

Merrill v Enlarged City Sch. Dist. of Troy

2013 NY Slip Op 31109(U)

April 12, 2013

Sup Ct, Rensselaer County

Docket Number: 233661

Judge: George B. Ceresia Jr

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.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

CHRISTIAN MERRILL, an infant by his mother and natural
Guardian, HEATHER DELAMERCED, and HEATHER
DELAMERCED, individually,
Plaintiff,

-against-

THE ENLARGED CITY SCHOOL DISTRICT OF TROY,
NEW YORK; THE BOARD FO EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW
YORK; SCHOOL NUMBER 12 OF THE ENLARGED
CITY SCHOOL DISTRICT OF TROY, NEW YORK; and
THE CITY OF TROY, NEW YORK,
Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-1337-12 Index No. 233661

Appearances: Levy & Obstarczyk PLLC
Attorneys For Plaintiff
350 Northern Boulevard, Suite 308
Albany, NY 12204

The Mills Law Firm LLP
Attorneys For Defendants
1520 Crescent Road, Suite 100
Clifton Park, NY 12065-7809

DECISION/ORDER

George B. Ceresia, Jr., Justice

On April 23, 2009 the infant plaintiff, then age 7, was injured at School 12 in the City of Troy, New York while participating in gym class. The plaintiffs subsequently commenced the above-captioned personal injury action against the defendants. Plaintiffs' complaint alleges two general theories of recovery. In their first and second causes of action they allege that by reason of the fact that the infant plaintiff suffered from Asperger

Syndrome, and possessed poor gross motor skills (and other physical limitations), School Officials were negligent in requiring him to participate in the physical education class. The plaintiffs maintain that the defendants should have placed the infant plaintiff in an adaptive physical education class, which would have been more appropriate for his skill level and physical limitations. In their third and fourth causes of action the plaintiffs allege that the infant plaintiff's injuries were caused by defendants' negligent supervision of the gym class. The defendants have made a motion pursuant to CPLR 3212 for summary judgment.

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 in admissible form to demonstrate the absence of any material issues of fact (see Vega v Restani Construction Corp., 18 NY3d 499 [2012]; Ferluckaj v Goldman Sachs & Co., 12 NY3d 316 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v AJI Industries, Inc., *supra*, citing Alvarez v Prospect Hosp., *supra*). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, *supra*; Alvarez v Prospect Hosp., *supra*). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson

v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

In addition, a party's burden on a motion for summary judgment is not satisfied by merely pointing to gaps in its adversary's proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant's right to judgment as a matter of law. Until that condition is met, the strength of the opponent's proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). “[A] movant’s failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of the opposing papers” (Ames v Paquin, , 40 AD3d 1379 [3rd Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

There is sharp disagreement with respect to how the accident occurred. The infant plaintiff initially testified at his pre-trial deposition that on the day he was hurt he (and fellow students) were playing Dodge Ball, a game involving two teams of ten players using approximately ten balls. Later on in the same deposition, he indicated that they were playing a game called Monster Dodge Ball, which involves use of a single large ball (instead of multiple smaller ones). As described by the infant plaintiff, the rules in Monster Dodge Ball called for the players to roll the large ball towards the opposing team, on the other side of the gym floor. If the ball struck an opposing player, that player was eliminated from the game. The infant plaintiff testified that at some point during the game, an opposing player

threw the ball, which struck the plaintiff in the forehead, causing him to fall backwards, resulting in a fracture of his left leg.

Douglas Knipple, the Physical Education Teacher that supervised the infant plaintiff's gym class that day, indicates that the students were playing a game called "Birthday Bowling" or the "Birthday Game". As indicated by Mr. Knipple, in Birthday Bowling a small group of students is requested to form a circle on the gym floor. A second group, selected by the month of their respective birthdays, enters the middle of the circle to become "bowling pins". The students on the periphery of the circle would then roll a large ball into the circle, and try to hit the student "bowling pins", who could move about to avoid being hit. Mr. Knipple indicates that the accident involving the infant plaintiff occurred after the game had ended, when plaintiff was jumping about, celebrating the fact that he had just won the game. Another student picked up the ball and threw it in plaintiff's direction. The ball hit the infant plaintiff in the face, which knocked him off balance. He came down awkwardly on his feet, stumbled and fell to the floor. Mr. Knipple indicates that he witnessed the entire incident and was standing less than ten feet away when it occurred. He indicates that there was no horseplay in class that day; that the incident was sudden and spontaneous; there was no reason for him to believe the other student would engage in that behavior; and he had never seen any student throw the ball at another student.

The Court turns first to plaintiffs' claim that it was improper to allow the infant plaintiff to participate in physical education class, by reason of his physical/medical impairment. The defendants have submitted the affidavit of Michelle Gladd, who was employed by the Enlarged City School District as licensed physical therapist at the time of

the subject incident. She indicates that she has attended several continuing education courses with specific regard to physical therapy for children with Asperger Syndrome; and has worked with approximately thirty students with Asperger Syndrome during her career. Ms. Gladd avers that she first met the infant plaintiff in 2006 while he was in kindergarten. She tested him at that time for gross motor development, and concluded that his scoring was “at age appropriate range in his gross motor skills”. As a consequence, she indicates that he was properly placed in a regular physical education class of his peers. Ms. Gladd indicates that in December 2006 the infant plaintiff was evaluated by the Committee on Special Education (“CSE”) to determine if he was eligible for special educational services. The CSE determined that he was not eligible for such services. According to Ms. Gladd, the infant plaintiff was subsequently diagnosed as having Asperger Syndrome. In September 2007 the School District developed a 504 Accommodation Plan (see § 504 of the Rehabilitation Act of 1973, codified as 29 USC § 794; see also the Americans With Disabilities Act, 42 USC § 12131 et seq. [hereinafter ADA]) to assist the infant plaintiff in certain school-related tasks, as needed. The 504 Accommodation Plan, however, did not include any accommodations for physical education class, because, according to Ms. Gladd, none were necessary or required. In September 2007 Ms. Gladd performed a second testing and determined that the infant plaintiff’s gross motor quotient was 85, slightly below average. At that time she scheduled physical therapy services for him, two times per week for thirty minutes. Physical therapy began in October 2007 and, according to Ms. Gladd, the infant plaintiff made significant progress. In February 2008 the CSE had a second meeting with regard to whether the infant plaintiff was eligible for special education

services. She indicates that the meeting was “tabled” because the infant plaintiff had a very poor attendance at school. In March 2008 the CSE met again. It was determined that the infant plaintiff did not meet the criteria to be classified as a student with disability, and that he should participate in the general physical education program. Ms. Gladd tested infant plaintiff again in October 2008. She attributed a reduction in the test score to the infant plaintiff’s refusal to perform the test in the required manner. In her opinion, his gross motor skills had, in fact, improved. A 504 Accommodation Plan was reviewed in December 2008, however there was nothing in the plan that suggested that the infant plaintiff was unable to participate in the regular physical education class. Ms. Gladd continued to see the infant plaintiff in physical therapy twice a week for thirty minutes up until the day that he was injured. In her view, although the infant plaintiff’s gross motor testing was slightly below average for his age, it did not preclude him from participating in physical education.

Doug Knipple, the physical education teacher in charge of infant plaintiff’s physical education class on April 23, 2009, indicates in his supporting affidavit that he did not receive an Individualized Education Plan (“IEP”, see Individuals with Disabilities Education Act [“IDEA”], 20 USC § 1400, et seq.) for the plaintiff which placed any restrictions on plaintiff’s activities in physical education class. He and Tony Fruscio, a physical education teacher who was present when the accident occurred and had known the plaintiff for approximately two years before the accident, both indicate in their supporting affidavits that the infant plaintiff was able to fully participate in all activities in physical education class.

In opposition to the motion, the plaintiffs have submitted the affidavit of Peter W. Loehr, Ph.D., who is currently employed by the State University of New York, College at

Buffalo as a tenured Associate Professor of Educational Administration and Supervision. Dr. Loehr maintains what whichever game was being played on the date in question (Monster Dodge Ball or Birthday Bowling), neither game has any educational value. He also maintains that if it is true that the accident occurred after the game was finished, while the plaintiff was celebrating his victory, that the defendants are still culpable, on a theory that but for the game, the injury would not have occurred.

The Court finds that the defendants demonstrated, *prima facie*, that the infant plaintiff's physical/medical condition did not require imposition of restrictions with regard to participation in physical education class. First, the defendants demonstrated that various review assessments under § 504 of the Rehabilitation Act of 1973 (supra), the ADA (supra), and/or the IDEA (supra) had been conducted by school officials and the CSE, including the development of an IEP and 504 Accommodation Plan. Neither the IEP or 504 Accommodation Plan imposed restrictions with regard to the infant plaintiff's participation in physical education. This, in the Court's view, forecloses any argument with regard to non-compliance with the requirements of § 504 of the Rehabilitation Act of 1973 (supra), the ADA (supra), and/or the IDEA (supra).¹

Secondly, the moving defendants have presented evidence (the affidavits of Michelle

¹More importantly, such discretionary administrative determinations, while subject to administrative appeal and judicial review (of which there is no evidence here), would not, ordinarily, operate to give rise to municipal tort liability. "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (Kreamer v Town of Oxford, 91 AD3d 1157, 1159 [3d Dept., 2012], quoting McLean v City of New York, 12 NY3d 194, 203 [2009]; see also Pryor v State of New York, 92 AD3d 1047, 1048-1049 [3d Dept., 2012]).

Gladd, Doug Knipple and Tony Fruscio, all of whom knew the infant plaintiff personally) to support their contention that the infant plaintiff's participation in physical education class was appropriate. In this respect, they have established that they had no notice of a physical and/or medical impairment, or other condition, which would preclude his participation in physical education class. The Court finds that the defendants demonstrated, prima facie, that the defendants were not negligent in permitting the plaintiff to participate in a physical education class. The Court finds that Dr. Loehr's affidavit and plaintiffs' other evidence fail to demonstrate the existence of a triable issue of fact. Under all of the circumstances, the Court concludes that defendant's motion should be granted with regard to any issue concerning the infant plaintiff's placement in a physical education class.

Turning to the issue of negligent supervision, as stated by the Court of Appeals, "[a]lthough we have recognized that schools are not insurers of safety,' they 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 NY2d 525, 526 [2003], quoting Mirand v City of New York, 84 NY2d 44, 49, [1994], citing Lawes v Board of Educ. of City of New York, 16 NY2d 302, 305 [1965]). "To establish negligent supervision, a plaintiff must 'demonstrate both that the defendant breached its duty to provide adequate supervision under this standard, and that this failure was the proximate cause of the plaintiff's injuries'" (Spaulding v Chenango Valley Central School District, 68 AD3d 1227, 1228-1229 [3rd Dept., 2009], mot for lv denied 14 NY3d 707 [2010]; quoting Bellinger v Ballston Spa Cent. School Dist., 57 AD3d 1296, 1297 [2008], lv denied 12 NY3d 704, 828 [2009]). It is well settled that school districts will only be held liable for such injuries to

its students as are reasonably foreseeable (see Gray v South Colonie Central School District, 64 AD3d 1125, 1128 [3rd Dept., 2009]; Doyle v Binghamton City School District, 60 AD3d 1127, 1128-1129 [3rd Dept., 2009]).

As noted, there is considerable disagreement concerning the game which was being played at the time of the accident, and/or whether the game had come to a conclusion. Adding even more confusion to the foregoing is the fact that the infant plaintiff, as noted, in the latter portion of his pre-trial deposition, described the game he was playing as Monster Dodge Ball. During his testimony, the infant plaintiff initially indicated that Monster Dodge Ball was a game in which the ball was rolled at players from the opposing team. Subsequently during the same deposition however, in response to a line of leading questions posed to him by defense counsel, he indicated that the ball was being thrown, not rolled. The infant plaintiff indicated that the ball had been thrown at him “many times”.

Physical education teachers Doug Knipple and Tony Fruscio both indicate in their supporting affidavits that the rules for Birthday Bowling require that only one ball be used, that the ball must be rolled, that it may never be thrown in the air, and that the players must freeze when the whistle is blown.

The Court finds that there is a triable issue of fact with regard to whether the game had concluded at the time the infant plaintiff was injured. There are triable issues with regard to what game was being played. There is a triable issue with regard to whether the large ball was being thrown instead of being rolled during the game, as the rules for Birthday Ball and apparently Monster Dodge Ball required. If, as the infant plaintiff testified, Mr. Knipple permitted the students to throw the large ball during the game, in

violation of game rules, this might support an inference that the game was not properly supervised.

Under the circumstances, the Court finds that summary judgment must be denied with respect to plaintiffs' third and fourth causes of action.

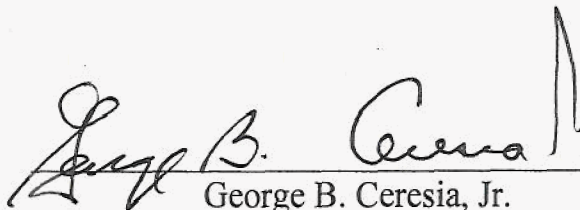
Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted to the limited extent that partial summary judgment is granted with regard to plaintiffs' first and second causes of action, which are hereby dismissed; and it is further

ORDERED, that the motion is denied with regard to plaintiffs' third and fourth causes of action.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the plaintiffs. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: April 12, 2013
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated September 28, 2012, Supporting Papers and Exhibits
2. Affidavit of Doug Knipple, sworn to June 14, 2012
3. Affidavit of Ed Dope, sworn to September 28, 2012
4. Affidavit of Richard T. Rothwell, PT, sworn to September 27, 2012 and Exhibit
5. Affidavit of Michelle Gladd, PT, sworn to September 27, 2012
6. Affidavit of Tony Fruscio, sworn to September 28, 2012
7. Affirmation of Christopher K. Mills, Esq. dated September 28, 2012 and Exhibits
8. Affirmation of Eric R. Gee, Esq. dated December 21, 2012, Supporting Papers and Exhibits
9. Reply Affirmation of Christopher K. Mills, Esq., dated December 28, 2012