

**Fiden v Williamsville Cent. Sch. Dist.**

2016 NY Slip Op 32811(U)

November 22, 2016

Supreme Court, Erie County

Docket Number: 807904/2014

Judge: E. Jeannette Ogden

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie on the 22<sup>nd</sup> day of November, 2016.

STATE OF NEW YORK  
COUNTY OF ERIE: SUPREME COURT

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ALEXA FIDEN

Plaintiff

**ORDER**

v.

**Index No.: 807904/2014**

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT and  
WILLIAMSVILLE SOUTH HIGH SCHOOL

Defendants

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**APPEARANCES:**

Lipsitz Green Scime Cambria LLP, by Max Humann, Esq. for the Plaintiff, Alexa Fiden

Hurwitz & Fine, P.C. by Jody E. Briandi, Esq. and Tessa R. Scott, Esq., for Defendants, Williamsville Central School District and Williamsville South High School

**PLEADINGS REVIEWED:**

Notice of Motion for Summary Judgment, Attorney Affidavit in Support of Motion for Summary Judgment of Jody E. Briandi, Esq. with Exhibits, and Memorandum of Law in Support of Defendant's Motion for Summary Judgment.

Reply Affirmation of Max Humann, Esq. with Exhibit

Attorney's Reply Affidavit in Further Support of Defendant's Motion for Summary Judgment of Tessa R. Scott, Esq.

Defendants, Williamsville Central School District and Williamsville South High School, move pursuant to CPLR §3212, for an Order granting summary judgment dismissing Plaintiff's complaint for damages for personal injuries she sustained to her left arm when she slipped and fell into another student allegedly as a result of a dangerous condition, to wit: a broken stage set on Defendants' property, during her performance in a school play. Defendants' maintain that Plaintiff assumed the risks associated with her voluntary participation as a cast member in the school play where she attended school, including the risks of the stage area; that there is no evidence a defective condition existed or that said condition was the proximate cause of Plaintiff's fall; and alternatively, that Defendants did not create, nor have prior actual or constructive notice of the alleged dangerous condition that caused Plaintiff's injury. Therefore, Plaintiff's complaint must be dismissed.

Plaintiff opposed Defendants' motion alleging that questions of fact exist regarding Defendant's negligence as a result of the size of the stage being decreased due to the incorrect placement of a piece of the stage set which caused Plaintiff to collide with another student and whether Defendants' were negligent for failing to instruct the students on what to do if a stage prop was in the wrong place and failing to ensure that all of the student performers were in the right place. Plaintiff also contends that whether these factual questions impact the normal and ordinary risk associated with dancing is a further question of fact which precludes summary judgment.

Oral argument of the motions was heard by this Court on November 22, 2016 and thereafter decision was reserved.

NOW, upon review of the aforementioned pleadings, consideration of the oral arguments of Counsel and due deliberation having been had thereon, it is hereby

**DETERMINED** that Defendants failed to establish, prima facie, that the doctrine of assumption of risk bars the Plaintiff's recovery. Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the activity generally and flow from such participation. (*Brown v Roosevelt Union Free School District*, 130 A.D.3d 852, 853, 14 N.Y.S.3d 140, quoting *Morgan v State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202) This would include risks associated with the surface of the stage and any open and obvious condition on it. Participants are not deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks. (*Id*)

The evidence established herein is that Plaintiff fell during the opening night of the performance. She was on stage with approximately 20 girls (Defendants' Exhibit J, pg. 54, lines 12-23). The set in question broke during the prior scene and the crew members were unable to freely maneuver the set as a result of the damage that occurred in the previous scene, so they just placed it in the incorrect spot (Defendant's Exhibit J, page 70). The placement of the damaged set caused Plaintiff and the other girls to be "smushed together" and decreased the amount of space that had been between them during rehearsals. When the girls broke up into separate lines, they were closer together because they had to accommodate for the placement of the broken set. (Defendants' Exhibit J, page 68). Plaintiff was injured when she collided with another cast member and fell.

The musical director and choreographer acknowledged that if the spacing during the performance was different than it was during the rehearsals, the performers would possibly collide with each other (Defendant’s Exhibit J, page 79)

The testimony as to the reduced area of space available for the performers to dance due to the placement of the set in the incorrect spot creates a question of fact as to whether the incorrect placement unreasonably increased the inherent risks of the dance performance. In addition, Defendants have failed to establish, prima facie, that they did not create or have actual or constructive notice of the alleged incorrect placement of set.

In light of the Defendants’ failure to establish their prima facie entitlement to judgment as a matter of law, it is


**ORDERED** that Defendants motion is **DENIED**.

  
**HON. E. JEANNETTE OGDEN, J.S.C.**

ENTER:

**GRANTED**

FEB 24 2017

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