Ross v City of New York
2021 NY Slip Op 30680(U)
March 8, 2021
Supreme Court, Kings County
Docket Number: 513444/2016
Judge: Francois A. Rivera

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York on the 8th day of March 2021

HONORABLE FRANCOIS A. RIVERA

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ANNIE ROSS INDIVIDUALLY and AS PARENT AND NATURAL GUARDIAN OF M. R.C, AN INFANT,

Plaintiff,

DECISION & ORDER
Index No. 513444/2016

- against -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION[1] AND HOSH KIDS,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by defendant Hosh Kids (hereinafter Hosh or the movant) on May 5, 2020 under motion sequence number three, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability and dismissing the complaint as asserted against it. The plaintiff has opposed the motion.

-Notice of Motion
-Affirmation in Support
-Exhibits A-I
-Affirmation in Opposition

[1] By notice of motion filed on December 19, 2017 under motion sequence number one, the City of New York and the New York City Department of Education jointly moved for an order pursuant to CPLR 3212 dismissing the complaint and all cross claims asserted against them. By decision and order dated April 1, 2018, the unopposed motion of the City of New York and the New York City Department of Education for summary judgment dismissing the complaint as asserted against them was granted.

-Exhibits A-K
-Affirmation in Reply
-Exhibit A

BACKGROUND

On August 3, 2016, plaintiff commenced the instant action for damages for personal injuries by filing a summons and complaint with the Kings County Clerk's office. On September 2, 2016, Hosh joined issue by filing a verified answer.

The complaint alleges the following salient facts. Plaintiff Annie Ross is the parent and natural guardian of MRC (hereinafter the injured infant). At all relevant times Hosh was the owner of a premise located at 18 Beaver Street, Brooklyn, New York (hereinafter the subject premise). At some point, Hosh, entered into a written contract to conduct an afterschool program at the subject premise (hereinafter the program). Hosh manages, operates, controls, and supervises the program.

On March 25, 2016, the injured infant was at the program and was under the supervision and control of personnel employed by Hosh. On that date, the injured infant was caused to be thrown to the ground by another student or students and thereby sustained injuries and damages (hereinafter the incident).

Hosh negligently operated, managed, controlled and supervised the persons under its charge at the program. Hosh was negligent in causing, permitting, and allowing a dangerous condition to exist, and in causing or creating the dangerous condition, and in failing to make the area safe. The incident and the injured infant's injuries were caused by Hosh's negligence. Annie Ross, as the parent and guardian of the injured infant, was

required to render services for the injured infant's care and cure and, as such, had also sustained damages.

MOTION PAPERS

Hosh's motion papers consists of a notice of motion, an affirmation of its counsel, and nine exhibits labeled A through I. Exhibit A is a copy of the summons and complaint. Exhibit B is Hosh's answer to the complaint. Exhibit C is the plaintiff's verified bill of particulars. Exhibit D is the deposition transcript of plaintiff Annie Ross. Exhibit E is the deposition transcript of Henry Cross. Exhibit F contains photographs of the playground area of the subject premise. Exhibit G is described as an incident report. Exhibit H is the affidavit of Margaret Payne, a safety expert. Exhibit I is a copy of the order dated April 1, 2018, which dismissed the complaint as asserted against the City of New York and the New York City Department of Education.

The plaintiff's opposition papers consist of an affirmation of counsel and eleven exhibits labeled A through K. Exhibit A is a copy of the summons and complaint. Exhibit B is Hosh's answer to the complaint. Exhibit C is the plaintiff's verified bill of particulars. Exhibit D is a copy of the order dated April 1, 2018, which dismissed the complaint as asserted against the City of New York and the New York City Department of Education. Exhibit E is a copy of the plaintiff's infant compromise petition. Exhibit F and G are the orders which denied the infant compromise petition without prejudice and directing the parties to proceed to trial. Exhibit H is a copy of Hosh's response to a compliance conference order. Exhibit I and J are several subpoenas ad testificandum. Exhibit K is the

deposition transcript of Rosaline Pinnock, a non-party witness.

Hosh submitted an affirmation of its counsel in reply to plaintiff's opposition papers.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 923 [1993]). If prima facie showing has been made the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

A party opposing a motion for summary judgment is obligated to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist (*Friends of Animals, Inc. v Associated for Manufacturers, Inc*., 46 NY2d 1065 [1979]). A genuine issue of fact may not be demonstrated by using mere conclusions, expressions of hope or unsubstantiated allegations or assertions (*Amatulli v Delhi Constr. Corp*., 77 NY2d 525 [1991]).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a

determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008], citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

The plaintiff claimed, among other things, that on May 25, 2016, Hosh negligently operated, managed, controlled and supervised the infants in its program. The plaintiff also alleged that Hosh's negligence caused the incident to occur and the injured infant to suffer a fractured femur.

Hosh has moved for summary judgment dismissing the complaint on two grounds. The first ground is that the supervision it provided was adequate and appropriate. The second is that the incident was unforeseeable and could not have been prevented by greater or more intense supervision. In other words, Hosh contends that the alleged lack or insufficiency of the supervision it had provided did not proximately cause the incident and the injured infant's injuries.

A person to whom the custody and care of a child is entrusted by a parent is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so (*see Appell v Mandel*, 296 AD2d 514, 514 [2nd Dept 2002]; *see also Singh v Persaud*, 269 AD2d 381, 382 [2nd Dept 2000]). The issue of foreseeability is normally a question of fact for a jury, but it is a question of law when, but a single inference can be drawn from undisputed facts (*see Elwood v Alpha Sigma Phi*, 62

AD3d 1074, 1076 [3rd Dept 2009], citing *Hendricks v Lee's Family Inc.*, 301 AD2d 1013 [3rd Dept 2003]).

Hosh submitted with its motion papers, among other thing, photographs, an incident report and sworn testimony. Hosh's counsel stated in an affirmation that the annexed photographs were of the playground on the subject premise. Hosh, however, did not explain the basis of the knowledge of its counsel. The photographs were not properly authenticated in that no person with personal knowledge identified them as an accurate representation of the playground on the subject premise (*see Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 635 [1st Dept 2017]). In sum, Hosh neither authenticated the photographs nor offered an explanation on how the photographs were otherwise admissible, such as a notice to admit.

The annexed incident report was unsworn and signed by Henry Cross (hereinafter Cross). To establish a foundation for the admission of a record under the business record exception to the hearsay rule, the proponent of the record must satisfy the requirements of the business records rule that the record was made in the regular course of business at the time of the act, transaction, occurrence or event, or within reasonable time shortly thereafter (CPLR 4518 [a]; *U.S. Bank Nat'l Ass'n v Moulton*, 179 AD3d 734 [2nd Dept 2020]). In his deposition testimony, Cross identified the incident report as a document that he prepared. His deposition testimony, however, did not establish the foundation for its admission as a business record pursuant to CPLR 4518. The plaintiff also correctly stated that the incident report contained nothing more than inadmissible hearsay. The incident report merely repeated claims that Cross averred in his deposition testimony. It was therefore

inadmissible as a prior consistent statement (*Boolbol v Paradigm Mgmt. Grp., LLC*, 144 AD3d 577 [2nd Dept 2016], citing *People v McDaniel*, 81 NY2d 10, 18 [1993]).

The sworn testimony that Hosh submitted in support of the motion was the affirmation of its counsel, the deposition testimony of Annie Ross, the deposition testimony of Cross and the affidavit of Margaret Payne. The affirmation of Hosh's counsel demonstrated no personal knowledge of the allegations of fact in the complaint or in Hosh's answer. It therefore has no probative value or evidentiary significance (*Onewest Bank, Fsb v Michel*, 143 AD3d 869 [2nd Dept 2016]).

The deposition testimony of Annie Ross was not signed by her or by the court reporter. Nor did Hosh allege or demonstrate that the deposition transcripts had been submitted to Annie Ross for review and signature. Deposition transcripts, which are not signed by either the deponent or the court reporter, and which are not shown to have been submitted to the deponent for review and signature, are inadmissible as evidence in support of summary judgment (*see* CPLR 3116 [a]; *Delishi v Prop. Owner (USA) LLC*, 31 Misc3d 661 [Sup. Ct. 2011]). Consequently, the transcript was inadmissible and disregarded.

Cross testified to the following allegations of fact. Cross was the co-founder of the program. He described the program as a not-for-profit after school program with approximately thirty (30) enrolled students supervised by four teachers and one director. On the date of the incident the injured infant was 4 years old and was enrolled in the program. The program was held at P.S. 120 located at 657 Meeker Street in Brooklyn, the very school in which the injured infant was enrolled.

The program accommodated students enrolled in Pre-K through fifth grade ranging in ages from four (4) through ten (10) years old. The injured infant was enrolled in the younger program for children enrolled in pre-K through first grade. The second program was for children enrolled in second through fourth grade.

Cross averred that the only time the two groups were scheduled to be together was for snack in the cafeteria at 2:30 P.M., and for dismissal in the cafeteria at 5:30 P.M. At all other times, the two groups had separate activities in separate physical spaces. Cross testified that the older and younger groups were kept separated in the interests of safety.

On the day of the incident, however, contrary to the normal practice, the two groups were placed together in the playground. Cross was present while two teachers supervised the younger children, and two other teachers supervised the older children.

The incident occurred while the younger children were on the jungle gym equipment, and older children were rehearsing for their year-end show. Cross heard a commotion but did not see the incident. He learned that a ten (10) year old student had admitted to knocking down the injured infant while the ten (10) year old was running for a ball. He later learned that the collision had caused the injured infant to suffer a fracture of the femur.

Margaret Payne (hereinafter Payne) was hired by Hosh to offer an expert opinion. Payne submitted an affidavit. Payne averred that she reviewed the following: an incident report, a notice of claim, a verified bill of particulars dated October 21, 2016, a verified bill of particulars dated October 31, 2016, the plaintiff's 50-h transcript, the plaintiff's deposition exhibits, EBT exhibits, a class roster, Cross's deposition transcript, as well as

photographs exchanged in discovery.

Payne described herself as a certified playground safety inspector. She averred that further details of her qualifications and experience were in her curriculum vitae attached as Exhibit 1 to her affidavit. There was, however, no curriculum vitae attached to her affidavit. In the part of her affidavit denominated as opinion she stated the following. The incident was caused by a sudden and spontaneous act of children. The act of a boy running during a transition from one activity to another was not anticipated. The boy who was running did not mean to run into the injured infant and in fact told the injured infant that he was sorry. In sum, Payne concluded that it was unlikely that closer supervision could have prevented the incident.

The admissibility and scope of expert testimony is a determination within the discretion of the trial court (*Kohler v Barker*, 147 AD3d 1037 [2nd Dept 2017]). Generally, expert opinion is proper when it would help clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror Proximate cause is generally a factual issue to be resolved by a jury (*id.*)

The opinion of Payne was offered on the issue of lack of proximate causation between the alleged inadequacy of Hosh's supervision and the occurrence of the subject incident. Payne's opinion was conclusory. It is noted the Cross did not witness the incident, only its aftermath. The adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff's injury (*RT v Three Vil.*

Cent. Sch. Dist., 153 AD3d 747, 748 [2nd Dept 2017]; *see Braunstein v Half Hollow Hills Cent. Sch. Dist.*, 104 AD3d 893 [2nd Dept 2013]). The issue of whether the supervision provided was adequate or insufficient depends on the facts and circumstances of the case as established by testimony and documents. It is not an issue which lends itself to expert testimony since what is adequate is an issue within the ken of an ordinary juror. Furthermore, Payne's conclusion on lack of proximate causation invaded the jury's province (*Ayala v Kaestner*, 224 AD2d 266, 267 [2nd Dept 1996]).

It is noted that the plaintiff has alleged, inter alia, that Hosh negligently operated, managed, controlled and supervised the infants in its program. Plaintiff has also alleged that Hosh caused a dangerous condition in the manner that it managed the infants in its program. Cross candidly averred that the older and younger group were intentionally kept apart except for snack time and dismissal for consideration of the safety of the children.

On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Const. Corp*., 18 NY3d 499, 503 [2012]). In the light most favorable to the plaintiff, the appropriate inference to be taken from Cross's admission is that Hosh thought it was unsafe to let the older and younger children have playtime together at the playground area. The inference flows logically from the common knowledge that a four (4) year old and a ten (10) year old child are generally vastly different in weight, size and in the ability to respond to supervisory direction.

The Court cannot conclude as a matter of law that a ten (10) year old child running after a ball in a playground is unforeseeable. It is also not unforeseeable that a ten (10) year

old running for a ball would present a collision hazard to a younger, smaller, and unsuspecting four (4) year old brought to play in the same playground area. Cross's testimony that the older and younger children were kept apart during playtime for safety reasons makes perfect sense.

What Cross did not explain is why they did not keep the two groups apart in the playground area on the date of the incident. Nor did Cross explain why the conduct of the ten (10) year old who allegedly ran and knocked down the injured infant was not foreseeable. There was no evidence offered regarding that child's prior behavior or response to supervisory direction.

Hosh did not offer any testimony from any of the teachers in the playground area on the date of the incident. Nor did Hosh offer any testimony regarding what these teachers were saying to the children or doing with the children during the time that the incident occurred. In sum, there was no specific explanation of precisely what the teachers were doing during the time of the incident to keep the children safe.

Hosh did not eliminate all material issues of fact as to whether it caused or created an unsafe or dangerous condition when it put the older and younger groups together at playtime. Consequently, Hosh did not demonstrate that its supervision of the children in its program did not proximately cause the incident and the injured infant's injuries (*see Mirand v City of New York*, 84 NY2d 44, 49-50 [1994]).

Since Hosh failed to meet its prima facie burden, the motion is denied without regard to the sufficiency of the plaintiff's opposition papers (*Coreano v 983 Tenants Corp.*, 190

AD3d 815 [2nd Dept 2021], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

CONCLUSION

The motion by defendant Hosh Kids for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability and dismissing the complaint is denied.

The foregoing constitutes the decision and order of this Court.

ENTER: Francois A. Rivera
J.S.C.