Dell Italia v Bellmore Union Free School Dist.
2012 NY Slip Op 30946(U)
March 30, 2012
Sup Ct, Nassau County
Docket Number: 9994-10
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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STEVEN DELL ITALIA, an infant by his father and natural guardian, ENRICO DELL ITALIA and ENRICO DELL ITALIA, individually,

Plaintiff's,

-against-

BELLMORE UNION FREE SCHOOL DISTRICT and CHARLES A. REINHARD EARLY CHILDHOOD CENTER,

Defendants.

---x

TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 9994-10

MOTION SEQ. NO:1

SUBMIT DATE:2/8/12

The following papers having been read on this motion:

Notice of Motion....................................1
Opposition...2
Reply..3

Motion by defendants, Bellmore Union Free School District and Charles Reinhard Early Childhood Center for an Order of this Court granting Summary Judgment dismissing the complaint of the plaintiff, Steven Dell Italia, an infant by his father and natural guardian, Enrico Dell Italia and Enrico Dell Italia, individually, is denied.

The instant motion arises from an underlying negligence action commenced by plaintiffs in April 2010. The infant plaintiff sustained an injury while participating in a school gymnastic activity during regular school hours. The plaintiffs filed a summons and complaint in this Court, alleging inter alia, that the defendants failed to provide adequate supervision, and employ proper safety procedures. The plaintiff's guardian and father is seeking damages for deprivation of the love, support, society, services and companionship of his son.

FACTS

On January 12, 2010, at 1:30 p.m., the infant plaintiff, Steven, then a six-year-old second-grade student at the Charles A. Reinhard Early Childhood Center, in Bellmore, New York, sustained an injury while in the school gym. The plaintiff was specifically attempting to use a balance beam

during a gym class, which was taught and supervised by school teacher, Mr Elia De Blasio, when he fell, sustaining an fracture to his left arm. The record indicates that at the time of the accident, there were about 21 students in the gymnasium, and Mr. De Blasio was the only adult assigned to teach 20 students, while another teacher was assigned to one child.

Plaintiffs filed the underlying action in this Court in April, 2010. According to the plaintiffs, Steve Dell Italia's testimony at his 50-h hearing in April, 2010 was taken over his counsel's objection in that a judicial determination was required for Steven's testimony to be deemed as sworn given his age of six-years-old at the time. Steven was examined again on March 16, 2011, where plaintiff's counsel objected to the infant plaintiff, then seven-years-old, being sworn in by the notary public.

ARGUMENTS

Defendants argue that school personnel are not expected to control all movements and activities of students, and that constant supervision of students is not required during the course of regular school activities. Further, the school had no actual or constructive notice of prior similar conduct. Additionally, because the accident happened so fast, the school could not reasonably be expected to guard against all of the spontaneous acts that take place among students. Even without the evidence in dispute, the defendants argue that they established their prima facie burden based on well settled law.

The defendants submit, as supporting evidence, transcripts of testimony by: infant plaintiff, Steve Dell Italia at his 50-h hearing and Examination Before Trial; plaintiff, Enrico Dell Italia; infant plaintiff's mother, Isabella Dell Italia; and Elia Deblasio. Additional evidence includes, copies of the pleadings; pictures of the gym and the gymnastic equipment, copies of lesson plan for the gymnastic activity, statement by Elia De Blasio, and affidavit by expert, Linda Quitoni, certified as a Gymnastics Instructor by the United States Gymnastics Safety Association.

In opposition, plaintiffs argue that the evidence on which the defendants rely in support of its motion, is inadmissible. The infant plaintiff's testimony cannot be deemed sworn without a prior judicial examination to determine competency and his appreciation of the nature of taking an oath. Additionally, plaintiff's expert evidence is also inadmissible as it was not identified prior to the filing of a note of issue. Plaintiffs submit a copy of the demands, which were served upon the defendants,

as supporting evidence while incorporating by reference, the evidence submitted by defendants.

DISCUSSION

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp*., 68 NY2d 320 [1986]). If the evidence submitted by the movant is not in admissible form, the motion must be denied regardless of the sufficiency of the opposing papers (*Martinez v. 123–16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2008]).

It is also well settled that although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, they are not insurers of the safety of their students, for they cannot be reasonably expected to continuously supervise and control all of the students' movements and activities (*Totan v. Board of Educ. of City of New York*, 133 AD2d 366 [2nd Dept 1987]). In order to find that a school has breached its duty to provide adequate supervision in the context of injuries caused by the acts of fellow students, the plaintiff must show that the school had sufficiently specific knowledge or notice of the dangerous conduct which caused injury *Hernandez v. Christopher Robin Academy*, 276 AD2d 592 [2nd Dept 2000]).

Actual or constructive notice to the school of prior similar conduct is generally required because school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students during the course of their activities (*Convey v. Rye*, 271 AD2d 154 [2nd Dept 2000]).

In the instant matter, the defendants mostly rely on the testimony of infant plaintiff, Steven, to establish that his accident occurred as a result of an impulsive, sudden, and unanticipated act. Defendants also rely on the testimony of both plaintiffs and witness, Mr. De Blasio to support that there was no actual and/or constructive notice of any dangerous condition.

It is noted, however, that Mr. De Blasio did not witness Steven's fall, but did testify that the accident occurred within the time span of 5 - 8 seconds. It is noteworthy that when asked to clarify what he meant by his testimony that "kids want to race on the beam", Mr. De Blasio responded: "I mean that some of the kids don't realize that they could get hurt by moving fast on the beam.." It is

also noted that Mr. De Blasio, in response to an inquiry as to whether he witnessed students racing on the beam prior to the infant Steven's accident, he answered "[s]ure, absolutely" (see Notice of Motion, Exhibit H, tr. De Blasio, p 25, ln. 1-6, ln. 11 -18).

In light of the foregoing, there remains the defendants' reliance on the infant plaintiff's testimony. The Court is aware of the issues involving the testimony of an infant and is guided by the rationale set forth in *Strickland v. Police Athletic League, Inc.*, 22 Misc3d 1107, (NY Sup Ct., 2009). There, the Court reviewed the statutory standards set forth in Criminal Procedure Law, that presumes the incompetence of a child under the age of nine [CPLR § 60 .20(2)] and that an infant must demonstrate sufficient intelligence and capacity to justify reception of his testimony and have some conception of obligations of an oath and consequences of giving false testimony, in order to "overcome the presumption of incompetence to testify under oath". The statute also provides that " ... it [is] *the duty of the Trial Judge to examine into the witness' competency* ..." The CPLR, however, contains no such provision.

In applying the foregoing standard to civil actions, courts have already held that the examination of an infant by a notary public is improper. This is premised on the fact that the notary public has no authority to make the inquiry and determination of the infants' competence (see *Cavuoto v. Smith,* 108 Misc.2d 221 [Sup Ct, Monroe County, 1981]). Some courts have required that such testimony is to be taken under its supervision and/or with strict guidelines. Generally, civil courts will allow infants to be examined but a preliminary examination to determine competency is required (see , *Tuohy v. Gaudio,* 87 AD2d 610 [2d Dept.1982])

As to the defendants' taking exception to the plaintiffs raising the issue regarding Steve's testimony in the instant motion *after* he was examined, courts have in fact held that it is inappropriate to summarily refuse to allow the examination of an infant (see *Tuohy v. Gaudio*, 87 AD2d 610 [2nd Dept 1982]).

Plaintiff's counsel clearly made an objection *prior* to the infant plaintiff's examination. His objection is set forth herein:

> "...I'm not objecting to you laying the foundation whether he can understand the nature of an oath. My objection is it's not proper for either counsel or the Notary that's here today, the court reporter, to determine whether he understands the nature of the oath. It is the province

of this court to determine whether a six-year-old can understand the nature of an oath..." (see Notice of Motion, Exhibit D, Tr. Steven Dell Italia, p. 4 ln. 10 -21.

Further, courts have declined to make unfavorable rulings on the issue even when no objection was made prior to the taking of an infant's testimony. CPLR § 3115(d) provides that objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time (see *Carrasquillo v. City of New York*, 22 Misc.3d. 171(Sup Ct, Kings County, 2008)

In the *Strickland* Court, the infant was older than Steven at eight-years-old, and the record indicated that he displayed conduct and/or behavior issues that evinced a concern as to whether the child understood the nature of an oath: "...[M]erely getting the answer does not establish that the child understood that he had a moral duty to tell the truth and /or that he understood the nature of an oath...." *Strickland* at 1108. Here, as in *Strickland* , Steven's actual swearing in was not placed on the record at either deposition. Although he was ultimately able to identify an obviously untrue statement as a lie, there were no questions directed to him as to his understanding of the consequences of telling a lie under oath.

Excerpts from Steven's testimony are set forth herein:

Examination of Steven Dell Italia , 50-H hearing, 4/27/2010

"...Q. Once you got inside the gymnasium, did you see Mr. DiBlasio there?

A. Well, it wasn't in the gym.

Q. Where was it?

A. Wait, do you mean in the nurse's office?

Q. No, we are not there yet..." (see Exhibit D, p. 14, ln. 4 - 10) ...

"...Q. Did Mr. Diblasio or any other [teacher] ever show you how to use the balance beam?

A. No, but sometimes he does it, like shows us.

Q. Before you had your accident?

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A. Yes. No, no..." (see Exhibit D, p. 25, ln. 17 -23) ...

"...Q. I just want to make sure I understand exactly what you were doing. So you were running on the mat; is that right?

A. I wasn't running on the mat. You were doing it right because I thought you were going side to side.

Q. I want to know where you were running. Were you running on the mat or the balance beam?

A. The mat? I don't know. I forgot..." (see Exhibit D, p. 43, ln. 11 - 19). ...

"...Q. So explain to me what happened? You were crossing from one side of the mat to the other side of the mat and what happened?

A. Then I think I tripped or like fell. I went to this other side and then I think I fell or like tripped. Because –I don't know. Maybe I tripped or fell. I just fell...."

(see Exhibit D, p. 48, ln. 13 -21)

"...Q. When you landed, can you point to me in the picture where you landed?

A. Right over, off the picture, like right over here...

Q. So the place you landed, did it have a mat or did it have wood?

A. Wood. Like this wooden floor..." (see Exhibit D, p. 49, ln. 5 - 11).

Examination of Steven Dell Italia, Examination Before Trial, 3/16/11:

"...Q. When you had your accident during gym class, do you remember what gym teacher was there that day?

A. I forgot

Q. Was it Mr. Deblasio?

A. No..." (see Exhibit F, p. 14, ln. 17 -23)

...

"...Q. Did you step up onto the balance beam with both feet?

A. Yes

Q After you stepped up onto the balance beam, did you take some steps on the balance beam?

A Yes.

Q How many steps did you take before the accident happened?

A Three.

Q After you took three steps on the balance beam, what happened?

A I fell and I fell on the wood and I landed on my arm.

Q When you say you fell on the wood, the area of the gym floor that didn't have mats on it, was that a wood floor?

A Yes..." (see Exhibit F, p. 34 ln. 2 -16)..

"...Q. After you took those three steps, that is when you fell?

A. Wait. I didn't mean –like I didn't take three steps. When I started, when I was done I went across, I went around and around and on my last one I landed on my arm.

Q. When you say you went around and around, what do you mean? Tell me what you did after. Did you step up onto the balance beam when you were the first one to go?

A. Yes.

Q. Did you walk all the way across the balance beam and step off it?

A Yes..." (see Exhibit F, p.35 ln. 3 - 18).

"...Q. When you were facing them [other students/ his friends], did you step –did you jump from the mat up onto the balance beam with both feet or one foot or something else?

A Something else.

Q Tell me.

A. I ran, I ran and I jumped over and on the last one I tripped..."

(Exhibit F, p. 40. ln. 9 -16).

Based on the foregoing setting forth the nature of Steven's responses, the taking of the plaintiff's deposition testimony under oath under these circumstances cannot be sustained, and thus the statements he made in the deposition are tantamount to unsworn statements. Unsworn deposition testimony cannot sustain the defendants' burden that the plaintiffs' actions were impulsive, sudden, and unanticipated (see *Medina v. City of New York,* 19 Misc3d 1121(A)[Kings County Sup Ct, 2008], *Strickland v. Police Athletic League, Inc.*, 22 Misc3d 1107(A) [NY Sup Ct. 2009]).

As such, there are questions of fact as to whether the school defendant sustained its burden of establishing that it had no actual or constructive notice of any dangerous conduct, whether there was adequate supervision for the activity that the infant plaintiff was engaged in, and whether the set up of the equipment was safe. The defendants' witness was certainly aware that "kids" run on the balance beam, and that such activity could be dangerous. The defendants attempted to address those issues with the affidavit of its expert.

Although the expert testimony contends that the set up of the balance beam was safe and appropriate for similarly-aged children as the infant plaintiff, it is noted that she did not witness the set up of the equipment on the day of the accident, nor did she witness the accident, itself. Further there is an issue as to whether this Court can consider this evidence.

It is undisputed that the expert was not identified by the defendants until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the defendants offered no valid excuse for the delay except that they had not yet received the expert's report (see *Wartski v C.W. Post Campus of Long Is. Univ.*, 63 AD3d 916, 917 [2nd Dept 2009]). Even if this Court were to consider the expert evidence, the Court would have reached the same conclusion. The expert failed to specifically address the adequacy of supervision, only contending that "[t]he subject activity was properly supervised' without setting forth any basis for her opinion. Even more interesting is her statement; "...An activity of this nature is taught at pre-kindergarten to older levels, while teachers observe with general supervision" without setting forth what general supervision is, particularly when Mr. De Blasio was positioned at the single bar station with another

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child while the infant plaintiff was using the balance beam (see Notice of Motion, Exhibit H, p. 53, ln. 22-25).

The plaintiffs do not expressly complain about the adequacy of the numerical ratio of teachers to pupils; but implicitly, by way of their examination of Mr. Di Blasio, it is an issue in this case. Although the defendants, through the expert evidence, attempted to establish a prima facie case regarding this issue; such evidence has been disregarded by this Court. It therefore remains an issue of fact to be decided by a jury. The plaintiffs also base their negligent supervision claim on the quality of the attention devoted by the teacher to his responsibilities, and this too remains an issue of fact that cannot be resolved in this motion.

Viewing the record in a light most favorable to the plaintiffs reveals that triable issues of fact exist as to whether more appropriate supervision during the gymnastics activity would have prevented the actions or inactions that caused the infant plaintiff's accident and ensuing injury. As the infant plaintiff's testimony has been deemed as inadmissable evidence, defendants cannot rely on his statements to conclude that the incident occurred so suddenly and in such a short span of time that no level of supervision could have prevented it. Further, although Mr. DeBlasio, the actual teacher and employee of the school district, testified that the accident occurred in so short of time, it does not conclusively resolve the issue as to whether proper supervision on gym apparatus would have prevented Steven's fall. Given the content of admissible evidence, there is no clear indication as to how the accident even happened.

In sum, while the defendants characterize the infant plaintiff's injuries as occurring as a result of a sudden and unanticipated act on his part, and the accident could not be realistically anticipated or prevented, such is not proven dispositively on this record. Specifically, the teacher witness was aware that the students had a propensity to run on the balance beam and even witnessed such activity, and the fact that the accident occurred on gym equipment, where its misuse could be dangerous by the teacher's own admission, this Court cannot find as a matter of law that the presence or absence of supervision was not a contributory factor in the happening of the accident. Further, the record indicates issues of fact on whether the matting underneath the balance bars was sufficient (see *Vonungern by Imbierowicz v. Morris Cent. School*, 240 AD2d 926 [3rd Dept 1997]).

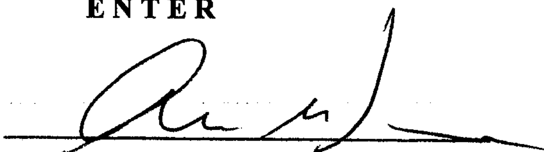
Here, the defendant failed to submit evidence sufficient to establish its prima facie entitlement to Summary Judgment (see *Rodriguez v. Riverhead Cent. School Dist*, .85 AD3d 1147 [2nd Dept 2011]).

Accordingly, the defendants' motion is denied, regardless of the sufficiency of the plaintiffs' opposition papers (see *Roofeh v. 141 Great Neck Road Condominium,* 85 AD3d 893 [2nd Dept 2011]).

This constitutes the decision and order of this Court.

ENTER

DATED: March 30, 2012



HON. ARTHUR M. DIAMOND
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