DeCastro v Center Moriches Sch. Dist.

2016 NY Slip Op 32532(U)

November 4, 2016

Supreme Court, Suffolk County

Docket Number: 14-5112

Judge: W. Gerard Asher

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This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 14-5112
CAL. No. 15-02264OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-21-16
ADJ. DATE 5-24-16
Mot. Seq. #001 - MD

COURTNEY DECASTRO, an infant by her mother and natural guardian, REALENE DECASTRO and REALENE DECASTRO, Individually,

Plaintiffs,

- against -

CENTER MORICHES SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 36 read on this motion by defendant for summary judgment dismissing the complaint ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33 - 34 ; Replying Affidavits and supporting papers 35 - 36 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Center Moriches School District for summary judgment dismissing the complaint is denied.

Plaintiff Realene DeCastro ("Realene"), individually and on behalf of her then seven-year-old daughter Courtney DeCastro ("Courtney"), commenced this action to recover damages for personal injuries Courtney allegedly suffered on April 15, 2013 at Clayton Huey Elementary School in Center Moriches, New York. It is alleged that, during recess in the schoolyard of Courtney's elementary school, she suffered a fractured front tooth when playing on a spiral slide.

It is alleged that four other children were permitted to descend the slide simultaneously with Courtney, causing her to strike her face on a vertical support column in the center of the slide. Plaintiffs allege that defendant Center Moriches School District, as owner of the school, was negligent by reason of improper supervision of children on the playground equipment.

Defendant now moves for summary judgment in its favor dismissing the complaint. In support of its motion, defendant has submitted copies of the pleadings; plaintiffs' notice of claim; plaintiffs' bill of particulars; a copy of a "Student Incident Form"; several photographs; transcripts of the plaintiffs' examinations pursuant to General Municipal Law §50-h; transcripts of the plaintiffs' depositions; a transcript of the deposition of Gina Henaghan, who worked as a recess monitor on the Clayton Huey Elementary School playground at the time of the incident in question; and an affidavit by Ms. Henaghan to supplement her deposition testimony. Plaintiffs' opposition consists of an attorney's affirmation.

Courtney testified at a 50-h municipal hearing on November 7, 2013 and was deposed on March 30, 2015. At the municipal hearing, Courtney testified that on the day in question she was at recess and playing on the spiral slide with other second-grade students. She testified that the students had been advised at the start of the school year as to the rules for use of the playground equipment. Specifically with regard to the slide, only one student was permitted to go down the slide at a time and there was to be no pushing, shoving or hitting. She testified that some of the other students pushed and shoved her prior to the time when she was allegedly injured and that a monitor saw them and told them to stop, but that they continued to do so. She also testified that she had gone down the slide approximately three times before the incident, that other students went down at the same time, that they were told both on that day and on prior days not to go down the slide while another student was still on it, but that the students continued to do so. Courtney stated that, if the monitors saw that students were misbehaving on the equipment and not listening to directions, "they would tell them to sit on the bench for a couple of minutes and then go back to the playground."

Courtney further testified that at one point that day she began to go down the slide and got approximately half-way down when another student slid down behind her and made contact with her arm and her back. Following that, four other students also came down the slide and Courtney testified that "they all were shoving me," that she "squished [her] feet in the pole" and that she held on to the support pole to stop herself from going further down the slide. At her subsequent deposition, Courtney also testified that she was holding onto the pole in order to let the other students go down the slide past her. Courtney stated that it began to hurt her and when she lifted her feet she slid into the pole, striking her face and knocking out her tooth. Courtney and one of the other students then went to a monitor to report the incident, she was taken to the school nurse, her father picked her up and she went to a pediatric dentist and later to Stony Brook Hospital.

Plaintiff Realene DeCastro testified at her November 7, 2013 municipal hearing that she was at work on the day in question and received a call from the school nurse advising her that her daughter has been injured on the playground coming down the slide. She testified at her March 30, 2015 deposition that the nurse told her that her daughter had fractured her adult tooth on the playground. Realene stated that Courtney told her that she was coming down the slide, that several children came down behind her and that she got stuck and wedged on the side of the slide and her face hit the pole. Realene testified that Courtney had never been injured on the playground before the incident in question and that she had never made any complaints to the school district regarding supervision on the playground.

Gina Henaghan (Henaghan) was deposed on October 26, 2015. She testified that on April 15, 2013 she was employed by defendant as a recess monitor and was assigned to the playground at Clayton Huey Elementary School. She testified that the school policy regarding proper use of the playground equipment was "passed onto us as part of our job requirements," that on the first day of recess during the school year the monitors would go over with the students the proper use of the equipment and that "the administrators as well as the classroom teachers are supposed to go over proper use of the equipment outside as well." Henaghan testified that during the recess period in question there were approximately 100 to 115 second grade students outside with five monitors plus some paraprofessionals with their special education students. On that day Henaghan and another monitor named Tina were assigned to the area of the schoolyard that contained the playground equipment, Henaghan in the front near the slide and Tina in the rear near the "monkey bars." Approximately five to ten minutes after the start of recess, Henaghan observed several students, including Courtney, going down the slide improperly; specifically, "they were bunching up, one would start, it was like a train, that they were trying to do a train down the slide." Henaghan testified that she stood at the bottom of the slide as the students were coming down and "redirected" them as to the proper use of the playground equipment. She further testified that she spoke to the students again less than three minutes later because they were continuing the same behavior and that Tina also spoke to them less than five minutes after that. During her testimony, Henaghan initially stated that it was only a minute or two between when she spoke with the students and the time that Courtney came to her injured but she subsequently testified that it was "probably four to five minutes" after Tina spoke with the students that Courtney approached her. Henaghan testified that she did not witness the specific incident in which Courtney was allegedly injured because another student came to her asking for her help tying his sneakers. She bent down to assist that student and when she was finished she stood up, picked up her clipboard and was then approached by Courtney and her friend regarding the alleged injury. She estimated that it took "a minute, two minutes" to help the other student.

During her deposition, Henaghan was asked if prior to the incident date she had ever "prohibited a student from using the slide, put them off the slide and withdrew their privilege to use the slide" and she stated, "Me personally, no." When asked if she had ever seen that done,

Henaghan responded, "Yes" but also testified that on the day in question no one had withdrawn the privilege of those students to use the slide before Courtney"s alleged injury. She also testified that she had no knowledge of any other incidents of student injury on the spiral slide. In her supplemental affidavit, Henaghan states that she told the involved students that if they went down the slide in tandem again they would receive a time out, but that she did not do so immediately "because [she] never had a problem with these girls ", that they had "always followed [her] directions prior to th[at] occasion" and that she "fully expected the girls to listen to [her] as they always had."

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; 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]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing 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]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364 [1974]; ***Elzer v Nassau County***, 111 AD2d 212; 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

While not insurers of the safety of their students, schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*see* ***Mirand v City of New York,*** 84 NY2d 44, 614 NYS2d 372 [1994]; ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2d Dept 2006]). "[A] school is obligated to exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances" (***Krumbiegel v Riverhead Cent. School Dist.***, 37 AD3d 766, 830 NYS2d 762 [2d Dept 2007]; *see* ***David v County of Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]). The record contains uncontradicted evidence that a group of students including Courtney were engaged in improper and prohibited

conduct on the spiral slide for a period of time before Courtney was injured. Issues of negligence, proximate cause, and forseeability are generally best left to a jury for resolution, even when the facts are undisputed (***Mei Cai Chen v Everprime 84 Corp.***, 34 AD3d 321, 825 NYS2d 184 [1st Dept 2006]; ***Vaswani v Martin***, 278 AD2d 96, 717 NYS2d 533 [1st Dept 2000]; ***Rotz v City of New York***, 143 AD2d 301, 532 NYS2d 245 [1st Dept 1988]). Questions of fact exist herein, *inter alia*, as to the reasonableness of the monitors' conduct and whether, when the students were not following directions regarding conduct on the slide, the monitors' failure to take additional measures to halt the improper conduct amounted to a failure to adequately supervise and was a proximate cause of Courtney's injury. It cannot be said as a matter of law that a jury could not so find.

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: Nov. 4, 2016

W. Gerard Asher
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION