

Tinto v Yonkers Bd. of Educ.

2016 NY Slip Op 31209(U)

April 27, 2016

Supreme Court, Westchester County

Docket Number: 60759/12

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH
Supreme Court Justice**

-----X
**ANTONIO TINTO by His Mother and Natural Guardian,
LORRAINE TINTO,**

**MOTION DATE: 4/22/16/16
INDEX NO.: 60759/12**

Plaintiff,

-against-

YONKERS BOARD OF EDUCATION,

Defendant.

-----X
The following papers numbered 1 to 6 were read on this motion by defendant for an Order pursuant to CPLR 4404, subdivision (a), setting aside the jury's verdict, etc.

Papers Numbered

Notice of Motion - Affirmation (Redmond) - Exhs. (A-E)	1-3
Answering Affirmation (Sayegh) - Exh.	4-5
Replying Affirmation (Redmond)	6

Upon the foregoing papers, it is Ordered that this motion by defendant for an Order pursuant to CPLR 4404, subdivision (a), setting aside the jury's verdict and dismissing this action based upon the applicable doctrine of primary assumption of risk or, alternatively, for an Order directing a new liability trial in this action based upon the jury's verdict being

against the weight of the evidence and/or in the interests of justice, is disposed of as follows:

This is a personal injury action arising from then 16-year old plaintiff Antonio Tinto's participation in a tackle football game, on September 3, 2012, immediately prior to the start of the school year on Labor Day weekend, on a grass field adjacent to and maintained by Yonkers School 27, on Valentine Lane, Yonkers.

On June 22, 2015, this Court (Connolly, J.) had denied defendant's motion for summary judgment dismissing the claim, finding that defendant had failed to meet its prima facie burden for dismissal premised upon its urged doctrine of primary assumption of the risk. Justice Connolly specifically had held that "the hole into which Antonio fell is so sharply pronounced that it cannot be said, even assuming he was aware of the hole, that falling into it is one of the 'known, apparent, natural, or reasonably foreseeable consequences of the participation.'" Further, Justice Connolly had held that the facts that Antonio previously had played on this field and had been aware of the offending hole prior to his fall was relevant only to the issue of Antonio's comparative negligence, if any, and "not whether primary assumption of the risk applies to the instant matter."

A 3-day liability trial before the undersigned had commenced, on January 12, 2016. This Court's recollection is that defendant had moved for a directed verdict in its favor at the close of plaintiff's case, which this Court had denied, and that defendant had renewed its application for a directed verdict dismissing this action at the close of the trial, which this Court also had denied. The jury subsequently had returned a liability verdict against defendant, whereupon defendant had made an oral application for judgment in its favor notwithstanding the jury's verdict. In part, defense counsel had argued that the jury's

finding of 0 percent liability of plaintiff was against the weight of the credible evidence. Defendant has filed appeals both of Justice Connolly's Decision and Order, and the jury's verdict.

Defendant presently is moving for an Order pursuant to CPLR 4404, subdivision (a), setting aside the jury's verdict and dismissing this action based upon the doctrine of primary assumption of risk and, alternatively, for an Order directing a new liability trial in this action based upon the jury's verdict being against the weight of the evidence and/or in the interests of justice. CPLR 4404, subdivision (a), provides "that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice ..."

Once again, defendant, relying upon the Court of Appeals' Decision in Morgan v. State, 90 N.Y.2d 471 (1997) and a litany of cited Second Department Decisions, argues that presented is a classic case of a plaintiff's primary assumption of the risks associated with participation in a recreational activity and that proper application of said doctrine bars plaintiff's recovery herein. Defendant submits that the record clearly establishes that plaintiff had been aware of the existence of the hole in the football playing field, that indeed plaintiff and his teenage friends had created the field's parameters with certain adjustments for the offending hole and additionally had placed a "book bag warning" near it, that the risks presented by the hole had been known, apparent or reasonably foreseeable to plaintiff notwithstanding his infancy, and that plaintiff voluntarily had chosen to participate in the football game, thereby legally having assumed the risks of injury.

Plaintiff opposes the motion but, as an initial matter, this Court is constrained to note

that plaintiff's opposition papers had been filed "nearly two weeks late" and that defendant objects to this Court's consideration of same, notwithstanding that defendant itself had been granted additional time to serve its motion and that it had ample time in which to serve its replying papers. In light of this Court's finding infra that defendant has failed to carry its burden on this motion, the Court necessarily finds the issue of whether it properly may consider plaintiff's opposition papers is moot.

Defendant has continued to argue herein, as it unsuccessfully had done on its summary judgment motion and in its several oral applications at trial to have judgment entered in favor of defendant, that the doctrine of primary assumption of risk and the undisputed facts at bar preclude plaintiff's recovery herein. The inescapable fact, however, is that, Justice Connolly, a jurist of coordinate jurisdiction, previously had determined in no uncertain terms that the subject hole in the field had been "so sharply pronounced" that, regardless of whether plaintiff had been aware of its existence, "it cannot be said" that the hole was "one of the 'known, apparent, natural, or reasonably foreseeable consequences' of participating in the game of football." This pronouncement is law of the case, see Hampton Val. Farms, Inc. v Flower & Medalie, 40 A.D.3d 699 (2nd Dept. 2007), and it refutes defendant's motion seeking vacature "as a matter of law." This Court cannot and will not review such determination, which instead shall be left for appellate review.

As to the remainder of defendant's request for alternative relief pursuant to CPLR 4404, subdivision (a), predicated on the jury's finding that no liability is attributable to plaintiff, said motion too is hereby denied. It is well settled that the fact-finding function of a jury is to be accorded great deference by the trial Court, Gamiel v. University Hospital, 216 A.D.2d 80 (1st Dept. 1995), lv. to app. dsmd. 87 N.Y.2d 911 (1996), and that a motion

pursuant to CPLR 4404, subdivision (a), to set aside the jury's verdict as being against the weight of the evidence should be exercised only with "considerable caution." Pickering v. New York City Transit Authority, 299 A.D.2d 402 (2nd Dept. 2002). "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (see Torres v. Esaian, 5 A.D.3d 670, 671)." Pearson v. Walker, 44 A.D.3d 1019 (2nd Dept. 2007). Indeed, a motion pursuant to CPLR 4404, subdivision (a), may not properly be granted unless the Court finds that "the jury's determination is palpably incorrect," Johnson v. New York City Health & Hospitals Corp., 246 A.D.2d 88 (1st Dept. 1998), and that the "jury could not have reached its verdict on any fair interpretation of the evidence (Citations omitted)," Yalkut v. City of New York, 162 A.D.2d 185, 188 (1st Dept. 1990); see also Kennedy v. County of Westchester, 295 A.D.2d 572 (2nd Dept. 2002); White v. Gasparini, 295 A.D.2d 422 (2nd Dept. 2002); Aprea v. Franco, 292 A.D.2d 478 (2nd Dept. 2002), there being "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial. (Citations omitted)" Nicastro v. Park, 113 A.D.2d 129 (2nd Dept. 1985).

Such simply cannot be found in the case at bar. As defendant concedes, the issue of this teenage plaintiff's understanding of the "obvious risks" presented by the hole in the playing field and his voluntary assumption of those risks necessarily involves consideration of plaintiff's age, maturity, background and skill. See Morgan v. State, *supra*, 90 N.Y.2d at 486; Hyde v. North Collins Cent. School Dist., 83 A.D.3d 1557 (4th Dept. 2011); Joseph v. New York Racing Ass'n, Inc., 28 A.D.3d 105, 108 (2nd Dept. 2006). Here, Antonio had testified and the jury consequently had been able to assess and make certain decisions

regarding Antonio's experience, skill, appreciation and understanding of the risks of his playing tackle football on that field. Upon all of the circumstances presenting, this Court cannot find that the jury's finding that plaintiff shares no comparative negligence for the happening of his injury is not based upon a fair interpretation of the evidence and that said determination is "palpably incorrect."

Motion denied.

Dated: April 27, 2016
White Plains, New York



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J.S.C.

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