For life event did so voluntarily and did not receive academic or other credit for their participation. She identified her signature on the bottom of the application for in-house use of school buildings or grounds dated November 23, 2011.

Plaintiff testified that on Saturday, May 20, 2012, he attended the Relay For Life event at Longwood High School. He testified he arrived at 11:00 a.m. and that he did not know defendant Michael Combs before the incident. Plaintiff testified that at 8:30 or 9:00 p.m. defendant Combs came over to plaintiff's friends, and threatened his friend Joey. Plaintiff testified that he took Joey by the shoulder and walked away. He testified he told defendant Combs to "get away." After the closing ceremony, plaintiff cleaned up his team's belongings and tent. Plaintiff testified as he was walking towards his car in the parking lot, he heard footsteps, turned around and looked, and was immediately struck in the face by defendant Combs. Plaintiff testified that defendant Combs struck him three times and then ran away.

Defendant Combs testified that he participated in the Relay For Life and that he did not know plaintiff prior to the event. He testified that four students, including plaintiff, had been bullying him and his friends. Combs testified plaintiff told him to "get cancer and die in a hole," and that plaintiff called him and his friends by vulgar names. He testified he told the adults on his team, who were teachers, about the bullying, and they spoke to the "head guy" at the event. Combs testified that plaintiff threw the first punch in the parking lot later that evening.

Rocco Perez testified that he is employed by the Longwood Central School District as a security guard, and that he worked the Relay for Life event for overtime pay. He was instructed to watch the event and to report. He testified that he was to keep circulating and not stay in one position. Perez testified that during the course of the day he did not observe any altercations between any groups of students at the event, and that no parent, teacher, or faculty member participating in the event ever came up to him at any point during the day to report that there was some sort of incident, altercation, or confrontation between any of the students. He left the event at 10:00 p.m. and the parking lot had less than 25 cars in it at that time.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The third-party complaint of the Longwood Central School District demands that American Cancer Society indemnify it. American Cancer Society has not established its prima facie entitlement to summary judgment in its favor as to the third-party complaint. The third-party complaint refers to the Longwood Central School District's application for use of school facilities, and the clear, unambiguous language in that document requires American Cancer Society to provide indemnification, contribution, and a defense. In relevant part the contract provides:

The undersigned is over 21 years of age and has read this form and attached regulations and agrees to comply with them. He/she agrees to be responsible to the District for the use and care of the facilities. He/she, on behalf of Name of Organization does hereby covenant and agree to defend, indemnify and hold harmless the District from and against any and all liability, loss, damages, claims, or actions (including costs and attorneys fees) for bodily injury and/or property damage, to the extent permissible by law, arising out of or in connection with the actual or proposed use of District's property, facilities and/or services by organization.

The agreement also required that the user obtain a commercial general liability insurance policy in the amount of \$1,000,000.00 per occurrence / \$2,000,000.00 aggregate naming the School District as an additional insured. The contact terms are clear and unequivocal. American Cancer Society did secure the requested insurance policy, and it is undisputed that the application for in-house use of school buildings or grounds, dated November 23, 2011, was signed by Elena Macaluso, who was designated by

Jamie Pacheco as American Cancer Society's chairperson of the event. As Chairperson of the event, Elena Macaluso had apparent authority to act on behalf of the American Cancer Society. Apparent authority is created by the words or conduct of the principal, communicated to a third party, that gives rise to the appearance and belief that the agent possesses authority to enter the transaction (*see McGuire v Parties, Picnics & Promotions*, 45 AD3d 1264, 845 NYS2d 629 [4th Dept 2007]). As such, on the cross motion, Longwood Central School District has established its entitlement to summary judgment in its favor on the third-party complaint against third-party defendant American Cancer Society based upon its right to contractual indemnity (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]). "The right to contractual indemnification depends on the specific language of the contract (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). Here, the contract covers "costs and attorney fees." A party entitled to contractual indemnification is entitled to the recover of legal expenses incurred in defending the main action (*Springstead v Ciba-Geigy Corp.*, 27 AD3d 720, 815 NYS2d 624 [2d Dept 2006]). Therefore, the claim for costs and attorney fees survives the dismissal of the main action discussed below. Accordingly, the motion by American Cancer Society for summary judgment dismissing the third-party complaint is denied, and the branch of the cross motion by Longwood Central School District for summary judgment in its favor on the cause of action in the third-party claim for contractual indemnification is granted.

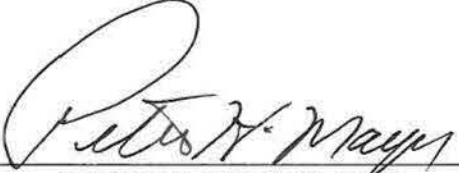
Longwood Central School District has also established its entitlement to summary judgment in its favor dismissing the complaint as asserted against it. Schools are under a duty to adequately supervise students in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994]). In addition, a plaintiff must prove that a school's negligence in supervising its students was a proximate cause of his or her injuries (*see Mirand v City of New York, supra* at 50). Here, the Longwood Central School District has established that the students who participated in the Relay For Life were not in their charge. It is undisputed that the students who participated did so voluntarily, in a non-school sponsored event, that was not directed or controlled by the School District. The School District, therefore, owed no duty to plaintiff (*Solomon v City of New York*, 66 NY2d 1026, 499 NYS2d 392 [1985]). Moreover, even the defendant School District owed a duty to plaintiff, defendant Combs' alleged intentional acts constitute an unforeseeable intervening act which bars recover from the defendant School District (*Tomlinson v Board of Educ. of City of Elmira*, 183 AD2d 1023, 583 NYS2d 664 [3d Dept 1992]). Defendant Longwood Central School District has also established its entitlement to summary judgment in its favor with regard to any negligence in its security measures, as there has been no showing that the School District had sufficiently specific knowledge or notice of dangerous conduct and that the alleged breach was a proximate cause of the injuries sustained (*Nossoughi v Ramapo Cent. School Dist.*, 287 AD2d 444, 731 NYS2d 78 [2d Dept 2001]).

A private nuisance threatens one person or a relatively few (*McFarlane v City of Niagara Falls*, 247 NY 340, 344, 160 NE 391 [1928]), an essential feature being an interference with the use or enjoyment of land (*Blessington v McCrory Stores Corp.*, 198 Misc 291, 299, 95 NYS2d 414, 421, *affd* 279 AD 807, 110 NYS2d 456, *affd* 305 NY 140, 111 NE2d 421 [1950]). It is actionable by the individual person or persons whose rights have been disturbed (Restatement, Torts, notes preceding § 822, p. 217). A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (Restatement,

Torts, notes preceding § 822, p. 217; *see* Penal Law § 240.45). It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (*New York Trap Rock Corp. v Town of Clarkston*, 299 NY 77, 80, 85 NE2d 873, 875 [1949]), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (*Melker v City of New York*, 190 NY 481, 488, 83 NE 565, 567 [1908]). The deposition testimony of plaintiff and the school officials establish that neither a private nor a public nuisance existed or was created on May 20, 2012, by the School District or by American Cancer Society.

In opposition, plaintiff fails to raise a triable issue of fact with regard to defendant Longwood Central School District. Plaintiff contends that security guard Rocco Perez was scheduled to work from 12:00 noon to midnight and, even though he was the only security guard at the event, he left early at 10:00 p.m., right before the alleged assault occurred. Plaintiff has, however, failed to show the existence of a special relationship with the School District that establishes a special duty of protection (*Varghese v Sewanhaka Cent. High School Dist.*, 260 AD2d 573, 688 NYS2d 643 [2d Dept 1999]; *Edwards v City of Mount Vernon*, 230 AD2d 821, 646 NYS2d 556 [2d Dept 1996]; *Ruchalski v Schenectady County Community Coll.*, 239 AD2d 687, 656 NYS2d 784 [3d Dept 1997]). Accordingly, the motion by defendant Longwood Central School District for summary judgment dismissing the complaint as asserted against it is granted.

Dated: October 16, 2017

  
\_\_\_\_\_  
PETER H. MAYER, J.S.C.