Penfield v Poughkeepsie City Sch. Dist.

2012 NY Slip Op 31964(U)

July 16, 2012

Supreme Court, Dutchess County

Docket Number: 2591-2006

Judge: Lewis Jay Lubell

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[* 1]

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF DUTCHESS

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ZHAKYLIA PENFIELD, by and through her mother and natural guardian, KIWANDA PERRY, and KIWANDA PERRY, Individually,

Plaintiffs,

-against -

POUGHKEEPSIE CITY SCHOOL DISTRICT by and through STANLEY F. MERRITT, President of Board of Education,

Defendant.

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DECISION & ORDER

Index No. 2591-2006

Sequence No. 1

LUBELL, J.

The following papers were considered in connection with this motion by defendants, Poughkeepsie City School District by and through Stanley R. Merritt, President of the Board of Education, for an Order granting summary judgment in favor of defendants dismissing the complaint:

PAPERS	**NUMBERED**
Motion/Affirmation/Memorandum of Law/Exhibits A-N	1
Reply/Affirmation/Exhibit A	2
Attorney Reply Affirmation (Poughkeepsie City SD)	3
Attorney Reply Affirmation (Poughkeepsie City SD)	4

Plaintiffs bring this action for monetary damages in connection with injuries sustained by plaintiff Zhakylia Penfield ("Zhakylia") when, on December 15, 2005, she was confronted by a group of students as she left the premises of one of the Poughkeepsie City School District's (the "District") schools, the Poughkeepsie Middle School (the "Middle School"), at the close of the school day. As set forth in their bill of particulars, plaintiffs claim that the District was negligent in failing to provide protection to the infant plaintiff, failing to escort her off of the premises, failing to control gang behavior, failing to provide adequate security, and failing to take adequate measures to protect the infant plaintiff in light of alleged earlier known threats to her safety.

[* 2]

Plaintiffs contend that, on the date in question, a fellow student, one Shakela Thompson ("Shakela"), punched the infant plaintiff in the side of her face, grabbed her by the hair and threw her to the ground at which time other unidentified students also assaulted her. As a result, the infant plaintiff suffered contusions, a concussion and a "substantial knot" to her forehead and, as well, had hair pulled out from her head.

The infant plaintiff, then in 7th Grade, was a participant in the District's Student Transitional Educational Program ("STEP"), an alternative educational setting for students with behavioral or academic problems, which was then housed in the Middle School. Plaintiffs contend that the infant plaintiff was permitted to leave the Middle School unattended on the day in question, notwithstanding knowledge of earlier threats to the infant plaintiff and contrary to school policy which provides that STEP students be escorted out of the Middle School through a side door exit approximately five minutes after the dismissal of non-STEP students.

The infant plaintiff testified at her 50-h hearing and/or deposition about being told to "watch her back". She also testified as to how other female students bumped into or pushed her, threw food at her in the lunchroom or threatened her at various earlier times.

Whether through the infant plaintiff or her mother, school officials, including the Middle School Principal and the Assistant Seventh Grade Principal, were made aware of such incidents and of past threats by various students against the infant plaintiff. Nonetheless, there is sufficient proof in the record establishing that school officials intervened and spoke to the offending students about the infant plaintiff's complaints. In any event, the past acts merely constitute vague threats of harm, unspecified as to time or date of occurrence, and did not constitute sufficient notice of the acts underlying this action. Furthermore, none of the reported earlier incidents involved physical violence resulting in personal injuries, as is the case here.

Plaintiff testified that the assault took place immediately outside of the Middle School building. Upon exiting, she noticed groups of male and female students, some of whom were alleged gang members, lined up against the school house wall adjacent to the exit door. An unidentified adult was also present in a nearby vehicle and within viewing distance, waiting to pick up a student. This is when the assault took place.

There is no doubt that moments before the assault the infant plaintiff reported to Theodore Arrington, the STEP Director, that another STEP student had told the infant plaintiff that Shakela had threatened to fight the infant plaintiff after school that day because Shakela had heard that the infant plaintiff called her sister a "ho", something the infant plaintiff denies. In any event, Shakela, an alleged member of the female gang known as the "Goonies", was supposedly after the infant plaintiff because of the infant plaintiff's refusal to join the gang.

Notwithstanding the information imparted by the infant plaintiff to Mr. Arrington, neither Mr. Arrington nor the infant plaintiff took the treat seriously. In fact, when testifying during her deposition about her thoughts just seconds prior to the assault, the infant plaintiff testified, " . . . I just turned away. I didn't think she was going to hit me. I was like, she's not going to hit me. She turned around and she hits me from the side . . . " (Exhibit I, page 90, lines 2-5).

The Court finds that defendants have come forward with a sufficient proof in admissible form establishing that defendants did not have sufficient and specific notice of an impending threat of *actual* harm to the infant plaintiff such that they can be said to have been negligent in their supervision of the infant plaintiff or have breached any duty to her such that liability may be imposed within the context of this action.

> 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 or notice of the dangerous conduct which caused the injury, that the acts of the fellow student could reasonably have been anticipated.

(Schrader v Board of Educ., 249 AD2d 741, 742, lv denied 92 NY2d 806; Nossoughi v Ramapo Cent. School Dist., 287 AD2d 444, 445 [2d Dept 2001][although there existed evidence of previous trespassing incidents by former students after school hours, none involved physical violence against students resulting in personal injuries]).

Random mouthing off, such as exists here, by a fellow student of a threat that neither school personnel nor the student victim herself reasonably thought would be carried out does not convert an otherwise sudden and unanticipated assault into an assault that could have or should have been reasonably anticipated, guarded

against and thwarted. "The basic premise upon which such liability is imposed is the foreseeability of harm based upon actual or constructive knowledge of a student's dangerous propensity or prior actions" (Busby v Ticonderoga Cent. School Dist., 258 AD2d 762, 764 [3d Dept 1999]), which here has not been shown to be present and, in fact, the opposite appears to have been the case.

Even upon taking into account the surrounding circumstances as propounded by plaintiffs, the Court concludes that plaintiffs have not come forward with sufficient proof in admissible form such as would raise a triable issue of material fact in response to defendants' initial prima facie showing of entitlement to judgment in their favor as a matter of law.

The fact that it was the defendants' usual practice and custom to have STEP students escorted to the exit upon recess makes no difference. The assault took place outside of the school building, in front of parent who was waiting to pick up a student, and was admittedly unanticipated, i.e., it was a "sucker punch" from one not believed would actually carry out an assault.

The ensuing group attack is no more actionable, there being no indication that this was any less unanticipated and, in any event, there is no showing that the defendants had specific knowledge of such an imminent group attack. "Nor can the circumstances at bar be equated with those that take place during general school dismissal, a time when supervision is necessary due to the congregation of large numbers of students and the increased likelihood of fights" (Nossoughi v Ramapo Cent. School Dist., 287 AD2d 444, 445 [2d Dept 2001] citing Mirand v City of New York, 84 NY2d 44, 50-51). Here, the side exit through which STEP students were directed to exit is not where the largest number of students would be expected to congregate at recess. In fact, the contrary is true (compare Mirand v City of New York, supra).

In sum, the Court concludes that the infant plaintiff was the victim of the "sudden, impulsive, unanticipated acts of other students" (Busby v Ticonderoga Cent. School Dist., 258 AD2d 762, 764 [3d Dept 1999]), for which the defendants cannot be held accountable. Furthermore, the manner in which the injury took place could have happened even if recess had been supervised (see Foster v New Berlin Cent. School Dist., 246 AD2d 880, 881 [3d Dept 1998]).

There being no merit to plaintiffs' positions as herein specifically addressed or otherwise advanced, it is hereby

ORDERED, that the complaint be and is hereby dismissed in all respects.

[* 5]

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
July 16, 2012

S/ ____________________________________
HON. LEWIS J. LUBELL, J.S.C.

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