Camacho v Amboy Bus Co., Inc.
2015 NY Slip Op 30192(U)
January 7, 2015
Supreme Court, Bronx County
Docket Number: 350630/2008
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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YVANNA CAMACHO, by her mother and natural guardian ROSA ORTIZ, and ROSA ORTIZ, Individually,

Plaintiff,

Index No. 350630/2008

DECISION and ORDER
Present: SHARON A. M. AARONS

-against-

AMBOY BUS COMPANY, INC., PIONEER TRANSPORTATION CORP., GRANDPA'S BUS COMPANY, INC., THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3

Upon the foregoing papers, the foregoing motion is decided as follows:

The defendants AMBOY BUS COMPANY, INC., PIONEER TRANSPORTATION CORP., GRANDPA'S BUS COMPANY, INC. (the "bus company defendants") and THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK ("the City" or "the municipal defendants"), all of whom are represented by the same counsel, move for summary judgment pursuant to CPLR 3212 dismissing the complaint based upon (1) the absence of a serious injury pursuant to Insurance Law 5102(d), and (2) the absence of negligence in failing to prevent an injury during school hours. Plaintiffs submit written opposition. The motion is granted in part and denied in part.

The infant plaintiff seeks recovery for alleged personal injuries incurred in two separate and distinct accidents. With respect to the first incident, she alleges that on December 14, 2007, when she was a 13 year-old student in a New York City public school on an approved school trip, she slipped and fell while descending the steps of a privately-owned bus when the bus stopped at a McDonald's restaurant for lunch, and that she fell backwards, striking her the back of her head. Plaintiff further alleges that she was injured in gym class on January 18, 2008, when she was struck by a basketball thrown by a fellow student.

In support of the motion, defendants submit the pleadings; the Order of Justice Laura Douglas, J.S.C., dated March 3, 2013, extending the defendants' time to move for summary judgment; plaintiff's verified bill of particulars; the certified testimony of the plaintiff at a hearing held pursuant to GML 50-h; the unsigned,[1] certified deposition testimony of the plaintiff; the affidavit of Harry Sherman, Principal of Castle Hill Middle School, dated June 18, 2013; the plaintiff's medical records from Jacobi Medical Center; the medical records of the plaintiff from Parkchester Family Practice; the affirmed report of David M. Kaufman, M.D., dated May 21, 2013; and portions of the unsworn, certified deposition testimony of Alan Yarow, a non-party witness.

With respect to the accident of December 14, 2007, plaintiff testified that she attended a school trip to a skating rink, to which the students were taken by bus. The students were then taken to a McDonald's for lunch, also by bus. Plaintiff testified at her

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[1] The plaintiff has not raised any issue with respect to the failure of the defendants to submit plaintiff's sworn testimony, or the sworn testimony of Alan Yarrow, a non-party witness. *See Pevzner v. 1397 E. 2nd, LLC*, 96 A.D.3d 921, 947 N.Y.S.2d 543 (2d Dept. 2012) ("Supreme Court providently reviewed the unsworn deposition transcripts submitted in support of the motion, since they were certified by the reporters and the plaintiffs did not challenge their accuracy.")

deposition that she slipped on water, which was present on the steps, evidently due to rain and/or sleet, which had accumulated due to inclement weather. Plaintiff testified that she had seen the water when she initially boarded the bus, when she exited at the skating rink, and when she re-entered the bus before being taken to McDonald's. Plaintiff further testified that one of the teachers accompanying the students repeatedly warned the students to be careful while existing the bus. Plaintiff testified that despite the warnings and her prior knowledge of the water condition, and despite holding the handrail and walking slowly, she nevertheless slipped and hit the back of her head. Plaintiff received a head laceration, which required six "staples" to close, but she received no other treatment.

The defendants maintain that the plaintiff cannot recover damages against any of the bus company defendants, as she is unable to identify the owner of the bus. In this regard, defendants rely on the deposition testimony of the plaintiff, in which she stated that she could not identify the bus company, nor describe the bus other than to state that it was "a long, yellow bus." In addition, the defendants rely on the affidavit of the Harry Sherman, Principal of Castle Hill Middle School. Mr. Sherman's affidavit recites that each of the named defendant bus companies was involved in transporting students, including the plaintiff, from Castle Hill Middle School to Lasker Skating Rink on December 16, 2007. However, the school retained no record as to which student was transported by which of the defendant bus companies.

The defendants further maintain that the plaintiff cannot establish a "serious injury" within the meaning of Insurance Law 5102(d). They maintain that any scar, which may have been left by the laceration, is covered by hair and thus not a "significant disfigurement" within the meaning of the statute. They further maintain that the affirmed

report of David M. Kaufman, M.D., dated May 21, 2013, negates any alleged neurological injury or impairment. The physician's report states that despite claiming poor memory and headaches, the records indicated that the plaintiff had poor school performance even before any of the alleged head traumas underlying this action. The medical records did not indicate symptoms associated with brain injury (persistent headache, seizures, etc.), nor did the plaintiff receive any evaluation or treatment for brain trauma. Her examination was normal, and her alleged deficits were entirely subjective and unsupported by medical findings.[2]

With respect to the gym accident, the municipal defendants argue that the accident is not actionable. Defendants rely on the plaintiff's deposition testimony that the accident occurred when the plaintiff's friend threw a basketball at the net, missed, and the ball suddenly and unexpectedly struck the plaintiff, causing the plaintiff's head to strike the wall. The defendants maintain that this sudden and unexpected accident could not have been avoided through greater supervision.

In opposition, the plaintiffs submit the deposition testimony of Vielca Anglin, one of the plaintiff's teachers who was present at the time of the December 14, 2007 accident on the bus, and of Alan Yarow. The plaintiff's argue that the No-Fault Law does not apply, and that the plaintiff is not required to demonstrate a "serious injury" within the meaning of Insurance Law 5102(d). They maintain that the bus was not the instrumentality which caused the injury; that the bus was not moving, or involved in a collision; and as such, the requirements of the No-Fault Law do not apply.

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[2] Plaintiff's deposition testimony showed, for example, that post-accident, she was able to attend karate school four days per week, engage in tournaments, and earn a "red belt."

As to the gym accident, the plaintiff alleges that numerous children were "running around" in an unsupervised and chaotic manner, and thus the municipal defendants have failed to establish a prima facie case of appropriate supervision.

On a motion for summary judgment in a case alleging serious injury, the burden is initially on the defendant to establish prima facie that the plaintiff did not suffer a serious injury. If the defendant meets this burden, the burden then shifts to the plaintiff to raise an issue of fact as to the existence of an injury meeting one of the statutory criteria. (*Farjam v. Paul Michael Management, Inc.*, 253 A.D.2d 535, 676 N.Y.S.2d 512 [2d Dept. 1998].)

The defendants have established a prima facie case of the absence of a "serious injury." The expert's affidavit submitted by the defendants establishes the absence of any neurological injury. "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 707 N.Y.S.2d 233 [1st Dept. 2000]). Further, it is not disputed that any scar on the back of plaintiff's head is covered by hair, is not noticeable, and thus does not rise to the level of a serious injury. (*Koppelmann v. Lepler*, 135 A.D.2d 507, 522 N.Y.S.2d 12 [2d Dept. 1987].)

Plaintiff does not attempt to establish a "serious injury" in response to the prima facie showing made by defendants, and has not submitted any medical proof in opposition. Instead, plaintiff maintains that the No-Fault Law does not apply, and thus she need not establish a "serious injury." The "use or operation" of the bus was held to be neither a "proximate cause" nor an "instrumentality" that produced plaintiff's injury in

Walton v Lumbermens Mut. Cas. Co. (88 NY2d 211, 214, 666 NE2d 1046, 644 NYS2d 133 [1996].) In that seminal case, the Court held that that an injury, which occurred while a worker, was unloading a truck was not within the No-Fault Insurance Law's scope of coverage. In that case, it was undisputed that the plaintiff's injuries were caused by the failure of a device known as a "levelator" – the plaintiff loaded merchandise from the truck onto the levelator, and then used the levelator to lower the merchandise to the level of the loading dock. The plaintiff tripped while on the levelator. Because plaintiff's injury was caused by an instrumentality other than the insured vehicle, liability for the losses sustained was properly addressed outside the area of No-Fault motor vehicle insurance. *Walton* is distinguishable from the present case, because the present accident occurred during the plaintiff's normal use of the bus as a passenger – i.e., descending the steps in order to depart the bus.

Plaintiff relies on *Cividanes v. City of New York* (20 N.Y.3d 925, 981 N.E.2d 281, 957 N.Y.S.2d 685 [2012]), in which it was held that when a plaintiff stepped off of a bus and fell in a hole in the roadway, the No-Fault Insurance Law was inapplicable because plaintiff's injury did not arise out of the "use or operation" of a motor vehicle within the meaning of Insurance Law § 5104(a). However, *Cividanes* is readily distinguishable from the present case, as the presence of a hole in the street, and not the bus, was the cause of the accident. In the present case, the fall was caused by a condition on the bus itself, and the entire accident occurred within the bus while the plaintiff was engaged in the customary activities of a passenger.

Because the No-Fault Law applies, plaintiff was required to establish a "serious injury" to recover for the accident of December 14, 2007. As noted above, the plaintiff has not rebutted defendants' prima facie case that no such injury exists. In addition,

plaintiff has failed to respond to the bus company defendants' arguments that plaintiff cannot identify the responsible bus company.[3]

As to the gym accident, schools have a duty to adequately supervise children in their charge, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. (*See Mirand v City of New York*, 84 N.Y.2d 44, 49, 637 N.E.2d 263, 614 N.Y.S.2d 372 [1994]; *Talyanna S. v Mount Vernon City Sch. Dist.*, 97 A.D.3d 561, 948 NYS2d 103 [2d Dept. 2012].). A school, however, is not an insurer of its students' safety and will be held liable only for foreseeable injuries proximately related to the absence of adequate supervision. (*Diana G. v Our Lady Queen of Martyrs Sch.*, 100 A.D.3d 592, 953 N.Y.S.2d 640 [2d Dept. 2012]).

Defendant argues that assuming, as plaintiff alleges, that the gym was not adequately supervised, when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is deemed not to be the proximate cause of the injury, and summary judgment in favor of the defendant school is warranted. (*Ronan v. School Dist. of City of New Rochelle*, 35 A.D.3d 429, 430, 825 N.Y.S.2d 249 [2d Dept. 2006] [school not liable liability when students collided during gym class].)

There is no dispute that the accident happened quickly and spontaneously. Plaintiff's own testimony indicates that one of her friends missed a basketball shot, and that the errant ball struck the plaintiff, who was walking at the perimeter of the gym. However, the defendant has not established its entitlement to judgment as a matter of law

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[3] Nor can any argument be made that the municipal defendants are liable for failure to adequately supervise the plaintiff on the bus. According to plaintiff's own testimony, she was well aware of the existence of the water on the steps, and of the hazard it posed. Moreover, according to her own testimony, the teachers on the bus reportedly warned the students to use caution descending the steps.

because the accident was not caused by a spontaneous and unforeseen event that could not have been prevented by any reasonable degree of supervision. The fact that a ball may hit a spectator or non-participant is not unforeseeable. Issues of fact exist as to whether, given adequate supervision, the plaintiff should not have been permitted to wander aimlessly in conversation, while a game of basketball was being played; whether being struck by an errant ball was foreseeable; and whether non-participants in the game should have been warned to remain in a separate area. In short, the municipal defendants have not established the absence of proximate cause as to this claim.

The motion is granted in part, and denied in part. It is, accordingly,

ORDERED that the complaint is dismissed against defendants AMBOY BUS COMPANY, INC., PIONEER TRANSPORTATION CORP., GRANDPA'S BUS COMPANY, INC., and it is

ORDERED that all claims based on the accident of December 14, 2007 are dismissed, and it is

ORDERED that the remaining defendants THE NEW YORK CITY DEPARTMENT OF EDUCATION and THE CITY OF NEW YORK are directed to serve a copy of this Order on the plaintiffs with notice of entry thereon.

Dated: 1/7/15

SHARON A. M. AARONS, J.S.C.