

Cruz v City of New York
2019 NY Slip Op 32101(U)
May 9, 2019
Supreme Court, Bronx County
Docket Number: 26699/2016E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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EDWIN CRUZ, as father and natural guardian of M.A.C.,
an infant, and EDWIN CRUZ, individually,

DECISION AND ORDER

Plaintiffs,

Index No. 26699/2016E

- against -

THE CITY OF NEW YORK, NEW YORK CITY BOARD
OF EDUCATION, NEW YORK CITY DEPARTMENT OF
EDUCATION, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, NEW YORK CITY DEPARTMENT
OF YOUTH AND COMMUNITY DEVELOPMENT,
SIMPSON STREET DEVELOPMENT ASSOCIATION,
INC. and JOHAN A. VARGAS-PAULINO,

Defendants.

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Daniel C. Murphy, Esq., McMahon & McCarthy, Esqs., Bronx, NY, for plaintiffs

Carl J. Schaerf, Esq., Schnader Harrison Segal & Lewis, LLP, New York, NY, for defendants
The City of New York, New York City Board of Education, New York City Department of
Education, New York City Department of Transportation and New York City Department of
Youth and Community Development

Nicholas Hurzeler, Esq., Lewis Brisbois Bisgaard & Smith, LLP, New York, NY, for defendant
Simpson Street Development Association, Inc.

John R. Higgitt, J.

Upon the October 26, 2018 notice of motion of defendant Simpson Street Development
Association, Inc. (SSDA) and the affirmation and exhibits submitted in support thereof; the
January 24, 2019 notice of cross motion of defendants The City of New York, New York City
Board of Education, New York City Department of Education, and New York City Department
of Youth and Community Development (“the municipal education defendants”) and defendant
New York City Department of Transportation (DOT; collectively, “the municipal education and
transportation defendants”), and the exhibit submitted therewith; plaintiffs’ February 25, 2019
affirmation in opposition and the affidavit and exhibits submitted therewith; the March 26, 2019

affirmation in reply of defendant SSDA; the March 28, 2019 affirmation in reply of the municipal education and transportation defendants; and due deliberation; the motion for summary judgment is denied and the cross motion for summary judgment is granted in part.

Plaintiffs allege that the then-13-year-old infant plaintiff MAC was struck by a vehicle driven by defendant Vargas-Paulino after being released from an after-school program administered by defendant SSDA under a contract with defendant City of New York, acting through the City's Department of Youth and Community Development. The building in which the after-school program was conducted is situated between Fox and Tiffany Streets in the Bronx. Plaintiffs allege that defendant SSDA and the municipal education defendants failed to adequately supervise plaintiff MAC. A component of this allegation is that defendant SSDA negligently required egress from the school through an exit on Fox Street instead of Tiffany Street. Plaintiffs allege that defendant DOT negligently maintained the sidewalk and roadway, failed to adequately warn pedestrians of hazards and failed to adequately warn drivers of a nearby school.

Defendant SSDA moves for summary judgment on the grounds that it was not negligent, and that its negligence, if any, was not a proximate cause of plaintiff MAC's injuries. Defendant SSDA asserts that plaintiff MAC was no longer in its custody and control at the time of the accident, having been released into the care and custody of the person designated by his parents, and that the conditions of the exit¹ from and street onto which plaintiff MAC was discharged merely furnished the occasion for plaintiff MAC's accident, given his spontaneous entry into the roadway while playing with other students.

¹ Prior to the accident, the school released the students from an exit on Tiffany Street. At the beginning of the 2015-2016 school year, the exit was changed to Fox Street. The accident occurred on Fox Street.

The municipal education and transportation defendants cross-move for similar relief, adopting defendant SSDA's arguments and proof. The cross-moving defendants further assert that defendants New York City Department of Transportation and New York City Department of Youth and Community Development are not independent jural entities that may be sued in their own names.²

In support of the motion, defendant SSDA submits the transcripts of the plaintiffs' deposition testimony, an uncertified copy of the police accident report, a video of the incident, uncertified police records from the investigation of the incident, the affidavit of defendant SSDA's On Site Program Director and related SSDA records, the affidavit of defendant SSDA's Activity Specialist, and the injury report.

Plaintiff MAC testified that the accident happened while he was playing "Man Hunt," a tag-like game, in the street with his brother and four friends after leaving the after-school program, and that he ran into the street without looking both ways and was hit by a car. He did not see the car before the accident. Plaintiff MAC testified that he had been playing long enough for three of the five participants to have been "tagged."³ He also testified that he and his brother would usually "hang out" on the sidewalk by the gate on the "back side" of the school "for a little bit" to play and talk after the program.

Plaintiff Cruz testified that plaintiff MAC was diagnosed with ADHD, oppositional defiant disorder and impulse disorder at four years old, for which he takes medication. In his affidavit, plaintiff Cruz averred that he gave plaintiff MAC's individualized education plan to defendant SSDA's Program Director at the beginning of the 2015-2016 school year.

Defendant SSDA's Program Director averred that the after-school program ended at 6:00

² The municipal education and transportation defendants raise no additional legal grounds for their cross motion.

³ There was no explicit testimony from plaintiff MAC as to the duration of their game prior to the accident.

p.m., and that the accident occurred after plaintiff MAC had been discharged from the program into the care of his older brother, as permitted by the siblings' parents in writing. The Program Director further averred that students are instructed not to remain and play after discharge, but to go home. The Program Director averred further that, upon his enrollment, plaintiff MAC was not designated as having special needs. The Program Director averred further that, at the beginning of the 2015-2016 school year, parents were advised that dismissal and pick-up were changed from the Tiffany Street exit to the Fox Street exit, due to the school's postal address being designated on Fox Street. The Program Director averred that the exit change was decided solely by the New York City Board of Education, and that defendant SSDA did not initiate or play any role in the decision.

The Activity Specialist averred that as she was leaving the school's Fox Street exit at approximately 6:15 p.m. on the day of the accident, students approached her and informed her of the accident. She ran to the scene, where she observed plaintiff MAC on the ground next to a parked car.

The injury report stated that plaintiff MAC was "out-of-camp" (as opposed to "in-camp") at the time of the accident, having "left program with other children at 6:00 p.m. and went home [*sic*]."

The surveillance video depicts the occurrence, but is of insufficient quality to permit any meaningful assessment as to how and with what warning (if any) plaintiff MAC entered the roadway.

With regard to the subject of whether SSDA and the cross-moving defendants breached the duty of care they owed to plaintiff MAC, "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately

related to the absence of adequate supervision” (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Generally, a school’s duty does not extend to “hazards which may beset [students] once they are on their way home and outside the control of the school” (*Pratt v Robinson*, 39 NY2d 554, 562 [1976]; *see also Doe v N.Y.C. Dept. of Educ.*, 126 AD3d 612 [1st Dept 2015]). As discussed below, however, the duty has been extended to off-school-premises injuries occurring shortly after school hours upon a student’s departure from school (*see Stephenson v City of N.Y.*, 19 NY3d 1031 [2012]).

Defendant SSDA asserted that, at the time of the accident, not only had it released plaintiff MAC to the person designated by his parents to assume custody and control of him (his brother, C.), but that C. had taken such custody and control.⁴ It is undisputed that plaintiff MAC was with C. at the time of the accident. Plaintiff MAC testified that he and his brother frequently stayed outside the school after dismissal from the after-school program to talk and play with friends. The admissible evidence indicates that plaintiff MAC had left the program and school grounds when the accident happened. This, however, does not end the inquiry, as the moving defendants implicitly acknowledge.

“[A] school district’s duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm” (*Ernest v Red Creek Cent. Sch. Dist.*, 93 NY2d 664, 672 [1999], *rearg den* 93 NY2d 1042 [1999]). “[W]hile a school has no duty to prevent injury to schoolchildren released in a safe and anticipated manner, the school breaches a duty when it releases a child without further supervision *into a foreseeably hazardous*

⁴ Defendant SSDA submitted the “participant safety” section of plaintiff MAC’s program enrollment form. The section purportedly granting plaintiff’s brother authority over him relates to plaintiff MAC’s discharge conditions. Above the list of persons permitted to pick up plaintiff MAC from school is the statement, “My child has permission to walk home alone at dismissal,” with checkboxes for “Yes” and “No.” The “No” box is checked, and handwritten in are the words “with his brother C.”

setting it had a hand in creating” (*id.* [emphasis added]). A school is in the position to determine the timing, place and conditions for sending a child home, and a school is under a duty to release a child from its custody in a safe manner (*see Williams v Weatherstone*, 23 NY3d 384 [2014]).

Contrary to the moving defendants’ assertion, plaintiff MAC’s testimony that the students could use either the Tiffany Street or the Fox Street exit does not establish that, as a matter of law, plaintiff MAC was provided with a safe place to exit, and, in any event, is contradicted by other proof that the discharge point was officially changed from the Tiffany Street exit to the Fox Street exit, presenting an issue of credibility (*see A.L. v N.Y.C. Hous. Auth.*, 169 AD3d 40 [1st Dept 2019]). Furthermore, contrary to defendant SSDA’s reading, the parental notification regarding the change in exit did not apply merely to “pick up.” The notification stated, “*the entrance to the school has changed ... dismissal and pick up will no longer be on the Tiffany Street entrance (emphasis added).*” The Program Director averred that the students were escorted to the Fox Street exit upon dismissal from the after-school program.

It is apparent that the environments of the Tiffany Street and Fox Street exits differed in several material respects.⁵ Regardless of the differences between them, defendant SSDA failed to affirmatively establish that the Fox Street exit, specifically, and the environment into which plaintiff MAC was released, generally, were not “foreseeably hazardous settings” (*see Ernest, supra*). To the extent defendant SSDA asserted that the exit change from Tiffany Street to Fox Street was beyond its control, it did not establish that it did not have the obligation, opportunity or means to enact such measures as would ensure that the Fox Street exit, specifically, and the environment into which plaintiff MAC was released, generally, were reasonably safe for student

⁵ According to plaintiffs, Fox Street was narrower and more dimly-lit than Tiffany Street, with more foliage cover and no school zone warning signs, reduced speed limit, pavement markings or speed bumps, whereas Tiffany Street possessed such signs, pavement markings and a speed bump, as well as a reduced speed limit.

egress, or that such measures were unnecessary and unwarranted in the discharge of its duty to release children from its custody in a safe manner. The only environmental characteristic of the Fox Street exit to which defendant SSDA referred was the neighborhood lighting. According to the police investigation report, although the accident happened during darkness, “the roadway was illuminated by overhead lights.” Defendant SSDA, however, failed to establish that this factor, alone, rendered the Fox Street exit reasonably safe for the release of students (*see Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014] [“whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case”]).

Thus, the moving and cross-moving defendants failed to meet their prima facie burden, as their evidence demonstrated the existence of triable issues of fact as to the safety of the environment into which plaintiff MAC was released (*see Mamadou S. v Feliciano*, 123 AD3d 610, 610-11 [1st Dept 2014] [“the record presents issues of fact as to whether defendant BOE owed a duty of care to protect the infant plaintiff from traffic hazards after he was discharged by the school bus in front of the school, five minutes before the school day would begin, and whether that duty was breached by the school’s failure to provide adequate safety measures, such as traffic barricades, proximately causing the injury” when the plaintiff darted or was pushed into the street]).⁶

Defendant SSDA asserts, though, that even if it was negligent in releasing plaintiff MAC into a foreseeably hazardous setting, such negligence was a not a proximate cause of his injuries, but merely furnished the occasion for the accident, because defendant SSDA could not

⁶ The moving defendants assert that *Mamadou S.* is not persuasive because, in contrast to this action, the events therein occurred before the school day commenced. The events in *Mamadou S.*, however, occurred at a time when, otherwise, the school would have had no duty toward the student, similarly to the moving defendants’ assertion here.

reasonably have anticipated that plaintiff MAC would suddenly run into the street during horseplay. Defendant SSDA asserts that plaintiff was 14 years old⁷ at the time of the accident, lived fairly close to the school, regularly walked to and from school with his older brother, and had done so from the Fox Street exit without incident for at least four months prior to the accident.

“Proximate cause is, at its core, a uniquely fact-specific determination, and depending upon the nature of the case, a variety of factors may be relevant in assessing legal cause. Such factors include, among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; the spatial gap, if any, between the original act and the intervening act; whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act; whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability. The relevance of each factor will vary depending upon the factual circumstances presented, but the most significant inquiry in the proximate cause analysis is often that of foreseeability” (*Hain v Jamison*, 28 NY3d 524, 530 [2016] [internal citations and quotation marks omitted]).

An actor’s affirmative negligence may “merely [furnish] the occasion for an unrelated act to cause injuries not ordinarily anticipated” (*Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 316 [1980]), “or give rise to the occasion by which plaintiff’s injury was made possible” (*McLean v Ripoli*, 157 AD3d 604, 605 [1st Dept 2018]), without being a legal cause of the injuries (*see Hain, supra; Barry v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 130 AD3d 500 [1st Dept 2015], *lv den* 26 NY3d 910 [2015]). Even where it is found that a defendant was negligent and created a dangerous condition, if such condition merely furnishes the occasion for an accident but was not one of its proximate causes, liability will not attach (*see Starks v R+L Carriers*, 134 AD3d 500 [1st Dept 2015]).

“Where the acts of a third person intervene between a defendant’s negligent conduct and

⁷ Assuming plaintiff MAC’s date of birth was accurately recited in the bill of particulars, the accident occurred approximately one and a half months prior to his 14th birthday.

a plaintiff's injury, the causal connection between the two is not severed as a matter of law. Rather, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*De 'L. A. v City of N.Y.*, 158 AD3d 30, 36 [1st Dept 2017] [citation and quotation marks omitted]). "Only where the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, may it possibly break the causal nexus" (*Mazella v Beals*, 27 NY3d 694, 706 [2016] [internal citations and quotation marks omitted]).

Where, however, "the risk of harm created by a defendant's conduct corresponds to that which actually results -- absent an extraordinary intervening act or significant facts weighing in favor of attenuation -- it cannot be said, as a matter of law, that a defendant's negligence merely furnished the occasion for the harm. Under such circumstances, the determination of proximate cause is best left for the factfinder" (*Hain*, 28 NY3d at 530 [internal citations and quotation marks omitted]).

Here, viewing the facts in the light most favorable to plaintiffs as the non-movants (*see Matter of N.Y.C. Asbestos Litig.*, 2019 NY Slip Op 01259 [2019]), and applying the principle that proximate cause is a question for the finder of fact where varying inferences are possible (*see Ernest, supra*), several factors militate against granting summary relief to defendant SSDA and the municipal education and transportation defendants. Very little time passed between dismissal and the accident, given that the accident occurred as few as nine minutes after the conclusion of the after-school session, as per the police accident report. In addition, given that the source of the video of the accident was either the school itself or a private house next to or near the school (according to the police records), the accident occurred in close proximity to the

school. It is furthermore apparent that dismissal and the accident did not occur during daylight hours. Additionally, the presence of school-related signage, roadway markings and a speed bump outside the *Tiffany* Street -- but not the *Fox* Street -- exit, directed to the attention of motorists, suggests that an accident between a vehicle approaching the school and a recently-released student was reasonably foreseeable (*see Ernest, supra; see also Chalen v Glen Cove Sch. Dist.*, 29 AD3d 508, 509 [2d Dept 2006], *lv den* 7 NY3d 709 [2006] [“to impose liability on the school, it must have sufficiently specific knowledge of the particular danger”]).⁸ It is reasonable to infer that such features are installed for the purpose of preventing motor-vehicle-related harm to the particular type of young pedestrian involved here. Accordingly, defendant SSDA has not demonstrated, as a matter of law, that the use of the Fox Street exit did not constitute a proximate cause of plaintiff MAC’s injuries (*see Allison D. v N.Y.C. Transit Auth.*, 115 AD3d 576 [1st Dept 2014]).

In addition, plaintiffs and the municipal education and transportation defendants assert that the motion and cross motion are premature because discovery, including the defendants’ depositions, remains outstanding. Significant discovery remains outstanding, and there is “either a likelihood that [defendants have] exclusive knowledge of relevant evidence or that further discovery might reveal the existence of such evidence” (*W. & M. Operating, L.L.C. v Bakhshi*, 159 AD3d 520, 522 [1st Dept 2018]).

The cross-moving defendants established that defendants New York City Department of Transportation and New York City Department of Youth and Community Development may not be sued as independent entities (*see Troy v City of N.Y.*, 160 AD3d 410 [1st Dept 2018]; *Matter*

⁸ To paraphrase *Ernest*, the evidence could readily support an inference that the absence of signage, roadway markings, a speed bump, or any temporary warning device outside the Fox Street exit contributed to the happening of the accident by materially increasing the risk of plaintiff MAC being struck after entering the road (*see Ernest*, 93 NY2d at 674-675).

of Carpenter v N.Y.C. Hous. Auth., 146 AD3d 674 [1st Dept 2017], *lv den* 29 NY3d 911 [2017]; *Paporters v Campos*, 122 AD3d 521 [1st Dept 2014]; *Toth v N.Y.C. Dept. of Citywide Admin. Servs.*, 119 AD3d 431 [1st Dept 2014], *lv den* 24 NY3d 908 [2014]; *Siino v Dept. of Educ. of N.Y.*, 44 AD3d 568 [1st Dept 2007]), and plaintiffs failed to raise an issue of fact in this regard.

Accordingly, it is

ORDERED, that the moving defendants' motion for summary judgment is denied; and it is further

ORDERED, that the aspect of the cross-moving defendants' cross motion for summary judgment dismissing the claims against defendants New York City Department of Transportation and New York City Department of Youth and Community Development is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants New York City Department of Transportation and New York City Department of Youth and Community Development dismissing the complaint as against them and all cross claims against them; and it is further

ORDERED, that the cross motion is otherwise denied.

The parties are reminded of the June 21, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: May 9, 2019



John R. Higgitt, J.S.C.