

Garrison v Harborfields Cent. School Dist.

2009 NY Slip Op 30144(U)

January 22, 2009

Supreme Court, Suffolk County

Docket Number: 14231-06

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

INDEX
NO.: 14231-06

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-16-08
SUBMITTED: 10-9-08
MOTION NO.: 002-MG

x
DAVID GARRISON, an infant by his father and
natural guardian, CHARLES GARRISON, and
CHARLES GARRISON, individually,

Plaintiffs,

-against-

HARBORFIELDS CENTRAL SCHOOL
DISTRICT and THOMAS AMBROGI, an infant
by his father and natural guardian, ALBERT S.
AMBROGI,

Defendants.

x

LARRY J. McCORD, ESQ.
Attorney for Plaintiffs
1291 Straight Path Road
North Babylon, New York 11704

DEVITT SPELLMAN BARRETT, LLP
Attorney for Defendant Harbor Fields
Central School District
50 Route 111
Smithtown, New York 11787

SCHONDEBARE & KORCZ
Attorneys for Defendant Thomas Ambrogi
3555 Veterans Memorial Highway, Suite P
Ronkonkoma, New York 11779

Upon the following papers numbered 1 18 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-10 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11-16 untabbed ; Replying Affidavits and supporting papers 17-18 ; it is.

ORDERED that this motion by the defendant Harborfields Central School District pursuant to CPLR 3212, for summary judgment dismissing the complaint, is granted, and the complaint is dismissed with prejudice insofar as asserted against the defendant Harborfields Central School District.

The complaint alleges that on June 9, 2005, while the infant plaintiff, David Garrison, was a student at the Harborfields High School (Harborfields), he was physically assaulted by Thomas Ambrogi, also a student at Harborfields. The complaint asserts causes of action sounding in assault; negligence based upon the failure of Harborfields to properly supervise the conduct of the defendant Thomas Ambrogi; racial discrimination by Harborfields

in violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1983 and §2000d; and derivative claims on behalf of Charles Garrison, the father of David Garrison. It is noted that the plaintiffs do not make any claims that the defendants violated any of the statutes or the Constitution 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, 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 Aeraxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) 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 be granted only 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 support of this motion, Harborfields has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint and the answer served by Harborfields; a copy of the bill of particulars; the transcript of the hearing conducted pursuant to GOL §50-h of David Garrison; and the examinations before trial of David Garrison, and David Bennardo and Ralph Forman on behalf of Harborfields.

In opposing this motion, the plaintiff has submitted, inter alia, an attorney’s affirmation; a copy of the summons and complaint and the answer served by Thomas Ambrogi; the transcript of the hearing conducted pursuant to GOL §50-h of David Garrison; and the examinations before trial of David Garrison, David Bennardo, and Ralph Forman.

David Garrison testified that he met Thomas Ambrogi, the captain of the wrestling team at Harborfields, when he attended ninth grade at Harborfields and was involved in some scrimmages and wrestled with Ambrogi. He played JV wrestling and Ambrogi, a senior, played varsity. He stated that, because Ambrogi could not pin him, there was other fighting spawned from a wrestling match wherein Ambrogi would put him in a headlock and push him

over in the wrestling room when he was getting changed. This happened about 100 to 150 times prior to June 2005. Garrison also stated Ambrogi called him names, but he could not remember the names he was called. He further stated that, one day in December, Ambrogi said something to which he replied, "Just get out of here, man. I ain't trying to get involved with you." Garrison stated he never told his parents, teachers, principals, counselor, or anyone else about these episodes. In January, before practice, he was lying down on the floor mat wrestling when Ambrogi came from behind and kicked him in the groin. He got angry, did not touch Ambrogi, but "got into his face" about it. Ambrogi grabbed him and punched him once in the face while he was still on the mat. Other people pulled him back. Mr. Foreman, the wrestling coach, heard about the incident, called both Garrison and Ambrogi into his office, and spoke to them. They shook hands and said it would never happen again. From January through June, they saw each other everyday without incident. Garrison stated that on June 9, 2005, Ambrogi said to him, "I've heard you've been talking about me," to which he replied, "I haven't been talking about you. You don't even pass through my mind." His last class was gym, but he did not participate in his gym class because he did not have his gym clothes. Afterwards, as he was leaving the school at about 2:30 p.m., he splashed water on one of his friends, went to the bathroom, came back out into the hall, and was talking to his friends when Ambrogi came by and pushed him into the wall. Ambrogi said, "I heard you were talking about me," to which he replied, "I don't even talk to you no more. I don't even care, neither. Your name doesn't cross my mind." Ambrogi then grabbed him and pushed him, punched him in the face, twice in his right eye. His back pack fell down to his elbows so he couldn't defend himself. He ducked to get away from Ambrogi, who began head-butting him and bit his ear. A security guard came over and broke them up by pulling him off Ambrogi. He went to the nurse's office, got ice for his ear, and was then paged to the principal's office. At the principal's office, he spoke to Mr. Bennardo and Mr. Kelly. He was given a five-day suspension, as was Thomas Ambrogi. After he went home, his anger got to him and he went to Ambrogi's house with his brother and his friend to ask Ambrogi why he had punched him. When he arrived, Ambrogi's father answered the door and they had a conversation. He left with his brother and friend and was near the school when the police stopped him. Mr. Ambrogi and Mr. Bennardo also arrived. He was not arrested and left when they were finished. Although he stated he had never heard Thomas Ambrogi use any racial slurs towards him, he had heard Ambrogi say something to other people. He did not know if the school administrators, principals, teachers or any of the adults knew of these racial comments. He has not seen the defendant Ambrogi since June 9, 2005. He stated felt he was discriminated against because the principal said it was a fair fight.

Garrison also testified that, when he was attending Old Field Middle School from sixth through eighth grade, he felt he was discriminated against because his teacher, Ms. Giordano, told him she heard he had a knife. He was patted down and had to empty his pockets and take off his shoes, but they didn't find a knife. In October 2004, he believed he was subjected to unlawful discrimination because his friends were called to the office and asked if he had brought drugs into school. However, no one asked him about any drugs, and he was never charged with anything. He was suspended once from school by his English teacher because he was told he was disrupting the class. He was also suspended in ninth grade for cutting classes,

“lots of times” and he was suspended because he was late for class.

Mr. David Bennardo, principal of Harborfields High School, testified that he knew David Garrison, a ninth grader, and Thomas Ambrogi, a twelfth grader. For the first time in June 2005, he was informed of an altercation. He had never been previously advised of any altercations between Garrison and Ambrogi. He was not aware of any racial tensions between Caucasian students and African-American students in the school in general. He was on parking lot duty when he was called on the radio about the incident between Garrison and Ambrogi. He met with David Garrison afterwards and asked him if he had had a fight. David Garrison said, “Nah, nah, nah, I don’t want to talk, I have to go home.” When he spoke to Thomas Ambrogi, Thomas told him, “I got into a fight with David Garrison, he was squirting water; we turned and fought each other.” Mr. Bennardo testified he spoke with Charles Garrison, David’s father, the following day and with Charles Tyson, director of guidance. He advised Mr. Garrison that both David and Thomas were suspended for five days because the school has a no-tolerance policy against fighting in general. He also said it was a fair, although foolish, move on both student’s parts. He stated he used “fair” because they were not talking about an assault and, according to David’s parents, David came from an extensive wrestling background. Thomas wrestled the previous three years. About a week after his meeting with Mr. and Mrs. Garrison, he received correspondence from them over his use of the word “fair.” He explained to them that he gave equal punishment per the school policy and advised them of their right to an appeal. Mr. and Mrs. Garrison wanted David’s suspension immediately voided and were concerned that Thomas would be walking freely about the school. Mr. Bennardo advised them that Thomas was only let into the school through the main office (he was not permitted to pass into the lobby) because he had a sign language exam which could not be given at home and the exam was imminent for Thomas’ graduation. He also testified that Thomas was forbidden from attending the senior video, the senior banquet, and the senior luncheon. Thomas did not enter the building and did not walk freely to enjoy those privileges. Moreover, Thomas’ father was furious with the suspension and wanted to know why his son was suspended. He stated that David’s exam for Earth Science was after his suspension was over. He further testified that it became the version of events several weeks later that David had been assaulted. The letter from Mr. and Mrs. Garrison was the first indication that what had been a very productive conversation with them had turned into something far different. He also stated that David did not tell him or the school nurse that he had been bitten behind the ear. He stated that the meeting with the parents had been turned over to student managers and the assistant principal.

Ralph Forman testified he worked for Sagem East High School for 32 years and was the varsity head wrestling coach at Harborfields High School. He stated he knew David Garrison and Thomas Ambrogi because they were on the wrestling team, but he did not recall any physical violence between them. He did remember they had a verbal disagreement when Thomas was a captain of the wrestling team and they needed quiet during practice to teach the moves. When the captains asked for quiet, David got very irritable and yelled at Thomas. He stated David was being boisterous and was not following directions. There were three coaches in the room and they stopped the incident right away without physical violence. During his time at

Harborfields, he was not aware of any racial tension between the Caucasian students and the African-American students and never heard any disparaging remarks about African-American students.

Based upon the foregoing, the court finds that the defendant Harborfields Central School District has demonstrated, *prima facie*, its entitlement to summary judgment. The defendant Harborfields has submitted evidence demonstrating as a matter of law that it did not negligently or carelessly supervise Thomas Ambrogi and that it did not practice discriminatory acts, policies or customs in violation of 42 USC §1983 or Section 601 (42 USC §200d) of Title VI of the Civil Rights Act of 1964 with regard to the infant plaintiff. In opposition, the plaintiffs have failed to raise triable issues of fact to preclude summary judgment.

The second cause of action is premised upon the alleged negligent supervision by Harborfields of Thomas Ambrogi. The school's standard of duty to a student is what a reasonably prudent parent would have done under the same circumstances (NY PJI 2:227). "The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the identical situation and armed with the same information, would invariably have provided greater supervision" (**Mirand v City of New York**, 190 AD2d 282, 288 598 NYS2d 464, *aff'd* 84 NY2d 44, 614 NYS2d 372[1994]; *see*, **In the Matter of the Claim of Jane Doe v Board of Education of Penfield School District, et al**, 2006 NY Slip Op 51615U, 12 Misc3d 1197A, 824 NYS2d 768 [Sup. Ct. of New York, Monroe County 2006]). "Where injuries are caused by the intentional acts of fellow students, imposition of liability upon the school under a theory of negligent supervision is justified when a plaintiff can show, usually by virtue of the school's prior knowledge or notice of the dangerous conduct which caused the injury, that the acts of the fellow student could reasonably be expected to guard against...an injury caused by the impulsive, unanticipated act of a fellow student" (*see*, **Shrader v Board of Education of the Taconic Hills Central School District**, 249 AD2d 741, 742, 671 NYS2d 785 [3rd Dept 1998]), quoting *Mirand v City of New York*, 84 NY2d 44, 49).

David Garrison testified that he never told any of the teachers, principals or school authorities about any incident which occurred prior to the June 2005 incident. In January 2005, Ambrogi allegedly came from behind and kicked Garrison. Mr. Foreman, the wrestling coach, heard about the incident. Both of them were called into Mr. Foreman's office where they were spoken to, shook hands, and said it would never happen again. David Garrison testified that after January 2005, he and Thomas saw each other every day without incident until June 9, 2005. The court finds that, under these circumstances, there was no actual or constructive notice to Harborfields about a problem between the two students, and it was not foreseeable that a fight would occur between them. There was no reasonable expectation, based upon the prior conduct of Garrison and Ambrogi, that anything more would occur. Therefore, the court finds that Harborfields did not negligently supervise defendant Ambrogi. It has not been demonstrated that there was a persistent pattern of conduct by Ambrogi that the school officials were made aware

of and failed to act upon. There were no reports of previous injury sustained by the infant plaintiff. Neither the plaintiff nor his parents ever advised the school district of any problem between the plaintiff and defendant Ambrogi, and the incident which occurred on June 9, 2005 was a spontaneous act (*see, Ceglia v Portledge School*, 187 AD2d 550, 590 NYS2d 228 [2nd Dept 1992]; *Bird v Port Byron Central School District*, 286 AD2d 938, 731 NYS2d 417 [4th Dept 2001]). Accordingly, the second cause of action sounding in negligent supervision asserted against defendant Harborfields is dismissed.

New York Courts have concurrent jurisdiction with federal courts over 42 USC §1983 claims (*Brody v Leamy*, 90 Misc2d 1, 393 NYS2d 242 [Sup. Ct. of New York, Dutchess County 1977]). Title 42 USC §1983 sets forth in pertinent part, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....” To state a claim under 42 USC §1983, a plaintiff must allege that a defendant acted under color of state law and that the defendant deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or laws of the United States (*Mermer v James D. Constantine of the Knox Memorial Central School District*, 131 AD2d 28, 520 NYS2d 264 [3rd Dept 1987]).

Section 601 (42 USC §2000d) of Title VI of the Civil Rights Act of 1964, prohibits intentional discrimination based on race, color, or national origin in covered programs and activities (*Bryant et al v Independent School District No. 1-38 of Garvin County, Oklahoma*, 334 F3d 928, 2003 U.S. App. Lexis 13477 [United States Court of Appeals for the Tenth Circuit 2003]). Title 42 USC §2000d provides, “No person in the United States, shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Title VI prohibits discrimination on the basis of race by any program that is a recipient of federal funds (*Steele et al v Alma Public School District et al*, 162 F Supp 1083, 2001 U.S. Dist. Lexis 15148 [United States District Court for the Western District of Arkansas, Fort Smith Division 2001]). Private individuals may sue to enforce §601 of Title VI and obtain both injunctive relief and damages.

Under an identical provision in Title IX of Educational Amendments of 1972, 20 U.S.C.S. § 1681, the United States Supreme Court has held that, unless an appropriate person has actual knowledge of the alleged discrimination and fails to adequately respond to such discrimination, a damage remedy will not lie. The Court implied that a school district can be liable where a principal knows of a teacher’s misconduct (*Rubio v Turner Unified School District No. 202, et al*, 475 F Supp2d 1092, 2007 U.S. Dist. Lexis 9693 [United States District Court for the District of Arkansas 2007]).

In **Bryant**, *supra*, the Court set forth the test for making an evidentiary showing to sustain a “deliberate indifference claim.” The four-part standard set forth by the Court of Appeals for the Tenth Circuit is (1) the school district had actual knowledge of and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school.

To maintain a claim for equal protection, a plaintiff “must come forward with at least some credible evidence that the actions of the individual [defendants] were motivated by racial animus or ill-will and must show treatment different than other similarly situated individuals as a result of race (**Grillo v New York City Transit Authority**, 291 F3d 231, [2nd Cir. 2002]; *see also*, **Crowley v Courville**, 76 F3d 47 [2nd Cir. 1996]).

In the instant action, the plaintiffs have not demonstrated that there was a violation of either Title 42 USC §1983 or Title 42 USC §2000d. David Garrison stated he never heard Thomas Ambrogi use any racial slurs towards him and never notified the school district of any incidents or racial slurs. The plaintiffs have not demonstrated that a protected interest was infringed upon by the conduct of defendant Harborfields or any of its employees or that David Garrison was accorded different treatment than other similarly situated students, namely the defendant Thomas Ambrogi, or that there was invidious discrimination. After the June 9, 2005, incident, both David Garrison and Thomas Ambrogi were suspended from school for five days. Mr. David Bennardo, principal of Harborfields High School, testified that he knew David Garrison and Thomas Ambrogi, that for the first time in June 2005 he was informed of an altercation between them, and that he had never been previously advised of any altercations between them. He was not aware of any racial tensions between Caucasian students and African-American students at the school in general. He met with David Garrison after the incident and asked him if he had a fight, and David Garrison told him, “Nah, nah, nah, I don’t want to talk, I have to go home.” When he spoke to Thomas Ambrogi after the incident, Thomas Ambrogi told him, “I got into a fight with David Garrison, he was squirting water. We turned and fought each other.” Mr. Bennardo testified that the following day he spoke with Charles Garrison, David’s father, with Charles Tyson, director of guidance, and advised Mr. Garrison that both David and Thomas were suspended for five days based on the school’s no-tolerance policy against fighting and that it was a fair, albeit foolish, move on both students’ parts.

Although Thomas was let into the school after the suspension on one occasion, he was only permitted into the main office (he was not permitted to pass into the lobby) to take a sign language exam which could not be given at home, which was imminent for his graduation. David’s exam was scheduled after the suspension, which is when he took it. Thomas was also forbidden to attend the senior video, the senior banquet, and the senior luncheon. He did not enter the building and did not walk freely to enjoy those privileges. Even if the plaintiffs could establish a *prima facie* case of discrimination based upon the very limited admission of defendant Ambrogi into the school to take the sign language exam necessary for graduation, the defendants have produced a legitimate non-discriminatory reason for their alleged discriminatory conduct

(*see*, **Griffin et al v Crossett School District, Inc., et al**, 2008 U.S. Dist. Lexis 50357 [United States District Court for the Western District of Arkansas, El Dorado Division 2008]).

There is no evidence of a denial of equal protection to David Garrison because there is no evidence that race played any role in the school officials' decisions on how to deal with the incident. The school had a zero-tolerance policy towards fighting, and both students were suspended. There is no showing that David Garrison would have been treated any differently if he were not African-American. He was permitted to take his exams and has not demonstrated how he was deprived of due process by the suspension or any treatment at the school.

State law can create an entitlement to a public education, and such a right, once created, cannot be taken away without due process. Except in emergency situations, a student cannot be suspended for alleged misconduct without notice and an opportunity to present his or her side of the story. The argument that a school district can violate substantive due process by not protecting students from harassment has been generally rejected. New York law establishes a right to a public education, (*see*, **Saggio et al v Sprady et al**, 475 F Supp2d 203, 2007 U.S. Dist. Lexis 11235 [United States District Court for the Eastern District of New York 2007]). Where a plaintiff asserts that school officials failed to appropriately discipline students perpetrating harassment, a court must give substantial deference to school administrators' determinations. Courts must refrain from second-guessing the disciplinary decisions made by school administrators. The standard is not one of mere reasonableness that transforms every school disciplinary decision into a jury question. The ultimate inquiry is one of discriminatory purpose on the part of a defendant. A plaintiff must show that a defendant's indifference was such that the defendant intended the discrimination to occur. The ultimate failure of school officials' measures to end harassment by other students does not mean that a plaintiff has created a jury question with regard to deliberate indifference. A court, thus, cannot be placed in a position where it is second guessing school administrators as to how best to deal with a problem when the undisputed facts show that they were actively involved and making informed judgments (**Saggio et al v Sprady et al**, *supra*).

Here, the defendants have not demonstrated that Harborfields even knew of any repeated harassment to the plaintiff, and David Garrison testified that he never reported any incidents to the school authorities. David Garrison stated he never heard Thomas Ambrogi use any racial slurs towards him, although he heard Ambrogi say "something to other people." He did not know if the school administrators, principals, teachers or any of the adults knew of these racial comments. He felt he was discriminated against because the principal said it was a fair fight, and he did not feel the fight was fair. Accordingly, the plaintiffs have not demonstrated that race was an issue in the discipline directed at the two students or that they were treated differently.

Based upon the foregoing, the court finds that the plaintiff David Garrison, alleged to be African American/non-Caucasian, is a member of a protected class. However,

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David Garrison was not subjected to unwelcome harassment because of his race that the school district knew or should have known about and failed to act upon (*see generally*, **Davison v Santa Barbara High School**, 48 F Supp2d 1225, 1998 US Dist Lexis 22407 [United States District Court for the Central District of California 1998]).

Plaintiffs' complaint asserts a conclusory discrimination claim, unsupported by the record. The record reveals that defendant Harborfields did not utilize criteria or methods of administration of discipline which would have the effect of subjecting individuals to discrimination because of their race, color, or national origin and did not knowingly permit a hostile environment to exist under Title VI. The record also reveals that Harborfields was not aware of any racial tensions between Caucasian students and African-American students in the school in general. Disparate impact and foreseeable consequences, without more, do not establish a constitutional violation. Moreover, disparate impact has not been demonstrated in this action, nor has any intent to discriminate been demonstrated. Purposeful discrimination must be proved to recover under Title VI, 42 USC §2000d (**Otero et al v Mesa County Valley School District No. 51 et al**, 470 F Supp 326, 1979 U.S. Dist Lexis 14913 [United States District Court for the District of Colorado 1979]). No finding of purposeful discrimination has been established.

Based upon the foregoing, it is determined as a matter of law that the defendant Harborfields did not violate Title VI, 42 USC §2000d or Title 42 USC §1983.

Accordingly, motion (001) is granted, and the complaint is dismissed in its entirety with prejudice insofar as asserted against the defendant Harborfields Central School District. That part of the complaint asserted against the defendant Thomas Ambrogi is severed and continued.

Dated: January 22, 2009

HON. ELIZABETH HAZLITT EMERSON

J.S.C.