Snow v Uniondale Union Free School Dist.
2012 NY Slip Op 31636(U)
June 11, 2012
Supreme Court, Nassau County
Docket Number: 11530/10
Judge: Thomas P. Phelan
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

NISHOBA SNOW,

Plaintiff,

-against-

UNIONDALE UNION FREE SCHOOL DISTRICT,

Defendant.

ORIGINAL RETURN DATE: 02/15/12
SUBMISSION DATE: 04/10/12
Index No. 11530/10

MOTION SEQUENCE #001

The following papers read on this motion:

Notice of Motion.. 1
Affirmation in Opposition............................. 2
Reply... 3
Memorandum of Law..................................... 3

Defendant moves for summary judgment dismissing the complaint against it. Plaintiff opposes the motion.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d

1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.,* 68 NY2d at 324).

This action was brought by plaintiff to recover damages alleged to have been sustained when she allegedly fell on an unprotected area while participating in cheerleading practice in the auditorium of Uniondale High School, located at 933 Goodrich Street, Uniondale, New York, on or about November 12, 2009. Defendant claims that plaintiff voluntarily participated in a sporting activity and that plaintiff's claim is barred by the doctrine of assumption of risk.

In support of the motion, defendant submits plaintiff's 50-H testimony, as well as the 50-H testimony of her grandfather and the transcripts of her deposition and the deposition transcript of Erica Ann Boden, who testified on behalf of defendant. Plaintiff testified that she had been a cheerleader since August 2008 (Ex. C, p. 8) and began performing stunts in August 2009 (Ex. E, p. 16). On the day of the accident, plaintiff was practicing in the auditorium in front of the stage on thin carpet as she had done many times before (Ex. C, p. 36).

Plaintiff was practicing a stunt known as the one man, which she described as follows: "The one man has to deal with your back spotter being underneath you. So basically I am on her shoulders, but I am also being helped by my side and my front spotters" (Id., p. 39). Plaintiff explained that as she is lifted into the air, the spotters still have both of her feet.

According to plaintiff, the accident happened as follows: "As I was up in extension, which is above my bases' heads, I didn't feel balanced, so I asked them to bring me down and as they were bringing me down I unlocked my legs and I lost my balance" (Id., p. 40). When asked why she unlocked her legs, plaintiff responded that she "just didn't feel stable, so I guess I was concentrating more on coming down instead of locking my legs" (Id.). Plaintiff acknowledged that she understood the safety precaution of locking the legs (Ex. E., p. 25).

Erica Ann Boden testified that she is employed by defendant as a reading teacher, is the club advisor for cheerleading and was present on the day of the accident (Ex. F, pp. 4, 5, 16). In supervising their pupils, a school must exercise the duty of care

that "a parent of ordinary prudence would observe in comparable circumstances" (*Hoose v. Drumm*, 281 NY 54, 58 [1939]). However, schools are not insurers of safety and cannot reasonably be expected to supervise every movement of its students (*Mirand v. City of New York*, 84 NY2d 44, 49 [1994]).

Furthermore, the alleged lack of supervision must be the proximate cause of the injury to impose liability on a school district for negligent supervision (*Lopez v. Freeport Union Free School Dist.*, 734 NYS2d 97, 98 [2d Dept. 2001]). Therefore, liability will not be found "where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it" (*Swan v. Town of Brookhaven*, 821 NYS2d 265, 267 [2d Dept. 2006]; *Lopez*, 734 NYS2d at 98).

Counsel for defendant submits that negligent supervision was not the proximate cause of the accident, which was sudden and spontaneous. Defendant has made a prima facie showing that it did not fail to properly supervise plaintiff (*Testa v. East Meadow Union Free School Dist.*, 92 AD3d 940, 941 [2d Dept. 2012]).

Defendant submits that plaintiff was aware that an injury could occur while performing the stunt and that plaintiff unlocked her legs in contravention of the instructions given to her by her advisors. Moreover, it is submitted that plaintiffs have failed to prove any defective condition.

Plaintiff retorts that she was "practicing in the auditorium on a hardwood floor, covered by carpet. At that time, there was no padding on the flooring" (Snow Aff., ¶4). Counsel for plaintiff argues that an issue of fact exists as to whether plaintiff was exposed to an increased risk.

Defendant submits the affidavit of Donna Roenbeck, a cheerleader coach and cheerleading consultant. Ms. Roenbeck avers that:

> "The performance of cheerleading stunts such as the "one man" on soft yielding surfaces such as grass, rubberized floor, indoor/outdoor carpeting or a rubberized track is common practice and standard procedure in cheerleading and is proper under the guidelines of the American Association for Cheerleading Coaches and Advisers (AACCA). It is also proper under the guidelines of the National Federation of High Schools which regulate all high school sports"

(¶7).

"Generally, those who voluntarily participate in sports activities consent, by their participation, to injury-causing events which are reasonably foreseeable consequences of their participation (citations omitted)" (*Bruno v. Town of Hempstead,* 248 AD2d 576, 577 [2d Dept. 1998]). Here, defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff assumed the risk of injury by voluntarily participating in the activity of cheerleading with knowledge of its inherent risks (*Testa v. East Meadow Union Free School Dist.*, 92 AD3d at 941).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to show that the condition of the auditorium floor was a proximate cause of plaintiff's injury (*Weber v. William Floyd School Dist., UFSD,* 272 AD2d 396 [2d Dept. 2000]).

Based upon all of the foregoing, defendant's motion is granted and plaintiff's complaint is dismissed.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: June 11, 2012

THOMAS P. PHELAN, J.S.C. XXX

Attorneys of Record:

Duffy & Duffy, Esqs.
Attention: Frank Torres, Esq.
Attorneys for Plaintiff
1370 RXR Plaza
West Tower, 13th Floor
Uniondale, NY 11556-1370

Congdon, Flaherty, O'Callaghan,
Reid, Donlon, Travis & Fishlinger, Esqs.
Attention: Henry C. Dieudonne, Jr., Esq.
Attorneys for Defendant
333 Earle Ovington Boulevard, Suite 502
Uniondale, NY 11553-3625

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