

<b>Benavides v Brentwood Union Free Sch. Dist.</b>
2020 NY Slip Op 34467(U)
January 8, 2020
Supreme Court, Suffolk County
Docket Number: 617430/2016
Judge: Linda Kevins
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NYSCEF DOC. NO. 135  
SHORT FORM ORDER

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INDEX No. 617430/2016

CAL. No. \_\_\_\_\_

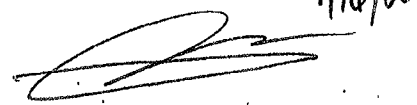
SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

HON. LINDA KEVINS  
Justice of the Supreme Court

MOTION DATE 12-6-18  
ADJ. DATE 5-28-19  
Mot. Seq. # 002-MotD

CERTIFIED COPY AS COMPARED  
TO THE ORIGINAL  
PETER R. GARCIA



-----X  
CANDELARIA PARADA BENAVIDES,  
Plaintiff,  
  
- against -

Attorney for Plaintiff  
PETER R. GARCIA, ESQ.  
38 CEDAR STREET  
STONY BROOK, NY 11790

BRENTWOOD UNION FREE SCHOOL  
DISTRICT,  
Defendants.

Attorney for Defendant  
CONGDON FLAHERTY O'CALLAGHAN  
333 EARLE OVINGTON BLVD.  
UNIONDALE, NY 11553

Upon the following papers e-filed and read on this motion by plaintiff to strike post-deposition errata sheet/compel /strike answer : Notice of Motion and supporting papers by plaintiff, dated November 12, 2018 ; Answering Affidavits and supporting papers by defendant, dated January 17, 2019 ; Replying Affidavits and supporting papers by plaintiff, dated February 4, 2019; Other \_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that plaintiff's motion for an order pursuant to CPLR 3116 (a) striking the post-deposition errata sheet of defendant's witness, and for an order pursuant to CPLR 3124 and 3126 (2), compelling defendant to respond to item seven of plaintiff's notice for discovery and inspection, dated March 30, 2018 or, alternatively, striking defendant's answer for its failure to respond to item seven of plaintiff's notice for discovery and inspection is granted to the extent set forth below and is otherwise denied; and it is further

**ORDERED** that defendant is directed to serve upon plaintiff's attorney a verified statement setting forth the names and addresses of such witnesses within 10 days after the service of a copy of this order with notice entry; and it is further

**ORDERED** that all parties and their counsel are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901 on February 4, 2020 at 9:30 a.m. for a Conference unless an executed stipulation of its discontinuance is filed with the Court prior thereto; and it is further

**ORDERED** that plaintiff is directed to serve a certified copy of this order upon the Suffolk County Clerk pursuant to CPLR §§ 8019(c) and 2105; and upon such entry; it is further

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ORDERED that plaintiff is directed to serve a copy of the order with notice of entry upon defendant and its counsel forthwith in the manner provided by CPLR § 308 and shall promptly file the affidavit of service with the Clerk of the Court.

Plaintiff commenced this action in November 2016 to recover damages for personal injuries she allegedly sustained on March 14, 2016 when she slipped and fell in the hallway of the North Elementary School owned by defendant Brentwood Union Free School District. Plaintiff now moves for an order striking the post-deposition errata sheet of defendant's witness, Beverly Wright, on the grounds that she failed to provide a sufficient reason to make substantive changes to her testimony.

Beverly Wright, assistant principal at the North Elementary School, testified for defendant on March 5, 2018. She testified that she was working on the date of the incident, and that she observed plaintiff when she was sitting at a table in the cafeteria at approximately 2:50 p.m. She testified that students are picked up from the cafeteria area, and that she had walked to the door by the cafeteria to prepare for dismissal of students when she first observed plaintiff. Wright testified that heavy rain was falling during dismissal, and that she observed water on the clothing of people who entered the building to pick up their children. She testified that she observed plaintiff fall while she was walking towards the door.

Wright was asked whether she noticed if water had accumulated on the floor, and her response was that she "did not." She was asked whether there was water on the floor where plaintiff fell, and her response was that she "does not recall." Wright was asked whether there was liquid on the floor or whether she observed any liquid on the floor prior to plaintiff's fall and she testified that she did not recall on both questions.

Wright created a post-deposition errata sheet, dated April 26, 2018, and made four changes to her testimony given at the deposition taken on March 5, 2018. In her post-deposition errata affidavit, Wright changed her response to the question of whether she noticed if water had accumulated on the floor, from "I did not" to "I did not observe water on the floor." Wright changed her response to the question of whether there was water on the floor where plaintiff fell, from "I do not recall" to "I did not see water on the floor." As to the two questions regarding whether there was liquid on the floor or whether she observed any liquid on the floor prior to plaintiff's fall, Wright changed her response from "I do not recall" to "I did not see water on the floor." The only explanation given by Wright is one word, "clarification."

While a deponent is authorized to make substantive corrections to their answers, any substantive change must be accompanied by a statement of the reasons therefor. CPLR § 3116 (a) states that "[t]he deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." To provide a sufficient explanation for a substantive change, specific facts must be set forth by the deponent as to why he or she is changing their testimony, and conclusory statements are insufficient and are not countenanced by the courts (*see Torres v Board of Education of City of NY*, 137 AD3d 1256, 29 NYS3d 396 [2d Dept 2016]; *Ashford v Tannenhauser*, 108 AD3d 735, 970 NYS2d 65 [2d Dept 2013]; *Marzan v Persaud*, 29 AD3d 652, 817 NYS2d 297 [2d Dept 2006]).

Here, the changes to Wright's testimony are critical to the issues of defendant's liability, as this is a premises liability case, and notice of an alleged dangerous condition is imperative in determining a property owner's liability. Wright has failed to provide an explanation as to why she did not recall the condition of the floor when she gave her testimony and subsequently was able to state that she did not see water on the floor. "Clarification" is conclusory and vague, and it does not provide an adequate explanation for materially altering the substance of Wright's deposition testimony (*see Horn v 197 5th Ave. Corp.*, 123 AD3d 768, 999 NYS2d 111 [2d Dept 2014]; *Kuzmin v Visiting Nurse Service of New York*, 56 AD3d 438, 866 NYS2d 781 [2d Dept 2008]).

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In opposition, defendant submits an affirmation of counsel. In her affirmation, counsel attempts to explain the reasons for Wright's "corrections" and seeks to provide clarification on behalf of Wright. However, the affirmation has no probative value (*see Cullin v Spiess*, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Accordingly, plaintiff's motion for an order striking the post-deposition errata sheet of Beverly Wright is granted.

Plaintiff also moves for an order pursuant to CPLR 3124 and 3126 (2), compelling defendant to respond to item seven of plaintiff's notice for discovery and inspection, dated March 30, 2018 or, alternatively, striking defendant's answer for its failure to respond to item seven of plaintiff's notice for discovery and inspection. Item seven of plaintiff's notice seeks the "names and addresses of all children and adults appearing in the video of the plaintiff's fall at the North Elementary School located at . . . as testified to by Beverly Wright at page 129-130 of her deposition on March 5, [sic] 2018." Defendant objects to such demand arguing that the names and addresses of students are not discoverable under the Family Educational Rights and Privacy Act.

CPLR § 3101(a) requires full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]; *Cioffi v S.M. Foods, Inc.*, 2019 NY Slip Op 09250 [2d Dept 2019]). Liberal construction is afforded to what is defined as "material and necessary," and as long as the facts requested will assist preparation for trial by sharpening the issues and reducing delay and prolixity, disclosure of such facts bearing on the controversy should be permitted (*Zupnick v City of New Rochelle*, 173 AD3d 947, 103 NYS3d 578 [2d Dept 2019]).

While the statute does not specifically mention names and addresses of witnesses, generally, names and addresses of witnesses who are material and necessary to the prosecution or defense of an action must be disclosed (*Liebowitz v Babad*, 175 AD3d 639, 106 NYS3d 380 [2d Dept 2019]; *Awai v Benchmark Constr. Serv., Inc.*, 172 AD3d 978, 101 NYS3d 130 [2d Dept 2019]; *Zellman v Metropolitan Transp. Auth.*, 409 AD2d 248, 339 NYS2d 255 [2d Dept 1973]). Unless a matter is privileged or is the work product of an attorney, full disclosure of material and necessary information is required (*see* CPLR 3101 [b] and [c]).

The Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, known as the "Buckley Amendment," prohibits the federal government from providing funds to "any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children (20 USCS § 1232g [A]). The purpose of the Act is to provide parents and students with access to their education records while protecting the privacy of students by restricting access of educational records to third parties (*Gonzaga University v Doe*, 536 US 273, 122 S Ct 2268 [2002]). FERPA does not create a private cause of action; rather, it was enacted under the spending clause provision, and it is administered by the Secretary of the Department of Education which has the authority to withdraw funds for noncompliance with the statute (*id.*).

Education records are defined as "those records, files, documents, and other materials which . . . contain information directly related to a student" (20 USCS § 1232g [4][A][i]).

The Act prohibits the unauthorized disclosure of personally identifiable information, other than directory information in student's education records unless there is written parental consent (20 USC § 1232g [b][1]). Further, it is not a violation of the statute if the information is furnished pursuant to a judicial order or subpoena (20 USC § 1232g [2] [B]).

The statute contains a definition for "directory information" relating to a student and it includes: "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance,

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degrees and awards received, and the most recent previous educational agency or institution attended by the student (20 USCS § 1232g [5][A]).


To constitute an educational record, information must relate to an individual student's educational performance, and information regarding the physical security and safety of the school building does not pertain to educational performance (*Culbert v City of New York*, 254 AD2d 385, 679 NYS2d 148 [2d Dept 1998]; *Matter of Rome City Sch. Dist. v Grifasi*, 10 Misc 3d 1034, 806 NYS2d 381 [Sup Ct, Oneida County 2005]). Here, plaintiff seeks disclosure of names and addresses of witnesses depicted in video surveillance footage who allegedly observed plaintiff's fall. Such information is not related to a student's educational performance and is, thus, not an education record (*Culbert v City of New York*, 254 AD2d 385, 679 NYS2d 148; *Rivera v Roman Catholic Diocese of Brooklyn & Queens*, 2017 NY Slip Op 31633[U] [Sup Ct, Queens County 2017]).

The information plaintiff is requesting is directory information (*Staub v East Greenbush School District*, 128 Misc 2d 935, 491 NYS2d 87 [Sup Ct, Rensselaer County 1985]), and the names and addresses of witnesses are material and necessary to plaintiff's claim. Therefore, disclosure of such information does not violate the Act. Furthermore, disclosure provided by judicial order does not violate the statute (20 USC § 1232g [2][B]; *Staten v City of New York*, 90 AD3d 893, 935 NYS2d 80 [2d Dept 2011]).

Accordingly, plaintiff's motion for an order pursuant to CPLR 3124 compelling defendant to disclose the name and addresses of witnesses to plaintiff's accident requested in item seven of plaintiff's notice for discovery and inspection, dated March 30, 2018, is granted. Defendant is directed to serve upon plaintiff's attorney a verified statement setting forth the names and addresses of such witnesses, if known, within 10 days after the service of a copy of this order with notice entry.

This constitutes the decision and order of the Court.

Dated: 1/8/20

  
\_\_\_\_\_  
J.S.C.

HON. LINDA KEVINIS

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\_\_\_\_ FINAL DISPOSITION  NON-FINAL DISPOSITION