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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

- X

TROY JERIDEAU, WAYNE FELDER and GABRIEL RIVERA,

Plaintiffs,

-against-

HUNTINGTON UNION FREE SCHOOL DISTRICT and HUNTINGTON HIGH SCHOOL,

Defendants.

..... X

PLAINTIFF'S ATTORNEY:
VITALE & LEVITT, P.C.
Atty. for Pltf. Jerideau
445 Broad Hollow Road
Suite 124
Melville, New York 11747

CASSAR & NAPPI, P.C.
Atty. for Pltf. Gabriel Rivera
24 East Main Street
Huntington, New York 11743

INDEX NO.: 2374/2000

MOTION DATE: 10/23/2003
(Original: 04/04/2003)

MOT. NO.: **006 MD**
007 M D 0

PLAINTIFF *PRO SE:*
WAYNE FELDER
Federal Correction Center
Schyulkill, P.O. **Box** 759
Inmate Register No. 235-41-016-Unit 2A
Minersville, PA 17954

DEFENDANT'S ATTORNEY:
MARTIN, VAN DE WALLE,
DONOHUE, MCGAHAN, CATALANO
& FAIRGRIEVE
555 North Broadway
P.O. Box 350
Jericho, New York 11753-0350

Upon the following papers 1 to 90 read on these motions to sever and for *summary* judgment: Notice of Motion and Affirmation in Support 1 to 4 and supporting papers; Affirmation in Opposition 5 to 8 and supporting papers; Affirmation in Further Support of Motion for Severance 9 to 10; Notice of Motion and Affirmation 11 to 23 and supporting papers; Memorandum of Law 24 to 41; Affirmation in Opposition 42 to 66 and supporting papers; Memorandum of Law in Opposition 67 to 80; Reply Affirmation 81 to 90;[1] it is

ORDERED that in this personal injury action arising out of an assault, the motion (motion sequence no. 006) of plaintiff TROY JERIDEAU for an order pursuant to CPLR 603 severing the claims of plaintiffs TROY JERIDEAU and GABRIEL RIVERA from those of plaintiff WAYNE FELDER in this consolidated action is considered together with the motion (motion sequence no. 007) of defendant HUNTINGTON UNION FREE SCHOOL DISTRICT for an order granting summary judgment in favor of defendant pursuant to CPLR 3211 and/or 3212, and dismissing plaintiffs' complaint, and the motions are determined as follows:

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[1] The Court declines to consider the unsworn submissions of *pro* **se** plaintiff WAYNE FELDER.

The instant action arises out of an incident that occurred on September **25, 1999,** on the football practice field of Huntington High School at the conclusion of a football game between Huntington High School and Amityville High School. At the conclusion of the game, as the spectators were leaving the bleachers and the field, a melee broke out on the practice field, in the course of which the three plaintiffs were stabbed. None of the plaintiffs or the alleged assailant, Rasheem Fraser, were then students at Huntington High School, although all three plaintiffs were former football players for Huntington High School.

The submissions establish that in the week before the football game, Huntington High School officials were apprised by several sources that there had been an "incident" between Huntington students and Amityville students the preceding week at a club on Route **110** and that there might "be a problem" at the upcoming football game. There is no evidence that any of the plaintiffs or Rasheem Fraser had been involved in the prior Route **110** incident.

The submissions further establish that in response to that information, school officials "beefed up" security for the game, hiring additional security guards and supervisors and requesting a police presence. Throughout the game and during halftime, security personnel sought to keep "home team" fans and visiting team fans separated fkom one another on their respective sides of the field, and both security officers and police assisted in dispersing the crowd and escorting spectators to the parking areas.

It is well established that the owner of a sporting facility that is open to the public is not an insurer of the safety of its spectators, but is under a duty to exercise "reasonable care under the circumstances" to prevent injury to those who come to watch the games played on its field. ***Akins v. Glens Falls City School District,*** **53** N.Y.2d **325,441** N.Y.S.2d **644 (1981); *Basso v. Miller,*** **40** N.Y.2d **233,386** N.Y.S.2d **564 (1976).** Where the owner knows or has reason to **know** that there is a likelihood of conduct on the part of third persons that is likely to endanger the safety of a visitor to the property, however, the owner has a duty to "take precautions . . . and to provide a reasonably sufficient number of servants to afford a reasonable protection." ***Nallan v. Helmsley-Spear, Inc., 50*** N.Y.2d **507,429** N.Y.S.2d **606 (1980)** (quoting Restatement, Torts 2d, **$344,** Comment **f).** Whether the safety precautions provided by a property owner are reasonable in the circumstances is "almost always a question of fact for the jury.'' ***Akins, supra.***

Defendant's submissions fail to establish its ***prima facie*** entitlement to *summary* judgment. The deposition testimony and exhibits reflect that after the game was over and the spectators were dispersing, Amityville cheerleaders and spectators from both the Huntington and Amityville factions were permitted to enter the football practice field, where the altercation erupted, together. It is undisputed that no security personnel were present in or even assigned to the practice field at the time. It is also undisputed that Huntington High School officials did not contact Amityville High School officials prior to the game and apprise them of their security concerns and enlist their assistance in securing the safety of players and spectators. In light of the foregoing, there are questions of fact **as** to whether the security measures the school undertook to prevent confkontations between the different factions of spectators were adequate in the circumstances. Accordingly, the motion for *summary* judgment is denied.

That branch of defendant's motion that seeks **an** order dismissing the complaint of plaintiff **WAYNE** FELDER for failure to appear for a deposition and an independent medical examination is

denied. It appears from the submissions and the Court's records that sometime after the commencement of the instant action, FELDER was sentenced to a 17-year sentence of incarceration which he is presently serving at the Federal Correction Center in Minersville, Pennsylvania. By short-form order dated November 25,2002, FELDER's former attorney was granted leave to withdraw as counsel for FELDER, and FELDER is apparently proceeding pro ***se.*** In the circumstances, FELDER's failure to appear for deposition and an IME is not willful.

Indeed, in opposition to defendant's motion, FELDER filed a purported "motion to continue to pursue Index no. 2374/00." Although the document is not properly sworn and thus not admissible as evidence, the Court notes that it reflects FELDER's intent and desire to "continue to pursue his civil complaint."[2]

Finally, defendant's submissions do not establish that it is unable to obtain the deposition and a medical examination of plaintiff while he is incarcerated, and defendants have proffered no authority for the dismissal of plaintiffs complaint under these circumstances. ***See, Hansel v. Lamb,*** 166 Misc. 2d 593,634 N.Y.S.2d 954 (Sup. Ct. 1995) (dismissal of the complaint would deprive incarcerated plaintiff of his constitutional right to his day in court); Castro ***v. Banister,*** 42 Misc. 2d 87,248 N.Y.S.2d 193 (Sup. Ct. 1964), *aff'd,* 227 A.D.2d 838,642 N.Y.S.2d 407 (3d Dept. 1996) (dismissal of complaint would result in forfeiture of property right of incarcerated plaintiff).

Moreover, defendant's submissions do not demonstrate that it is substantially prejudiced. The record reflects that defendant obtained the sworn testimony of FELDER regarding the substance of his claims at a hearing held pursuant to General Municipal Law $50-h on February 24,2000. FELDER's claims arise out of the same facts and occurrences as those of the two other plaintiffs, who have been fully deposed.

The parties are reminded that a compliance conference is presently scheduled for April 15, 2004 at 9:30 a.m. If by that date defendant has taken no affirmative steps to promptly obtain the deposition and IME of FELDER at the federal correctional facility where he is incarcerated, its right to do so shall be deemed waived, and the parties are thereupon directed to enter into a compliance order and file a note of issue as directed therein.

In light of the foregoing determination, the motion of plaintiff **JERIDEAU** for an order of severance is denied.

Dated: February 23,2004

PAUL J. BAISLEY, JR.

J.S.C.

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[2] FELDER's purported "Motion for appointment of counsel due to plaintiffs indigency" is similarly unsworn and thus not considered by the Court, and in any event is without merit. Plaintiff has submitted no proof of his indigency, and as a plaintiff in a personal injury action, is presumptively capable of retaining counsel on a contingent basis.