Tzimopoulos v Plainview-Old Bethpage Cent. Sch. Dist.
2015 NY Slip Op 32640(U)
July 13, 2015
Supreme Court, Nassau County
Docket Number: 602607-12
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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CHRISTOPHER TZIMOPOULOS, a minor by his Father and Natural Guardian, GEORGE TZIMOPOULOS, and GEORGE TZIMOPOULOS, Individually,

Plaintiff,

-against-

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT and PLAINVIEW-OLD BETHPAGE BOARD OF EDUCATION, STRATFORD ROAD ELEMENTARY SCHOOL and CLARE BURKETT,
Defendants.

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TRIAL PART: 9

NASSAU COUNTY

MOTION SEQ. NO: 2

INDEX # 602607-12

SUBMIT DATE: 06/2/15

The following papers have been read on this motion:

Notice of Motion.....1
Memorandum of Law..... 2
Opposition.....3
Reply.....4

Motion pursuant to CPLR § 3212 by defendants Plainview-Old Bethpage Central School District , Plainview-Old Bethpage Board of Education, Stratford Road Elementary School and Clare Burkett (collectively School District) for summary judgment dismissing the complaint is granted as to all defendants.

This action arises out of an incident on September 21, 2011 during recess at the Stratford Road Elementary School in which the infant-plaintiff, then an eight year old third grader, was injured when he and another student collided as they both ran to retrieve a ball from the grass during a game of wall ball. The infant-plaintiff fell to the ground and the other student fell over him.

Plaintiffs allege that defendant School District was negligent in failing, *inter alia*, to

properly supervise and monitor the infant-plaintiff, a special education student with an individualized education plan (IEP).[1]

According to the deposition testimony of the infant-plaintiff's father, under the IEP his son was assigned a one-on-one aide for his personal safety and also received physical therapy at school. The IEP, however, placed no restrictions on the infant plaintiff's activities, including running or engaging in sports (Exhibit "G" pp. 8-9: Defendants' Motion for Summary Judgment). Moreover, prior to the incident herein, neither of the infant-plaintiff's parents requested that their son's activities be restricted.

Defendant School District seeks summary judgment dismissing the complaint predicated on the grounds that it provided adequate supervision in that the recess period was actively supervised by several adults and plaintiff's one-on-one aide in a manner consistent with the IEP; any alleged failure to supervise was not the proximate cause of the infant-plaintiff's injury which occurred suddenly and unexpectedly; and defendant School District employees were qualified for the positions they held and were trained to deal with the infant-plaintiff's special needs.

In opposition to defendant School District's motion, plaintiffs counter that the School District was not only aware of the dangers to which the infant-plaintiff would be exposed if he were allowed to play wall ball but increased his risk of injury by allowing him to play. In so doing, defendant School District breached its duty of care to ensure the infant-plaintiff's safety under the IEP.

According to the affidavit of plaintiff's expert, "an expert in the field of education and school administration (Exhibit "F": Plaintiffs' Opposition to Defendants' Motion for Summary Judgment), based on the infant-plaintiff's IEP, and his disability and medical classification, he should not have been allowed by defendant Burkett, his one-on-one aide, or the physical education teacher who supervised the children's activities during the recess period, to participate in the wall ball game. Moreover, the expert opines that the proximate cause of the infant-plaintiff's injuries

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[1]An IEP is developed jointly by a school official, the child's teacher and parents and, where appropriate, the child. It details the specific needs of a disabled child and the services which are to be provided to serve the individual needs of that child (*Matter of Northeast Cent. School Dist. v Sobol*, 79 NY2d 598, 603 [1992] [quotation marks and citations omitted]).

was:

> "the failure of the District to adequately inform and train [defendant] Burkett about [the infant-plaintiff's] disability and limitations and her failure to appropriately and reasonably supervise [the infant-plaintiff] during recess by allowing him to play wall ball or be in an area with other students playing wall ball."

Because of the infant-plaintiff's physical disability, the expert opines that it was foreseeable that he could fall and become injured while playing.

It is well settled that schools have a duty to adequately supervise their students and will be liable for foreseeable injuries proximately related to the absence of adequate supervision (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). Schools, however, are not insurers of the safety of their students (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 147 [2d Dept 2011]) and generally will not be held liable for the unanticipated acts of a third party unless the school district could have reasonably anticipated such acts (*Mirand v City of New York,* 84 NY2d 44, 49 [1994]). The standard for determining whether the school has breached its duty is to compare the school's supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information (*Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 828 [2d Dept 2015]). A teacher owes it to his or her students to exercise such care of them as a reasonably prudent parent would exercise in comparable circumstances (*Khosrova v Hampton Bays Union Free Sch. Dist.*, 99 AD3d 669, 670 [2d Dept 2012]).

Plaintiffs' papers in opposition to defendant School District's motion, even when viewed in the light most favorable to plaintiffs (*Rollins v Fencers Club, Inc.*, 128 AD3d 401 [1st Dept 2015]), fail to raise a triable issue of fact on the issues of proximate cause and/or adequate supervision.

The plaintiff's conclusory claim that the infant-plaintiff's aide, defendant Burkett, was not adequately informed of – and trained to deal with – his disability and safety needs thereby placing him in a dangerous situation is insufficient to defeat summary judgment. According to her deposition testimony (Exhibit "D", Plaintiffs' Opposition to Defendants Motion for Summary

Judgment, pp. 26-28), defendant Burkett was informed of the infant-plaintiff's diagnosis and "knew specifically what he needed in order to maintain himself." Further, defendant Burkett testified that she

> "can have access to any type of medical document that pertains to a student including their individualized educational progress reports"

and that all the information she needed was

> "provided to [her] by Dr. Savage and [her] principal to safeguard [the infant-plaintiff] effectively as [she] did."

Notwithstanding assertions to the contrary by plaintiff's expert, it appears from her testimony that the infant-plaintiff's aide was aware that she needed to be in close proximity to plaintiff throughout the school day and was within ten feet of him when the accident occurred.

Inasmuch as the infant-plaintiff's IEP placed no restrictions on his activities, and his parents, who attended meetings with the Committee on Special Education and participated in the formulation of the IEP, made no request for any such restrictions, there is no foundational support in the record to substantiate the speculative and conclusory opinion proffered by plaintiffs' expert that the defendant School District and/or defendant Burkett breached a duty to provide adequate supervision to the infant-plaintiff or that defendant School District failed to adequately inform and train defendant Burkett *vis-a-vis* the infant-plaintiff's disability and limitations.

Accordingly, defendant School District's motion for summary judgment dismissing the complaint as to the individual defendants is granted. In response to defendant School District's *prima facie* showing of entitlement to summary judgment, plaintiffs failed to show the existence of a material issues of fact which require a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1968]).

Assuming that the infant-plaintiff's condition warranted a degree of supervision greater than that which would be warranted in the case of a non-special education student, there is no basis to conclude, based on the record, that defendant School District was negligent. When an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury (*Odekirk v Bellmore-Merrick Cent.*

School Dist., 70 AD3d 910, 911 [2d Dept 2010]). Short of prohibiting children with disabilities from engaging in physical activities, there is no way to insure that accidents will not occur. The mere happening of an accident is not probative of negligence (*Ancewicz v Western Suffolk BOCES*, 282 AD2d 632, 634 [2d Dept 2001]).

This constitutes the decision and order of this Court.

ENTER

DATED: July 13, 2015

HON. ARTHUR M. DIAMOND
J. S.C.