

**Allen v Freeport Pub. Schools**

2009 NY Slip Op 33153(U)

December 21, 2009

Supreme Court, Nassau County

Docket Number: Supreme Court, Nassau County

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

**SARA ALLEN, an infant under the age of  
fourteen by mother and natural guardian,  
JACQUELINE MUNZEL and JACQUELINE  
MUNZEL, individually,**

**Notice of Motion #2  
Submitted October 13, 2009  
XXX**

**Plaintiffs,**

**-against-**

**INDEX NO: 6141/04**

**FREEPORT PUBLIC SCHOOLS, FREEPORT HIGH  
SCHOOL and FREEPORT UNION FREE SCHOOL  
DISTRICT,**

**Defendants.**

**The following papers were read on this motion:**

<b>FREEPORT Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>

**Relief Requested**

Defendants, FREEPORT PUBLIC SCHOOLS, FREEPORT HIGH SCHOOL and FREEPORT UNION FREE SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"), move for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the plaintiffs' complaint. Plaintiffs, SARA ALLEN, an infant under the age of

fourteen (14) years, by JACQUELINE MUNZEL, her mother and natural guardian, and JACQUELINE MUNZEL, individually, oppose the motion, which is determined as follows:

### **Background**

In 2003, the plaintiff, SARA ALLEN, was a 10<sup>th</sup> grade student at FREEPORT HIGH SCHOOL, which is located in the DISTRICT, and was approximately sixteen (16) years of age. At a Municipal Hearing, held on March 16, 2004, plaintiff testified that, on the afternoon of June 2, 2003, she was at school for cheerleading tryouts and was told to leave the gym so that the tryouts could begin, and that she and the other students waited in the hall outside the gym for their turn. Plaintiff testified that there were two (2) sets of wooden doors leading from the gym, that did not have windows and which swung open from the gym into the hallway when girls were coming out of the gym. Plaintiff stated that, because she wanted to see what was going on in the gym, she crouched down near the door to look into a keyhole size opening under the handles of the door and, while she was bending over, the left door swung open and came into contact with her forehead over her left eye. She claimed that she was hit with the edge of the door when it swung open and that she had a bump on her head and was dizzy after the incident.

In the Notice of Claim, sworn to August 14, 2003, plaintiff claimed that she was at a door when a child suddenly and violently kicked the door open striking the claimant, causing her to sustain serious personal injuries. She also claimed that a contributing factor to her injuries was the defective condition of the door— that it had no door stop or preventative device to minimize the force of the door when it was pushed open, as well as the broken lock and/or keyhole on said door. She claimed that her injuries were solely due to the carelessness, recklessness and negligence of the DISTRICT, in its lack of

supervision of the children in its care and in permitting the door to become and remain in a dangerous, defective condition.

On the instant motion, the DISTRICT asserts that it is entitled to summary judgment dismissing the complaint because the accident arose as a result of plaintiff's own behavior, and not as a result of any negligence on the part of the DISTRICT. Counsel for the DISTRICT points to plaintiff's testimony at the Municipal Hearing and at her deposition, where she acknowledged that, before she was struck by the gym door, she was crouched down leaning towards an open hole in the door, that she knew that the doors opened into the hallway and, despite her claims that the "swing" was missing on the door and there were no windows, that the door was working and would open.

Moreover, the witness for the DISTRICT, the varsity cheerleading coach for twenty (20 years, testified that, from inside the gym, the door is opened by pushing a metal panic bar, that the doors opened into the hallway, that she had not seen students looking through the hole in the door, and that she was not aware of any complaints about the door. It is the DISTRICT's position that neither the door, the keyhole nor the lack of a window was the proximate cause of plaintiff's injuries but rather, the incident was caused by plaintiff's own lack of caution. The DISTRICT urges that even if another student suddenly opened the door, ostensibly in anger, the DISTRICT could not have foreseen the accident, could not have prevented it and, therefore, cannot be held liable.

In opposition to the motion, counsel for plaintiffs states that there are questions of fact which require a trial by a jury, such as whether the DISTRICT had actual or constructive notice of the defective condition of the door, was there a duty to ensure the safety of the children within the school property, whether it was foreseeable that the

children would peek into the hole in the door— that it was an attractive nuisance or trap to peek the interest of the children--, and whether it was foreseeable that an outward opening door would cause injury to a student looking through the hole in the door. Counsel for plaintiffs claims that the DISTRICT improperly supervised the students and that the hole was the proximate cause of the accident which was a dangerous condition and a trap. Other than the affirmation of plaintiff's counsel, there is no evidence submitted, no statute, caselaw or expert affidavit, that demonstrates that a small hole in the door constitutes an attractive nuisance or a trap.

### The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2<sup>nd</sup> Dept. 2001]. Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2<sup>nd</sup> Dept. 2002]). As is often stated, the facts must be viewed in a light

most favorable to the non-moving party. (See, *Mosheyev v Pilevsky, supra*).

It is a fundamental principle of law that before a party may be held liable in negligence, it must be shown that the party owed a duty of care to the plaintiff. *Strauss v Belle Realty Company*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 24 (C.A. 1985). In the absence of a duty, there is no breach and without a breach there is no liability. *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (C.A. 1976). To establish a claim sounding in negligence, it is incumbent upon the plaintiffs to demonstrate that the defendants breached a legal duty owed to her and that this breach was a substantial factor in occasioning the plaintiff's injuries (*Pulka v Edelman, supra; Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 [C.A. 1980]).

In the instant matter, there are two separate duties that the plaintiffs must demonstrate defendants breached, to wit: the duty of the DISTRICT as the landowner of FREEPORT HIGH SCHOOL, the site of the plaintiff's accident; and the duty of the DISTRICT to provide adequate supervision.

*Duty of the Landowner:*

It is well settled that, "[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk" (*Branham v Loews Orpheum Cinemas, Inc.*, 31AD3d 319, 819 NYS2d 250 [1<sup>st</sup> Dept. 2006]; *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937, 662 NE2d 255 [C.A. 1995]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 [C.A. 1976]; *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 785 NYS2d 424 [1<sup>st</sup> Dept. 2004]). In order to recover

damages for an alleged breach of this duty, a plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493, 646 NE2d 795 [C.A. 1994]; *Beck v J.J.A. Holding Corp.*, *supra*). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or its agents to discover and remedy it (*Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 [C.A. 2005]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774 [C.A. 1986]; *Green v City of New York*, 34AD3d 528, 825 NYS2d 227 [2<sup>nd</sup> Dept. 2006]). Notably, a “general awareness of a dangerous condition” will not suffice (*Solazzo v New York City Transit Authority*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 740 [C.A. 2005]; *Piacquadio v Recine Realty Corp.*, *supra*, at 967; *Panetta v Phoenix Beverages, Inc.*, 29 AD3d 659, 816 NYS2d 122 [2<sup>nd</sup> Dept. 2006]; *Melendez v New York City Housing Authority*, 23 AD3d 211, 803 NYS2d 547 [1<sup>st</sup> Dept. 2005]).

In view of the accepted belief that “[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded” (*Di Ponzio v Riordan*, 89 NY2d 578, 657 NYS2d 377, 679 NE2d 616 [C.A. 1997], quoting Prosser and Keeton, Torts § 31, at 170 [5<sup>th</sup> Ed.]), the law draws a distinction between possibilities which are remote in nature to those that are reasonably foreseeable. A risk of harm is deemed to have been foreseeable if such hazard could have been reasonably anticipated (*Di Ponzi v Riordan*, *supra*).

Applying the foregoing principles to the instant matter, it is the judgment of the Court that the DISTRICT neither created or had actual or constructive notice of a dangerous condition with respect to the hole in the door at the DISTRICT gym, and the Court finds that the DISTRICT has demonstrated that the hole in the door was not an inherently dangerous condition. The door did not fall on plaintiff but rather she was hit in the head when she couched down near the door and peeked into a small hole in the bottom half of the door, which she knew opened in her direction. The Court finds that the DISTRICT has not breached a duty to the plaintiff with respect to its ownership, maintenance and control of its property.

*Duty of the DISTRICT to Supervise:*

It is well settled that schools are not insurers of their students' safety as they cannot reasonably be expected to provide continuous supervision over all of the movements and activities of the student body (*Smith v Ramapo Cent. School Dist.*, 293 AD2d 521, 741 NYS2d 251 [2<sup>nd</sup> Dept. 2002]; *Maldonado v Tuckahoe Union Free School District*, 30 AD3d 567, 817 NYS2d 376 [2<sup>nd</sup> Dept. 2006]). However, schools are charged with a duty to provide sufficient supervision to ensure the students' welfare while in their charge, and are liable for injuries which are foreseeable and proximately caused by the lack of adequate supervision (*Ungaro v Patchogue-Medford School District*, 19 AD3d 480, 797 NYS2d 114 [C.A. 2005]; *Swan v Town of Brookhaven*, 32 AD3d 1012, 821 NYS2d 265 [2<sup>nd</sup> Dept. 2006]).

However, when "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 and summary judgment in favor of the School is warranted”. (*Mayer v Mahopac Central School District*, 29 AD3d 653, 815 NYS2d 189 [2<sup>nd</sup> Dept. 2006]; *Ronan v School District of City of New Rochelle*, 35 AD3d 429, 825 NYS2d 249 [2<sup>nd</sup> Dept. 2006]; *Walker v Commack School District*, 31 AD3d 752, 820 NYS2d 287 [2<sup>nd</sup> Dept. 2006]).

The record as viewed in a light most favorable to the plaintiff does not reveal any triable issues of fact. The opening of the door by another student, even if in anger, was so sudden and spontaneous that no amount of supervision could have prevented it from occurring. *MacCormack v Hudson City School District*, 51 AD3d 1121, 856 NYS2d 721 (2<sup>nd</sup> Dept. 2008). It is well settled that the constant supervision of high school students is not required (*Rose v Onteora Central School District*, 52 AD3d 1161, 861 NYS2d 442 [3<sup>rd</sup> Dept. 2008]), and it is equally clear that, during after school activities, the DISTRICT is not held to the same standard as a “reasonably prudent parent”, but rather to the lesser standard of “reasonably prudent person”. *Benitez v New York City Board of Education*, 73 NY2d 650, 543 NYS2d 29, 541 NE2d 29 (C.A. 1989); *Reed v Pawling Central School District*, 245 AD2d 281, 664 NYS2d 483 (2<sup>nd</sup> Dept. 1997); *Barretto v City of New York*, 229 AD2d 214, 655 NYS2d 484 (1<sup>st</sup> Dept. 1997). As in *Barretto*, this Court finds that the DISTRICT “was not obligated to assure the safety of a student during after school activities against the consequence of his own independent and ill-advised acts unrelated to the sport in which he was engaged”. The Court concludes that plaintiff created her own peril, was aware of the danger, and assumed the risks of her conduct. *Barretto v City of New York supra*.

**Conclusion**

Based on the foregoing, it is the judgment of the Court that the defendants have established the absence of any material issues of fact and sufficiently demonstrated that FREEPORT has not breached any duty owed to the plaintiffs. In opposition, the plaintiffs have failed to meet their burden by submitting sufficient competent evidence to raise any triable issue of fact.

Based on the foregoing, it is hereby

**ORDERED**, that the DISTRICT's motion is granted and plaintiff's complaint is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 21, 2009

WILLIAM TRUMPER, J.S.C.  
**ENTERED**

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