

Wilkerson v City of New York
2018 NY Slip Op 32107(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 0022704/2012
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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KENNETH WILKERSON, as Administrator of the
Estate of KENDALL WILKERSON, and
KENNETH WILKERSON, individually,

Index No.: 0022704/2012

DECISION/ORDER

Plaintiff(s),

Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK ,
THE NEW YORK CITY DEPARTMENT
EDUCATION, and SPORTS & ARTS IN SCHOOL
FOUNDATION,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion for Summary Judgment

Papers Numbered

Notice of Motion and Affirmation and Memorandum of Law in Support with Exhibits	<u>1</u>
Affirmation in Opposition by Plaintiff.	<u>2</u>
Affirmation in Opposition by City	<u>3</u>
Reply Affirmation in Support	<u>4-5</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant, SPORTS & ARTS IN SCHOOL FOUNDATION (“S&A”), moves for summary judgment dismissing the complaint and all cross-claims against it pursuant to CPLR §3212. Co-defendants, CITY OF NEW YORK and NEW YORK CITY DEPARTMENT FO EDUCATION (hereinafter, “City”), have separately moved for summary judgment and said motion is resolved pursuant a separate order of the Court. The City’s “affirmation in opposition” to the instant motion does not contend that the motion by S&A should be denied.

This case arises out of the tragic death of a young student due to his severe asthma condition on the night of February 10, 2012. On the day of his death, Kendall Wilkerson (“Kendall”) was present in P.S. 97 all day and then attended two after school programs that were held within the school. The first after school program was operated by the City and was a homework help program. The second was an after school program that was undisputedly operated by S&A. The record establishes the following. All defendants were aware that Kendall had an asthma conditions prior

to the date of Kendall's death. An asthma inhaler was kept in the nurse's office, but Kendall also always carried one on his person while at school. The school nurse has no records indicating that Kendall had made any trips to the nurse for an asthma related issue during the entire 2009-2010 school year. During the day of February 2, 2010, while Kendall was in school, he did not indicate to any teachers or staff that he was having any problems with his asthma. On the contrary, Kendall attended each class and played kickball outside during recess. Kendall's twin brother, Stephon, testified that he saw Kendall during recess and that Kendall used his inhaler twice during recess. However, Stephon also testified that Kendall looked "good" and "normal" during recess and that Kendall did not indicate that he was not feeling well. Moreover, one of Kendall's teacher did not recall Kendall exhibiting any signs of distress on the date of his death. Another teacher testified that Kendall appeared sluggish, just like half of the entire class that day.

After the regular school day ended, Kendall attended an after school homework help program that is operated by the Department of Education. After that program concluded, Kendall appeared at another program operated within the school, by S&A. During S&A's program, Kendall did not exhibit any signs of distress until just before it was time to leave. When Kendall's mother, Stephanie Robateau ("Ms. Robateau"), appeared at the school to pick up Stephon and Kendall at between 5:00 and 5:15 p.m., Stephon indicated to her that Kendall did not look well. Ms. Robateau testified that Kendall was wheezing a little bit, but did not look pale or blue when she appeared at the school to pick him up. At some point, the Assistant Director of S&A, Justin Parker, walked over to Kendall, Stephon and Ms. Robateau to say goodbye and became concerned because Kendall was wheezing. Mr. Parker went to get Kendall some water and then offered to carry him to Ms. Robateau's car. Ms. Robateau testified that Kendall could walk but that Mr. Parker carried Kendall to the car anyway. Ms. Robateau then took both boys home, which was about a five minute drive from the school. When she arrived at home, Ms. Robateau administered a nebulizer treatment to Kendall. Ms. Robateau testified that after about 15-20 minutes of the treatment, she noticed that Kendall's lips started turning blue. At that point, she called 911 and Kendall was taken to Jacobi Medical Center at around 6:18 p.m., almost an hour after he left the school premises. Tragically, Kendall was declared dead at the hospital at 6:50 p.m. Following an investigation and autopsy by the Medical Examiner, Kendall's immediate cause of death was, "Acute and Chronic Bronchial Asthma."

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for summary judgment, the non-moving party must establish the existence of triable issues of fact that are, “real, not feigned since a sham or frivolous issue will not preclude summary relief (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dep’t., 1983]). “It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff” (*Pulka v. Edelman*, 40 N.Y.2d 781, 781 [1976]). “In the absence of a duty, there is no breach and without a breach there is no liability (Id., see also, *Daubert v. Flyte Time Regency Limousine*, 1 A.D. 3d 396, 396 [2d Dep’t., 2003]).

It is well established that schools, having assumed physical custody and control over their students, are under a duty to adequately supervise the students in their charge, as would a parent of ordinary prudence in comparable circumstances (*Ohman v. Board of Education of the City of New York*, 300 N.Y. 306, 309 (1949); *Lazardo v. Board of Educ. of City of New York*, 77 A.D.3d 437 [1st Dep’t., 2010]). The provider of an after school program owes to the students in its charge the same duty of care and supervision owed by a reasonably prudent parent, under the circumstances (*De Los Santos v. New York City Dept. of Educ.*, 42 A.D. 3d 422 [2d Dep’t., 2007]).

However, the duty owed by a school and a provider of an after school program to its students, stems from the fact of its physical custody over them. “The school's duty is thus coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to resume control over the child's protection, the school's custodial duty also ceases (*Pratt v Robinson*, 39 NY2d 554, 560 [1976] internal citations omitted; see also: *Marcano v. City of New York*, 305 A.D.2d 223 [1st Dep’t., 2003]; *Ruiz v. Life Skills School Ltd.*, 267 A.D. 2d 182 [1st Dep’t., 1999]).

The Court finds the facts of this matter remarkably similar to the facts in *Williams v. Hempstead School District* (46 A.D. 3d 550 [2d Dep’t., 2007]). In *Williams*, an asthmatic student exhibited signs of coughing and wheezing during the morning hours at school. At the suggestion of a teacher, the student was taken to the nurse at around 10:40 a.m. Thereafter, the student’s mother (plaintiff in *Williams*) picked the student up from school at approximately 11:40 a.m. Upon arriving at the school, the plaintiff mother noticed that her child was able to walk and talk but she indicated to the nurse that she would take the child to his pediatrician. While driving to the pediatrician, the plaintiff mother noticed the child was hot and ill and stopped twice to attend to him. Thereafter, plaintiff mother brought the child home to call 911 from there. An ambulance arrived shortly thereafter and took the *Williams* child to the hospital. Unfortunately, the child was pronounced dead shortly after his arrival at the hospital. On appeal from the trial court’s order denying the defendant School District’s motion for summary judgment, the Second Department reversed the trial court’s order. The Court specifically held that by removing the child from the actual control of the defendants, and in deciding to take the child home and administer medication, “the plaintiff cannot establish as a matter of law, that a duty existed which could give rise to any liability by the defendants” (*Williams* at 552).

Here, the record establishes that nothing took place during the day, nor during S&A’s after school program, to put S&A on notice that Kendall was in any distress. While plaintiff focuses on the fact that one teacher testified that Kendall looked sluggish during the day, that same teacher also testified that half of her class looked sluggish that day because it was a Friday. Moreover, Kendall participated in a game of kick ball during recess. Additionally, Ms. Robateau testified that when she picked up Kendall he was able to talk and while he was wheezing a bit, he was not blue, nor was he

shaking. Ms. Robateau testified that she did not request an ambulance at the time she picked up Kendall because she believed that Kendall needed to get on the nebulizer, that she wanted to get him on the nebulizer, and that she thought giving Kendall nebulizer treatment would be sufficient. Ms. Robateau testified that on prior occasions when Kendall exhibited similar symptoms, the nebulizer treatment was sufficient and that no hospitalization of Kendall was required.

Based on the foregoing, the Court finds that S&A has made a prima showing of entitlement to judgment as a matter of law because, prior to his death, Kendall had been released from S&A to his mother, who assumed complete custody and control of him prior to the time of his death. Ms. Robateau took Kendall home and put him on the nebulizer for approximately 15-20 minutes before calling 911. Ultimately, Kendall had been out of the custody of S&A for several hours before his death. Therefore, no duty existed on the part of S&A at the time of Kendall's death (*Williams* at 552).

Plaintiff fails to raise an issue of fact to warrant denial of the motion. Plaintiff asserts that the S&A breached its duty of care during the day in failing to recognize signs of distress in Kendall. However, nothing in the record indicates that Kendall exhibited any serious distress on the day of his death during school and during S&A's program. Again, the standard of care is that of a reasonably prudent parent. As the record demonstrates, as S&A was releasing Kendall to the custody of his mother - the person who had treated Kendall's asthma attacks in the past - thought the most appropriate course of action was to get him on the nebulizer. The Court in no way attempts to pass judgment on the actions of Ms. Robateau and expresses its deepest and most heartfelt condolences to her and Kendall's entire family. While Kendall's death is undeniably tragic, on the record before it, the Court cannot find that movants breached any duty.

Plaintiff's purported expert attempts to place a more stringent standard of care on S&A than the standard of care required by law (reasonably prudent parent as set forth by *Ohman* and *De Los Santos*, supra.) by citing to several Chancellor Regulations. However, the standard of care assessed against a defendant is a creature of law and depends on the relationship between the parties (see generally, *Benitez v. New York City Bd. of Educ.*, 73 N.Y. 2d 650 [1989] where the Court of Appeal dismissed plaintiff's complaint after finding that the trial court erroneously instructed the jury that a school owes a student voluntarily competing in an interscholastic high school football game the

more protective duty and standard of care of a prudent parent). Moreover, plaintiff's attempt to raise an issue of fact by highlighting testimony of several S&A employees indicating that they did not remember seeing Kendall on the date of his death is not persuasive. Based upon the full record before the Court, it is clear that nothing out of the ordinary took place until the moments just before Kendall was being picked up by his mother. At that time, S&A employee, Mr. Parker, inquired about Kendall's condition to Kendall and his mother, to which Ms. Robateau responded that she just needed to get him home and on the nebulizer.

Consequently, the Court finds that defendant S&A owed no duty at the time of Kendall's untimely death, and breached no duty during the time in which Kendall was in its care. In light of the foregoing, the Court need not address S&A's proximate cause argument in support of the motion.

Based on the above, the motion is granted in its entirety that the complaint and all cross-claims are hereby dismissed as against, SPORTS AND ARTS IN SCHOOL FOUNDATION.

S&A is directed to serve a copy of this order with notice of entry, upon all parties, within 30 days of the entry date.

The above constitutes the decision and judgment of the Court.

Dated:

7/3/18
Bronx, New York



HON. MITCHELL J. DANZIGER, J.S.C.