

**Matter of Drawbridge v Patchogue-Medford Union
Free Sch. Dist.**

2014 NY Slip Op 31966(U)

July 23, 2014

Sup Ct, Suffolk County

Docket Number: 09-40328

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-19-13
ADJ. DATE 2-13-14
Mot. Seq. # 005 - MD

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In the Matter of BRUNO RESTIFO
DRAWBRIDGE, an infant by his legal guardian,
BRIDGETTE DRAWBRIDGE, and
BRIDGETTE DRAWBRIDGE, individually,

Plaintiffs,

- against -

PATCHOGUE-MEDFORD UNION FREE
SCHOOL DISTRICT, PATCHOGUE-
MEDFORD UNION FREE SCHOOL DISTRICT
BOARD OF EDUCATION, RANDY E.
RUSIELEWICZ, D.D., PRINCIPAL OF SOUTH
OCEAN MIDDLE SCHOOL,

Defendants.

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DANA GROSSBLATT, ESQ.
Attorney for Plaintiffs
471 North Broadway, Suite 265
Jericho, New York 11753

DEVITT SPELLMAN BARRETT, LLP
Attorney for Defendants
50 Route 111, Suite 314
Smithtown, New York 11787

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17 - 22; Replying Affidavits and supporting papers 23 - 24; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Patchogue-Medford Union Free School District, Patchogue-Medford Union Free School District Board of Education, and Randy Rusielewicz seeking summary judgment dismissing the complaint against them is denied.

The plaintiff Bridgette Drawbridge commenced this action on behalf of herself and her infant nephew, the infant plaintiff Bruno Drawbridge, to recover damages for injuries sustained by the infant plaintiff as a result of an assault that occurred at South Ocean Middle School in the Town of Brookhaven

on March 9, 2009. The plaintiffs, by their complaint, allege that the infant plaintiff was attacked and severely beaten by numerous students on the third floor of South Ocean Middle School, which is operated by the defendants Patchogue-Medford Union Free School District and Patchogue-Medford Union Free School District Board of Education. At the time of the subject incident the defendant Randy Rusielewicz was the principal of South Ocean Middle School and the infant plaintiff was approximately 13 years old.

The defendants now move for summary judgment on the bases that their supervision of the infant plaintiff was not inappropriate or inadequate under the circumstances, and that the level of supervision provided at the time of the incident was not the proximate cause of the infant plaintiff's alleged injuries. The defendants further assert that they did not have notice of any potential danger towards the infant plaintiff, nor did they have notice of a need for greater supervision, because there was no known history of animosity between the infant plaintiff and the other students involved in the incident. In support of the motion, the defendants submit copies of the pleadings, the 50-h hearing transcripts of the plaintiffs, the parties' deposition transcripts, and the deposition transcripts of nonparty witnesses Jennifer Dailey and Anthony Procida. The plaintiffs oppose the motion on the grounds that there are material triable issues of fact as to whether the defendants had notice of the potential danger to the infant plaintiff and whether the defendants level of supervision was adequate under the circumstances. In opposition to the motion, the plaintiffs submit their own deposition and the 50-h hearing transcripts and the deposition transcript of the defendant Randy Rusielewicz.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see Boyce v Vazquez*, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

It is axiomatic that schools have a duty to adequately supervise their students, and "will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49, 614 NYS2d 372 [1994], *citing Lawes v Board of Educ. Of City of New York*, 16 NY2d 302, 306, 266 NYS2d 364 [1965]; *see Brandy B v Eden Cent. School Dist.*, 15 NY3d 297, 907 NYS2d 735 [2010]; *Decker v Dundee Cent. School Dist.*, 4 NY2d 462, 176 NYS2d 307 [1958]). Concomitantly, schools are required to exercise such care of their students as a parent of ordinary prudence under similar circumstances (*Pratt v Robinson*, 39 NY2d 554, 560, 384 NYS2d 749 [1976]). Nevertheless, schools are not insurers of safety, because they cannot reasonably be expected to continuously supervise and control all the movements and the activities of their students (*see Mirand v*

City of New York, supra; *Paragas v Comsewogue Union Free School Dist.*, 65 AD3d 1111, 885 NYS2d 128 [2d Dept 2009]). Therefore, schools will not be held liable “for every thoughtless or careless act by which one pupil may injure another” (*Lawes v Board of Educ. of City of NY*, 16 NY2d 302, 306, 266 NYS2d 364 [1965]). Furthermore, the unanticipated acts of a fellow student against another student, generally will not give rise to a school’s liability absent actual or constructive notice of prior similar conduct (see *Mayer v Mahopac Cent. School Dist.*, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]). It must be established that the school officials had sufficiently specific knowledge or notice of the dangerous conduct that caused the injury; that is, that the third-party acts could reasonably have been anticipated (see *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 907 NYS2d 735 [2010]; *Bertola v Board of Educ. of City of N.Y.*, 1 AD2d 973, 150 NYS2d 831 [2d Dept 1956]). Consequently, an injury caused by an impulsive and unanticipated act of a fellow student will not give rise to liability absent proof of prior conduct that would have put a reasonably prudent person on notice to protect against the injury-producing act (see *Schleef v Riverhead Cent. School Dist.*, 80 AD3d 743, 915 NYS2d 506 [2d Dept 2011]; *Tanenbaum v Minnesauke Elementary School*, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]; *Mayer v Mahopac Cent. School Dist.*, *supra*).

Furthermore, a plaintiff must demonstrate that the school’s negligence was the proximate cause of the injuries sustained (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]). It also must be shown that under all the circumstances, the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school’s negligence (*Parvi v City of Kingston*, 41 NY2d 553, 560, 394 NYS2d 161 [1977]; see *Dunn v State of New York*, 29 NY2d 313; 327 NYS2d 622 [1971]; *Lopez v Freeport Union Free School Dist.*, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; *Schlecker v Connetquot Cent. School Dist. of Islip*, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]).

Here, the defendants have failed to establish their prima facie burden that the assault on the infant plaintiff occurred in so short a span a time that any lack of supervision was not a proximate cause or that they did not have notice of the potential danger towards the infant plaintiff by the five students that participated in the attack (see *Weiner v Jericho Union Free School Dist.*, 89 AD3d 728, 932 NYS2d 138 [2d Dept 2011]; *Buchholz v Patchogue-Medford School Dist.*, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]; *Shaw v Metro Missions, Inc.*, 47 AD3d 802, 850 NYS2d 518 [2d Dept 2008]; *Vonungem v Morris Cent. School*, 240 AD3d 926, 658 NYS2d 760 [3d Dept 1997]; cf. *Keaveny v Mahopac Cent. School Dist.*, 71 AD3d 955, 897 NYS2d 222 [2d dept 2010]). The record reveals that on numerous occasions, prior to the March 9th incident, the infant plaintiff and the plaintiff spoke with the school psychologist and the defendant Randy Rusielewicz regarding threats of physical harm directed toward the infant plaintiff by Zachary Clerge, Joseph Iorio, Connell Owen, Jonathan Lindauer and Nicholas Natalie, the five boys involved in the assault on the infant plaintiff, as well as threats that were being made by two other boys, Atreyu Lee and Angel Cruz, who were students at the high school. In addition, the record shows the defendant Randy Rusielewicz was informed on numerous occasions about the specific threat that the infant plaintiff would be “jumped,” and that the school was made aware of an order of protection that the infant plaintiff had against Mr. Lee and Mr. Cruz. In response, the defendant Randy Rusielewicz only spoke with two of the boys, Zachary Clerge and Nicholas Natalie, whom he believed were friends of the infant plaintiff, and determined “it was a typical middle school situation,” and did not warrant further investigation.

Moreover, the defendant Randy Rusielewicz testified at an examination before trial that he did not believe that the infant plaintiff would be threatened while he was in school and that, since Atreyu Lee and Angel Cruz did not attend the middle school, he believed there was no risk of imminent harm to the infant plaintiff, despite having had previous issues with the two boys trespassing on the school's premises, "messaging" with other middle school students and being arrested for trespass on the school's property. He testified that he did not inform the infant plaintiff's teachers or the school security guard about any of the threats made against the infant plaintiff, nor did he continually monitor the situation. The defendant Randy Rusielewicz testified that he advised the plaintiff to call the police and save the threatening texts sent to the infant plaintiff, and that the infant plaintiff would not be allowed to carry his cell phone during school hours, since it was against school policy. In fact, the infant plaintiff testified at his 50-h hearing that the attack by the five boys occurred during dismissal while he was retrieving his cell phone from his locker and that there were no other classrooms located along the corridor where his locker was located. Thus, based upon this record, there are triable issues of fact as to whether the infant plaintiff sustained foreseeable injuries that were proximately caused by the defendants' inadequate supervision during dismissal (*see Commisso v Greenleaf*, 82 AD3d 1684, 919 NYS2d 682 [2d Dept 2011]; *Wilson v Vestal Cent. School Dist.*, 34 AD3d 999, 825 NYS2d 159 [3d Dept 2006] *Doe v Board of Educ.*, 9 AD3d 588, 780 NYS2d 198 [3d Dept 2004]). It is noted that the courts have consistently recognized that dismissal is a time when supervision is necessary due to the congregation of large numbers of students and the increased likelihood of fights (*Smith v Poughkeepsie City School Dist.*, 41 AD3d 579, 579, 839 NYS2d 99 [2d Dept 2007], *quoting Mirand v City of New York*, *supra* at 50-51).

Furthermore, the evidence shows that at the time of the assault on the infant plaintiff, there was no security or school personnel present, that at least 15 to 20 students watched the attack, which lasted for approximately five to six minutes, that some of the students videotaped the assault, and that the infant plaintiff was chased through the halls of the school by his attackers until he was able to run into his math teacher's classroom (*see e.g. Smith v Poughkeepsie City School Dist.*, *supra*). Indeed, nonparty witness Jennifer Daily testified at her deposition that she was the infant plaintiff's math teacher, that the infant plaintiff ran into her classroom and fell to the floor crying, and informed her that "he got jumped," and that when she stepped into the hallway she observed approximately 15 to 20 students shouting "Go Connell," and one of those students informed her that the infant plaintiff "got jumped." Additionally, nonparty witness Anthony Procida testified at his deposition that he was the only security guard stationed in the building during the school hours and that at the time of the incident he was stationed outside of the school's doors monitoring the buses during dismissal. Procida further testified that he was informed of the incident via radio transmission, that he observed the infant plaintiff walking with a limp, and that he did not conduct any interviews regarding the subject incident. Therefore, the defendants' submissions failed to establish that the incident between the infant plaintiff and the five other students occurred in so short a span of time that "even the most intense supervision could not have prevented it" (*Janukajtis v Fallon*, 284 AD2d 428, 430, 726 NYS2d 451 [2d Dept 2001]; *Buchholz v Patchogue-Medford School Dist.*, *supra*; *see Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 850 NYS2d [4th Dept 2008]; *McLeod v City of New York*, 32 AD3d 907, 822 NYS2d 562 [2d Dept 2006]). Rather, the defendants' submissions raised triable issues of fact as to whether the defendants were negligent and if so, whether that negligence was a proximate cause of the infant plaintiff's injuries (*see Gomez v Floral Park-Bellrose Union Free School Dist.*, 83 AD3d 778, 921 NYS2d 148 [2d Dept 2011]; *Commisso v Greenleaf*, 82 AD3d 1684, 919 NYS2d 682 [4th Dept

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2011]; *Doxtader v Middle Country Cent. School Dist. at Centereach*, 81 AD3d 685, 916 NYS2d 215 [2d Dept 2011]; *Shoemaker v Whitney Point Cent. School Dist.*, 299 AD2d 719, 750 NYS2d 355 [3d Dept 2002]). Accordingly, the defendants' motion for summary judgment dismissing the complaint against them is denied.

Dated: 7/23/14



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION