Suhr v Northport-East Northport Schools
2010 NY Slip Op 31815(U)
July 14, 2010
Sup Ct, Suffolk County
Docket Number: 08-24665
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 08-24665
CAL. No. 09-02254-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

COPY

Mot. Seq. # 001 - MG; CASEDISP

ADRIA SUHR, an infant by her mother and natural guardian, DAGMAR SUHR and DAGMAR SUHR, individually, Plaintiffs, - against - NORTHPORT-EAST NORTHPORT SCHOOLS, Defendant.	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706 DEVITT SPELLMAN BARRETT, LLP Attorneys for Defendant 50 Route 111 Smithtown, New York 11787

Upon the following papers numbered 1 to 22 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 -10 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 11-20; Replying Affidavits and supporting papers 21-22 ; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Northport-East Northport Schools pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

The infant plaintiff, Adria Suhr, by her mother Dagmar Suhr, has commenced this action for damages for personal injury she claims to have sustained on September 26, 2007 at the Northport Middle School located at 11 Middleville Road, Northport, New York, while participating in gym class in a "run through a jump rope" activity, tripped and fell when her foot caught on the rope. The infant plaintiff was about eleven years of age at the time of the accident. A cause of action sounding in negligence and a derivative claim have been asserted. It is claimed that the infant plaintiff sustained a sprained wrist, a cervical sprain and a concussion as a result of the fall.

The defendant, Northport-East Northport Schools, seeks dismissal of the complaint as a matter of law on the basis that the Notice of Claim fails to set forth any allegation as to a defective or dangerous condition being a contributing cause or factor in the plaintiff's accident; that it did not negligently supervise the infant plaintiff; that the activity the infant was participating in was age-appropriate; that appropriate instructions were given to the infant; that supervision was adequate and reasonable under the circumstances; and the school district did not have notice that the subject activity resulted in and/or constituted an alleged danger or hazard.

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, bill of particulars; and copies of the transcripts of the examinations before trial of Adria Suhr, Dagmar Suhr, and Margaret Burton.

In opposing this motion, the plaintiffs have submitted, inter alia, an attorney's affirmation; the affidavits of Adria Suhr, Leonard K. Lucenko; copies of the summons and complaint, answer, bill of particulars; copies of the transcripts of the examinations before trial of Adria Suhr, Dagmar Suhr, and Margaret Burton, photographs of the gymnasium.

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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [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 for summary judgment, 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 [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 Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) 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 [2nd Dept 1981]). Summary judgment shall only be granted 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 [1979]).

"Before a defendant may be held liable for negligence, it must be shown that the defendant owed a duty to the plaintiff. A school's duty is strictly limited by time and space and exists only so long as a student is in its care and custody during school hours, or if a specific statutory duty has been imposed. The school's duty is coextensive with and concomitant to its physical custody and control over the child (***Ramo et al v Serrano et al,*** 301 AD2d 640 [2nd Dept 2003]). "While New York schools are not insurers of the safety of their students, they are under a duty to exercise the same degree of care as would a reasonably prudent parent placed in comparable circumstance. This duty includes the obligation to assign students to supervised athletic activities that are within their abilities and age-appropriate. Whether a school's conduct met this duty and was a proximate cause of a particular injury are generally questions of fact" (***Lindaman et al v Vestal Central School District,*** 12 AD3d 916 [3rd Dept 2004]; see also, ***Merson et al v Syosset Central School District et al***, 286 AD2d 668 [2nd Dept 2001]; ***Snyder et al v Morristown Central School District No. 1,*** 167 AD2d 678 [3rd Dept 1990]; ***Leung et al v The City of New York et al,*** 13 Misc3d 1208A [Supreme Court of New York, Richmond County 2006] citing ***Mirand v City of New York,*** 84 NY2d 44). Schools 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. Whether a student is properly supervised depends largely on the circumstances attending the event (***Chan et al v City of Yonkers et al,*** 34 AD3d 540 [2nd Dept 2006]). To find that a school district has breached its duty to provide adequate supervision, a plaintiff must show that the district had sufficiently specific knowledge or notice of the dangerous conduct and that the alleged breach was a proximate cause of the injuries sustained (***Ronan et al v School District of City of New Rochelle,*** 35 AD3d 429 [2nd Dept; ***Nocilla v Middle Country Cent. School Dist,*** 302 AD2d 573 [2002]). Moreover, "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 and summary judgment in favor of the [defendant school district] is warranted (***Ronan et al v School District of City of New Rochelle,*** supra, citing ***Convey v City of Rye School Distr.,*** 271 AD2d 154; ***Walker v Commack School Dist.,*** 31 AD3d 752 [2006]; ***Mayer v Mahopac Cent. School Dist.*** 18 AD3d 653 [2006]; ***Siegell v Herricks Union Free School Dist***. 7 AD3df 607 [2004]).

Adria Suhr testified to the effect that when she was in sixth grade she was involved in an accident on the morning of September 26, 2007 in the gymnasium located at the Northport Middle School during gym class with fourteen other students while engaged in the activity described as running through a jump rope. It was not the first time she had participated in this activity as she had previously engaged in that activity one time at home in her driveway with her friend, Bianca, who had participated in this activity before. She did not injure herself when she did this at home and could not remember if another child participated at home. At gym, she wore her gym clothes. Her gym teacher, Ms. Burton, had two eighth graders assisting her that day to turn the rope. She showed a picture on the white board and told them to run through the jump rope, one at a time as the first round. If one person hit the rope, they would have to do the rope over again. If everybody got through, they would then have two people going through the jump rope, and so on. She stated they had to run under the rope and that she went through the center when she went through. They were also instructed to stay in single file perpendicular to the jump rope while the others were going through. She could not remember, if when performing the activity, whether Ms. Burton was giving instructions. She had been participating in the activity for about ten to fifteen minutes, and had passed under the jump rope two or three times before the accident occurred. She could only remember going into the jump rope and then waking up on the ground, but had no idea how the accident happened. There was no problem with the floor; it was not slippery and there was no slippery substance on it. She had no difficulty maintaining her footing. Another girl before her tripped but did not fall as she just jumped out. No one said they did not want to participate in the activity or that they were having trouble with it.

Dagmar Suhr was not present at the school when the accident occurred and did not witness the accident. She was unaware of anyone ever making complaints to the school about the nature of the activity that was involved in her daughter's accident and knew of no other children who were injured participating in such activity. She testified that her daughter was permitted to jump rope at home.

Margaret Burton testified to the effect that she had been a physical education instructor for almost thirty-five years at Northport Middle School and was at the Northport Middle School on the date of the accident. It was her general duty and responsibility as a physical education teacher to teach different skills, work on character, teach different activities, teach teamwork, getting along with others, cooperation, and listening skills. She gave reading assignments and made sure the students understood the rules of the game they were to play and she wrote the rules on the board. For the sixth grade classes in the fall, there was field hockey and Project Adventure activities to get the students to work together as a team, cooperate, understand, and problem solve as a group. Warm-ups and instructions are given first before the games begin. She had lesson plans and at the open house in the beginning of September explained the curriculum for the year, and how the students are graded. Students were required to wear sneakers to gym class, along with shorts, tee shirts, or long sweats.

Ms. Burton stated that with the Project Adventure unit of sixth graders, jumping rope was done as "turnstile" where the students had to get together on one side, and the task was for them, as a group, to figure out how to get through the jump rope to the other side while the rope is turning, without being touched by the jump rope. This was an activity that was "challenge by choice" wherein the student was not required to participate if afraid, not comfortable or whatever the reason. The student did not have to do the actual activity of going under the rope. If the student does not participate, the student has to be involved either in problem solving, or has to figure out the best way to go through the rope and be successful. There were no disciplinary measure as long as the student participated. Ms. Burton testified that in this activity, the students were not jumping rope and did not have to know how to jump rope as they were going through under the rope.

On her instruction board, Ms. Burton had written about challenge by choice and indicated how they were

to be working together to do teamwork. Each day she put a word on the board having to do with the activities they were doing, such as team work or decision-making. Adria Suhr participated in a small gym class of about seventeen to nineteen students in September 2007. Warmup was done first, consisting of stretching for five to eight minutes. The jump rope being used at the time of the incident was nylon on the outside, blue and gray, a little bit weighted, about twenty feet long and weighed about two to three pounds. Two eighth-grade girls who had done this activity before were turning the rope that day. She had instructed the eighth graders to take the excess rope and to hold on to it that so it wasn't hanging. She distanced them to her liking and they practiced turning the rope to get it to the right cadence or beat. She made sure they were turning the rope properly before anyone could go through. She told the other students to stand behind a certain colored line and positioned herself as well. She explained how the activity was to be done and a student volunteer demonstrated as she instructed the students. She testified that the activity was problem solving and teamwork based, so they had to figure out as a group where to stand and then move, and also on an individual basis for each student. She advised that when their turn was up that they had a choice where to stand, and where they have to go, and the student decides whether to be closer or further away before going through. If the student was going too fast, the student was told to slow down. If there was too much slack, she would have them back up. If they got tired they could take a rest. She worked with them and remained behind them during the entire activity, standing on the side with one of the girls holding the rope about two to three feet away.

She stated that the gymnasium floor was hardwood. No protective gear was given as the activity does not call for it pursuant to the rule booklet provided by the district. Mats would not be used as they would be a tripping hazard and are too soft to run on and the rope would not be heard while being turned as the middle portion of the rope hits the floor as it turns. The point at which the student is to go under the rope is part of the problem solving so the students figure out as a group when to go under. If they were having difficulty, she would give them hints. Instructions could vary with the student. There was no particular order for the students to go in as it was challenge by choice. She thought Adria went in the first round, and was about ten to fifteen feet from the rope turner, with one foot ahead of the other, her body in a back and forth motion ready to go through, and when she was ready, ran through the middle, slowed down at the end and stopped a little bit too soon, at which time her back foot caught the rope as it was about to swing up. Adria then took a nose dive, a belly flop, hitting the floor hard with her hands and then her head. She ran over to Adria, who turned over and said, "I'm such a klutz." She never lost consciousness, responded right away, and then started to cry. The turners were consistent in their pace when they were turning for the participants. Adria never told her before that she was afraid to participate. No one was forced to go. No one ever complained to her about this particular activity.

Based upon the foregoing, it is determined that the defendant has established prima facie entitlement to summary judgment dismissing the complaint. In reviewing the plaintiffs' opposition, it is determined that the plaintiffs have failed to raise a factual issue to preclude summary judgment.

Leonard Lucenko, the plaintiffs' expert, testified to the effect that his professional experience includes thirty-five years as a university professor teaching risk management and safety to physical education teachers and administrators, and he has also taught the same at the undergraduate and graduate levels. He sets forth that Ms. Burton did not recognize the hazards created by the activity the plaintiff was engaged in and failed to make certain that mats were placed on the floor prior to the class to prevent or minimize falling injuries. However, plaintiffs' expert does not cite to any documents which require mats to be placed on the floor for this particular activity and cites only to general safety standards which he has not established are applicable and required by the State of New York for this activity.

Mr. Lucenko states that despite the problem-solving intent of Project Adventure, appropriate safety

instruction should be given prior to the student performing the activity, and that this was not done. However, he fails to set forth the proper instructions which he claims should have been given and were not. Ms. Burton testified that she explained how the activity was to be done and had a student volunteer demonstrate the activity as she instructed the students. Ms. Burton testified that she instructed this activity pursuant to the instructional booklet provided by the school. Mr. Lucenko does not address the content of the particular booklet and does not indicate that it is inappropriate or that it provides insufficient guidance and structure or requirements for Project Adventure. Mr. Lucenko cited to various references as the basis for his opinions, but does not indicate that these references have been adopted by the State of New York as required guidelines and rules and regulations to be utilized and implemented for sixth grade students or middle school students in New York State for Project Adventure. Additionally, Adria could not remember the instructions which were given when she was asked at her examination before trial and could not remember what was written on the instruction board.

Although the plaintiff's expert states that the rope-turners should have been instructed to stop turning the rope if someone hits the rope, there is no evidentiary submission to show that the students did not stop turning the rope when the plaintiff's foot hit the rope or that any activity by the rope-turners after the plaintiff's foot hit the rope was the proximate cause of the accident and injury. Although Mr. Lucenko states that it is important for the students to receive instruction and practice in the skills necessary to achieve the goals of Project Adventure, he fails to state what instructions should have been given and were not, and has failed to set forth the practice skills which should have been provided and were not.

The plaintiffs' expert sets forth that proper, progressive, and foundational instruction concerning this activity was not met when the plaintiff and her friend practiced at home as it required at least two people to turn the rope and, therefore, this at-home activity was not proper, progressive and foundational. However, the testimony establishes that the plaintiff could not remember if someone else practiced with them. Thus the expert's opinion is conclusory and unsupported by the record.

The plaintiff testified that no one requested to opt out of the challenge.

No factual issue has been raised to demonstrate that the defendant failed to exercise the same degree of care as would a reasonably prudent parent placed in comparable circumstance, that the activity was not age-appropriate or not within the plaintiff's ability. In fact, the plaintiff testified that she participated in this activity the day before at home and there is no record to support that the plaintiff's mother supervised such activity or prohibited such activity. The plaintiff's mother testified Adria was permitted to jump rope at home. There has been no factual issue raised to demonstrate that there was any departure from the standard of care proximately causing the plaintiff's fall, or that the defendant failed to properly supervise the plaintiff during this activity, did not provide age-appropriate activity, that the defendant was negligent in supervising the infant, that the plaintiff did not possess the skill required to perform the activity, or that any action by the defendant proximately caused the plaintiff to fall and sustain injury.

Accordingly, motion (001) for an order granting summary judgment dismissing the complaint is granted and the complaint is dismissed.

Dated: July 14, 2010

HON. JOSEPH C. PASTORESSA

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION