

Cerda v City of New York

2011 NY Slip Op 33317(U)

June 24, 2011

Supreme Court, Queens County

Docket Number: 33052/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Alina Cerda, an infant by her Mother and Index
Natural Guardian, Erna Cerda, Individually, Number: 33052/09

Plaintiffs,

- against -

Motion
Date: 6/14/11

The City of New York, New York City
Department of Education, Public Schools
Athletic League, and Bryan Brown,

Motion
Cal. Number: 7

Defendants.

Motion Seq. No.: 3

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The following papers numbered 1 to 10 read on this motion by defendants for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by the Department of Education (DOE) (sued herein as the Department of Education and Public Schools Athletic League) and Bryan Brown for summary judgment dismissing the complaint as against them is denied. That branch of the motion by the City for summary judgment dismissing the complaint as against it is granted.

Infant plaintiff, a 15-year-old freshman on the varsity softball team of Francis Lewis High School in Queens County, allegedly sustained injury to her left ankle while practicing sliding on the softball field at the school on May 18, 2009. She testified in her 50-h hearing that she also played softball for a non-school team, the Jamaica Estates Lady Lightning team, that she has been playing on that team since she was 9 years old, that she practices with that team twice a week at Cunningham Park and plays

games on Saturdays. She has been playing for this team every Spring. In October 2008, she also tried out for and was accepted into the Francis Lewis High School varsity softball team. Practice for the Spring season commenced in April 2009. On the date of the accident, softball practice commenced at 4:30 P.M. and ended at 6:00 P.M. The accident occurred at 5:30 P.M. Infant plaintiff testified that there were 10 girls at practice that day. She testified that after a warmup of approximately 10 minutes, her team practiced sliding. She explained that they stood on line at first base and would run and slide into second base. Defendant Brown, the coach, was at second base. She stated that she was practically at the end of the line because Brown allowed the more experienced girls who had been on the team longer to go first. There were 9 girls ahead of her. She testified that the first time she executed a slide she performed it incorrectly and "I rubbed off on my right thigh." The accident occurred the second time she slid. She recounted that she ran at "medium speed" toward second base, went down, forming a figure "4" with her body, and her cleat became stuck in the mud, causing her ankle to twist and snap. Infant plaintiff testified that it had rained the day before and the field was muddy and "that's how my cleat got stuck." She also stated that the girls who had slid before her caused a "trench" to form approximately a foot long and a foot wide. She also stated that she had observed the trench before the accident.

Infant plaintiff testified that she had never practiced sliding before that day, never practiced sliding with her other softball league, no one showed her how to slide and no instructions were given to her by Brown as to how to execute a slide or what to avoid when sliding. She also stated that the day before the accident, when the coach informed the team that they would be practicing sliding tomorrow, she informed her mother that she was nervous about sliding and was not sure whether she wanted to do so, since she had not practiced sliding. She also represented that her mother told her that she did not have to slide and that infant plaintiff should talk to the coach. However, she did not inform the coach of her reservations about sliding because "you just don't say no to the coach."

The DOE and Brown move for summary judgment upon the ground that plaintiff assumed the risk of injury by voluntarily playing softball. The City moves for summary judgment upon the ground that it does not own or maintain public school facilities and, therefore, owed no duty of care to plaintiff.

The doctrine of assumption of risk as applied to a sporting activity provides that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated

risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (Morgan v. State of New York, 90 NY 2d 471, 484 [1997]). The Court of Appeals has recognized that the doctrine exists to safeguard "free and vigorous participation in athletic activities" (Trupa v Lake George Central School Dist., 14 NY 3d 392, 395 [2010] [quoting Benitez v New York City Bd. Of Educ., 73 NY 2d 650, 657 [1989]]). It has observed, "We have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (id. at 395).

As the DOE correctly points out, "Sliding into base is an integral part of the game of softball" (Totino v Nassau County Council of Boy Scouts of Am., 213 AD 2d 710, 711 [2nd Dept 1995], lv denied 86 NY 2d 708 [1995]). Therefore, sustaining an ankle injury as a result of sliding into base is a risk inherent in and which arises out of the nature of the sport of softball.

The DOE is also correct that the doctrine of assumption of risk applies to any readily observable condition or defect in the area where the sport was played (see Sanchez v. City of New York, 25 AD 3d 776 [2nd Dept 2006]), including the playing surface (see Cevetillo v Town of Mount Pleasant, 262 AD 2d 517 [2nd Dept 1999]). The muddy condition of the field and the so-called "trench" were readily observable, according to infant plaintiff's own testimony. And while a player may not be held to have assumed the risk with respect to a dangerous condition over and above the usual dangers inherent in the sport (see Clark v. State of New York, 245 AD 2d 413 [2nd Dept 1997]), a muddy playing surface and a gouge or "trench" in the dirt or sand of the field next to a base caused by players sliding into the base and pushing the dirt or sand with their feet are common ballfield conditions that do not transcend the usual dangers inherent in the game of softball.

However, notwithstanding that sliding is an integral part of the game of softball and the conditions of the playing field did not present unusual dangers, the record on this motion raises a question of fact as to whether the DOE, through its coach, Brown, was negligent in failing to provide infant plaintiff adequate instruction on how to perform a slide and whether plaintiff's injury was a proximate cause of his failure to provide such instruction.

Assumption of risk "is not an absolute defense but a measure of the defendant's duty of care" (Turcotte v Fell, 68 NY 2d 432,

439 [1986]). The duty of care owed to students by schools supervising athletic or recreational activities is one of ordinary reasonable care to protect the students from "unassumed, concealed or unreasonably increased risk" (Benitez v New York City Bd. Of Educ., 73 NY 2d 650, 658 [1989]). Moreover, assumption of a risk requires awareness and appreciation of the risk (see Maddox v City of New York, 66 NY 2d 270 [1985]). "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (id. at 278). Since plaintiff testified that she was inexperienced in playing varsity softball, having never performed a slide, and that the coach did not give her any instruction on how to slide or what obstacles to avoid, there are questions of fact as to whether and to what extent plaintiff appreciated the risk involved in sliding upon a muddy field containing a trench and whether the failure of the coach to show plaintiff how to execute a proper slide before having her perform such maneuver unreasonably increased her risk of injury. An unreasonably increased risk may arise from a school's failure to provide adequate supervision (see Simmons v Saugerties Central School District, 82 AD 3d 1407 [3rd Dept 2011]). Therefore, there are issues of fact as to whether Brown failed to provide adequate supervision to infant plaintiff by having her perform slides without instruction (see e.g. Schmidt v Massapequa High School, 83 AD 3d 1039 [2nd Dept 2011]; Cody v Massapequa Union Free School District, 227 AD 2d 368 [2nd Dept 1996]).

Even though Brown, in his deposition, testified that he did instruct infant plaintiff on how to perform a slide, and while plaintiff's testimony that she never learned how to perform a slide and had never done it before, even though she had been playing in a softball league for five years and was skilled enough to make the high school varsity softball team as a freshman, seems incredible, the Court may not usurp the function of the trier of fact and assess a party's credibility on summary judgment. Rather, the Court must view the evidence in a light most favorable to the party against whom summary judgment is sought. Since the record on this motion raises issues of fact as to whether Brown provided adequate supervision and instruction and whether infant plaintiff assumed the risk of her injuries, the motion by the DOE and Brown for summary judgment must be denied.

However, the City is entitled to summary judgment dismissing the complaint against it. It is undisputed that Francis Lewis High School is a public school under the New York City Department of Education. The Department of Education of the City of New York (formerly known as the Board of Education) is a separate and distinct entity from the City of New York (see NY Education Law

§2551; Campbell v. City of New York, 203 AD 2d 504 [2nd Dept 1994]).

Pursuant to §521 of the New York City Charter, although title to public school property is vested in the City, it is under the care and control of the Board of Education for purposes of education, recreation and other public uses. Suits involving public school property may only be brought against the Department of Education (Board of Education). New York City Charter §521(b) provides, "Suits in relation to such property shall be brought in the name of the board of education." Moreover, although the 2002 amendments to the Education Law granted the Mayor greater control over public schools and limited the power of the Department of Education (L 2002, ch 91), such amendments did not alter the fact that the City and the Department of Education are separate legal entities and did not serve to abrogate the rule that tort actions involving public schools may not be brought against the City (see Perez v. City of New York, 41 AD 3d 378 [1st Dept 2007]). Since the City does not operate, maintain or control the subject public school, it is entitled to summary judgment as a matter of law (see Cruz v. City of New York, 288 AD 2d 250 [2nd Dept 2001]).

The contention of plaintiffs' counsel that the City is liable for Brown's negligence under a theory of respondeat superior because Brown testified that he was employed by the City is without merit. Although Brown did testify that he worked for the City, clear and unequivocal evidence has been presented that Brown is a teacher employed by the DOE. Brown's layperson's confusion over the distinction between the City and the DOE does not serve to raise any issue of fact, and no serious argument has been, or can be, advanced by plaintiffs that Brown, admittedly the coach of Francis Lewis High School, is a City employee.

Accordingly, the motion is granted solely to the extent that the complaint is dismissed as against the City. That branch of the motion for summary judgment dismissing the complaint against the DOE and Brown is denied.

Dated: June 24, 2011

KEVIN J. KERRIGAN, J.S.C.