

Strauss v Plainedge High School

2011 NY Slip Op 31991(U)

June 20, 2011

Supreme Court, Nassau County

Docket Number: 6587/09

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

STEPHEN STRAUSS and PATRICIA STRAUSS,

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001, 002
MOTION DATE: 4/6/11**

**PLAINEDGE HIGH SCHOOL and VALLEY STREAM
NORTH HIGH SCHOOL,**

INDEX NO.: 6587/09

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion Seq. 001.....	1
Reply Affirmation.....	2
Affirmation in Opposition.....	3
Notice of Motion Seq. 002.....	4
Memorandum of Law.....	5

The following motions are determined herein: Motion by defendant Plainedge Union Free School District i/s/h/a Plainedge High School ("Plainedge") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against Plainedge; and Motion by defendant Valley Stream Central i/s/h/a Valley Stream North High School ("Valley Stream") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against Valley Stream.

On January 11, 2008, plaintiff allegedly slipped on water while he was refereeing a basketball game which took place at Plainedge High School. The game was between Plainedge and Valley Stream. Specifically, plaintiff alleges that he slipped on accumulated water that was spilled on the floor by members of the aforementioned basketball team.

Plaintiffs commenced this action against Plainedge and Valley Stream for negligence in the ownership, operation, management, supervision, use and control of its premises, by allegedly causing plaintiff Stephen Strauss to sustain injuries while refereeing a basketball game at Plainedge between Plainedge and Valley Stream. Mr. Strauss alleges that he slipped on some water that was on the floor of the basketball court

near the Valley Stream bench. The accident happened within the first few minutes of the basketball game. Prior to the beginning of the game, Mr. Strauss and another official had inspected the basketball court and, after having some water mopped up in a different area from where the accident occurred, deemed the court safe to play.

Plainedge and Valley Stream move for summary judgment on the grounds that they did not create the alleged condition, nor had actual or constructive notice of the alleged condition that caused Mr. Strauss to slip and fall. Defendants further assert that plaintiff was an experienced referee and voluntarily assumed the risk of falling during the course of a basketball game since an inherent risk in participating in the officiating of a basketball game is the risk of falling while the game is in progress.

Mr. Strauss, a retired medical equipment sales representative, was working as a basketball referee for the Board of Cooperative Educational Services of Nassau County (“BOCES”), assigned to referee a basketball game between the defendant schools at the time that the accident happened. As a referee, he had about 40 years of experience officiating basketball, and had officiated basketball games at the Plainedge High School on at least 10 to 15 previous occasions. Mr. Strauss was not an employee of BOCES and was considered an independent contractor receiving compensation on a per- game basis.

On the day of the accident, Mr. Strauss arrived at Plainedge High School early so he could watch the Junior Varsity (“JV”) game and the JV officials. See Exhibit D, pg. 75. He watched the third quarter and part of the fourth quarter, before going into the locker room to change into his referee uniform. (*Id.*, pgs. 10-11 and 75)

After Mr. Strauss changed, but prior to the commencement of the game that he was to officiate, Mr. Strauss and the other official assigned to the game stood opposite the player benches to inspect the players for prohibited conduct (i.e., dunking the ball and hanging on the rim) or wearing prohibited items of clothing or protective gear. *Id.* pgs 14-15; see Exhibit E, pg. 11.

At about 12 minutes prior to the start of the game, one of the officials would routinely validate the scorer’s book and players’ names and numbers. Exhibit D, pg. 15. During this time, Mr. Strauss would typically “run the sideline” and do a couple of sprints to get warmed up, in the process also checking and taking note of the activities on the basketball court. *Id.* pg. 79.

After warming up, Mr. Strauss and the other official assigned to the game – on the night of the accident was referee Joe Compose (referred to as Joe Capozzi in the 50-h

hearing transcript, see Exhibit D, pg. 23) – would inspect the basketball court by walking around the court. Exhibit E, pg. 20. Mr. Strauss specifically recalled splitting up the basketball court from the middle of the court, with Joe Compose doing one half and Mr. Strauss inspecting the other half. *Id.* pgs. 20-21.

As a result of this inspection, about 10 minutes before game time, Mr. Strauss noticed a water spot on the spectator's side. *Id.* pg. 26. He had someone with a yellow jacket mop up the water spill so that before the commencement of the game. This particular water spill was not an issue in this claim. *Id.* page 27; see Exhibit D, pg. 83. Mr. Strauss admits that this spill was not in the area where he had his accident and had no role in causing the accident. See Exhibit E, pg. 27. Aside from that spill that was quickly mopped up, Mr. Strauss was satisfied that the court was safe for players and officials prior to commencement of the game. *Id.* pg. 72.

Within the first couple of minutes of the commencement of the game, during the first quarter, Mr. Strauss fell. *Id.* pgs. 27-28; see Exhibit D, pg. 72. It was so early in the game that neither team had taken any time-outs for drinking breaks and no evidence was presented that any of the players took water cups or bottles onto the playing surface prior to the accident. See Exhibit D, pgs. 72-73.

The accident happened during a sudden change in possession. See Exhibit F, pgs. 23-24. According to Craig Murphy, coach of the Plainedge High School basketball team, Mr. Strauss was backpedaling frantically and while turning to run forward, fell near the sideline by the Valley Stream North bench. *Id.* pgs. 24 and 31-33. Coach Fabian Jara of the Valley Stream North High School basketball team testified he saw Mr. Strauss backpedal near the Valley Stream bench when he tripped and fell. See Exhibit G, pg. 25. Coach Jara, however, saw that at the point where Mr. Strauss was backpedaling and would have turned to proceed forward, his right foot got caught behind his left foot causing the fall. *Id.* pg. 25. According to Coach Jara, Mr. Strauss tripped over his own foot. *Id.*

Both coaches had not observed any water or liquid at or about the location of the accident and had not seen anyone mopping up at or about the location of the accident after the accident had happened. See Exhibit F, pgs. 42-43; see Exhibit G, pgs. 27 and 31. Coach Jara specifically recalls inspecting the floor where Mr. Strauss is alleged to have slipped and fallen, and not finding anything that could have caused Mr. Strauss to slip. *Id.* pgs. 32-33.

Mr. Strauss himself did not see any water or a puddle of water either, before or after the accident. See Exhibit D, pgs. 14 and 69; see also Exhibit E, pg. 37. It is Mr. Strauss' testimony that his pant leg and shoes had gotten wet, and that because his shoes were "top officiating shoes" that could not slip unless there was water on the floor, that there must have been a puddle of water on the floor where he fell. Exhibit D, pgs. 14 and 71. Plaintiff, however, does not know the actual cause of his accident.

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Leary v Leisure Glen Home Owners Ass'n, Inc.*, 82 AD3d 1169 [2nd Dept. 2011]; *Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034 [2nd Dept. 2010]; *Dennehy-Murphy v Nor-Topia Serv. Center, Inc.*, 61 AD3d 629 [2nd Dept. 2009]; see *Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527, 528 [2nd Dept. 2008]; *Rubin v Cryder House*, 39 AD3d 840 [2nd Dept. 20007]). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Dennehy-Murphy v Nor-Topia Serv. Center, Inc.*, *supra*; *Gordon v American Museum of Natural History*, 67 NY2d 836[1986]; *Williams v SNS Realty of Long Island, Inc.*, *supra*; *Przywalny v New York City Transit Authority*, 69 AD3d 598 [2nd Dept. 2010]; *Hayden v Waldbaum, Inc.*, 63 AD3d 679 [2nd Dept. 2009]; *Denker v Century 21 Dept. Stores, LLC*, *supra* at 528; *Rubin v Cryder House*, *supra*).

Here, defendants satisfied their initial burden of demonstrating their entitlement to judgment as a matter of law by submitting the deposition testimony of plaintiffs; Craig Murphy, Coach of the Plainedge High School basketball team; Fabian Jara, Coach of the Valley Stream basketball team; and an affidavit of Peter C. Stellatos, Assistant Head Custodian with Plainedge.

In his affidavit, Mr. Stellatos states that he and other custodians would "sweep and mop the basketball floor, pull the bleachers out, open bathrooms, set the chairs up for away and home team benches, and lock the doors at the end of the hallway before all basketball games at Plainedge." Mr. Stellatos was unaware of any complaints prior to the game on January 11, 2008, concerning water or liquid on the basketball court.

In opposition to the motion, plaintiffs assert that defendants have not satisfied their initial burden; and issues of fact exist as to whether defendants created the subject defective condition. Plaintiffs contend that certain deposition testimony reveals the

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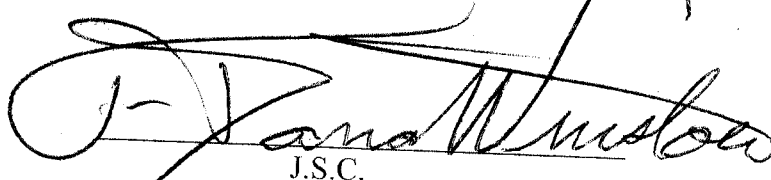
following: "(1) the players are permitted to drink water while sitting on the bench during the game; (2) the players are permitted to drink water during full time outs; (3) while not technically allowed, the players drink water on the court during thirty second time outs; (4) that it is known that water collects on the court after a thirty second time out; and (5) that immediately preceding the varsity basketball game and plaintiff's subject accident, the maximum amount of time outs, including thirty second time outs, were taken during the junior varsity basketball game." ¶ 9 of Keri A. Wehrheim's Affirmation in Opposition.

Plaintiffs' contentions are speculative. They fail to raise an issue of fact sufficient to defeat the motion. In view of this determination, it is unnecessary to consider the defendants' arguments regarding the assumption of risk.

Based upon the foregoing, both motions for summary judgment are **granted**, and the complaint is dismissed in its entirety.

This constitutes the Order of the Court.

Dated: June 20, 2011


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**