Montanez v State of New York
2017 NY Slip Op 30916(U)
March 23, 2017
Court of Claims
Docket Number: 125895
Judge: Thomas H. Scuccimarra
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STATE OF NEW YORK COURT OF CLAIMS

GIANNA MONTANEZ,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 125895

Defendant.

BEFORE: HON. THOMAS H. SCUCCIMARRA
Judge of the Court of Claims

APPEARANCES: For Claimant:
LAW OFFICE OF LOUIS C. FIABANE
BY: STANISLAV I. LADNIK, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: SUZETTE C. MERRITT
ASSISTANT ATTORNEY GENERAL

Gianna Montanez alleges that she was injured as a result of the defendant's negligence on January 6, 2015 while practicing a cheerleading routine at Brooklyn College, one of the senior colleges of the City University of New York [CUNY]. According to the affidavit of service filed in the office of the Chief Clerk of the Court of Claims, the claim was personally served on the Attorney General's office on or about April 6, 2015. Issue was joined by service of an answer[1]

[1] The State raised as fifth, sixth and seventh affirmative defenses the failure to obtain jurisdiction over CUNY because of the failure to serve the claim or any notice of intention to file a claim upon CUNY, that the State of New York is not a proper party defendant, and that CUNY was not named as a party and served as required.

on or about May 12, 2015. This decision relates only to the issue of liability, after a bifurcated trial of the matter.

In addition to her own testimony in support of her claim, Ms. Montanez submitted a video recording of the incident. [Exhibit 1]. The state cross-examined claimant, presented the testimony of Tonika Simmons, the head coach of the cheerleading team, and submitted several documentary exhibits. [Exhibits A, B, C].

Ms. Montanez testified that she had been a member of the Brooklyn College cheerleading team since her Spring 2013 enrollment at the school, and had been about 8 years old when she first began the sport in 2000. She attended cheerleading camps, participated in cheerleading throughout high school, and at one of the other two colleges she attended before starting at Brooklyn College. Prior to her enrollment in Brooklyn, she said she had "reached out" to the coach, Tonika Simmons to inquire about getting on the team.[2]

On the team, she acted as a "flyer", "the girl who goes in the air", performing maneuvers at the very top of a human pyramid, and also as a "tumbler", someone who performs "gymnastic . . . floor skills." [T-13]. Ms. Montanez had also served as the captain of the Brooklyn College team since Fall 2015, a position she had held on her high school team as well. Part of her role as captain was addressing safety concerns voiced by the other members of the team and conferring with the coaches.

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[2] Quotations are to pages of the trial transcript unless otherwise indicated, here [T-12].

Long-term training as a cheerleader involved learning how to fall in all directions. Ms. Montanez claimed that there was no "direct instruction on how to catch" a falling flyer ("you're just supposed to make sure the flyer doesn't hit the floor"). [T-17].

There was a roster of 23 team members, but only 20 team members would compete at a time. Those who were not involved in the mechanics of a particular stunt would act as spotters. Claimant could not recall how many people were at the practice on January 6, 2015.

That night, practice began at approximately 6:00 p.m. with warm-ups, including stretching and jumping. The stunt they were practicing when Ms. Montanez was injured at approximately 7:00 p.m. had been practiced successfully once, moments earlier in the evening. Overall, there were four spotters when they practiced the stunt the second time, with only one spotter in the back, she said. The head coach, and other assistant coaches, were present and involved in the stunts.

Claimant thought that the first time they had practiced the pyramid stunt that night they had more spotters, specifically, more than one spotter to the back, where she said that a fall is more difficult to control because one cannot see. When she fell, she was at the top of the pyramid, with "two people below [her]" or "two layers deep." [T-24]. When claimant fell backwards, the spotter caught her at her "chest" but was not successful at preventing the fall to the ground. [T-24].

Asked why what she had been taught to do to prevent injury while falling did not work, Ms. Montanez said that she "[did not] know exactly what happened" when she fell. [T-26]. She said: "I just remember there was shift below me, but I am not supposed to really look down to see what's happening, but I don't know what happened, no." [*Id*]. Later, Ms. Montanez said: "I

know my body was facing to the left of me, and I fell backwards . . . [when I felt a shift] I stayed . . . firm in my position, and then I started to - - I know I was falling, because everything was kind of crumbling, it was very scary, and I just turned my upper body to see who was behind me, so I could catch the person behind me." [T-48-49]. She connected with a person behind her, and remembered that at that point her "body was still kind of horizontal, and all I remember is my feet just - - my ankles and my feet just diving into the floor." [T-49].

In terms of what she was supposed to do when falling, claimant said one tries to "catch anyone who was - - a spot, or anyone that wasn't already trying to help somebody," and that nothing special was to be done with one's feet when falling. [T-49-50].

Claimant testified that she had experienced falling numerous times during her cheerleading history, but never "anything where . . . [she] hurt [herself] like a broken bone or anything." [T-33]. During her two years on the Brooklyn College team she had fallen "a lot" during practices, actually hitting the floor twice. [T-45].

Prior to the accident, she had never suggested to the coaches that there were not enough spotters for a proposed stunt, or expressed any concern about safety.

On the day of the accident, she had not felt or expressed to coaches any particular concern about safety, or the dearth of spotters, or their location, saying "No. There were enough spotters." [T-43].

After the accident, the coaches came to her assistance immediately. While she talked to them about what happened, she never asked them about the spotters nor did she tell them that a spotter was not in the right place for the stunt.

Ms. Montanez acknowledged that text messages between her and Tonika Simmons, the head coach, starting from the day before the accident to March 10, 2015, did not contain any indication that she told the coach that a spotter should have been in a particular location or that it was a concern. [*See* Exhibit C].

Ms. Montanez was not allowed to participate in the cheerleading program for the rest of the semester because of a "bad" grade point average from the Fall 2012 semester. [T-47].

A video recording of the accident, 26 seconds long, was submitted and reviewed. [Exhibit 1]. No testimony concerning the video was presented on claimant's direct case, rather, the video was shown without explanatory comment.

The video shows what appear to be 18 people centered on a large mat surface, with those participating in the stunt facing the viewer. The total number of people present is unclear because the visible portions of their bodies overlap. There are numerous spotters - at least five to seven people - circling those doing the stunt, and they are seen to slightly change position as the stunt progresses. A voice is heard counting as the pyramid grows from a base of students standing at full height, to a second tier of students - also seemingly at full height - with the claimant ascending from that second tier to top the pyramid, then again descending, to be thrown by one leg back up to the top into a position parallel to the floor. Claimant remains in that position parallel to the floor above the second tier, with one person who is standing on the shoulders of the first tier below holding claimant's upper body at the armpits, and another at the second tier holding her outstretched, left leg, while the right leg, outstretched as well, is unsupported, for a matter of seconds. It is from there that the person holding her left leg appears to shift, and claimant is seen to fall backwards, first to the base of the second tier upon which she

was standing - where she appears to have been initially caught - and then to the ground (although she is not visible on the ground in the video through the people in front of the viewer).

No other witnesses testified and no other evidence was submitted on claimant's direct case. The Court reserved decision on defendant's motion to dismiss made after claimant rested her case.

Tonika Simmons, the head coach for the cheerleading program at Brooklyn College since 2004, testified that she began the program there as a graduate student because of her own participation in the sport in high school and in college and after college. She said that as of January 2015, she had been involved in cheerleading for 20 years, with "approximately 13 to 14" of those years as a coach. [T-66].

Part of her experience before starting the program at CUNY was cheering for three to four years with an organization called "Cheer New York, which is a not-for-profit organization that gives back to charity and cheers at different events around the city." [T-64]. She also assisted in writing a portion of the safety manual first put out to educate coaches on how to train their cheerleaders for different cheerleading organizations, including Cheer Limited, and the National Council for Spirit and Safety Education [NCSSE].

Ms. Simmons said that in 2010 the American Association of Cheerleading Coaches and Administrators [AACCA] merged with NCSSE, and "currently governs high school and college cheerleading." [T-66]. In January 2015 she had a current certification with the AACCA, and was also certified in first aid and CPR by the American Red Cross. [*See* Exhibit A].

Part of her job as coach was to discuss with her 23 team members safety procedures and the rules of cheerleading under the AACCA [Exhibit B], and guidelines for falling among other

things. "[W]e always talk about protecting the head and neck of the flyer . . . if they fall . . . that's our main focus is making sure that we catch them. We talk about how the back spot is the most important person in the stunt, because they're the ones that that's their primary duty is to protect the head and neck . . . [W]e talk about making sure that we catch . . . when we catch the flyer, we try to bear hug them and try to lessen any impact that they would have onto the floor." [T-68-69]. She said she had these types of conversations with the team "any time that they're stunting. It may not be as a collective whole that I'm talking about it, because . . . they're at different . . . progression levels, so as they're trying new skills, we'll have that conversation. Before we do any stunts, we always have a conversation of who is spotting who and making sure that there are spotters sufficiently everywhere." [T-69].

On January 6, 2015 practice was scheduled from 6:00 p.m. to about 8:30 or 9:00 p.m. They were starting their "competition skills" so they were going to be trying "group stunts and then pyramids, college pyramids." [T-71]. At this point in January, they were "playing around, seeing what's going to work, what's not going to work, what's doable, what's our strength, what's our weaknesses" in anticipation of more complete routines by the end of January. [T-71].

The subject stunt was a type of "college pyramid", which they successfully completed once that night. She thought that perhaps 16 people of the 23 member roster were there that evening, participating in the successful stunt and acting as spotters. The same number of people participated in the second attempt.

When asked what happened during the second attempt, Ms. Simmons said that "between the middle flyers and the top flyer, there was - - the weight was distributed different. I'm not sure from the toss - - if it was from the toss or what caused the stunt to go over the head of the

middle flyer who had the top flyer's leg, so that is - - she tried to pull back like, to push Gianna forward, but she wasn't able to so the - - it ended up going behind her." [T-74]. Ms. Simmons said that as the stunt was intended, she was acting as a "base" for claimant, meaning she was "underneath her", and "I have her feet, and then I toss her up, she gets caught by the two middle flyers, and so when she dismounts I would catch her with a group of two other people." [T-75].

During the stunt, Ms. Simmons was in the front of the pyramid at the point Ms. Montanez started to fall off, prepared to catch her intended dismount. Ms. Simmons "tried to get to the back, and then just made sure that I was verbal to the back - - the people that were in the back, that [Gianna] was coming toward the back of the stunt." [T-75-76]. She said there were three spotters "who were not designated to . . . the pyramid at all," in the back behind claimant, "and then there was an additional fourth person, who was a part of the group with me putting Gianna up, who stays towards the back of the stunt when she goes up." [T-76]. After claimant fell, the room was cleared, the athletic trainer was called, as was an ambulance that took Ms. Montanez to the hospital.

In the communications they had after this accident, Ms. Montanez never expressed any concern to Ms. Simmons that there was not a spotter behind her when she fell.

Ms. Montanez did not come back to the cheerleading team thereafter, but it was not due to the injury rather there were issues with her grades. Ms. Simmons learned about the grade point average problem a few days after the accident.

The 2014-2015 AACCA college safety rules, applicable at the time of this accident, give guidelines for the construction of cheer pyramids and the use of spotters. [Exhibit B]. The applicable section, as pointed out by Ms. Simmons, states:

> "E. Pyramids . . . 2. In all pyramids, there must be at least two spotters designated for each person who is above two persons high and whose primary support does not have at least one foot on the ground. Both spotters must be in position as the top person is loading onto the pyramid. One spotter must be behind the top person and the other must be in front of the top person or at the side of the pyramid in a position to get to the top person if they were to dismount forward . . ."

Ms. Simmons explained that the top person should have a spotter behind and a spotter in front according to this rule. She said: "[O]nce the top person is released, essentially, everybody underneath it becomes a spotter. So you want to make sure that you have people to the front, in case it comes off the front, into the back, in case it comes off of the back of the pyramid." [T-83].

Ms. Simmons gave testimony throughout another viewing of the 26 second video [Exhibit 1]. She pointed out where she was, where the claimant was situated, and where the various spotters were, including three spotters in the back. She said "you never fully see the face [of the first back spotter], only the feet of the second spotter, and then the third" in the back of the claimant. [T-88]. She also observed what looked like 21 people present by her count, using parts of bodies, such as feet and arms, and flashes of faces to count the numbers. Ms. Simmons agreed that there were enough spotters on the floor on the date of this accident. She testified that the practice was in conformance with the AACCA rules, including rules concerning the type of stunts that may be practiced on a "two-inch foam mat" such as the one present, as opposed to a wooden gym floor. [T-93].

No other witnesses testified and no other evidence was submitted.

"[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Morgan v State of New York, 90 NY2d 471, 484 (1997). Risks that are known and fully comprehended, open and obvious, inherent in the activity, and reasonably foreseeable are assumed by the student athlete. *See* Turcotte v Fell, 68 NY2d 432, 439 (1986).

Cheerleading is one of those sports where the doctrine of primary assumption of risk has been applied. *See* Williams v Clinton Cent. School Dist., 59 AD3d 938 (4th Dept 2009).[3] As pertinent here, "[e]ven where the risk of injury is assumed . . . a school must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from 'unassumed, concealed, or unreasonably increased risks' (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]). Lomonico v Massapequa Pub. Schools, 84 AD3d 1033 (2d Dept 2011);[4] *see also*, Williams v Clinton Cent. School Dist., 59 AD3d 938; *c.f.*, Traficenti v Moore

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[3] Defendant's motion for summary judgment granted on ground of primary assumption of risk. Plaintiff fell performing cheerleading stunt during practice at school on bare wooden floor, and assumed the risk of injury by doing so under such circumstances. Plaintiff's argument that mats should have been provided and that a failure to do so unreasonably increased the risk discounted.

[4] Defendant's summary judgment motion granted. Experienced high school cheerleader injured performing stunt during practice on bare gym floor when teammate fell on her. Primary assumption of risk applicable. No showing that risks unreasonably increased by defendant's lack of supervision or other misfeasance. Additionally, defendant established that the plaintiff did not know why the accident occurred, thus the defendant's negligence in terms of proximate cause would only be based on speculation.

Catholic High School, 282 AD2d 216 (1st Dept 2001);[5] Chinitz v State of New York, UID No. 2008-044-584 (Ct Cl, Schaewe, J., Oct. 1, 2008).[6]

After applying the foregoing principles to the evidence submitted, including assessment of the consistency and credibility of the witnesses presented, the doctrine of assumption of risk here applies initially to bar the lawsuit because the claimant fully comprehended the risks associated with her sport, the particular risk of falling here is one that is obvious and inherent in the activity, and is reasonably foreseeable, as is the potential for a fumble on the part of a spotter.

Claimant failed to establish a basis for removing the matter from the ambit of primary assumption of risk, and did not show that Brooklyn College failed to exercise reasonable care or unreasonably increased the risk of harm. Claimant was a very experienced cheerleader in a leadership position on the team, was aware of the risk of falling and did not know why the accident happened other than to say that something shifted beneath her: another inherent risk in the sport.

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[5] Spotter failed to catch cheerleader who fell to wooden gym floor. Spotter's error forseeable, and danger of falling on wooden floor of gym while participating in routine an assumed risk. Nonetheless, triable issue of fact as to whether risk unreasonably increased where supervision provided by fellow students alone and whether spotter's error result of inadequate instruction.

[6] Although defendant met initial burden on motion for summary judgment showing that claimant an experienced college cheerleader who appreciated risks, had performed the subject stunt several times including in high school, knew the risk of falling on a wooden floor, and could not show inherent compulsion because her deposition testimony muddled on how credits issued for academic credit and no evidence that she would be denied credits were she to refuse to continue practicing, claimant met her burden in turn. Triable issues of fact as to whether mats provided, whether requiring claimant to repetitively practice stunts without breaks as part of a post-game practice violated AACCA standards as presented by claimant's expert, whether spotter placement within guidelines as presented by claimant's expert, and whether the doctrine of inherent compulsion may apply because of claimant's clarification of her anticipation of academic credit for participation, and the requirements for same.

No evidence was presented on her direct case as to the violation of any rules or regulations on the part of Brooklyn College, nor was there any showing that claimant was subject to any unreasonably increased risks. Ms. Montanez, herself, opined at one point in her testimony at trial that there were not enough spotters behind her at the time of the accident, but did not establish what should be the requisite number of spotters. She also testified, somewhat confusingly, that there were more spotters during the second, unsuccessful attempt at the stunt, and also said that there were enough spotters present during the practice.

No expository or expert testimony was offered when the video of the accident was shown on the claimant's direct case. The Court was thus presented with what appeared to a layman to be numerous people surrounding Ms. Montanez as spotters in all directions, in positions to prevent an injury. Indeed, Ms. Montanez testified that as she fell she turned to "catch" the spotter behind her, connected with that person, but ultimately her fall was not completely prevented. On her direct case, then, claimant established only that an accident occurred and nothing more, which is not negligence. *See generally*, Mochen v State of New York, 57 AD2d 719 (4th Dept 1977).

Additionally, and assuming for the sake of argument that dismissal is not warranted for the reasons stated above, claimant did not establish any basis for the liability of Brooklyn College by a preponderance of the credible evidence. The Brooklyn College coach established what the standards were for running a practice and attempting stunts, by reference to the applicable portions of AACCA rules, and by relating such rules to what happened in this claim in her credible testimony, including expository testimony during the video claimant submitted.

Unfortunately, Ms. Montanez fell while practicing a stunt. A fall alone does not establish negligence.

Finally, it is obvious, too, that the State of New York is not a proper party defendant to this claim, as the accident occurred at Brooklyn College, one of the senior colleges in the CUNY system [*see* Education Law §6202(5); Perry v City of New York, 126 AD2d 714 (2d Dept 1987)[7]], and no evidence has been adduced to show that the State of New York has any involvement with regard to the situs of the accident, or the school involved. While this Court has jurisdiction to hear a properly commenced lawsuit against CUNY, according to the affidavit of service filed, claimant failed to serve the claim upon CUNY[8], the proper party defendant, as required, the issue was raised in the State's answer with particularity, and the Court thus lacks jurisdiction. Education Law §6224(4), Court of Claims Act §11(a)(ii).

While it is unfortunate that Ms. Montanez fell and injured herself, based upon the foregoing there is no basis for imposing liability upon the State of New York, and Claim No.

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[7] "[T]he City of New York is not a proper defendant in this action where the . . . injuries allegedly were caused by the negligent maintenance of the Brooklyn College campus, a senior CUNY college. The proper defendant is CUNY, with the ultimate governmental body responsible for paying any judgment being the State, and the proper forum for such an action being the Court of Claims, not the Supreme Court."

[8] Had the claim been timely and properly served upon CUNY in addition to service upon the Attorney General, then amendment of the caption to name the proper party would not have been an issue, as no jurisdictional infirmity would be implicated. *See e.g.*, Sh v State of New York and City University of New York, UID No. 2008-036-317 (Ct Cl, Schweitzer, J., April 23, 2008); James v State of New York and City College, a Division of City University of New York, UID No. 2004-030-907 (Ct Cl, Scuccimarra, J., Mar. 9, 2004).

125895 is dismissed in its entirety.

Let Judgment be entered accordingly.

White Plains, New York
March 23, 2017

THOMAS H. SCUCCIMARRA
Judge of the Court of Claims