Piazzola v West Hills Day Camp, Inc.

2008 NY Slip Op 31073(U)

April 1, 2008

Supreme Court, Suffolk County

Docket Number: 0026517/2004

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 04-26517
CAL. No. 07-00943-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-19-07
ADJ. DATE 11-9-07
Mot. Seq. # 002 - MG; CASEDISP

MARCUS PIAZZOLA, an infant by his father and natural guardian, MARTIN PIAZZOLA and MARTIN PIAZZOLA, individually, Plaintiffs, - against - WEST HILLS DAY CAMP, INC., Defendant.	LITMAN & LITMAN, P.C. Attorneys for Plaintiffs 209 Glenmore Street East Williston, New York 11596-1415 HAVKINS ROSENFELD RITZERT & VARRIALE, LLP Attorneys for Defendant 114 Old Country Road, Suite 300 Mineola, New York 11501

Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 14 - 21; Replying Affidavits and supporting papers 22 - 26; Other defendant's memorandum of law 12 - 13; defendant's opposition to sur-reply of plaintiffs - pg. 27; plaintiff's sur-reply - pg. 28 - 33; 34 - 38; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant West Hills Day Camp, Inc. seeking summary judgment dismissing the plaintiffs' complaint is granted.

The plaintiff Martin Piazzola commenced this action on behalf of himself and his son, the infant plaintiff Marcus Piazzola, to recover damages for injuries allegedly sustained by the infant plaintiff on July 2, 2004 while playing soccer at a summer camp operated by the defendant, West Hills Day Camp. The infant plaintiff's accident allegedly occurred when he was running for a soccer ball and another player, who was attempting to kick the soccer ball, kicked him in his right leg. The infant plaintiff, who was eight years old at the time of the incident, suffered a broken leg.

The defendant now moves for summary judgment dismissing the complaint on the grounds that there was adequate supervision of the infant plaintiff and that a lack of supervision was not the proximate cause of the infant plaintiff's injury . In addition, the defendant asserts that the infant

plaintiff was an experienced soccer player, who assumed the risk associated with participation in the soccer game. In support of its motion, the defendant submits the pleadings, copies of the parties' deposition transcripts, and an affirmed medical report prepared by Dr. Noah Finkel. At the defendant's request, Dr. Finkel, an orthopedic surgeon, conducted an examination of the infant plaintiff in February 2007 and reviewed various medical records related to the infant plaintiff's injury.

The plaintiffs oppose the instant motion on the ground that the defendant breached its duty of care to the infant plaintiff by failing to provide shin guards during the soccer game in contravention of applicable rules and regulations, particularly the Long Island Junior Soccer League manual. The plaintiffs also assert that an issue of fact has been raised as to whether the defendant, by not providing shin guards to the participants of the soccer game, unreasonably increased the inherent risks associated with playing soccer. The plaintiffs, in opposition, submit the infant plaintiff's deposition transcript errata sheet and the affidavit of the plaintiffs' expert, Joseph Assante. The plaintiffs also submit an excerpt of the rules and regulations promulgated by the Long Island Junior Soccer League for the Fall 2006 and Spring 2007 seasons. The Court notes that it did not consider the sur reply submitted by the plaintiffs in its determination of the motion (*see,* ***Flores v Stankiewicz***, 35 AD3d 804, 827 NYS2d 281 [2006]; ***Mu Ying Zhu v Zhi Rong Lin***, 1 AD3d 416, 766 NYS2d 897 [2003]).

At a deposition before trial, the infant plaintiff testified that he had gone to West Hills' camp for two or three years before his accident occurred. He testified that West Hills has various sporting activities, such as soccer, basketball, football and hockey. He testified that he always played the same activities and that the counselors watched the campers while they played the activities, including soccer. The infant plaintiff testified that two or three counselors were assigned to a group. He testified that after the counselors made out the teams, they sat down and did not give the campers instructions on how to play soccer He testified that soccer was played with either a soccer ball or a red rubber kick ball. The infant plaintiff further testified that his accident happened when he and another camper tried to kick the soccer ball at the same time. The infant plaintiff testified that he was kicked in the leg by another player when, in an effort to get the ball, he dropped down onto the grass, closed his eyes and slid toward the ball. When questioned further about the incident, the infant plaintiff testified that he did not know whether the other player actually kicked his leg or if he twisted his leg when he slid on the ground. In a correction sheet dated January 2007 the infant plaintiff changed his testimony, stating that he had been kicked in the leg by the opposing player. He also testified that the counselors were not in the immediate vicinity and did not witness the accident.

Plaintiff Martin Piazzola testified, in pertinent part, that all five of his children had attended West Hills camp, and that the infant plaintiff had attended the camp the previous year. The plaintiff testified that his son informed him that he had been kicked in the leg while playing soccer. The plaintiff testified that he also spoke with a head counselor, who was not present when the infant plaintiff was injured, but had been told the infant plaintiff had been kicked while playing soccer. The plaintiff further testified the infant plaintiff started playing soccer when he was about five years old, and had played on an organized soccer league called Dix Hills Association.

Michael Moore, the Director of West Hills, testified that he is responsible for overseeing all of the camp's day-to-day operations, including hiring the staff, ensuring the camp's compliance with all safety regulations, and supervising all camp activities. He testified that the camp is open all year, but is

only in operation during the months of July and August. He testified that prior to West Hills' opening, each staff member has four days of orientation, during which time they are instructed on how to deal with child safety and with injuries sustained by children. He testified that staff members are not given training on providing the campers with safety equipment, such as shin guards.

Mr. Moore further testified that the campers attending West Hills are broken into age groups, with each group consisting of no more than 20 children. He stated each group has a group leader who is strictly responsible for that group, and two counselors. He testified that a junior counselor would also be assigned to the group if it is a group of third grade or younger students. Mr. Moore also testified that the children are not forced to participate in any activity and may sit on the side with the counselors. He testified that the children are not allowed anywhere in West Hills, including the bathroom, without a counselor. Mr. Moore testified that the infant plaintiff's accident occurred on the back soccer field, and that accident reports were written by the counselor who witnessed the accident, the group leader and the nurse that tended to the infant plaintiff. He testified that West Hills does not use shin guards during soccer play, because they are more dangerous than helpful if they are improperly fitted. He further testified that West Hills does not use regulation soccer balls.

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 nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

A prima facie case of negligence is established by a plaintiff showing that the defendant's negligence was the substantial cause of the injury producing events (***Boltax v Joy Day Camp***, 67 NY2d 617, 619, 499 NYS2d 600 [1986]; ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]). Assumption of the risk "is not an absolute defense but a measure of the defendant's duty of care" (***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; *see,* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Baker v Briarcliff School Dist.***, 205 AD2d 652, 613 NYS2d 660 [1994]). A voluntary participant in a sport or recreational activity consents to the commonly appreciated risks that are inherent, apparent, arise out of the nature of the sport itself, and generally flow from such participation (*see, **Turcotte v Fell**, supra*; ***Trainer v Camp Hadar Hatorah***, 297 AD2d 731, 748 NYS2d 386 [2002]; ***Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 689 NYS2d 523 [1999]); *see also,* Restatement [Second] of Torts § § 896 [2], 496A, comment *c*). Awareness of the assumed risk is assessed against the background of the skill and experience of the particular plaintiff; therefore, a higher degree of awareness will be imputed to a professional than to one with less professional experience in the particular sport (*see, **Benitez v New York City Bd. of Educ.**, supra*; ***McGee v Board of Educ. of City of New York***, 16 AD2d 99, 226 NYS2d 329 [1962], *lv denied* 13 NY2d 596 [1963]). Thus, a player who voluntarily joins a recreational sport assumes the "risks to which their roles expose them, but not risks which are unreasonably increased or concealed" (***McGee v Board of Educ. of City of New York***, *supra* at 102; *see also, **Turcotte v Fell**, supra*; ***Baker v Briarcliff School Dist.***, *supra*). Consequently, no liability will attach if a participant makes an informed estimate

of the risks involved in the activity, willingly undertakes, and is injured as a result of those risks (*see, **Turcotte v Fell**, supra*). However, the doctrine of primary assumption of the risk does not relieve a defendant from the obligation of using reasonable care to guard against a risk that might be reasonably anticipated (*see, **Hochreiter v Diocese of Buffalo***, 309 AD2d 1216, 764 NYS2d 753 [2003]; ***Havens v Kling***, 277 AD2d 1017, 715 NYS2d 812 [2000]).

Camps, like schools, are not an insurer of safety, and are not required to continuously supervise and control all movements and activities of the children entrusted in their care (*see, **Fintzi v New Jersey YMHA-YWHA Camps***, 97 NY2d 669, 739 NYS2d 85 [2001]; ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, 8 AD3d 327, 778 NYS2d 77 [2004]). Rather, the duty of care owed by persons supervising campers at a summer camp is that of a reasonably prudent parent under comparable circumstances (***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, *supra* at 328, 778 NYS2d 77; ***Colarusso v Dunne***, 286 AD2d 37, 39, 732 NYS2d 424 [2001]). Moreover, liability for negligent supervision of children entrusted in the care of persons or entities such as schools and camps, will only lie if there is a showing that such negligent supervision constituted a proximate cause of the sustained injury (*see, **Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [1989]). Therefore, summary judgment is precluded where inadequate supervision may have unreasonably increased the risk of injury (*see, **Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 689 NYS2d 523 [1999]; ***Kennedy v Rockville Ctr. Union Free School Dist.***, 186 AD2d 110, 587 NYS2d 442 [1992]).

Initially, the Court notes that ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from a relevant industry standard would preclude the granting of summary judgment (*see, **Trimaco v Klein***, 56 NY2d 98, 106, 451 NYS2d 52 [1982]). Here, the affidavit of the plaintiffs' expert was not considered since the plaintiffs failed to disclose that they planned to utilize expert testimony (*see, **Safrin v DST Russian & Turkish Bath, Inc.***, 16 AD3d 656, 791 NYS2d 443 [2005]; ***Dawson v Cafiero***, 292 AD2d 488, 739 NYS2d 131 [1999]). The Court notes that, even if it was to consider the affidavit by Mr. Assante, it is insufficient to raise a triable issue of fact (*see, **Murphy v Conner***, 84 NY2d 969, 622 NYS2d 494 [1994]; ***Gralnik v Brighton Beach Assoc.***, 3 AD3d 518, 770 NYS2d 633 [2004]; ***Mestric v Martinez Cleaning Co., Inc.***, 306 AD2d 449, 761 NYS2d 504 [2003], *appeal denied* 2 NY3d 706, 780 NYS2d 311 [2004]). Significantly, the affidavit failed to demonstrate that the West Hills' camp was subject to the rules and regulations of the Long Island Junior Soccer League, which specifically requires that it provide shin guards for campers playing soccer (*see, **Merson v Syosset Cent. School Dist.***, 286 AD2d 668, 670, 730 NYS2d 132 [2001]; ***Dash v City of New York***, 236 AD2d 579, 580, 654 NYS2d 33 [1997]).

Based upon the adduced evidence, the defendant has established its prima facie entitlement to judgment as a matter of law (*see, **Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). The defendant's submissions demonstrate that the alleged negligent supervision was not the proximate cause of the infant plaintiff's injuries (*see, **Tanon v Eppler***, 5 AD3d 667, 774 NYS2d 718 [2004]; ***Lopez v Freeport Union Free School Dist.***, *supra*; ***Thomas v United States Soccer Fedn.***, 236 AD2d 600, 653 NYS2d 958 [1997]). The affidavit of the defendant's expert indicates that the infant plaintiff's injury, a spiral fracture of the mid and lower tibia, was caused by a rotational-type of torque

on the tibia bone, rather than a direct contact. Additionally, the evidence submitted demonstrates that the subject accident was caused by a spontaneous act that happened as the infant plaintiff slid for the soccer ball, and that even the most intense amount of supervision would not have prevented its occurrence (*see, **Tanon v Eppler**, supra*; ***Ancewicz v Western Suffolk BOCES***, 282 AD2d 632, 634, 730 NYS2d 113 [2001]; ***Convey v City of Rye School Dist.***, 271 AD2d 154, 160, 710 NYS2d 641 [2000]). As discussed above, the defendant's duty to adequately supervise the infant plaintiff did not extend to providing strict immediate supervision of the infant plaintiff in order to protect him from any risks associated with playing soccer (*see*, ***Gustin v Association of Camps Farthest Out***, *supra* at 1003; ***Kosok v Young Men's Christian Assn of Greater NY***, 24 AD2d 113, 115, 264 NYS2d 123 [1965], *affd* 19 NY2d 935 [1967]). Thus, the defendant shifted the burden to the plaintiffs to come forth with sufficient admissible evidence to prove the contrary (*see, **Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Portaro v Tillis Inv. Co.***, 304 AD2d 635, 757 NYS2d 606 [2003]).

In opposition, the plaintiffs failed to raise a triable issue of fact. Here, the plaintiffs failed to present any evidence supporting their allegation that the supervision of the infant plaintiff was inadequate under the circumstances (*see, **De Los Santos v New York City Dept. of Educ.***, 42 AD3d 442, 840 NYS2d 91 [2007]; ***Park v YMCA of Greater NY Flushing***, 17 AD3d 333, 791 NYS2d 848 [2005]; *cf.*, ***Douglas v John Hus Moravian Church of Brooklyn***, *supra*). Moreover, the plaintiffs failed to submit any evidence to establish that the spiral fracture of the infant plaintiff's tibia was proximately caused by the defendant's lack of supervision, namely the failure to provide shin guards (*see, **Fintzi v Riverdale Riding Corp.***, 32 AD3d 701, 819 NYS2d 919 [2006], *lv denied* 8 NY2d 812, 836 NYS2d 551 [2007]). Significantly, the plaintiffs did not submit any medical evidence showing that the fracture sustained by the infant plaintiff was the result of a blunt force injury, like a kick, as opposed to a rotational/twisting injury (*see, **Walker v Commack School Dist.***, 31 AD3d 752, 820 NYS2d 287 [2006]; ***Tanon v Eppler***, *supra*; ***Walsh v City School Dist. Of Albany***, 237 AD2d 811, 654 NYS2d 859 [1997]; ***Muniz v Warwick School Dist.***, 293 AD2d 724, 743 NYS2d 113 [2002]). The plaintiffs also failed to demonstrate that the risk that was encountered by the infant plaintiff was unusual to playing soccer (*see, **Heard v City of New York***, 82 NY2d 66, 603 NYS2d 414 [1993]). Accordingly, summary judgment in favor of the defendant is granted.

Dated: APR 01 2008

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION