SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

JACQUELINE NICHOLS,

Plaintiff,

- against -

CARRIE MCCAY, INDIVIDUALLY AND FRANK MCCAY AND NANCY MCCAY, as LEGAL GAURDIANS OF CARRIE MCCAY,

Defendants.

Index No. 1656/2015
Sequence # 001

Part 22
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Upon the foregoing papers, the motion of defendants Caroline McCay, Individually and Frank McCay and Nancy McCay, as legal guardians of Caroline McCay, for an Order granting summary judgment and dismissing plaintiff's complaint, is determined as set forth below.

This is an action for personal injuries allegedly sustained by plaintiff on March 7, 2014 at the Brookville Center for Children's Services, as a result of the actions of Caroline McCay (hereinafter "Caroline"), an intellectually disabled individual with autism. Plaintiff alleges in her complaint that contact was made with plaintiff's body causing plaintiff to fall backwards and strike the floor. As a result of said incident plaintiff alleges to have sustained serious physical injuries to her spine.

Defendants contend no triable issue of fact exists with regard to defendants Frank McCay and Nancy McCay because it is unsound to impose tort liability upon the parents of disabled children such as Caroline, and because Frank McCay and Nancy McCay had no duty to warn plaintiff as they were unaware of any alleged dangers presented by Caroline. Defendants also contend that they are entitled to summary judgment because Caroline owed no duty of care to plaintiff and plaintiff's assumption of the risk and/or contributory negligence bars her claims against Caroline.

In support of its motion, defendants submit, *inter alia*, a copy of the pleadings, plaintiff's Verified Bill of Particulars, the affidavit of Victor M. Fornari, M.D. (hereinafter "Dr. Fornari"), copies of the deposition testimony of plaintiff, defendants Frank McCay and Nancy McCay, and non-party witnesses Pamela Ali, and Patricia Vallely.

Plaintiff testified at her examination before trial that she is a New York State licensed teacher's assistant certified in behavior training and CPR. Plaintiff stated that she was familiar with Caroline prior to the date of the incident, from being in the school for nine years. Plaintiff stated that on the date of the incident she was assigned to Caroline's class. On the date of the incident plaintiff testified that she had taken Caroline to the bathroom from her classroom and that after the bathroom, Caroline proceeded to the main office and lobby where she positioned herself by the couch located opposite to the main office (hereinafter "subject couch"). Plaintiff testified that she positioned her body between the subject couch and Caroline and that Caroline made contact with plaintiff's body causing her to fall backward and land on her back. Plaintiff testified that she was aware of Caroline's predilection with the subject couch located in the lobby prior to the incident.

Non-party witness Pamela Ali (hereinafter "Ali") testified at her examination before trial that she witnessed the incident that occurred between plaintiff and Caroline. Ali testified that she was on her phone playing a game while seated at a table in the same lobby where the subject couch was located. Ali, an employee at Brookville Center for Children's Services, testified that she saw plaintiff backing up and Caroline coming toward plaintiff by the couch in the lobby, and that plaintiff kept walking backwards as Caroline kept advancing toward plaintiff, and eventually plaintiff ended up on the floor.

Non-party witness Pamela Vallely (hereinafter "Vallely"), Caroline's teacher at Brookville Center for Children's Services, testified at her examination before trial that she was in her classroom when she first learned of the incident between plaintiff and Caroline on the day that the incident occurred. Vallely testified that she instructed plaintiff prior to and on the day of the incident, that because of Caroline's predilection for the couch, that plaintiff should encourage Caroline to go down the hall the other way and that "if Caroline is going to go to the couch, she is going to go to the couch" but that she should encourage walking Caroline the other way down the hall.

The Affidavit of Dr. Fornari states that he has treated Caroline since 2008 and in his opinion, due to her severe autism spectrum disorder and profound intellectual disability, Caroline does not have the capacity to control her behavior or understand the consequences of her behavior. With regard to the subject couch in the lobby of the Brookville Center for Children's Services, Dr. Fornari's report states that Caroline "does not possess the ability to foresee or understand that by attempting to get onto the couch, in such close proximity to the plaintiff, she could potentially

cause injury to the plaintiff." Dr. Fornari also states in his report that as a result of Caroline's obsessive-compulsive behavior she requires constant supervision.

In opposition, plaintiff contends that the rules of negligence and tort liability for assault and battery apply to mentally disabled individuals such as Caroline. Plaintiff asserts that Caroline negligently caused plaintiff's accident and injuries, and Frank McCay and Nancy McCay are liable for Caroline's tort.

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" *(Foster v. Herbert Slepoy Corp., 76 A.D.3d 210, 214, 905 N.Y.S.2d 226; see Carlucci v. Village of Scarsdale, 104 A.D.3d 797, 798, 961 N.Y.S.2d 318). Begley v. City of New York, 111 A.D.3d 5, 972 N.Y.S.2d 48 [2d Dept. 2013].*

Plaintiff's complaint alleges that defendants acted negligently without regard for safety of others and are liable for the injuries to plaintiff as a result of defendant Caroline's deliberate movements in making contact with plaintiff's body. Plaintiff's complaint also asserts that plaintiff is free of comparative negligence regarding the action of defendant negligently contacting plaintiff's body.

It is axiomatic that plaintiff's complaint, while sounding in negligence, necessitates intent for the alleged tortious actions by Caroline, for deliberate movements and contact with plaintiff's body as proximately causing the injuries sustained by plaintiff on the date of the incident. The term 'deliberate' as defined by Merriam-Webster's Dictionary, is "done or said in a way that is planned or intended; done or said on purpose; done or decided after careful thought; slow and careful." Defendants have submitted evidence, in admissible form, that Caroline does not have the capacity to control her behavior or understand the consequences of her behavior. Dr. Fornari, who has consistently treated Caroline since 2008, set forth in his affirmed report that Caroline does not have the mental capacity to understand her actions. Plaintiff asserts that the rules of negligence and tort liability for assault and battery apply to mentally disabled individuals such as Caroline, however, fails to set forth evidentiary support for its conclusory characterizations of Caroline's conduct as negligent or provide an explanation of how the intrinsically intentional act of assault could be negligently performed. *See, Sphere Drake Ins. Co., v. 72 Centre Ave. Corp., 238 A.D.2d 574, 657 N.Y.S.2d 65 [2d Dept. 1997]; Exchange Mutual Ins. Co. v. Blazey, 19 A.D.2d 682, 241 N.Y.S.2d 602 [3rd Dept. 1963]*;

Even supposing plaintiff's pleadings as asserting a cause of action for negligence without any intentional actions, this Court finds that "[B]ecause determining the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him by others" *(Turcotte v. Fell, 68 N.Y.2d at 437, 510 N.Y.S.2d 49, 502 N.E.2d 964)*, the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. *Crotty v. Town of Southampton, 64 A.D.3d 251, 880 N.Y.S.2d 656 [2d*

Dept. 2009]. Defendants provided evidence in admissible form that plaintiff was aware of Caroline's mental capacity and limitations prior to the date of the incident.

With respect to defendants Frank McCay and Nancy McCay, while as a general rule, parents are not liable for the torts of their child, a parent may be held liable, inter alia, "where the parent's negligence consists entirely of his [or her] failure reasonably to restrain the child from vicious conduct imperilling others, when the parent has knowledge of the child's propensity toward such conduct" *(Steinberg v. Cauchois, 249 App.Div. 518, 519, 293 N.Y.S. 147). Davies v. Incorporated Village of East Rockaway, 272 A.D.2d 503, 708 N.Y.S.2d 147 [2d dept. 2000]*.

Defendants Frank and Nancy McCay were not present at the school when the incident occurred, and there is no evidence in the record that they, as opposed to plaintiff or the other professionals working with Caroline at Brookville Center for Children's Services, would have been able to restrain her or otherwise control her behavior. Nor did plaintiff allege in her complaint that these defendants had the opportunity or ability to control Caroline's actions. *(See, Dawes, 133 A.D.2d at 662, 520 N.Y.S.2d 11; see also Miltz v. Ohel, Inc., 165 Misc.2d 167, 169–170, 627 N.Y.S.2d 891)*.

Accordingly, defendants motion for summary judgment is granted.

This constitutes the decision and Order of this Court. Any relief not expressly granted herein is denied.

July 28, 2017

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Hon. John M. Galasso, J.S.C.