Y.F. v Comsewogue Union Free Sch. Dist.
2019 NY Slip Op 33394(U)
November 13, 2019
Supreme Court, Suffolk County
Docket Number: 08469/2016
Judge: William B. Rebolini
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Y.F., an Infant under Fourteen (14) years of age by his Mother and Natural Guardian, Nirda Fernandez, and Nirda Fernandez, individually,

Plaintiff,

-against-

Comsewogue Union Free School District, N.M., an Infant under Fourteen (14) years of age by his Mother and Natural Guardian "Jane" Cruz and "Jane" Cruz, Individually,

Defendants.

Motion Sequence No.: 004; MG
Motion Date: 8/14/19
Submitted: 8/28/19

Index No.: 08469/2016

Plaintiff Pro Se:

Nirda Fernandez
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Port Jefferson Station, NY 11776

Attorney for Defendants:

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Clerk of the Court

Upon the following papers numbered 1 to 24 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 20; Answering Affidavits and supporting papers, 21 - 22; Replying Affidavits and supporting papers, 23 - 24; it is

ORDERED that the motion by defendant Comsewogue Union Free School District for summary judgment dismissing the complaint as asserted against it is granted.

This is an action to recover damages for injuries allegedly sustained by infant plaintiff Y.F. on June 9, 2015, at John F. Kennedy Middle School, in Port Jefferson Station, New York. The accident allegedly occurred when infant plaintiff was tripped by a fellow student, defendant N.M., in the hallway, causing him to fall to the ground and sustain injuries. Plaintiff Nirda Fernandez,

suing on behalf of her son, claims that defendant Comsewogue Union Free School District (District) was negligent in failing to properly supervise infant plaintiff and N.M. Plaintiff also sues derivatively for loss of services and society. Neither N.M. nor his mother, "Jane" Cruz, have appeared in this action.

The District now moves for summary judgment dismissing the complaint as asserted against it, arguing that the supervision provided by the school was adequate, that it did not have actual or constructive notice of any prior dangerous conduct on the part of N.M., and that if supervision was negligent, that the incident happened so quickly that any alleged negligent supervision was not the proximate cause of infant plaintiff's injuries. In support of its motion, the District submits, *inter alia*, transcripts of infant plaintiff's and Nirda Fernandez's testimony at their General Municipal Law §50-h hearings, as well as transcripts of the deposition testimony of infant plaintiff and Michael Fama, Principal of John F. Kennedy Middle School. Plaintiffs oppose the motion, arguing that N.M. has engaged in prior dangerous conduct, including physical conduct against infant plaintiff. In support, plaintiff Nirda Fernandez submits her affidavit.

Infant plaintiff testified at a General Municipal §50-h hearing on January 18, 2016, and he was deposed on August 22, 2017. His testimony was essentially the same at both proceedings. Y.F. testified that he had been friends with N.M. for at least one year prior to the incident and that they had not had any conflict. He testified that on June 9, 2015, he was in the sixth grade at John F. Kennedy Middle School. He testified that at approximately 8:30 a.m., he was in his home room when he asked permission to leave to use the bathroom. Y.F. testified that while he was in the bathroom, the bell went off, signaling a change in class. He testified that he began to walk back to his classroom. Y.F. testified that he observed N.M. and two other classmates walking in the hall, toward him, in the opposite direction. He testified that the hallway was "very crowded," but that everyone was walking "normally." Y.F. testified that N.M. stuck his right foot out, hitting Y.F.'s right leg, causing him to trip and fall to the ground. Y.F. testified that before June 9, 2015, he never saw N.M. trip or pull pranks on anyone, and that he never complained to anyone at the school about N.M. Y.F. testified that N.M. once fooled around and slapped his face. Y.F. also testified that N.M. has "bullied" and tripped two other students.

At his deposition, Michael Fama testified that he has been the principal at John F. Kennedy Middle School for 15 years. He testified he is responsible for, *inter alia*, scheduling, teacher evaluation, curriculum development and student discipline. He testified that the District employed two assistant principals, James Hilbert and Theresa Etts, who assisted him with student discipline, stating that the assistant principals primarily handle discipline, but that he steps in when he considers student conduct to be "severe." Mr. Fama testified that if two students had a conflict, school staff would attempt mediation with guidance counselors. If that process did not work, then the next steps would be to separate the students and institute progressive disciplinary measures. Additionally, Mr. Fama testified that teachers are present in the hallways between class periods to monitor student movement, and that additional aides are on duty to monitor the hallways between 10:00 a.m. and 1:20 p.m., as those hours had more student movement than at 8:30 a.m. Mr. Fama testified that he is familiar with both Y.F. and N.M., and that he had met with each as he progressed through the

middle school. He testified he was unaware or did not recall any conflict between the two. He testified that he first became aware of the June 9 incident when he reviewed the incident report documenting Y.F.'s fall. Mr. Fama testified that the Y.F.'s incident was never characterized as an intentional trip by N.M. until he read the complaint filed in this action.

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 moving party has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the moving party 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 such a showing requires 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 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 caused by the absence of adequate supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; *see* ***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]; ***Chiauzzi v Sewanhaka Cent. High Sch. Dist.***, 170 AD3d 1106, 94 NYS3d 880 [2d Dept 2019]). 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 New York***, 172 AD3d 693, 100 NYS3d 51 [2d Dept 2019]; ***Chiauzzi v Sewanhaka Cent. High Sch. Dist.***, *supra*; ***Ponzini v Sag Harbor Union Free Sch. Dist.***, 166 AD3d 914, 87 NYS3d 566 [2d Dept 2018]). Additionally, "unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct" (***Brandy B. v Eden Cent. Sch. Dist.***, 15 NY3d 297, 302, 907 NYS2d 735 [2010]; *see* ***Mirand v City of New York***, *supra*; ***Meyer v Magalios***, 170 AD3d 1163, 97 NYS3d 265 [2d Dept 2019]). "It must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (***Brandy B. v Eden Cent. Sch. Dist.***, *supra* at 302; *see* ***Williams v Student Bus Co., Inc.***, 170 AD3d 1085, 96 NYS3d 345 [2d Dept 2019]). School employees cannot be expected to guard against all of the sudden, spontaneous acts that take place among students on a daily basis, and "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence" (***Mirand v City of New York***,

supra at 49; *see* ***Maldari v Mount Pleasant Cent. Sch. Dist.***, 131 AD3d 1019, 17 NYS3d 48; ***Jake F. v Plainview-Old Bethpage Cent. Sch. Dist.***, 94 AD3d 804, 944 NYS2d 152 [2d Dept 2012]).

Even if a breach of the duty of supervision is established, it must still be established that the negligence was a proximate cause of the injuries sustained (*see* ***Gaston v East Ramapo Cent. Sch. Dist.***, 165 AD3d 761, 85 NYS3d 525 [2d Dept 2018]; ***R.T. v Three Vil. Cent. Sch. Dist.***, 153 AD3d 747, 59 NYS3d 483 [2d Dept 2017]). The test for causation is whether the chain of events following the negligent act or omission was a normal or foreseeable consequence under the circumstances (*see* ***Mirand v City of New York***, *supra*; ***Guerriero v Sewanhaka Cent. High Sch. Dist.***, 150 AD3d 831, 55 NYS3d 85 [2d Dept 2017]). Where an accident occurs so quickly that even the most intense supervision could not have prevented it, any alleged lack of supervision is not a proximate cause of the injury, and summary judgment in favor of the school district is warranted (*see* ***B.T. v Bethpage Union Free Sch. Dist.***, *supra*; ***K.A. v City of New York***, 169 AD3d 655, 92 NYS3d 718 [2d Dept 2019]; ***Hinz v Wantagh Union Free Sch. Dist.***, 165 AD3d 1074, 86 NYS3d 140 [2d Dept 2018]; ***Tzimopoulos v Plainview-Old Bethpage Cent. Sch. Dist.***, 155 AD3d 987, 64 NYS3d 323 [2d Dept 2017]; ***Santos v City of New York***, 138 AD3d 968, 30 NYS3d 258 [2d Dept 2016]). The determination of whether an incident occurs in such a short span of time is based on the circumstances leading up to and surrounding the incident rather than "the speed of the punch" (***K.J. v City of New York***, 156 AD3d 611, 614, 65 NYS3d 522 [2d Dept 2017], quoting ***Wood v Watervliet City Sch. Dist.***, 30 AD3d 663, 665, 815 NYS2d 360 [3d Dept 2006]).

Here, the District has demonstrated, prima facie, that it did not have actual or constructive notice of N.M. engaging in conduct similar to that alleged in this action, specifically, tripping another student, prior to the subject incident (***Brandy B. v Eden Cent. Sch. Dist.***, *supra*; ***Meyer v Magalios***, *supra*; ***Fernandez v City of Yonkers***, 139 AD3d 895, 31 NYS3d 595 [2d Dept 2016]; ***Maldari v Mount Pleasant Cent. Sch. Dist.***, *supra*). Infant plaintiff testified that he and N.M. were friends and had no history of disagreements up until the day of the incident. Further, infant plaintiff testified that he never complained to school personnel about any of N.M.'s behavior toward him, or any other student, preceding the incident. Additionally, he testified that he considered N.M.'s behavior to be "fooling around." Further, Principal Michael Fama testified that he was unaware of any reports of incidents between N.M. and infant plaintiff.

Further, the District has demonstrated that any alleged inadequate supervision was not a proximate cause of the accident (*see* ***J.H. v City of New York***, 170 AD3d 816, 93 NYS3d 896 [2d Dept 2019]; ***K.B. v City of New York***, 166 AD 3d 744, 88 NYS3d 549 [2d Dept 2018]; ***Hinz v Wantagh Union Free Sch. Dist.***, *supra*; ***Goldschmidt v City of New York***, 123 AD3d 1087, 1 NYS3d 204 [2d Dept 2014]). The District's submissions established that the incident occurred so quickly that it could not have been prevented by any reasonable degree of supervision (*see* ***M.P. v Central Islip Union Free Sch. Dist.***, 174 AD3d 636, 101 NYS3d 898 [2d Dept 2019]; ***C.M. v Gasiorowski***, 173 AD3d 1156, 102 NYS3d 681 [2d Dept 2019]; ***Scavelli v Town of Carmel***, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]; ***Reardon v Carle Place Union Free Sch. Dist.***, 27 AD3d 635, 813 NYS2d 150 [2d Dept 2006]). Infant plaintiff acknowledges that the action of N.M. occurred quickly and without warning (*see* ***K.J. v City of New York***, *supra*).

In opposition, plaintiffs failed to raise a triable issue of fact as to either actual or constructive notice, or causation (***J.H. v City of New York***, *supra*; ***Hinz v Wantagh Union Free Sch. Dist.***, *supra*; ***Goldschmidt v City of New York***, *supra*). Plaintiffs' opposition papers, which offer speculatory accusations about N.M.'s propensity to engage in offensive physical behavior toward others, but do not specify when or where this alleged behavior occurred are insufficient to defeat the District's prima facie showing of entitlement to summary judgment.

Accordingly, the motion by defendant Comsewogue Union Free School District for summary judgment dismissing the complaint as asserted against it is granted.

Dated: 11/13/2019

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**