

Bonomo v City of New York

2008 NY Slip Op 30394(U)

February 8, 2008

Supreme Court, Richmond County

Docket Number: 0010756/1999

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: JCP8

By: Philip G. Minardo, J.S.C.

Date: February 8, 2008

MICHELLE BONOMO, Individually and as Parent
and Natural Guardian of JOSEPH BONOMO, an
infant under the age of 14 years,

DECISION/ORDER

Plaintiffs,

vs.

Index. No: 10756/99

THE CITY OF NEW YORK and the NYC BOARD
OF EDUCATION, ROBERT GALE, "JOHN"
RICHARDSON, "JANE" RICHARDSON,
individually and as Parents and Natural Guardians
of JUSTIN RICHARDSON, an infant under the age
of 14 years,

Defendants.

The following papers numbered 1-4 used on this motion this 22nd day of January, 2008.

	Papers Numbered
Notice of Motion by Plaintiff	1
Notice of Motion by Defendant	2
Affirmation in Opposition and in Reply by Plaintiff	3
Reply Affirmation by Defendant	4

Plaintiff moves for an order restoring the instant action to the trial calendar. The defendant, The City of New York, moves to dismiss the action as abandoned pursuant to CPLR §3404; §3211(a)(7) and §3212.

On December 9, 1997 the plaintiff, a ten (10) year old third grade student attending P.S. 23 on Staten Island, alleges he incurred personal injuries as a result of the defendant employee's negligent supervision of him and other students while taking tennis lessons at an after school

program. The case was marked off the trial calendar on October 3, 2005 allegedly for plaintiff to have further dental treatment and for plaintiff's counsel to subpoena the supervising teacher, Robert Gale, for a deposition, who has since retired and is now living out of state.

Plaintiff served the within motion to restore on November 12, 2007, slightly over two (2) years after his case was marked off. Pursuant to CPLR §3404, a case marked "off calendar" and not restored within one (1) year thereafter shall be deemed abandoned and dismissed. The plaintiff, however, may overcome this automatic dismissal by showing his lack of intent to abandon this matter by exhibiting a reasonable excuse for the delay, a meritorious cause of action, and lack of prejudice to the defendants. (See Iazzetta v Vicenzi, 243 AD2d 540 [2nd Dept. 1997]; Yacono v Waterman S.S. Co., 216 AD2d 556 [2nd Dept. 1995]; Santiago v Petschauer, 208 AD2d 517 [2nd Dept. 1994]; Kougianos v City of New York, 234 AD2d 14 [1st Dept. 1996]).

It is defendant City of New York's position that the plaintiff has not established a reasonable excuse for the two (2) year delay in moving to restore the action. The defendant does acknowledge the reason for marking the case off the calendar was to complete discovery, i.e. to depose the supervising teacher who has since retired. It is plaintiff's position that they attempted to serve the supervising teacher, Robert Gale, in New Jersey but was unable to do so because the teacher was evading service. Further, the plaintiff was still undergoing dental treatment, in which medical updates were served on defendant.¹ Unfortunately, the plaintiff's attorney also failed to properly diary this case in his calendar, claiming law office failure. (See Muriel v St. Barnabas Hospital, 3 AD2d 419 [1st Dept. 2004]).

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Plaintiff's treating dentist, Dr Galligan, submitted an affirmation of treatment to the present, dated January 20, 2008.

Accordingly, this court finds the plaintiff has established a reasonable excuse for the delay in moving to restore this action to the trial calendar.

The defendant The City of New York also claims the plaintiff has failed to establish that there exists a meritorious cause of action. Specifically, the infant plaintiff assumed the risk of injury by voluntarily participating in a sport, tennis, when a fellow student swung a tennis racket and accidentally hit him in the mouth. (*See Benitez v New York City Board of Education*, 73 NY2d 650 [1989]). The defendant had previously moved to dismiss before Justice William Mastro who, in essence, denied its motion with leave to renew after completion of discovery.

Though at first blush, this court finds the assumption of risk defense to be a formidable hurdle for the plaintiff to overcome, it is the particular facts of this case which enable this action to survive.

The facts alleged by the plaintiff are as follows: The infant plaintiff, being ten (10) years old at the time, attended his first after school tennis class along with approximately twenty-five (25) other students of the same age or younger. After initially instructing plaintiff and others how to swing the racket, the plaintiff and three (3) other students were told to go on the other side of the gym to practice. The teacher then went about instructing other students with his back towards plaintiff. The plaintiff being inexperienced of the dangers of the sport of tennis, was standing too close behind another student who swung his racket striking plaintiff in the mouth. Unlike baseball where one student would be swinging a bat, here there were twenty-five (25) ten (10) year olds swinging tennis rackets on their first day of lessons. The court finds that a reasonable person might find this inherently unwise and dangerous. In order for the assumption of risk to apply, the defendant must show that the plaintiff had knowledge of and appreciation for the inherent risks of the sport

which has to be assessed against the background of skill and experience of the infant plaintiff. (*See Morgan v State*, 90 NY2d 471, 486 [1997]).

Under the particular circumstances of this case, when applied to the measured rubrics of the above cases, this court finds the plaintiff has established a meritorious claim of negligent supervision. Further, the defendant has not articulated any prejudice from the two (2) year delay in prosecuting this case. The mere passage of time does not establish prejudice. (*See Muriel v St. Barnabas Hospital*, *supra* at 421.

Accordingly, the defendant's motion to dismiss is denied. The plaintiff's motion to restore is adjourned to July 21, 2008 trial date.

This shall constitute the decision and order of the court.

ENTER,

s/ Philip G. Minardo
J. S. C.