

Scarito v St. Joseph Hill Academy
2008 NY Slip Op 33724(U)
July 16, 2008
Supreme Court, Richmond County
Docket Number: 102802/06
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.102802/06
Motion No.:004

TONI SCARITO, an behalf of and as natural mother and
legal guardian of ANTHONY SCARITO, infant, and
TONI SCARITO, individually,

Plaintiffs

against

ST. JOSEPH HILL ACADEMY,
CONGREGATION OF THE DAUGHTERS OF THE
DIVINE CHARITY, and
SALVATORE GERARDI,

Defendants

DECISION & ORDER
HON. JOSEPH J. MALTESE

FILED
2008 JUN 30 PM 2:04
CLERK OF COURT

The following items were considered in the review of this motion to reargue.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Supplemental Affirmations	4,5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff moves this court pursuant to CPLR § 2221(d) to reargue the prior decision and order of this court dated May 27, 2008. Plaintiff's motion to reargue is granted, and upon reargument this court's prior decision and order is vacated.

Facts

The instant action for personal injuries arose on March 5, 2004 when the plaintiff, Anthony Scarito ("Scarito"), sustained injuries during a game of "speed soccer" during gym class at St. Joseph Hill Academy ("St. Joseph"). Speed soccer is similar to a game of soccer except the students compete one on one and have only one (1) minute to try and score. Scarito suffered a fractured leg when his opponent struck him in the leg as they competed. Co-defendant

Salvatore Gerardi, ("Gerardi") the physical education teacher, supervised the game. Gerardi testified at his examination before trial that the school did not provide any safety equipment to children competing in speed soccer matches.

Plaintiff alleges in his bill of particulars that St. Joseph was negligent in failing to take proper precaution in supervising, training, instructing and controlling the student body and plaintiff. As a result of the defendants' alleged negligence, plaintiff claims he sustained a fractured leg.

On May 27, 2008 this court issued a decision and order denying plaintiff's cross-motion for summary judgment and granting defendants' motion granting summary judgment dismissing plaintiff's complaint. Upon reargument, this court vacates its previous decision.

Discussion

Leave to reargue is governed pursuant to *CPLR* § 2221:

A motion for leave to reargue:

1. shall be identified specifically as such:
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.¹

¹ *CPLR* § 2221(d).

Plaintiff argues that this court misapprehended his argument concerning defendants' failure to properly provide protective gear to students participating in "speed soccer" contests. This court agreed and permitted oral argument of this motion. At that time this court asked the plaintiff and defendants to submit to the court any formal written rule, law or regulation that requires the use of shin guards in soccer competition.

In response, defendants submit several e-mails directed to different agencies including: the New York State Association for Health, Physical Education, Recreation, and Dance; the New York State Department of Education; and the American Alliance for Health, Physical Education, Recreation and Dance. These organizations were unable to provide defendants with standards relating to soccer competition.

Plaintiff submits information gained from the Federation Internationale de Football Association ("FIFA") the world governing body of soccer, as well as the Laws of the Game 2007/2008 ("Laws of the Game") distributed by the U.S. Soccer Federation. The information provided from the FIFA website states "... [s]hin guards are required in [soccer]." In addition, the Laws of the Game state that "[t]he basic compulsory equipment of a player comprises the following separate items: ... shinguards ..."

The existence of such a rule governing soccer competition creates an issue of fact regarding whether the same safety precaution is necessary in "speed soccer" competitions. The Appellate Division, Second Department held that whether a school installed proper safety equipment is a question of fact sufficient to deny a summary judgment motion.²

² See, *Mei Kay Chan v. City of Yonkers*, 34 AD3d 540, [2d Dep't. 2006].

Conclusion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."³ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."⁴ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁵ As plaintiff demonstrated that soccer competition requires the use of shin guards a significant question of fact exists.

Accordingly, it is hereby:

ORDERED, that upon reargument this court's decision dated May 27, 2008 is modified in so much as summary judgment is denied to both plaintiff and defendant; and it is further

ORDERED, that parties return to DCM Part 3 on Monday, September 22, 2008 at 9:30 A.M. for a pre-trial conference.

GRANTED
ENTER,

JUL 25 2008

DATED: July 16, 2008

~~Stephen J. Fleck~~

Joseph J. Maltese
Justice of the Supreme Court

³ CPLR §3212[b].

⁴ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2^d Dep't 1990.]

⁵ *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dep't 1994].