

Arrasate v Westhampton Beach UFSD

2017 NY Slip Op 30508(U)

March 17, 2017

Supreme Court, Suffolk County

Docket Number: 13-30421

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-24-16 (005)
MOTION DATE 6-16-16 (006)
ADJ. DATE 9-22-16
Mot. Seq. # 005 - MD
006 - MG

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SAMANTHA ARRASATE, a minor by her parents and natural guardians, STEPHEN ARRASATE AND CORINNE ARRASATE, and STEPHEN ARRASATE and CORINNE ARRASATE, Individually,

Plaintiffs,

- against -

WESTHAMPTON BEACH UFSD, a/k/a WESTHAMPTON BEACH SCHOOL DISTRICT, WESTHAMPTON BEACH UFSD BOARD OF EDUCATION, a/k/a WESTHAMPTON BEACH SCHOOL DISTRICT BOARD OF EDUCATION, THOMAS SHEPPARD, CHARISSE MILLER, KATHRYN SWEZEY, MICHAEL RADDAY, WILLIAM FISHER, MARIA DORR, SUZANNE MENSCH, HALSEY C. STEVENS, DR. G. GREGORY FROST, JAMES N. HULME, BRYAN DEAN, GEORGE R. KAST, JR., GORDON A. WERNER, and LISA HANNAFORD,

Defendants.

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Upon the following papers numbered 1 to 53 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; 23 - 34; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 20; 35 - 50; Replying Affidavits and supporting papers 21 - 22; 51 - 53; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiffs and the motion by defendants Westhampton Beach Union Free School District, Westhampton Beach School District Board of Education, Charisse Miller, Kathryn Swezey, Michael Raddy, William Fisher, Maria Dorr, Suzanne Mensch, Halsey Stevens, Dr. G. Gregory Frost, James Hulme, Bryan Dean, George Kast, Jr., Gordon Werner, and Lisa Hannaford (hereinafter referred to collectively as the School District defendants) are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability as against defendant Thomas Sheppard is denied; and it is further

ORDERED that the motion by the School District defendants for summary judgment dismissing the complaint against them is granted.

On February 26, 2013, defendant Thomas Sheppard, who at the time was a physical education teacher at Westhampton Beach Middle School, hid his cell phone in the girls' locker room in an attempt to record students as they were changing. One of the students discovered the cell phone, stopped the recording, and saw defendant Sheppard's face when she played the video. A few of the students, including infant plaintiff, were informed of the discovery and they put the cell phone back where they found it. Some of the students went to inform the school principal, defendant Charisse Miller, of the incident but she was meeting with Sheppard in her office. Thereafter, the students spoke to defendant Kathryn Swezey, a guidance counselor, about the incident.

At Sheppard's meeting with Miller, he told her that he had accidentally left his cell phone in the girls' locker room, that it may have recorded something, and that he had deleted the recording. Miller directed Sheppard to the school's technology personnel to retrieve the video, but they were unable to retrieve it. Thereafter, Miller requested that infant plaintiff and a few of the other girls involved in the incident meet in her office while Sheppard was present so he could apologize and explain his cell phone was left in the locker room by accident. After the meeting, Miller contacted the girls' parents to inform them of the incident and defendant Westhampton Beach School District Superintendent, Michael Radday, who also met with defendant Sheppard. At some point after the incident, the police were contacted. On December 18, 2013, defendant Sheppard was convicted of unlawful surveillance in the second degree and endangering the welfare of a child.

Subsequently, plaintiffs Stephen Arrasate and Corinne Arrasate commenced this action on behalf of themselves and their daughter, infant plaintiff Samantha Arrasate, to recover damages for injuries they allegedly suffered as a result of the subject incident. The complaint asserts causes of action for negligence, negligent supervision and negligent training.

Plaintiffs now move for summary judgment on the issue of liability on their causes of action against defendant Sheppard for negligence, intentional infliction of emotional distress, and negligent

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infliction emotional distress, arguing that no issue of fact exists, as he admitted in his deposition testimony to intentionally placing his cell phone in the girls' locker room to record them changing and was criminally convicted for his conduct. In support of their motion, plaintiffs submit, among other things, copies of the pleadings, a transcript of defendant Sheppard's plea allocution, excerpts of the deposition testimony of defendant Sheppard, and affidavits of plaintiffs and an affidavit Yael Aboulafia, a psychologist. The School District defendants oppose the motion to the extent that it pertains to them.

Here, the complaint alleges four causes of action against defendant Sheppard. The fourth, thirteenth, twenty-second, and twenty-ninth causes of action against defendant Sheppard are almost identical, alleging that he "undertook a duty to care, supervise and be responsible for the safety of the infant plaintiff," and that he intentionally breached his duty to care and be responsible for the safety of infant plaintiff, creating an unreasonable risk of bodily harm. While plaintiffs' counsel asserts in the motion papers that plaintiffs seek summary judgment on the issue of liability on the causes of action sounding in intentional infliction of emotional distress and negligent infliction of emotional distress, the complaint does not contain such causes of action. As to the branch of the motion for summary judgment as to the negligence cause of action, plaintiffs' counsel fails to make any arguments as to how they have established their prima facie entitlement to summary judgment. Moreover, the evidence demonstrates that defendant Sheppard committed a intentional tort, not a negligent act. Accordingly, plaintiffs' motion is denied.

The School District defendants move for summary judgment dismissing the complaint against them. In support of the motion, they submit, among other things, copies of the pleadings, an affidavit of Charisse Miller, excerpts of the deposition testimony of Charisse Miller and defendant Sheppard, a transcript of infant plaintiff's testimony at a 50-h hearing, and a transcript of defendant Sheppard's plea allocution. Plaintiffs oppose the motion and submit, among other things, a transcript of defendant Sheppard's plea allocution, transcripts of the deposition testimony of Miller, Swezey, and defendant Sheppard, and affidavits of plaintiffs and an affidavit of Yael Aboulafia, a therapist. Initially, the Court notes that while the statutory 120-day period for making a summary judgment motion in this case expired on May 14, 2016, the School District defendants did not make their motion for summary judgment until May 17, 2016. However, the School District defendants demonstrated "good cause" for the delay as they submitted a copy of the minutes of the Suffolk County Clerk's Office which they relied on, showing that the note of issue was filed on January 19, 2016.

With regard to the School District defendants' motion for summary judgment, "[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Quiroz v Zottola*, 96 AD3d 1035, 1037, 948 NYS2d 77 [2d Dept 2012]; see *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015]). Here, the School District defendants established their prima facie entitlement to summary judgment as a matter of law dismissing the portions of plaintiffs' complaint alleging that they may be held vicariously liable for Sheppard's misconduct, as the alleged conduct is a clear departure from the scope of a physical education teacher's employment, and is unrelated to the furtherance of their business (see *"John Doe 1" v Board of Educ. of Greenport Union Free Sch. Dist.*,

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100 AD3d 703, 955 NYS2d 600 [2d Dept 2012]; *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 739 NYS2d 348 [2002]; *Dia CC v Ithaca City Sch. Dist.*, 304 AD2d 955, 758 NYS2d 197 [3d Dept 2003]).

As to the claims of negligent hiring and negligent supervision, a plaintiff must show that the employer was on notice of a propensity to commit the alleged acts in order to recover against an employer for negligent retention or negligent supervision of an employee (*see Doe v Chenango Val. Cent. School Dist.*, 92 AD3d 1016, 938 NYS2d 360 [3d Dept 2012]; *G.G. v Yonkers Gen. Hosp.*, 50 AD3d 472, 858 NYS2d 11 [1st Dept 2008]; *Doe v Rohan*, 17 AD3d 509, 793 NYS2d 170 [2d Dept 2005]). Here, the School District defendants established that they did not have notice of Sheppard's propensity to commit the alleged acts. Miller testified at her deposition testimony that she conducted an interview of Sheppard, which was followed by interviews of him conducted by the athletic director and a committee of teachers. She testified that after the assistant superintendent and superintendent performed reference checks on Sheppard, he was hired because he had extraordinarily strong references, connected with the students during the teaching demonstration, and was able to coach multiple sports. Furthermore, Miller testified that Sheppard had no blemish on his record and that parents and students wanted him as a teacher. In opposition, plaintiffs failed to raise a triable issue of fact. While plaintiffs contend that Miller did not have personal knowledge regarding any reference or fingerprint checks relating to Sheppard's hiring, an employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past (*see Day v J. Vlachos Hellenic Serv. Station, Inc.*, 2 AD3d 482, 767 NYS2d 893 [2d Dept 2003]; *Yeboah v Snapple, Inc.*, 286 AD2d 204, 729 NYS2d 32 [1st Dept 2001]). Nevertheless, there is no evidence to suggest that Sheppard had a criminal history prior to the subject incident.

The complaint does not assert a cause of action alleging infliction of emotional distress. However, to the extent that any of the causes of action against the School District defendants could be construed to include a claim for negligent infliction of emotional distress, to establish such a claim, a plaintiff must demonstrate "[a] breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness" (*Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6, 852 NYS2d 1 [2008]; *see Sawitsky v State of New York*, 146 AD3d 914, 46 NYS3d 423 [2d Dept 2017]; *Taggart v Costabile*, 131 AD3d 243, 14 NYS3d 388 [2d Dept 2015]). Moreover, such an action generally requires a plaintiff to show a breach of a duty owed to her which unreasonably endangered her physical safety, or caused her to fear for her own safety (*see Sacino v Warwick Val. Cen. School Dist.*, 138 AD3d 717, 29 NYS3d 57 [2d Dept 2016]). Here, the intervening act of Sheppard in using his cell phone in an attempt to record infant plaintiff and other students in the girls' locker room is a superseding cause which severed the causal nexus between the School District defendants' alleged negligence and the claimant's alleged injuries. Moreover, nothing in the evidence demonstrates that infant plaintiff's physical safety was unreasonably endangered or that she was caused to fear for her own safety.

Plaintiffs' submissions are insufficient to raise a triable issue of fact. In opposition, plaintiffs' counsel contends that defendant Miller "putting the infant plaintiff in the same room with Sheppard" raises an issue of fact as to whether such conduct was reasonable. While the affidavit of infant plaintiff's therapist states that infant plaintiff suffers from anxiety, it does not state that it was related to

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being in the same room with Sheppard during the subject meeting. Furthermore, infant plaintiff merely testified that she felt "uncomfortable" during the meeting.

Accordingly, the School District defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: MAR 17 2017



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION