McLoughlin v East Islip Union Free Sch. Dist.
2017 NY Slip Op 31028(U)
April 17, 2017
Supreme Court, Suffolk County
Docket Number: 12-4036
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 12-4036
CAL. No. 16-00464OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-19-16
ADJ. DATE 10-18-16
Mot. Seq. # 004 - MG; CASEDISP

PATRICIA MCLOUGHLIN, an infant by her father and natural guardian, PATRICK MCLOUGHLIN, individually, and EMILY FUSCO, an infant by her father and natural guardian, DOMINICK FUSCO and DOMINICK FUSCO, individually,

Plaintiffs,

- against -

EAST ISLIP UNION FREE SCHOOL DISTRICT and STEVEN OLENICK,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 26 ; Replying Affidavits and supporting papers 27 - 28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant East Islip Union Free School District for summary judgment dismissing the complaint is granted.

This action was commenced to recover damages, personally and derivatively, for personal injuries sustained by the infant plaintiffs, Patricia McLoughlin (Patricia) and Emily Fusco (Emily), on February 16, 2011, when they were struck by a chair thrown by a fellow student in the cafeteria at East Islip High School (the school). In their complaint, the plaintiffs set forth six causes of action against the defendants. In the first cause of action, the plaintiffs allege that the defendant East Islip Union Free

School District (the district) is liable for Patricia's injuries based on its negligence that day. The second cause of action, sets forth a cause of action for battery against her fellow student, the defendant Steven Olenick (Olenick). The third cause of action, is a derivative claim by Patricia's father, the plaintiff Patrick McLoughlin. The fourth through six causes of action repeat the same claims and causes of action on behalf of Emily and her father, the plaintiff Dominick Fusco.

In their first and fourth causes of action on behalf of Patricia and Emily, the plaintiffs allege that the district was negligent in failing to take adequate and proper measures to protect the safety of the infant plaintiffs, to properly supervise its students, to properly supervise Olenick despite having knowledge of his violent propensities, to have an adequate number of trained personnel for the students' safety, and in permitting Olenick to remain a student and allowing its students to "harass, intimidate, and bully" the infant plaintiffs. In addressing the plaintiffs' claims, the allegations can be summarized as consisting of five elements; that is, inadequate security, negligent supervision, allowing Olenick to remain a student, inadequate training, and permitting the infant plaintiffs to be bullied.[1]

This action was duly commenced by the filing of a summons and complaint on February 8, 2012. In accordance with the General Municipal Law, the plaintiffs had previously filed notices of claim against the district dated April 20, 2011. The district joined issue by the service of an answer dated April 27, 2012, which includes a cross claim against Olenick. Olenick failed to appear, and by order dated July 26, 2013, the Court (Jones, Jr., J.) granted the plaintiffs a default judgment against Olenick.

The district now moves for summary judgment dismissing the complaint against it on the grounds, among other things, that it was not negligent in the supervision and handling of its students. In support of its motion, the district submits, among other things, the pleadings, the respective notices of claim, the deposition and municipal hearing testimony of the plaintiffs, the deposition testimony of one of its employees, and a video disc containing security camera footage of the cafeteria at the time of this incident.

Patricia testified at a 50(h) municipal hearing on July 14, 2011, and she was deposed on September 16, 2013. Her testimony was essentially the same at both proceedings, and can be summarized as follows: on the date of the incident, she was in ninth grade at the school, eating lunch in the cafeteria with her friend Emily, when she felt something damp on her and turned her head to see what was happening. Patricia testified that she heard a boy, that she later found out was Olenick, yell and saw him covered with a "slushy,"[2] that Olenick was behind her, and that there was a girl standing between her and Olenick. She stated that she saw Olenick flip a cafeteria table, that she looked back at Emily, who was sitting to her left, and that she was hit in the head by a chair. She indicated that the incident took "like 15 seconds, it went by so fast," that she did not see Olenick throw the chair, and that she did not see the girl throw the slushy on Olenick.

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[1] The district contends that some of the plaintiffs' claims are not contained in the notices of claim filed herein. The adduced evidence reveals that the issue is academic, and the undersigned declines the request to address the merits of the district's position.

[2] The term refers to a frozen flavored drink by 7-Eleven stores as a "Slurpee."

Patricia further testified that there were close to 300 students in the cafeteria at the time of this incident, that there were two teachers and two security guards present, and that the teachers were stationed on opposition sides of the cafeteria. She indicated that the security guards "go wherever, walk the hallways along the side the cafeteria or stand by the window," that "as soon as [this incident] happened, there was a bunch [of security guards] there, but I don't remember exactly if they were there beforehand," and that they surrounded Olenick and escorted him out of the cafeteria. She stated that nothing happened before this incident to indicate that a commotion might erupt, that incidents of fighting or yelling in the cafeteria are "pretty infrequent," and that she did not know Olenick before this incident. Patricia further testified that neither Olenick nor the girl involved had ever said anything to her or threatened her, that she had never been bullied at the school, and that she had not made any complaints about the behavior of other students to anyone at the district.

The plaintiff Patrick McLoughlin testified at a 50(h) municipal hearing on July 14, 2011, and he was deposed on September 16, 2013. His testimony was essentially the same at both proceedings, and can be summarized as follows: he received a telephone call from the school regarding this incident, that he went to the nurse's office where his daughter was being watched, and that he then went to the principal's office. He testified that he asked the principal to call the police, that the principal did so, and that he and Patricia left for the hospital before the police arrived. He stated that his older daughter had graduated from the school two years before, and that he had never made any complaints about the behavior of students at the school to the district prior to this incident.

Emily testified at a 50(h) municipal hearing on July 14, 2011, and she was deposed on September 16, 2013. Her testimony was essentially the same at both proceedings, and can be summarized as follows: on the date of the incident, she was in ninth grade at the school, eating lunch in the cafeteria with her friend Patricia, when she heard a boy yelling "you bitch" behind her. She testified that she saw the boy flip a cafeteria table, that she turned back in her seat, and that she and Patricia were struck in the head by a chair thrown by the boy. She stated that the time between the boy's yell and getting hit by the chair was "about five seconds," that she did not know the boy or girl involved in this incident, and that she did not see the girl throw the slushy on the boy. She indicated that it was a "normal routine lunch period" before this incident, that there were no fights or yelling beforehand, and that there were two security guards, lunch aides, and a couple of aides that just stand in the cafeteria, all present before this incident. Emily further testified that she had never been bullied or intimidated at the school, that any improper behavior in the cafeteria was occasional and "not much."

Dominick Fusco testified at a 50(h) municipal hearing on July 14, 2011, and he was deposed on September 16, 2013. His testimony was essentially the same at both proceedings, and can be summarized as follows: he received a message from his mother and telephone call from his wife that they were at a local hospital with Emily after this incident. He testified that his older son had graduated from the school one year before, that he had never made any complaints about the behavior of students at the school to the district prior to this incident, and that he learned from the police that Olenick was going to be suspended.

Lawrence Teknus (Teknus), a security guard employed by the district, testified that he is a retired police officer and detective with the New York Police Department, that he has been employed by the

district for eight years, and that he served as the director of security for the district for one year in 2006-2007. He stated that the district only hires retired police officers, firemen, and corrections officers, that security guards must take an annual class to retain their state license, and that he was not working at the school on the day of this incident. He indicated that, in 2011, the school assigned one or two teachers, two or three aides, and two security guards to monitor the cafeteria, that the cafeteria is also monitored by security cameras, and that he did not see the video of this incident. Teknus further testified that the security guards would "post patrol" in the gymnasium lobby adjacent to the cafeteria, walk through the cafeteria and observe the cafeteria through widows to monitor the cafeteria, and the cafeteria is the location in the school were most incidents happen. He indicated that he had to intervene in an encounter between Olenick and another security guard in February 2010 when that other security guard was attempting to prevent Olenick from going after another student, that Olenick was uncooperative and in a "rage" at the time, and that he was cautioned in a letter from the district for escalating the situation. He stated that only the principal and assistant principals are authorized to sanction students for their behavior, and that "violent students are supposed to be sent to the state."

A viewing of the video disc, attached as an exhibit to the district's motion for summary judgment, reveals that it does not capture the events described by Patricia and Emily. Regardless, the district has demonstrated its entitlement to summary judgment on the issues of inadequate security, inadequate training, and whether it permitted the infant plaintiffs to be bullied. The testimony of the infant plaintiffs establishes that they did not suffer any intimidating or untoward behavior from Olenick or any other student at the school prior to this incident, and that security responded immediately and adequately to this incident. Teknus' testimony establishes that the district only hired security guard with a background and training in security and supervision, all of whom were required to undergo annual training.

In addition, the district has demonstrated its entitlement to summary judgment on the claim that it negligently permitted Olenick to remain a student at the school. It is well settled that the placement of students is a matter of educational policy which lies within the discretion of school administrators (***Brady v Board of Educ. of City of N.Y.***, 197 AD2d 655, 602 NYS2d 892 [2d Dept 1993]; *see also* ***Rivera v Board of Educ. of the City of N.Y.***, 82 AD3d 614, 919 NYS2d 154 [1st Dept 2011]). The rule is that governmental action, if discretionary, may not be a basis for liability (***Valdez v City of New York***, 18 NY3d 69, 936 NYS2d 587 [2011], quoting ***McLean v City of New York***, 12 NY3d 194, 878 NYS2d 238 [2009]; *see* ***Bawa v City of New York***, 94 AD3d 926, 942 NYS2d 191[2d Dept 2012]).

The standard for determining whether a school was negligent in executing its supervisory responsibility is whether a parent of ordinary prudence, placed in the same situation and armed with the same information, would have provided greater supervision (***Mirand v City of New York***, 84 NY2d 44, 614 NYS2d 372 [1994]). 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 (***Mirand v City of New York***, *id.*). Schools are not, however, the insurers of their students' safety and there is no duty to provide constant supervision as the level and degree thereof is measured by the reasonableness thereof under the circumstances (*see* ***MacNiven v East Hampton Union Free School Dist.***, 62 AD3d 760, 878 NYS2d 449 [2d Dept 2009]; ***Legette v City of New York***, 38 AD3d 853, 832 NYS2d 669 [2d Dept 2007]).

Further, the plaintiffs must demonstrate not only that the school was negligent in its supervision, but also that such lack of supervision was the proximate cause of the injury (*see* ***Mirand v City of New York***, *supra*; ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]). Where, as here, an incident occurs in "so short a span of time that 'even the most intense supervision could not have prevented it,' lack of supervision is not the proximate cause of the injury and summary judgment in favor of the school defendants is warranted" (***Janukajtis v Fallon,*** 248 AD2d 428, 726 NYS2d 451 [2d Dept 2001], quoting ***Convey v Rye School District*** 271 AD2d 154, 710 NYS2d 641[2d Dept 2000]).

The district has demonstrated its entitlement to summary judgment on the issue of negligent supervision. The evidence demonstrates that there was adequate supervision at the time of the accident and that the level of supervision was not the proximate cause of the accident. Rather, the injury suffered by plaintiffs was sudden, spontaneous, and unforeseeable and no amount of supervision, however vigilant, could have prevented its occurrence (***Fraioli v City of New Rochelle***, 6 AD3d 657, 775 NYS2d 559 [2d Dept 2004]). No one at the school was aware of any potential violence involving Olenick, the infant plaintiffs, or the girl who threw the slushy at Olenick on the day in question.

In opposition to the motion, the plaintiffs submit unauthenticated copies of Olenick's school disciplinary records, written statements by Teknus and one of the teachers on duty in the cafeteria on the day of this incident, and an email of a school administrator regarding this incident. The plaintiffs have failed to lay the necessary foundation or submit certified copies of the subject documents as may be required for their respective admissibility herein (CPLR 4518[a] and [c]). In any event the latter three exhibits do not raise issues of fact regarding the plaintiffs' claims herein, or the district's entitlement to summary judgment dismissing the complaint.

Moreover, even if admissible herein, Olenick's disciplinary record does not raise an issue of fact requiring a trial of this action. Said record indicates that Olenick was disciplined a number of times for minor behavioral issues between October 2007 and February 2011, the date of this incident. However, Olenick was disciplined four times for fighting prior to this incident. On April 7, 2008 and March 31, 2009, Olenick was given "in school suspension" for fighting. On February 5, 2010, was suspended with the comment that "incident to be expunged at end of school year if no [other] similar incidents." On February 6, 2009, the day of his encounter with Teknus, Olenick was given a five day suspension. Other that the incident with Teknus, in which Teknus was cautioned for escalating the situation, it appears that Olenick's fights with other students were relatively minor in scope, or instigated by another student, as in this incident.

It is well settled that prior, unrelated incidents resulting in discipline are insufficient to put a school on notice of a specific threat of danger requiring supervision (***Morman v Ossining Union Free Schiano. Dist.***, 297 AD2d 788, 747 NYS2d 586 [2d Dept 2002]). This is true despite the fact that the assaulter had an "extensive disciplinary record," because most of the incidents in the record involved only acts of insubordinate behavior of a non-violent nature (***Morman v Ossining Union Free Schiano. Dist.***, *id.*; ***Taylor v Dunkirk City Schiano. Dist.***, 12 AD3d 1114, 785 NYS2d 623 [4th Dept 2004); ***Velez v Freeport Union Free Schiano. Dist.***, 292 AD2d 595, 740 NYS2d 364 [2d Dept 2002]). In addition, it

has been held that notice is not established even where the assaulter was previously disciplined for fighting (***Morman v Ossining Union Free Schiano. Dist.***, *supra*; ***Velez v Freeport Union Free Schiano. Dist.***, *supra*).

In an action for negligent supervision involving injuries caused by the acts of a fellow student, a plaintiff must show 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***, 84 NY2d at 49, 614 NYS2d 372 [1994]; *see* ***Whitfield v Board of Educ. of City of Mount Vernon***, 14 AD3d 552, 789 NYS2d 188 [2d Dept 2005]; ***Morman v Ossining Union Free School Dist.***, *supra*). Here, the plaintiffs have failed to raise an issue of fact whether the district was on notice of any dispute between Olenick and the girl who threw the slushy, or between Olenick and the infant plaintiffs.

While the district had the requisite notice of Olenick's past behavioral issues, the element of proximate cause is lacking, as the incident occurred so suddenly and spontaneously that no amount of supervision would have prevented it (*see* ***Van Leuvan v Rondout Val. Cent. School Dist.***, 20 AD3d 646, 798 NYS2d 770 [3d Dept 2005]; ***Velez v Freeport Union Free School Dist.***, *supra*). Here, the infant plaintiffs testified that the incident occurred "so fast" and took "five seconds." The plaintiffs have failed to raise an issues of fact requiring a trial of this action. Accordingly, the district's motion for summary judgment dismissing the complaint is granted.

Dated: April 17, 2017

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**