

Morabito v McCarthur
2008 NY Slip Op 31546(U)
May 20, 2008
Supreme Court, Nassau County
Docket Number: 6803-05/
Judge: Thomas A. Adams
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

TAYLOR MORABITO, infant by his mother and
natural guardian, CARRIE MORABITO and
CARRIE MORABITO,

Plaintiff(s),

MOTION DATE: 5/6/08

INDEX NO.: 16803/05

-against-

SEQ. NO. 2-4

ANDREW MACARTHUR, ALICE DAWN MACARTHUR, MARK
E. MACARTHUR, GREAT NECK UNION FREE SCHOOL
DISTRICT, GREAT NECK PUBLIC SCHOOL BOARD OF
EDUCATION,

Defendant(s)

The defendants' respective motions, pursuant to CPLR §3126 and 3212 for an award of summary judgment dismissing the plaintiffs' complaint as against them or, in the alternative, to dismiss the complaint due to the plaintiffs' failure to file a note of issue and the plaintiffs' cross motion, for leave to serve and file a late note of issue are determined as hereinafter provided.

On October 25, 2004 the infant plaintiff, a Junior at Friends Academy, was participating in a boy's varsity interscholastic soccer game against Great Neck South High School on Friends' Locust Valley campus. With approximately two minutes left to play, the infant plaintiff collided with Great Neck South's goalie, a senior, the defendant Andrew Macarthur, causing the infant plaintiff to sustain a fractured left leg.

On October 21, 2005 the plaintiffs filed the within action asserting causes of action for assault and battery, the intentional infliction of emotional distress and negligent supervision (see Great Neck defendants' Exhibit A). After joinder of issue and the completion of disclosure, the case was certified for trial on June 28, 2007. Following the plaintiffs' failure to file a note of issue within 90 days thereafter in accordance with the June 28, 2007 order, on April 1, 2008 the case was automatically dismissed by the Calendar Clerk (see CPLR §3216).

During a March 22, 2005 municipal hearing (see General Municipal

Law §50-h), the infant plaintiff testified, inter alia, that the incident occurred when he and Mr. Macarthur each raced towards the ball in Great Neck South's goalie box (p.20, L15). Mr. Macarthur, the goalie, snared it seconds before the infant plaintiff's arrival. He allegedly "veered off" towards the sideline in order to avoid contact with a sliding Mr. Macarthur who reportedly raised his leg and kicked the infant plaintiff's left leg (p.20, L15 - p.21, L6). No penalty was called (p.53, L18) and the infant plaintiff had no unusual prior involvement with Mr. Macarthur (p.54, L6-19). Yet, he believes the act was intentional (p.56, L12) and attributes it to Mr. Macarthur's alleged frustration at his scoring the goal which caused Great Neck South to end its season with a loss (p.56, L14). The infant plaintiff's subsequent March 2, 2007 deposition testimony was consistent.

For his part, during a March 16, 2007 municipal hearing Mr. Macarthur testified, in pertinent part, that he did not know the infant plaintiff prior to October 25, 2004 (p.24, L16) and that he merely went into a "protective slide" as soon as he gathered the ball (p.44, L13). The players then made contact (p.49, L4) after which Mr. Macarthur arose and kicked the ball away (p.50, L9) before noticing that the infant plaintiff was injured and had remained on the ground (p.51, L18). His coach, James Millevoi, testified later that day and stated, inter alia, that Mr. Macarthur had been a member of his team in 2003 and 2004 and that he "never had a problem with him" (p.9, L18) i.e., there were no disciplinary problems (p.9, L15).

One of the two Referees to officiate the game, Gary Goodside, a non-party, was deposed on April 20, 2007. He recalled that Mr. Macarthur slid and retrieved the ball before the infant plaintiff had arrived and there was "significant" contact (p.19, L11; p.19, L25). However, a penalty was not assessed because "it was a normal play" with "no malicious intent" or "intent to harm" (p.22, L23).

Another non-party, the infant plaintiff's coach, Marshall Linder, was also deposed on April 20, 2007. In his opinion, there was a foul because he believes that Mr. Macarthur deliberately made contact with the infant plaintiff (p.9, L25 - p.10, L8) although he did not know whether there was an intent to cause injury (p.10, L21 - p.11, L2; p.22, L15). Nor did he observe any animosity between the teams (p.15, L3-17) or between the infant plaintiff and Mr. Macarthur (p.19, L14). Later that evening, however, Coach Millevoi called him to inquire about the infant plaintiff's condition and allegedly acknowledged that Mr. Macarthur had "deliberately [tried] to get a

piece of [the infant plaintiff]" (p.26, L14-22). He was reportedly motivated by his frustration at the infant plaintiff's having scored the winning goal a short time earlier (p.27, L4-11). While the contact was allegedly intentional, Coach Linder reiterated his belief that Mr. Macarthur "did not want to really hurt him badly" (p.36, L11-19). He also characterized Mr. Goodside and the other Referee, Orland G. Sweeny, as "good referees" despite their failure to call a penalty on the play (p.45, L7-14).

The infant plaintiff's father and non-party, Terry Morabito, was deposed on September 6, 2007. He recalled a discussion the day after the incident during which Coach Millevoi purportedly described Mr. Macarthur as "a little high-strung" (p.26, L10). Moreover, during the game he allegedly appeared "agitated" (p.32, L10). In sum, his recollection of the play was that after Mr. Macarthur grabbed the ball, the infant plaintiff turned or veered towards the sideline (p.44, L 24) and attempted to jump over him in order to avoid contact (p.49, L18) but Mr. Macarthur reportedly "cocked his leg back . . . , came across and got [the infant plaintiff] . . . on the side" (p.50, L12).

Finally, the other Referee, Orland G. Sweeny, appeared for a January 7, 2008 non-party deposition. He described the contest as a "very competitive" and "clean game" (p.15, L2). Mr. Macarthur came out of the crease to collect the ball in a customary or standard manner with his foot extended (p.15, L14-22; p.16, L22-25). "By the time [the infant plaintiff] kicked, [Mr. Macarthur] already had the ball in his possession, so [the infant plaintiff] ended up kicking the foot of [Mr. Macarthur]" (p.15, L25 - p.16, L3). Since neither he nor Mr. Goodside saw "any malicious action for [Mr. Macarthur]" who was inside his 18-yard goalie box, no penalty was assessed (p.19, L13-18). He did not observe Mr. Macarthur "cocking his leg" (p.30, L13) or see the infant plaintiff "veer off" towards the sideline (p.32, L14).

"Liability for negligent supervision 'does not lie absent a showing that it constitutes a proximate cause of the injury sustained' (Lopez v Freeport Union Free School District, 288 AD2d 355, 356 [2001]). 'Where 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 not the proximate cause of the injury' (Convey v City of Rye School District, 271 AD2d 154, 160 [2000]" (Tanon v Eppler, 5 AD3d 667, 668).

Here, the Great Neck defendants established a prima facie entitlement to summary judgment dismissing the complaint as against them because Mr. Macarthur's alleged spontaneous intentional act could not have been reasonably foreseen (see Schwab v Gadsden, 286 AD 431; Thomas v United States Soccer Federation, Inc., 236 AD2d 600). There was no prior acrimony between either the teams or these two players and Mr. Macarthur did not have a history of being disciplined. Indeed, Coach Millevoi's uncontroverted conclusion was that he "never had a problem with him" (p.9, L18). Mr. Morabito's subjective and conclusory assertion that he looked "agitated" (p.32, L10) or "seemed angry" (March 29, 2008 affidavit, para.9) is inadequate to create a triable issue of fact. The Great Neck defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint as against them (i.e., the fifth and sixth causes of action) is therefore granted.

"The elements of a cause of action [to recover damages] for battery are bodily contact, made with intent, and offensive in nature" (Fugazy v Corbetta, 34 AD3d 728, 729; see Siegell v Herricks Union Free School District, 7 AD3d 607, 609; Tillman v Nordon, 4 AD3d 467, 468; 6A New York Jurisprudence 2d Assault - Civil Aspects §§4-6; 2 PJI 3:3). The defendants and Referees' (i.e., Mr Goodside and Sweeny's) non-party testimony is sufficient to establish a prima facie entitlement to summary judgment dismissing the battery cause of action. Mr. Morabito's deposition testimony and March 29, 2008 affidavit averring that Mr. Macarthur's leg was "cocked" and Coach Linder's hearsay assertion that Coach Millevoi later admitted that Mr. Macarthur had "deliberately tried to 'get a piece' of [the infant plaintiff]" (April 7, 2008 affidavit para.10) are inadequate to create a triable issue of fact that the conduct was offensive i.e., "wrongful under all circumstances" (Tillman supra at 468 quoting Zraggen v Wilsey, 200 AD2d 818, 819).

Moreover, "[t]o sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful conduct" (Fugazy supra at 729). The infant plaintiff concededly had no prior involvement with Mr. Macarthur (see March 22, 2005 municipal hearing, p.54, L6-16) and there is no admissible evidence that he was in imminent apprehension of being harmed by an intentional act. Instead, it was not until after the incident that the plaintiffs concluded that Mr. Macarthur had acted intentionally.


Lastly, "[t]o state a claim for the intentional infliction of

emotional distress, the conduct alleged must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (Nigro v Pickett, 39 AD3d 720, 721 quoting Murphy v American Home Prod.s Corp., 58 NY2d 293, 303; see Howell v New York Post Co., 81 NY2d 115). Even assuming, arguendo, that Mr. Macarthur's behavior was intentional, as a matter of law it was not so outrageous as to surpass that arduous threshold.

Accordingly, the Macarthur defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint (i.e., the first through fourth causes of action) as against them is granted.

That branch of the Great Neck defendants' motion which, in the alternative, seeks to dismiss the plaintiffs' complaint due to their failure to timely file a note of issue (see CPLR §3216) and the plaintiffs' cross motion for leave to serve and file a late note of issue are therefore dismissed as academic.

Dated: 5-20-08


ENTERED
MAY 23 2008
NASSAU COUNTY
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