

Banegas-Gioielli v County of Suffolk

2019 NY Slip Op 33114(U)

October 16, 2019

Supreme Court, Suffolk County

Docket Number: 15-8176

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 15-8176
CAL. No. 18-01412OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 1-22-19
ADJ. DATE 5-7-19
Mot. Seq. # 002 - MG; CASEDISP

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MATTHEW J. BANEGAS-GIOIELLI, an Infant
by His Mother and Natural Guardian, CIERRA
GIOIELLI, and CIERRA GIOIELLI, Individually,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, EASTERN SUFFOLK
BOCES BOARD OF COOPERATIVE
EDUCATION SERVICES, FIRST
SUPERVISORY DISTRICT OF SUFFOLK
COUNTY, SAYVILLE ACADEMIC CENTER,
ASHA MAZA-SHAW, JOHN DOE 1, JOHN
DOE 2, AND JOHN DOE 3, the first and last
names being fictitious and unknown to the
plaintiffs herein,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29 - 30; Replying Affidavits and supporting papers 31 - 33; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Eastern Suffolk Board of Cooperatives Educational Services, First Supervisory District of Suffolk County, Sayville Academic Center, and Asha Maza-Shaw for summary judgment dismissing the complaint is granted.

Plaintiff Cierra Gioielli, suing individually and on behalf of her son, Matthew J. Banegas-Gioielli, commenced this action to recover for injuries infant plaintiff allegedly sustained at Sayville Academic Center, on May 19, 2014. By their complaint, as amplified by their bill of particulars, plaintiffs allege, among other things, that defendants Eastern Suffolk Board of Cooperatives Educational Services, First Supervisory District of Suffolk County (Eastern Suffolk BOCES), Sayville Academic Center, and Asha Maza-Shaw failed to adequately supervise infant plaintiff by failing to prevent certain teachers and aides from pushing, kicking, and striking infant plaintiff, and that defendant Eastern Suffolk BOCES was negligent in hiring, training, and supervising its employees. Infant plaintiff, a ten-year old student at the time of the incident, allegedly sustained injuries as a result of intervention techniques performed by Eastern Suffolk BOCES employees, Asha-Maza Shaw, Michael Reid Harris, and Alonza Hopkins. The Court notes that by order dated February 1, 2017, this Court granted the motion by the County of Suffolk for summary judgment dismissing the complaint and all cross claims against it.

Defendants now move for summary judgment dismissing the complaint, contending that Eastern Suffolk BOCES did not breach its duty to adequately supervise infant plaintiff. In support of their motion, defendants submit, among other things, the deposition testimony of Maza-Shaw, Harris, and Hopkins, the testimony from plaintiff's hearing conducted pursuant to General Municipal Law § 50-h, and the affidavit of Bruce Levenberg. In opposition, plaintiffs argue that triable issues of fact remain as to whether Hopkins implemented the intervention techniques in a non-negligent manner.

Infant plaintiff's special education teacher, Maza-Shaw testified that she was assigned to a self-contained classroom during the subject school year, in which there were six students, one teacher, and one teacher assistant. She stated that she received training yearly relating to behavior intervention, including non-violent crisis intervention (NVCPI) and de-escalation techniques. She testified that physical restraint would only be implemented when the safety and the welfare of a student or of a teacher were in jeopardy. She also stated that other de-escalation techniques were always used before a student was placed in the behavior intervention room (BIR). According to her testimony, she received infant plaintiff's individualized education program (IEP) before infant plaintiff began attending Sayville Academic Center in May of 2014. His IEP allegedly contained strategies and services to be implemented, and was generated by his home school district. She testified that it was her responsibility to implement the IEP, which included information regarding the assignment of an individual aide and individual counseling. She testified that she believed that infant plaintiff had been placed in the BIR before this incident. She allegedly was aware that infant plaintiff had attempted to run away at his other placements.

Maza-Shaw testified that on the date of the incident, she was not present when infant plaintiff became frustrated during art class. After allegedly arriving at the art room, she allegedly observed that infant plaintiff was not responding, and that he had his head down. She stated that she attempted to de-escalate him. Infant plaintiff allegedly did not follow directions to lineup with the rest of the class, and began to walk to her classroom, which was two floors above the art room. Maza-Shaw testified that infant plaintiff was using his body to collide into her and other staff members, and that he was attempting to run away. She stated that after returning to the classroom, she asked infant plaintiff if he would like to sit in a quiet area of the classroom. Infant plaintiff allegedly was punching himself in the legs and face. Maza-Shaw offered to walk with infant plaintiff and his individual aide, Harris. She stated that infant plaintiff agreed to walk

with them. Maza-Shaw stated that she decided to escort infant plaintiff to the BIR because he had attempted to run away. Maza-Shaw and Harris allegedly used NVCPI team transport techniques to transport infant plaintiff to the BIR, in which they stood on opposite sides of infant plaintiff and interlocked arms with him to guide him down the hallway to the BIR.

After arriving at the BIR, Maza-Shaw and Harris allegedly used verbal de-escalation techniques to calm infant plaintiff. Maza-Shaw testified that infant plaintiff continued to escalate and charged at them, and attempted to open the doors in the BIR, which connected to an office and to the hallway. Maza-Shaw and Harris allegedly blocked both doors of the BIR, and infant plaintiff allegedly continued to charge at them and attempted to run away. She testified that infant plaintiff was rolling around on the floor, was banging his head on the mats, and was attempting to bite, to pinch, and to scratch them, making contact with her multiple times. Maza-Shaw and Harris allegedly maintained a supportive stance to minimize contact. Maza testified that when infant plaintiff grabbed her arm and bit her for the third or fourth time, she implemented NCVPI team control techniques with Harris. Maza-Shaw and Harris allegedly stood with infant plaintiff, with their arms interlocked, to ensure that infant plaintiff could not run around or attempt to hurt himself or others. She stated that in response, infant plaintiff yelled and attempted to move his body to run away. Maza-Shaw and Harris allegedly stood with infant plaintiff for a few minutes, when infant plaintiff allegedly lifted his legs, dropped to his knees, and lay on his stomach. Maza-Shaw further testified that she and Harris dropped to their knees in response to infant plaintiff dropping to his knees, and that she continued to provide verbal de-escalation. Maza-Shaw stated that one of her arms was supporting her weight, while the other arm was holding onto infant plaintiff's wrist, and that Harris was in the same position on the other side of infant plaintiff. She testified that she never grabbed infant plaintiff's arm, and that she did not observe Harris grab his arm at any point.

Maza-Shaw allegedly provided verbal de-escalation for approximately five to ten minutes, when the head of the support team, Hopkins, allegedly knocked on the door of the BIR, and entered it. She testified that it was protocol for the head of the support team to enter to the BIR after a student had entered it. As she allegedly wanted to call plaintiff, she allegedly asked Hopkins to switch positions with her. According to her testimony, she went downstairs to call plaintiff. She allegedly explained to plaintiff that infant plaintiff was in the BIR, and that they used physical restraint to maintain his safety. Maza-Shaw testified that after contacting plaintiff, she returned to the BIR, where she observed that infant plaintiff appeared to be calmer, sitting on the floor, in a corner of the BIR. Harris and Hopkins allegedly were standing on the opposite side of the room from infant plaintiff. She stated that she attempted to speak to infant plaintiff, however, infant plaintiff did not respond. After Maza-Shaw allegedly returned, infant plaintiff allegedly remained in the BIR for approximately one or two minutes, and left without any assistance or restraint. According to her testimony, after noticing that he was holding his mouth off to the side, she escorted infant plaintiff to the nurse. She testified that she made no contact with infant plaintiff's jaw, and that she did not observe Harris make any contact with infant plaintiff's jaw.

Infant plaintiff's individual aide, Harris testified that he had been assigned to infant plaintiffs for less than a week before the accident occurred. As his individual aide, Harris allegedly was required to follow infant plaintiff throughout the entire school day. He testified that he received crisis intervention training prior to becoming an aide. According to Harris' testimony, prior to the incident, infant plaintiff was

allegedly in Maza-Shaw's classroom, making disruptive noises, hitting his desk, kicking his chair, and swinging his arms around. Infant plaintiff allegedly was asked to leave and was brought to the BIR by Harris and Maza-Shaw. He testified that a transportation technique was used to direct infant plaintiff out of the classroom, which was standard procedure when a student was being disruptive and would not leave on his or her own accord. He further testified that prior to implementing the transportation technique, no one from the crisis intervention team came to the classroom. When asked to describe how infant plaintiff was directed to the BIR, he stated that they went on each side of him, placing one of their arms underneath one of his arms, and one of their arms near one of his wrists. Infant plaintiff allegedly bit Harris' hand at least one time, scratched Harris and Maza-Shaw, and swung his foot. According to his testimony, infant plaintiff was resisting to a degree where the transport technique was no longer safe, so they switched to a transition technique, in which they remained still for approximately 30 seconds. Each staff member allegedly put one of their feet in front of infant plaintiff's feet, and one of their arms on one of infant plaintiff's shoulders, while their other arms was placed on infant plaintiff's wrists. He testified that they returned to the transportation technique after infant plaintiff stopped being aggressive.

According to Harris' testimony, after entering the BIR, infant plaintiff attempted to bite, to kick, and to scratch Maza-Shaw and him. Harris testified that at the instruction of Maza-Shaw, they transitioned into a different technique, in which Harris pushed infant plaintiff's legs backwards, and positioned one of their arms underneath one of infant plaintiff's arms, causing all three of them to drop to the floor. Harris testified that infant plaintiff was on his knees, and that he did not voluntarily lie down. Harris further testified that infant plaintiff was positioned where he was supporting himself with his knees, and that he and Maza-Shaw moved forward to lie down. According to his testimony, the manner in which Harris and Maza-Shaw fell to the ground did not allow infant plaintiff's knees to support him. Harris allegedly was lying on his left side, facing away from infant plaintiff, and would occasionally turn his head to verify that they remained properly positioned. He stated that while they were on the floor, infant plaintiff bit him one or two times, and also bit Maza-Shaw. In response, they allegedly moved their arms closer to infant plaintiff's head to limit his ability to move and to bite them. He testified that two or three people came to door of the BIR. Hopkins allegedly took the position of Maza-Shaw on the floor, and they remained in that position for a few minutes. According to Harris' testimony, he left his side position, leaving his hands on infant plaintiff's shoulder and wrist to ensure that infant plaintiff did not harm himself or others, and released him. He testified that after the three stood up, infant plaintiff went to the corner of the room for a few minutes. Infant plaintiff allegedly grunted and moaned during the entire transition. He stated that he did not observe infant plaintiff make contact with any walls in the room. According to his testimony, infant plaintiff voluntarily left the room.

The building coordinator of the Sayville Academic Center at the time of the incident, Hopkins testified that he received training by the Crisis Prevention Institute every three years to train employees of BOCES. According to his testimony, all staff members for Eastern Suffolk BOCES received training on crisis intervention. He stated that he did not recall the incident.

Plaintiff testified that infant plaintiff was placed at the Sayville Academic Center on or about May 3, 2014, at the recommendation of the committee on special education from the South County School District. She stated that infant plaintiff had an IEP, which did not include any information

regarding infant plaintiff's physical behaviors or manifestations. However, she stated that her son had exhibited self-injurious behavior, including scratching himself, hitting himself, and banging his head. According to her testimony, after infant plaintiff's second day at Sayville Academic Center, she notified the school that he was not assigned an individual aide as specified in his IEP, and she expressed concerns to the assistant director of the BOCES program, Ms. Wainright, regarding infant plaintiff's frustrations resulting from his arms being touched. She also testified that she expressed such concerns to Maza-Shaw. According to her testimony, infant plaintiff was not assigned an individual aide until the week after he started school at Sayville Academic Center.

Bruce Levenberg states that he is a trained Crisis Interventionist in the proper use of student restraint and in Autism Spectrum Disorder DSM-V. Levenberg states that he has reviewed, among other things, infant plaintiff's 2013-2014 IEP, the deposition testimony of plaintiff, Maza-Shaw, Harris, and Hopkins, and the statutory hearing testimony of plaintiff. Levenberg opines that infant plaintiff's 2013-2014 IEP accounted for infant plaintiff's behavioral and communicative deficits including his emotional issues, aggression, self-harm, and history of eloping. He states that the BIR at Sayville Academic Center met New York State Education Department requirements relating to physical and monitoring requirements, parental rights, and IEP requirements for students with disabilities. Levenberg concludes that on the date of the incident, the BOCES staff provided adequate supervision because the staff attempted to use verbal interaction to calm down infant plaintiff and to de-escalate the situation, and resorted to directing infant plaintiff out of the classroom after verbal communication was unsuccessful. He opines that Crisis Prevention Institute Program techniques were implemented appropriately by defendants and BOCES staff in accordance with protocols and state regulations. Levenberg concludes, to a reasonable degree of certainty, that defendants employed appropriate restraint and behavior management techniques in removing infant plaintiff from the classroom, while they transported infant plaintiff to the BIR, and while infant plaintiff was in the BIR. He further concludes, to a reasonable degree of certainty, that defendants did not apply unreasonable or excessive force to infant plaintiff at any time, and that the physical intervention and venue control followed properly controlled protocols and state regulations, and were required by infant plaintiff's own actions in order to prevent harm to infant plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v*

Banegas-Gioielli v County of Suffolk
 Index No. 15-8176
 Page 6

Chevron Corp., 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

Schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision (*Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372 [1994]; see *M.P. v Central Islip Union Free Sch. Dist.*, 174 AD3d 636, 101 NYS3d 898; *Jackson v Brentwood Union Free Sch. Dist.*, 173 AD3d 985, 104 NYS3d 148 [2d Dept 2019]; *B.T. v Bethpage Union Free Sch. Dist.*, 173 AD3d 806, 103 NYS3d 99 [2d Dept 2019]; *Chiauszi v Sewanhaka Cent. High Sch. Dist.*, 170 AD3d 1106, 94 NYS3d 880 [2d Dept 2019]). Schools must exercise the degree of care as an ordinary parent would under comparable circumstances (see *Mirand v City of New York*, *supra*; *Palopoli v Sewanhaka Cent. High Sch. Dist.*, 166 AD3d 639, 87 NYS3d 207 [2d Dept 2018]; *Deb B. v Longwood Cent. Sch. Dist.*, 165 AD3d 1212, 87 NYS3d 625 [2d Dept 2018]). Where a school is aware that a student has a particular disability that makes him or her more susceptible to harm, the school must exercise a degree of care commensurate with that known disability (see *Jaquin v Canastota Cent. Sch. Dist.*, ___ AD3d ___, 2019 NY Slip Op 06555 [3d Dept 2019]; *Lewis v Board of Educ. of the Lansingburgh Cent. Sch. Dist.*, 137 AD3d 1521, 28 NYS3d 493 [3d Dept 2016]; *Warley v Grampp*, 107 AD3d 1111, 967 NYS2d 444 [3d Dept 2013]). However, schools cannot reasonably be expected to continuously supervise and control all of their students' movements and activities (see *B.J. v Board of Educ. of the City of N.Y.*, 172 AD3d 693, 100 NYS3d 51 [2d Dept 2019]; *Chiauszi v Sewanhaka Cent. High Sch. Dist.*, *supra*; *Ponzini v Sag Harbor Union Free Sch. Dist.*, 166 AD3d 914, 87 NYS3d 566 [2d Dept 2018]).

Here, defendants established, prima facie, that defendants provided adequate supervision to infant plaintiff, and that any alleged lack of supervision was not the proximate cause of infant plaintiff's injuries (see *V.W. v Middle Country Cent. Sch. Dist. at Centereach*, 175 AD3d 638, 2019 NY Slip Op 06226 [2d Dept 2019]; *Perez v Comsewogue Sch. Dist.*, 141 AD3d 577, 36 NYS3d 159 [2d Dept 2016]; *Gomez v Our Lady of Fatima Church*, 117 AD3d 987, 986 NYS2d 550 [2d Dept 2014]). Defendants' submissions included the affidavit of Levenberg, which demonstrated that the individual defendants employed appropriate restraint and behavior management techniques, and that such defendants did not apply unreasonable or excessive force to infant plaintiff during the incident. In opposition, plaintiffs failed to raise a triable issue of fact (see *V.W. v Middle Country Cent. Sch. Dist. at Centereach*, *supra*; *Perez v Comsewogue Sch. Dist.*, *supra*; *Gomez v Our Lady of Fatima Church*, *supra*).

Defendant Eastern Suffolk BOCES also established its prima facie entitlement to judgment as a matter of law dismissing the claim of negligent hiring, supervision, and training. As a general rule, 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 (see *Decker v State of New York*, 164 AD3d 650, 83 NYS3d 533 [2d Dept 2018]; *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015]). As defendants' submissions established that Maza-Shaw, Harris, and Reid were not negligent in their supervision of infant plaintiff during the alleged incident, the claim for negligent hiring, supervision, and training must be dismissed (*cf. Cotter v Summit Sec. Servs., Inc.*, 14

Banegas-Gioielli v County of Suffolk
Index No. 15-8176
Page 7

AD3d 475, 788 NYS2d 153 [2d Dept 2005]; *Primeau v Town of Amherst*, 303 AD2d 1035, 757 NYS2d 201 [4th Dept 2003]).

In light of the foregoing, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: October 16, 2019

Martha R. Pule
A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION