

Caba v Equity Project Charter School

2012 NY Slip Op 31655(U)

June 18, 2012

Supreme Court, New York County

Docket Number: 108752-10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHÉ

PART 10

Index Number : 108752/2010
CABA, JEREMY J.

Justice

vs
EQUITY PROJECT CHARTER SCHOOL
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/18/12

HON. JUDITH J. GISCHÉ, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X

Jeremy J. Caba *an infant by his mother and
natural guardian Jessica Urena,*

Plaintiff (s),

-against-

The Equity Project Charter School and
Zeke Vanderhoek,

Defendant (s).

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Defs' n/m (3212) w/ZK affid, AJH affirm, exhs	1
Plt's opp w/BL affid, exhs	2
Defs' reply w/AJH affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for personal injuries. Defendants, The Equity Project Charter School ("school")¹ and Zeke Vanderhoek ("principal"), have answered the complaint. The note of issue was previously filed, but then stricken on consent because discovery was incomplete (Order, Gische J., 10/27/11). It has not been refiled by plaintiff. Defendants now move for summary judgment dismissing the claims against them. Since the requirements of CPLR 3212 have been satisfied, summary judgment relief is available and this motion will be decided on the merits (CPLR § 3212; Brill v. City of

¹This is a not-for-profit private charter school.

New York, 2 NY3d 648 [2004]).

Arguments Presented

Jeremy J. Caba was a fifth grade student at the school on January 22, 2010. Caba claims that while playing an after school game of kickball outside on an athletic field belonging to a local high school, another student ("Harmon") put an "ankle lock" on him, which caused him to fall down and break his left ankle in the process.

Caba's mother has sued the school and its principal on her son's behalf, claiming that his injuries were proximately caused by their negligence. Specifically she claims that they were negligent in: 1) their ownership, control, management etc., of the premises, 2) their training etc., of school staff in handling students, 3) how they supervised the students during the game, 4) who they hired to supervise the students during this extended after school program ("Team First"), 5) failing to protect Caba "from students who exhibited poor command of instructions particularly when allowing in a violent way fellow students to forcibly push [him] to the ground" and 6) controlling children who were known to have violent and dangerous propensities. She also claims defendants had notice of the dangerous condition(s) alleged because the child who performed the maneuver is alleged to have done it on a previous occasion on another student. Plaintiffs state further that certain laws, codes, rules and regulations were violated.

At his deposition, Caba, now 11 years old², answered questions about his accident. He testified that Casey Ash, his social studies teacher, was in charge of

²Caba was found competent to be sworn and testify at an examination before trial (Order, Gische J., 4/7/11).

supervising the kick ball game that day and that there are different activities each day in the after school program. The accident occurred near the end of the game and while Ash was on the field near home base. Ash was the only teacher present that day supervising this particular activity, but there was another coach on the field supervising a different after school activity.

Caba testified that earlier in the game Harmon had told him to "go to third base and I ignored him." Apparently Harmon thought the "third baseman was a bad catcher." Harmon's demand of Caba was loud enough to be heard by another student, but Caba testified he was not sure if Ash had heard what Harmon said. Caba believes that Harmon was annoyed with him, which is why later when he saw Harmon walking slowly towards him, he expected that "[Harmon] was going to do something." According to Caba, Harmon had also warned him that he would "come" and Caba had taken that to mean Harmon would do something to him, although Caba could not recall exactly how Harmon phrased it.

After the ankle lock, Caba was in pain and he went to Ash. Caba stated that Ash told him to sit on the bench for awhile and Caba sat there while the game was completed. Ash did not examine the ankle or ask Caba any questions about how he felt nor did Caba tell Ash what had happened on the field. Caba then asked permission to see the school nurse. Later, as Caba boarded the school bus home, the principal noticed how Caba was acting (moaning, in pain, trying not to cry) and he asked Caba what was wrong. Caba testified that the principal confronted Harmon. Caba does not recall what else happened, but that the principal got off the bus, leaving Caba to complete his trip home. Caba was later taken by his mother to the hospital in a cab.

Caba testified that the ankle lock was a "pro wrestling" move that Harmon had done to another student about a month before. He described the move as Harmon wrapping both his legs around his left foot and pushing him on his chest so he would fall down.

Harmon was also deposed³. He recalled that Caba was on the bus with an ice pack complaining about pain but he denied any involvement in the accident or even knowing what had happened to him. Harmon stated that Ash was on the field during the game "between second and first [base] but, like, far back so he doesn't get in the way." The distance was approximately "twenty" feet. Harmon said the principal asked him if he had hurt Caba, but he told the principal he had not. Harmon stated he was never punished after the incident, but was not allowed to go to a Knicks game at Madison Square Garden because "they were saying that I broke his leg." Harmon testified that had he done what he was accused of having done to Caba (the ankle lock) "Mr. Ash would have [seen] it and suspended me." Harmon denied that he warned Caba "not to say anything" about what happened.

Ash was also deposed about the accident. He graduated from Washington University at St. Louis. He has a master's degree in education from Walden and is presently a math teacher and assistant principal at the school. Ash stated that on the day of the accident, he was in charge of the kickball game and sliding into the bases was allowed. He did not train the children to slide however, they just knew how. He

³Harmon was about to turn 12 when he was deposed. The attorney ascertained that Harmon understood what an oath is and what it meant to tell the truth. Harmon's parents were present at the deposition.

stated that in addition to the coach for another team on the field, there was also a school security guard at the game, posted approximately 40 feet away.

Ash remembered Caba playing in the game and watching him playing. He described Caba as being a "good kid, he's very capable academically, yeah he's a nice kid." When asked if he had kept Caba "under constant observation ... 100 percent of the time" during the game, he answered "I don't know" though he recalled seeing Caba "many times throughout that game."

Ash also remembered Harmon and identified him as being "an excellent student..." never disruptive and without any issues with his behavior. Ash testified he saw Caba slide into third base, mostly on his rear, and then he saw the child start to grimace. Ash asked Caba what was wrong and Caba complained about his ankle. Ash stated he told Caba to sit on the bench. Later, Ash observed the nurse on the field. Ash only learned about a "different version of what happened" later on from the principal. Ash states that Harmon was later punished and that he (Ash) had to come up with "the consequences" which was that Harmon could not go to a Knicks game that Ash had procured tickets for. According to Ash, Harmon admitted he had "tripped slashed pushed" Caba.

Vanderhoek was deposed and he has provided an affidavit on this motion. Vanderhoek testified at his deposition that he was at the school when the accident happened, but not sure exactly where he was. He stated that he saw Caba on the bus and noticed he was crying. He asked him what happened and Caba told him he was hurt. Caba also said he had already seen the nurse. Vanderhoek could not the specifics about what Caba told him had caused the injury. Although Vanderhoek

testified he "made sure" Caba would be able to get home safely, he does not recall what arrangement he made.

The accident occurred on a Friday and the principal met with the mother on Monday when she came to the school. That Monday, Vanderhoek also talked to the school nurse and Ash. The school nurse is no longer working at the school and the principal does not know where she is now working. She made a written statement about what happened and it was demanded by plaintiffs' attorney at the deposition. The principal also spoke to Ash, who expressed surprise that Caba's injury was actually serious. Ash also told the principal that Caba had been injured while sliding into third base and was limping slightly when he got up. Ash also made and provided the principal with a written statement. Plaintiffs' attorney also demanded this document and an objection was made on the ground of privilege.

After speaking to Caba's mother, the principal learned that Caba had told her that Harmon had knocked him down. The principal confronted Harmon who admitted he had been "fooling around with [Caba]" but did not offer anything more specific. The principal stated he used his judgment in deciding some punishment was necessary and discussed that with Ash. The punishment meted out was not being allowed to go to the Knicks game. The principal was unable to ask Caba whether he was injured because he slid into third base or something Harmon did because Caba was out of school a long time. The principal denied ever receiving any complaints about Harmon before the accident.

The principal stated that Ash supervised the students participating in the program (20-25 children). In his affidavit, Vanderhoek states that he personally interviewed Ash

for a position at the school and that his application included letters of recommendation. Ash underwent annual individual evaluations as part of his yearly review and he demonstrated an ability to effectively perform as an instructor and educator. The principal states he received no complaints about Ash's ability to organize and supervise the Team First activities, including kickball.

Caba's mother was deposed and stated that Caba told her Harmon had "wrapped his legs around [mine] and [held them]."

Defendants contend that Ash continuously supervised the kickball game, Caba's injury was the result of an impulsive, unpredictable act that occurred in a matter of seconds, and plaintiffs have failed to establish that the school had notice of any history of violence concerning Harmon prior to the accident to warrant closer supervision. Defendants contend that Ash and the principal were acting within the scope of their employment and, therefore, plaintiffs' claims against the principal in his individual capacity must be dismissed. Defendants deny they breached their duty to supervise the students in their charge and state they are not the insurers of the students' safety. Defendants deny that Harmon's acts could have been reasonably anticipated because there were no prior complaints about him. Defendants also deny that anyone had complained about Ash and, therefore, plaintiffs have failed to establish that Ash had a propensity for the conduct that is alleged to have caused Caba's injury.

In opposition to defendants' motion, plaintiffs allege there are many factual disputes that warrant a trial of this action, defendants stonewalled their discovery demands and Vanderhoek's affidavit is not evidence in admissible form because it is unsworn. Plaintiffs contend Ash improperly supervised the students and it was negligent

to have one teacher in charge of 28 students. Plaintiffs also argue that there are contradictory accounts of how the accident happened and that these factual disputes must be decided by the trier of fact. They contend Ash was too far away from where the accident happened and he should have been standing closer. They also claim that it is unclear whether Harmon was ever disciplined before for aggressiveness and defendants have failed to come forward with any evidence that he was not. Plaintiffs also contend that a reasonable jury could find that the use of another school's athletic field was a proximate cause of Caba's injuries.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1st Dept 2003]).

Plaintiffs have raised a preliminary argument about the admissibility of principal Vanderhoek's affidavit. It is notarized and provides that "Zeke Vanderhoek being sworn, deposes and states:..." The State and County where the document was notarized is missing. The formal parts of an affidavit consist of the title, the venue, the formal

opening, the signature, and the jurat (1 NY Jur2d § 46). There is no requirement that the words "under the penalty of perjury appear" because the document is notarized. The omission of the venue is de minimus because no issue is raised about whether the document was signed and notarized. Therefore, Vanderhoek's affidavit is in the proper form and has been considered.

Schools have a duty to adequately supervise their students and will be held liable for "foreseeable injuries proximately related to the absence of adequate supervision" (Hunter v. New York City Dept of Education, – A.D.3d – [1st Dept 2012], 2012 NY Slip Opn 04089 [5/29/12] [*internal citations omitted*]). Furthermore, schools "are not insurers of safety" and "are not to be liable for every thoughtless or careless act by which one pupil may injure another" (Hunter v. New York City Dept of Education, 2012 NY Slip Opn 04089 *1).

On a motion for summary judgment, the court is constrained to view the evidence in the light most favorable to the plaintiff (Branham v. Loews Orpheus Cinemas, Inc., 8 N.Y.3d 931, 932 [2007]). There is a dispute about how Caba's accident occurred, specifically whether Harmon was involved. Regardless of whether Harmon did an ankle lock on Caba, as alleged, it is unrefuted that Caba was injured during the stick ball game and that he sustained a fracture. By all accounts, the child was seen grimacing in pain near the end of the game and Ash actually saw him on the ground at the base. It is, therefore, unrefuted that Caba impacted with the ground and that is how he was injured. The issue on this motion is whether Caba's injury was proximately caused by the alleged lack of adequate supervision at the game, or phrased differently, whether with better

supervision, Caba's injury could have been avoided.

Defendants have established that there was a teacher (Ash) on the field throughout the game. They have also established that Ash never left the field and he was paying attention to the game. Plaintiffs contend that Ash's admission, that his eyes were not on Caba "100%" of the time during the game raises triable issues of fact whether Ash was inattentive to his students, implying that he should have been watching Caba "100%" of time. They also claim that the threat made earlier in the game by Harmon is proof that the incident (the ankle lock) was not sudden at all, but something that built up slowly and should have been anticipated.

A school has a duty to adequately supervise its students by exercising the same degree of care which would be exercised by a reasonably prudent parent (Brandy B. v. Eden Cent. School Dist., 15 N.Y.3d 297 [2010]). As a general matter, the scope and intensity of the supervision required in each case is a question of fact, largely dependent on the circumstances (Phelps v. Boy Scouts of Am., 305 A.D.2d 335 [1st Dept 2003]). Caba was not the only player on the field. This was a game with several students playing. No reasonable juror could find that Ash's failure to keep his eyes "100%" of the time on Caba is negligence since he was in charge of more than one student.

Even were it true that Caba was threatened earlier in the game, not only is the threat allegedly made by Harmon so vague ("I'm coming"), Caba did not report the threat to Ash or tell him that he felt endangered in any way. Although Harmon is alleged to have made this statement loud enough for another teammate to hear, Caba testified at his EBT that he does not think Ash heard it. The actual aggressive act that is alleged

(the ankle lock) — assuming it occurred— happened in such a short span of time and was so sudden and spontaneous that even the most intense supervision could not have prevented it (Weiner v. Jericho Union Free School Dist., 89 A.D.3d 728 [2 Dept. 2011]; Moffatt v. North Colonie Cent. School Dist., 82 A.D.3d 1311 [3rd Dept 2011]). Plaintiffs have failed to raise issues of fact that school authorities (Ash, the principal) knew of Harmon's threat and, therefore, Harmon's act could reasonably have been anticipated (Mirand v. City of New York, 84 N.Y.2d 44 [1994]).

If, on the other hand, Caba's accident is attributable to his deciding to slide into third base, the plaintiffs make no claim that the school failed to enforce a rule banning that practice during one of their games (*compare* Tashjian v. North Colonie Cent. School Dist., 50 A.D.2d 691 [3rd Dept 1975]). Thus, whether Caba was injured by Harmon or through his own actions, defendants have established that they provided adequate supervision of the stickball game and plaintiffs have failed to raise triable issues of fact to defeat their motion for summary judgment dismissing that claim. It is hereby severed and dismissed.

Defendants have also established that there was no prior history of behavioral issues or disciplinary action involving Harmon who was described as being an excellent student and not disruptive. Plaintiffs claim that Harmon has a violent propensity because he claims to not know what an ankle lock is, yet he knows that doing such a move might get him suspended. A motion for summary judgment cannot be defeated by the shadowy semblance of an issue, rather the parties must lay bare their proof (SJ Capelin v. Globe, 34 NY2d 338 [1974]).

The testimony by Harmon, the principal and Ash is that they were unaware of any prior disciplinary actions against Harmon and Harmon himself denied being disciplined for anything prior to the accident. Plaintiffs' have only come forward with hearsay about a prior incident involving Harmon. There is no indication that defendants withheld any prior incident reports involving Harmon. If, as claimed by the defendants, there were no prior incidents involving Harmon, then there would be no incident report for the defendants to provide in response to such a demand.

Plaintiffs generally claim they demanded school incident reports but none were provided. This issue was the subject of a motion by plaintiffs and it was resolved when the defendants produced a one page document which they represented was the "Casey Ash Report" about the Caba incident. The court ordered that plaintiffs accept the report (Order, Gische, 2/9/12). Plaintiffs apparently now claim other documentary evidence, such as incidents reports involving Harmon, have been withheld. It is unclear whether this was the subject of that prior motion. However, at Caba's EBT made that same demand and defendants stated that they were not discoverable because they are school records. Defendants' counsel also stated that if plaintiffs' counsel "had an issue with our response, he can certainly make a motion."

Although the burden is on the party resisting discovery to prove that it does not have to provide the documents demanded, or that they are not discoverable, and that party can move for a protective order, it is incumbent on the party seeking discovery to make a motion to compel to protect its rights. Either plaintiffs did not pursue these demands any further or it has already been decided. Consequently, any further

complaints by plaintiffs about the lack of discovery is raised too late and cannot defeat defendants' motion. Defendants have, therefore, proved that Harmon did not have a history of violence or violent propensities such that the school should have been on notice that extra precautions were prudent, if not necessary, because this particular student was involved in the game.

To establish a cause of action based on negligent hiring and supervision, it must be shown that "the employer was on notice of the relevant tortious propensities of the wrongdoing employee" (Coffey v. City of New York, 49 A.D.3d 449, 553 [1st Dept 2008]). Defendants have provided Ash's credentials and state that he is a qualified teacher with an unblemished academic record. Prior to the accident, Ash had supervised the Team First program without incident. There is no record of any complaints by parents, students or other school personnel about Ash's supervision of the program. This satisfies defendants' burden of showing that there was no notice of Ash's propensity for being negligent, inattentive, etc. Plaintiffs' statement, that Ash is unqualified to be a Team First supervisor because he lacks the necessary training is a vague, generalized and completely unsubstantiated opinion lacking any probative value. Such statements do not raise a triable issue of fact that Ash is unqualified to lead Team First. Therefore, defendants' motion for summary judgment dismissing the negligent hiring claims is granted and that claim also severed and dismissed.

"An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment" (Holmes v. Gary

Goldberg & Co., Inc., 40 A.D.3d 1033 [2nd Dept 2007]). The principal is on the board of trustees of the not-for-profit corporation that operates, manages, etc., the school and he is employed by the school. He has been sued in his individual capacity. Defendants has established that any actions he took were taken by him in his capacity as the principal of the school and while serving the school's interest. There are no factual claims by plaintiffs that the principal acted outside the scope of his employment. Defendants are entitled to summary judgment on the claims against Vanderhoek. Those claims are severed and dismissed.

Plaintiffs have also asserted general negligence claims which range from it being negligent for the school to use an adjoining high school's field to assertions that certain laws, codes, rules and regulations were violated by the defendants. Defendants have presented legal arguments why none of the cited laws, codes, rules and regulations are applicable. For example, sections 27-2038, 27-2005 and 27-2053 of the New York City Administrative Code apply to "dwellings," mandating that public areas of multiple dwellings be maintained in good repair. Plaintiff have not addressed these arguments in opposition and appear to have abandoned those claims. Therefore, defendants' motion for summary judgment severing and dismissing the claims for statutory, regulatory, etc. violations is granted. Those claims are hereby severed and dismissed.

Recapitulation

Defendants have established that: they did not have notice of any violent propensity by Harmon; there was no dangerous condition at the field; regardless of the reason Caba sustained his injury, they were not negligent in their supervision of the

stickball game; plaintiffs have no claim against Vanderhoek individually as he was acting within the scope of his employment; they were not negligent in their hiring and retention of Ash as the supervisor of the Team First activities; none of the statutes, rules, regulations, etc. relied on have any applicability to the facts of this case.

Conclusion

There being only one cause of action asserted and defendants having been granted summary judgment in their favor on each branch of that claim,

It is hereby

ORDERED that defendants' motion for summary judgment dismissing the claim and the complaint against them is granted in accordance with this decision/order; and it is hereby

ORDERED that the clerk shall enter judgment in favor of defendants The Equity Project Charter School and Zeke Vanderhoek against plaintiffs Jeremy J. Caba, an infant, by his mother and natural guardian Jessica Urena dismissing the complaint and this action; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 18, 2012

So Ordered: JUN 21 2012

FILED
NEW YORK
COUNTY CLERK'S OFFICE
Hon. Judith J. Gische, JSC