

**Donofrio v Rockville Ctr. Union Free Sch. Dist.**

2015 NY Slip Op 32804(U)

March 31, 2015

Supreme Court, Nassau County

Docket Number: 8017/13

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

-----X PART 6

JAKE DONOFRIO, an infant under the age of 14 years, by his father and natural guardian, ALBERT DONOFRIO, and ALBERT DONOFRIO, individually.

Plaintiffs,

INDEX NO. 8017/13  
MOTION DATE: 02/13/15  
SEQUENCE NO. 001

-against-

ROCKVILLE CENTRE UNION FREE SCHOOL DISTRICT, SOUTH SIDE MIDDLE SCHOOL, COURTESY BUS CO., INC., ATLANTIC EXPRESS TRANSPORTATION CORP., "JOHN DOE", the name being fictitious, DAUNTLESS AUTO INC., JEREMY E. MORRISEY and GUISEPPE DIPAOLA,

Defendants

-----X

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Upon the foregoing papers, defendants', Rockville Centre Union Free School District and South Side Middle School (hereinafter the "School District") motion pursuant to CPLR Rule 3211(a)(7) and Rule 3212 ( c), dismissing the plaintiff's complaint and any cross claims and granting summary judgment in favor of the School District, is granted.

The within action arises out of an accident involving the infant plaintiff, Jake Donofrio, who was a 7<sup>th</sup> grade student on December 17, 2012, the date of the accident.

On the date of the accident, at the conclusion of the school day, it is alleged that the infant plaintiff was refused entry to his usual school bus. The infant plaintiff alleges he was unable to

locate his school bus pass and that the school bus driver was not the usual bus driver. The bus driver on the date of accident would not let the infant plaintiff on the school bus without his bus pass. The school bus in question was allegedly owned and operated by the defendant, Courtesy Bus Co., Inc. and/or defendant, Atlantic Express Transportation Corp. (hereinafter "Atlantic"). The aforesaid defendant bus companies had entered into a contract with the School District to provide bus transportation to the students of the School District.

After being refused entry to the school bus the infant plaintiff is alleged to have made a telephone call to his mother, requesting that she pick him up from the South Side Middle School. After contacting his mother the infant began to walk from the school grounds to meet his mother. The infant's mother began driving to infant plaintiff's school to pick him up but before he was met by his mother the infant plaintiff was struck, while crossing the street, by an automobile owned by the defendant, Dauntless Auto Inc. and/or defendant, Jeremy E. Morrissey and operated by the defendant, Guiseppe DiPaola. The accident occurred on Lakeview Avenue, approximately 75 feet west of Forest Avenue in the Village of Rockville Centre, New York.

At this point in the prosecution of the action, the infant plaintiff and his father have appeared for depositions pursuant to General Municipal Law § 50(h). The action had been "stayed" due to the bankruptcy filing of the defendant Atlantic. According to the School District's attorney the bankruptcy stay was lifted sometime in August of 2014; however, no order from the Bankruptcy Court evidencing the lifting of the stay is provided to this Court.

The school district moves to dismiss the plaintiff's complaint pursuant to CPLR Rule 3211 (a)(7), arguing that the complaint fails to state a cause of action. The thrust of the School District's argument is that having been denied entry to the school bus and then having called his mother to get a ride home from school, the infant's mother "reassumed" custody and control over her son and therefore the infant plaintiff "had passed out of the orbit of the District's authority" so that the School District's custodial duty had ceased.

In considering a motion to dismiss for failure to state a cause of action the "pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]; *Fuller v Collins*, 114AD3d 827, 982

[\*3]

*NYS2d 484 [2014]; Kopelowitz & Co., Inc. v Mann, 83 AD3d 793, 797, 921 NYS2d 108 [2011]; Panish v Panish, 24 AD3d 642, 808 NYS2d 325 [2005]] & Co., 5 N.Y.3d 11 (2005)". *Michaan v. Gazebo Horticultural, Inc., supra*. at 692. The "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (*Guggenheimer v. Ginzberg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977)*). Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (2005)*; see also, *Sokol v. Leder, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010)*).*

In the present case the plaintiffs' complaint fails to set forth allegations, which taken together, manifest a cause of action against the School District.

"A school's duty to supervise the students in its charge arises from its physical custody over them (see *Pratt v Robinson, 39 NY2d 554, 560, 349 N.E.2d 849, 384 N.Y.S.2d 749; Begley v City of New York, 111 AD3d 5, 23, 972 N.Y.S.2d 48*). The rationale underlying this duty is that when a school takes custody of a child, it deprives the child of the protection of his or her parents or guardian, and thus must give the child the protection of which the child has been deprived (see *Pratt v Robinson, 39 NY2d at 560; Begley v City of New York, 111 AD3d 5, 972 N.Y.S.2d 48*). For this reason, a school's duty to supervise is generally viewed as being coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases (*Pratt v Robinson, 39 NY2d at 560; see Begley v City of New York, 111 AD3d 5, 972 N.Y.S.2d 48*)" (*Giresi v. City of New York, 2015 N.Y. App. Div. LEXIS 852, 2015 NY Slip Op 00844 [2<sup>nd</sup> Dept. 2015]*).

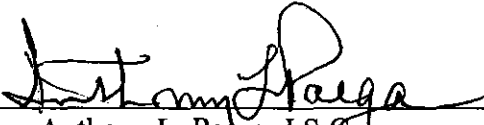
The School District has made a *prima facie* showing that they are entitled to judgment as a matter of law. The infant plaintiff, at the time of the accident, (even when the facts and allegations of the complaint are viewed most favorably to the plaintiff) had passed from the custody and control of the School District to that of his mother, and under these circumstances, the School District no longer had a duty of care. (*Williams v. Weatherstone, 23 N.Y.3d 384, 15*

[\* 4]  
N.E.3d 792, 991 N.Y.S.2d 779 [2014]; *Ritchie v. Churchville-Chili Central School District*, 122 A.D.3d 1265, 996 N.Y.S.2d 421 [ 4<sup>th</sup> Dept. 2014]).

Accordingly, the motion of the School District is granted and the plaintiff's action , as against the School District, only, as well as any cross claims asserted by the co-defendants, are dismissed.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: March 31, 2015

  
Anthony L. Paiga, J.S.C.

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