

Bauver v Commack Union Free School Dist.

2014 NY Slip Op 31169(U)

May 1, 2014

Supreme Court, Suffolk County

Docket Number: 10-13877

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-18-13
MOTION DATE 1-22-14
ADJ. DATE 1-29-14
Mot. Seq. # 006 - Mot D
007 - MG

-----X
ROBIN BAUVER and STEVEN BAUVER, as :
Parents and Natural Guardians of DYLAN :
BAUVER, an infant, :
Plaintiffs, :
- against - :
COMMACK UNION FREE SCHOOL DISTRICT, :
JAMES A. FELTMAN, as Superintendent and :
individually, SEBASTIAN DIRUBBA as Coach :
and individually, COMMACK SCHOOL :
DISTRICT BOARD OF EDUCATION, MARY :
JO MASCIELLO as School Board President and :
individually, JOSEPH PENNACCHIO as School :
Board Vice President and individually, DEBORAH :
GUBER as School Board Trustee and individually, :
ALLEN LEON as School Board Trustee and :
individually, and THOMAS L. TORNEE as School :
Board Trustee and individually, :
Defendants. :
-----X

BARBARA A. RASMUSSEN, ESQ.
Attorney for Plaintiffs
P.O. Box 883
Westhampton Beach, New York 11978

LAMB & BARNOSKY, LLP
Attorneys for Defendant Commack UFSD
534 Broadhollow Road, Suite 210
P.O. Box 9034
Melville, New York 11747-9034

GORDON & REES
Attorneys for Defendant Sebastian Dirubba
90 Broad Street, 23rd Floor
New York, New York 10004

Upon the following papers numbered 1 to 67 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 35 - 54; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 31; 57 - 64; Replying Affidavits and supporting papers 32 - 34; 65 - 67; Other 55 - 56 Memorandum of Law : (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by defendant Sebastian DiRubba and the motion (#007) by defendants Commack Union Free School District, James Feltman, the Commack School District Board of Education, Mary Jo Masciello, Joseph Pennacchio, Deborah Guber, Allen Leon, and Thomas Tornee are consolidated for purposes of this determination; and it is

RR

Bauver v Commack UFSD

Index No. 10-13877

Page No. 2

ORDERED that the motion by defendant Sebastian DiRubba for an order granting summary judgment in his favor is granted as to the claim for defamation, but denied as to the claim for battery; and it is further

ORDERED that the motion by defendants Commack Union Free School District, James Feltman, the Commack School District Board of Education, Mary Jo Masciello, Joseph Pennacchio, Deborah Guber, Allen Leon, and Thomas Tornee for an order granting summary judgment in their favor on the complaint is granted.

This action was commenced by plaintiffs Robin Bauver and Steven Bauver on behalf of their son, Dylan Bauver, to recover damages for injuries he allegedly suffered when he was a twelfth grade student at Commack High School. The second amended complaint alleges that, in September 2009, Dylan, who was a member of the boy's varsity soccer team for four years and played the position of goalie, was slapped in the face by his coach, defendant Sebastian DiRubba, during a team practice. It also alleges that DiRubba made defamatory statements about Dylan in December 2009 during an awards dinner for varsity athletes. At the time of the alleged tortious conduct, defendant Commack Union Free School District, which owns and operates the Commack High School, employed DiRubba as a high school teacher and a coach, and defendant James Feltman as Superintendent.

The first and second causes of action in the second amended complaint allege defendants Commack Union Free School District, Feltman, the Commack School District Board of Education, as well as the officers and trustees of the Board of Education, namely defendants Mary Jo Masciello, Joseph Pennacchio, Deborah Guber, Allen Leon, and Thomas Tornee the members of the Board of Education, are liable for the negligent hiring, retention and supervision of DiRubba. The third cause of action alleges the same defendants (hereinafter collectively referred to as the School District) are liable for breaching the duty to adequately supervise students. The fourth cause of action alleges DiRubba is liable for assault and battery, and the fifth cause of action alleges he is liable for defamation. More specifically, the fifth cause of action alleges DiRubba maliciously defamed Dylan, who was a captain of the varsity soccer team and was known by his teammates as Rodney, by stating during an awards dinner that "Rodney is dead, and I still get no respect," that "I had three good captains, and then there was Dylan," and that "Matt DiDominico was my only four-year player." The sixth cause of action, asserted against all defendants, seeks attorney's fees.

The School District now moves for an order granting summary judgment in its favor. In support of its motion, the School District argues that the cause of action for negligent hiring and retention must be dismissed, as there is no evidence it had knowledge DiRubba had a propensity for the physical conduct that allegedly caused injury to Dylan, and that the cause of action for breach of a duty to act "in loco parentis" must be dismissed as duplicative of the cause of action for negligent supervision. As to the claim that it breached the duty to adequately supervise its students, the School District argues it had no notice prior to the alleged September 2009 incident involving Dylan Bauver that DiRubba had hit or had a propensity to hit students. It further argues there is no legal basis for the cause of action seeking attorney's fees. In support of its motion, the School District submits copies of the pleadings and excerpts of the transcripts of the deposition testimony of plaintiffs, Dylan Bauver, Feltman, and Masciello, and excerpts of its own deposition testimony. The School District also submits excerpts of

Bauver v Commack UFSD
Index No. 10-13877
Page No. 3

the deposition testimony of nonparty witnesses Julian Andrade, Peter Kravitz, Clayton Armica, and Richard Posipanko. Plaintiffs oppose the motion, arguing that it is untimely, and that deposition evidence raises a triable issue as to whether the School District had notice of DiRubba's "propensity for aggressive and bullying behavior towards his students." In opposition, plaintiffs submit an affidavit of Steven Bauver, copies of the deposition transcripts of DiRubbia, Peter Kravitz, and Julian Andrade, and a copy of a letter to the Clerk's office from plaintiffs' counsel, dated July 10, 2013, requesting that certain documents related to this action and enclosed therewith, including a note of issue and certificate of readiness, be filed.

DiRubba also moves for an order granting summary judgment in his favor, arguing that he did not hit Dylan and, even if a triable issue exists as to the alleged hitting incident, there is no evidence Dylan suffered any damages as a result. He further argues that the statements he allegedly made about Dylan at the awards dinner are not defamatory and, in any event, plaintiffs are unable to establish special harm to Dylan as a result of such statements. DiRubba's submissions in support of his motion include transcripts of plaintiffs' and Dylan Bauver's deposition testimony, a transcript of his own deposition testimony, printouts of e-mail correspondence from Robin Bauver, and copy of correspondence to Dylan from the head coach of Iona College's mens' soccer team offering a scholarship package. Plaintiffs oppose DiRubba's motion on the grounds that it is untimely and that a triable issue exists as to whether the hitting incident occurred. Plaintiffs further contend that the statements alleged in the complaint, if proven, "are, on their face, sufficiently defamatory to justify recovery if [Dylan] sustained special damages," and request leave to amend the complaint to plead special damages. In opposition to DiRubba's motion, plaintiffs submit, inter alia, a copy of plaintiffs' counsel's July 10, 2013 correspondence to the Clerk's office, an affidavit of Dylan Bauver, the deposition transcript of Julian Andrade, and copies of the original complaint, the amended complaint and the second amended complaint.

Initially, the Court notes that the transcripts of the deposition testimony of the nonparty witnesses Julian Andrade and Clayton Aronica were not considered in the determination of these motions. Significantly, plaintiffs' and defendants' submissions fail to show that such transcripts were signed and sworn to by the nonparty witnesses. There also is no indication that the transcripts were certified as accurate by the reporter and forwarded to the nonparty witnesses for review. Andrade's and Aronica's deposition transcripts, therefore, are not in admissible form and lack probative value (*see Kahan v Spira*, 88 AD3d 964, 932 NYS2d 76 [2d Dept 2011]; *Moffett v Gerardi*, 75 AD3d 496, 904 NYS2d 757 [2d Dept 2010]; *McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]; *cf. Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763, 930 NYS2d 900 [2d Dept 2011]). Further, while the affidavits of Steven Bauver and Dylan Bauver, which were signed and notarized in South Carolina, were not accompanied by certificates of conformity (*see CPLR 2309 [c]*), such affidavits were considered by the Court, as defendants have not claimed any prejudice resulting from such defect (*see Ali v Verizon New York, Inc.*, ___ AD3d ___, 982 NYS2d 903 [2d Dept 2014]; *Matos v Salem Truck Leasing*, 105 AD3d 916, 963 NYS2d 366 [2d Dept 2013]; *Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]).

Plaintiffs' contention that the motions should be denied as untimely is rejected. CPLR 3212(a)

provides that if no date for making a summary judgment motion has been set by the court, such a motion “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (see *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). The note of issue in this action was filed on July 25, 2013, when copies of the note and an affidavit of service was filed with the Clerk of the Court (see CPLR 3402), and the motions were made on November 21 and November 22, 2013 (see CPLR 2211). As the 120-day statutory period for making a summary judgment motion expired on November 22, 2013, both motions are timely.

The branch of the School District’s motion seeking dismissal of the causes of action for negligent hiring, negligent retention and negligent supervision is granted. To establish a cause of action for negligent hiring or negligent retention, a plaintiff must show that the employer knew or should have known of the offending employee’s propensity to commit the conduct that caused the plaintiff’s injury (see *Evans v City of Mount Vernon*, 92 AD3d 829, 939 NYS2d 130 [2d Dept], *lv denied* 20 NY3d 852, 957 NYS2d 689 [2012]; *Shor v Touch-N-Go Farms, Inc.*, 89 AD3d 830, 933 NYS2d 686 [2d Dept 2011]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 654 NYS2d 791 [2d Dept 1997]; *Mataxas v North Shore Univ. Hosp.*, 211 AD2d 762, 621 NYS2d 683 [2d Dept 1995]). Furthermore, a school district is under a duty to adequately supervise the students in its care and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision (see *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 907 NYS2d 735 [2010]; *Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994]; *Oldham v Eastport Union Free School Dist.*, 26 AD3d 480, 809 NYS2d 461 [2d Dept 2006]; *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342, 804 NYS2d 752 [2d Dept 2005]). A school district, however, is not an insurer of the safety of its students (see *Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372; *Doe v Orange-Ulster Bd. of Coop. Educ. Servs.*, 4 AD3d 387, 771 NYS2d 389 [2d Dept 2004]). Rather, it is expected to exercise the same degree of care towards them as would a reasonably prudent parent placed under the same circumstances and armed with the same information (*Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372; *Kelly G. v Board of Educ. of City of Yonkers*, 99 AD3d 756, 758, 952 NYS2d 229 [2d Dept 2012]; see *Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170 [2d Dept], *lv denied* 6 NY3d 701, 810 NYS2d 415 [2005]; *Dia CC v Ithaca City School Dist.*, 304 AD2d 955, 758 NYS2d 197 [3d Dept], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). Thus, as with a claim for negligent hiring or retention, to establish a claim against a school district for negligent supervision based on an employee’s tortious conduct, a plaintiff must demonstrate the school district knew or should have known of the employee’s propensity for the conduct that caused the plaintiff’s injury (see *John B. v Allegro Vivace Music School, Inc.*, 113 AD3d 800, 979 NYS2d 531 [2d Dept 2014]; *Gomez v Floral Park-Bellrose Union Free School Dist.*, 83 AD3d 778, 921 NYS2d 148 [2d Dept 2011]).

Here the School District’s admissible evidence in support of its motion was sufficient to establish a prima facie case that it had no specific knowledge that DiRubba had a propensity to strike or otherwise physically assault students (see *Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342, 804

Bauver v Commack UFSD
Index No. 10-13877
Page No. 5

NYS2d 752; *see also Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 [3d Dept 2004]). The admissible evidence submitted in opposition to the motion failed to raise a triable question as to whether the School District had notice DiRubba had a propensity to hit or engage in other similar physical conduct against students (*see Gomez v City of New York*, 304 AD2 374, 758 NYS2d 298 [1st Dept 2004]; *cf. Peter T. v Children's Vil., Inc.*, 30 AD3d 582, 819 NYS2d 544 [2d Dept 2006]). The vague, conclusory assertion in Steve Bauver's affidavit that, prior to the September 2009 incident with Dylan, parents had "voiced concerns regarding Coach DiRubba's treatment of the soccer players" is insufficient to raise a triable question as to whether the School District, in fact, had notice of the alleged physical conduct by DiRubba at issue in this action (*see Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170). In addition, the third cause of action against the School District for breach of the duty to care for students "as a parent of ordinary prudence would act in comparable circumstances" (*Hoose v Drumm*, 281 NY 54, 57-58, 22 NE2d 233 [1939]) is duplicative of the cause of action for negligent supervision (*see Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372; *Nash v Port Washington Union Free School Dist.*, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]; *Milbrand v Kenmore-Town of Tonawanda Union Free School Dist.*, 49 AD3d 1341, 853 NYS2d 809 [2d Dept 2008]). Accordingly, summary judgment dismissing plaintiffs' third cause of action is granted.

As to the motion by DiRubba for summary judgment in his favor, to establish a claim for civil assault, there must be proof of intentional conduct by the defendant placing the plaintiff in apprehension of imminent harmful or offensive contact (*see Marilyn S. v Independent Group Home Living Program, Inc.*, 73 AD3d 892, 903 NYS2d 403 [2d Dept 2010]; *Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 788 NYS2d 153 [2d Dept 2005]; *Reichle v Mayeri*, 110 AD2d 694, 488 NYS2d 15 [2d Dept 1985]). Physical injury is not required to recover for an assault, as an assault may occur "without the striking of a blow or other physical contact" (*Brown v Yasper*, 256 AD 991, 991, 10 NYS2d 502 [2d Dept 1939]; *see Reichle v Mayeri*, 110 AD2d 694, 488 NYS2d 15; *Di Gilio v William J. Burns Intl. Detective Agency*, 46 AD2d 650, 359 NYS2d 688 [2d Dept 1974]). Civil battery is an intentional wrongful physical contact with another person that is offensive in nature (*see Fugazy v Corbetta*, 34 AD3d 728, 825 NYS2d 120 [2d Dept 2006]; *Higgins v Hamilton*, 18 AD3d 436, 794 NYS2d 421 [2d Dept], *lv denied* 5 NY3d 708, 803 NYS2d 28 [2005]; *Tillman v Nordon*, 4 AD3d 467, 771 NYS2d 670 [2d Dept 2004]). DiRubba failed to meet his burden on the motion as to the fourth cause of action, as the conflicting deposition testimony of Dylan Bauver and DiRubba regarding the alleged hitting incident demonstrates the existence of a triable issue as to whether Dylan was subjected to intentional offensive contact (*see Ciminello v Sullivan*, 65 AD3d 1002, 885 NYS2d 118 [2d Dept 2009]; *Fugazy v Corbetta*, 34 AD3d 728, 825 NYS2d 120; *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 777 NYS2d 148 [2d Dept 2004]). Questions also exist as to whether Dylan suffered emotional injuries as a result of the alleged incident and, if so, the extent of such injuries. Accordingly, the branch of DiRubba's motion seeking dismissal of the fourth cause of action is denied.

Summary judgment in favor of DiRubba on the cause of action for defamation is granted. The making of a false statement which tends to expose a person to public contempt, ridicule, aversion, or disgrace constitutes defamation (*Thomas H. v Paul B.*, 18 NY3d 580, 584, 942 NYS2d 437 [2012]; *Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583 [1996]). A plaintiff seeking to recover for

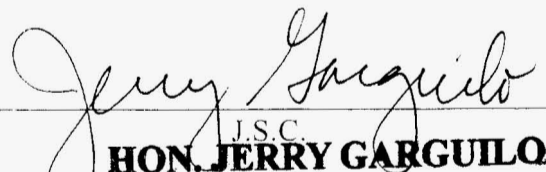
Bauver v Commack UFSD
 Index No. 10-13877
 Page No. 6

defamation must prove the defendant's publication of a false statement to a third-party, without privilege or authorization, which either caused special harm or constituted defamation per se (*see Epifani v Johnson*, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]; *Salvatore v Kumar*, 45 AD3d 560, 845 NYS2d 384 [2d Dept 2007], *lv denied* 10 NY3d 703, 854 NYS2d 104 [2008]). "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action'" (*Gross v New York Times Co.*, 82 NY2d 146, 152-153, 603 NYS2d 813 [1993], *quoting 600 W. 115 th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139, 589 NYS2d 825 [1992]; *see Thomas H. v Paul B.*, 18 NY3d 580, 942 NYS2d 437; *Brian v Richardson*, 87 NY2d 46, 637 NYS2d 347 [1995]).

Conversely, expressions of pure opinion – whether false or not, libelous or not, pernicious or not – are protected speech under the First Amendment (*see Steinhilber v Alphonse*, 68 NY2d 283, 508 NYS2d 901 [1986]; *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 397 NYS2d 943 [1977]; *Melius v Glacken*, 94 AD3d 959, 943 NYS2d 134 [2d Dept 2012]). Expressions of "mixed opinion," i.e., statements that imply they are based upon facts which justify such opinion but which are unknown to the reader or listener, however, are actionable (*see Steinhilber v Alphonse*, 68 NY2d 283, 508 NYS2d 901; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 925 NYS2d 407 [1st Dept 2011]). When tasked with distinguishing between a statement of fact and a statement of opinion, a court must consider the following factors: (1) whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) whether the statement is capable of being objectively characterized as true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal to readers or listeners that what is being heard or read is likely to be an opinion, not a fact (*Gross v New York Times Co.*, 82 NY2d 146, 153, 603 NYS2d 813; *Steinhilber v Alphonse*, 68 NY2d 283, 292, 508 NYS2d 901). DiRubba's submissions demonstrate as a matter of law that the statements he allegedly made about Dylan Bauver at the awards dinner were rhetorical hyperbole and expressions of opinion and clearly would have been recognized as such by listeners at the event (*see Versaci v Richie*, 30 AD3d 648, 815 NYS2d 350 [3d Dept 2006]; *Wanamaker v VHA, Inc.*, 19 AD3d 1011, 797 NYS2d 672 [4th Dept 2005]; *Ansorian v Zimmerman*, 215 AD2d 614, 627 NYS2d 706 [2d Dept 1995]; *see also Steinhilber v Alphonse*, 68 NY2d 283, 292, 508 NYS2d 901).

Finally, the sixth cause of action is dismissed. Generally, attorney's fees are regarded as an incident of litigation and are not recoverable absent a contractual or statutory obligation (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 511 NYS2d 216 [1986]; *Levine v Infidelity, Inc.*, 2 AD3d 691, 770 NYS2d 83 [2d Dept 2003], *lv dismissed* 3 NY3d 656, 782 NYS2d 695 [2004]). Here, the sixth cause of action alleges merely that plaintiffs have incurred attorney's fees in connection with the instant lawsuit.

Dated: May 1st, 2014


 J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION X NON-FINAL DISPOSITION