Ivanoff v Village of Lindenhurst
2011 NY Slip Op 31172(U)
April 25, 2011
Supreme Court, Suffolk County
Docket Number: 07-37579
Judge: Peter H. Mayer
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 07-37579
CAL. No. 10-01489MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-11-10 (#002)
MOTION DATE 12-7-10 (#003)
ADJ. DATE 2-22-11
Mot. Seq. # 002 - MD
003 - MD

TAYLOR IVANOFF, an Infant by her Legal Guardian and Natural Mother DONNA IVANOFF, and DONNA IVANOFF, Individually,

Plaintiff,

- against -

THE VILLAGE OF LINDENHURST, THE LINDENHURST BOARD OF EDUCATION and LINDENHURST UNION FREE SCHOOL DISTRICT, BRITTANY CHAMBERLAIN, individually, BRITTANY CHAMBERLAIN, an Infant by her Parent and Natural Guardian, GRACE CHAMBERLAIN, and, GRACE CHAMBERLAIN, Individually and "JOHN" (First name unknown) CHAMBERLAIN,

Defendants.

HARMON, LINDER & ROGOWSKY, ESQ.
Attorney for Plaintiffs
42 Broadway, Suite 1227
New York, New York 10004

EPSTEIN, FRANKINI & GRAMMATICO
Attorneys for Defendants Grace Chamberlain and "John" Chamberlain
45 Crossways Park Drive, Suite 102
Woodbury, New York 11797

CONSTANTINO & CONSTANTINO
Attorneys for Brittany Chamberlain
632 Montauk Highway
Copaigue, New York 11726

DONOHUE McGAHAN CATALANO & BELITSIS
Attorney for Defendant Lindenhurst
555 North Broadway, PO Box 350
Jericho, New York 11753

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (002) by the defendants Grace Chamberlain and Rickey Chamberlain s/h/a "John" Chamberlain dated October 8, 2010 and supporting papers numbered 1-15; (2) Notice of Cross Motion (003) by defendants Lindenhurst Union Free School District s/h/a Lindenhurst Board of Education and Lindenhurst Union Free School District dated November 10, 2010 and supporting papers numbered 16-39; (3) Affirmation in Opposition by the defendants Lindenhurst Union Free School District dated January 25, 2011 and supporting papers numbered 40-42; (4) Affirmation in Opposition by the plaintiffs dated January 20, 2011 and supporting papers numbered 43-62; (5) Reply Affirmation by the defendant Lindenhurst Union Free School District dated February 19, 2011 and supporting papers numbered 63-64; (6) Reply Affirmation by defendants Grace Chamberlain and "Rickey Chamberlain dated November 10, 2010 and supporting papers numbered 65-66; (7) Other-Mem/Law by defendant Lindenhurst numbered 67-68; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows; it is

ORDERED that motion (002) and cross motion (003) are consolidated for the purpose of determination; and it is further

ORDERED that motion (002) by the defendants Grace Chamberlain and Rickey Chamberlain s/h/a "John" Chamberlain pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' complaint and the co-defendants' cross claims is hereby denied; and it is further

ORDERED that cross motion (003) by the defendants Lindenhurst Union Free School District s/h/a The Lindenhurst Board of Education and Lindenhurst Union Free School District pursuant to CPLR 3212 for an order granting summary judgment dismissing the plaintiffs' complaint and all cross claims asserted against them is hereby denied.

The complaint of this action arises out of an incident which occurred on February 9, 2007 when the plaintiff, Taylor Ivanoff, was allegedly assaulted by the defendant, Brittany Chamberlain, in the locker room located on the premises of the Lindenhurst Senior High School at 450 Charles Street, Lindenhurst, New York. It is claimed that the Lindenhurst defendants knew of Brittany Chamberlain's violent propensities and negligently failed to provide proper supervision and safety in the school environment. It is further claimed that Grace and Rickey Chamberlain, Brittany Chamberlain's parents, negligently failed to supervise and control their daughter despite their knowledge of her violent and abusive behavior.

By order dated July 14, 2008 (Mayer, J.), summary judgment was granted dismissing the complaint against The Village of Lindenhurst.

In motion (002), Grace Chamberlain and Rickey Chamberlain seek summary judgment dismissing the complaint and cross claims asserted against them on the bases that they were not responsible for the care and supervision of Brittany Chamberlain who was a student at the Lindenhurst High School at the time of the accident, they did not own, maintain or control the property where the Lindenhurst High School is located, that they were not negligent with regard to Brittany Chamberlain, and that they did not proximately cause the accident.

In motion (003), the Lindenhurst Union Free School District (Lindenhurst School District) claims that it was incorrectly sued as The Lindenhurst Board of Education and the Lindenhurst Union Free School District. It seeks summary judgment dismissing the complaint and cross claims asserted against it on the bases that it did not breach any duty of care to the plaintiffs, that its' alleged negligence did not proximately cause the plaintiffs' injuries or damages, that it did not have sufficiently specific knowledge or notice of the dangerous conduct of Brittany Chamberlain, and that no greater amount of reasonable supervision could have prevented the spontaneous, unforeseeable, and obviously premeditated attack.

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 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, 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 Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [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, 435 NYS2d 340 [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, 416 NYS2d 790 [1979]).

In support of motion (002), Grace Chamberlain and Rickey Chamberlain have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers and cross claims served by the defendants, and plaintiffs' verified bill of particulars; unsigned copy of the transcript of the 50-h hearing of Taylor Ivanoff dated August 21, 2007; unsigned copies of the transcripts of the examinations before trial of Taylor Ivanoff and Donna Ivanoff both dated October 26, 2009, Brittany Chamberlain and Rickey "John" Chamberlain both dated September 10, 2009, Grace Chamberlain dated February 12, 2010; notarized affidavits by Rickey Chamberlain and Grace Chamberlain, to which neither has sworn to the truth of the contents.

In support of motion (003), Lindenhurst School District has submitted, inter alia, an attorney's affirmation; the affidavit of Mary Lou Gates; the affidavit of Janine Cheskay; a copy of the Notice of Claim, summons and complaint, answers and cross claims served by the defendants, and plaintiffs' verified bill of particulars; various discovery demands; unsigned copies of the transcripts of the 50-h hearings of Taylor Ivanoff and Donna Ivanoff, both dated August 21, 2007; unsigned copies of the transcripts of the examinations before trial of Taylor Ivanoff and Donna Ivanoff both dated October 26, 2009, Brittany Chamberlain and Rickey "John" Chamberlain both dated September 10, 2009, Grace Chamberlain dated February 12, 2010; unauthenticated copies of the Incident Statement and a typewritten statement by Janine Cheskay; and a signed copy of the transcript of the examination before trial of Janine Cheskay dated September 10, 2009.

Brittany Chamberlain has submitted an affidavit in opposition to motion (003), and has attached an unsigned copy of her deposition transcript in support of her affidavit. However, the defendant Lindenhurst has objected to the consideration by this court of unsigned transcripts.

The unsigned copies of the aforementioned hearing and deposition transcripts submitted in support of and in opposition to the parties respective motions are not in admissible form as required by CPLR 3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]) as they are not signed and are not accompanied by an affidavit pursuant to CPLR 3116, and are, therefore, not considered. The unsigned transcript by Janine Cheskay submitted with motion (002) is considered, however, as a signed copy was provided with motion (003).

Janine Cheskay testified at her examination before trial that she has been employed for over 13 years at the Lindenhurst High School as a physical education teacher and coach. There is one gym but separate locker rooms for male and female students. She knew both Taylor Ivanoff and Brittany Chamberlain, but did not know if either was her student in February 2007. She continued that when the bell rings for the period, the students get about five minutes to change and then go into the gym, and are permitted to return to the locker room for about five minutes at the end of the period to change again. There were no monitors in the locker room when the girls changed. She was in her office when she became aware of the incident involving Taylor and Brittany on February 9, 2007 when Demi Nichols and Taylor Ivanoff came to her door which connects her office and the locker room. She could not remember what happened but she thought she asked Taylor what happened and was advised Taylor got hit. Another gym teacher, Ms. Cvlick, took Taylor to the nurse's office. Cheskay testified

she then ran to the gym and saw Brittany Chamberlain standing with Melissa Perdue, another student. She testified that when she was bringing Brittany to the security guards to go to the principal's office, that Brittany said she was "going to fucking kill her." Cheskay further testified that, thereafter, she went back to her office and wrote up an incident report. She stated she did not know whether Brittany had any other altercations with anyone else in the school prior to this event. Prior to the incident, Taylor did not ask to speak to her about Brittany Chamberlain and she could not remember if Taylor ever told her she was afraid of Brittany.

In her affidavit submitted in support of motion (003), Janine Cheskay averred that it is the school policy that the door to her office connecting with the girls' locker room had to be kept closed to prevent the boys from looking into the girls' locker room through her other office door which opened to the gym. She stated that she is able to hear shouting from the girls' locker room when the door is closed and she did not hear any shouting prior to Taylor Ivanoff and Demi Nichols coming to her office on the date of the incident. She further averred that at no time prior to February 9, 2007 did she observe any argument, animosity or altercations between Taylor Ivanoff and Brittany Chamberlain.

Mary Lou Gates set forth in her affidavit submitted in support of motion (003) that she is employed as the District Clerk for the Lindenhurst Union Free School District since 2001. Upon having accessed the records for Brittany Chamberlain maintained by the school district, which records included the computer printout of the complete student disciplinary history for Brittany Chamberlain, she placed those records in a sealed envelope and gave them to defense counsel for an *in camera* review by Justice Mayer. She further avers that, thereafter, a redacted copy of those records was provided to counsel for the parties by the court. A redacted copy of the record has been submitted with her affidavit, and has been authenticated by Ms. Gates as an accurate reproduction of those maintained by the school district.

The disciplinary records reveal that Brittany Chamberlain was involved in a prior fighting incident on September 20, 2005, in addition to the incident on February 9, 2007.

Rickey Chamberlain and Grace Chamberlain aver they are husband and wife and that Brittany Chamberlain is their daughter. They both state that, at the time of the within occurrence, they were not at the premises of the Lindenhurst High School, and did not own, maintain, or control said premises. They continue that, at the time of the occurrence, Lindenhurst High School had physical custody of Brittany and, therefore, the school was responsible for Brittany's care and supervision. They further aver that at no time prior to the incident did Brittany, or anyone else, advise them that she was going to approach Taylor Ivanoff on that particular day, that they had no prior knowledge that either Brittany or Taylor had threatened to harm one another, and that they did not become aware of the occurrence until after it happened. They both deny having met or having had any contact with Taylor Ivanoff prior to the date of the incident.

Brittany Chamberlain set forth in her affidavit submitted in opposition to motion (003) that she testified unequivocally during her deposition that before the incident of February 9, 2007 that she advised her guidance counselor, Miss Ricciardi, that she was experiencing a problem in school with Taylor Ivanoff.

Upon consideration of the admissible evidence, it is determined that Rickey Chamberlain and Grace Chamberlain have not demonstrated prima facie entitlement to summary judgment. Their affidavits are conclusory and self-serving. They do not address whether Brittany has had prior behavioral problems or whether she has been involved in any violent acts or assaults upon others aside from Taylor Ivanoff. Although they aver that at no time prior to the incident did Brittany, or anyone else, advise them that Brittany was going to approach Taylor Ivanoff on that particular day, they do not comment as to whether they were aware of any animosity or problems between Brittany and Taylor or between Brittany and anyone else at the school or

elsewhere on any other day. There has been evidence submitted establishing Brittany has had a prior altercation in school. It is not known whether that incident involved the plaintiff in this action. Thus, there are factual issues concerning Brittany's prior conduct and the parent's knowledge of the same.

The school's standard of duty to a student is what a reasonable 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, [w]hether 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, 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 of notice of the dangerous conduct which caused the injury, that the acts of the fellow student could reasonably have been anticipated. On the other hand, school personnel cannot reasonably be expected to guard against...an injury caused by the impulsive, unanticipated act of a fellow student" (*citations omitted,* ***Shrader v Board of Education of the Taconic Hills Central School District,*** 249 AD2d 741, 671 NYS2d 785 [3rd Dept 1998]).

Based upon the admissible evidentiary submissions, it cannot be determined that Lindenhurst properly supervised the locker room area. There are factual issues concerning how long the confrontation in the locker room continued, whether or not there was adequate supervision of the students in the locker room, and whether the school negligently supervised the locker room. There are further factual issues concerning how supervision of the locker room was effectuated when the door to the locker room was kept closed when the students were in it.

Moreover, there has been no admissible testimony establishing Brittany's conduct in school as it relates to the events giving rise to this incident. Brittany Chamberlain has set forth in her affidavit submitted in opposition to Lindenhurst's motion that she made Ms. Riccardi, her guidance counselor, aware of a problem concerning Taylor Ivanoff. Therefore, there are factual issues concerning whether the defendant school district failed to properly act upon Brittany's statement to Ms. Ricciardi. There was a report of a previous fight involving Brittany, giving rise to the school district's knowledge of Brittany's prior history of fighting. It has not been established that the incident which occurred on February 9, 2007 was a spontaneous act in that Brittany Chamberlain avers that there were events leading up to the incident (*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]).

In view of the foregoing, the separate motions by defendants Lindenhurst and Chamberlain for summary judgment dismissing the complaint are denied.

Dated: 4/25/11

PETER H. MAYER, J.S.C.