

**Hofmann v Coxsackie-Athens Cent. School
Dist.**

2009 NY Slip Op 31285(U)

June 15, 2009

Supreme Court, Greene County

Docket Number: 07-1765

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

CHARLES HOFMANN, Individually and as
Parent and Natural Guardian of
NICOLE HOFMANN,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 07-1765
RJI NO. 19-08-3594

COXSACKIE-ATHENS CENTRAL SCHOOL
DISTRICT, PAUL VanALPHEN, JR.
and BRIANNA ANDREWS,

Defendants.

Supreme Court Greene County All Purpose Term, June 2, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On November 20, 2006, twelve year old Nicole Hofmann (hereinafter "Nicole") was attending the defendant Coxsackie-Athens Central School District's (hereinafter "defendant Coxsackie") middle school. While at school, during school hours, Nicole was assaulted by defendants VanAlphen and Andrews and was seriously injured. Due to the injuries, she underwent jaw surgery and had her jaw wired approximately six times.

Charles Hofmann, as the father of and on behalf of Nicole, commenced this personal injury action against defendants VanAlphen and Andrews, based upon their assault, and against defendant Cocksackie, claiming negligent supervision. Issue was joined by defendant Cocksackie and discovery is complete. Defendant Cocksackie now moves for summary judgment claiming that their supervision was not negligent, nor was their supervision the proximate cause of Nicole's injuries. Plaintiffs oppose the motion. Because, on this record, not all issues of fact have been resolved, summary judgment is denied.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). “[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden.” (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). While the submission of an attorney's affidavit, with attachments based upon personal knowledge, is not fatal to the proponent's motion for summary judgment (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]), the motion must still be supported by a “person having knowledge of the facts” and otherwise “admissible proof”. (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra).

If the movant establishes their right to judgment as a matter of law, the burden then shifts

to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

Turning first to defendant Cocksackie’s claim that their supervision was not negligent, “[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.” (Mirand v. City of New York, 84 NY2d 44, 49 [1994]). “[A] school is liable for injuries caused by the intentional act of another student only where the plaintiff shows that the acts of the fellow student could have been reasonably anticipated due to the school's notice or prior specific knowledge of the aggressor student's propensity to engage in such conduct.” (Flanagan v. Canton Central School Dist., 58 AD3d 1047 [3d Dept. 2009][internal quotes omitted]). However, “[t]he adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve”. (Wilson ex rel. Wilson v. Vestal Cent. School Dist., 34 AD3d 999, 1000 [3d Dept. 2006], see also Wood v. Watervliet City School Dist., 30 AD3d 663 [3d Dept. 2006]).

In support of its motion, defendant Cocksackie submits their attorney’s affidavit along with numerous deposition transcripts. They argue that their supervision was not negligent because the acts of VanAlphen and Andrews could not have been anticipated. However, defendant Cocksacki fails to properly support such contention.

On this motion, defendant Cocksackie acknowledges that VanAlphen and Andrews

threatened Nicole at a dance four days prior to their attacking her. Nicole reported the threat to one of the dance chaperones (who was also Nicole's aunt). The school's principal testified that the dance took place on school property, after school hours, and was sponsored and supervised by the school's Parent Teacher Organization (hereinafter "PTO"). The school's principal testified about the general relationship between the PTO and school, but did not detail any specific separation between the entities. While the principal speculated that the dance was not sponsored by the school, he failed to specify the basis for such conclusion. Moreover, when asked about the dance chaperone's "responsibility to report" incidents at the dance to the school, he stated "based on best practices, yes, we usually do find out what happened, yes". Nor did the principal's testimony, or any other evidence submitted on this motion, demonstrate that the PTO chaperones were not acting as the school's agents at a school function. Defendant Cocksackie also failed to submit an affidavit, made by an individual with knowledge of the facts herein, to clarify these issues. As such, defendant Cocksackie failed to demonstrate, as a matter of law, that they did not have specific notice of VanAlphen and Andrews' threat against Nicole.

Likewise, defendant Cocksackie failed to demonstrate that no issues of fact exist relative to their knowledge of Van Alphen's "propensity to engage in such conduct". Defendant Cocksackie's Administrator for School Discipline testified that prior to Van Alphen attacking Nicole he had received "maybe a handful of discipline referrals". The school's principal also testified to Van Alphen's being "generally insubordinate, disrupting a classroom, talking back, inappropriate language". The only violence in Van Alphen's record, defendant Cocksackie alleged, was a fight he engaged in with his brother. Defendant Cocksackie minimized the seriousness of Van Alphen's school conduct and did not attach his disciplinary record to their

original motion papers. Plaintiffs, however, did submit Van Alphen's disciplinary record. Even a cursory review of which plainly demonstrates that an issue of fact exists relative to defendant Cocksackie's knowledge of Van Alphen's "propensity" to engage in harmful behavior. Van Alphen's disciplinary record does not contain a "handful" of disciplinary referrals, but rather thirty discipline referrals over the fourteen months (which includes a summer vacation break) prior to his attack of Nicole. He engaged in multiple violent acts and generally disregarded the safety and well being of all those around him. Many of the disciplinary referrals allege conduct which constitute crimes under New York's Penal Law. Van Alphen's disciplinary record demonstrates that he engaged in fighting, kicking, punching, a "hitting contest" with girls, shoving, bullying, stealing and multiple acts, over a weeks long period, of forcible sexual touching of three girls at the school. The specific victims of his aggressions, except for his brother, all appear to be girls attending defendant Cocksackie's school. Based on a review of Van Alphen's record as contrasted with the deposition testimony of defendant Cocksackie's administrators, an issue of fact exists relative to whether or not defendant Cocksackie had knowledge of Van Alphen's "propensity to engage in [the] conduct" which caused Nicole's injuries.

Turning next to "the question of whether inadequate supervision was the proximate cause of the plaintiff's injury", this court is mindful that such inquiry is "generally a question left to the trier of fact to resolve". (Wilson ex rel. Wilson, supra at 1000, see also Wood, supra).

Here, defendant Cocksackie has failed to demonstrate that no issue of fact exists relative to causation. Defendant Cocksackie claims that the assault occurred so quickly that no amount of supervision could have prevented VanAlphen and Andrews' attack, and Nicole's injuries.

However, “[t]he issue is not the speed of the punch, but the circumstances leading up to and surrounding that conduct.” (Wood, supra at 665). Considering the threat VanAlphen and Andrews made to Nicole four days prior to their assault, coupled with VanAlphen’s disciplinary record, defendant Coxsackie has not demonstrated that their claimed lack of supervision was not a proximate cause of Nicole’s injuries.

Accordingly, defendant Coxsackie’s motion for summary judgment is denied.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 15, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 20, 2008, Affidavit of Fawn Arnold, dated April 20, 2009, with attached Exhibits A-N.
2. Affirmation of Sean Doolan, dated May, 26, 2009, Affidavit of Jack Martin May 19, 2009, with attached Exhibits A-D.
3. Reply Affidavit of Fawn Arnold, dated May 28, 2009, with attached Exhibits A-D.