

Molina v Conklin

2008 NY Slip Op 30528(U)

February 6, 2008

Supreme Court, Suffolk County

Docket Number: 0029415/2004

Judge: Robert W. Doyle

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This is an action for money damages for personal injuries sustained by the infant plaintiff, Estefany Molina, on September 24, 2003, at approximately 5:07 p.m. When attempting to cross north over Route 25/Front Street at a school crossing in front of the Greenport School, at or near its intersection with 7th Street, Town of Southold, County of Suffolk, State of New York, she was struck by a vehicle owned and operated by defendant Geraldine Conklin. Plaintiffs allege, inter alia, defendant Conklin was negligent in the operation of her vehicle. Plaintiffs further allege the Greenport Union Free School District and the Town of Southold were negligent, inter alia, in failing to timely and properly recognize the heavy traffic conditions on the roadway; failing to provide crossing guards at the crosswalk; failing to properly illuminate the accident site; failing to provide a safe means for the infant to cross the roadway; and failing to provide adequate assistance to students at the crosswalk. A derivative claim is asserted by Beatrice Puerta, mother of the infant plaintiff.

It is noted that Greenport Union Free School District made a previous motion, (001), for an order pursuant to CPLR 3211(a)(7) and 3211(c) dismissing the complaint and all cross claims asserted against it alleging that although it owns the school building located adjacent to Route 25/Front Street, Southold, it did not hire or employ, control or supervise crossing guards for the location. It is also noted that the Town of Southold made a cross motion (002) pursuant to CPLR 3212 for summary judgment dismissing the complaint alleging it was not responsible for the roadway, including signage, where the accident occurred, and that the roadway is a State owned road. Both motions were denied in that it was determined by order dated August 8, 2005 (Molia, J.) that the moving papers were facially insufficient for judgment as a matter of law as they were unsupported by evidence in admissible form, and there were factual issues which precluded summary judgment. The factual issues included, but were not limited to, who hires or pays the salary of the crossing guards at the site of the accident and who determines the hours the crossing guards are to work.

The Town of Southold has now moved for summary judgment dismissing the complaint and cross claims asserted against it on the basis it owed no duty to the infant plaintiff, it did not control the roadway, it had no duty to maintain the roadway nor to warn of dangers arising out of the failure to properly design, construct or maintain it because the roadway was owned and controlled by the State of New York.

The Greenport Union Free School District has now moved for summary judgment dismissing the complaint and cross claims asserted against it on the basis it owed no duty to the infant plaintiff at the time of the accident, and because the District did not employ or assign the crossing guards. They further claim that the roadway where the accident occurred was under the control of the State of New York.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show

facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant’s negligence was a substantial factor in bringing about the injury. If, defendant’s negligence were a substantial factor, it is considered to be a “proximate cause” even though other substantial factors may also have contributed to plaintiff’s injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see, Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347, 728 NYS2d 731[2001]).

In support of motion (003), the Town of Southold has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint and defendants’ answers; a copy of the Notice of Claim; and a copy of the transcript of the examination before trial of Peter W. Harris.

In support of cross motion (003), Greenport Union Free School District has submitted, inter alia, an attorney’s affirmation; a copy of the Notice of Claim; a copy of the summons and complaint; a copy of the moving papers and Decision and Order dated August 8, 2005 (Molia, J.) previously submitted to this court in motions (001) and (002); a copy of plaintiff’s verified bill of particulars; copies of the transcripts of the hearings held pursuant to GML 50-h and examination before trial of Beatrice Puerto and Estefany Molina; and copies of the transcripts of the examination before trial of Geraldine Conklin, Charles Kozora, and Peter Harris.

In opposing both motions, defendant Geraldine Conklin has submitted an attorney’s affirmation for each, adopting and incorporating the arguments set forth in defendant Conklin’s opposition papers. While CPLR 3212(b) does not provide for a party to adopt or incorporate another party’s papers with their own, this Court will search the record and consider plaintiff’s opposition.

Based upon a review of the submissions in support of the motion and cross motion, it is determined that neither the Town of Southold nor the Greenport Union Free School District have demonstrated prima facie entitlement to summary judgment dismissing the complaint and cross claims.

Beatrice Puerto testified that her daughter, Estefany Molina, attended the Greenport Public School since first grade, and was in seventh grade when the accident occurred. She stated her daughter took the school bus to school each morning. Dismissal from the school was usually at 2:45 at which time there

were uniformed crossing guards, however, during the times when she was present for dismissal, she never saw any school teachers or administrators outside. In September, 2003, her daughter played soccer for the school and practices were every weekday after the 2:45 dismissal until 4:30, after which Estefany usually walked home, which took about ten to fifteen minutes. There was no bus provided for students involved in after school activities. She learned of her daughter's accident about 5:15 at home. She testified her daughter came home from the soccer practice about 5 p.m., stayed about three minutes, and left to go back to school to pick up her soccer uniform at the school so she could wash it so it would be clean for the game the next day. Estefany returned to the school by bike where she was hit by defendant Conklin's car, was rendered unconscious and taken to a hospital by helicopter.

Estefany Molina testified her date of birth is April 25, 1991. She stated she did not remember anything about the accident, and that the last day prior to the accident that she could remember was September 24, 2003. She was in the seventh grade at the Greenport Public School located in Greenport on Front Street where she had attended since kindergarten. She stated she took the bus to school, and usually walked home or her mom would pick her up. She played on the seventh and eighth grade soccer team and attended practice five days a week Monday through Friday from 3 to 4:30 p.m. She kept her uniform in a gym locker. After practice she would go to the locker room and change into her clothes and walk home, which was two or three blocks away. She testified she took the same route each day. When she leaves the school to go home, she stated, she has to cross the street and always crosses in front of the school at the cross walk. She testified that there is a crossing guard at the cross walk in the morning and after school until three, but sometimes the crossing guard leaves before three. Prior to the accident, there was no crossing guard at the crosswalk when she got out of soccer.

Peter Harris testified at his examination before trial that he is the Superintendent of Highways for the Town of Southold and is in charge of the budget, oversees the daily operations of the highway department of the Town of Southold. He stated the daily operations involve overseeing thirty two employees, dealing with resurfacing of the roads, plowing snow, drainage work, and anything pertaining to the highway system in the Town of Southold. It was his testimony that the crossing guards are employed by the police department, but he did not know who did the assigning or what hours or training they are assigned.

Charles Kozora testified he is the Superintendent of Schools for the Greenport Union Free School District and generally supervises the district. He described the school building at 720 Front Street as being located on the north side of Front Street. The speed limit in front of the school was twenty miles per hour and there was one crosswalk located on the edge of the driveway on the northeast side. He testified that Southold Town supplied the crossing guards in 2003, but he did not know what the scheduled hours were. He stated they just give the Town their dismissal and lunch times and they assign the hours. In 2003, the earliest class was 7:45 a.m. and the latest class would end at 2:45 p.m. He testified Mrs. Rey was the crossing guard in September 2003 and her hours in front of the school were approximately 7:30 to 9:00, 10:45 to 12:30, and 1:45 to 3:00. He stated no one from the school district ever made a request or expressed a desire to have a school crossing guard at the cross walk after 3:00. Mr. Kozura testified he learned by phone of the accident involving Estefany Molina on September 24, 2003 minutes after it happened and returned to the school. He did not report this accident to the school because, he stated, it happened off of school grounds, although he did not witness it. He testified that about seven years prior, a high school girl had been hit by a car at lunchtime when she stepped off the

curb while a crossing guard was there.

Geraldine Conklin testified the accident occurred on Front Street in front of the Greenport school around 4:00 p.m. while she was driving her car. She had come from her home on Fifth Street and turned to her left on Front Street traveling in a westbound direction to go to her second job in Southold. She described Front Street as having two travel lanes, one lane in each direction, and the tree-line road was straight from Fifth Street to Greenport High School. She did not know what speed she was traveling at on Front Street, but stated there was a twenty mile an hour speed zone. She testified there were signs for the school and she was aware there was a school. She testified there was a crossing area, "the crossing guard thing." She stated the sun was pretty strong that day and there was a glare when she turned onto Front Street. She was not wearing sun glasses and did not know if there was anything she did to minimize the glare. She did not know if she had her sun visor down. As she approached the school, she just remembered glass shattering and she yelled that there was a person because she must have struck the front of the car. She stated she did not know how it happened, but that the girl must have bounced off the windshield. She testified she did not see the person before the accident, but she was able to see the road in front of her at the time. She applied her brakes and came to a stop, sort of realizing what happened, got out of her car and started to walk up to where the little girl was but then walked away because she did not know what was what. The little girl was to the front of the car, but she did not know if she was conscious. Someone called the police and she got back into her car.

Based upon the foregoing, there are factual issues concerning where the accident actually happened as there has been no evidence submitted which sets forth the exact location of the impact. Based upon the testimonies provided, this court would have to speculate as to the exact location of the vehicle which struck the child, if any part of the vehicle was not on the roadway, where the child was when the impact occurred, whether she was riding her bicycle at the time of the accident, and if so, the location of the bicycle and where the child was in relation to the roadway and school property, precluding summary judgment as a matter of law. There are also factual issues concerning whether the Town pays the crossing guards, who determines the hours the crossing guards work, and the reason there were no crossing guards for the students who participated in after school activities.

The Town of Southold and the Greenport Union Free School District both assert they owed no duty to the infant plaintiff. The Town of Southold argues it did not control the roadway. Greenport School District argues it did not employ or assign the crossing guards. There was no testimony by any party or witness concerning whether the police department, who allegedly supplies the crossing guards, is part of Southold Town, who pays the crossing guards, the source of the monies for paying the crossing guards, and who determined what hours the crossing guards would be provided. Mr. Kozora did not set forth if the school district reimbursed any entity or paid any part of the salary of the crossing guard.

"Negligence consists of a breach of a duty of care owed to another. Care must be taken to avoid confusing duty, which is a question of law, with breach, which is a question of fact. Whether a duty of care arises turns on the relation between the defendant and the plaintiff and the potential risk of harm to the plaintiff by the defendant's act or omission. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension" (*DiCerbo v Rabb et al*, 132 AD2d 763, 516 NYS2d 995 [3rd Dept 1987]). "Although a school district's

duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when a student is released into a potentially hazardous situation, particularly when the hazard is partly of a school district's own making; a school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm; while a school has no duty to prevent injury to school children released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision into a foreseeable hazardous setting it had a hand in creating" (*Ernest v Red creek Central School District et al*, 93 NY2d 664, 695 NYS2d 531 [1999]).

A school district has a special relationship to its students, as that term is used in the negligence context, a relationship analogous to that between carriers and their passengers or innkeeper and their guests. This special duty owed to students requires a school to act when a child, while in its charge, is threatened by the negligence of a third-party, and it must make reasonable efforts to anticipate such threats (*Pratt v Robinson et al*, 39 NY2d 554, 384 NYS2d 749 [1976]).

A school district owes a duty of care to its students while the children are in its physical custody or orbit of authority, or if a specific statutory duty has been imposed (*Womack v Duvernay et al*, 229 AD2d 486, 645 NYS2d 831 [2nd Dept 1996]). Although a school district's duty of care toward a student generally ends when it relinquishes custody of the student, the duty continues when a student is released into a potentially hazardous situation, particularly when the hazard is partly of a school district's own making; a school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm (*Ernest v Red Creek Central School District*, 93 NY2d 664, 695 NYS2d 531 [1999]).

Police Department regulations for crossing guards state that school crossing guards are entrusted with the community's most priceless asset, children (*Branch v Stehr et al*, 93 AD2d 849, 461 NYS 2d 346 [2nd Dept 1983]). In *Florence v Goldberg*, 48 AD2d 917, 369 NYS2d 794 [2nd Dept 1975]), the Court found that New York City had assumed a special duty to school children, insofar as it has provided personnel to act as school crossing guards and charged them with the responsibility for the safety of these school children at designated crossings. In the instant action, because both the Town of Southold and the Greenport School District both appreciated the risks and dangers to school children crossing Route 25/Front Street in front of the school, and requested and provided crossing guards for the safety of those children, it is determined they assumed the duty of providing safety to their students in this regard, and therefore, must do so in a careful and prudent manner (*Squitire v Middle Country Central School District et al*, 2004 NY Slip Op 51044U, 4 Misc3d 1025A, 798 NYS2d 348 [Sup Ct Suffolk County 2004]), including protecting those students when they are being released into a foreseeable risk of harm, such as a situation where there is no crossing guard at the crosswalk across Route 25 for those children participating in after school activities.

Based upon the foregoing, it is determined as a matter of law that both the Town of Southold and Greenport School District assumed the duty of providing safety for school children by either requesting and/or providing crossing guards at the cross walk in front of the Greenport School for the perceived danger to the students in crossing over Route 25. However, there remains the factual issue concerning whether the Greenport School District and the Town of Southold were negligent in breaching that duty by not providing a crossing guard for those students participating in after school activities involving late

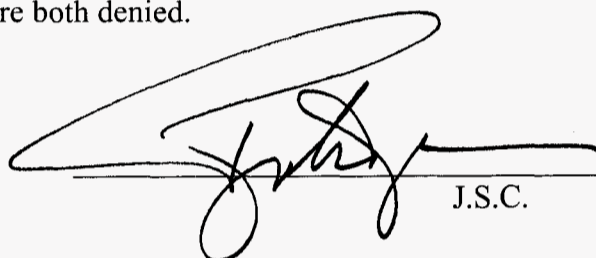
dismissal. Such factual issue precludes summary judgment in this matter.

It is undisputed that there had been discussions between the Greenport School District and the Town of Southold concerning safety issues in front of the school involving traffic along the roadway and concerns for safety of the children, so much so that a request for crossing guards was made by the school district to the Town of Southold. While these crossing guards were provided, allegedly by the Southold Police Department, there are factual issues concerning why crossing guards were not either requested or provided for the students participating in after school activities and sports, and once having assumed the duty to provide crossing guards, whether that duty was breached by not providing a crossing guard for late dismissal. Mr. Kozura testified late dismissal was about 5:30 and that there was no bus transportation provided for students participating in these after school activities. The infant plaintiff was crossing Route 25 at the school crosswalk between the hours of regular dismissal at 2:45 and later dismissal at about 5:30.

There are also factual issues concerning whether or not the infant plaintiff, who left the school grounds after soccer practice, and returned to the school shortly thereafter to get her gym uniform so she could wash it for the soccer game scheduled the following day, was in the custody of the Greenport School District as she was leaving the school grounds when the accident occurred.

Accordingly, motions (003) and (004) are both denied.

Dated: FEB 06 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION