Meyer v Magalios
2017 NY Slip Op 30190(U)
January 30, 2017
Supreme Court, Suffolk County
Docket Number: 14505-13
Judge: James Hudson
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SHORT FORM ORDER

INDEX No. 14505-13
CAL. No. 16-00015OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 5-27-16 (001)
MOTION DATE 6-2-16 (002)
ADJ. DATE 7-13-16
Mot. Seq. # 001 - MotD
002 - MG

X----------X

CHRISTOPHER GEORGE MEYER, DAWN MARIE MEYER and WILLIAM MEYER,

Plaintiffs,

- against -

JOHN MAGALIOS, CONSTANTINE MAGALIOS, JOANNE MAGALIOS, LINDENHURST PUBLIC SCHOOLS, LINDENHURST UNION FREE SCHOOL DISTRICT and LINDENHURST HIGH SCHOOL,

Defendants.

X----------X

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Upon the following papers numbered 1 to 52 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 34 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 35 - 48; 49 - 50 ; Replying Affidavits and supporting papers 51 - 52 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Lindenhurst Union Free School District and the motion by defendants Constantine Magalios and Joanne Magalios are consolidated for the purposes of this determination, and it is

ORDERED that the motion by defendant Lindenhurst Union Free School District for summary judgment dismissing plaintiffs' complaint against it is granted in part but is otherwise denied; and it is further

ORDERED that the motion by defendants Constantine Magalios and Joanne Magalios for summary judgment dismissing the complaint and all cross claims against them is granted.

On April 23, 2012, plaintiff Christopher Meyer, who at the time was a junior at Lindenhurst High School, was injured when he was assaulted and battered by another student, defendant John Magalios. The assault occurred in a classroom during school hours, when Christopher walked into the class and said to John, "You are fat." About a week prior to the incident, Christopher, a senior, called John to discuss problems he was having with his girlfriend and told him that he was going to threaten her with certain photographs. Christopher sent a message via Facebook to John's girlfriend to inform her of the discussion, but learned that John was logged onto his girlfriend's Facebook account and read the message. John responded with a message to Christopher, telling him that if he ever catches him talking about him, he would physically attack him.

Christopher and John continued their argument by exchanging text messages, insulting and threatening each other. At one point in the conversation, Christopher called John "fat" and John responded by daring Christopher to say that to his face. Christopher sent a message saying that John would not have the courage to lay a hand on him. The two have one class together during period five and when Christopher walked into that class and called John "fat," John punched Christopher multiple times and stopped when another student broke up the fight.

Subsequently, plaintiffs Christopher Meyer, Dawn Meyer, and William Meyer commenced this action seeking damages for the injuries allegedly suffered as a result of the assault. The complaint alleges that defendant Lindenhurst Union Free School District (hereinafter referred to as the School District) and defendants Constantine Magalios and Joanne Magalios negligently failed to properly supervise defendant John Magalios, allowing him to assault and batter plaintiff Christopher Meyer.

The School District now moves for summary judgment dismissing the complaint against it on the grounds that plaintiff was a voluntary participant in the incident, that there was no notice of a need for greater supervision, and that the incident happened so suddenly that even intense supervision could not have prevented it. It also argues that plaintiff William Meyer's claims should be dismissed as he was not a named claimant in the notice of claim. In support of the motion, the School District submits, among other things, copies of the pleadings, transcripts of the parties' testimony at deposition and the 50-h hearing, an affidavit of James Campbell, messages from the parties' Facebook accounts, and text messages from their mobile telephones. Plaintiffs oppose the motion, arguing that Christopher was not a willing participant in the altercation and that the teacher assigned to the classroom had notice of the

subject incident. In opposition, plaintiffs submit, among other things, transcripts of the parties' testimony at deposition and 50-h hearing, copies of the Lindenhurst High School Code of Conduct and the incident report prepared after the assault.

Defendants Constantine Magalios and Joanne Magalios (hereinafter collectively referred to as the Magalios defendants) move for summary judgment dismissing the complaint and all cross claims against them on the ground that they had no knowledge of any propensity on the part of their son, defendant John Magalios, to engage in conduct which could be deemed "vicious" or dangerous to others. In support of their motion, they submit copies of the pleadings and transcripts of the deposition testimony of defendants Constantine Magalios, Joanne Magalios, John Magalios, and plaintiff Christopher Meyer, and affidavits of Constantine Magalios and Joanne Magalios. In partial opposition, the School District argues that the portion of the motion by the Magalios defendants seeking dismissal of the School District's cross claims should be denied as it is entitled to indemnification.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well settled that a school has a duty to provide supervision to ensure the safety of the students in its charge, and is liable for foreseeable injuries proximately caused by the absence of adequate supervision (*see* ***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]; ***Staten v City of New York***, 90 AD3d 893, 935 NYS2d 80 [2d Dept 2011]; ***Nash v Port Wash. Union Free School Dist.***, 83 AD3d 136, 922 NYS2d 408 [2d Dept 2011]). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (***Mirand v City of New York***, *supra*; *accord* ***Bucholz v Patchogue-Medford School Dist.***, 88 AD3d 843, 931 NYS2d 113 [2d Dept 2011]). Consequently, an injury caused by an impulsive and unanticipated act of a fellow student will not give rise to liability absent proof of prior conduct that would have put a reasonably prudent person on notice to protect against the injury-producing act (*see* ***Schleef v Riverhead Cent. School Dist.***, 80 AD3d 743, 915 NYS2d 506 [2d Dept 2011]; ***Tanenbaum v Minnesauke Elementary School***, 73 AD3d 743, 901 NYS2d 102 [2d Dept 2010]; ***Mayer v Mahopac Cent. School Dist.***, 29 AD3d 653, 815 NYS2d 189 [2d Dept 2006]).

Summary judgment dismissing all claims against the School District is denied. Viewing the record in a light most favorable to plaintiffs, triable issues of fact exist as to whether the School District

was negligent in supervising the classroom (*see* ***Shoemaker v. Whitney Point Cent. School Dist.***, 299 AD2d 719, 750 NYS2d 355 [3d Dept 2002]; *see also* ***Mirand v City of New York***, *supra*). Here, there is conflicting deposition testimony as to whether the altercation occurred when class was in session or in-between class periods. There is also conflicting testimony as to what Mr. Mottl was doing at the time of the altercation, and whether there were glass bottles broken during the altercation which may have alerted him that something was occurring in his classroom. These conflicts raise issues of credibility which may not be resolved on a summary judgment motion (*see* ***Gordan v Honig***, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]; ***Ahr v Karolewski,*** 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Christopher testified at his deposition that as his schedule does not include a lunch period, he is permitted to get food from the cafeteria after period four and arrive at his period five class late. He testified that he was just exiting the cafeteria when the bell signaling the start of period five rang, and that when he arrived at his period five class, his teacher, Mr. Mottl was talking to a language teacher outside in the hallway, about five to ten feet from the classroom door. John testified at his deposition that when the incident occurred, the bell signaling the start of period five had rung, and that Mr. Mottl was outside in the hallway. Furthermore, Christopher testified that the altercation lasted about 20 seconds, and that John grabbed him and pushed him into a cabinet, causing glass bottles to fall on the ground and break. He testified that John struck him several times in the head and that his head also made contact with the wall. John also testified at his deposition that the altercation lasted about 30 seconds, and that glass bottles fell to the floor during the altercation. Mr. Mottl, however testified at his deposition that he heard a noise in the classroom, and when he went inside, he saw John standing over Christopher. He testified that the bell signaling the start of period five did not ring until about 15 seconds later, that he was not having a conversation with another teacher in the hallway, and that he did not observe any broken glass in the classroom.

As to the School District's argument that plaintiffs cannot recover for negligent supervision because Christopher was a voluntary participant in the fight, liability for injuries resulting from a fight between two students cannot be predicated on negligent supervision if the plaintiff was a participant in the fight (*see* ***Ambroise v City of New York***, 44 AD3d 805, 843 NYS2d 685 [2d Dept 2007]; ***Borelli v Board of Educ. of Highland School Dist.***, 156 AD2d 903, 550 NYS2d 120 [3d Dept 1989]). However, the testimony of the parties raises a triable issue of fact as to whether Christopher was a voluntary participant in the altercation with John (*see* ***Williams v Board of Educ.***, 277 AD2d 373, 717 NYS2d 190 [2d Dept 2000]; *see generally* ***Wood v Watervliet City School Dist.***, 30 AD3d 663, 815 NYS2d 360 [3d Dept 2006]; *cf* ***Danna by Danna v Sewanhaka Cent. High School Dist.***, 242 AD2d 361, 662 NYS2d 71 [2d Dept 1997]; ***Jones v Kent***, 35 AD2d 622, 312 NYS2d 728 [3d Dept 1970]). While the deposition testimony of the parties reveal that Christopher called John "fat," it is undisputed that Christopher did not throw any punches during the altercation. Moreover, Christopher testified that he did not think that John would assault him in a classroom. Furthermore, in the text messages exchanged between the two boys, Christopher stated that he did not want to fight with John.

However, the branch of the School District's motion seeking dismissal of the claims of plaintiff William Meyer is granted, as he was not named in the notice of claim (*see* ***Alvarez v City of New York***, 134 AD3d 599, 22 NYS3d 362 [1st Dept 2015]; ***Tannenbaum v City of New York***, 30 AD3d 357, 819 NYS2d 4 [1st Dept 2006]).

With regard to the motion for summary judgment by the Magalios defendants, parents have an obligation to supervise their children (***Holodook v Spencer***, 36 NY2d 35, 45, 364 NYS2d 859 [1974]), and may be held liable to a third-party for injury caused by an infant child's improvident use of a dangerous instrument if they entrusted the child with such dangerous instrument (*see* ***Holodook v Spencer***, 36 NY2d 35, 364 NYS2d 859; ***Nolechek v Gesuale***, 46 NY2d 332, 413 NYS2d 340 [1978]). Parents also may be held liable for the torts of their infant child if they negligently failed to restrain the child from committing a vicious act, if they had knowledge that the child had a propensity to engage in violent or vicious conduct (*see* ***Rivers v Murray***, 29 AD3d 884, 815 NYS2d 708 [2d Dept 2006]; ***Armour v England***, 210 AD2d 561, 619 NYS2d 807 [3d Dept 1994]; ***Steinberg v Cauchois***, 249 AD 518, 293 NYS2d 147 [2d Dept 1937]). Evidence of a single incident of violence involving the infant child, however, is not sufficient to establish that the child had a propensity to engage in vicious conduct (*see* ***Davies v Incorporated Vil. of E. Rockaway***, 272 AD2d 503, 708 NYS2d 147 [2d Dept 2000]; ***Armour v England***, *supra*).

Here, there is no evidence in the record that defendants Constantine Magalios and Joanne Magalios had knowledge prior to the subject incident that their son had a propensity to engage in vicious conduct. The testimony of Joanne Magalios reveals that she was aware of an incident when John was in the sixth grade where John and another boy were pushing each other on the school bus, and that he has never been involved in any other fight since that incident. However, that incident is insufficient to establish that John had a tendency to engage in vicious conduct which might endanger a third-party (*see* ***Rivers v Murray***, *supra*; ***Armour v England***, *supra*). In opposition, no triable issues were raised. Accordingly, the motion by the Magalios defendants for summary judgment dismissing the complaint and all cross claims against them is granted.

Dated: Jan 30th, 2017

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION