Almonte v Uniondale Union Free School Dist.
2011 NY Slip Op 31727(U)
June 16, 2011
Supreme Court, Nassau County
Docket Number: 13830/09
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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MARIA ALMONTE, as parent and natural guardian, **of ANTONIO ALMONTE,** and **MARIA ALMONTE,** individually,

Plaintiff(s),

-against-

UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendant(s).

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Index No. 13830/09

Motion Submitted: 4/15/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................X
Answering Papers..X
Reply..X
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's................................

Defendant school district moves this Court for an Order granting summary judgment in its favor and dismissing the complaint. Plaintiffs oppose the requested relief.

Plaintiffs commenced this action as a result of the infant plaintiff (hereinafter "Antonio") sustaining a broken arm during a school-day recess period. Plaintiffs claim that defendant's negligent supervision was the proximate cause of Antonio's injury. According to plaintiffs, two boys with whom Antonio had a previous altercation, pushed Antonio on a piece of playground equipment, causing him to fall to the ground and sustain injury.

Defendant asserts that there was adequate supervision on the playground, and no known history of fighting between Antonio and the two boys, who were his fellow students. According to defendant, the incident giving rise to this action, which occurred on October

7, 2008, was a surprise attack that no level of supervision could have prevented.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Specifically with respect to the liability of schools in the care and supervision of the children attending, it is well-settled that schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances (***David v County of Suffolk***, 1 N.Y.3d 525, 526, 807 N.E.2d 278, 775 N.Y.S.2d 229 [2003]). A school is not, however, an insurer of safety, and cannot be expected to continuously supervise and control all of the students' movements and activities (***Mirand v. City of New York***, 84 N.Y.2d 44, 48, 637 N.E.2d 263, 614 N.Y.S.2d 372 [1994]).

In other words, in order to find that a school has breached its duty to provide adequate supervision resulting in injuries caused by the acts of fellow students, it must be shown that the school had actual or constructive, and sufficiently specific, knowledge or notice of the dangerous conduct that caused the injury such that the school could have anticipated the acts of the third party. Actual or constructive notice is required because school personnel cannot guard against sudden, impulsive and spontaneous acts that take place among students (***Mirand, supra*** at 49; ***Brandy B. v. Eden Central School District***, 15 N.Y.3d 297, 934 N.E.2d 304, 907 N.Y.S.2d 735 (2010); ***Nocilla v. Middle Country Central School District***, 302 A.D.2d 573, 757 N.Y.S.2d 300 [2d Dept. 2003]), and "[a] school is not liable for every thoughtless or careless act by which one pupil may injure another" (***Lawes v. Board of Education of the City of New York***, 16 N.Y.2d 302, 305, 213 N.E.2d 667, 266 N.Y.S.2d 364 [1965]).

Furthermore, even if it is shown that a school breached its duty of supervision, absent a showing that the alleged negligent supervision was a proximate cause of the injury sustained, there is no liability to be imposed upon a school or school district (*See* ***Mirand, supra***; ***Benitez v. New York City Bd. of Educ.***, 73 N.Y.2d 650, 658, 541 N.E.2d 29, 543 N.Y.S.2d 29 [1989]). When an incident giving rise to injury occurs in so short a span of time that the most intense level of supervision could not have prevented it, negligent supervision is not the proximate cause of the injury (***Soldano v. Bayport-Blue Point Union Free School District***, 29 A.D.3d 891, 815 N.Y.S.2d 712 [2d Dept. 2006]).

In support of its motion for summary judgment, defendant has submitted, *inter alia*,

Antonio's testimony taken at the General Municipal Law § 50-h hearing ("50-h hearing"), and Antonio's deposition testimony. Defendant has also submitted Maria Almonte's 50-h hearing testimony, the testimony of a teaching assistant, and the testimony of a security guard employed by defendant.

At the outset, the Court notes that, aside from the testimony of Antonio, which will be addressed below, there were no eyewitnesses to this incident. Neither Maria Almonte, nor the teaching assistant, nor the security guard witnessed the events that resulted in Antonio's injury. The teaching assistant and the security guard first observed Antonio after he had already fallen to the ground. Maria Almonte responded to the school after Antonio had been removed from the playground.

At the time of the accident, Antonio was in the fourth grade, and approximately nine years old. According to his 50-h hearing testimony, given when he was nearly ten years old, Antonio was swinging around on "monkey bars" when two boys pushed him, causing him to flip and fall to the ground. Antonio identified the boys as Jeffrey and Osman[1], but testified that he never saw them approach him, nor did they say anything to him prior to the incident. Antonio stated that the two boys were in back of him when he was on the monkey bars[2], prior to them pushing Antonio.

Antonio further claimed in his 50-h hearing testimony that those same two boys had previously hit him in a school bathroom. Antonio could not state when that alleged prior incident occurred; he claimed only that he reported the incident to his teacher, Ms. Abreu, and that they were "punished." Antonio testified that he did not tell his mother about this alleged prior incident.

In his subsequent deposition testimony, given when he was eleven years old, Antonio again stated that Jeffrey and Osman were standing behind him talking to one another, but said nothing to him prior to the incident. Antonio testified that he had no idea that they were going to push him.

As to the alleged prior incident involving the same two boys, Antonio testified that he told his teacher, but could not remember her name, and he did not know if they were punished for that incident. Again, Antonio could not supply a time frame, or specific date, when the alleged prior incident occurred.

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[1]Osman is also referred to as Osmond in the transcripts provided. No last name is known for Osman nor Jeffrey.

[2] The playground apparatus Antonio was playing on was referred to as "monkey bars" as well as a "glider".

Neither the teaching assistant, nor the security guard, were aware of the two boys, Jeffrey and Osman, and/or that there was any alleged previous incident between them and Antonio.

According to the teaching assistant, Mr. Johnson, there were approximately six to seven adults on the playground during the recess period. These adults consisted of Mr. Johnson, lunch aides, the security guard, and other paraprofessionals charged with supervising the approximately 100 to 120 children present. Mr. Johnson was not near the equipment where the incident occurred, and he did not discipline anyone as a result of the incident. Additionally, Mr. Johnson was unaware of any other school personnel having to discipline anyone as a result of the incident.

Further according to Mr. Johnson, who attended to Antonio when he was on the ground, Antonio told him that he was running and tripped and fell, not that he was pushed.

The security guard testified that he responded to the playground after he saw Antonio on the ground. According to the guard, other students were overheard saying that Antonio was pushed, but none of them came forth to report the alleged perpetrators. The guard aptly characterized those statements as "hearsay." Furthermore, the guard testified that he had no prior knowledge of any prior incidents involving Jeffrey and Osman.

Based on the foregoing, defendant has made a prima facie showing that it did not have sufficiently specific knowledge or notice of a particular danger at a particular time, and is therefore entitled to summary judgment as a matter of law (***Miccio v. Bay Shore Union Free School District***, 289 A.D.2d 542, 735 N.Y.S.2d 202 [2d Dept. 2001]).

Furthermore, defendant has established that, even if it was negligent in its supervision of the students on the playground, such negligence was not a proximate cause of Antonio's injuries. Given the apparently sudden, unprovoked nature of the incident, as well as its extremely short duration, Antonio's injury would have occurred regardless of the level of supervision provided by defendant on the playground that day (***Nocilla***, 302 A.D.2d at 574).

In opposition to defendant's motion, plaintiffs have failed to raise a triable issue of fact. Whether defendant notified Maria Almonte regarding an alleged prior incident, whose occurrence cannot be established, or whether Antonio was subsequently enrolled in private school is immaterial to the determination of this application.

Moreover, Maria Almonte's claim that the alleged prior occasion occurred on October 6, 2008, which she makes in her affidavit in opposition to the instant motion, is utterly unsupported by the testimony of her own son, Antonio. As previously stated, Antonio did not tell his mother about the alleged prior incident, and he was unable to provide a date, let alone a specific time frame, for the previous incident. Alternately, he stated that the boys

were punished, and then that he did not know if they were punished. He also claimed he reported the incident to a particular teacher, and subsequently could not remember the name of the teacher to whom he reported the alleged prior incident.

Defendant' motion is granted in its entirety, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 16, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE